MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14, 2016

The Civil Rules Advisory Committee met at the Tideline Hotel in Palm Beach, Florida, on April 14, 2016. (The meeting was scheduled to carry over to April 15, but all business was concluded by the end of the day on April 14.) 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 N. Ericksen; Parker C. Folse, Esq. (by telephone); Professor Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also participated by telephone. 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 (by telephone), and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf,Esq., Derek Webb, Esq., and Julie Wilson, Esq., represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee, Esq., attended for the Federal Judicial Center. Observers included Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq.(Lawyers for Civil Justice); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Natalia Sorgente (American Association for Justice); John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelsen, Esq.; and Benjamin Robinson, Esq.

Judge Bates opened the meeting by welcoming everyone. He noted that Judge Pratter and Elizabeth Cabraser have completed serving their second terms and are due to rotate off the Committee. "We will miss you, but hope to see you frequently in the future." Judge Sutton also is completing his term as Chair of the Standing Committee, and Judge Harris is concluding his term with the Bankruptcy Rules Committee. They too will be missed.

Benjamin Mizer introduced Joshua Gardner, who will succeed Ted Hirt as a Department of Justice representative to the Committee. Gardner is a highly valued member of the Department, and makes time to teach civil procedure classes as an adjunct professor.

Judge Bates noted that the proposed amendments to Civil Rules 4, 6, and 82 remain pending in the Supreme Court. On this front, "no news is good news." The Minutes for the January meeting of the Standing Committee are in the agenda book for this meeting. The package of six proposed amendments to Rule 23 that had advanced at

ythe November meeting of this Committee was discussed. The Rule 23 discussion also described the decision to defer action on the growing number of decisions grappling with "ascertainability" as a criterion for class certification and with the questions raised by different forms of "pick-off" strategies that defendants use in attempts to moot individual class representatives and thus defeat class certification. The Rule 62 stay-of-execution proposal also was discussed. Apart from specific rules proposals, the ongoing efforts to educate bench and bar on the December 1, 2015 package of amendments were described. These efforts are "important, essential." Discussion also included the continuing efforts to develop pilot projects to test reforms that do not yet seem ready to be adopted as national rules.

November 2015 Minutes

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

Legislative Report

Rebecca Womeldorf reported that, apart from the bills noted at the November meeting, there appear to be no new legislative activities the Committee should be tracking.

Rule 5

The history of the Committee's work on the e-filing and e-service provisions of Rule 5 was recounted. A year ago the Committee voted to recommend publication of amendments to reflect the growing maturity of electronic filing and service. Moving in parallel, the Criminal Rules Committee began a more ambitious project. Criminal Rule 49 has invoked the Civil Rules provisions for filing and service. The Criminal Rules Committee began to consider the possibility of adopting a complete and independent rule of their own. This development counseled delay in the Civil Rules proposals. The e-filing and e-service provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules were developed together. The value of adopting identical provisions in each set of rules is particularly high with respect to filing and service, although it is recognized that differences in the rules may be justified by differences in the characteristics of the cases covered by each set of rules. The plan to recommend publication in 2015 was deferred.

The Criminal Rules Committee developed an independent Rule 49. The Subcommittee that developed the rule welcomed participation in their work and conference calls by representatives of the Civil Rules Committee. The Civil Rules provisions proposed now were substantially improved as a result of these discussions. The differences from the proposals developed a year ago are discussed with the description of the current proposals.

Although filing is covered by Rule 5(d), which comes after the service provisions of Rule 5(b) in the sequence of subdivisions, it is easier to begin discussion with filing, which is the act that leads to service.

Present Rule 5(d)(3) allows e-filing when allowed by local rule, and also provides that a local rule may require e-filing "only if reasonable exceptions are allowed." Almost all districts have responded to the great advantages of e-filing by making it mandatory by requiring consent in registering as a user of the court's system. Reflecting this reality and wisdom, proposed Rule 5(d)(3) makes e-filing mandatory, except for filings "made by a person proceeding without an attorney."

Pro se litigants have presented more difficulty. Last year's draft also required e-filing by persons proceeding without an attorney, but directed that exceptions must be allowed for good cause and could be made by local rule. Work with the Criminal Rules Subcommittee led to a revision. The underlying concern is that many pro se litigants, particularly criminal defendants, may find it difficult or impossible to work successfully with the court's system. The current proposal allows e-filing by a person proceeding without an attorney "only if allowed by court order or by local rule." A further question is whether a pro se party may be required to engage in e-filing. Some courts have developed successful programs that require e-filing by prisoners. The programs work because staff at the prison convert the prisoners' papers into proper form and actually accomplish the filing. This provides real benefits to all parties, including the prisoners. The Criminal Rules Subcommittee, however, has been concerned that permitting a court to require e-filing might at times have the effect of denying access to court. Their concern with the potential provisions for Rule 5 arises from application of Rule 5 in proceedings governed by the Rules for habeas corpus and for § 2255 proceedings. Discussion of these issues led to agreement on a provision in proposed Rule 5(d)(3)(B) that would allow the court to require e-filing by a pro se litigant only by order, "or by a local rule that allows reasonable exceptions."

e-Service is governed by present Rule 5(b)(2)(E) and (3). (b)(2)(E) allows service by electronic means "that the person consented to in writing." (b)(3) allows a party to "use" the court's electronic facilities if authorized by local rule. Most courts now exact consent as part of registering to use the court's system. Proposed Rule 5(b)(2)(E) reflects this practice by eliminating the requirement for consent as to service through the court's facilities. One of the benefits of consulting with the Criminal Rules Subcommittee has been to change the reference to "use" of the court's system. The filing party does not take any further steps to accomplish service — the system does that on its own. So the rule now provides for serving a paper by sending to a

registered user "by filing it with the court's electronic filing system." Other means of e-service continue to require consent of the person to be served. The proposal advanced last year eliminated the requirement that the consent be in writing. The idea was that consent often is given, appropriately enough, by electronic communications. The Criminal Rules Subcommittee was uncomfortable with this relaxation. The current proposal carries forward the requirement that consent to e-service be in writing for all circumstances other than service by filing with the court.

The direct provision for service by e-filing with the court in proposed Rule 5(b)(2)(E) makes present Rule 5(b)(3) superfluous. The national rule will obviate any need for local rules authorizing service through the court's system. The proposals include abrogation of Rule 5(b)(3).

Finally, the recommendations carry forward the proposal to allow a Notice of Electronic Filing to serve as a certificate of service. Present Rule 5(d)(1) would be carried forward as subparagraph (A), which would direct filing without the present "together with a certificate of service." A new subparagraph (B) would require a certificate of service, but also provide that a Notice of Electronic Filing constitutes a certificate of service on any person served by filing with the court's electronic-filing system. It does not seem necessary to add to this provision a provision that would defeat reliance on a Notice of Electronic Filing if the serving party learns that the paper did not reach the person to be served. If it did not reach the person, there is no service to be covered by a certificate of service.

Discussion noted the continuing uncertainties about amending the provisions for e-filing and e-service without addressing the many parallel provisions that call for acts that are not filing or service. Many rules call for such acts as mailing, or delivering, or sending, or notifying. Similar words that appear less frequently include made, provide, transmit[ted] return, sequester, destroy, supplement, correct, and furnish. Rules also refer to things written or to writing, affidavit, declaration, document, deposit, application, and publication (together with newspaper). On reflection, it appears that the question of refitting these various provisions for the electronic era need not be confronted in conjunction with the Rule 5 proposals. Rule 5 provides a general directive for the many rules provisions that speak to serving and filing. It can safely be amended without interfering with the rules that govern acts that are similar but do not of themselves involve serving or filing.

It was noted that the parallel consideration of e-filing and e-service rules in the several advisory committees means that some work remains to be done in achieving as nearly identical drafting as possible, consistent with the differences in context that may

justify some variations in substance. What appear to be style differences may in fact be differences in substance. It was agreed that the Committee Chair has authority to approve wording changes that resolve style differences as the several committees work to generate proposals to present to the Standing Committee in June. If some changes in substance seem called for, they likely will be of a sort that can be resolved by e-mail vote.

Rule 62: Stays of Execution

Judge Bates introduced the Rule 62 proposals by noting that this project has been developed as a joint effort with the Appellate Rules Committee. A Rule 62 Subcommittee chaired by Judge Matheson has developed earlier versions and the current proposal.

Judge Matheson noted that earlier Rule 62 proposals were discussed at the April 2015 and November 2015 meetings. The Subcommittee worked to revise and simplify the proposal in response to the concerns expressed at the November meeting. The Subcommittee reached consensus on the three changes that provided the initial impetus for taking on Rule 62. The proposal: (1) extends the automatic stay from 14 days to 30 days, and eliminates the "gap" between expiration of the stay on the 14th day and the express authority in Rule 62(b) to order a stay pending disposition of Rule 50, 52, 56, or 60 motions made as late as 28 days after judgment is entered; (2) expressly recognizes that a single security can be posted to cover the period between expiration of the automatic stay and completion of all proceedings on appeal; and (3) expressly recognizes forms of security other than a bond.

Discussion in the Standing Committee in January focused on only one question: why is the automatic stay extended to 30 days rather than 28? The answer seemed to be accepted — it may be 28 days before the parties know whether a motion that suspends appeal time will be made, and if appeal time is not suspended 30 days allows a brief interval to arrange security before expiration of the 30-day appeal time that governs most cases.

After the Standing Committee meeting, the Subcommittee made one change in the proposed rule text, eliminating these words from proposed (b)(1): " * * * a stay that remains in effect until a designated time[~~, which may be as late as issuance of the mandate on appeal,~~] * * *." The Subcommittee concluded that it may be desirable to continue the stay beyond issuance of the mandate. There may be a petition for rehearing, or a petition for certiorari, or post-mandate proceedings in the court of appeals. And the Committee Note was shortened by nearly forty percent.

Discussion began with a question about proposed Rule 62(b)(1): "The court may at any time order a stay that remains in effect until a designated time, and may set appropriate terms for security

or deny security." Present Rule 62 "does not mention a stay without a bond. It happens, but ordinarily only in extraordinary circumstances." If there is no intent to change present practice, something should be said to indicate that a stay without security is disfavored. And it might help to transpose proposed paragraph (2) with (1), so that the nearly automatic right to a stay on posting bond comes first. That would emphasize the importance of security.

Judge Matheson noted that earlier drafts had expressly recognized the court's authority to deny a stay for good cause, and to dissolve a previously issued stay. Those provisions were deleted, but that was because they would have enabled the court to defeat what has been seen as a nearly automatic right to obtain a stay on posting security. Proposed (b)(1) is all that remains. In a sense it carries over from the Committee's first recent encounter with Rule 62. Before the Time Project, the automatic stay lasted for 10 days and the post-judgment motions that may suspend appeal time had to be made within 10 days. The Time Project created the "gap" in present Rule 62 by extending the automatic stay only to 14 days, while extending the time for motions under Rules 50, 52, and 59 to 28 days. A judge asked the Committee whether the court can order a stay after 14 days but before a post-judgment motion is made. The Committee concluded at the time that the court always has inherent power to control its own judgment, including authority to enter a stay during the "gap" without concern about any negative implications from the express authority to enter a stay pending disposition of a motion once the motion is actually made. The Subcommittee thought that proposed (b)(1) is a useful reflection of abiding inherent authority.

This observation was met by a counter-observation: Is the proposed rule simply an attempt to codify existing practice? If so, should it recognize the cases that say that only extraordinary circumstances justify a stay without security? The need to be clear about the relationship with present practice was pointed out from a different perspective. The Committee Note says that proposed subdivisions (c) and (d) consolidate the present provisions for stays in actions for an injunction or receivership, and for a judgment or order that directs an accounting in an action for patent infringement. Does that imply that some changes in present practice are embodied in proposed subdivision (b), as they are in proposed subdivision (a)? The response was that proposed subdivision (b)(2) clearly incorporates several changes over practice under the supersedeas bond provisions of present Rule 62(d). Under the proposed rule, a party may obtain a stay by bond at any time after judgment enters, without waiting for an appeal to be taken. The new rule would expressly recognize a single security for the duration of post-judgment proceedings in the district court and all proceedings on appeal. It would expressly recognize forms of security other than a bond. So too, the automatic stay is

extended, and the court is given express power to "order otherwise." The decision not to change the meaning of the present provisions that would be consolidated in proposed Rule 62(c) and (d) does not carry any implications, either way, as to proposed Rule 62(b)(1).

Judge Matheson asked whether, if a standard for denying a stay is to be written into rule text, it should be "good cause" or "extraordinary circumstances." Some uncertainty was expressed about what standard might be written in. "Extraordinary circumstances" may be too narrow.

A Committee member asked what experience the district-judge members have with these questions. The answers were that judges seldom encounter questions about stays of execution. One judge suggested that because questions seldom arise, judges will read the rule text carefully when a question does arise. It is important that the rule text say exactly what the rule means. A similar suggestion was that it would be better to resist any temptation to supplement rule text with more focused advice in the Committee Note. The Committee should decide on the proper approach and embody it in the rule text.

Proposed Rule 62(b)(1) will be further considered by the Subcommittee, consulting with Judge Gorsuch as liaison from the Standing Committee, with the purpose of reaching consensus on a proposal that can be advanced to the Standing Committee in June as a recommendation for publication. If changes are made that require approval by this Committee, Committee approval will be sought by electronic discussion and vote.

Rule 23

Judge Dow introduced the Rule 23 Subcommittee report. The Subcommittee continued to work hard on the package of six proposals that was presented for consideration at the November Committee meeting. Much of the work focused on the approach to objectors, and particularly on paying objectors to forgo or abandon appeals. Working in consultation with representatives of the Appellate Rules Committee, the drafts that would have included amendments of Appellate Rule 42 have been abandoned. The current proposal would amend only Civil Rule 23(e). In addition, a seventh proposal has been added. This proposal would revise the Rule 23(f) amendment to include a 45-day period to seek permission for an interlocutory appeal when the United States is a party. It was developed with the Department of Justice, and had not advanced far enough to be presented at the November meeting.

The rule texts shown in the agenda materials, pp. 96-99, have been reviewed by the style consultants. Only a few differences of opinion remain.

Notice. Two of the proposed amendments involve Rule 23(c)(2)(B). The first reflects a common practice that, without the amendment, may seem to be unauthorized. When a class has not yet been certified, it has become routine to address a proposal to certify a class and approve a settlement by giving "preliminary" certification and sending out a notice that, in a (b)(3) class, includes a deadline for requesting exclusion, as well as notice of the right to appear and to object. The so-called preliminary certification is not really certification. Certification occurs only on final approval of the settlement and the class covered by the settlement. This amendment would expand the notice provision to include an order "ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)." That makes it clear that an opt-out deadline is properly set by this notice. Generally, settlement agreements call for an opt-out period that expires before actual certification with final approval of the settlement.

The second change in Rule 23(c)(2)(B) is to address the means of notice. The Subcommittee worked diligently in negotiating the words and sequence of words. The Note explains that the choice of means of notice is a holistic, flexible concept. Different sorts of class members may react differently to different media. A rough illustration is provided by the quip that a class of people who are of an age to need hearing aids respond by reading first-class mail, and trashing e-mail. A class of younger people who wear ear buds, not hearing aids, trash postal mail and read e-mail. The Note emphasizes that no one form of notice is given primacy over other forms. The Note further emphasizes the need for care in developing the form and content of the notice.

Discussion began by expressing discomfort with the direction that notice "must" include individual notice to all members who can be identified through reasonable effort. The proposal carries forward the language of the present rule, but there is a continuing tension between "must" and the softer requirement that notice only be the best that is practicable under the circumstances. A determination of practicability entails a measure of discretion. Part of the tension arises from the insistence of the style consultants that the single sentence drafted by the Subcommittee was too long: "the best notice that is practicable under the circumstances, — by United States mail, electronic means, or other appropriate means — including individual notice to all members who can be identified through reasonable effort."

Further discussion reflected widespread agreement that "the best notice that is practicable under the circumstances" and "reasonable effort" establish a measure of discretion that may be thwarted by the two-sentence structure that, in a second stand-alone sentence, says that "the notice must include individual notice to all members who can be identified through reasonable

effort." The style change seems to approach a substantive change. It will be better to draft with only one "must," so as to emphasize what is the best practicable notice. That approach will avoid any unintended intrusion on the process by which courts elaborate on the meaning of "practicable" and "reasonable."

One suggested remedy was to delete from rule text the references to examples of means — "United States mail, electronic means, or other appropriate means." The examples could be left to the Committee Note. But that would strain the practice that bars Note advice that is not supported by a change in rule text.

As to the choice of means, it was noted that some comments have suggested that careful analysis of actual responses in many cases shows that postal mail usually works better than electronic notice. The Committee Note may benefit from some revision. But e-mail notice is happening now, and it may help to provide official authority for it.

The drafting question was resolved by adopting this suggestion:

> * * * the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by United States mail, electronic means[,] or other appropriate means.

As revised, the Committee approved recommendation of this proposal for Standing Committee approval to publish this summer.

Frontloading. Proposed Rule 23(e)(1)(A) focuses on ensuring that the court is provided ample information to support the determination whether to send out notice of a proposed settlement to a proposed class. The underlying concern is that the parties to a proposed settlement may join in seeking what has been inaccurately called preliminary certification and notice without providing the court much of the information that bears on final review and approval of the settlement. If important information comes to light only after the notice stage and at the final-approval stage, there is a risk that the settlement will not withstand close scrutiny. The consequences are costly, including a second round of notice to a perhaps disillusioned class if the action persists through a second attempt to settle and certify.

Early drafting efforts included a long list of categories of information the proponents of settlement must provide to the court. The list has been shortened to more general comments in the Committee Note. The rule text also has been changed to clarify that it is not the court's responsibility to elicit the required

information from the parties, rather it is the parties that have the duty to provide the information to the court.

The idea is transparency and efficiency. The information, initially required to support the court's determination whether to send notice, also supports the functions of the notice itself. It enables members to make better-informed decisions whether to opt out, and whether to object. Good information may show there is no reason to object. Or it may show that there is reason to object, and provide the support necessary to make a cogent objection.

The Subcommittee discussed at length the question whether the rule text should direct the parties to submit all information that will bear on the ultimate decision whether to certify the class proposed by the settlement and approve the settlement. The difficulty is that the objection process may identify a need for more information. And in any event, the parties may not appreciate the potential value of some of the information they have. It would be too rigid to prohibit submission at the final-approval stage of any information the parties had at the time of seeking approval of notice to the class. But at the same time, it is important that the parties not hold back useful information that they have. Alan Morrison has suggested that the Note should say something like this: "Ordinarily, the proponents of the settlement should provide the court with all the available supporting materials they intend to submit at the time they seek notice to the class, which would make this information available to class members." The Committee agreed that the Subcommittee should consider this suggestion and, if it is adopted, determine the final wording.

An important difference remains between the Subcommittee and the style consultants. The information required by (e)(1)(A) is to support a determination, not findings, that notice should be given to the class. The Subcommittee draft requires "sufficient" information to enable these determinations. The style consultants prefer "enough" information. If they are right that "enough" and "sufficient" carry exactly the same meaning, why worry about the choice? But, it was quipped, "we think 'enough' is insufficient."

"Sufficient" found broad support. A quick Google search found British authority for different meanings for "enough" and "sufficient." It was suggested that "sufficient" is qualitative, while "enough" is quantitative. "Sufficiency," moreover, is a concept used widely in the law, particularly in addressing such matters as the sufficiency of evidence.

The outcome was to transpose the two words: "~~sufficient~~ information sufficient to enable" the court's determination whether to send notice. This form better underscores the link between information and determination, and creates a structure that will not work with "enough." The Committee believes that this question

goes to the substance of the provision, not style alone.

A different question was raised. Proposed Rule 23 (e)(1)(B) speaks of showing that the court will likely be able to approve the proposed settlement "under Rule 23(e)(2)," and "certify the class for purposes of judgment on the proposal." (e)(2) does not say anything about certification beyond the beginning: "If the proposal would bind class members * * *." That might be read to authorize creation of a settlement class that does not meet the tests of subdivision (b)(1), (2), or (3). The proposed Committee Note, at p. 102, line 131, repeats the focus on the likelihood the court will be able to certify a class, but does not pin it down.

The Subcommittee agreed that, having discussed the possibility of recommending a new "(b)(4)" category of class action, it had decided not to pursue that possibility. One possibility would be to amend the Committee Note to amplify the reference to certifying a class: "likely will be able, after the final hearing, to certify the class under the standards of Rule 23(a) and (b)." That leaves the question whether this approach relies on the Note to clarify something that should be expressed in rule text. Perhaps something could be done in (e)(1)(B)(ii), though it is not clear what — "certify the class under Rule 23(a) and (b) for purposes of judgment on the proposal" might do it.

It was pointed out that the provision for notice of a proposed settlement applies not only when a class has not yet been certified but also when a class has been certified before a settlement proposal is submitted. This dual character is reflected in (e)(1)(B)(ii)'s reference to the likely prospect that the court will, at the end of the notice and objection period, be able to certify a class not yet certified. The purpose of the proposal is to ensure the legitimacy of the common practice of sending out notice before a class is certified. There are two steps. Settlement cannot happen without certifying a class. But the common habit has been to refer to the act that launches notice and, in a (b)(3) class, the opt-out period, as preliminary certification. That led to attempts to win permission for interlocutory appeal under Rule 23(f), most prominently seen in the NFL concussion litigation. Perhaps the Committee Note should say something, but there is no apparent problem in the rule language.

One possible remedy might be to expand the tag line for Rule 23(e)(2): "Approval of the proposal and certification of the class [for settlement purposes]." But that might be misleading, since (e)(2) does not refer to certification criteria.

It was observed again that when a class has not already been certified, the court does not certify a class in approving notice under (e)(1). Certification comes only as part of approving the settlement after considering the criteria established by (e)(2).

Certification of the class and approval of the settlement are interdependent. The settlement defines the class. The court approves both or neither; it cannot redefine the class and then approve a settlement developed for a different class. Not, at least, without acceptance by the proponents and repeating the notice process for the newly defined class.

A resolution was proposed: Add a reference to Rule 23(c)(3) to (e)(2): "If the proposal would bind class members under Rule 23(c)(3), the court may approve it only * * *." This was approved, with "latitude to adjust" if the Subcommittee finds adjustment advisable. Corresponding language in the Committee Note might read something like this, adding on p. 103, somewhere around line 122: "Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether the class may be certified under the standards of Rule 23(a) and (b)."

The proposed Rule 23(e)(2) criteria for approving a proposed settlement were discussed briefly. They are essentially the same as the draft discussed at the November meeting. They seek to distill the many factors expressed in varying terms by the circuits, often carrying forward with lists established thirty years ago, or even earlier. Tag lines have been added for the paragraphs at the suggestion of the style consultants.

The Committee approved a recommendation that the Standing Committee approve proposed Rule 23(e)(1) and (2) for publication this summer.

Objectors. In all the many encounters with bar groups and at the miniconference last fall, there was virtually unanimous agreement that something should be done to address the problem of "bad" objectors. The problem is posed by the objector who files an open-ended objection, often copied verbatim from routine objections filed in other cases, then "lies low," saying almost nothing, and — after the objection is denied — files a notice of appeal. The business model is to create, at low cost, an opportunity to seek advantage, commonly payment, by exploiting the cost and delay generated by an appeal.

Part of the Rule 23(e)(5) proposal addresses the problem of routine objections by requiring that the objection state whether it applies only to the objector, to a specific subset of the class, or to the entire class. It also directs that the objection state with specificity the grounds for the objection. The Committee Note says that failure to meet these requirements supports denial of the objection.

Another part of the proposal deletes the requirement in

present Rule 23(e)(5) that the court approve withdrawal of an objection. There are many good-faith withdrawals. Objections often are made without a full understanding of the terms of the settlement, much less the conflicting pressures that drove the parties to their proposed agreement. Requiring court approval in such common circumstances is unnecessary.

At the same time, proposed Rule 23(e)(5)(B) deals with payment "in connection with" forgoing or withdrawing an objection, or forgoing, dismissing, or abandoning an appeal from a judgment approving the proposed settlement. No payment or other consideration may be provided unless the court approves. The expectation is that this approach will destroy the "business model" of making unsupported objections, followed by a threat to appeal the inevitable denial. A court is not likely to approve payment simply for forgoing or withdrawing an appeal. Imagine a request to be paid to withdraw an appeal because it is frivolous and risks sanctions for a frivolous appeal. Or a contrasting request to approve payment to the objector, not to the class, for withdrawing a forceful objection that has a strong prospect of winning reversal for the class or a subclass. Approval will be warranted only for other reasons that connect to withdrawal of the objection. An agreement with the proponents of the settlement and judgment to modify the settlement for the benefit of the class, for example, will require court approval of the new settlement and judgment and may well justify payment to the now successful objector. Or an objector or objector's counsel may, as the Committee Note observes, deserve payment for even an unsuccessful objection that illuminates the competing concerns that bear on the settlement and makes the court confident in its judgment that the settlement can be approved.

The requirement that the district court approve any payment or compensation for forgoing, dismissing, or abandoning an appeal raises obvious questions about the allocation of authority between district court and court of appeals if an appeal is actually taken. Before a notice of appeal is filed, the district court has clear jurisdiction to consider and rule on a motion for approval. If it rules before an appeal is taken, its ruling can be reviewed as part of a single appeal. The Subcommittee has decided not to attempt to resolve the question whether a pre-appeal motion suspends the time to appeal. Something may well turn on the nature of the motion. If it is framed as a motion for attorney fees, it fits into a well-established model. If it is for payment to the objector, matters may be more uncertain — it may be something as simple as an argument that the objector should be fit into one subclass rather than another, or that the objector's proofs of injury have been dealt with improperly.

After the agenda materials were prepared, the Subcommittee continued to work on the relationship between the district court

and the court of appeals. It continued to put aside the question of appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to address the potential for overlapping jurisdiction when a motion to approve payment is not made, or is made but not resolved, before an appeal is docketed. The proposal is designed to be self-contained, operating without any need to amend the dismissal provisions in Appellate Rule 42. "The question is who has the case." The proposal, as it evolved in the Subcommittee, reads:

> (C) *Procedure for Approval After Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Invoking the indicative ruling procedure of Rule 62.1 facilitates communication between the courts. The district court retains authority to deny the motion without seeking a remand. It is expected that very few motions will be made simply "for" approval of payment, and that denial will be the almost inevitable fate of any motion actually made. But if the motion raises grounds that would lead the district court either to grant the motion or to want more time to consider the motion if that fits with the progress of the case on appeal, the court of appeals has authority to remand for that purpose.

Representatives of the Appellate Rules Committee have endorsed this approach in preference to the more elaborate earlier drafts that would amend Appellate Rule 42.

The first comment was that it is extraordinary that it took so long to reach such a sensible resolution.

The next reaction asked how this proposal relates to waiver. If an objector fails to make an objection with the specificity required by proposed Rule 23(e)(5)(A), for example, can the appeal request permission to amend the objection? Isn't this governed by the usual rule that you must stand by the record made in the district court? And to be characterized as procedural forfeiture, not intentional waiver? The purpose of (e)(5)(A) is to get a useful objection; an objection without explanation does not help the court's evaluation of the proposed settlement. Pro se objectors often fail to make helpful objections. So a simple objection that the settlement "is not fair" is little help if it does not explain the unfairness. At the same time, the proposed Committee Note recognizes the need to understand that an objector proceeding without counsel cannot be expected to adhere to technical legal standards. The Note also states something that was considered for rule text, but withdrawn as not necessary: failure to state an objection with specificity can be a basis for denying the objection. That, and forfeiture of the opportunity to supply

specificity on appeal, is a standard consequence of failure to comply with a "must" procedural requirement. The courts of appeals can work through these questions as they routinely do with procedural forfeiture. Forfeiture, after all, can be forgiven, most likely for clear error. It is not the same as intentional waiver.

The Committee approved a recommendation that the Standing Committee approve publication of proposed Rule 23(e)(5) this summer.

Interlocutory appeals. The proposals would amend Rule 23(f) in two ways.

The first amendment adds language making it clear that a court of appeals may not permit appeal "from an order under Rule 23(e)(1)." This question was discussed earlier. The Rule 23(e)(1) provisions regulating notice to the class of a proposed settlement and class certification are only that — approval, or refusal to approve, notice to the class. Despite the common practice that has called this notice procedure preliminary certification, it is not certification. There is no sufficient reason to allow even discretionary appeal at this point.

The Committee accepted this feature without further discussion.

The second amendment of Rule 23(f) extends the time to file a petition for permission to appeal to 45 days "if any party is the United States" or variously described agencies or officers or employees of the United States. The expanded appeal time is available to all parties, not only the United States. This provision was suggested by the Department of Justice. As with other provisions in the rules that allow the United States more time to act than other parties are allowed, this provision recognizes the painstaking process that the Department follows in deciding whether to appeal, a process that includes consultation with other government agencies that often have their own elaborate internal review procedures.

Justice Nahmias reacted to this proposal by a message to Judge Dow asking whether state governments should be accorded the same favorable treatment. Often state attorneys general follow similarly elaborate procedures in deciding whether to appeal. A participant noted that he had been a state solicitor general, and that indeed his state has elaborate internal procedures. At the same time, he noted that the state procedures were not as time-consuming as the Department of Justice procedures.

This question prompted the suggestion that perhaps states should receive the same advantages as the United States. But this question arises at several points in the rules, often in provisions

allowing extra time for action by the United States. The appeal time provisions in Appellate Rule 4 are a familiar example, as well as the added time to answer in Rule 12. And at least on occasion, the states are accorded the same favorable treatment as the United States. Appellate Rule 29 allows both the United States and a state to file an amicus brief without first winning permission. It may be that these questions of parity deserve consideration as a separate project. There might be some issues of line drawing. If states get favorable treatment, what of state subdivisions? Actions against state or local officials asserting individual liability? Should large private organizations be allowed to claim equally complex internal procedures — and if so, how large?

The concluding observation was that extending favorable treatment to the United States will leave states where they are now. The amendment will not disadvantage them; it only fails to provide a new advantage. Nor need it be decided whether the time set by a court rule, such as Rule 23(f), is subject to extension in a way that a statute-based time period cannot be.

A separate question was framed by a sentence appearing in brackets in the draft Committee Note at p. 107, lines 408-409 of the agenda book. This sentence suggested that the 45-day time should also apply in "an action involving a United States corporation." There are not many "United States corporation[s]." Brief comments for the Department of Justice led to the conclusion that this sentence should be deleted.

The Class Action Fairness Act came into the discussion with a question whether any of the Rule 23 proposals might run afoul of statutory requirements. CAFA provides an independent set of rules that must be satisfied. It has provisions relating to settlement, including notice to state officials of proposed settlements. But nothing in the proposed amendments is incompatible with CAFA. Courts can fully comply with statutory requirements in implementing Rule 23.

The Committee voted to recommend proposed Rule 23(f) to the Standing Committee to approve for publication this summer.

Ongoing Questions. The Subcommittee has put aside for the time being some of the proposals it has studied, often at length.

"Pick-off" offers raise one set of questions, addressed by a number of drafts that illustrate different possible approaches. The questions arise as defendants seek to defeat class certification by acting to moot the claims of individual would-be representatives. The problem commonly arises before class certification, and often before a motion for certification. One reason for deferring action was anticipation of the Supreme Court's decision in the Campbell-Ewald case. The decision has been made, and the Subcommittee has

been tracking early reactions in the courts. It is more difficult to track responses by defendants. One recent district-court opinion deals with an effort to moot a class representative by attempting to make a Rule 67 deposit in court of full individual relief. The attempt was rejected as outside the purposes of Rule 67. Other attempts are being made to bring mooting money into court, responding to the part of the Campbell-Ewald opinion that left this question open, and to the separate opinions suggesting that mootness might be manufactured in this way. The question whether to propose Rule 23 amendments remains under consideration.

Consideration of offers that seek to moot individual representatives has led also to discussion of the possibility that Rule 23 should be amended by adopting explicit provisions for substituting new representatives when the original representatives fail. The rule could be narrow. One example of a narrow rule would be one that addresses only the effects of involuntary mooting by defense acts that afford complete individual relief. A broad rule could reach all circumstances in which loss of one or more representatives make it desirable or necessary to find replacements.

Discussion of substitute representatives began with the observation that it can be prejudicial to the defendant when class representatives pull out late in the game. An illustration was offered of a case in which a former employee sought injunctive relief on behalf of a class. He retired. He could not benefit from injunctive relief that would benefit only current employees. The plaintiffs sought to amend the complaint to substitute a new representative. But they acted after expiration of the time for amendments allowed by the scheduling order. And they had not been diligent, since the impending retirement was well known. "It would have been different if the representative had been hit by a bus," an unforeseeable event that could justify amending the scheduling order.

A different anecdote was offered by a judge who asked about the size of a proposed payment for services by the representative plaintiff. The response was that the representative deserved extra because he had rejected a pick-off offer.

It was asked whether judges understand now that they have authority to allow substitution of representatives. An observer suggested that it would be good to adopt an explicit substitution rule. A representative seeks to assume a trust duty to act on behalf of others. And after a class is certified, a set of trust beneficiaries is established. It would help to have an affirmative statement in the rule that recognizes substitution of trustees.

The Committee agreed that the Subcommittee should continue to consider the advantages of adopting an express rule to confirm, and

perhaps regularize, existing practices for substituting representatives.

Finally, the Subcommittee continues to consider the questions raised by the growing number of decisions that grapple with the question whether "ascertainability" is a useful concept in deciding whether to certify a class. The decisions remain in some disarray. But the question is being actively developed by the courts. Continuing development may show either that the courts have reached something like consensus, or that problems remain that can be profitably addressed by new rule provisions.

The Committee thanked the Subcommittee for its long, devoted, and successful work.

Pilot Projects

Judge Bates introduced the work on pilot projects by noting that the work is being advanced by a Subcommittee that includes both present and former members of this Committee and the Standing Committee. Judge Campbell, former chair of this Committee, chairs the Subcommittee. Other members include Judge Sutton, Judge Bates, Judge Grimm (a former member of this Committee), Judge Gorsuch, Judge St. Eve, John Barkett, Parker Folse, Virginia Seitz, and Edward Cooper. Judge Martinez has joined the Subcommittee work as liaison from the Committee on Court Administration and Case Management.

Judge Campbell began presenting the Subcommittee's work by noting that the purpose of pilot projects is to advance improvements in civil litigation by testing proposals that, without successful implementation in actual practice, seem too adventuresome to adopt all at once in the national rules.

The Subcommittee has held a number of conference calls since this Committee discussed pilot projects last November. Two projects have come to occupy the Subcommittee: Expanded initial disclosures in the form of mandatory early discovery requests, and expedited procedures.

Mandatory Initial Discovery. The mandatory early discovery project draws support from many sources, including innovative federal courts and pilot projects in ten states. The Subcommittee held focus-group discussions by telephone with groups of lawyers and judges from Arizona and Colorado, states that have developed enhanced initial disclosures. Another conference call was held with lawyers from Ontario and British Columbia to learn about initial disclosures in Canada. "People who work under these disclosure systems like them better than the Federal Rules of Civil Procedure."

The draft presented in the agenda materials has been considered by the Case Management Subcommittee of the Committee on Court Administration and Case Management. They have reflected on the draft in a thoughtful letter that will be considered as the work goes forward.

Judge Grimm took the lead in drafting the initial discovery rule.

Mandatory initial discovery would be implemented by standing order in a participating court. The order would make participation mandatory, excepting for cases exempted from initial disclosures by Rule 26(a)(1)(B), patent cases governed by local rule, and multidistrict litigation cases. Because the initial discovery requests defined by the order include all the information covered by Rule 26(a)(1), separate disclosures under Rule 26(a)(1) are not required.

The Standing Order includes Instructions to the Parties. Responses are required within the times set by the order, even if a party has not fully investigated the case. But reasonable inquiry is required, the party itself must sign the responses under oath, and the attorney must sign under Rule 26(g).

The discovery responses must include facts relevant to the parties' claims or defenses, whether favorable or unfavorable. This goes well beyond initial disclosures under Rule 26(a)(1), which go only to witnesses and documents a party "may use." The Committee on Court Administration and Case Management may raise the question whether the requirement to respond with unfavorable information will discourage lawyers from making careful inquiries. Experience in Arizona, Colorado, and Canada suggests lawyers will not be discouraged.

The time for filing answers, counterclaims, crossclaims, and replies is not tolled by a pending motion to dismiss or other preliminary motion. This provision provoked extensive discussion within the Subcommittee. An answer is needed to frame the issues. Suspending the time to answer would either defer the time to respond to the discovery requests or lead to responses that might be too narrow, broader than needed for the case, or both. The Subcommittee will consider whether to add a provision that allows the court to suspend the time to respond, whether for "good cause" or on a more focused basis.

The times to respond are subject to two exceptions. If the parties agree that no party will undertake any discovery, no initial discovery responses need be filed. And initial responses may be deferred, one time, for 30 days if the parties certify that they are seeking to settle and have a good-faith belief that the dispute will be resolved within 30 days of the due date for their

responses.

Responses, and supplemental responses, must be filed with the court. The purpose of this requirement is to enable the court to review the responses before the initial conference.

The initial requests impose a continuing duty to supplement the initial responses in a timely manner, with a final deadline. The draft sets the time at 90 days before trial. The Court Administration and Case Management Committee has suggested that it may be better to tie the deadline to the final pretrial conference. Later discussion recognized that it may be better to gear the deadline to the final pretrial conference.

The parties are directed to discuss the mandatory initial discovery responses at the Rule 26(f) conference, to seek to resolve any limitations they have made or will make, to report to the court, and to include in the report the resolution of limitations invoked by either party and unresolved limitations or other discovery issues.

As a safeguard, the instructions provide that responses do not constitute an admission that information is relevant, authentic, or admissible.

Rule 37(c)(1) sanctions are invoked.

The mandatory initial discovery requests themselves follow these instructions in the Standing Order.

The first category describes all persons who have discoverable information, and a fair description of the nature of the information.

The second category describes all persons who have given written or recorded statements, attaching a copy of the statement when possible, but recognizing that production is not required if the party asserts privilege or work-product protection.

The third category requires a list of documents, ESI, and tangible things or land, "whether or not in your possession, custody, or control, that you believe may be relevant to any party's claims or defenses." If the volume of materials makes individual listing impracticable, similar documents or ESI may be grouped into specific categories that are described with particularity. A responding party "may" produce the documents, or make them available for inspection, instead of listing them.

The fourth category requires a statement of the facts relevant to each of the responding party's claims or defenses, and of the legal theories on which each claim or defense is based.

The fifth category requires a computation of each category of damages, and a description or production of underlying documents or other evidentiary material.

The sixth category requires a description of "any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party."

The seventh provision authorizes a party who believes that responses in categories three, five, or six are deficient to request more detailed or thorough responses.

The Standing Order has separate provisions governing the means of providing hard-copy documents and ESI.

Hard-copy documents must be produced as they are kept in the ordinary course of business.

When ESI comes into play, the parties must promptly confer and attempt to agree on such matters as requirements and limits on disclosure and production; appropriate searches, including custodians and search terms "or other use of technology assisted review"; and the form for production. Disputes must be presented to the court in a single joint motion, or, if the court directs, a conference call with the court. The motion must include the parties' positions and separate certifications by counsel under Rule 26(g). Absent agreement of the parties or court order, ESI identified in the initial discovery responses must be produced within 40 days after serving the response. Absent agreement, production must be in the form requested by the receiving party; if no form is requested, production may be in a reasonably usable form that will enable the receiving party to have the same ability as the producing party to access, search, and display the ESI.

Finally, the Subcommittee has begun work on a User's Manual to help pilot judges implement the project. It will cover such familiar practices as early initial case-management conferences, reluctance to extend the times for initial discovery responses, and prompt resolution of discovery disputes.

Judge Grimm added that the Subcommittee also had considered an extensive amount of information about experience with initial disclosures under the Civil Justice Reform Act. It also reviewed experience with the initial disclosure requirement first adopted in 1993, a more extensive form than the watered-down version adopted in 2000. Further help was found in the 1997 conference at Boston College Law School with lawyers, judges, and professors. In addition to Arizona and Colorado, a number of other state disclosure provisions were studied. "This was a comprehensive approach to what can be found."

Judge Sutton asked what the Standing Committee will be asked to approve. This proposal is more developed than the proposals for earlier pilot projects have been. But there will have to be refinements along the way to implementation. That is the ordinary course of development. The goal will be to ask the Standing Committee to approve the pilot conceptually, while presenting as many of the details as can be managed. Judge Bates agreed that "refinements are inevitable."

Discussion began with a practicing lawyer's observation that he had been skeptical about the ability of lawyers to find ways to avoid the requirement in the 1993 rule that unfavorable information be disclosed. But this pilot is worth doing. "Let's 'go big' with something that has a potential to make major changes in the speed and efficiency of federal litigation." The discussions with the groups in Arizona and Colorado, and the lawyers in Canada, provided persuasive evidence that this can work. "They live and work with many of these ideas. And they find the ideas not only workable, but welcome." The proposal results from intense effort to learn from actual experience. The effort will continue through the time of seeking approval from the Judicial Conference in September, and on to the stage of actual implementation.

This view was seconded by "a veteran of 1993." The 1993 rule failed because the Committee did not work closely enough with the bar, and was not able to provide persuasive evidence that the required disclosures could work. A pilot will provide the data to support broader disclosure innovations.

An initial question observed that much of the conversation refers to this project as involving initial disclosure. But the standing order refers to "requests": does the duty to respond depend on having a party promulgate actual discovery requests? The answer is that the pilot's standing order adopts a set of mandatory initial discovery requests. The requests are addressed to all parties, and must be responded to in the same way as ordinary discovery requests under Rules 33 and 34.

Thinking about implementation of the pilot project has assumed that it should be adopted only in districts that can ensure participation by all judges in the district. That may make it impossible to launch the project in any large district, but it seems important to involve a large district or two. Discussion of this question began with the observation that the pilot project embodies great ideas, but that it will be easier to "sell" them if they can be tested in large districts. At the same time, it is not realistic to expect that all judges in a large district will be willing to sign on, even in the face of significant peer pressure from other judges. A separate question asked whether there might be some advantage of being able to compare outcomes in cases assigned to participating and nonparticipating judges in the ordinary

random-assignment practices of the district. Emery Lee responded that there could be an advantage, but that the balance between advantage and disadvantage would depend on the judges in the two pools. This prompted the observation that there is reason to be concerned about self-selection into or out of pilot projects. A judge suggested that participation in the pilot "should not be terribly onerous." It may be better to leave the program as one that expects unanimity, understanding that a pilot district might allow a judge to opt out for individual reasons. Another judge thought that his court could achieve near-unanimity: "Judges on my court take pride in what they do." Several members agreed that the project should not be changed by, for example, adopting an explicit 80% participation threshold. Perhaps it is better to leave it as a preference for districts in which all judges participate in the pilot, recognizing that the need to enlist one or more large districts may lead to negotiation. One approach would be to design the project to say that all judges "should," not "must" participate. A judge noted that success will depend on willingness and eagerness to participate. In his relatively small district, "our senior judges are not eager."

A more difficult question is raised by recognition of the possibility that some sort of exception should be adopted that allows a court to suspend the time to answer when there is a motion to dismiss. "In my district we get many well-considered motions to dismiss." They can pretty much be identified on filing. A lot of them are government cases. Another big set involve "200-page" pro se complaints that will require much work to answer. This observation was supported by the Department of Justice. The goal of speedy development of the case is important, but many motions to dismiss address cases that should not be in court at all. If the case is subject to dismissal on sovereign-immunity grounds, for instance, the government should be spared the work of answering and disclosing. In other cases, the claim may challenge a statute on its face, pretermitting any occasion for disclosure or discovery — why not invoke the ordinary rule that suspends the time to answer? A judge offered a different example: "Many cases have meritorious but flexible motions to dismiss." A diversity complaint, for example, may allege only the principal place of business of an LLC party. The citizenship of the LLC members needs to be identified to determine whether there is diversity jurisdiction. Further time is needed to decide the motion. Yet another judge observed that setting the time to respond to the initial mandatory requests at 30 days after the answer can enable action on the motion to dismiss.

A further suggestion was that there are solid arguments on both sides of the question whether a pleading answer should be required before the court acts on a motion to dismiss. "The usefulness of responses turns to a significant degree on the parties' ability to understand the issues." But if the time to answer is deferred pending disposition of a motion to dismiss, it

may be difficult to devise a suitable trigger for the duty to respond to the initial mandatory requests. And if the duty to respond is always deferred until after a ruling on a motion to dismiss, the result may be to encourage motions to dismiss.

A judge agreed that further thought is needed, particularly for jurisdictional motions and cases in which the government is a party. But he noted that he has conferences that focus both on motions and the merits. "If there is too much possibility of deferring the time to answer, we may suffer."

A lawyer member suggested that the line could be drawn at motions arguing that the defendant cannot be called on to respond in this court. These motions would go to questions like personal jurisdiction and subject-matter jurisdiction. They would not include motions that go to the substance of the claim.

Another troubling example was offered: a claim of official immunity may be raised by motion to dismiss. Elaborate practices have grown up from the perception that one function of the immunity is to protect the individual defendant from the burdens of discovery as well as the burden of trial.

An analogy was suggested in the variable practices that have grown up around the question whether discovery should be allowed to proceed while a motion to dismiss remains under consideration.

A judge offered "total support" for the project, recognizing that further refinements are inevitable. One part of the issues raised by motions to dismiss might be addressed through the timing of ESI production, which may be the most onerous part of the initial mandatory discovery responses. The draft recognizes that ESI production can be deferred by the court or party agreement.

Judge Campbell agreed that this question deserves further thought.

Model orders provided another subject for discussion. A judge suggested that some judges, including open-minded innovators, would resist model orders because they think their own procedures work better. They may hesitate to buy into a full set of model orders. But Emery Lee said that model orders will be needed for research purposes. And Judge Campbell thought that the good idea of developing model orders could be pursued by looking for standard practices in Arizona and other states with expansive pretrial disclosures.

The Committee approved a motion to carry the initial mandatory discovery pilot project program forward to the Standing Committee for approval for submission to the Judicial Conference in September. The Committee recognizes that the Subcommittee will

continue its deliberations and make further refinements in its recommendations.

Expedited Procedures. Judge Campbell introduced the expedited procedures pilot project by observing that it rests on principles that have been proved in many courts, by many judges, and in many cases. The project is designed not to test new procedures, but to change judicial culture.

The project has three parts: The procedural components; means of measuring progress in pilot courts; and training.

These practices provide the components of the pilot: (1) prompt case-management conferences in every case; (2) firm caps on the time allocated for discovery, to be set by the court at the conference and to be extended no more than once, and only for good cause and on a showing of diligence by the parties; (3) prompt resolution of discovery disputes by telephone conferences; (4) decisions on all dispositive motions within 60 days after the reply brief is filed; and (5) setting and holding firm trial dates.

The metrics to be measured are these: (1) if it can be measured, the level of compliance with the practices embodied in the pilot; (2) trial dates in 90% of civil cases set within 14 months of case filing, and within 18 months in the remaining 10% of cases; and (3) a 25% reduction in the number of categories of cases in the district "dashboard" that are decided more slowly than the national average, bringing the court closer to the norm. (The "dashboard" is a tool developed for use by the Committee on Court Administration and Case Management. It measures disposition times in all 94 districts across many different categories of cases. Each district's experience in each category is compared to the national average. The dashboard is described in the article by Donna Stienstra set out as an exhibit to the Pilot Projects report. The chief judge of each district got a copy of that district's dashboard last September.)

Training and collaboration will have these components: (1) an initial one-day training session by the FJC, followed by additional FJC training every six months, or possibly every year; (2) quarterly meetings by judges in the pilot district to discuss best practices, what is working and what is not working, leading to refinements of case-processing methods to meet the pilot goals; (3) making judges from outside the district available as resources during the quarterly district conferences; (4) at least one bench-bar conference a year to talk with lawyers about how well the pilot is working; and (5) a 3-year period for the pilot.

This pilot "has a lot of moving parts, but not as many as the mandatory initial disclosure pilot."

Judge Fogel and Emery Lee responded to a question about the likely reaction of pilot-district judges to exploring individual disposition times. They answered that in many settings researchers are wary of compiling individual-judge statistics because many judges are sensitive to these matters. But the problem is reduced in a pilot project because the districts volunteer. They also pointed out that it will be necessary to compile a lot of pre-pilot data to compare to experience under the pilot. "The CACM-FJC model helps." At the same time, the question whether individual judges' "dashboards" would become part of the public data must be approached with caution and sensitivity.

Judge Fogel also noted that it is important to avoid the problem of eager volunteers. The FJC has a very positive reaction to the pilot. It will be useful to engage in a project designed to see what happens with a training program.

It was noted that Judge Walton, writing for the CACM Case Management Subcommittee, raised questions regarding the deadline for decisions on dispositive motions. "[T]here are some practical considerations that may make compliance" difficult. Individual calendar and trial schedules may interfere. Supplemental briefing may be required after the reply brief. And added time may be required in cases that deserve extensive written decisions because of novel or unsettled issues of law or extensive summary-judgment records. The deadline might be extended to 90 days. Or it could be framed as a target time for disposing of a designated fraction of dispositive motions in all cases. Or it could be framed in aspirational terms, as "should" rather than "must."

The trial-date target also was questioned. Perhaps it is not ambitious enough — even today, a large proportion of all cases are resolved in 14 months or less.

The Committee adopted a recommendation that the Standing Committee approve the Expedited Procedures pilot project for submission to the Judicial Conference in September. As with the initial mandatory discovery pilot, it will be recognized that approval of the concept will entail further work by the Subcommittee, at times in conjunction with the FJC, the Committee on Court Administration and Case Management, and perhaps others.

Other Proposals

Several other proposals are presented by the agenda materials. Some have carried over from earlier meetings. Others respond to new suggestions for study. Each came on for discussion.

RULE 5.2: REDACTING PROTECTED INFORMATION

Rule 5.2 requires redaction from paper and electronic filings

of specified items of private information. It was initially adopted in conjunction with Appellate Rule 25(a)(5), Bankruptcy Rule 9037, and Criminal Rule 49.1. It has seemed important to achieve as much uniformity among these four rules as proves compatible with the different settings in which each operates.

The Committee on Court Administration and Case Management referred to the Bankruptcy Rules Committee a problem that seems to arise with special frequency in bankruptcy filings. Bankruptcy courts are receiving creditors' requests to redact previously filed documents that include material that the privacy rules forbid. These requests may involve thousands of documents filed in numerous courts. The immediate question was whether Bankruptcy Rule 9037 should be amended to include an express procedure for moving to redact previously filed documents. The prospect that different bankruptcy courts may become involved with the same questions arising from simultaneous filings suggests a particular need for a nationally uniform procedure, even if satisfactory but variable procedures might be crafted by each court acting alone.

The Bankruptcy Rules Committee has responded by creating a draft Rule 9037(h) that would establish a specific procedure for a motion to redact. The central feature of the procedure is a copy of the filing that is identical to the paper on file with the court except that it redacts the protected information. The court would be required to "promptly" restrict public access both to the motion and the paper on file. The restriction would last until the ruling on the motion, and beyond if the motion is granted. Public access would be restored if the motion is denied.

Judge Harris explained that bankruptcy courts receive hundreds of thousands of proofs of claim. "The volume is great." Redaction of information filed in violation of the rules is not as good as initial compliance. But there is good reason to have a uniform redaction procedure. If the court cannot restrict access until redaction is actually accomplished, the motion to redact may itself draw searches for the private information. The proposed Rule 9037(h) relies on the assumption that the CM/ECF system can immediately restrict access when a motion to redact is filed. If not, the motion just makes things worse.

Judge Sutton asked whether the Bankruptcy Rules Committee "is in a rush to publish." Judge Harris answered that the Committee is ready to wait so that all advisory committees can come together on uniform language.

Clerk-liaison Briggs noted that "we get a lot of improper failures to comply with Rule 5.2. We have an established procedure that immediately denies access."

Further discussion confirmed the wisdom of the Bankruptcy

Rules Committee's willingness to defer publication of their draft Rule 9037(h) pending work in the other committees. "One train is pretty far ahead of the others." Waiting for parallel development and publication will provide a better opportunity for uniformity.

One possible outcome might be that the Administrative Office and other bodies could develop procedures that automatically respond to the filing of a motion to redact by closing off public access to the paper addressed by the motion. If that could be done, there might be no need for a new set of rules provisions. But the work should continue, recognizing that this happy outcome may not come to pass.

RULE 30(b)(6): 16-CV-A

Members of the council and Federal Practice Task Force of the ABA Section of Litigation, acting in their individual capacities, submitted a lengthy examination of problems encountered in practice under Rule 30(b)(6). Rule 30(b)(6) allows a party to depose an entity, whether a party or not a party, on topics designated in the notice. The entity is required to designate one or more witnesses to testify on its behalf, providing "information known or reasonably available to the organization."

The idea that there are problems in implementing Rule 30(b)(6) is not new to the Committee. Extensive work was done in 2006 in response to proposals made by a Committee of the New York State Bar Association. The topic was considered again in 2013 in response to proposals made by the New York City Bar. Each time, the Committee concluded that there is little opportunity to adopt new rule text that would provide effective remedies for problems that are often case-specific and that often reflect deliberate efforts to subvert or misuse the Rule 30(b)(6) process.

Many of the present proposals involve issues that were considered in the earlier work. One example is that Rule 30(b)(6) does not require the entity to designate as a witness the "most knowledgeable person." Another example is questions that go beyond the topics listed in the notice. Questions addressing a party's contentions in the litigation are yet another example.

The question is whether the Committee should take up these questions in response to this third expression of anguish from a third respected bar group. The request, rather than urge specific answers, is that the Committee "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice * * *." It is clear that Rule 30(b)(6) "continues to be a source of unhappiness." On the other hand, to paraphrase Justice Jackson, there is a risk that pulling one misshapen stone out of the grotesque structure may disrupt a

careful balance. So "many litigants find Rule 30(b)(6) an extremely important tool to discover important information. Others find it an enormous pain."

Discussion began by noting that three important groups have now suggested the need to attempt improvements.

Committee members could not, on the spot, identify any clear circuit splits on the meaning or administration of Rule 30(b)(6). It may be helpful to explore this question.

It was noted that it is difficult to impose sanctions for not providing the most knowledgeable person.

It also was noted that there is an acute problem of producing witnesses who are not prepared.

So it was observed that the rule should be enforceable, and adding complications will make enforcement more difficult.

A lawyer member said that he confronts problems with Rule 30(b)(6) "constantly, all over the country, and even in sister cases. The Rule is constantly a source of controversy. Proper preparation issues will never go away." The recurring issues of interpretation and application show that as hard as it may be to make the Rule better, we should feel an obligation to address these issues. The problems are not going away. Another look would be useful.

Full agreement was expressed with this view.

A judge observed that the 2015 discovery amendments raise the prospect that proportionality may become a factor in administering Rule 30(b)(6). It might help to confront this integration head-on as part of a Rule 30(b)(6) project.

It was agreed that Rule 30(b)(6) should move to the active agenda. Judge Bates will appoint a subcommittee to address the problems.

RULE 81(C)(3): 15-CV-A

This item was carried forward from the agenda for the November 2015 meeting.

The question was framed by 15-CV-A as a potential misstep in the 2007 Style Project. The question is best understood in the full frame of Rule 81(c).

Rule 81(c) begins with (c)(1): "These rules apply to a civil action after it is removed from a state court." Applying the rules

is important — a federal court could not function well with state procedure, it would be awkward to attempt to blend state procedure with federal procedure, and the very purpose of removal may be to seek application of federal procedure.

Rule 81(c)(3) provides special treatment for the procedure for demanding jury trial. It begins with a clear proposition in (3)(A): a party who expressly demanded a jury trial before removal in accordance with state procedure need not renew the demand after removal.

A second clear step is provided by Rule 81(c)(3)(B): if all necessary pleadings have been served at the time of removal, a jury trial demand must be served within 14 days, measured for the removing party from the time of filing the notice of removal and measured for any other party from the time it is served with a notice of removal. This provision avoids the problem that otherwise would arise in applying the requirement of Rule 38(b)(1) that a jury demand be served no later than 14 days after serving the last pleading directed to the issue.

The third obvious circumstance departs from the premise of Rule 81(c)(3)(B): All necessary pleadings have not been served at the time of removal. Subject to the remaining two variations, it seems safe to rely on Rule 81(c)(1): Rule 38 applies after removal.

The fourth circumstance arises when state law does not require a demand for jury trial at any time. Up to the time of the Style Project, this circumstance was clearly addressed by Rule 81(c)(3)(A): "If the state law **does** not require an express demand for jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own." The direction was clear. The underlying policy is to balance competing interests. There is a fear that a party may rely after removal on familiar state procedure — absent this excuse, the right to jury trial could be lost for failure to file a timely demand under Rule 38 after removal. At the same time, the importance of establishing whether the case is to be set for jury trial reflected in Rule 38 is recognized by providing that the court can protect itself by an order setting a time to demand a jury trial, and by further providing that a party can protect its interest by a request that the court must honor by setting a time for a demand.

The Style Project changed "does," the word highlighted above, to "did." That change opens the possibility of a new meaning for this fifth circumstance: "[D]id not require an express demand" could be read to excuse any need to demand a jury trial when state law does require an express demand, but sets the time for the demand at a point after the time the case was removed. The question was raised by a lawyer in a case that was removed from a court in

a state that allows a demand to be made not later than entry of the order first setting the case for trial. The court ruled, in keeping with the Style Project direction, that the change from "does" to "did" was intended to be purely stylistic. The exception that excuses any demand applies only if state law does not require an express demand for jury trial at any point.

The question put by 15-CV-A can be stated in narrow terms: Should the Style Project change be undone, changing "did" back to "does"? That would avoid the risk that "did" will be read by others to mean that a jury demand is not required after removal if, although state procedure does require an express demand, the time set for the demand in state court occurs at a point after removal. There is at least some ground to expect that the ambiguous "did" may cause some other lawyers to misunderstand what apparently was intended to be a mere style improvement.

A broader question is whether a party should be excused from making a jury demand if, although a demand is required both by Rule 38 and by state procedure, state procedure sets the time for making the demand after the time the case is removed. It is difficult to find persuasive reasons for dispensing with the demand in such circumstances. And there is much to be said for applying Rule 38 in the federal court rather than invoking state practice.

A still broader question is whether it is time to reconsider the provision that excuses the need for any jury demand when a case is removed from a state that does not require a demand. Both the court and the other parties find it important to know early in the case whether it is to be tried to a jury. Present Rule 81(c)(3)(A) recognizes this value in the provision that allows the court to require a demand, and that directs that the court must require a demand if a party asks it to do so. In effect this rule transfers the burden of establishing whether the case is to be tried to a jury from a party who wants jury trial to the court and the other parties. The evident purpose is to protect against loss of jury trial by a party that does not familiarize itself with federal procedure even after a case is removed to federal court. It may be that the time has come to insist on compliance with Rule 38 after removal, just as the other rules apply after removal.

Discussion began with the question whether it would be useful to change "did" back to "does" now, holding open for later work the question whether to reconsider this provision. Two judges responded that it is important to know, as early as possible, whether a case is to be tried to a jury. Rather than approach the question in two phases, it will better to consider it all at once.

The Committee agreed to study the sketch of a simplified Rule 81(c)(3) presented in the agenda materials:

(3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one[1] if the party serves a demand within 14 days after:

(A) it files a notice of removal, or

(B) it is served with a notice of removal filed by another party.

[1] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after the party * * *."

If there is some discomfort with the 14-day deadline, it could be set at 21 days.

15-CV-EE: FOUR SUGGESTIONS

Social Security Numbers: Rule 5.2 allows a filing to include the last four digits of a social security number. The suggestion is that the last four digits can be used to reconstruct a full number for any number issued before the last few years. This risk was known at the time Rule 5.2 and the parallel provisions in other rules were adopted. The decision to allow the last four digits to be filed was made deliberately in response to the special need to have the last four digits in bankruptcy filings and the desire to have parallel provisions in all the rules. The Committee concluded that Rule 5.2 should not be amended unless another advisory committee believes the question should be studied further.

Forma pauperis affidavits: This suggestion is that an affidavit stating a person's assets filed to support an application to proceed in forma pauperis should be protected by requiring filing under seal and ex parte review. Other parties could be allowed access for good cause and subject to a protective order. Unsealing could be allowed in redacted form. The purpose is to protect privacy. Committee discussion recognized the privacy interest, but concluded that the proposal should be put aside. Ex parte consideration would make difficult problems for institutional defendants that confront a party who frequently files forma pauperis actions. Requiring long-term preservation of sealed papers is not desirable. Sealing is itself a nuisance. Recognizing forma pauperis status expends a public resource, conferring a public benefit. And the interest in privacy concern may be lessened by the experience that "no one has any interest" in most i.f.p. filings. The Committee voted to close consideration of this suggestion.

Copies of Unpublished Authorities: This proposal is drawn verbatim from Local Rule 7.2, E.D. & S.D.N.Y. The rule, in some detail,

requires a lawyer to provide a pro se party with a copy of cases and other authorities cited by the lawyer or by the court if the authority is unpublished or is reported exclusively on computerized databases. Discussion reflected agreement that this practice can be a good thing. Some judges do it without benefit of a local rule. But not all do, and it cannot be assumed that all lawyers do it. A lawyer will supply the court with a truly inaccessible authority, and that may entail providing it to other parties. And even large institutions may not have ready access to everything that is out there. The committee agreed that although this local rule is an attractive idea, it is not an idea that should be embodied in a national rule. The practice might prove worthy of a place on the agendas of judicial training programs.

Pro se e-filing: This suggestion is addressed by the proposals for e-filing and e-service discussed earlier in the meeting.

PLEADING STANDARDS: 15-CV-GG

This suggestion is that Rule 8(a)(2) and the appendix of forms that was abrogated on December 1, 2015 "are so misleading as to be plain error." The underlying proposition is that although the Supreme Court wrote its Twombly and Iqbal opinions as interpretations of Rule 8(a)(2), anyone who relies on the rule text will be grievously misled as to contemporary federal pleading standards. The question thus is whether the time has come to take on a project to consider whether the pleading standards that have evolved in the last nine years should be addressed by more explicit rule language. The project would attempt to discern whether there is any standard that can be articulated in rule language, and make one of at least three broad choices: confirm present practice; heighten pleading standards beyond what courts have developed in response to the Supreme Court's opinions; or reduce pleading standards to establish some more forgiving form of "notice pleading." The Committee has considered this question repeatedly. Brief discussion concluded that it is not yet time to undertake a project on general pleading standards.

RULE 6(d) AND "MAKING" DISCLOSURES

This suggestion arises from the need to read carefully through the provisions of Rules 26(a)(2)(D)(2) and 26(a)(3)(B) in relation to Rule 6(d). Rule 6(d) provides an additional three days to act after service is made by specified means when the time to act is set "after service" ["after being served" as the rule may soon be amended]. The provisions in Rule 26 direct that disclosure of a rebuttal expert be "made" within 30 days after the other party's disclosure, and that objections to pretrial disclosures be made within 14 days after the disclosures "are made." The concern is that although these provisions set times that run from the time a disclosure is "made," not the time it is served, some unwary

readers may overlook the distinction and rely on Rule 6(d). The Committee concluded that this suggestion should be closed.

15-CV-JJ: Pro se e-filing

This suggestion urges that pro se litigants be allowed to use e-filing. As with 15-CV-EE, noted above, this topic is addressed by the pending proposals to amend Rule 5.

Third-Party Litigation Financing: 15-CV-KK

This suggestion follows up an earlier submission that the Committee should act to require disclosure of third-party financing arrangements. It provides additional information about developments in this area, including materials reflecting interest in Congress. But it does not urge immediate action. Instead, it urges the Committee "to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation." Discussion noted that "this is a hot topic in the MDL world." It was noted that third-party funding raises difficult questions of professional responsibility. The Committee decided, as it had earlier, that this topic should remain open on the agenda without seeking to develop any proposed rules now.

Rule 4: Service on Individual Federal Employees: 15-CV-LL

This suggestion says that it can prove difficult to effect service on a federal employee who is made an individual defendant. Locating a home address can be hard, particularly as to those whose permanent address is outside the District of Columbia. It is not clear whether service can be made by leaving a copy of the summons and complaint at the defendant's place of federal work, in the manner authorized by Rule 5(b)(2)(B)(i) for service of papers after the summons and complaint. Two amendments are suggested: authorizing service by leaving the summons and complaint at the defendant's place of work, or requiring the agency that employs the defendant to disclose a residence address. Discussion began by observing that the Enabling Act may not authorize a rule directing a federal agency to disclose an employee's address. It also was noted that similar problems can arise in attempting to serve state and local government employees. The Department of Justice thinks that service by leaving at the defendant's place of work is a bad idea. The Committee concluded that although there may be real problems in making service in some circumstances, they cannot be profitably addressed by amending Rule 4. This suggestion is closed.

15-CV-NN: Minidiscovery and Prompt Trial

This suggestion by Judge Michael Baylson, a former Committee member, proposes a new rule for "Mini Discovery and Prompt Trial." The rule would expand initial disclosure of documents, require

responses to interrogatories within 14 days, limit depositions among the parties to 4 per side at no more than 4 hours each, allow third-party discovery only on showing good cause, allow no more than 10 requests for admissions, and set the period for discovery (including expert reports) at 90 days. Motions for summary judgment would be permitted only for good cause, defined as potentially meritorious legal issues, and not for insufficiency of the evidence. Discussion noted that a rule amendment would be required to authorize a court to forbid filing a motion for summary judgment, although a court can require a pre-motion conference to discuss the matter. Judge Pratter observed that Judge Baylson is a persuasive advocate for this proposal. It was suggested that judges should be encouraged to experiment along these lines. But it was concluded that it would be premature to consider rulemaking now. There is a big overlap between this proposal and the practices that will be explored in the two pilot projects approved by the Committee in earlier actions.

15-CV-OO: Time Stamps, Seals, Access for Visually Impaired

This set of suggestions addresses several issues that do not lend themselves to resolution by court rule. The concern that improvements are needed in access to courts for the visually impaired is particularly sympathetic. Emery Lee will investigate whether PACER is accessible.

Rule 58: Separate Document

Judge Pratter brought to the Committee's attention a Third Circuit decision that found an appeal timely only because judgment had not been entered on a separate document. The catch was that the dismissal order included a footnote that set out the district court's "opinion." The ruling that the appeal was timely reflects many other applications of Rule 58. The separate document requirement was added to Rule 58 to establish a bright-line point to start the running of appeal time. It has been interpreted to deny separate-document status to very brief orders that provide even minimal explanation in addition to a direction for judgment. For many years the result was that appeal time — and the time for post-judgment motions — never began to run in cases that were finally resolved without entry of judgment on an appropriately "separate" document. This problem was resolved by amendments made to Rule 58 in 2002. Rule 58(c) now provides that when entry of judgment on a separate document is required, judgment is entered on the later of two events: when it is set out in a separate document, or 150 days after it is entered in the civil docket.

Judge Pratter said that judges on her court have the desirable practice of providing brief explanations for judgments that do not warrant formal opinions. But that means that if a judge inadvertently fails to enter a still briefer separate document,

appeal time expands from 30 days to 180 days (150 days plus 30 days). Is this desirable? The summary of the work done in 2002, and repeated by the Appellate Rules Committee in 2008, shows deliberate choices carefully made in creating and maintaining the present structure. Rather than reconsider these choices now, perhaps the Committee can find a mechanism that will foster compliance with the separate-document requirement.

Discussion suggested that the problem is not in the rule. "We simply need to do it better." The courtroom deputy clerk should be educated in the responsibility to ensure entry of judgment on a separate document whenever the court intends a final judgment. Some circuits have managed educational efforts that have been successful, at least in immediate effect.

This agenda item was closed.

Respectfully Submitted

Edward H. Cooper
Reporter