MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April 10, but all business was concluded by the end of the day on April 9.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; 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.; Hon. Benjamin C. Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and 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. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy Fogel and Emery G. 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); Alex Dahl, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll, Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of Consumer Advocates).

Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of the meeting.

This is the last meeting for Committee members Grimm and Diamond. Deep appreciation was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in Committee discussions, and has taken on a variety of special tasks, including the task of working with the Internal Revenue Service and the Administrative Office to establish means of paying taxes on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge Grimm chaired the Discovery Subcommittee through arduous work, especially including the revision of Rule

37(e) that we hope will take effect this December 1 and advance resolution of disputes arising from the loss of electronically stored information. His contributions in guiding this work were invaluable.

Judge Campbell further noted that Judge Bates has been named by the Chief Justice to become the next chair of this Committee. Judge Bates has recently been Director of the Administrative Office. He also has served as a member of an important parallel committee of the Judicial Conference, the Court Administration and Case Management Committee.

Judge Campbell also reported on the meeting of the Standing Committee in January. The Civil Rules Committee did not seek approval of any proposals at that meeting. But there was a stimulating discussion of pilot projects, a topic that will be explored at the end of this meeting.

Judge Sutton said that this Committee did great work on the Duke Rules package. It will be important to support educational efforts that will guide lawyers and judges toward effective implementation of the new rules. He also noted that the Standing Committee is enthusiastic about the prospect that carefully designed pilot projects will help further advance the goals of good procedure.

Judge Campbell reminded the Committee that the Supreme Court had asked whether a couple of changes might be made in the Committee Notes to the amendments now pending before the Court. The changes were approved by an e-mail vote of the Committee, and were approved by the Judicial Conference without discussion. If the Court approves the amendments and transmits them to Congress, it will be important that the Committee find ways to educate people to use the rules and to encourage all judges to engage in active case management. These efforts are not a sign that the Committee is presuming that Congress will approve the rules if transmitted by the Supreme Court. Instead they will just begin the process of preparing people to implement them effectively. Judge Fogel says that the Federal Judicial Center is ready for judicial education programs. The Committee can help to prepare educational materials that can be used in Circuit Conferences in 2016, in bar associations, Inns of Court, and other forums. The Duke Law School is planning a parallel effort. This work can be advanced by designating a Subcommittee of this Committee. Members who are interested in participating should make their interest known.

A member noted that a package of CLE materials "available for free" would be seized by many law firms for their own internal programs. Judge Fogel noted that the Federal Judicial Center "really wants to collaborate with this Committee." The Center has two TV studios, and does many video productions. Videos, webinars,

and like means can be used to get the word out.

Judge Campbell suggested that it will be good to use Committee alumni to get the word out, especially those who were involved in shaping the proposals. One important need is to say what is intended, to forestall use of the new rules in ways not intended. The Committee Notes were changed in light of the public comments to dispel several common misunderstandings, but ongoing efforts will be important.

October 2014 Minutes

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

Legislative Report

Rebecca Womeldorf provided the legislative report for the Administrative Office. Two familiar sets of bills have been introduced in this Congress.

The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by reinstating the essential aspects of the Rule as it was before the 1993 amendments. Sanctions would be mandatory. The safe harbor would be removed. In 2013 Judge Sutton and Judge Campbell submitted a letter urging respect for the Rules Enabling Act process, rather than undertake to amend a Civil Rule directly.

H.R. 9, the Innovation Act, embodies patent reform measures like those in the bill that passed in the House last year. There are many provisions that affect the Civil Rules. Parallel bills have been introduced in the Senate, or are likely to be introduced. There are some indications that a bipartisan bill will be introduced in the Senate.

A participant observed that informal conversations suggest that some form of patent legislation will pass this year. The President agrees with the basic idea. The question for Congress is to reach agreement on the details.

Judge Campbell noted that H.R. 9 directs the Judicial Conference to prepare rules. Logically, the Conference will look to the rules committees. But the bill does not say anything of the Enabling Act process; the simple direction that the Judicial Conference act seems to eliminate the roles that the Supreme Court and Congress play in the final stages of the Enabling Act process.

Parts of H.R. 9 adopt procedure rules directly, without adding them to the Civil Rules. Discovery, for example, is initially limited to issues of claim construction in any action that presents

those issues. Discovery expands beyond that only after the court has construed the claims.

Other parts of H.R. 9 direct the Judicial Conference to adopt rules that address specific points. The rules should distinguish between discovery of "core documents," which are to be produced at the expense of the party that produces them, and other documents that are to be produced only if the requester pays the costs of production and posts security or shows financial ability to pay. These rules also are to address discovery of "electronic communications," which may or may not embrace all electronically stored information. The party requesting discovery can designate 5 custodians whose electronic communications must be produced; the court can order that the number be expanded to 10, and there is a possibility for still more.

A participant suggested that Congressional interest in these matters is inspired by the Private Securities Litigation Reform Act.

Experience with the Bankruptcy Abuse Prevention and Consumer Protection Act was recalled. The Bankruptcy Rules Committee was responsible for adopting interim rules on a truly rush basis, and then for adopting final rules on a somewhat less pressed schedule. The press of work was incredible.

It was agreed that it will be important to keep close track of these bills in order to be prepared to act promptly if urgent deadlines are set.

A matter of potential interest also was noted. The Litigation Section of the American Bar Association will present a resolution on diversity jurisdiction to the House of Delegates this August. The recommendation will be to amend 28 U.S.C. § 1332 to treat any entity that can be sued in the same way as a corporation. Partnerships, limited partnerships, limited liability companies, business trusts, unions, and still other organizations would be treated as citizens of any state under which they are organized and also of the state where they have their principal place of business. The effect would be to expand access to diversity jurisdiction because present law treats such entities as citizens of any state of which any member is a citizen. The reasons for this recommendation include experience with the difficulty of ascertaining the citizenship of these organizations before filing suit, the costs of discovery on these issues if suit is filed, and the particularly onerous costs that may result when a defect in jurisdiction is discovered only after substantial progress has been made in an action.

Discussion noted that in the Judicial Conference structure, primary responsibility for issues affecting subject-matter

jurisdiction lies with the Federal-State Jurisdiction Committee. The Civil Rules Committee cannot speak to these questions as a committee.

One question was asked: How would a court determine the citizenship of a law firm — for example a nationwide, or international firm, with offices in many different places. Can a "nerve center" be identified in the way it may be identified for a corporation?

The conclusion was that if individual Committee members have thoughts about this proposal, they can be transmitted to the Litigation Section.

Rules Recommended for Adoption

Proposals to amend Rules 4(m), 6(d), and 82 were published for comment in August, 2014. This Committee now recommends that the Standing Committee recommend them for adoption, with a possible change in the Committee Note for Rule 6(d).

RULE 4(m)

Rule 4(m) sets a presumptive limit on the time to serve the summons and complaint. The present rule sets the limit at 120 days; the Duke Package of rule amendments now pending in the Supreme court would reduce the limit to 90 days as part of a comprehensive effort to expedite the initial phases of litigation.

It has long been recognized that more time is often needed to serve defendants in other countries. Rule 4(m) now recognizes this by stating that it does not apply to service in a foreign country under Rule 4(f) or Rule 4(j)(1). These cross-references create an ambiguity. Service on a corporation in a foreign country is made under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service outside any judicial district of the United States on a corporation, partnership, or other unincorporated association "in any manner prescribed by Rule 4(f) for serving an individual," except for personal delivery. It can be argued that by invoking service "in any manner prescribed by Rule 4(f)," Rule 4(h)(2) service is made under Rule 4(f). But that is not exactly what the rule says. At the same time, it is clear that the reasons that justify exempting service under Rules 4(f) and 4(j)(1) from Rule 4(m) apply equally to service on corporations and other entities. At least most courts manage to reach this conclusion. But many of the comments responding to the proposal to reduce the Rule 4(m) presumptive time to 90 days reflected a belief that the present 120-day limit applies to service on a corporation in a foreign country. It seems wise to amend Rule 4(m) to remove any doubt.

There were only a few comments on the proposal. All supported

it.

The proposed amendment is commended to the Standing Committee with a recommendation to recommend it for adoption as published.

RULE 6(d)

Under Rule 6(d), "3 days are added" to respond after service is made in four described ways, including electronic service. The proposal published last August removes service by electronic means from this list. It also adds parenthetical descriptions of service by mail, leaving with the clerk, or other means consented to, so as to relieve readers of the need to constantly refer back to the corresponding subparagraphs of Rule 5(b)(2).

The 3-added days provision has been the subject of broader inquiry, but it has been decided that for the time being it is better to avoid eliminating the 3 added days for every means of service.

For service by electronic means, however, the conclusion has been that the original concerns with imperfections in electronic communication have greatly diminished with the rapid expansion of electronic technology and the growing numbers of people who can use it easily.

This conclusion was challenged by some of the comments. One broad theme is that the time periods allowed by the rules are too short as they are. Busy, even harassed practitioners, need every concession they can get. More specific comments repeatedly complained of "gamesmanship." Electronic filing is delayed until a time after the close of the ordinary business day and after the close of the clerk's office. Many comments invoked the image of filings at 11:59 p.m. on a Friday, calculated to reach other parties no earlier than Monday.

A more specific concern was expressed by the Magistrate Judges Association. As published, the rule continues to add 3 days after service under Rule 5(b)(2)"(F)(other means consented to)." They fear that careless readers will look back to present Rule 5(b)(2)(E), which allows electronic service only with the consent of the person served, and conclude that 3 days are added because service by electronic means is an "other means consented to." This is an obvious misreading of Rule 5(b)(2), since (F) embraces only means other than those previously enumerated, including (E)'s provision for service by electronic means. Nonetheless, the magistrate judges have great experience with inept misreading of the rules, and it is difficult to dismiss this prospect out of hand. At the same time, there are reasons to avoid the recommended cures. One would eliminate the parenthetical descriptions added to illuminate the cross-references to subparagraphs (C), (D), and (F).

These descriptions have been blessed by the Style Consultant as a useful addition to the rule, and they do seem useful. The other would expand the parenthetical to subparagraph (F) to read: "(other means consented to, except electronic service.)" One reason to resist these suggestions is that it seems unlikely that serious consequences will be imposed on a party who manages to misread the rule. A 3-day overrun in responding is likely to be treated leniently. More important is that the proposals to amend Rule 5(b)(2)(E) discussed below will eliminate the consent requirement for registered users of the court's electronic system. The Committee agreed that neither of the recommended changes should be made.

The Department of Justice has expressed concerns about the 3-added days provision, and particularly about the prospect of gamesmanship in filing just before midnight on the eve of a weekend or legal holiday. It has proposed a lengthy addition to the Committee Note to describe these concerns and to state expressly that courts should accommodate those situations and provide additional time to discourage tactical advantage or prevent prejudice. An alternative shorter version was prepared by the Reporter to illustrate possible economies of language: "The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances."

Discussion began with the statement that the Department of Justice feels strongly about adding an appropriate caution to the Committee Note. Some changes might be made in the initial Department draft — the list of examples of filing practices that may shorten the time to respond could be expanded by adding a few words to one example: "or just before or during an intervening weekend or holiday * * *." Their longer language is more helpful than the more compact version. "Our attorneys are often beset by gamesmanship."

A member asked whether there really will be difficulties in getting appropriate extensions of time. His experience is that this is not a problem, and problems seem unlikely. In any event, the shorter version seems better. The second sentence respects what most courts do.

Another member was "not keen on adding admonitions to judges to be reasonable." This is not a general practice in Committee Notes. If we are to go down this road, it might be better to have a single general admonition in a Note attached to one rule.

A lawyer member reported that he recently had encountered a problem in delivering an electronic message. The recipient's firm

had recently installed a new system and the message was sorted out by the spam filter. "Consent comforted me." It took a few days to clear up the difficulty. That leads to the question: when does the clock start? The sensible answer is not from the time of the transmission that failed, but from the time of sending a transmission that succeeded. On the broader question of gamesmanship, "I'm always served Friday afternoon at the end of the day."

A judge member "shares the ambivalence." Does a judge really need to be told to be reasonable? Should Committee Notes go on to suggest reasonable accommodations for extenuating family circumstances, or clinical depression?

Another lawyer member observed that "Judges are busy. They do not notice the abuses I see all the time." Adding to the Committee Note as the Department suggests serves a useful purpose because it implicitly condemns the abuses that judges do not — and should not — see on a regular basis.

Still another judge member suggested that the Department's draft language is opaque. The first sentence says the amended rule is not intended to discourage judges from granting additional time. The final sentence directs them that they should do so. Whatever else can be said, it needs editing.

A judge suggested that "Much of what we do here is to write rules for colleagues who do not do their jobs. Too often this is simply writing more rules for them to ignore. I do keep aware of counsel's behavior." The Duke Rules Package served the need to encourage judges to manage their cases. "We know this already."

The concern with preaching to judges in a Committee Note was addressed by suggesting that the Note could instead address advice to lawyers that they should not be diffident about seeking extensions in appropriate circumstances.

One more judge suggested that the kinds of gamesmanship feared by the Department "is obviously bad conduct, easily brought to the court's attention." The response for the Department was that "we try not to be whiners about bad lawyers." And the reply was that it can be done without whining.

The Department renewed the suggestion of the member who thought an addition to the Note would be a reminder to lawyers to behave decently. "At least the more economical version is helpful."

Actual practice behavior was described by another member. "Whether or not it's sharp practice, the routine filing is at 11:59 p.m. on Friday, unless the court directs a different time. No one gets to go home until after midnight." It would help to amend the

rule to set 6:00 p.m. as the deadline for filing.

This observation was seconded by observing that sometimes late-night filing is bad behavior. Sometimes it is routine habit, or a simple reflection of routine procrastination. Adding something to the Note may be appropriate, but it should be more neutral than the reference to "outside ordinary business hours" in the compact sketch.

Judge Campbell summarized the discussion as showing that three of four practicing lawyers on the Committee say late filing is a common event. The Department says the same. Other advisory Committees are working on the same issue. Rather than work out final Note language in this Committee, it would be good to delegate to the Chair and Reporter authority to work out common language with the other committees, as well as to resolve with them whether anything at all should be added to the Committee Note.

The Committee voted unanimously to recommend the published text of Rule 6(d) for adoption. And it agreed to delegate to the Chair and Reporter responsibility for working with the other committees to adopt a common approach to the Committee Notes.

RULE 82

The published proposal to amend Rule 82 responds to amendments of the venue statutes. It has long been understood that admiralty and maritime actions are not governed by the general provisions for civil actions. When the admiralty rules were folded into the Civil Rules, this understanding was embodied in Rule 82 by providing that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory amendments repeal § 1392. They also add a new § 1390. Section 1390(b) excludes from the general venue chapter "a civil action in which the district court exercises the jurisdiction conferred by section 1333" over admiralty or maritime claims.

The proposed amendment provides that an admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390, and deletes the statement that the claim is "not a civil action for purposes of 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after publication.

The Committee voted unanimously to recommend the published Rule 82 proposal for adoption.

Rules Recommended for Publication

The rules recommended for publication deal with aspects of electronic filing and service. Judge Solomon and Clerk Briggs were this Committee’s members of the all-Committees Subcommittee for

matters electronic, and have carried forward with the work after the Subcommittee suspended operations at the beginning of the year. The choice to suspend operations may have been premature. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all working on parallel proposals. It is desirable to frame uniform rule text when there is no reason to treat common questions differently, recognizing that different sets of rules may operate in circumstances that create differences in what might have seemed to be common questions. But the process of seriatim preparation for the agendas of different committees meeting at different times has impeded the benefits of simultaneous consideration. For the Civil Rules, the result has been that worthy ideas from other Committees have had to be embraced in something of a hurry, and have been presented to the Civil Rules Committee in a posture that leaves the way open for accommodations for uniformity with the other Committees. The Committee Note language issue for Rule 6(d) is an illustration. The e-filing and e-service rules provide additional illustrations.

These proposals emerge from a process that winnowed out other possible subjects for e-rules. The Minutes for the October 2014 meeting reflect the decision to set aside rules that would equate electrons with paper. Filing, service, and certificates of service remain to be considered.

E-FILING: RULE 5(d)(3)

Rule 5(d)(3) provides that a court may allow papers to be filed, signed, or verified by electronic means. It further provides that a local rule may require e-filing only if reasonable exceptions are allowed. Great progress has been made in establishing and becoming familiar with e-filing systems since Rule 5(d)(3) was adopted. The amendment described in the original agenda materials directed that all filings must be made by electronic means, but further directed that paper filing must be allowed for good cause and that paper filing may be required or allowed for other reasons by local rule. This approach reflected the great advantages of efficiency that e-filing can achieve for the filer, the court, and other parties. Those advantages accrue to an adept pro se party as well as to represented parties. Indeed the burdens of paper filing may weigh more heavily on a pro se party than on a represented party.

The Criminal Rules Committee considered similar questions at its meeting in mid-March. Criminal Rule 49 incorporates the Civil Rules provisions for filing. Their discussion reflected grave doubts about the problems that could arise from requiring pro se criminal defendants and prisoners to file by electronic means. Access to e-communications systems, and the ability to use them at all, are the most basic problems. In addition, training pro se litigants to use the court system could impose heavy burdens on

court staff. Means must be found to exact payment for filings that require payment. There are risks of deliberate misuse if a court is unable to limit a defendant or prisoner's access by blocking access to all other cases. Constitutional concerns about access to court would arise if exceptions are not made. This array of problems could be met by adopting local rules, but the burden of adopting new local rules should not be inflicted on the many courts whose local rules do not now provide for these situations.

It was recognized that the problems facing criminal defendants and prisoners may be more severe than those facing pro se civil litigants, but questions were asked whether the differences are so great as to justify different provisions in the Criminal and Civil Rules. The Criminal Rules Committee asked that these issues be considered in addressing Civil Rule 5, and that if this Committee continues to prefer that adjustments for pro se litigants be made by local rules or on a case-by-case basis it consider deferring a recommendation to publish Rule 5 amendments while the Criminal Rules Committee further considers these issues.

A conference call was held by the Chair of the Criminal Rules Committee, the immediate past and current chairs of their subcommittee for e-issues, their Reporters, and the Civil Rules e-rules contingent. Thorough review of the Criminal Rules Committee concerns led to a revised Rule 5(d)(3) proposal. The revised proposal was circulated to the Committee as a supplement to the agenda materials, and endorsed by Judge Campbell, Judge Oliver, and Clerk Briggs.

The version of Rule 5(d)(3) presented to the Committee mandates e-filing as a general matter, except for a person proceeding without an attorney. E-filing is permitted for a person proceeding without an attorney, but only when allowed by local rule or court order. This approach is designed to hold the way open for pro se litigants to seize the benefits of e-filing as they are competent to do so. It well may be that these advantages will become more generally available to pro se civil litigants than to criminal defendants or prisoners filing § 2254 or § 2255 proceedings, but that event will not interfere with adopting local rules that reflect the differences.

Judge Solomon endorsed the revised approach. Although the Civil Rule draft started in a different place, the Criminal Rules Committee's concerns were persuasive. The pro se problem is greater in the criminal arena, but there also are problems in the civil arena. The new approach does no harm in the short run, and it is likely that we can live with it longer than that. And it is an advantage to have rules that are as parallel as can be.

Clerk Briggs agreed. It will not be burdensome to address pro se civil filings through local rules or by court order. For now,

there will not be many pro se litigants that will be trusted with e-filing. But it should be noted that the present CM/ECF system can be used to ensure that a pro se litigant is able to file and access files only in his own case. And the system screens for viruses. And yes, there is a disaster recovery plan — everything is replicated on an essentially constant basis and stored in distant facilities.

A specific drafting question was raised: is there a better way to refer to pro se parties than "a person proceeding without an attorney"? It was agreed that this language seems adequate. One advantage is that it includes an attorney who is proceeding without representation by another attorney — such an attorney party may not be a registered user of the system, and may not be admitted to practice as an attorney in the court.

Another question is whether the rule should continue to say that a paper may be signed by electronic means, or whether it is better to provide only for e-filing, adding a statement that the act of filing constitutes the signature of the person who makes the filing. The reasons for omitting a statement about signing by electronic means are reflected in the history of a Bankruptcy Rule provision that was published for comment and then withdrawn. Many filings include things that are signed by someone other than the filer. Common civil practice examples include affidavits or declarations supporting and opposing summary-judgment motions, and discovery materials. Means for verifying electronic signatures are advancing rapidly, but have not reached a point of common acceptance and practice that would support attempted rules on the issue. It was agreed that the rule text should adhere to the approach that describes only filing by e-means, and then states that the act of filing constitutes the filer's signature. But it also was agreed that it would be better to delete the next-to-last paragraph of the draft Committee Note that discusses these possible signature issues.

Another issue was presented by the bracketed final paragraph in the Committee Note that raised the question whether anything should be said about verification. Present Rule 5(d)(3) recognizes local rules that allow a paper to be verified by electronic means. The proposed amendment omits any reference to verification. Not many rules provide for verification. Rule 23.1 provides for verification of the complaint in a derivative action. Rule 27(a) requires verification of a petition to perpetuate testimony. Rule 65(b)(1)(A) allows use of a verified complaint rather than an affidavit to support a temporary restraining order. Verification or an affidavit may be required in receivership proceedings. Verified complaints are required by Supplemental Rules B(1)(A) and C(2). Although these add up to a fair number of rules by count, they touch only a small part of the docket. It was concluded that it would be better to omit this paragraph from the recommendation to publish.

RULE 5(b)(2)(E): E-SERVICE

Rule 5(b)(2)(E) now allows service by electronic means if the person served consents in writing. Rule 5(b)(3) allows this service to be made through the court's transmission facilities if authorized by local rules. In practice consent has become a fiction as to attorneys — in almost all districts an attorney is required to become a registered user of the court's system, and access to the court's system is conditioned on consent to be served through the system. The proposed revision of Rule 5(b)(2)(E) set out in the agenda materials deletes the consent element, and simply provides that service may be made by electronic means. It further provides that a person may show good cause to be exempted from such service, and that exemptions may be provided by local rule.

This time it is preparation of the agenda materials for an Appellate Rules Committee meeting later this month that has raised complicating issues. The complications again involve pro se litigants. The concern is that many pro se litigants may not have routine, continuous access to means of electronic communication, and in any event may not be adept in its use. This has not been a problem under the present rule, since it requires consent to e-service. A pro se party need not consent, and is not subject to the fictive consent that applies to attorneys. But eliminating consent will generate substantial work in case-specific court orders or in amending local rules.

These questions were presented on the eve of this meeting. Drafting to accommodate them can be considered, but subject to further polishing. The draft presented for consideration responded by distinguishing registered users of the court's system from others. It continues to say simply that service may be made by electronic means on a person who is a registered user of the court's system. But it requires consent for others. The consent can provide ample protection by specifying the electronic address to use, and a form of transmission that can be used by the recipient. Consent also will be available for registered users of the court's system who find it convenient to serve some papers by means other than the court's system. For civil cases, discovery requests and responses are a common example. These papers are not to be filed with the court until they are used in the case or the court orders filing. It may prove desirable to serve them by electronic means outside the court's system. Here too, consent will afford important protections by specifying the address to be used and the form of communication.

A judge observed that he encounters many pro se litigants who exchange with attorneys by e-mail.

Another judge noted that bankruptcy practice is moving to bar pro se filing, but to recognize consent to service by e-mail. "This

saves costs."

It was noted that the CM/ECF system allows service without filing. One court, as an example, requires a court order after a litigant moves for permission. It would be good to have a rule that allows consent to serve this function without need for a court order.

A separate question was whether written consent should be required, as in the present rule. Why not allow consent in an e-communication? One way written consent can be accomplished would be to add consent to the check list of provisions on the pro se appearance form. Another judge suggested that it would be prudent to get written consent, but the rule should not specify it.

If the rule is framed to require consent for service outside the court's system, it was agreed that there is no need to carry forward from the agenda draft the exceptions that allow a person to be exempted for good cause or by local rule.

Further discussion reiterated the point that the revised draft distinguishes service through the court system on registered users, which would not require consent, from service by other electronic means, which would require consent. This is an advance over the original suggestion, which focused on service through the court's system. The Committee Note can address consent among the parties, refer to a check-the-box pro se appearance form, the availability of direct e-mail service with consenting parties, and the need for court permission for consent by a person who is not a registered user to receive service through the court system.

The Committee agreed to go forward with a recommendation to publish a version of Rule 5(b)(2)(E) that distinguishes between service on registered users through the court's system and service by other e-means with consent. Precise rule language and corresponding changes in the Committee Note will be settled, if possible in ways that achieve uniformity with other advisory committees.

(An observer raised a particular question outside the agenda materials. She has twice encountered difficulties with e-filing in this circumstance: A discovery subpoena is served on a nonparty outside the district where the action is pending. A motion to compel compliance becomes necessary in the district where the discovery will be taken. There is no current docket in the district for enforcement. Two courts have refused to allow her to use electronic means to open a miscellaneous docket item. They insisted on a personal appearance. This is an unnecessary inconvenience. There is a patchwork of rules around the country.

(This problem may not be a subject for rulemaking. Certainly

it is not fit for rulemaking on the spur of the moment. But the problem may be helped by proposed Rule 5(d)(3), which will allow e-filing unless a local rule requires paper filing. It might be possible to add a comment on this problem to the Committee Note for Rule 5(d)(3). That possibility was taken under advisement.)

NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

The agenda materials include an amendment of Rule 5(d)(1) that would provide that a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. The draft includes in brackets a provision that would add a statement similar to Rule 5(b)(2)(E): the notice of electronic filing does not constitute a certificate of service if the serving party learns that the filing did not reach the party to be served.

Allowing a notice of electronic filing to constitute a certificate of service on any party served through the court's transmission facilities may not seem to do much. A party accustomed to serving through the court's system includes in the filing a certificate that says the paper was served through the court's system. Eliminating those lines is a small gain. But the amendment also protects those who do not think to add those lines, and also avoids the instinctive reaction of cautious filers that prompts filing a separate certificate just to be sure. The amended rule text was approved as a recommendation to publish.

Brief discussion concluded that the bracketed material addressing failed delivery is not necessary. As drafted, it is limited to service through the court's facilities. Ordinarily the court system will flag a failed transmission. It may be that a party will learn that a successful transmission somehow did not come to the recipient's attention, but that situation seems too rare to require rule text. That will be deleted from the recommendation to publish.

Judge Harris, after these questions were discussed in the Bankruptcy Rules Committee, suggested that it would be useful to expand the rule by adding a statement of what should be included in a certificate of service when service is not made through the court's electronic facilities. The added language would address the elements that should be included in a certificate: the date and manner of service; the names of the persons served; and the address used for whatever form of service was made. The advantage of adding this language to the several sets of rules that address certificates of service would be to establish a uniform certificate for all federal courts. Uniformity is desirable in itself, and uniformity would protect against the need to consult local rules, or the ECF manual, for each district. Certificates now may vary. It may be as bland as "I served by mail," or "I served by mail on this

date, to this address," and so on. The proposed language is taken from Appellate Rule 25(d)(1)(B) for a proof of service. The language works there, and would work elsewhere.

This proposal was countered: the courts and parties seem to be doing well without help from a detailed rule prescription. And service by these other means is likely to decline continually as electronic service takes over and provides a notice of electronic filing. Another member added that he routinely includes all of this information in the certificate of service. It was further noted that the Civil Rules did not provide for certificates of service until 1991. The present provision was added then to supersede a variety of local rules. The Committee then considered a provision that would prescribe the contents of the certificate, but feared that in some situations the party making service would not be able to provide all of the information that might be included.

Brief further discussion showed that no Committee member favored adding a provision that would define the contents of a certificate of service by means other than the court's transmission facilities.

A style question was left for resolution by the Style Consultant. Rule 5(d)(1) now concludes with a sentence introduced by "But." A paper that is required to be served must be filed. "But" disclosure and discovery materials must not be filed except in defined circumstances. The question is whether "but" remains appropriate after lengthening the first sentence.

RULE 68

Judge Campbell summarized the discussion of Rule 68 at the October 2014 meeting. Rule 68 was the subject of two published amendment proposals in 1983 and 1984. The project was abandoned in face of fierce controversy and genuine difficulties. Rule 68 was taken up again early in the 1990s and again the project was abandoned. Multiple problems surround the rule, including the basic question whether it is wise to maintain any rule that augments natural pressures to settle. But, aside from all the discovery rules taken together, Rule 68 is the most frequent subject of public suggestions that amendments should be undertaken. Most of the suggestions seek to add "teeth" to the rule by adding more severe consequences for failing to win a judgment better than a rejected offer. The Committee decided in October that the most fruitful line of attack will be to explore practices in state courts to see whether there are rules that in fact work better than Rule 68. Jonathan Rose undertook preliminary research that produced a chart of state rules, comparing their features to Rule 68. He also provided a bibliography. It was hoped that the Supreme Court Fellow at the Administrative Office could make time to explore these materials, and perhaps to look for state-court decisions.

There have been too many competing demands on his time, however, and little progress has been made. This work will be pursued, aiming at a report to the meeting next November.

DISCOVERY: "REQUESTER PAYS"

Judge Grimm opened the subject of requester-pay discovery rules by noting that these questions were opened at the fall meeting in 2013 in response to suggestions that "requester-" or "loser-pays" rules be adopted to shift the costs of responding to discovery requests in cases where the burdens of responding to discovery are disproportionate among the parties or otherwise unfair. The focus of these suggestions ordinarily is Rule 34 document production. The background is the shared assumption, not articulated in any rule but recognized in the 1978 Oppenheimer opinion in the Supreme Court, that ordinarily the responding party bears the burdens and costs of responding. The Court noted then, and it is also widely understood, that a court order can shift the costs, in whole or in part, to the requesting party.

The Rule 26(c) proposal now pending in the Supreme Court as part of the Duke Rules Package expressly confirms the common understanding that a protective order can allocate the expenses of discovery among the parties.

The House of Representatives has held hearings to examine the possibilities of requester-pay practices. Patent law reform bills recently introduced in Congress contain such provisions.

Subcommittee work on these issues was sidetracked for a year while the Subcommittee concentrated on the Rule 37(e) provisions addressing loss of electronically stored information that now are pending before the Supreme Court. The work is resuming now.

Passionate views are held on all sides of requester pays. Much of the discussion focuses on asymmetric discovery cases in which one party has little discoverable information and is able to impose heavy burdens in discovering vast deposits of information held by an adversary. The explosion of discoverable matter embodied in electronically stored information adds to the passion. And it is often suggested that a data-poor party may deliberately engage in massive discovery for tactical reasons.

The other side of the debate is framed as an issue of access to justice. Often a data-poor party is poor in other resources as well, and cannot afford to pay the expenses of sorting through information held by a data-rich party. This viewpoint was expressed in public comments on many of the discovery rules provisions in the Duke Rules Package, and particularly in the comments on proposed Rule 26(c).

A 2014 publication of the Institute for the Advancement of the American Legal System provides information about these issues. A recent law review article catalogues the current rules that allow shifting litigation costs — most of them discovery rules — and explores many of the surrounding issues, including possible due process implications. The closed-case study done by the Federal Judicial Center in conjunction with the Duke Conference shows that most cases do not generate significant discovery burdens. But it also shows that there are outliers that involve serious burdens and present serious issues for possible reform. It remains a challenge to determine whether these problems are unique to identifiable types of cases. One particular opportunity will be to explore the experience of "patent courts." Other subject-matter areas may be identifiable. Or other characteristics of litigation may be associated with disproportionate discovery, whether or not it is possible to address them in any particular way by court rules.

One line of inquiry will be to attempt to find out through the Federal Judicial Center what kinds of cases are now associated with motions to order a requester to bear the costs of discovery.

Emery Lee reported that it is difficult to sort the cases out of general docket entries. He began an inquiry by key-citing the headnotes in the Zubulake opinions, which are prominent in addressing cost-shifting in discovery of ESI. They have not been much cited. Looking at the cases he found through Pacer, he developed search terms. Then he undertook a docket search in four districts that have high volumes of cases — S.D.N.Y., N.D.Ill, N.D.Cal., and S.D.Tex. A "fuzzy search" turned up nothing useful. There were, to be sure, "lots of hits" in the Northern District of Illinois because the e-pilot there requires the parties to discuss cost bearing. And a lot of the hits involved the costs of depositions, not documents. There were not many hits for document discovery.

Judge Grimm asked what further research might be done: law review articles? State experience? Case law? A survey or other empirical inquiry? The quest would be to refine our understanding of how often burdensome costs are encountered.

Judge Grimm further noted that England has cost shifting, but it also has broad bilateral initial disclosures.

The Subcommittee hopes to narrow what needs be considered. What guidance can be provided?

Judge Campbell reminded the Committee that the Committee Note to Rule 26(c) in the pending package of Duke Rules amendments was revised after publication to provide reassurance that it is not intended to become a general requester-pays rule. Many comments on the published proposal expressed fears on this score

A judge urged that it is not wise "to write rules for exceptional-exceptional cases. There is a cost of litigation. Part of that is the cost of discovery." It is really depositions that drive the cost of discovery in most cases. And the requesting party pays for most of the costs of a deposition. Document production does not drive discovery costs in most cases. There are not many cases where the plaintiff does not have to bear some discovery costs, especially depositions. The rules already limit the numbers of interrogatories and depositions, and proposals to tighten these limits were rejected for good reasons after publication of the Duke Rules Package. And "counsel has to invest time in depositions." It is better not to attempt to write rules for the massive document discovery cases that do come up.

Another judge asked what is the scope of the problem? We need to know that before making a rule. Whose problem needs to be fixed? Why do we think we should redistribute the costs of discovery?

Judge Grimm responded that the Subcommittee shares these concerns. "We can understand there are problem cases without knowing what to do about them. The source of the problems remains to be determined."

A member asked what protections there are for discovery from third parties who do not have a stake in the game? Rule 45(d)(1) directs that a party or attorney responsible for issuing and serving a subpoena take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(d)(2) further provides that a person directed to produce documents or tangible things may serve objections. An objection suspends the obligation to comply, which revives only when ordered by the court, and the order "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Perhaps that is protection enough.

One possible approach was suggested — to sample a pool of district judges to ask whether they have problems with excessive discovery that should be addressed by explicit requester-pays rules provisions. Much civil litigation now occurs in MDL proceedings; perhaps we could look there.

A different suggestion was that "this looks like a solution in search of a problem. The requester-pays proposals have the air of a strategic effort to deter access to justice in certain types of cases. District judges will have a much better sense of it — whether there are patterns of abuse that can be dealt with by rule, rather than case management. I litigate cases with massive discovery, but the pressures are to be reasonable because it's 2-way, and I have to search through what I get." Perhaps there are problems in asymmetric cases. "But the very fact that the Committee is struggling to figure out whether there is a problem suggests we

pause" before plunging in.

Another member said that the mega-cases tend to be MDL proceedings. The purpose of MDL is to centralize discovery, to avoid constant duplication. The management orders are for production that occurs once, and for one deposition per witness. MDL proceedings are likely to save costs, reaping the efficiency advantages of economies of scale. MDL judges seek to tailor cost sharing in ways that make sense.

Another lawyer member noted the many protective provisions built into the rules. Rule 45(d)(2)(B) expressly protects nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not reasonably accessible, and contemplates requester-pays solutions. Rule 26(b)(2)(C)(iii) directs the court to limit discovery on a cost-benefit analysis. Rule 26(c) is used now to invoke requester-pays protections. Rule 26(g) requires counsel to avoid unduly burdensome discovery requests. The Duke Rules package pending before the Supreme Court is designed to invigorate these principles. If the Court and Congress allow the proposed rules to take effect, we will need to find out whether they have the intended effect. Among them is the explicit recognition in Rule 26(c) of protective orders for cost-sharing. Together, these rules provide many opportunities to control unreasonable discovery.

Continuing, this member noted that something like 300,000 cases are filed in federal courts every year. Perhaps 15,000 to 30,000 of them will involve document-heavy discovery. The FJC closed-case study shows that most cases have little discovery. We need to find out whether there are types of cases that generate problems. But even that inquiry might be deferred for a while to see how the proposed amended rules will work. "I do not know that it's a big problem now in most cases." Problems are most likely to arise when discovery pairs a data-poor party against a data-rich party. Perhaps we should defer acting on requester-pays rules for a while.

It was noted that the Department of Justice has a lot of experience with discovery, both asking and responding. Further inquiry probably is warranted. The Department can undertake further internal inquiries.

A judge said that there are not many reported cases invoking Rule 45(d)(2). That may suggest there is little need for new rules to protect nonparties. More generally, the rules we have now seem adequate to address any problems. "The need may be to use them, not to add new rules."

A lawyer echoed these views, observing that a great deal of work went into shaping the Duke Rules package with the goal of advancing proportionality in discovery. We should wait to see what

effect the new rules have if they are allowed to become effective.

Another judge suggested that study of initial disclosure may be a good place to start. It may be helpful to return to the original rule, requiring disclosure of what is relevant to the case as a whole, not merely "your case." The present limited disclosure rule seems to fit awkwardly with our focus on cooperation and proportionality. Initial disclosure rules, indeed, will be discussed later in this meeting as a possible subject for a pilot project.

Discussion of initial disclosure continued. The original idea was to get the core information on the table at the outset. That proved too ambitious at the time — local rule opt-outs were provided to meet resistance, and many districts opted out in part or entirely. National uniformity was attained only by narrowing disclosure to "your case." The employment protocols now adopted by 50 judges may show that broad initial disclosure can work. So it was suggested that we could look to state practices. The Institute for the Advancement of the American Legal System has generated reports. Broad initial disclosure remains a controversial idea: "You can be right, but too soon."

The final observation was that the Committee undertook to study requester-pays rules in response to a letter from members of Congress.

Appellate-Civil Rules Subcommittee

A joint subcommittee has been reconstituted to explore issues that overlap the Appellate Rules and Civil Rules. Judge Matheson chairs the Subcommittee. Virginia Seitz is the other Civil Rules member. Appellate Rules Committee members are Judge Fay, Douglas Letter, and Kevin Newsom.

The Subcommittee is exploring two sets of issues that first arose in the Appellate Rules Committee. As often happens, if it seems wise to act on these issues, the most likely means will be revisions of Civil Rules. That is why a joint Subcommittee is useful. The issues involve "manufactured finality" and post-judgment stays of execution under Civil Rule 62.

MANUFACTURED FINALITY

Judge Matheson introduced the manufactured finality issues. "This is not a new topic." An earlier subcommittee failed to reach a consensus. "Nor is consensus likely now." The Subcommittee seeks direction from the Appellate and Civil Rules Committees.

"Manufactured finality" refers to a wide variety of strategies that may be followed in an attempt to appeal an interlocutory order

that does not fit any of the well-established provisions for appeal. Rule 54(b) partial finality is, for any of many possible reasons, not available. Other elaborations of the final-judgment rule, most obviously collateral-order doctrine, also fail. Avowedly interlocutory appeals under § 1292 are not available. The theoretical possibility of review by extraordinary writ remains extraordinary.

Many examples of orders that prompt a wish to appeal could be offered. A simple example is dismissal of one claim while others remain, and a refusal to enter a Rule 54(b) judgment. Or important theories or evidence to support a single claim are rejected, leaving only weak grounds for proceeding further.

If the would-be plaintiff manages to arrange dismissal of all remaining claims among all remaining parties with prejudice, courts recognize finality. Finality is generally denied, however, if the dismissal is without prejudice. And an intermediate category of "conditional prejudice" has caused a split among the circuits. This tactic is to dismiss with prejudice all that remains open in the case after a critical interlocutory order, but on terms that allow revival of what has been dismissed if the court of appeals reverses the order that prompted the appeal. Most circuits reject this tactic, but the Second Circuit accepts it, and the Federal Circuit has entertained such appeals. There is a further nuance in cases that conclude a dismissal nominally without prejudice is de facto with prejudice because some other factor will bar initiation of new litigation — a limitations bar is the most common example.

The Subcommittee has narrowed its discussion to four options: (1) Do nothing. The courts would be left free to do whatever they have been doing. (2) Adopt a simple rule stating what is generally recognized anyway — a dismissal with prejudice achieves finality. Although this is generally recognized, an explicit rule would provide a convenient source of guidance for practitioners who are not familiar with the wrinkles of appeal jurisdiction and reassurance for those who are. But the rule might offer occasion for arguments about implied consequences for dismissals without prejudice, particularly the "de facto prejudice" and "conditional prejudice" situations. (3) Adopt a clear rule saying that only a dismissal with prejudice establishes finality. Still, that might not be as clear as it seems. Only elaborate rule text could definitively defeat arguments for de facto prejudice or conditional prejudice. Committee Note statements might lend further weight. Assuming a clear rule could be drafted to close all doors, it would remain to decide whether that is desirable. (4) A rule could directly address conditional prejudice, whether to allow it or reject it.

Rules sketches illustrating the three alternatives for rules approaches are included in the agenda materials. The Subcommittee

deliberated its way to the same pattern as the earlier subcommittee. It has not been possible to reach consensus. On the conditional prejudice question, the circuit judges on the Subcommittee would not propose a rule that would manufacture finality in this way. The lawyers seemed to like the idea, and there are indications that district judges also like the idea.

This introduction was followed by reflections on the general setting. The final-judgment rule rests on a compromise between competing values. The paradigm final judgment leaves nothing more to be done by the district court, apart from execution if there is a judgment awarding relief. Insisting on finality is a central element in allocating authority between trial courts and appellate courts. It also conduces to efficiency, both in the trial court and in the appellate court. Many issues that seem to loom large as a case progresses will be mooted by the time the case ends in the district court. Free interlocutory appeal from many orders would delay district-court proceedings and, upon affirmance, produce no offsetting benefit. Periodic interruptions by appeals could wreak havoc with effective case management.

The values of complete finality are offset by the risk that all trial-court proceedings after a critical and wrong ruling will be wasted. Some interlocutory orders, moreover, have real-world consequences or exert pressures on the parties that, if the order is wrong, are distorting pressures. These concerns underlie not only the provision for partial final judgments in Rule 54(b) but a number of elaborations of the final-judgment concept. The best known elaboration is found in collateral-order doctrine, an interpretation of the "final decision" language in § 1291 that allows appeals from orders that do not resemble a traditional final judgment. Other provisions are found in avowedly interlocutory-appeal provisions, most obviously in § 1292 and Rule 23(f) for orders granting or refusing class certification. Extraordinary writ review also provides review in compelling circumstances.

The recent process of elaborating § 1291 seems, on balance, to show continuing pressure from the Supreme Court to restrain the inventiveness shown by the courts of appeals. The courts of appeals embark on lines of decision that expand appeal opportunities, confident in their abilities to achieve a good balance among the competing forces that shape appeal jurisdiction on terms that at times seem to approach case-specific rules of jurisdiction. The Supreme Court believes that it is better to resist these temptations. The clearest illustrations are provided by the line of cases that have restricted collateral-order appeals by insisting that collateral-order appeal is proper only when all cases in a "category" of cases are appealable. Otherwise, no case in a particular "category" will support appeal.

These are the pressures that have shaped approaches to

manufactured finality. A bewildering variety of circumstances have been addressed in the cases without generating clear patterns. The concept of "de facto prejudice" is an example. The seemingly clear example of dismissal nominally without prejudice in circumstances that would defeat a new action by a statute of limitations is clear only if the limitations outcome is clear. But the limitations question may depend on fact determinations, and even choice of law, that cannot easily be made in deciding on appeal jurisdiction. Another example is found in cases that have accepted jurisdiction when a dismissal is without prejudice to bringing a new action in a state court — often with very good reason if the critical ruling by the federal court is affirmed on appeal — but the dismissal is on terms that bar filing a new action in federal court. And a particularly clear example is provided by a case in which the University of Alabama filed an action, only to have the state Attorney General appear and dismiss the action without prejudice. The University was allowed to appeal to challenge the Attorney General's authority to assume control if the action.

The Rules Committees have clear authority under § 2072(c) to adopt rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291." But regulating appeal jurisdiction is an important undertaking. There is great value in having clear rules. Attorneys who are not thoroughly familiar with appeal practice may devote countless hours to attempts to determine whether and when an appeal can be taken, and may reach wrong conclusions. Even attorneys who are familiar with these rules may seek reassurance by costly reexamination. And misguided attempts to appeal can disrupt district-court proceedings while imposing unnecessary work on the court of appeals.

Clear rules, however, may not always be the best approach. Clarity can sacrifice important nuances. The pattern of common-law elaborations of a simply worded appeal statute shows an astonishing array of subtle distinctions that may provide important protections by appeal.

The choice to proceed to recommend a clear rule, any clear rule, is beset by these competing forces.

Discussion began by recognizing that these are hard choices. Courts of appeals often believe strongly in the opportunity to shape appeal jurisdiction to achieve an optimal concept of finality. How would they react, for example, to a recommendation that adopts finality by dismissal with conditional prejudice?

A related suggestion was that it may be better to leave these issues to resolution by the Supreme Court in the ordinary course of reviewing individual cases. Circuit splits can be identified on some easily defined issues, such as conditional prejudice.

It was further suggested that the Committee does not believe that it must always act to resolve identifiable circuit splits. The conditional prejudice issue, for example, "is of first importance to appellate judges." The Subcommittee, as the earlier subcommittee, has shown the difficulty of the question through its divided deliberations. Do we need to act to establish clarity for lawyers?

These questions are not for the Civil Rules Committee alone. The Appellate Rules Committee shares responsibility for determining what is best. So far it has happened that actual rules provisions tend to wind up in the Civil Rules, in part because many appeal-affecting provisions remained in the Civil rules when the Appellate Rules were separated out from their original home in the Civil Rules. But it is possible to imagine that new rules could be located in the Appellate Rules, or even in a new and independent Federal Rules of Appeal Jurisdiction.

Further discussion suggested that everyone agrees that a dismissal with prejudice is final. It may be useful to say that in a rule. The Committee Note can say that the rule text does not address the question whether "conditional prejudice" qualifies as "with prejudice." It may be worth doing.

A response asked what is the value of a rule that states an obvious proposition widely accepted? The reply was that people who are not familiar with appellate practice may benefit.

Judge Sutton noted that these questions first came up in 2005. "My first reaction was that this is a manufactured problem." The circuit split on conditional prejudice may be worth addressing, but either answer could prove difficult to advance through the full Enabling Act process. And any more general rule would incur the risk of negative implications. The time has come to fish or cut bait.

Judge Matheson observed that it would be useful to have the sense of the Committee to report to the Appellate Rules Committee when it meets in two weeks.

The first question put to the Committee was whether the best choice would be to do nothing. Thirteen members voted in favor of doing nothing. One vote was that it would be better to do something.

STAYS OF EXECUTION: RULE 62

Judge Matheson began by observing that the questions posed by Rule 62 and stays of execution arose in part in the Appellate Rules Committee. They have not been as much explored by the Subcommittee as the manufactured-finality issues. The focus has been on

execution of money judgments, not judgments for specific relief. The provisions for injunctions, receiverships, or directing an accounting may be relocated, but have not been considered for revision.

Rule 62(a) provides an automatic stay. Until the Time Computation Project the automatic stay provision dovetailed neatly with the Rule 62(b) provision for a court-ordered stay pending disposition of post-judgment motions under Rules 50, 52, 59, and 60. The automatic stay lasted for 10 days, and the time to make the Rule 50, 52, and 59 motions was 10 days. The Time Computation Project, however, set the automatic stay at 14 days, but extended to 28 days the time to move under Rules 50, 52, and 59. A district judge asked the Committee what to do during this apparent "gap." The Committee concluded at the time that the court has inherent authority to stay its own judgment after expiration of the automatic stay and before a post-judgment motion is made. The question of amending Rule 62 was deferred to determine whether actual difficulties arise in practice.

A separate concern arose in the Appellate Rules Committee. Members of that committee have found it useful to arrange a single bond that covers the full period between expiration of the automatic stay and final disposition on appeal. That bond encompasses the supersedeas bond taken to secure a stay pending appeal, and is already in place when an appeal is filed.

The Subcommittee has begun work focusing on Rule 62(a), (b), and (d). Other parts of Rule 62 have yet to be addressed. A detailed memorandum by Professor Struve, Reporter for the Appellate Rules Committee, addresses other issues that remain for possible consideration.

The Subcommittee brings a sketch of possible revisions to the Committee for reactions. The first question is whether in its present form Rule 62 causes uncertainties or problems.

The second of two sketches in the agenda book became the subject of discussion. This sketch rearranges subdivisions (a), (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution on a judgment to pay money, and proceedings to enforce it." It carries forward an automatic stay, extending the period to 30 days. But it also recognizes that the court can order a stay at any time after judgment is entered, setting appropriate terms for the amount and form of security or denying any security. The court also can dissolve the automatic stay and deny any further stay, subject to a question whether to allow the court to dissolve a stay obtained by posting a supersedeas bond. An order denying or dissolving a stay may be conditioned on posting security to protect against the consequences of execution. The order may designate the duration of a stay, running as late as issuance of the mandate on appeal. That

period could extend through disposition of a petition for certiorari.

The question whether a supersedeas bond should establish a right to stay execution pending appeal remains open for further consideration. Consideration of the amount also remains open — if a stay is to be a matter of right, the rule might set the amount of the bond at 125% of the amount of a money judgment.

The purpose of this sketch is to emphasize the primary authority of the district court to deny a stay, to grant a stay, and to set appropriate terms for security on granting or denying a stay. It also recognizes authority to modify or terminate a stay once granted. Appellate Rule 8 reflects the primacy of the district court. Explicit recognition of matters that should lie within the district court's inherent power to regulate execution before and during an appeal may prove useful.

Discussion began with a judge's suggestion that he had not seen any problems with Rule 62. The question whether any other judge on the Committee had encountered problems with Rule 62 was answered by silence.

The next question was whether the lack of apparent problems reflects the practice to work out these questions among the parties. A lawyer member responded that "you wind up stipulating to a stay through the decision on appeal." Another lawyer member observed, however, that "there may be power struggles."

It was noted that the "gap" between expiration of the automatic stay and the time to make post-judgment motions seems worrisome, but perhaps there are no great practical problems.

Another member said that the "more efficient" draft presented for discussion is simple, and collects things in a pattern that makes sense. Most cases are resolved without trial. Even recognizing summary judgments for plaintiffs, problems of execution may not arise often. This "little rewrite" seems useful. A judge repeated the thought — this version "makes for a cleaner rule."

Judge Matheson concluded by noting that the Subcommittee is "still in a discussion phase." Knowing that Committee members have not encountered problems with Rule 62 "makes a point. But we can address the 'gap,' and perhaps work toward a better rule."

Rule 23 Subcommittee

Judge Dow began the report of the Rule 23 Subcommittee by pointing to the list of events on page 243 of the agenda materials.

The Subcommittee has attended or will attend many of these events; some Subcommittee members will attend others that not all members are able to attend. The events for this year will culminate in a miniconference to be held at the Dallas airport on September 11. The miniconference will be asked to discuss drafts that develop further the approaches reflected in the preliminary sketches included in the agenda materials. The most recent of these events was a roundtable discussion of settlement class actions at George Washington University Law School. It brought together a terrific group of practitioners, judges, and academics. It was very helpful.

Suggestions also are arriving from outside sources and are being posted on the Administrative Office web site. The suggestions include many matters the Subcommittee has not had on its agenda. It is important to have the Committee's guidance on just how many new topics might be added to the Rule 23 agenda. The Subcommittee's sense has been that there is no need for a fundamental rewrite of Rule 23. But some of the submissions suggest pretty aggressive reformulations of Rule 23(a) and (b) that seem to start over from scratch. These suggestions have overtones of a need to strengthen the perspective that class actions should be advanced as a means of increasing private enforcement of public policy values.

A Subcommittee member noted that several professors propose deletion of Rule 23(a)(1), (2), and (3). Adequacy of representation would remain from the present rule. And they would add a new paragraph looking to whether a class action is the best way to resolve the case as compared to other realistic alternatives. The question for the Committee is whether we should spend time on such fundamental issues.

A first reaction was that no compelling justifications have been offered for these suggestions. It was noted that in deciding to take up Rule 23, the Committee did not have a sense that a broad rewrite is needed, but instead focused on specific issues. "The burden of proof for going further has not been carried."

The next question was whether new issues should be added to the seven issues listed in the Subcommittee Report that will be brought on for discussion today.

Multidistrict proceedings were identified as a topic related to Rule 23. There was a presentation on MDL proceedings to the Judicial Conference in March. MDL proceedings overlap with Rule 23. It will be important to pay attention to developments in MDL practice. And it was noted that discussion at the George Washington Roundtable included the thought that some of the current Rule 23 sketches reflect approaches that could reduce the pressures that mass torts exert on MDL practice. Further development of settlement-class practice might move cases into Rule 23, with the benefits of judicial review and approval of settlements, and away from widespread private settlements of aggregated cases free from

any judicial review or supervision. One way of viewing these possibilities is the idea of a "quasi class action" — a sensible system for certifying settlement classes could be helpful. So a big concern is how to settle mass-tort cases after Amchem.

Another suggestion was that the "biggest topic not on our list" is the concept of "ascertainability" that has recently emerged from Third Circuit decisions.

Settlement class certification: Discussion turned to the question whether there should be an explicit rule provision for certifying settlement classes. One question will be whether the rule should prescribe the information provided to the court on a motion to certify and for preliminary "approval." Should the concept be not preliminary "approval," but instead preliminary "review"? The review could focus on whether the proposed settlement is sufficiently cogent to justify certification and notice to the class. What information does the judge need for taking these steps? Something like what Rule 16 says should be given to the judge? An explicit rule provision could guide the parties in what they present, as well as help the judge in evaluating the proposal. There was a lot of interest in this at the George Washington Roundtable.

Further discussion noted that Rule 23(e) does not say anything about the procedure for determining whether to certify a settlement class in light of a proposed settlement. At best there is an oblique implication in the Rule 23(e)(1) provision for directing notice in a reasonable manner to all class members who would be bound by the proposal.

A judge observed that once the parties agree on a settlement and take it to the judge, the judge's reaction is likely to be that it is good to settle the action. The result may be that notice is sent to the class without a sufficiently detailed appraisal of the settlement terms. Problems may appear as class members respond to the notice, but the process generates a momentum that may lead to final approval of an undeserving settlement. Another judge observed that there are great variations in practice. Some judges scrutinize proposed settlements carefully. Some do not. It would be helpful to have criteria in the rule.

A choice was offered. The rule could call for a detailed "front load" of information to be considered before sending out notice to the class. Or instead it could follow the ALI Aggregate Litigation Project, characterizing the pre-notice review as review, not "approval." Discussion at the George Washington Roundtable "was almost all for front-loading."

A judge said that most of the time in a "big value case" the lawyers know they should front-load the information. "But when the

parties are not so sophisticated, the late information that emerges after notice to the class may lead me to blow up the settlement." And if the settlement is rejected after the first notice, a second round of notice is expensive and can "eat up most of the case value."

Another judge observed that "it gets dicey when some defendants settle and others do not." What seems fairly straightforward at the time of the early settlement may later turn out to be more complicated.

A lawyer thought that front-loading sounds like it makes sense. But the agenda materials do not include rule language for this. What factors should be addressed by the parties and considered by the court? It was suggested that the factors are likely to be much the same as the factors a court considers in determining whether to give final approval. One perspective is similar to the predictions made when considering a preliminary injunction: a "likelihood of approval" test at the first stage.

Another judge said that the Third Circuit "is pretty clear on what I should consider. Lawyers who practice class actions understand the factors." But there are many class actions — for example under the Fair Credit Reporting Act — brought by lawyers who do not understand class-action practice. Those lawyers will not be helped by a new rule. There is no problem calling for a more detailed rule. A different judge agreed that the problem lies with the less experienced lawyers.

Yet another judge expressed surprise at this discussion. "We go through pretty much the same information as needed for final approval of a settlement." It may help to say that in generic terms in rule text, but it is less clear whether detailed standards should be stated in the rule.

And another judge said "I do less work on the front end than at the back end. But the factors are the same."

The final comment was that drafting a rule provision will require careful balancing. There are impulses to make the criteria for final approval simpler and clearer, as will be discussed. But there also are impulses to demand more information up front.

It was agreed that the Subcommittee agenda would be expanded to include a focus on the procedure for determining whether to approve notice to the class of a settlement, looking toward final certification and approval.

Rule 23(f) Appeal of Settlement Class Certification: The question whether a Rule 23(f) appeal can be taken from preliminary approval of a settlement class has come to prominence with the Third Circuit

decision in the NFL case. Given the language of Rule 23(f) as it stands, the answer seems to turn on whether preliminary approval of a settlement and sending out notice to the class involves "certification" of the settlement class. The deeper question is whether it is desirable to allow appeal at that point, remembering that appeal is by permission and that it might be hoped that a court of appeals will quickly deny permission to appeal when there are not compelling reasons to risk derailing the settlement by the delays of appeal.

The question of appeal at the preliminary review and notice stage is not academic. High profile cases are likely to draw the attention of potential objectors well before the preliminary review. They may view the opportunity to seek permission to appeal at this stage as a powerful opportunity to exert leverage.

The Third Circuit ruled that Rule 23(f) does not apply at this stage. But other courts of appeals have simply denied leave to appeal without saying whether Rule 23(f) would authorize an appeal if it seemed desirable. This issue will arise again. The Third Circuit reasoned that the record at this early stage will not be sufficient to support informed review. But if the rules are amended to require the parties to present sufficient information for a full-scale evaluation of the proposed settlement at the preliminary review stage, that problem may be reduced.

A judge observed that Rule 23(f) hangs on the seismic effect of certification or a refusal to certify. Certification of a settlement class is very important. It is rare to go to trial. Certification even for trial tends to end the case by settlement. So what, then, of certification for settlement? Will an opportunity to appeal enable objectors to derail settlements? Given the agreement of class and the opposing parties to settle, a court of appeals will be reluctant to grant permission to appeal.

Uncertainty was expressed whether the possibility of a § 1292(b) appeal with permission of the trial court as well as the court of appeals may provide a sufficient safety valve.

An observer stated that "the notice process is what brings out objectors." If Rule 23(f) appeal is available on preliminary review, the way may be opened for a second Rule 23(f) appeal after notice has gone out.

It was agreed that seriatim Rule 23(f) appeals would be undesirable.

The discussion concluded with some sense that the Third Circuit approach seems sensible. Whether Rule 23(f) should be revised to entrench this approach may depend on the text of any rule that formalizes the process of certifying a settlement class.

If the rule calls for certification only after preliminary review, notice, review of any objections, and final approval of the settlement, then there will be no room to argue that the preliminary review grants certification, nor, for that matter, that refusal to send out notice after a preliminary review denies certification.

A final Rule 23(f) question was noted later in the meeting. The Department of Justice continues to experience difficulties with the requirement that the petition for permission to appeal be filed with the circuit clerk within 14 days after the order is entered. It will explore this question further and present the issue in greater detail in time for the fall meeting.

With this, discussion turned to the seven topics listed in the agenda materials.

Criteria for Settlement Approval: Rule 23(e) was revised in the last round of amendments to adopt the "fair, reasonable, and adequate" phrase that had developed in the case law to express the multiple factors articulated in somewhat different terms by the several circuits. At first a long list of factors was included in draft rule text. The factors were then demoted to a draft Committee Note that is set out in the agenda materials. Eventually the list of factors as abandoned for fear it would become a "check list" that would promote routinized presentations on each factor, no matter how clearly irrelevant to a particular case, and divert attention from serious exploration of the factors that in fact are important in a particular case.

The question now is whether the rule text should elaborate, at least to some extent, on the bland "fair, reasonable, and adequate" phrase. The ALI Aggregate Litigation Project criticized the "grab bag" of factors to be found in the decisions, but provided a model of a more focused set of criteria requiring four findings, looking to adequate representation; evaluation of the costs, risks, probability of success, and delays of trial and appeal; equitable treatment of class members relative to each other; and arm's-length negotiation without collusion. These factors are stated in the agenda sketch as a new Rule 23(e)(2)(A), supplemented by a new (B) allowing a court to consider any other pertinent factor and to refuse approval on the basis of any such other factor. The goal is to focus attention on the matters that are useful. A related goal is to direct attention away from factors that have been articulated in some opinions but that do not seem useful. The common example of factors that need not be considered is the opinion of counsel who shaped the proposed settlement that the settlement is a good one.

One reaction to this approach may be "I want my Circuit factors." Another might be that the draft Committee Note touches on too many factors. And of course yet another reaction might be that

these are not the right factors.

A participant recalled a remark by Judge Posner during the George Washington Roundtable discussion: "why three words? 'Reasonable' says it all" — the appropriate amendment would be to strike "fair" and adequate" from the present rule text. The response was that these three words had become widely used in the cases when Rule 23(e) was amended. They were designed to capture ongoing practice. There is little need to delete them simply to save two words in the body of all the rules.

The agenda materials include a spreadsheet comparing the lists of approval factors that have been articulated in each Circuit. It was asked whether each of these factors is addressed in the draft Committee Note. Not all are. Greater detail could be added to the Note. Some factors are addressed negatively in the note, such as support of the settlement by those who negotiated it. The formulation in rule text was built on the foundation provided by the ALI. The question is how far the Committee Note should go in highlighting things that really matter.

A judge observed that the sketch of rule text required the court to consider the four listed elements, but the text then went on to allow the court to reject a settlement by considering other matters even though the settlement had been found fair, reasonable, and adequate. Would it not be better to frame it to make it clear that these other factors bear on the determination whether the settlement is fair, reasonable, and adequate? What factors might those be?

A response was that this sketch of a Rule 23(e)(2)(B) is a catch-all for case- or settlement-specific factors. Such factors may be important. It might be used to invoke the old factors lists, but it seems more important to capture unique circumstances.

Subparagraph (B) also generated this question: Is this structure designed so that passing inspection under the required elements of subparagraph (A) creates a presumption of fairness that shifts the burden from the proponents of the settlement to the opponents? The immediate response was that this question requires further thought, but that often it is not useful to think of sequential steps of procedure as creating a "presumption" that invokes shifting burdens.

A different approach asked what is gained by this middle ground that avoids any but a broad list of considerations without providing a detailed list of factors? So long as these open-ended considerations remain, they can be used to carry forward all of the factors that have been identified in any circuit. All of those factors were used to elaborate the capacious "fair, reasonable, and adequate" formula, and they still will be.

A response was that various circuits list 10, or 12, or 15 factors. Some are more important than others. "Distillation could help." But the reply was that "then we should make clear that these are the only factors."

The next step was agreement that if a proposal to amend Rule 23(e) emerges from this work, it should be sent out for comment without the "any other matter pertinent" provision sketched in subparagraph (B).

Turning back to subparagraph (A), it was noted that it will be difficult to implement criterion (iv), looking to arm's-length negotiation without collusion. The lawyers will always say that they negotiated at arm's length and did not collude. The response was that this element is one to be shown by objectors. If they make the showing of "collusion" — an absence of arm's length negotiation — the settlement must be disapproved. This was challenged by asking whether a court should be required to disapprove a settlement that in fact is fair, reasonable, and adequate — perhaps the best deal that can be made — simply for want of what seems an arm's-length negotiation?

A broader perspective was brought to bear. Courts commonly recognize separate components in evaluating a proposed settlement, one procedural and the other substantive. There may be striking examples that combine both components, as in one case where a settlement was quickly arranged for the purpose of preempting a competing class action in a state court. It may be hoped that such examples are rare.

A twist was placed on the nature of "collusion." One dodge may be that parties who have engaged in amicable negotiations take the deal to some form of ADR — often a retired judge — for review and blessing. "If reputable counsel are involved, it's different from a rushed settlement by an inexperienced lawyer."

Item (iv), then, might be dropped. But the focus on procedural fairness and adequacy may be important. It may be useful to highlight it in rule text.

Discussion of these issues concluded with a reminder that the federal law of attorney conduct is growing. Collusion is prohibited by state rules of attorney conduct. These rules are adopted into the local rules of federal courts. Item (iv) will become "another rule governing attorney conduct."

Settlement Class Certification: A settlement-class rule was published for comment as a new subdivision (b)(4) at virtually the same time as the Amchem decision in the Supreme Court. The Committee suspended consideration to allow time to evaluate the aftermath of the Amchem decision. The idea of reopening the

question is that certification to settle is different from certification to try the case. The ALI Aggregate Litigation Project is something like this. Most participants in the George Washington Roundtable discussion were of similar views.

One common thread that distinguishes proposals to certify a settlement class from trial classes is to downplay the role of "predominance" in a (b)(3) class.

Two alternative sketches are presented in the agenda materials. The first expressly invokes Rule 23(a), and includes an optional provision invoking subdivision (b)(3). Certification focuses on the superiority of the proposed settlement and on finding that the settlement should be approved under Rule 23(e). The second includes a possible invocation of Rule 23(b)(3), but focuses on reducing the Rule 23(a) elements by looking to whether the class is "sufficiently numerous to warrant classwide treatment," and the sufficiency of the class definition to determine who is in the class.

Is either alternative a useful addition to Rule 23?

A judge offered no answers, but only questions. "It is a big step to downplay predominance." At some point a settlement class judgment where common issues do not predominate might violate Article III or due process. "Huge numbers of cases will be moved from (b)(3) to (b)(4)."

The first response was that many predominance issues are obviated by settlement. The common illustration is choice of law. By adopting common terms, the settlement avoids the difficulties that arise when litigation would require applying different bodies of law, emphasizing different elements, to different groups within the class. But the reply was that the sketch does not refer to predominance for settlement.

The next observation was that "manageability" appears in the text of Rule 23(b)(3) now, and at the time of Amchem, but the Court ruled in Amchem that manageability concerns can be obviated by the terms of settlement. Commonality, on the other hand, provides protection to class members, even if its significance is reduced by the terms of settlement.

That observation led to the question whether, if Rule 23(a) continues to be invoked for settlement classes, the result will be to place greater weight on typicality. The first response was that "typicality is easy." But what of common causation issues, and defenses against individual claimants, that are not common? The only response was that if class treatment is not recognized, cases will settle by other aggregated means that provide no judicial review or control.

Cy pres: The agenda materials include a sketch that would add an extensive set of provisions for evaluating cy pres distributions to Rule 23(e)(1). The sketch is based on the ALI Aggregate Litigation Project, § 3.07. The value of addressing these issues in rule text turns in part on the fact that cy pres distributions seem to be rather common, and in part on the hesitations expressed by Chief Justice Roberts in addressing a denial of certiorari in a cy pres settlement case. Nothing in the federal rules addresses cy pres issues now. Some state provisions do — California, for example, has a cy pres statute.

The sketch narrowly limits cy pres recoveries. The first direction is to distribute settlement proceeds to class members when they can be identified and individual distributions are sufficiently large to be economically viable. The next step, if funds remain after distributions to individual class members, is to make a further distribution to the members that have participated in the first distribution unless the amounts are too small to be economically viable or other specific reasons make further individual distributions impossible or unfair. Finally, a cy pres approach may be employed for remaining funds if the recipient has interests that reasonably approximate the interests of class members, or, if that is not possible, to another recipient if that would serve the public interest. This cy pres provision includes a bracketed presumption that individual distributions are not viable for sums less than $100, but recent advice suggests that in fact claims administrators may be able to provide efficient distributions of considerably smaller sums.

The opening lines of the sketch include, in brackets, a provision that touches a sensitive question. These words allow approval of a proposal that includes a cy pres remedy "if authorized by law." There is virtually no enacted authority for cy pres remedies in federal law. The laws of a few states do address the question. It may be possible to speak to the sources of authority in the general law of remedies. But the question remains: courts are approving cy pres distributions now. If the practice is legitimate, there should be authority to regulate it by court rule. If it is not legitimate, it would be unwise to attempt to legitimate it by court rule.

The value of cy pres distributions depends in large measure on how effective the claims process is in reducing the amounts left after individual claims are paid. Courts are picking up the ALI principle. It seems worthwhile to confirm it in Rule 23.

The first question was whether the rule should require the settlement agreement to address these issues. That would help to reduce the Article III concerns. This observation was developed further. Suppose the agreement does not address disposition of unclaimed funds. What then? Must there be a second (and expensive)

notice to the class of any later proposal to dispose of them? The sketch Committee Note emphasizes that cy pres distribution is a matter of party agreement, not court action.

It was observed that even though a cy pre distribution is agreed to by the parties, it becomes part of the court's judgment. It can be appealed. And there is a particular problem if cy pres distribution is the only remedy. Suppose, for example, a defendant's wrong causes a ten-cent injury to each of a million people. Individual distributions do not seem sensible. But finding an alternative use for the $100,000 of "damages" seems to be creating a new remedy not recognized by the underlying substantive law of right and remedy.

Another judge noted that "courts have been doing this, but it's a matter of follow-the-leader." There is not a lot of endorsement for the practice, particularly at the circuit level. Cy pres theory has its origins in trust law. Settlement class judgments ordinarily are not designed to enforce a failed trust. "What is the most thoughtful judicial discussion" that explains the justification for these practices?

The response was that cy pres recoveries have been discussed in a number of California state cases. California recognizes "fluid recovery," as illustrated by the famous case of an order reducing cab fares in Los Angeles — there was likely to be a substantial overlap between the future cab users who benefit from the period of reduced fares and the past cab users who paid the unlawful high fares, but the overlap was not complete. The Eighth Circuit has provided a useful review this year. And cy pres distribution can be made only when the court has found the settlement to be fair, reasonable, and adequate. That determination itself requires an effort to compensate class members — by direct distribution if possible, but if that is not possible in some other way.

A judge noted a recent case in his court involving a defendant who sent out 100,000,000 spam fax messages. The records showed the number of faxes, but then the records were spoliated. There was no record of where the faxes had gone. The liability insurer agreed to settle for $300 for each of the class representatives. But what could be done with the remaining liability, which — with statutory damages — was for a staggering sum? Seven states in addition to California provide for distributing a portion of a cy pres recovery to Legal Services. That still leaves the need to dispose of the rest. Addressing these questions in rule text must rest on the premise that such distributions are proper.

It was agreed that these questions are serious. The ALI pursued them to cut back on cy pres distributions, to make it difficult to bypass class members. Perhaps a rule should say that it is unfair to have all the settlement funds distributed to

recipients other than class members.

Discussion concluded on two notes: these questions cannot be resolved in a single afternoon. And although it would be possible to adopt a rule that forbids cy pres distributions, that probably is not a good idea.

Objectors: Objectors play a role that is recognized by Rule 23 and that is an important strand in reconciling class-action practice with the dictates of due process. Well-framed objections can be very valuable to the judge. At the same time, it is widely believed that there are "bad objectors" who seek only strategic personal gain, not enhancement of values for the class. On this view, some objectors may seek to exploit their ability to delay a payout to the class in order to extract tribute from class counsel that may be to the detriment of class interests. Rule 23(e)(5) was added to reflect the concern with improperly motivated objections by requiring court approval for withdrawal of an objection. This provision appears to have been "somewhat successful."

The Appellate Rules Committee is studying proposals to regulate withdrawal of objections on appeal. The Rule 23 Subcommittee is cooperating in this work.

Alternative sketches are presented at page 273 in the agenda materials. In somewhat different formulations, each requires the parties to file a statement identifying any agreement made in connection with withdrawal of an objection. An alternative approach is illustrated by sketches at pages 274-275 of the agenda materials. The first simply incorporates a reminder of Rule 11 in rule 23(e)(5). The second creates an independent authority to impose sanctions on finding that an objection is insubstantial or not reasonably advanced for the purpose of rejecting or improving the settlement.

No rule can define who is a "good" or a "bad" objector. The idea of these sketches is to alert and arm judges to do something about bad objectors when they can be identified.

Another possibility that has been considered is to exact a "bond" from an objector who appeals. The more expansive versions of the bond would seek to cover not simply the costs of appeal — which may be considerable — but also "delay costs" reflecting the harm resulting from delay in implementing the settlement when the appeal fails.

A "good" objector who participated in the George Washington Roundtable commented extensively on the obstacles that already confront objectors.

The first comment was that sanctions on counsel "are more and

more regulation of attorney conduct."

And the first question from an observer was whether discovery is appropriate to support objections. The response was that it is not likely that a rule would be written to provide automatic access to discovery. There is a nexus to opt-out rights. At most such issues might be described in a Committee Note, recognizing that at times discovery may be valuable.

The next question was whether courts now have authority under Rule 11 and 28 U.S.C. § 1927 to impose sanctions on frivolous objections or objections that multiply the proceedings unreasonably and vexatiously. The response was that the second alternative, on page 275, seems to cut free from these sources of authority, creating an independent authority for sanctions. But it remains reasonable to ask whether independent authority really is needed. One departure from Rule 11, for example, is that Rule 11 creates a safe harbor to withdraw an offending filing as a matter of right; the Rule 23 sketch does not include this.

Rule 68 Offers: The sketches in the agenda materials, beginning at page 277, provide alternative approaches to a common problem. Defendants resisting class certification often attempt to moot the representative plaintiff by offering complete individual relief. Often the offers are made under Rule 68. Although acceptance of a Rule 68 offer leads to entry of a judgment, it is difficult to find any principled reason to suppose that a Rule 68 offer has greater potential to moot an individual claim than any other offer, particularly one that may culminate in entry of a judgment. Courts have reacted to this ploy in different ways. The Supreme Court has held that a Rule 68 offer of complete relief to the individual plaintiff in an opt-in action under the Fair Labor Standards Act moots the action. The opinion, however, simply assumed without deciding that the offer had in fact mooted the representative plaintiff's claim, and further noted that an opt-in FLSA action is different from a Rule 23 class action. Beyond that, courts seem to be increasingly reluctant to allow a defendant to "pick off" any representative plaintiff that appears, and thus forever stymie class certification. Some of the strategies are convoluted. In the Seventh Circuit, for example, a class plaintiff is forced to file a motion for class certification on filing the complaint because only a motion for certification defeats mooting the case by an offer of complete individual relief. But it also is recognized that an attempt to rule on certification at the very beginning of the action would be foolish, so the plaintiff also requests, and the courts understand, that consideration of the certification motion be deferred while the case is developed. This convoluted practice has not commended itself to judges outside the Seventh Circuit.

The first sketch attacks the question head-on. It provides that a tender of relief to a class representative can terminate the

action only if the court has denied certification and the court finds that the tender affords complete individual relief. It further provides that a dismissal does not defeat the class representative's standing to appeal the order denying certification.

The second sketch simply adopts a provision that was included in Rule 68 amendments published for comment in 1983 and again in 1984. This provision would direct that Rule 68 does not apply to actions under Rules 23, 23.1, and 23.2. It did not survive withdrawal of the entire set of Rule 68 proposals.

The third sketch begins by reviving a one-time practice that was at first embraced and then abandoned in the 2003 amendments. This practice required court approval to dismiss an action brought as a class action even before class certification. The parties must identify any agreement made in connection with the proposed dismissal. The sketch also provides that after a denial of certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the denial of certification.

The first question was whether these proposals reflect needs that arise from limits on the ability to substitute representatives when one is mooted. The first response was that it is always safer to begin with multiple representatives. But it was suggested that the problem might be addressed by a rule permitting addition of new representatives. That approach is often taken when an initial representative plaintiff is found inadequate.

The next observation was that substituting representatives may not solve the problem. The defendant need only repeat the offer to each successive plaintiff. The approach taken in the first sketch is elegant.

Another member observed that courts allow substitution of representatives at the inadequacy stage of the certification decision. But substitution may require formal intervention. That is too late to solve the mootness problem. These issues are worth considering.

The last observation was that the Seventh Circuit work-around seems to be effective. "It's not that big a deal." But the first and second sketches are simple.

Issues Classes: The relationship of Rule 23(c)(4) issues classes to the predominance requirement in Rule 23(b)(3) has been a longstanding source of disagreement. One view is that an issue class can be certified only if common issues predominate in the claims considered as a whole. The other view is that predominance is required only as to the issues certified for class treatment.

There are some signs that the courts may be converging on the view that predominance is required only as to the issues.

The first sketch in the agenda materials, page 281, simply adds a few words to Rule 23(b)(3): the court must find that "questions of law or fact common to the class predominate over any questions affecting only individual class members, subject to Rule 23(c)(4), and * * *." The "subject to Rule 23(c)(4)" phrase may seem somewhat opaque, but the meaning could be elaborated in the Committee Note.

The second sketch, at page 282, would amend Rule 23(f) to allow a petition to appeal from an order deciding an issue certified for class treatment. The rule might depart from the general approach of Rule 23(f), which requires permission only from the court of appeals, by adding a requirement that the district court certify that there is no just reason for delay. This added requirement, modeled on Rule 54(b), might be useful to avoid intrusion on further management of the case. An opportunity for immediate appeal could be helpful before addressing other matters that remain to be resolved.

A judge asked the first question. "Every case I have seen excludes issues of damages. Does this mean that every class is a (c)(4) issues class that does not need to satisfy the predominance requirement"? That question led to a further question: What is an issue class? An action clearly is an issue class if the court certifies a single issue to be resolved on a class basis, and intends not to address any question of individual relief for any class member. The action, for example, could be limited to determining whether an identified product is defective, and perhaps also whether the defect can be a general cause of one or more types of injury. That determination would become the basis for issue preclusion in individual actions if defect, and — if included — general causation were found. Issues of specific causation, comparative responsibility, and individual injury and damages would be left for determination in other actions, often before other courts. But is it an "issue" class if the court intends to administer individual remedies to some, or many, or all members of the class? We have not thought of an action as an issue class if the court sets the questions of defect and general causation for initial determination, but contemplates creation of a structure for processing individual claims by class members if liability is found as a general matter.

This plaintive question prompted a response that predominance still is required for an issue class. This view was repeated. Discussion concluded at that point.

Notice: The first question of class-action notice is illustrated by a sketch at page 285 of the agenda materials. Whether or not it was

wise in 1974 to read Rule 23(c) to require individualized notice by postal mail whenever possible, that view does not look as convincing today. Reality has outstripped the Postal Service. The sketch would add a few words to Rule 23(c)(2)(B), directing individual notice "by electronic or other means to all members who can be identified through reasonable effort." The Committee Note could say that means other than first class mail may suffice.

This proposal was accepted as an easy thing to do.

The Committee did not discuss a question opened in the agenda materials, but not yet much explored by the Subcommittee. It may be time to reopen the question of notice in Rule 23(b)(1) and (2) classes, even though the concern to enable opt-out decisions is not present. It is not clear whether the Subcommittee will recommend that this question be taken up.

Pilot Projects

Judge Campbell opened the discussion of pilot projects by describing the active panel presentation and responses at the January meeting of the Standing Committee. Panel members explored three possible subjects for pilot projects: enhanced initial disclosures, simplified tracks for some cases, and accelerated ("Rocket") dockets.

The Standing Committee would like to encourage this Committee to frame and encourage pilot projects. It likely will be useful to appoint a subcommittee to study possible projects, looking to what has been done in state courts and federal courts, and to recommend possible subjects.

One potential issue must be confronted. Implementation of a pilot project through a local district court rule must come to terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a), which direct that local rules must be consistent with the national Enabling Act rules. The agenda materials include the history of a tentative proposal twenty years ago to amend Rule 83 to authorize local rules inconsistent with the national rules, subject to approval by the Judicial Conference and a 5-year time limit. The proposal was abandoned without publication, in part for uncertainty about the fit with § 2071(a).

The Rule 83 question will depend in part on the approach taken to determine consistency, or inconsistency, with the national rules. The current employment protocols employed by 50 district judges are a good illustration. They direct early disclosure of much information that ordinarily has been sought through discovery. But they seem to be consistent with the discovery regime established in Rule 26, recognizing the broad discretion courts have to guide discovery.

Initial Disclosures: Part of the Rule 26(a)(1) history was discussed earlier in this meeting. The rule adopted in 1993 directed disclosure of witnesses with knowledge, and documents, relevant to disputed matters alleged with particularity in the pleadings. It included a provision allowing districts to opt out by local rule; this provision was included under pressure from opponents who disliked the proposal. The rule was revised in 2000 as part of the effort to eliminate the opt-out provision of the 1993 rule, limiting disclosure to witnesses and documents the disclosing party may use. Arizona Rule 26.1 requires much broader disclosure even than the 1993 version of Rule 26(a)(1). It is clearly intended to require disclosure of unfavorable information as well as favorable information. The proposal for adoption was greeted by protests that such disclosures are inconsistent with the adversary system. The Arizona court nonetheless persisted in adoption. This broad disclosure is coupled with restrictions on post-disclosure discovery. Permission is required, for example, to depose nonparty witnesses. Arizona lawyers were surveyed to gather reactions to this rule in 2008 and 2009. In the 2008 survey, 70% of the lawyers with experience in both state and federal courts preferred to litigate in state court. (Nationally, only 43% of lawyers with experience in both state and federal courts prefer their state courts.) The results in the 2009 survey were similar. More than 70% of the lawyers who responded said that initial disclosures help to narrow the issues more quickly. The Arizona experience could be considered in determining whether to launch a pilot project in the federal courts.

An observer from Arizona said that debate about the initial disclosure rule declines year-by-year. "It does require more work up front, but it is, on average, faster and cheaper. Unless a client wants it slow and expensive, we often recommend state court." An action can get to trial in state court in 12, or 16, months. Two years is the maximum. It takes longer in federal court. He further observed that Arizona should be considered as a district to be included in a federal pilot project because the bar, and much of the bench, understand broad initial disclosures.

The next comment observed that a really viable study should include districts where broad initial disclosure "is a complete shock to the system." There may be a problem with a project that exacts disclosures inconsistent with the limited requirements of Rule 26(a)(1). But it is refreshing to consider a dramatic departure, as compared to the usually incremental changes made in the federal rules. This comment also observed that even in districts that adhered to the 1993 national rule, lawyers often agreed among themselves to opt out.

A member asked whether comparative data on case loads were included in the study of Arizona experience. The answer was that they were not in the study. But Maricopa County has 120 judges.

Their dockets show case loads per judge as heavy as the loads in federal court.

A judge observed that a mandatory initial disclosure regime that includes all relevant information would be an integral part of ensuring proportional discovery. The idea is to identify what it is most important to get first. A pilot project would generate this information as a guide to judicial management. The judge could ask: "What more do you need"? This process could be integrated with the Rule 26(f) plan. This is an extraordinarily promising prospect. There will be enormous pushback. Justice Scalia, in 1993, wondered about the consistency of initial disclosure with an adversary system. But the success in Arizona provides a good response.

Accelerated Dockets: This topic was introduced with a suggestion that the speedy disposition rates recently achieved in the Western District of Wisconsin appear to be fading. The Southern District of Florida has achieved quick disposition times for some cases. "Costs are proportional to time." Setting a short time for discovery reflects what is generally needed. State-court models exist. The "patent courts" are experimenting with interesting possibilities. The Federal Judicial Center will report this fall on experience with the employment protocols.

These and other practices may help determine whether a pilot project on simplified procedures could be launched. Federal-court tracking systems could be studied at the beginning. State court practices can be consulted.

A member provided details on the array of cases filed in federal court. The four most common categories include prisoner actions, tort claims, civil rights actions (labor claims can be added to this category), and contract actions. Smaller numbers are found for social security cases, consumer credit cases, and intellectual property cases. Some case types lend themselves to early resolution. Early case evaluation works if information is shared. Early mediation also works, although the type of case affects how early it can be used.

One thing that would help would be to have an e-discovery neutral available on the court's staff to help parties work through the difficulties. Many parties do not know what they're doing with e-discovery. This member has worked as an e-discovery master. "Weekly phone calls can save the parties a lot of money." One ploy that works is to begin with a presumption that the parties will share the master's costs equally, unless the master recommends that one party should bear a larger share. That provision, and the fact that they're being watched, dramatically reduces costs and delay. And e-discovery mediation can help.

It also helps when the parties understand the case well enough

for early mediation.

And experience as an arbitrator, where discovery is limited to what the arbitrator directs, shows that it is possible to control costs in a fair process.

Another suggestion was that a statute allows summary jury trial. If the parties agree, it can be a real help. The trial can be advisory. It may be limited, for example to 3 hours per party. Summaries of testimony, or live witnesses, may be used. Charts may be used. "Juries love it." After the jury decides, lawyers can ask the jury why they did what they did. This practice can be a big help in conjunction with a settlement conference.

Another suggestion was that it would help to devise rules to dispose of cases that require the court to review a "record." Social Security cases, IDEA cases, and ERISA fiduciary cases are examples.

Another judge noted that the Northern District of Ohio has a differentiated case management plan. The categories of cases include standard, expedited, complex, mass tort, and administrative. There are ADR options, and summary jury trial. It would be good to study this program to see how it works out over time.

Discussion concluded with the observation that if done well, study of these many alternatives could lead to useful pilot projects.

Judge Sutton concluded the discussion of pilot projects by noting that the Standing Committee is grateful for all the work done on the Duke Rules package and on Rule 37(e). He further noted that Rule 26(a)(1) failed in its initial 1993 form because it was a great change from established habits. It may be worthwhile to restore it, or something much like it, as a pilot project in 10 or 15 districts to see how it might be made to work now.

Judge Sutton concluded the meeting by noting that Judge Campbell's term as Committee Chair will conclude on September 30. Judge Campbell will attend the November meeting, and the Standing Committee meeting in January, for proper recognition of his many contributions to the Rules Committees. "Surely 100% of Arizona lawyers would prefer David Campbell to anyone else." His stewardship of the Committee has been characterized by steadiness, even-handedness, patience, and insight. And he is always cheerful. "Thank you."

Respectfully submitted,

Edward H. Cooper
Reporter