Minutes

Civil Rules Advisory Committee

November 5, 2015

The Civil Rules Advisory Committee met at S.J. Quinney College of the Law at the University of Utah on November 5, 2015. (The meeting was scheduled to carry over to November 6, but all business was concluded by the end of the day on November 5.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by telephone); and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm 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, Judge Amy J. St. Eve (by telephone), and (also by telephone) 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, Esq.. Rebecca A. Womeldorf, Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the Administrative Office. Emery G. Lee, III, attended for the Federal Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); and Ariana Tadler, Esq..

Judge Bates opened the meeting by greeting new members, Judge Ericksen and Judge Morris.

Judge Bates also noted the presence of former Committee member Judge Grimm and former Committee Chair Judge Campbell. They, and Judge Diamond who rotated off the Committee at the same time, contributed in many and invaluable ways to the Committee's work. Looking to the package of rules amendments that are pending in Congress now, Judge Grimm chaired the Discovery Subcommittee and was a member of the Subcommittee chaired by Judge Koeltl that worked through proposals generated by the Committee's 2010 Conference on reforming the rules. Judge Campbell has devoted a decade to Committee work, and continues with the work on pilot projects and on educating bench and bar in what we hope will, on December 1, become the 2015 amendments. The Reporters also described the many lessons in drafting, practice, and wisdom they had learned in working closely with Judge Campbell as chair of the Discovery Subcommittee and then Committee Chair.

Judge Bates concluded these remarks by observing that the new members would soon witness the Committee's determination to work toward consensus in its deliberations. The package of amendments now pending in Congress emerged from a remarkable level of agreement even on the details. Judge Campbell's strong and tireless leadership was demonstrated at every turn. Professor Coquillette "seconded" all of this high praise.

Judge Campbell expressed appreciation for the "overly kind comments." He noted that special praise is due to Judge Grimm for contributions "as substantial as anyone," especially in chairing the Discovery Subcommittee. He emphasized that the Committee is indeed a collaborative group. It is the profession's best example of collective thinking, good-faith effort, and agenda-less work. Every member who moves into alumnus standing has expressed this view. The Reporters provide excellent support. Judge Bates and Judge Sutton will carry the work forward in outstanding fashion.

Judge Campbell also noted that in 1850 his great-great grandparents came to the valley where the Committee is meeting as Mormon pioneers. Robert Lang Campbell became the first Commissioner of Public Education and was a regent of the University of Deseret, a progenitor of the University of Utah. "The University is home to me and my family."

Dean Robert W. Adler welcomed the Committee to the Law School and its new building. The new building is designed both to improve the learning experience and to advance the Law School's involvement with the community. He noted that as a professor of civil procedure he always demands that his students read the Committee Notes as they study each rule. "You can see the lights going off in their heads" as they read the Notes and come to understand that there is more in the rule texts than may appear on first reading.

April 2015 Minutes

The draft minutes of the April 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Standing Committee and Judicial Conference

Judge Campbell reported on the May meeting of the Standing Committee and the September meeting of the Judicial Conference.

The Standing Committee meeting went well. There was a good discussion of pilot projects.

At the Judicial Conference, the Chief Justice invited Judge Sutton and Judge Campbell to present a summary of the amendments now pending in Congress. They urged the Chief Judges to offer programs to explain to judges and lawyers the nature and importance of these

amendments in the hoped-for event that they emerge from Congress.

The Judicial Conference approved and sent to the Supreme Court amendments to Rule 4(m) dealing with service on corporations and other entities outside the United States; Rule 6(d), clarifying that the "3-added-days" provision applies to time periods measured after "being served," and eliminating from the 3-added days service by electronic means; and Rule 82, synchronizing it with recent amendments of the venue statutes as they affect admiralty and maritime cases.

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 of 2015 (LARA) has passed in the House. It 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. This bill has been introduced regularly over the years. 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. The prospects for enactment remain uncertain.

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. The earlier strong support for some form of action seems to have diminished for the moment.

A proposed Fairness in Class Action Litigation Act would directly amend Rule 23. A central feature is a requirement that each proposed class member suffer an injury of the same type and scope as every other class member. The ABA opposes this bill.

Publicizing the Anticipated 2015 Amendments

Judge Grimm described the work of the Subcommittee that is seeking to support programs that will educate members of the bench and bar in the package of rules that will become law on December 1 unless Congress acts to modify, suspend, or reject them.

The 2010 Conference emphasized themes that have persisted through the ensuing work to craft these amendments. Substantial reductions in cost and delay can be achieved by proportionality in discovery and all procedure, cooperation of counsel and parties, and early and active case management. These concepts have been reflected in the rules since 1983. They have been the animating spirit of succeeding sets of rules amendments. The need for yet another round of amendments has suggested that amending the rules is not always enough to get the job done. So

it was decided that the amendments should be advanced by promoting efforts to bring them home to members of the bench and bar by focused education programs. Work on the programs is progressing.

Five videotapes are being prepared. They will be structured in segments, facilitating a choice between a single viewing and viewing at intervals. Judge Fogel and the FJC have been a wonderful resource. Tapes by Judge Koeltl and Judge Grimm have been made. The remaining tapes will be made on November 6.

Letters from Judge Sutton and Judge Bates will alert district judges to the new rules. A powerpoint presentation is being prepared.

Bar organizations have been encouraged to prepare programs. The ABA has done one, and will do more; John Barkett is participating. The American College of Trial Lawyers has planned a program. The Fifth Circuit and Eighth Circuit will have programs; it is hoped that other circuits will as well.

Many articles are being written. Judge Campbell has prepared one for Judicature. Professor Gensler, a former Committee member, has prepared a very good pamphlet.

One indication of the value of educational efforts is provided by a poll Judge Grimm undertook. He asked 110 judges — 68 Magistrate Judges and 42 District Judges — whether they actively manage discovery from the beginning of an action or, instead, wait for the parties to bring disputes to them. More than 80% replied that they wait for disputes to emerge. "We hope to educate them that early management reduces their work."

One caution was noted. The Duke Center for Judicial Studies has convened a group of 30 lawyers, evenly divided between 15 who regularly represent plaintiffs and 15 who regularly represent defendants, to prepare a set of Guidelines on proportionality. Some present and former Committee members reviewed drafts. These guidelines will be used in 13 conferences planned by the ABA and the Duke Center that aim to advance the practice of proportionality. The first conference will be held next week, a few weeks before we can know that the proposed amendments will in fact take hold. Professor Suja Thomas has expressed concern that these guidelines will be used to "train" judges, and to be presented in a way that casts an aura of official endorsement. In response to this concern, Judges Sutton, Bates, and Campbell have sent out a letter to federal judges making it clear that the guidelines are not endorsed by the rules committees. The letter also notes that these conferences are not being used to "train" judges.

Judge Sutton noted that December 1 has not yet arrived. "We must be very careful to show that we are not presuming Congress will approve the amendments." It is appropriate to anticipate the expected birth of the amendments by preparing to encourage implementation from and after December 1. And it is appropriate to participate in programs that

are presented before December 1 if it is made clear that the amendments remain pending in Congress and will become law only if Congress does not intervene by December 1. It is proper for Committee members and former Committee members to participate in these educational programs, but it is important to continue the tradition that no favoritism should be shown among the outside groups that organize the programs. An invitation should be accepted only if the same invitation would be accepted had it been extended by a different organization. And, as always, it is important to emphasize both in opening and in closing that no member speaks for the Committee.

Judge Campbell noted that the Duke Center has invested great effort in promoting the new rules. "We should be grateful." It is unfortunate that Professor Thomas has become concerned that the Center is too closely connected to the Committee. It continues to be important that all branches of the profession, teaching, practicing, and judging, understand that the Committee is in fact independent of all outside groups. The letter to federal judges is designed to provide reassurance.

Judge Bates echoed this appreciation of the Duke Center's efforts.

John Rabiej noted that the Duke Center says, explicitly and repeatedly, that the Guidelines are not binding. They are only suggestions. And they emerged from a working group evenly divided between plaintiff interests and defense interests.

A Committee member noted that she observed e-mail traffic, including messages focused on the Duke Center's involvement, that reflects a widespread perception that the rules result from an adversary process in which "someone wins and someone loses." That wrong impression is unfortunate. "The rules are for everyone." As a private person, she tells people that the best course is to read the rules and Committee Notes. Practicing lawyers may be forgiven for misperceiving the process because they are largely unaware of it. But it is difficult to forgive similar ignorance when it is shown by academics — within the last few weeks she had occasion to ask a civil procedure teacher what he thought of the pending amendments and he asked "what amendments"?

Another Committee member observed that it is a good process. The 2010 Conference contributed a lot. But it remains important to stress, without overdoing it, that the Duke guidelines are not ours.

Another Committee member underscored the importance of making it clear that members do not speak for the Committee. "I always do it." But it also is important to emphasize that the Committee is seeking to achieve the effective administration of justice.

Yet another member noted that at least some judges are uncertain whether it is appropriate to attend the ABA-Duke Center presentations. Reassurances would be helpful.

Rule 23

Judge Bates introduced the Rule 23 proposals by noting that the Class-action Subcommittee has been working with extraordinary intensity. Over the course of the summer he participated in 10 Subcommittee conference calls working on the substance of the proposals, and there was much other traffic by messages and calls on incidental matters. Judge Dow and Professor Marcus deserve much credit for pushing things along.

For today, the goal is to form a good idea of which proposals should move forward. It may be possible to work on some specifics, but "this is not the final round." The Committee will report to the Standing Committee in January. By this Committee's meeting next April we may be in a position to make formal recommendations for publication in 2016. For today, we can view the package as a whole. Much of it deals with settlements.

Judge Dow introduced the Subcommittee report by noting that it presents 11 items for discussion, generally with illustrative rule text and committee notes.

Six topics are recommended for continuing work: "frontloading" the initial presentation of a proposed settlement; adding a provision to Rule 23(f) to ensure that appeal by permission is not available from an order approving notice of a proposed settlement; amending Rule 23(c)(1) to make it clear that the notice of a proposed settlement triggers the opt-out and objection process, even though the class has not yet been certified; emphasizing opportunities for flexible choice among the means of notice; establishing a requirement that a court approve any payment to be made in connection with withdrawing an objection to a settlement or withdrawing an appeal from denial of an objection, along with provisions coordinating the roles of district courts and circuit courts of appeals when dismissal of an appeal is involved; and expanding the rule text criteria for approving a proposed settlement.

One topic, adoption of a separate provision for certifying a settlement class, is presented for discussion, although the Subcommittee is not inclined to move toward adopting such a provision.

Two other topics are on hold. Each awaits further development in the courts. One is "ascertainability," a set of questions that are percolating in the circuits. The other is the use of Rule 68 offers of judgment or other settlement offers as a means of attempting to moot a class action by "picking off" all class representatives; this question has been argued in the Supreme Court, and any further consideration should await the decision.

Finally, the Subcommittee recommends that two other topics be removed from present work. One is "cy pres" awards in settlements. The

other is any attempt to address the role of "issue" classes. The reasons for setting these topics aside will be developed in the later discussion.

Frontloading: Draft Rule 23(e)(1) tells the court to direct notice of a proposed class settlement if the parties have provided sufficient information to support a determination that giving notice is justified by the prospect of class certification and approval of the settlement. The basic idea was developed in response to discussion at the George Washington conference described in the Minutes for the April meeting, and with help from an article by Judge Bucklo about the things judges need to know about a proposed class settlement but often do not know. The information will enable the judge to determine whether notice to the class is justified. If the class has not already been certified, the notice will be in the form required by Rule 23(c)(2) — for a (b)(3) class, it will trigger the opportunity to request exclusion, and for all classes it will provide a basis for appearing and for objecting to the proposed settlement. These purposes are best served by detailed notice of the terms of settlement. Many courts follow essentially this practice now, but express rule text will advance the best practice for all cases.

This proposal begins by adding language to the initial part of Rule 23(e)(1), making it clear that court approval is required to settle the claims not only of a certified class but also of a class that is proposed for certification at the same time as the settlement is approved.

The frontloading concept was presented to the September miniconference in the form of rule text that listed 14 kinds of information the parties should provide. This "laundry list" approach met a lot of resistance. There is constant fear that an official list of factors will be diluted in practice to become a simple check-list that routinely checks off each factor without distinguishing those that are important to the specific case from those that are not. The present draft channels all these factors into an open-ended behest that the parties provide "relevant" or "sufficient" information. Perhaps some other descriptive word should be found to emphasize the purpose to provide as much as possible of the information that will be presented on the motion for final approval. This approach, leaving it to the court and parties to identify and focus on the considerations that bear on a particular proposed settlement, seemed to win support at the miniconference. The Committee Note can go a long way toward calling attention to the multiple factors that appeared in the "laundry list" draft.

Judge Dow noted that the sophisticated lawyers who bring class actions in his court commonly provide the kinds of information required by the proposal. But not all lawyers do it. "The less sophisticated practitioners need" more guidance in the rule.

Judge Dow further noted that the proposed rule text does not

address the question of what to do with the residue of the relief a class defendant agreed to when not all class members make claims. It would be possible to say something on this score, and to support the rule text with a Committee Note that identifies the factors included in the original laundry list rule draft. Professor Marcus added that the Note attempts "to identify, advocate, convey." It does not say that all 14 factors need be checked off every time.

A Committee member said that the draft rule reflects what has become "procedural common law." Judges created this procedure. The Manual for Complex Litigation adopts it. When the parties present a proposed settlement for approval in an action that has not already been certified as a class, the practice calls for "preliminary approval" of certification and settlement, notice to the class with opportunity to opt out or object, and final approval. Many experienced lawyers and judges believe that Rule 23 says this. "The proposal is to have the rule say what many think it says now." But too often, in the hands of those who are not familiar with Rule 23 practice, the important information comes out too late. Yet the draft is ambiguous in calling for relevant information about the proposed settlement — is this information about the quality of the settlement, or does it include information about the reasons for certifying any class and about proper class definition? The response was to point to the statement in the draft Committee Note that "[o]ne key element is class certification." But perhaps more could be said in the rule text.

A drafting question was raised: would it be better to begin in this form: "The court must direct notice," etc., if the parties have provided the required information and if the court determines that giving notice is justified, etc.? And is either of the alternative words used the best that can be found to describe the quantity and quality of information that must be provided? "'Relevant' calls to mind the scope-of-discovery provision in rule 26(b)(1)." The answer was recognition that work will continue on the drafting. The earlier draft that set out 14 factors was troubling because in many cases several of the 14 "do not matter." But drafting a more open-ended approach is a work in progress.

This answer prompted the reflection that "the information relevant is quite different from one type of action to another." A complex antitrust action may call for quite different types of information than will be called for in an action involving a single form of consumer deception.

A similar style suggestion was offered: "I like better rules that tell the parties to do things," rather than "rules that tell the court to do things." The purpose of this rule is to tell the parties to provide more information. Such was the approach taken in the 14-factor draft, set out at p. 189 in the agenda materials: when seeking approval, "the settling parties must present to the court" all of the various described items of information.

A finer-grained drafting comment also was made. The draft simply grafts a reference to a proposed settlement class into the present text of subdivision (e)(1):

> The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed, or compromised only with the court's approval. * * *

There is a miscue — the proposal described in the new operative text is only to settle, not to voluntarily dismiss or compromise the action. The broader sweep that includes voluntary dismissal or compromise fits better with the class that has already been certified. It would be better to separate this into separate parts: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval; the claims, issues, or defenses of a class proposed to be certified as part of a settlement may be settled only with the court's approval. The following procedures apply in seeking approval: * * *.

Judge Dow concluded the discussion by observing that the Committee agrees that the frontloading proposal should be pursued further, with work to refine the drafting. The rule will speak to the parties' duty to provide information, and other improvements will be made.

Rule 23(f): This proposal would add a new sentence to the Rule 23(f) provision for appeal by permission "from an order granting or denying class-action certification": "An order under Rule 23(e)(1) may not be appealed under Rule 23(f)." The concern arises from the common practice that refers to "preliminary certification" of a class when the court approves notice to the class. An appeal was attempted at this stage in the NFL concussion litigation; the Third Circuit decided not to accept the appeal. But the possibility remains that appeals will be sought in other cases. And the sense is that there should be only one opportunity for appeal, at least as to a single grant of certification.

This introduction generated no further discussion. It was noted later, however, that the Department of Justice continues to study a proposal to expand the time available to ask permission to appeal under Rule 23(f) when the request is made in actions involving the United States or its officers or employees. The Department expects to have a concrete proposal ready fairly soon.

Rule 23(c)(2)(B): This proposal is intended to solidify the practice of sending out notice to the class before actual certification when a proposed settlement seems likely to be approved:

> For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice practicable

under the circumstances * * *.

Judge Dow noted that sending out notice before certification and approval of the settlement is intended to accomplish the purposes of notice in a (b)(3) class, including establishing the deadline to request exclusion and affording the opportunities to enter an appearance and to object. This is consistent with present practice. And it is mutually reinforcing with the frontloading proposal: frontloading will support notice that provides more comprehensive information, enabling better-informed decisions whether to opt out or to object. The opt-out rate and objections in turn will support further evaluation of the proposed settlement at the final-approval stage. An important further benefit will be to reduce the risk that a second round of notice will be required because the initial notice is made defective by the parties' failure to provide adequate information to the court and objections show the need for better notice or demonstrate the inadequacy of the proposed settlement.

Professor Marcus added that this proposal is useful to respond to an argument forcefully advanced by at least one participant in the miniconference. The common practice, carried forward in this package of proposals, is that actual certification of the class is made only at the same time as approval of the settlement. As Rule 23(c)(2)(B) stands now, its text literally directs that notice satisfying all the requirements of (B) be sent out then, never mind that the notice of proposed settlement sent out under (e)(1) has already triggered an opt-out period and so on. It is better to make it clear that class members can be required to decide whether to opt out, to appear, or to object before the class is formally certified.

A committee member observed that courts believe now that the notice of a proposed settlement discharges the function of (c)(2)(B). Characterizing the court's initial action as preliminary certification and approval brings it within the rule language. But, in turn, that triggers the prospect that a Rule 23(f) appeal can be taken at that stage, a disruptive prospect that is so unlikely to prove justified by a grossly defective proposal that it should never be available. This revision of (c)(2)(B) helps in all these dimensions.

General Notice Provisions. Discussion turned to the draft that would introduce added flexibility to the description of notice in Rule 23(c)(2)(B):

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first-class mail, electronic, or other means] {by first-class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort * * *.

Judge Dow noted that this proposal would "bring notice into the

21st Century." First-class mail may not be the best means of informing class members of their rights, but it seems to be settled into general practice. The proposal is designed to establish the flexibility required to provide notice by the most effective means. The objective is the same as before — to provide the best notice possible to the greatest number of class members. The alternative presented in the first bracketed alternative, focusing on "the most appropriate means," emphasizes the importance of the choice. Whatever choice is made for rule text, it is important to have text that supports the examples that may be useful in the Committee Note.

The first suggestion, made and seconded, was that it might be better to simplify the rule text by referring only to "the most appropriate means." Amplification could be left to the Committee Note. The response was that it may be important to add examples to rule text to make it clear that the choice of means is technology-neutral. The ingrained reliance on first-class mail may make it important to make it clear that other means may be as good or better. This response was elaborated by suggesting the advantages of the first alternative, calling for the most appropriate means and referring to "electronic means" rather than "electronic mail." It may be, particularly in the not-so-distant future, that appropriate means of electronic communication will evolve that cannot be fairly described as part of the familiar "e-mail" practices we know today.

Further discussion suggested that limiting the rule text to "the most appropriate means" would avoid an implication that first-class mail or e-mail are always appropriate.

A separate question was addressed to the parts of the draft Note that discuss the format and content of class notice: is it appropriate to address these topics when the amended rule text does not directly bear on them? The only response was that any amendment addressing effective means of notice will support discussion of the importance of making sure that the notice conveyed by appropriate means is itself appropriately informative. Merely reaching class members does little good if the notice itself is inadequate.

Objectors: Judge Dow began by observing that the Subcommittee has repeatedly been reminded that there are both "good" and "bad" objectors. Class-member objections play an important role in class-action settlements. As a matter of theory, the opportunity to object is a necessary check on adequate representation. As a practical matter, objectors have shown the need to modify or reject settlements that should not be approved as initially proposed. But there are also objectors who seek to enrich themselves — that is, commonly to enrich counsel — rather than to improve the settlement for the class. The advice received at several of the meetings the Subcommittee has attended, and at the miniconference, is that bad-faith objections can be dealt with successfully in the trial court. The problem that persists is appeals or threats to appeal a judgment based on an approved settlement. An appeal can delay implementation of the judgment by a

year or more. That means that class members cannot secure relief, in some cases relief that is important to their ongoing lives. The objector offers not to appeal, or to dismiss the appeal, in return for a payment that goes only to the objector's counsel, or perhaps in part to the objector as well. Too often, class counsel are unwilling to submit the class to the delay of an appeal and agree to buy off the objector.

Starting in 2010, the Appellate Rules Committee has been considering rules to regulate dismissal of objector appeals. The Subcommittee has been working in coordination with them.

The first step in addressing objectors is a draft that requires some measure of detail in making an objection. This draft responds to suggestions that some "professional objectors" simply file routine, boilerplate objections in every case, do nothing to explain or support them, fail to appear at a hearing on objections, and then seek to appeal the judgment approving the settlement. The draft adds detail to the present provision that authorizes objections:

(A) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~:~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

The first comment was that "this is the most oft-repeated topic at all the conferences." The materials submitted for discussion at the miniconference included a lengthy list of information an objector must provide in making an objection. "It seemed too much."

Later discussion provided a reminder that the Subcommittee will continue to consider whether to retain the bracketed words stating that failure to state the grounds for the objection is a ground for rejecting the objection.

The draft in the agenda materials addresses the question of payment by adding to present Rule 23(e)(5) a new subparagraph:

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c) of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.

This draft is supplemented by alternative versions of a new subparagraph (C) that require court approval of any payment for withdrawing an objection or an appeal from denial of an objection. The overall structure is built on the premise that payment to an objector

may be appropriate in some circumstances. Rather than prohibit payment, approval is required. It may be that the district court finds it appropriate to compensate the costs of making an objection that, although it did not result in any changes in the settlement, played an important role in assuring the court that the settlement had been well tested and does merit approval. That prospect, however, is not likely to extend to payment for withdrawing an appeal.

Recognizing that the Appellate Rules Committee has primary responsibility for shaping a corresponding Appellate Rule, a sketch of a possible Appellate Rule is included. The Appellate Rules Committee met a week before this meeting. Their deliberations have suggested some revisions in the package.

One question is how the court of appeals will know the problem exists. A new sketch of a possible Appellate Rule 42(c) would direct that a motion to dismiss an appeal from an order denying an objection to a class-action settlement must disclose whether any payment to the objector or objector's counsel is contemplated in connection with the proposed dismissal. Then a possible Rule 42(d) would provide that if payment is contemplated, the court of appeals may refer the question of approval to the district court. The court of appeals would retain jurisdiction of the appeal, pending final action after the district court reports its ruling to the court of appeals. The court of appeals can instead choose to rule on the payment without seeking a report from the district court. Finally, a new Civil Rule 23(e)(5)(D) would direct the district court to inform the court of appeals of the district court's action if the motion to withdraw was referred to the district court.

One initial question is whether there should be any provision regulating withdrawal of an objector's appeal when there is no payment. As a matter of theory, it may be wondered whether other objectors may have relied on this appeal to forgo taking their own appeals. But that theory may bear little relation to reality. It was not developed further in the discussion.

The focus of the new structure is to provide the court of appeals a clear procedure for getting advice from the district court. The district court is familiar with the case and often will be in a better position to know whether payment is appropriate. The Appellate Rules Committee is anxious to retain jurisdiction in the court of appeals. That can be done whether the action by the district court is simply a recommended ruling or is a ruling by the district court subject to review by the ordinary standards that govern the elements of fact and the elements of discretion.

The first question was what happens when the district court refuses to approve a payment and the objector wants to appeal. The response was that the draft retains jurisdiction in the court of appeals. The objector can address his grievance to the court of appeals, whether the question be one of independent decision by the

court of appeals as informed by the district court's recommendation, or be one of reviewing a ruling by the district court.

An analogy was offered: Appellate Rule 24(a) directs that a party who desires to appeal in forma pauperis must file a motion in the district court. If the district court denies the motion, the party can file a motion in the court of appeals, in effect renewing the motion. Here, the motion to dismiss the appeal is made in the court of appeals, disclosing whether any payment is contemplated. But what happens if the court of appeals simply dismisses the appeal without deciding whether to approve the payment? The draft prohibits payment without court approval, so the objector would have to seek approval from the district court. The district court's action would itself be a final judgment, subject to appeal.

Another analogy also is available. There are many circumstances in which a court of appeals finds it useful to retain jurisdiction of an appeal, while asking the district court to take specific action or to offer advice on a specific question. The court of appeals can manage its own proceedings as it wishes, but is most likely to defer further proceedings until the district court reports what it has done in response to the appellate court's request. There is a further analogy in the "indicative rulings" provisions of Civil Rule 62.1 and Appellate Rule 12.1 — one of the paths open under those rules is for the court of appeals to remand to the district court for the purpose of ruling on a motion that the district court otherwise could not consider because of a pending appeal. The court of appeals retains jurisdiction unless it expressly dismisses the appeal.

Further discussion suggested that at least one participant thought it better to think of this process as a "remand," because a "referral" does not seem to contemplate factfinding in the district court.

A member expressed a skeptical view about the value of this process. The hope is for an in terrorem effect that will deter payments by the threat of exposure and the prospect that courts will never approve a payment that is not supported by a compelling reason. But the problem is delay in implementing the judgment; the more elaborate the process for withdrawing an appeal, the greater the delay.

This view was countered. "The use of delay as leverage for a payoff is the problem. If we say no payoff without court approval, we do a lot. The bad-faith objector wants delay not for its own sake, but for leverage." A legitimate objector will not be affected by the need for approval of any payment.

A different doubt was expressed: the incentive is to get rid of objectors, but will this process simply encourage objectors to pad their bills? The response was that the objector's lawyer does not get paid unless there is a benefit to the class. But the doubt was renewed: that can be met by a stipulation of the objector and counsel that there

was a benefit to the class. The response in turn was that this procedure will eliminate the incentive for delay. Bad-faith objectors self-identify before taking an appeal, or after filing the notice of appeal. They do not appear at the hearing on approval, they often do no more than file form objections. And the good-faith objectors articulate their objections in the district court. They appeal for the purpose of defeating what they view as an inadequate settlement, not for the purpose of delay or coercing payment for abandoning their objections.

This view was supported by noting that a good-faith objector who participated in the miniconference reported that the business model of bad-faith objectors does not support actual work on an appeal. But why not let the district court be the one that decides whether to approve payment? The court of appeals can grant the motion to dismiss the appeal, and remand to the district court to decide on payment. The district-court ruling can be appealed. This view was supported by noting that once the district court has ruled, "there is something to review."

General support for the proposed approach was offered by noting that "rulemaking cannot resolve every problem." But we can accomplish the modest goal of insisting on sunlight, and creating a mechanism for courts to address the issues as promptly as possible.

A wish for simplicity was expressed by suggesting that it may be enough to provide in Rule 23(e)(5)(B) that court approval is required to withdraw an objection or an appeal from denial of an objection, and to limit new provisions in Appellate Rule 42 to a direction that any payment for dismissing the appeal be disclosed to the court of appeals. The court of appeals then "does what it does." It may choose to decide the appeal. Or it can simply dismiss the appeal; the case is over. But an objector who wants payment must apply to the district court. The key is disclosure to the court of appeals. Appellate Rule 12.1 and Civil Rule 62.1 already provide the opportunity to seek an indicative ruling if a motion to approve payment is made in the district court while the appeal remains pending. The full set of draft provisions is "too much process."

A different vision of simplicity was suggested: the rules should leave it open to the court of appeals to choose between acting itself, referring to the district court, making a limited remand, or adopting whatever approach seems to work best for a particular case.

The next question was whether it might be possible to provide some guidance in rule text on the circumstances that justify payment for withdrawing an objection or appeal? Apart from that, should we be concerned that there may be means of compensation that are not obviously "payment"? One possibility may be to accord some form of benefit in collateral litigation — the objector may represent clients who are not in the class, or it might be agreed to acquiesce in an objection made in a different class action.

These questions were addressed by the observation that the only familiar demands are for payments to lawyers, or to clients who want more than the judgment gives them. But it is possible to imagine a threat of objections in all future cases, or a promise to withdraw objections in other cases. So the sketch of a possible Appellate Rule 42(c) on p. 102 of the agenda materials refers to "payment or consideration."

The discussion concluded by noting the paths to be tested by further drafting. It will be good to achieve as much simplicity as possible. Full disclosure should be required of any payments (or consideration) for withdrawing an objection or appeal from denial of an objection. The district court should be the place for determining whether to approve any payment. Beyond that, this structure can be effective if lawyers for the plaintiff class do their part in resisting requests for payment.

Settlement Approval: Judge Dow introduced the draft criteria for approving a class-action settlement by noting that the draft is inspired in part by the approach taken in the ALI Principles of Aggregate Litigation. The ALI approach was shaped by the same concerns that the Subcommittee has encountered. There are as many dialects as there are circuits; each circuit has its own differently articulated list of factors to be applied in determining whether a settlement is "fair, reasonable, and adequate." The draft is an effort to capture the most important procedural and substantive elements that should guide the review and approval process. In its present form, it seeks to capture the most important elements in four provisions that might be viewed as "factors," or instead as the core concerns. The first question is whether this focus will support meaningful improvement in current practices.

Professor Marcus supplemented this introduction by identifying two basic questions: Will the draft, or something like it, prove helpful to judges and lawyers? The purpose begins with helping the parties to shape the information they submit in seeking approval. Every circuit now has a list of multiple factors. The draft presented to the Committee last April included a catch-all "whatever else" provision. Discussion then suggested that the provision was not helpful. It was dropped during later drafting efforts, but has found renewed support and is included in the agenda drafts for further discussion. It takes different forms in the two alternative structures. In alternative 1, the court "may disapprove * * * on any ground the court deems pertinent, * * * considering whether." That is less restrictive than alternative 2, which directs that the court "may approve" "only * * * on finding" the four core criteria are met and also that "approval is warranted in light of any other matter that the court deems pertinent." The choice here is whether to suggest the relevance of considerations in addition to the four core showings that are explicitly described, and whether to be more or less restrictive.

The second question is related: what prominence should be given to the present rule formula, which was drawn from well-developed case law, looking to whether the settlement is "fair, reasonable, and adequate"? These words support consideration of every factor that has been identified by any circuit. Should the process remain that open?

The first comment was that both alternatives are open-ended. A "ground" or "matter" that "the court deems pertinent" is not a legal standard.

The next comment was that the second alternative displaces the present "fair, reasonable, and adequate" standard from its present primacy, demoting it to a role as part of the factor that asks whether the relief awarded to the class is fair, reasonable, and adequate, taking into account the costs, risks, probability of success, and delays of trial and appeal. The fair, reasonable, and adequate standard is the over-arching concern. Another member agreed — this is an argument for alternative 1, which allows approval "[only] on finding it is fair, reasonable, and adequate." The brackets would be removed, allowing approval only on making this finding.

Alternative 2 is "more focused." It allows approval only on finding that all four factors are satisfied, compared to Alternative 1 that allows a finding that the settlement is fair, reasonable, and adequate, after simply "considering" the four. Alternative 1 is less rigorous.

Turning to one of the four core elements, it was asked how a court is to determine whether a settlement "was negotiated at arm's length and was not the product of collusion." Why is that not implicit in finding the settlement is fair, reasonable, and adequate?

This question was addressed by observing that a number of circuits distinguish between procedural and substantive fairness. The parties must show that the process was free of collusion. This showing is made by describing the process, or by having a special master or mediator participate and report. Account is taken of how long the negotiations endured, and whether there was actual negotiation.

The open-endedness of "considering whether" in Alternative 1 provoked the suggestion that, taken literally, it overrides a lot of circuit law. It would allow a court to find a settlement is fair, reasonable, and adequate, even though it was not negotiated at arm's-length and was the product of collusion. But then perhaps the intention is to overrule the various laundry lists of factors found across the circuits?

A Subcommittee member responded that the purpose is not to overrule existing circuit factors. In all but two circuits, these factors were developed in the 1970s and 1980s. Any of these factors may, at some time with respect to some proposed settlement, prove relevant. But the purpose of identifying the core concerns is to

encourage the court to look closely at the settlement rather than move unthinkingly down a check list of factors, none of them clearly developed by the parties and many of them not relevant to the particular settlement. Part of the purpose is to respond to the increasing cynicism found in public views of class actions. Many people view settlements in consumer-class actions as devices that provide no meaningful value to consumers and provide undeserved awards to class counsel.

In a similar vein, it was observed that the purpose of focusing on four core concerns seems to be to simplify and codify the purposes and best elements of present practice. But we should consider whether the "considering whether" formula in alternative 1 might be seen as overruling the circuit factors. "Would any circuit think we're changing what it can do"?

A response was that the ALI concern was that the lengthy lists of factors distract attention from the central elements. A related concern was that there is a tendency to view the various "factors" as things to be weighed in a balancing process, albeit without any direction as to how any one is to be weighed. It is better to adopt the approach of Alternative 2: the court may approve "only on finding." This will redirect attention to the essential elements of approval.

But it was noted that the four subparagraphs attached to both alternative 1 and alternative 2 are conjunctive: the court must consider, or find, all of them. The rule is written not for the experts, who understand this now. It focuses everyone on the key factors in a way that is not always understood.

The fifth element, "any other matter" or "any ground" the court deems pertinent, was questioned: what does it add? What is there that could not be read into the four central elements identified in the first four subparagraphs? The response was that "there still will be X factors." The four factors focus on what is important, and focus the parties on what to present to the court, and on what to present in the notice to the class. But the rejoinder asked again: what else is relevant if all four are satisfied — there is adequate representation, not tainted by collusion, adequate relief, and equitable treatment of class members relative to each other? Should it be made clear that the burden is on the objector to show reasons to reject a settlement when all of these elements are present?

It was noted that the alternative 2 formulation, "may approve only * * * on finding" the four elements leaves discretion to refuse approval even if all four are found. And it implies that the standard of review should be abuse of discretion. So the court can draw on any factor that has been identified in any circuit that seems relevant to evaluating the settlement. "There are any number of things that cannot be captured in factors." As one example: the settlement is negotiated while the defendant is teetering on the brink of insolvency. By the time of the hearing on objections, the defendant has been restored to a financial

position that would support more adequate relief. How do you write a specific factor for that? Still, it was suggested that alternative 1, "considering whether," provides a more emphatic statement of discretion.

A more particular question was asked: what happens if a lawyer who initially supported a proposed settlement changes position to challenge the proposal? No answer was attempted.

The summary of this discussion began by observing that the really good lawyers the Subcommittee has been meeting in its travels do all these good things now. But not all lawyers do. "These four factors are aimed at the lowest common denominator" of lawyers who bring class actions without much experience or background learning. They are not intended to displace the factors identified in the many appellate opinions that have been written over nearly a half-century of review. The intent instead is to focus attention on the important core. The plan is to displace the process in which parties and court are distracted by routine, uninformative submissions that simply run through the local check-list of factors, some important to the particular case, some not important, and some irrelevant.

All of this pointed toward a synthesis of alternative 1 and alternative 2. "fair, reasonable, and adequate" will be retained as the entry point. The court may approve a settlement only on making the four core findings. And "fair, reasonable, and adequate" will be removed from the third core:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate because: * * *
>
> (C) the relief awarded to the class * * * is ~~fair, reasonable, and~~ adequate, given the costs, risks * * *.

Settlement Classes: Judge Dow introduced this topic by asking whether it would be useful, or perhaps necessary, to adopt a separate provision for settlement classes. The underlying question arises from uncertainty in applying the "predominance" requirement of Rule 23(b)(3) to settlements. The Subcommittee has reached a tentative view that it should table this question, but is not prepared to recommend that course without guidance from the Committee.

The dilemma can be framed by asking what might be gained by adopting an express settlement-class provision, and what are the "unnerving things that might happen" if one were adopted.

The first question was whether settlements have failed because a class could or would not be certified? The answer was that this in fact has happened. And there is a concern that people are deterred from even attempting settlements by the obscurity of the predominance requirement as applied to settlement.

The most common illustration of the value of subordinating predominance is choice-of-law concerns. A class that spans several states may present thorny choice-of-law questions, and present the prospect that different laws will be chosen for different groups within the class, forestalling predominance in litigation. These problems can be readily resolved, however, by settlement. At least the Second and Third Circuits have approved settlements despite choice-of-law predominance concerns. Beyond that, a number of lawyers believe that courts are pretty much ignoring the statements in the Amchem opinion that predominance is required in certifying a class for settlement.

This comment was amplified by the observation that the role of predominance in settlement classes has generated many objections by "those who take Amchem literally." But courts have developed a gloss on Amchem that takes the fact and value of settlement into account in finding that (b)(3) criteria have been satisfied. Still, the objections come in — often from "serial objectors." Adopting a settlement-class rule would clarify the law, restating where it is in practice today, helping to identify how account should be taken of settlement in determining whether to certify a class. But as for the empirical question, "I do not know how many settlements are disapproved, or not attempted," for want of a clear rule.

But, it was asked, why not require predominance? An immediate response was that Amchem would require the laws of 50 states to apply at trial; on settlement, there is no need to worry about that — "everyone gets the same." But it was objected that giving everyone "the same" may not be right if different sets of laws would prescribe differences in the awards. The rejoinder was that choice-of-law questions can be resolved in settlement, perhaps choosing different laws and relief for different subclasses. And if the case comes to be tried, the court may chose a single state's law to govern, or may choose the law of a few states to govern, grouping subclasses around the similarities in the chosen separate laws. So long as the class is given notice of a proposed settlement — everyone gets to see what is proposed and can object — why force it to trial?

A further response was that predominance addresses the efficiencies of trial on class claims. It does not address the fairness of settlement. The Court in Amchem recognized that manageability is not a concern on settlement, despite the inclusion of difficulties in managing a class action among the matters pertinent to finding predominance and superiority. The same can be true of predominance.

In the same vein, it was noted that in 1993 the Third Circuit said that a class action cannot be certified for settlement unless the same class could be certified for trial. Amchem has superseded that. Amchem led the Committee to stop work on its pre-Amchem proposal to add a settlement-class provision as a new Rule 23(b)(4). The current draft (b)(4), however, is different from the 1996 version.

A Subcommittee member said he was impressed by how little reaction was provoked by the draft of a settlement-class rule. People did not even seem to be worried about the prospect that representations made in promoting a proposed settlement might be used against them if the settlement falls through and a request is then made to certify a class for trial.

A different perspective was suggested by the observation that settlement generally is in the interests of the immediate parties. But that does not ensure fairness to absent class members. Settlement does avoid the risks of class adjudication, and that may justify some dilution of the predominance requirement. But does it justify abandoning any shadow of predominance?

It was suggested that the evolution that has followed Amchem shows a reduced emphasis on predominance in reviewing proposed class settlements.

Beyond that, an alternative approach that incorporates settlement classes into Rule 23(b)(3) itself is also sketched in the agenda materials from p. 130 to p. 132. This approach would allow certification on finding "that the questions of law or fact common to class members, or interests in settlement, predominate * * *." (The parallel structure could be tightened further by looking to "common interests in settlement.")

Still another approach was suggested. The role of predominance could be diminished by a rule provision that the court can consider whether settlement obviates problems that would arise at trial.

But it also was recognized that the defense bar is concerned that reducing the role of predominance in settlement classes will unleash still more class actions. And on the other side, there is concern that the bargaining position of class representatives will be eroded if they cannot make a plausible threat of certification for trial.

It was noted again that the interest in doing anything to add a separate provision for settlement classes diminished steadily as the Subcommittee made the rounds of many outside groups. There was substantial enthusiasm for doing something several years ago, prompting the ALI to address the question in the Principles of Aggregate Litigation. But that has faded.

The conclusion was to not go further with the settlement-class proposal.

Ascertainability: The question of criteria for the "ascertainability" of class membership has come to the fore recently. The most demanding approach is reflected in a series of Third Circuit decisions, many of them in consumer actions. The Seventh Circuit has expressly rejected the Third Circuit approach. Other circuits come close to one side or the other. This is an important topic, and it continues to be developed

in the lower courts. There is some prospect that the Supreme Court may address it soon. And it is difficult to be confident about drafting rule language that would give effective guidance. The Subcommittee has put this topic on "hold," keeping it in the current cycle but without anticipating a recommendation for publication over the next several months. The Committee approved this approach.

Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee looked at the use of Rule 68 offers of judgment in an attempt to moot class actions because of the Seventh Circuit decision in the Damasco case. Under that approach, an offer of complete relief to the representative plaintiffs before class certification moots their individual claims and defeats certification. Plaintiffs commonly worked around this rule by moving for certification when they filed, but also by requesting that consideration of the motion be deferred until the case had progressed to a point that would support a well-informed certification ruling. The Seventh Circuit recently overruled its mootness rule. Most circuits now refuse to allow a defendant to defeat class certification by offers that attempt to moot the individual claims of any representative plaintiffs who may appear. More importantly, this question has been argued in the Supreme Court. The Subcommittee has deferred further work pending the Court's decision. The Committee agreed this course is wise.

Separately, it was noted that the Committee is committed to further study of Rule 68 in response to regularly repeated suggestions for revision. The timing will depend on the allocation of available resources between this and other projects that may seem more pressing.

Cy pres: For some time, the Subcommittee carried forward a proposal to address cy pres awards. The proposal was based, at least for purposes of illustration, on the model adopted by the ALI. This model attempts to achieve the maximum feasible distribution of settlement funds to class members. Only when it is not feasible to make further distributions could the court approve distribution of remaining settlement funds — and even then, the first effort must be to identify a beneficiary that would use the funds in ways that would benefit the class.

It seems to be generally agreed that many classes are defined in terms that make it impracticable to identify every class member and achieve complete distribution to class members. Some undistributed residue will remain. The ALI proposal would confine cy pres awards to those circumstances. That set of issues seems to fall comfortably within the scope of the Rules Enabling Act. But these are not the only circumstances that characterize cy pres awards in present practice. More creative awards are structured, often in cases involving small injuries to large numbers of consumers, most of whom cannot be easily identified. Attempting to address cy pres awards of this sort would present tricky questions about affecting substantive rights.

Cy pres awards have evolved in practice and have been accepted

in many judgments. Some states have statutes addressing them. Given the difficulty of knowing how to craft a good rule, the Subcommittee recommended that further work on these questions be suspended. The Committee accepted this recommendation.

Issue Classes: Judge Dow introduced the question of issue classes by noting that the subject was taken up because of a perceived split between the Fifth Circuit and other circuits on the extent to which the predominance requirement of Rule 23(b)(3) limits the use of an issue class to circumstances in which the issue certified for class treatment predominates over all other issues in the litigation. More recent Fifth Circuit decisions, however, seem to belie the initial impression. "Dissonance in the courts has subsided." There seems little need to undertake work to clarify the law. And any attempt might well create new complications.

A Subcommittee member said that the Subcommittee has learned that courts address issue-class questions in case-specific ways. Difficult questions of appealability would be raised by any distinctive changes in the issue-class provisions in Rule 23(c)(4) so as to focus on final decision of a discrete issue without undertaking to resolve all remaining questions within the framework of the same action. The problems could be similar to those that arise after separate-issue trials under Rule 42.

The Committee agreed with the Subcommittee recommendation that further work on these questions be suspended.

Judge Bates concluded the class-action discussion by stating that the Committee had done good work. Thanks are due to both the Subcommittee and the Committee.

Requester Pays for Discovery

For some time the Committee and the Discovery Subcommittee have deliberated the questions raised by periodic suggestions that the discovery rules should be revised to transfer to the requesting party more of the costs incurred in responding to discovery requests. Many different approaches could be taken. Many suggestions cluster around a middle ground that would leave the costs of responding where they lie as to some "core" discovery, but require the requesting party to pay — or perhaps to justify not paying — for the costs of responding to requests outside the core. Those suggestions present obvious challenges in the task of defining core discovery in terms that apply across different subjects of litigation.

Beyond these questions, the assumption that the responding party bears the costs of responding is well-entrenched. Hundreds of comments addressed to the package of discovery amendments that is pending in Congress emphasize the role of discovery in supporting enforcement of public policies that provide important protection for public interests beyond the disposition of the particular action. Great difficulty

would be encountered in attempting to devise a wise rebalancing of the competing interests.

Additional reasons for diffidence about requester-pays proposals arise from the pending discovery amendments. They are designed in many ways to reduce the costs of discovery. The renewed emphasis on proportionality, coupled with the strong encouragement of early and active case management, and perhaps supported by the encouragement of party cooperation, may achieve substantial reductions in the cost and delay that occasionally result from searching discovery. Beyond that, if the amendments take effect the Rule 26(c) protective-order provisions will be modified to recognize expressly the court's authority to allocate the costs of responding in a particular case. This provision is not designed to inaugurate any general practice of shifting response costs, but it can be used to address specific needs in particular cases.

In all, it was agreed that further work on requester-pays proposals would be premature. One or another aspect of discovery is usually on, or close to, the active agenda. Requester-pays issues will remain in the background, to be taken up again when it may seem appropriate.

Rule 62: Stays of Execution

Rule 62 came on for study in response to separate suggestions made to the Civil Rules Committee and to the Appellate Rules Committee. The work has been pursued through a joint subcommittee chaired by Judge Matheson. The materials in the agenda book were also on the agenda of the Appellate Rules Committee, which considered them last week.

Judge Matheson opened the Subcommittee Report by reminding the Committee that these questions were discussed in a preliminary way last April. The Appellate Rules Committee also took up the topic then, and both Committees agreed that it makes sense to carry the work forward. At the same time, no one identified any actual difficulties that have emerged in practice under the current rule, apart from the specific questions that prompted the project from the beginning. The Subcommittee worked through the summer and fall to simplify and improve the draft revision. The current version appears in the agenda materials at p. 342.

The draft reorganizes the allocation of subjects among present subdivisions (a) through (d), and changes the provisions for judgments that do not involve an injunction, an accounting in an action for patent infringement, or a receivership.

Draft Rule 62(a) addresses three kinds of stays: (1) the automatic stay; (2) a stay obtained by posting a bond; and (3) a stay ordered by the court. These provisions address all forms of judgment, whether the relief be an award of money or some other form of relief such as foreclosing a lien or a decree quieting title.

Several changes are made over the current rule.

The automatic stay is extended from 14 days to 30 days. This eliminates the "gap" in present Rule 62(b), which recognizes the court's authority to order a stay "pending disposition" of post-judgment motions that may be made up to 28 days after entry of judgment. This revision addresses one of the two questions that prompted the Committees to take up Rule 62. The draft also expressly recognizes the court's authority to "order otherwise," denying or terminating an automatic stay. (In response to a later question, it was explained that the stay was extended to 30 days to allow an orderly opportunity to begin to prepare for a further stay when expiration of the 28-day period shows there will be no post-judgment motion and while a brief period remains before expiration of the 30-day appeal time that governs most civil actions.)

The draft revises the supersedeas bond provisions of present Rule 62(d) in various respects. It allows the bond to be posted at any time after judgment is entered, rather than "upon or after filing the notice of appeal." It allows "other security," not only a bond. These provisions address the questions that prompted the Appellate Rules Committee to study Rule 62 by enabling a party to post a single bond or other security that runs from entry of judgment through completion of any appeal. It also expressly recognizes the opportunity to rely on security other than a bond — one example might be a letter of credit, or establishment of an escrow fund.

Draft Rule 62(a)(3) allows the court to order a stay at any time. This authority could, for example, be used to substitute a stay with security for the automatic stay.

Draft Rule 62(b) authorizes a court, for good cause, to refuse a stay sought by posting security under draft 62(a)(2), or to dissolve or modify a stay. This is new.

Draft Rule 62(c), also new, authorizes the court to set appropriate terms for security, or to deny security, both on entering a stay and on refusing or dissolving a stay. One example could be an order denying a stay only on condition that the judgment creditor post security to protect the judgment debtor against the injury caused by execution in case the judgment is reversed on appeal.

Proposed Rule 62(d) does little more than consolidate the provisions in present subdivisions (a) and (c) for injunctions, receiverships, and accountings in actions for patent infringement. It does bring into rule text the complete array of actions that support appeal from an interlocutory order with respect to an injunction.

Some attention was paid to the possibility of revising present subdivisions (e) and (f), but it was decided that no changes are needed. Subdivisions (g) and (h) were addressed in extensive memoranda

prepared by Professor Struve as Reporter for the Appellate Rules Committee, but no action has been recommended as to them.

The discussion by the Appellate Rules Committee led to agreement on extending the automatic stay to 30 days, closing the gap; to supporting the opportunity to post a single bond; and to recognizing alternative forms of security.

The practitioner members of the Appellate Rules Committee, however, expressed concern about the features of the draft that would authorize the court to deny a stay even when the judgment debtor offers adequate security in the form of a bond or another form. They believe that the present rule recognizes a nearly absolute right to a stay on posting adequate security, and that allowing a court to deny a stay, even for "good cause," would be a dangerous departure. This question must be taken seriously.

This introduction was followed by a reminder that there seems to be general agreement on the answers to the questions that launched this work. The automatic stay should be extended to 30 days, closing the potential gap between its expiration on the 14th day and the time when the court is authorized to order a stay pending disposition of a motion that may not be made until 28 days after judgment is entered. A judgment debtor should be able to post security in a form other than a bond, and should be allowed to post a single security that covers both post-judgment proceedings in the district court and all proceedings on appeal.

The questions that go beyond the initial concerns arose in a familiar way. Studying Rule 62 suggested ways in which it might be made more flexible, for the most part by provisions that would expressly recognize steps a court might well be prompted to take to protect the judgment or the parties even without explicit rule provisions. This approach often leads to the common dilemma: many ideas look good in the abstract. But there may be unforeseen problems that show both abstract and practical defects, and further difficulties may arise from the attempt to translate even good ideas into specific rule language. The wisdom of restraining ambition is underscored by the responses in the Standing Committee and both advisory committees that there have been no general complaints about Rule 62 in practice.

Turning more pointedly to the concerns raised in the Appellate Rules Committee, the Subcommittee discussed repeatedly, and in depth, the question whether there should be a nearly absolute right to a stay on posting adequate security. There does seem to be a general belief in this right. And it might be seen as an integral part of the system that assures one appeal as a matter of right from a final judgment. The purpose of appeal is to provide an opportunity for reversal, even if the standards of review narrow the opportunity with respect to matters of fact or discretion.

Counter considerations persuaded the Subcommittee to recognize

authority to deny a stay. There may be cases in which the district court can accurately predict that there is little prospect of reversal, while also recognizing the risk of injuries that cannot be compensated even by assurance that the amount of a money judgment can be collected after affirmance. The judgment creditor may have immediate needs for money that cannot be addressed by collection of money after the delay of an appeal. For example, it may be possible to revive a damaged business by immediate action, while it may fail irretrievably pending appeal. A judgment for some other form of relief may pose comparable problems. A decree quieting title, for example, may open an opportunity for an immediate transaction that will be lost by delay. The "good cause" standard was thought to be sufficient protection of the judgment debtor's interests, particularly when coupled with the court's further authority to require security for the judgment debtor as a condition of denying a stay.

Discussion began in two directions. One question was whether there truly is a right to a stay on posting security. The other went in the other direction: why should the rule allow the court to order a stay without any security, as the draft clearly contemplates? Is the judgment itself not assurance enough of the judgment creditor's probable right to require that the judgment be protected against defeat by delay — with the potential for concealing or dissipating assets — by requiring security?

The question of absolute right turned into discussion of present Rule 62(d). It says that an appellant "may obtain a stay by supersedeas bond." Does "may obtain" imply discretion, so that the court may refuse the stay even though the bond is otherwise satisfactory in its amount, terms, and guarantor? That possible reading may be thwarted by the reading of parallel language in Rule 23(b), which begins: "A class action may be maintained if Rule 23(a) is satisfied and if" the requirements of paragraphs (1),(2), or (3) are satisfied. In Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S.Ct. 1431, 1437, 1438 (2010), the Court read "may be maintained" to entitle the plaintiff to maintain a class action on satisfying Rule 23(a) and one paragraph of Rule 23(b). Rule 23 says not that the court may permit a class action, but that the class action may be maintained. "The Federal Rules regularly use 'may' to confer categorical permission." "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes." Parallel interpretation of present Rule 62(d) would read it to mean that all discretion resides in the judgment debtor, who has categorical permission to obtain a stay on posting suitable security.

It was noted that Appellate Rule 8(a)(1) directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. But Rule 8(a)(2) authorizes a motion in the court of appeals if it is impracticable to move first in the district court, or if the district court denied the motion or failed to afford the relief requested. Rule 8(a)(2)(E) says blandly that the court of appeals "may condition relief on a party's filing a bond or

other appropriate security." This locution clearly recognizes appellate discretion to deny any stay — as seems almost inevitable if application has been made to the district court and denied — and to grant a stay without security.

It was suggested that district courts have authority now to order a stay without any security, but that it may be unwise to emphasize that authority by explicit rule text.

A tentative solution was suggested: the draft should be shortened by deleting subdivisions (b) and (c). Subdivision (b) reads: "The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms." Subdivision (c) reads: "The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security." The final words of (c) would be transferred to paragraph (a)(3): "The court may at any time order a stay that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal,] and set appropriate terms for security or deny security.

A separate issue was raised. The draft rule does not describe the appeal bond as a "supersedeas" bond. It was agreed that it would be better to move away from that antique-sounding word. But "supersedeas" appears in Appellate Rule 8(a)(1)(B), most likely because it directs that application for a stay be made first to the district court. (Appellate Rule 8(a)(2)(E) is simpler — it refers only to conditioning a stay on "a bond or other appropriate security.") The Bankruptcy Rules also refer to a supersedeas bond. It would be good to strike the word from each set of rules.

Discussion concluded with the suggestion that the proposed rule should be simplified along the lines indicated above. The practicing lawyers on the Appellate Rules Committee believe there is a nearly absolute right to a stay on posting an adequate bond or other security. No one is pressing for revision. If the rule is amended to authorize the court to deny a stay by posting bond, even if the court must find good cause to deny the stay, there will be an increase in arguments seeking immediate execution. And it will be difficult to implement the good-cause concept. Imagine one simple argument: The judgment creditor is 85 years old and wants the chance to enjoy the fruits of judgment in this life time.

Judge Matheson agreed that the Subcommittee will reconsider these problems in light of the discussion here and in the Appellate Rules Committee.

e-Rules

The Committee was reminded of the recent history of work on the rules for electronic filing, electronic service, and use of the Notice of Electronic Filing as a certificate of service. Last April, this Committee voted to recommend publication of a set of rules amendments

addressing these topics. The Criminal Rules Committee, however, decided at the same time that the time has come to write independent provisions for these topics into Criminal Rule 49. Rule 49 currently incorporates the practice of the civil rules for filing and service. Their project is designed to avoid cumbersome cross-references between different sets of rules, and also to determine whether differences in the circumstances of criminal prosecutions justify differences in the filing and service provisions. Brief discussions led to modifications in the Civil Rules provisions that were presented to the Standing Committee for discussion. The revised provisions are included in the agenda materials for this meeting. This Committee did not recommend publication at the May Standing Committee meeting. The Criminal Rules Committee continues to work on its new Rule 49. A conference call of the Criminal Rules Subcommittee will be held on November 13; representatives of this Committee will participate.

The goal of this undertaking is to work toward common proposals on all topics that merit uniform treatment across the different sets of rules. That goal leaves the way open to different treatment of topics that warrant different treatment in light of differences in the circumstances that confront the different sets of rules. The parallel proposals for the Appellate Rules already include some variations that integrate these subjects with the structure of the Appellate Rules. So it may be that the Criminal Rules Committee will find that criminal prosecutions deserve different treatment of some aspects of electronic filing and service.

One of the topics that has been discussed is access to electronic filing and service by pro se litigants. The Civil Rules proposals reflect a belief that a pro se litigant, the court, and all other parties may benefit from allowing electronic filing and service by a pro se litigant. The question is how to manage this practice. It may be that uniform provisions are suitable for all sets of rules. It may be that different approaches are desirable. These questions will be addressed as all committees work toward final proposals for publication. One committee member noted that her court has had difficulty with local rules that track each other for pro se litigants in criminal and civil proceedings — the problems really are different.

Once decisions are reached as to the appropriate level of substantive uniformity, style questions will remain. It will be important to work out style questions with the help of the style consultants so as to avoid any occasion for asking the Standing Committee to resolve any differences.

Pilot Projects

Judge Bates opened the discussion of pilot projects by asking Judge Campbell, who has chaired the pilot projects committee, to report on the committee's work.

Judge Campbell began by noting that many people have worked in

the effort to advance consideration of pilot project proposals.

The interest in pilot projects was stimulated by experience in attempting to translate the lessons offered at the 2010 Conference into specific rules proposals. There are limits to what can be accomplished by rules. If a page of history is worth a volume of logic, the purpose of pilot projects may be to create pages of history by actual experience in testing new approaches. One result may be rules amendments. But pilot projects may provide valuable lessons that are implemented in other ways. The Committee on Court Administration and Case Management may find valuable practices that it can foster through its work. The Judicial Conference may gain similar benefits. It may be that approaches that have been tested and found valuable will be adopted by emulation without the need for formal action by any committee.

For the rules committees, the immediate plan is to prepare concrete proposals for possible pilot projects that can be discussed with the Committee on Court Administration and Case Management and with the Standing Committee this coming spring. The goal will be to identify one or more projects that could be implemented late in 2016.

One informal pilot project, the protocols for initial discovery in individual employment actions, is already being studied. Emery Lee at the FJC has been tracking experience.

Emery Lee reported that the first thing he learned was that the employment protocols are being used by more judges than he had thought. He has identified 70 judges that are using them. Drawing on cases that have concluded since 2011, he identified some 500 terminated cases. He drew a random sample of cases that did not use the protocols during the same period. Overall, he studied data on 1,150 cases.

The positive lesson is that there are fewer discovery motions in protocol cases: motions were made in 12% of these cases, as compared to 21% of the comparison cases. The average number of motions made was half as many in the protocol cases. "That is a big number." The number suggests that the protocols made an important difference. But it is not possible to draw firm conclusions because the judges who choose to adopt the protocols may be judges who are actively engaged in managing discovery in any event.

The negative lesson is that the time to disposition appears to be essentially identical in protocol cases and in non-protocol cases. The essential identity held true for the time taken to reach disposition by different methods — by motion to dismiss or by summary judgment. The time to settlement, however, appears to be different. The identity of times to disposition is puzzling.

The first comment was made by a judge who requires a request for a conference before a motion can be made. That may be happening in the employment cases — the same number of discovery disputes arise, but many of them are resolved at the pre-motion conference, reducing the

number of motions.

A second comment was that the times to disposition may track closely if courts set the same discovery cut-off time in protocol cases as in non-protocol cases. The timing of dispositive motions tends to feed off the discovery cut-off.

Another judge offered a guess that protocol judges are likely to be "more progressive — to require a conference before a discovery motion can be made." But he uses the protocols, and thinks he is seeing fewer discovery disputes. "They don't fight over things they used to fight over because of automatic disclosures." As one example: confronted with a request to identify the person who made the decision to terminate a plaintiff, defendants used to argue that the information was protected by work product. It is not protected, but the argument had to be resolved. Now the information is automatically disclosed and there is no dispute.

Yet another judge said that lawyers use the protocols and "play nicely together." The similarity in times to disposition is probably because the case schedules are not changed.

Discussion turned to pilot projects in general. Various pilot projects aimed at reducing cost and delay have been identified in eleven states. Before that, the Civil Justice Reform Act stimulated a massive set of local experiments. The Conference of Chief Justices is working on a Civil Justice Improvement Project. The Institute for the Advancement of the American Legal System has studied several pilot projects, and recommended principles to improve civil litigation. The National Center for State Courts has evaluated some projects. Projects are upcoming in Texas and Minnesota. New York State is developing a program that is aimed at trading early trial dates for curtailed pretrial procedure.

One possible pilot project that has drawn attention is the one that would involve some form of expanded initial discovery, perhaps moving beyond the form embodied by Civil Rule 26(a)(1) between 1993 and 2000 to a model drawn from the Arizona rule.

Other possibilities focus on assigning cases to different tracks that embody different levels of pretrial procedure, as many of the CJRA plans attempted. One problem that has confronted these programs has been identification of criteria for assigning cases to the different tracks. When dollar limits are set, lawyers tend to plead around them. Other criteria become difficult to manage.

A quite different approach would forgo formal experiments with new procedures to focus on training. The FJC study of the CJRA experiments confirmed that time to disposition can be reduced by a combination that includes early judicial case management, shorter discovery cut-offs, and early setting of a firm trial date. This learning could be demonstrated by a quasi-pilot project that trains

judges in a district, gathers statistics, measures the progress of judges in reducing times to disposition, and seeks to persuade other judges of the value of these practices. Emery Lee noted that gathering information on individual judge performance can be sensitive. But the RAND study shows that there is real value. We know it is there.

A Committee member noted that he does a lot of arbitrations as an arbitrator, usually as a neutral member. "There is a convergence of what happens in arbitration with civil litigation." In arbitration, you get only the discovery the arbitrator orders. So a lawyer may request 10 depositions; the order is to come back after talking with the client about the cost. The next request is for one deposition. "People sign up for this." "At the Rule 16 conference you quickly learn what the case is about." The idea of training judges is terrific. But we have to be able to distinguish cases for tracking purposes — small cases have to be dealt with differently. And they must be identified early. Tracking can work. Arbitration hearing dates tend to be quite firm because they must coordinate the schedules of 8, 9, 10 different people — a missed date may push the next hearing back by half a year.

A judge noted that before he became a judge he was a member of the CJRA committee for his district. "We're still doing tracking." But "I can't say whether it's good or bad." Lawyers are required to address tracking in their Rule 26(f) conference. Then they discuss it with the judge. There are five tracks: expedited, standard, complex, mass tort, and administrative.

Another judge reported that "tracking works." For example, he reduces the time for discovery in FDCA cases and reduces the number of discovery events.

The same judge then asked how does the Arizona initial disclosure of legal theories relate to practice on motions to dismiss for failure to state a claim? Judge Campbell suggested that it does not seem to have made a significant change.

A broader perspective was suggested. The RAND study of CJRA experience was expensive. We should focus on what we can try to do, and on what resources are available. Comparing pilot projects in some districts with others can be interesting, but "we do not have a lot of resources for data-driven projects." Pilot projects, however, "can be about norm changing." None of the suggested projects embodies an idea that is strong enough to be adopted without testing in a national rule that binds all 94 districts. Instead, we can find 5 or 10 districts to implement known good ideas. The hope will be that they will like the experience, carry on with it, and perhaps encourage other districts to emulate their experience. A similar comment suggested that it may be more effective to develop ideas, label them as best practices or innovations, and then draw attention to successful adoptions. But another judge expressed doubt whether "it catches on that way among judges." A different judge, however, thought that judges will be willing to adopt a practice when they become convinced that it will

help move cases effectively. The question "is how to get people off the mark." A more specific suggestion was that "we can convince people to have a pre-motion telephone conference."

Federal Judicial Center training of all judges may be another means of fostering ideas that have proved out in one or a few districts.

A judge suggested that the idea of pilots is to test ideas, such as initial disclosure. Initial disclosure can be tested to see how it affects the number of motions, the time to disposition, and other variables. The Committee on Court Administration and Case Management will meet to discuss these same pilot-project ideas in December. They support work on this. It was agreed that involving "CACM" is essential. If they identify districts that have long times to disposition, they can help to focus enhanced training there. And it may be possible to measure the results.

A suggestion from an absent member was relayed: "Why are we thinking of small cases"? We need fact pleading, short discovery, and firm trial dates in all cases. "Do we need two rounds of pleading in every case"? Unlimited discovery? State courts working along these lines are achieving cheaper, faster resolutions. "We should be driving toward pretty radical rule change."

Another judge noted that it is difficult to measure achievement of the "just" aspiration expressed in Rule 1. But it is possible to measure satisfaction of the parties, and that may be a good thing to study.

The initial disclosure proposal came on for more detailed discussion. This model aims at "robust, but not aggressive" disclosure. It works from the Arizona model, but reduces the level of required disclosures in several dimensions.

The first question asked why the model requires only identification of categories of relevant documents, rather than actual production. The Arizona rule requires actual production unless the documents are voluminous. Arizona lawyers report that the rule operates as a presumption for production of particular documents. The response was that the model reflects concern that too much burden will be imposed by requiring actual production at the outset of an action, particularly if that were added to the obligation to identify witnesses, the fact basis for claims and defenses, and legal theory. To be sure, not much is accomplished by disclosing that relevant information can be found in such categories as "personnel files," "R & D files," or the like. But the parties can figure out where to start discovery by other means. Still, this question is open to further consideration if this model moves toward testing in a pilot project.

Initial disclosure was viewed from an expanded perspective. The bar was not ready for the 1993 rule that required disclosure of information unfavorable to the disclosing party. "The Arizona

experience may not convince" federal judges in 49 other states. It would be difficult to move directly to adopting a rule that embodies the Arizona practice. But if it works in 5 or 10 pilot districts, there could be support for adopting a national practice.

A member reported work on a CJRA committee that adopted an initial disclosure rule. "It failed. Lawyers weren't ready." But the "pilot project" label may not be effective in selling a program. We want to test ideas to see whether they work. We need something that facilitates culture change. Seeing that something actually works can do a lot.

A truly pointed question was asked: (a)(2) and (a)(2)(A) of the model require disclosuring:

> (2) whether or not the disclosing party intends to use them in presenting its claims or defenses:
>
> (A) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action * * *.

Just what is intended? The purpose is to require disclosure of information unfavorable to the disclosing party — it is enough that the information is relevant to the events, etc.

The alternative of judge training programs came back for expanded discussion with the question whether it is a fool's errand. A judge responded that there are some judges who will resist training. But overall, training can do more than can be done by rules. Still, it would be a mistake to adopt a pilot that forces all judges into training. Another judge said that newer judges are particularly likely to want to take training in subjects they do not know well. But forcing it will not work. Still another judge agreed that new judges are more amenable to this sort of training.

"Baby judges school" also was noted, but it was suggested that new judges are still so new at this point that the school cannot do the job of more focused and advanced programs. And in any event, "I'm not sure the problem is newer judges." However that may be, the training has to be meaningful. It will not work just to tell us judges that early case management is important. "Tell me how to make it happen."

A similar perspective was offered. "The important thing is to move from the abstract to the concrete." "Here's what actually works": A phone call on a 3-page statement of a motion to dismiss leads to an amended complaint. If the motion is renewed, whatever is dismissed is with prejudice. The ideas must be packaged in a way that makes it easier for the judge to do it.

So it was noted that "we learn more in gatherings of judges where we talk together." Mid-career judges help newer judges in informal

exchanges that often are more useful than formal training programs. So one promising approach may be to go to the districts to get the local judges talking among themselves about topics they would not "fly to D.C. to learn about."

Other questions were raised about pilot projects. "We know a lot about what works." A pilot project will take 3 or 4 years in practice. Then it will have to be evaluated. And the result may be a simple message that it works better with more judge involvement.

One note of frustration was expressed. In many districts the district judges refer all pretrial matters to magistrate judges, but do not set trial dates. The magistrate judge can move cases, but the district judge has to be involved.

It was noted that sometimes a pilot project will not be able to enlist every judge in a district. It may be necessary to look for judges. The Administrative Office can tell a district whether it is moving faster or slower than the national average. "It's a question of putting the resources in the right place."

A final suggestion was that it could be useful to get on the agenda of the Chief District Judges conference.

New Docket Items

15-CV-C

This suggestion protests the overuse of "objection as to form" during oral depositions. The proposed remedy is to create a Committee Note "indicating that it is improper to merely object to 'form' without providing more precise information as to how the question asked is 'defective as to form' (e.g., compound, leading, assumes facts not in evidence, etc.)."

It is well established that a Committee Note can be written only as part of the process of adopting or amending a rule. Rule 30(c)(2) could be amended to say something like this: "An objection must be stated in a nonargumentative and nonsuggestive manner <u>that reasonably explains the basis of the objection</u>." But the Committee concluded that any revisions of the rule text are unlikely to change behavior for the better, and might easily create more problems than would be solved.

This suggestion was removed from the docket.

15-CV-E

This suggestion addresses the time to file a responsive pleading when a Rule 12(b)(6) motion to dismiss addresses only part of a complaint or when the motion is converted to a motion for summary judgment. The concern is that some courts rule that the time to respond is suspended by Rule 12(a)(4) only as to the parts of the complaint

challenged by the motion; an answer must be filed as to the remainder of the complaint. The same problem can persist if the motion to dismiss is converted to a motion for summary judgment.

It is urged that it is better to suspend the time to respond as to the entire complaint. This practice avoids duplicative pleadings and confusion over the proper scope of discovery. Many cases support it.

Discussion revealed that even though many cases support the suggested approach, not all judges follow it. One Committee member reported that some judges in his home district require a response to the parts of a pleading not addressed by the motion, even though the time to respond is suspended as to the parts addressed by the motion. There is some reason for concern.

Despite these possible concerns, the Committee concluded that there is not yet evidence of a problem so general as to warrant amending the rules. This suggestion will be removed from the docket, although without any purpose to suggest that it should not be considered further if a general problem is shown.

15-CV-X

This suggestion raises two or three issues.

One suggestion is that Rule 45 should be revised to extend the reach of trial subpoenas so as "to force a representative of a non-resident corporate defendant to appear at trial in the court that has jurisdiction over the parties and the case." This question was thoroughly explored in working through the recent amendments of Rule 45. A proposal similar to this one was published for comment, albeit without any recommendation that it be adopted. No sufficient reasons are offered to justify reexamination now.

A second suggestion would adopt the procedure of Rule 30(b)(6) for trial subpoenas. A trial subpoena could name an entity as witness and direct the entity to produce one or more real persons to testify for the entity. Discussion noted that Rule 30(b)(6) itself has been examined twice in the recent past. Each time the Committee found problems in practice, but concluded that the problems were not sufficiently pervasive to justify amending the rule. It was concluded that however well Rule 30(b)(6) works for discovery, extending it to trial would generate additional problems that could become serious.

The suggestion also might be read to urge that a nonparty entity be required to produce witnesses to testify at a deposition in the district where an action is pending.

The Committee concluded that this set of suggestions should be removed from the docket.

15-CV-EE

This submission offers four discrete suggestions, all of which touch on other sets of rules in addition to the Civil Rules.

The first suggestion is to amend Rule 5.2(a)(1). The rule now permits disclosure in a filing of the last four digits of the social-security number and taxpayer-identification number. The suggestion is that no part of these numbers be disclosed. The reason is that the method of generating social security numbers relies on a well-known formula that, together with additional information about a person that is often readily available, can be used to reconstruct the full number. This phenomenon was considered by the joint subcommittee that drafted Rule 5.2 and the parallel Appellate, Bankruptcy, and Criminal Rules. The decision to allow filing the last four digits was made because this information was thought important for the Bankruptcy Rules. A preliminary inquiry suggests that this information may remain important for bankruptcy purposes. This suggestion will be carried forward for consultation with the other advisory committees.

The second suggestion is that any affidavit made to support a motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed under seal and reviewed ex parte. The court could order disclosure to another party for good cause and under a protective order, or permit unsealing in appropriately redacted form. The concern seems to be to protect privacy interests. Again, the other advisory committees are involved. Brief discussion suggested that filing under seal is not a general practice now. One judge says that he does not order sealing because it imposes costly burdens on the court. Another participant suggested that i.f.p. disclosures generally invade privacy only to the extent of disclosing a lack of financial resources, a state that could be inferred from a grant of in forma pauperis permission in any event. This suggestion too will be carried forward for consultation with other advisory committees.

The third suggestion is for a new Rule 7.2. It is modeled on a local rule for the Eastern and Southern Districts of New York. It would address citation by counsel of cases or other authorities "that are unpublished or reported exclusively on computerized data bases." Counsel who cites such authority would be required to provide copies to a pro se litigant. In addition, on request, counsel would be required to provide copies of such cases or authorities that are cited by the court if they were not previously cited by counsel. Discussion began by asking whether other courts have local rules similar to the E.D. & S.D.N.Y. rule; no one had information to respond. A judge noted that he makes copies available when he cites unpublished authority. A lawyer suggested that Assistant United States Attorneys seem to do this in some districts. It was suggested that some way might be found to encourage this as a best practice. A note of this suggestion will be sent to the head of the FJC. But it was concluded that this practice involves a detail of practice that need not be enshrined in the Civil

Rules.

The final suggestion is that pro se litigants should be permitted, but not required, to file by paper, and should be permitted to qualify for e-filing and service to avoid burdens that other parties do not have to bear. These questions are being actively considered by several advisory committees, as noted during earlier parts of this meeting. They will continue to be considered.

Pre-Motion Conference: Rule 56

Judge Jack Zouhary, a member of the Standing Committee, has offered an informal suggestion that this Committee consider the practice of requiring a party to request a conference with the court before making a motion for summary judgment. He follows that practice, and finds that it has many benefits.

The benefits that may be realized by pre-motion conference include these possibilities: The movant may decide not to make the motion, or may focus it better by omitting issues that are genuinely disputed. The nonmovant may realize that some issues are not genuinely disputed or are not material. Discussion in the conference may lead the parties to a better understanding of the facts, the law, or both. A conference with the court may work better than a conference of the parties alone. The court may not use the conference to deny permission to make the motion — Rule 56 establishes a right to move. But the court can suggest and advise.

Similar advantages can be gained by holding a conference with the court before other motions are made. These advantages were discussed in developing the package of case-management amendments now pending in Congress. The result of those deliberations is to add a new Rule 16(b)(3)(B)(v), which provides that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." This provision was limited to discovery motions in a spirit of conservatism in adding details to the rules. It was recognized that many courts require pre-motion conferences for motions other than discovery motions, including summary-judgment motions. But it also was recognized that some judges do not. One step was to reject any general requirement — the new Rule 16(b) provision serves simply as a reminder and perhaps as an encouragement.

It would be easy enough to expand pending Rule 16(b)(3)(B)(v) to encompass summary-judgment motions. It would authorize a scheduling-order provision that "direct[s] that before moving for an order relating to discovery <u>or for summary judgment</u>, the movant must request a conference with the court." Or Rule 56(b) could be amended to mandate this procedure: "a party may<u>, after requesting a conference with the court,</u> file a motion for summary judgment at any time until 30 days after the close of all discovery."

Discussion began with a judge who requires a pre-motion conference for "all sorts of motions." This practice has many benefits. Recognizing that some judges would oppose a mandate, why not expand Rule 16(b) to encompass not only discovery but any "substantive" motion?

Another judge thought the underlying idea is good. "But we have just been through one round of amendments. We did it carefully." We can find a way to recommend pre-motion conferences as a best practice, but should wait before suggesting another rule amendment. And then we will need to think about how broadly the rule should apply. For example, is there a sufficiently clear concept of what is a "substantive motion" to support use of that term in rule text?

A lawyer noted that the AAA rules used to provide for summary disposition in general terms. The rules were amended to require permission of the arbitrator before making the motion. As an arbitrator, he has denied permission when the motion seemed inappropriate. That is not to suggest that a judge be authorized to deny leave to make a summary-judgment motion, but requiring a conference would give the judge an opportunity to observe that a motion would not have much chance of succeeding.

The discussion concluded by determining to hold this suggestion open, without moving forward now.

Rules 81, 58

Two additional items were included in the agenda materials. One addresses the provisions of Rule 81(c) that govern demands for jury trial in an action that has been removed from state court. The other addresses the Rule 58 requirement that a judgment be entered in a "separate document." These items will be carried forward on the agenda.

Respectfully submitted,

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