MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 4, 2018

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts, Washington, DC, on November 1, 2018. Draft minutes of this meeting are attached as Tab B.

The Committee has no action items to report.

Amendments to Civil Rules 5, 23, 62, and 65.1 took effect on December 1.

A proposed amendment of Civil Rule 30(b)(6) was published for comment in August. Not many written comments have been received, but the level of interest shown during the development of these changes augurs a healthy level of public comment yet to come. Many witnesses have signed up to testify at the hearings scheduled for January 4 and February 8.

The information items that form the balance of this Report begin with the work of two subcommittees, the Subcommittee for MDL Litigation and the Subcommittee for Social Security Disability Review cases. Added subjects include the procedure for consenting to referral of a case to a magistrate judge for trial; proposals to expand the categories of interested nonparties to be described in the Rule 7.1 disclosure statement; and the effect of consolidating originally independent actions on final-judgment appeals.

I. Subcommittee on Multidistrict Litigation

The Advisory Committee received several proposals for rulemaking regarding MDL proceedings, mainly focused on "mass tort" proceedings. Those MDL centralizations have grown considerably in recent years, and now around one third of all pending civil cases in the federal court system are subject to an MDL order.

No Civil Rules are focused specifically on MDL proceedings, and suggestions have been made that some rules are needed to deal with these proceedings, which constitute a significant segment of the courts' civil docket.

At its November 2017 meeting the Advisory Committee formed its MDL Subcommittee. During 2018, that Subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation. That outreach effort has included participating in, attending, or listening to at least eight conferences, three of which have included Standing Committee members as participants.[1]

Meanwhile, two members of the Subcommittee completed their terms on the Advisory Committee, and three new members have recently been appointed to the Subcommittee, which now includes three MDL transferee judges.[2]

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[1] The conferences involved included the following:

Duke Law Conference on Documenting and Seeking Solutions to Mass-Tort MDLs, April 26-27, 2018, Atlanta, GA.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Finance & State/Federal Coordination Roundtable and Conference, June 4-5, 2018, Berkeley, CA. (including Judge Carolyn Kuhl)

American Association for Justice Roundtable on MDL Practice, July 10, 2018, Denver, CO.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Conference on Issues Roundtable, Aug. 8-10, 2018, Atlanta, GA.

Lawyers for Civil Justice Conference on MDL Practice, Sept. 14, 2018, Washington, DC

New York University Conference on "MDL at 50," Oct. 12-13, 2018, New York, NY (including Judge Amy St. Eve)

MDL Transferee Judges Conference, Oct. 29-31, 2018, Palm Beach, FL (including Judges Amy St. Eve and Jesse Furman)

George Washington University Law Center Roundtable on Third Party Litigation Funding, Nov. 2, 2018, Washington, DC

[2] The current membership of the Subcommittee includes Judge Robert Dow (N.D. Ill), Chair, Judge Joan Ericksen (D. Minn.), Judge Robin Rosenberg (S.D. Fla.), Virginia Seitz (Sidley & Austin), Ariana Tadler (Milberg Tadler), Helen Witt (Kirkland & Ellis), and Joseph Sellers (Cohen Milstein Sellers & Toll).

The Advisory Committee's November 2018 meeting included an extended discussion of the issues identified by the Subcommittee and possible rule responses to them, as reflected in the minutes of that meeting in this agenda book. That discussion identified a number of further issues that the Subcommittee will continue to pursue, with the assistance of the Federal Judicial Center. Already the Subcommittee has received additional valuable material since the November meeting. Further work is likely to involve surveying judges, and perhaps also lawyers.

Though much work has been done and more is under way, this project remains at an early stage. As the questions posed in the remainder of this report show, the Subcommittee remains uncertain about various issues that have been raised and also about whether useful rule responses exist. This memorandum seeks to introduce the wide variety of concerns that have arisen. It also invites Standing Committee input on the importance and appropriateness for rulemaking of the topics on which the Subcommittee has focused:

A. Winnowing unsupportable claims
B. Interlocutory appellate review
C. PSC formation and funding
D. Trial
E. Settlement promotion/review
F. Third Party Litigation Funding

A. Winnowing Unsupportable Claims

There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations – perhaps particularly those involving claims of personal injuries resulting from use of pharmaceutical products or medical devices – a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20% to 30%, but in some litigations it may be even higher.

Whether these problems have manageable rule-based solutions remains unclear, however. Even if a rule-based solution could be devised, it might create an undue risk of intruding too much on a transferee judge's latitude to devise an appropriate treatment for a given MDL proceeding.

The source of these problems might be called the "Field of Dreams" problem, or "If you build it, they will come." The unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. Were there no MDL centralization, arguably, this would not be a problem. Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for the MDL centralization order, many of those claims might not have reached court at all.

The reasons offered to explain this phenomenon vary. One is the effect of "1-800" lawyers and "claims generators" who support an atmosphere of "get a name, make a claim." From the perspective of some, these lawyers are not complying with Rule 11. Instead, they are taking a flier in the expectation that there will be a settlement in the MDL transferee court in which they can get "inventory value" for their claims. It may be that this reported inflation of the number of claims results in part from the reality that most MDL cases settle before remand; were remand for

individualized litigation the normal result of filing a claim, the frequency of unsupported claims might decline.

Another explanation offered is that amassing a large inventory of claims can support a lawyer's quest for appointment to a leadership position in the MDL – "I've got 3,000 cases, so I should be on the Plaintiffs' Steering Committee (PSC)."

Other reasons for the submission of unsupported claims have also been offered. One is inability to get needed records. For example, when the question is whether a person has been implanted with a certain medical device, it is usually not difficult to determine whether the device in issue in the litigation is the same one. But in other instances it may be difficult to make a similar determination. Determining which over-the-counter drug the client took may be a challenge. Even with prescribed medications, it may be difficult to determine whether the client was exposed to the challenged product. For example, in one litigation the problem turned out to be about a tainted batch of otherwise good medicine, but it was very difficult for plaintiff's counsel to find out which batch was the source of the medication used by a particular patient.

In some situations, it appears, the defendant may have records indicating whether given individuals got the specific medical device or got medication from a given batch that the plaintiff's attorney can obtain only with great difficulty.

Another frequently offered explanation is that the statute of limitations forces responsible lawyers to make claims before they have completed a full examination of the client's circumstances. What might be called protective filings can be a legitimate response to this sort of problem, though such filings should be followed by prompt further investigation to verify that the claimant actually used the product in question. Whether that further investigation routinely occurs is uncertain; some assert that certain lawyers often make claims and do nothing more.

A variant of the limitations concern is that a given client has in fact used the product in question but has so far not suffered a negative outcome from use of the product. Attorneys representing the "healthy" user of the product may feel they must file promptly for fear failure to do so will defeat the client's claim later should full-fledged disease or injury emerge. In that situation, the very prominence of MDL orders might operate to trigger the statute of limitations even though no serious disease or injury has occurred with this plaintiff. Perhaps limitations should not start running until the client actually manifests the condition, but counsel may fear the running of limitations will not be suspended.

A related reason that has been offered is that scientific or medical understanding of all the adverse and actionable consequences from use of or exposure to a certain substance or device may be revealed only over time. Thus, although the current litigation is about condition X, it is not clear that there is such a claim for condition Y or Z. Failure to make a claim now on behalf of those suffering from conditions Y and Z may, however, create a risk of being barred later if proof emerges supporting such a claim based on condition Y or Z. So the solution is to make a claim now. Perhaps the ideal solution to this problem would be a "split" cause of action, but the pertinent tort law may not offer that solution.

Confronting this range of situations, defendants complain of what they perceive to be an "MDL exception" to operation of the Civil Rules. In an individual litigation, they could challenge the plaintiff's allegations as insufficiently specific about the medication/device used, or about the

resulting medical condition. Alternatively, they could rely on initial disclosure and prompt discovery to support a summary judgment motion to knock out claims that can't be supported.

But in MDL mass tort litigation, those tools may be unavailable to defendants. The transferee judge may focus at first on the common issues rather than the unique circumstances of each claimant. That orientation seems consistent with the basic goal of the statute. Detailed examination of the circumstances of each claimant might prove an enormous and potentially unmanageable distraction to the judge.

That distraction might also appear to require unnecessary work as well. For example, assume that the defendant has some sort of preemption defense that would be a "kill shot" with regard to all the claims, no matter how supportable they might be in terms of having used the drug in question and suffered the adverse consequence in issue. Would it not make sense for the court then to begin with a focus on that possibly dispositive issue rather than undertaking an individualized review of each plaintiff's circumstances?

This sort of concern underlies some resistance to any required early triage of individual cases. Insisting on early triage, no matter what, may hamstring the transferee judge, who might otherwise favor focusing early energies on issues of general causation, preemption, or other dispositive matters.

More generally, questions have been raised about how important it is to deal early, even if not first, with winnowing individual claims. Assume that it's likely 30% of the claims will prove not to be supportable. (Note that the fact a given plaintiff ultimately loses does not mean this was an "unsupportable" case, for many who have used the product involved and suffered the malady involved in the litigation may nonetheless fail to prove causation.) Is it urgent to find out which cases fall within the 30% up front?

One could say that, even if such sorting could be expeditiously done, the court and the parties would still have to deal with the remaining 70% of the claims. So in terms of efficient use of the court's and the parties' time and energy, it may be preferable to focus on all claims at the outset. One could even argue that an effort to identify factually unsupportable claims is inconsistent with the thrust of MDL centralization, which is designed to deal mainly with common issues rather than individual circumstances of individual cases.

One reason for treating early screening as urgent that has been advanced has to do with the adverse consequences of having what appear to be large numbers of claims when the numbers should be considerably smaller. For some medical products, there is a requirement of making a report for each reportedly adverse incident, and it appears that making a claim in litigation often is treated as triggering a requirement to report.

Separately, the volume of claims may bear on what must be included in SEC filings and reports to shareholders. Beyond that, it is reported that publicity about litigation can prompt patients to stop taking their medications or to forgo needed treatment. It may also prompt doctors to stop using the most effective treatment.

At least in the really large-volume MDL proceedings, however, it is not clear that winnowing the 30% of claims that are not supported is likely to avoid these sorts of adverse consequences. Maybe reducing the number by 30% will sometimes reduce the total below some sort of reporting

trigger, but it is not clear that is often true. Indeed, even if the 30% are dismissed with alacrity, the deterrent impact on patients or doctors may already have occurred. Moreover, to the extent that some of these concerns relate to lessening corporate reporting burdens, that may not be a legitimate rulemaking objective.

Against this background, a number of specific responses have been suggested:

Heightened pleading requirements for mass tort plaintiffs: There have been suggestions that some sort of heightened or particularized pleading requirement (like the one in Rule 9(b) for fraud cases) should be applied to mass tort plaintiffs. This might be different from plaintiff fact sheets (discussed below). Such a pleading requirement for these tort plaintiffs that does not apply to other tort plaintiffs (much less plaintiffs with non-tort claims) may be difficult to justify unless there is a way to focus it solely on meritless or doubtful claims drawn by what one might call the magnetic pull of the MDL litigation.

At least some supporters of a pleading upgrade seem to be focused only on the claims presumed to result from the MDL centralization; thus some submissions also emphasize the activities of "claim generators" who may provide some lawyers with large inventories of claimant names. Taken in this light, it seems that this effort is designed to counter the "MDL exception" behavior that defendants may regard as depriving them of a meaningful opportunity to challenge individual claims in MDL litigation and thereby inviting the filing of unsupported claims.

Focusing pleading changes only on post-centralization claims would presumably not provide a basis for applying any such pleading requirements to cases already on file at the time of an MDL transfer order, or perhaps any filed in a state court. Indeed, it seems that at least some plaintiffs' lawyers file in state court partly to avoid the MDL transfer that would occur if their case were in federal court; it is hard to see these state-court claimants as "free riders" in the MDL proceedings. Applying different standards to different individual cases before the MDL transferee court could complicate that court's task. Moreover, prescribing pleading standards applicable only to tag-along cases originally filed in federal court could conceivably complicate the task of the transferor court after remand, when that occurs. To the extent the "MDL exception" attitude prevails among transferee judges, it may be that pleadings challenges by defendants would occur after remand.

Plaintiff Fact Sheets (PFS): In many medical products litigations the court directs the plaintiffs to fill out PFSs designed to determine whether each plaintiff has actually used the product involved and manifested the condition on which the litigation is focused. Some of these documents are quite elaborate, requiring time-consuming efforts to complete. Presumably defendants must then spend time and effort analyzing the PFSs once they are completed.

These burdens on the parties may not impose significant burdens on the court. We have heard that some MDL transferee courts have adopted administrative processes to screen out claimants who don't complete and return the PFSs; dismissal of those claims involves only a modicum of work for the court.

Carefully scrutinizing the fact sheets that are completed could create burdens of quite another dimension for both the court and the parties, however. It might lead to something like individualized 12(b)(6) motions or "mini" summary-judgment motions. That could lead to further exchanges regarding "supplemental" PFSs from those whose fact sheets are initially challenged. In a way, such motions could replicate what would happen in individual litigation, but as part of the MDL

proceeding. Whether this individualized decision-making would be worthwhile in the MDL context could be debated, especially if remands become more common.

Another complication from the rulemaking perspective is that there likely is no "generic" fact sheet suitable for all litigations, or even all pharmaceutical or medical product litigations. Instead, it appears that case-specific fact sheets are the usual method of proceeding. So a rule likely could not provide many specifics on what a fact sheet should address in a given case.

Future work should include gathering more specifics about actual experience of MDL transferee judges with PFS procedures. This effort could shed light not only on whether a PFS procedure is routine in MDL centralizations, but also about specifics of judicial experience with this device, including when claimants are to submit information, whether they must submit "evidence" to support their claims at that point, whether a PFS procedure imposes significant burdens on the court, and whether such a procedure in fact has resulted in the dropping of a significant number of claims. Additional topics may include the logistics of submitting and reviewing PFSs and the ways in which this effort can support a "triage" of claims before the MDL court.

Defendant fact sheets: It appears that, in at least some litigations, defendants are also called upon early to provide some specified information. If the PFS rulemaking idea is seriously pursued, it might be even-handed also to consider a rule provision concerning information defendants should provide. But as with PFSs, it seems that the specifics of any such early requirements for providing information depend a great deal on the nature of a given litigation.

Expanded initial disclosure: Something along the lines of a PFS approach might be built into Rule 26(a)(1). That rule already calls for every party to disclose information about witnesses and documents it may use to support its claims or defenses. A clarification could possibly make more specific disclosures mandatory in certain cases. It might also make uniform a practice now evidently subject to divergent practices of individual transferee judges. One suggestion calls for adding a requirement to the initial disclosure rule that, in MDL personal injury proceedings involving medical products, plaintiffs specify the drug or medical implement they used (including its maker) and also specify the harm they claim to have suffered, along with documentary or electronic evidence supporting these assertions.

But at present the consequence prescribed in Rule 37(c)(1) for a failure to disclose is different from what the proponents of this amendment seem to desire – something like immediate dismissal for those plaintiffs who fail to provide the required information. So perhaps another provision could be added to Rule 12(b) or 12(c) or perhaps Rule 56 to authorize an early motion based on what the plaintiff disclosed (or failed to disclose).

Alternatively, it might be possible to build a mechanism directly into a Rule 26(a)(1) amendment leading to dismissal. That may be somewhat out of step with the general cast of Rules 26-37; ordinarily a merits sanction or other adverse court action in regard to discovery can only occur after the court has ordered compliance and the party has failed to obey the order. Motion practice is the norm. It may be that Rules 36 or 37(d) could provide a model for such a provision, however.

Yet another possibility would resemble H.R. 985 – to impose on the court an obligation to review and determine the adequacy of each such disclosure.[3] Such a burden might ask too much of the court, and might also be out of step with the usual "adversary system" requirement that the parties seek relief from the court rather than requiring that the court undertake the review on its own.

Expanding the role of Rule 11: The proponents of early screening emphasize that the unfounded claims they want winnowed out result from failures by some plaintiff's counsel to satisfy their Rule 11 obligations. Arguably, one could therefore focus on Rule 11 as a place to install a screening mechanism. There certainly have been dramatic examples of using Rule 11 to respond to unfounded claims. *See, e.g.*, *In re Engle Cases*, 288 F.Supp.3d 1174 (M.D. Fla. 2017) (sanctions of over $9 million imposed on lawyers who were found to have filed 1250 unsupportable claims, some of them on behalf of plaintiffs who did not even know the cases had been filed).

Such a provision might focus on lawyers who have filed more than a certain number of claims and impose on them a duty to show that they have complied with Rule 11(b)(3). That idea might be somewhat at odds with Rule 11(c)(2), which provides a safe harbor by requiring that a motion for sanctions be served 21 days before it is filed, although amendment or dismissal could be allowed before the time set for the showing, which could be 21 days or more after filing. (Note that the Lawsuit Abuse Reduction Act, also passed by the House of Representatives in March 2017, contains provisions that would change Rule 11 in all cases.) On the other hand, something along this line might be regarded as consistent with Rule 11(c)(3), which already authorizes the court to enter an order to show cause why "specifically described" conduct has not violated Rule 11(b). It does not seem that a court would usually be justified in concluding that all claims by plaintiffs in MDL mass tort litigation support such treatment under Rule 11(c)(3).

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[3] H.R. 985, the Fairness in Class Action Litigation Act of 2017, was passed by the House in March 2017, and remains pending in the Senate. Though the bill contains a number of provisions about class actions, Section 5 of the bill is about MDL proceedings and would add new provisions to 28 U.S.C. § 1407, the multidistrict litigation statute. Several of these additions bear on topics also under consideration by the MDL Subcommittee:

> § 1407(i), entitled "Allegations Verification," would require that plaintiffs' counsel submit to the transferee court, within 45 days, evidentiary support for each claim and that the transferee judge, within 30 days of submission, enter an order determining whether the submission is sufficient. If it is not, the court is to dismiss without prejudice and the plaintiff has 30 days to tender a sufficient submission, failing which the action is dismissed with prejudice.
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> § 1407(j) would prohibit trial by the transferee judge unless all parties to the action consent to trial.
>
> § 1407(k) would require the court of appeals for the transferee district to accept an interlocutory appeal if an immediate appeal "may materially advance the ultimate termination of one or more civil actions in the proceedings."
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> § 1407(l) would direct that claimants in MDL proceedings "receive not less than 80 percent of any monetary recovery obtained," and would grant the transferee judge jurisdiction to decide any disputes about compliance with this requirement.

Rule 11 litigation has not been viewed as a positive feature of most cases. Adopting this approach would seem inconsistent with at least some comments at conferences during this year. More than once, it has been stressed that an effective screening program should provide the affected lawyers with an "exit strategy" that is not harmful or costly to them. Shifting to a sanctions mode does not seem to move in that direction. And, as the $9 million sanction mentioned above shows, the present rule provides a basis for responding to flagrant failures to perform the investigation required by Rule 11(b)(3).

Relying on the Plaintiffs' Leadership Committee (PLC): Another theme that has emerged is that leadership on the plaintiff side might be able to facilitate this winnowing. It is clear that the plaintiff-side lawyers the Subcommittee has talked with recognize that other lawyers file cases without adequate investigation and, sometimes, in hope of a free ride to a profitable settlement. At least on occasion, leadership counsel on the plaintiff side may be able to prompt other lawyers to remove those cases from the mix. One way that was mentioned was that leadership could say it was not intending to prepare expert causation support for claims of plaintiffs with certain experiences or certain conditions. In the California state courts, more generally, it has been said that the courts expect the PLC members to perform this service.

Selection and appointment of the PLC is addressed below (Part C). Adding such a responsibility to the others more often imposed on lead or liaison counsel could be considered. Perhaps success in handling this responsibility could be a factor in determining fee awards from common benefit funds. Perhaps it could be a factor in determining whether to reappoint originally designated leadership in MDLs in which the members of the PLC are term-limited and subject to reappointment.

Master complaints/answers: One aspect of the "MDL exception" objection is the use of master complaints. The Manual for Complex Litigation contains an exemplar case management order with such provisions. *See* Manual (4th) § 40.52 ¶ 6 at 774-75. Such documents are highly likely to be written at a level of such generality that there is no way for defendants to challenge the claims of individual plaintiffs. Some defendants urge that this generality permits claimants with unsupportable claims to evade individualized attention. It appears that, at least in some instances, MDL courts using master complaints may initially require nothing more of claimants than the pleading equivalent of "count me in," deferring individualized details until later. One could argue that such pleadings do not comply with Rule 8(a)(2), which requires a "showing that the pleader is entitled to relief." The exemplar case management order in Manual (4th) instead says (at 777): "No motion shall be filed under Rule 11, 12, or 56 without leave of court."

Nonetheless, proposals to permit master complaints and answers have been made by many, including those advocating defendants' interests. The rules presently contain no reference to "master complaints" or "master answers." One suggestion has been to add references to these documents to Rule 7(a). If Rule 7(a) were so amended, a provision in Rule 8 or Rule 12 might invite motions to require submission of individual complaints. But such a provision might seem in tension with the idea of a master complaint and answer, which might themselves be designed to deflect a preoccupation with the specifics of individual cases and variations in individual allegations. Perhaps a Rule 7(a) amendment could specify – perhaps in the Committee Note – that any plaintiff joining a "master complaint" must also provide individualized specifics of the sort sometimes required in a PFS. But that could make "master complaints" ungainly or tend to defeat a possible purpose for them – to avoid immersing the court in those individual details and flooding the clerk's office with filings. Without such a requirement, it might be said that amending Rule 7(a) puts the rules'

imprimatur on exactly the sort of generalized pleading practices the proposal seems designed to change.

Further work may shed light on the frequency of master complaints in MDL proceedings, and the manner in which these documents are used. For example, it may be that individual plaintiffs may "adopt" some but not other claims from the master complaint in individual filings or submissions, and there may be experience with methods for screening such individual plaintiff submissions.

Filing fees: Another idea that has been proposed is to require each plaintiff to pay a full filing fee to deter unsupported claims. Rule 20 fairly flexibly permits joinder of plaintiffs, and the federal filing fee statute presently requires that the fee be paid for each action, not for each plaintiff. *See* 28 U.S.C. § 1914(a). Reportedly, when agreements permit "direct filing" of cases in the MDL transferee court (avoiding the step of filing in a transferor court and becoming a tag-along action), separate filings and fees are sometimes required. Perhaps a rule could somehow make a similar pay-per-plaintiff approach mandatory in tag-along cases involving Rule 20 joinder of multiple plaintiffs after MDL centralization has occurred, though that might require a statutory change. Further investigation of whether MDL transferee judges are now requiring individual payment of filing fees needs to occur.

Whether this approach would produce helpful results is uncertain. So also is the proper way to handle it in removed actions. The current statute says that the court must "require the parties instituting any civil action, whether by original process, *removal* or otherwise, to pay a filing fee of $350." 28 U.S.C. § 1914(a). So it appears that the removing defendant must pay the fee. If all a plaintiff lawyer has to do to avoid the federal filing fee is to file in state court (perhaps joining dozens of plaintiffs in one suit, as allowed under state court rules), the state-court filing fee might seem modest if divided among 50 or 60 plaintiffs, and the change would seem not to achieve much. It might even mean that the removing defendant would have to pay a per-plaintiff fee to remove. But perhaps filing in state court would create risks for plaintiff's lawyers who *want* to be tag-alongs in federal court, because defendants might not remove and instead leave them to litigate their cases in state court.

Further work may shed light on the frequency of requiring each claimant to pay an individual filing fee in MDL proceedings, and the effect of that requirement on the rate of unsupportable claims presented.

Adding screening as a mandatory topic in MDL cases to the 26(f) conference and 16(b) order: A more flexible and promising approach might be to add discussion of a claim-screening method like the PFS as something required in certain litigation under Rule 26(f) and also adding it to Rule 16(b) as a matter for judicial attention in such cases.

This method could adapt to the specifics of individual cases. It would not be a requirement that any judge use such screening, but could provide the transferee judge with sufficient information to enable the judge to decide how best to address the concern with unfounded claims. Due to its flexibility it might avoid many potential drawbacks of the other ideas discussed above while introducing early consideration of these issues into the centralized proceeding.

On the other hand, it is likely that many cases enter the MDL proceeding only long after the time for the Rule 26(f) conference and Rule 16 order have passed. Perhaps there is a way to adapt

the existing 26(f)/16(b) sequence to the MDL setting. Nothing in Rule 16(b) or (c) would stand in the way of such orders, and Rule 16(c)(2)(L) seems to authorize such provisions. Perhaps the screening idea could be added to that part of Rule 16(c).

B. Immediate Appellate Review

Although the ordinary starting point is that interlocutory appeal is not allowed in individual cases, many urge that MDL proceedings should be treated differently because they involve so many claims and parties, and last much longer than individual tort cases. Putting those factors together suggests that some interlocutory rulings in MDL proceedings may be much more significant than similar rulings in stand-alone litigation.

Nonetheless, a preliminary question is whether MDL proceedings are really so distinctive that a special rule for interlocutory review would be appropriate. The model advanced is Rule 23(f), added in 1998 to permit immediate review of class certification orders. The Committee Note accompanying that amendment noted that other possible avenues for immediate review existed, but added:

> [S]everal concerns justify expansions of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the cost of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than run the risks of possibly ruinous liability.

Whether orders in MDL proceedings regularly raise similar issues is not clear. Class certification has long been recognized as a central and critical decision in cases governed by Rule 23. It is surely not true that all orders in MDL proceedings are similarly central. Among the sorts of orders urged to justify immediate review are rulings on preemption, personal jurisdiction, and admissibility of proposed expert testimony under the *Daubert* standard.

One concern regarding Rule 23(f) was a worry that, before it provided an avenue for review of certification orders, the courts of appeals actually had insufficient opportunities to address these Rule 23 issues and provide guidance to district courts. It is not clear that there is a similar problem with the issues advanced as warranting interlocutory review in MDL proceedings. There seem already to be many appellate rulings on the issues suggested for interlocutory review in MDL proceedings, and accordingly less concern about facilitating "law-making" on these topics by the courts of appeals. And at least some of these topics (*Daubert* is an example) seem to involve such broad trial court discretion that appellate review is not likely to make new law or lead to many reversals.

One objection to current practice is that there sometimes seems to be asymmetrical access to immediate review. For example, if defendants prevail on preemption grounds or obtain an order excluding expert testimony critical to plaintiffs' cases, that may lead to entry of an appealable judgment. But if plaintiffs prevail on such motions, appeal could not follow absent special circumstances. Of course, that is generally true with motions to dismiss or for summary judgment in all litigation, not just MDL proceedings.

Special circumstances might often support certification of such rulings for immediate review under 28 U.S.C. § 1292(b). Review under that statute depends on a certification by the district judge that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Some who have spoken during events have urged that § 1292(b) certification is not granted sufficiently frequently in MDL proceedings, but firm data are as yet not available, nor easy to come by.[4] It may be that the transferee judge is best positioned to evaluate the utility of an immediate appeal (something one could view as inherent in the MDL process), so that § 1292(b) could be an effective solution to the problems identified.

The proposals advanced so far, however, are premised on the idea that § 1292(b) has not proved equal to the task, so that a rule should provide an additional avenue for appeal of at least some rulings in MDL proceedings, as Rule 23(f) does regarding class certification decisions. Some proposals seek to focus on district court rulings that would affect (perhaps resolve) a "substantial portion" of all cases in the MDL proceeding, though devising a rule that would draw a workable line of this sort could prove challenging.

One special feature of MDL proceedings that has been mentioned is that the absence of immediate review may in some cases deter or hobble settlement efforts. For example, if the defendant is convinced that the claims should be barred by preemption, it may refuse to consider settling a multitude of claims on the basis of a district court decision without first obtaining appellate review. Whether a court of appeals decision affirming the district judge's ruling would materially affect settlement prospects would depend on the case. As noted below, if there are circuit conflicts on an issue addressed in such an appeal, and remand to a district in a different circuit is a possibility, the decision of a given court of appeals may not be regarded as dispositive.

Besides the basic question whether there is a need for expanding opportunities for immediate appellate review, several additional issues have emerged:

Mandatory v. discretionary review: During its recent review of Rule 23 issues, the Committee received a number of submissions arguing that courts of appeals have not used their discretion to grant review under Rule 23(f) sufficiently frequently. Some urged that Rule 23(f) be rewritten to require immediate review of all orders granting or denying class certification. H.R. 985 has a provision requiring courts of appeals to grant such review, described in footnote 3 above. To the extent immediate review is required for specified types of orders in MDL proceedings (as discussed below regarding types of orders subject to mandatory review), one consequence of mandatory review for certain types of orders may be to provide an incentive to those who wish to trigger review to style their motions as falling within the enabled group.

Role for the district court: Proposals have been made that a new rule, like Rule 23(f), authorize a direct petition to the court of appeals rather than (as in § 1292(b)) requiring or even inviting the district court to opine on whether immediate review would contribute to effective resolution of the pending cases. One response to these proposals is that it will be difficult for the

[4] Since the November Advisory Committee meeting, the Subcommittee has received a very helpful report about § 1292(b) experience in MDL litigation. *See* letter from John Beisner, Nov. 21, 2018, no. 18-CV-BB, available at www.uscourts.gov. It remains to be seen, however, whether this report actually supports immediate appellate review.

court of appeals to determine whether to grant review, assuming that the "enabling" features of immediate review are important to the appellate court. A suggestion, then, has been that any appealability rule provide explicitly that the district court be invited to express views on the utility of immediate review, or invite the court of appeals to solicit the district court's views on the desirability of immediate review. Either way, the court of appeals would benefit from the district judge's evaluation of the legal issues and the impact of an immediate appeal on further proceedings. The court of appeals could retain discretion to accept an immediate appeal no matter what the district court's view.

Identifying orders by legal type or topic: Rule 23(f) deals only with class-certification orders, which are a relatively discrete category. Class certification orders in MDL proceedings would qualify. But the present proposal is to create new grounds for appeal of orders by type. The types mentioned most frequently are *Daubert*, preemption, and personal jurisdiction orders. Whether these types of orders regularly involve issues of such importance in MDL proceedings that immediate review should be permitted or required is uncertain. Whether other orders (e.g., motions to remand for lack of diversity jurisdiction) should be added is also unclear.

Identifying orders by focusing on how many cases are affected by them: An alternative (or additional) way of identifying orders subject to a new rule would be to specify that they must affect (be central to?) a specific number of cases. Such a standard might, however, be difficult to apply (particularly for a court of appeals) and invite satellite litigation.

Focusing on orders that are subject to de novo review: At least some orders entered in MDL proceedings, *Daubert* decisions, for example, are reviewed under an abuse of discretion standard. In the abstract, the low likelihood of reversal might make these rulings unsuitable for immediate review, while rulings on preemption and the legal aspects of personal jurisdiction, subject ordinarily to de novo review, might be more suitable. But that does not distinguish *Daubert* rulings from orders reviewable under Rule 23(f), since class certification decisions are also reviewed for abuse of discretion, although the measure of discretion may be different.

Possible timing tension with early screening of unsupportable claims: Part I discussed possible responses to the problem of unsupportable claims in MDL proceedings. As noted there, any requirement that such screening be the transferee court's first task may sometimes seem unwarranted because another issue such as preemption might defeat all the claims, whether the claimants used the product or not. In terms of advancing the MDL proceedings, then, a new appellate review possibility and an early screening requirement might be incompatible.

Increasing delay in MDL proceedings: The proposals made so far do not call for staying proceedings in the district court pending interlocutory review. But the more one stresses the centrality of the orders involved to justify immediate review, the greater the tendency may be to await the results of that review before investing very considerable additional time and effort in the district court proceedings. The Subcommittee has been told that in states in which frequent interlocutory review is available (e.g., New York and Louisiana), such review does produce considerable delay in resolution of cases. Delays in the federal MDL forum may, in turn, affect the willingness of state courts entertaining related litigation to await the results of, or even coordinate with, the federal proceedings.

Coping with delay issues by directing the court of appeals to provide "expedited" review: One reaction to the delay concern has been to urge that a rule direct the court of appeals to provide

"expedited" review. That seems an odd thing for a Civil Rule to do. Particularly since the courts of appeals often have heavy dockets of criminal cases, it also seems odd to try to advance civil cases in front of them.

Volume of appeals: The volume of appeals, were interlocutory review authorized by rule, would surely depend in part on whether review is mandatory or discretionary. One estimate presented to the Subcommittee is that creating this additional route for appellate review would produce only about one or two additional appeals per year for each Circuit. But if the report that there are 24 mega MDLs is accurate, the estimate may imply an appeal in each of them every year, which may be high. Though it is impossible to predict with confidence what the caseload impact would be, that may be an additional consideration.

"Binding" effect of appellate review: Orders for which immediate review has been urged include issues (e.g., preemption, *Daubert*) on which there may be circuit conflicts, or parties may argue that there are such conflicts. Given that cases are supposed to be returned to the transferor court (and circuit) after the pretrial proceedings are completed by the MDL court, questions may be raised about whether the appellate rulings of the court of appeals for the transferee court would be binding upon remand. Would that "binding" effect mean that the transferor district court or circuit court could not apply its own circuit law after remand of a case? Initial reactions have been that this is not a problem due to the law of the case doctrine, but further attention may be necessary. For discussion of these issues, *see* 18B Wright, Miller & Cooper, Fed. Prac. & Pro. § 4478.4 at 774-80; Marcus, Conflicts Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677 (1984).

The possibility that interlocutory appellate rulings would not be binding after remand might affect the impact of immediate review on settlement prospects. Even at present, at least in some instances, there can be a dispute about whether cases should be remanded following the transferee court's exclusion of the testimony of plaintiffs' expert witnesses. Cf. In re Lipitor Marketing, Sales Practices and Liability Litigation, 892 F.3d 624, 647-49 (4th Cir. 2018) (rejecting plaintiffs' argument in favor of returning cases to the transferor districts for resolution of the issue of specific causation and upholding summary judgment against all plaintiffs).

Need to involve Advisory Committee on Appellate Rules: Any serious consideration of providing by rule for immediate review of interlocutory orders in MDL proceedings would have to be coordinated with the Appellate Rules Committee. This is not a reason not to proceed, but is worth noting.

C. Formation and Compensation of PSC

In 2003, Rule 23(g) was added to provide guidance to courts in making the important choice of class counsel. In part, that amendment drew on experience in appointing lead and liaison counsel in MDL proceedings. But there is no rule saying Rule 23(g) criteria apply to selection of leadership counsel in MDL proceedings.

In MDL litigation, the Manual for Complex Litigation (4th) (§§ 10.22-10.225) provides guidance on appointment of lead and liaison counsel. Sections 14.221-14.224 of the Manual provide guidance specifically about handling attorney fees and expenses for counsel involved in such common benefit activities. That guidance includes recommendations that early and clear guidelines be established for reporting to the court on the level of attorney activity, and for cost reimbursement.

The Subcommittee has been informed that many experienced MDL transferee judges have developed sophisticated methods of guiding and monitoring counsel appointed to such positions. One method is appointment of leadership counsel for a one-year term, with renewed appointment frequent but not assured. Another technique is appointment of a Special Master delegated responsibilities for monitoring both the amount of attorney time and the amount of attorney expenditures on a regular basis.

Rule 23(g)(4) provides that class counsel have a duty to represent the best interests of the class members (not only the class representative). It does not appear that in MDL proceedings a similar Civil Rule applies (though Rule 23(g) would apply if class actions were included in the MDL proceeding). Leadership counsel likely have their own clients and also may effectively act on behalf of other plaintiffs who have their own lawyers (known sometimes as IRPAs – individually represented plaintiffs' attorneys). There may be a concern that leadership counsel are actually "representing" the other lawyers more than other clients. Whether there is something like a fiduciary obligation of leadership counsel to other plaintiffs has been debated. For a recent discussion of these issues, *see* Herman, Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent, 64 Loyola Law Review 1 (2018). It is not clear that civil rules could usefully contribute to resolving such questions. Matters of professional responsibility generally are left to regulation by the states. But court rules might properly define the role of court-designated lead counsel in federal MDL proceedings.

Rule 23(h) provides guidance for attorney-fee awards in class actions. Somewhat similar issues arise in MDL proceedings, with the added complication that attorney-fee payments can come from numerous individual settlements (with the individual clients of IRPAs). "Common benefit funds" address this issue, and have become commonplace. The Subcommittee has been told that judges employ percentages from 2% to 12% of each settlement to fund the common benefit fund. It seems that the contribution ordinarily comes from the IRPA's "share" of the settlement. The allocation of the common benefit funds, in turn, appears to be handled in a variety of ways, and may also involve a special master's assistance.

Going forward, a key question is whether there is any reason to consider rules or even guidelines of some sort about these issues. If there are serious problems, it is not clear to the Subcommittee how they might be solved by a rule.

One recurrent concern, however, is that there is something of an "inside baseball" aspect to existing practices. *See* Burch & Williams, Repeat Players in Multidistrict Litigation: The Social Network, 102 Cornell L. Rev. 1445 (2017) (describing and explaining the reappearance of a small number of lawyers in a large number of MDL proceedings). The Subcommittee has been told that transferee judges are aware of this concern, and are attempting to respond to it. Again, a rules-based solution to this problem is not apparent.

A related concern is that members of a PSC are often expected to contribute considerable sums to pay out-of-pocket costs of the litigation. That fiscal need may hamper efforts for diversity in leadership roles. (One possible method for "new entrants" into leadership is to rely in part on third party litigation funding, addressed in part F below.)

D. Trial Issues

It may seem odd that trial issues are included in a discussion of MDL practice, since the statute limits transfer to "pretrial" management and requires remand once that process is complete. For some time, transferee judges relied on 28 U.S.C. § 1404(a) to enable them to transfer cases for all purposes (including trial), but the Supreme Court rejected that practice in Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

Despite *Lexecon*, trials in MDL transferee districts have continued to occur, often by consent when trial would not otherwise be possible. Consent can address such issues as personal jurisdiction and venue. H.R. 985 includes a provision that would forbid trial in transferred cases unless all parties consent. And there have been academic calls that early remand should become the norm. *See* Burch, Remanding Multidistrict Litigation, 75 La. L. Rev. 399 (2014).

Bellwether trials: A recurrent effort in some MDL centralizations is to arrange bellwether trials as a means of informing the parties about the strengths of cases, perhaps thereby to further settlement negotiations. The Subcommittee has heard numerous expressions of skepticism about the value of bellwether trials. One concern is that the process of selection may not yield "representative" cases for trial. Another is that it may happen that cases selected for trial disappear (perhaps due to voluntary dismissal of claims that turn out to be unsupported or settlement of strong claims), thereby skewing those ultimately tried despite a satisfactory initial selection process.

Such trials in MDL proceedings have become expensive propositions. The Subcommittee has been informed that – at least in pharmaceutical and medical device MDL litigation – it is unusual to be able to try such cases for less than $1 million in out-of-pocket costs (not including attorney fees). Given the potential stakes, the attorney fees may be larger.

There have been few proposals for rule changes addressing such trials, however. One early proposal was that transferee judges enlist other judges (perhaps in the same district) to preside over such trials so that the entire burden of trial does not fall onto one judicial officer. In some instances, transferee judges have assembled "trial packets" that other judges can use to become "trial ready" for purposes of presiding at such trials. Though this practice may be salutary, particularly in large districts, it does not seem suitable for inclusion in a rule.

Limiting joint trials to cases involving injuries to the same person or property: Lawyers for Civil Justice has proposed an amendment to Rule 20(a) that would permit joinder of claims for injury to person or property only when the parties' claims are all based on an injury to the same person or property. If applied rigorously in MDL cases, that joinder limitation would seem consistent with the idea of requiring separate filing fees from each plaintiff.

But this proposal does not appear to be limited to MDL proceedings. Applied to the general docket, this joinder limitation could affect many cases. Consider a bus accident in which many passengers are injured and want to sue the bus company. Under Rule 20(a) as now written, they could sue as co-plaintiffs because their claims all arise out of the same occurrence. As written, the proposal seems to require that each file a separate suit. If that were required, it is likely the court would nevertheless treat them as "related cases."

It may be that a proposal could be directed to combined trials, not initial joinder. Something along these lines might be added to Rule 20(b), which already addresses "an order for separate

trials." This rule and Rule 42 could perhaps be amended to require separate trials as proposed by LCJ, at least in MDL proceedings, although it is not clear what the benefit would be. But absolutely prohibiting multi-plaintiff trials could hamstring the MDL transferee court.

Forbidding trial unless all parties consent: Another proposal is a rule forbidding an MDL transferee court to hold a trial unless all parties consent. A similar provision appears in H.R. 985. If that requirement required consent from all parties in any action before the MDL transferee court – perhaps thousands – it would likely be unworkable; the focus seems to be on the parties to the individual cases to be set for trial.

Before *Lexecon* was decided in 1998, MDL transferee judges frequently used § 1404(a) to transfer cases in the MDL proceeding to themselves for all purposes, but the Supreme Court held that such self-transfer was not authorized under the statute. More recently, a practice of "direct filing" arose, under which cases that might have been filed in "home" districts around the country and transferred as tag-along actions would instead be directly filed in the MDL transferee district. Owing to jurisdictional and venue limitations, such direct filing is often possible only with the consent of the defendants. More recently, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), may have raised further jurisdictional obstacles to filing in the MDL transfer district by plaintiffs who are citizens of other states. As noted above (*see* Part A), the consent sometimes requires payment of a filing fee by each plaintiff. It also often requires that these cases be transferred to a designated "home" district once pretrial activities are completed unless the cases are settled.

Together, these developments make it likely that many of the cases pending before the MDL transferee judge can be set for trial – whether "bellwether" or not – only on party consent. The all-party consent proposal thus might not change the current situation significantly.

But the proposal is that the transferee judge may not conduct a trial in any action in the consolidated or coordinated proceedings without consent of all parties to that action. If that means that the transferee judge could not, after a Panel centralization order, even try the cases she already had before the order, or others properly filed in her "home" district, that would seem a curious result, meaning that the Panel's order would deprive the transferee judge of authority to try cases she already had before the Panel acted.

On the other hand, if the proposed rule does not apply to cases directly filed in the MDL transferee district, that would further limit its impact, though not likely in an important way if consent to direct filing usually includes a requirement of transfer to the "home" district before trial. Nonetheless, the seeming requirement of consent in direct filed cases is also curious.

It may be that a feature of the problem is that sometimes the parties consent to trial of a tranche of "bellwether" cases that includes some that plaintiffs have selected as strong for the plaintiffs and some that defendants have selected as strong for the defendants. Commentary suggests that on occasion, as trial approaches, several of the cases that are strong for the defendants are dismissed voluntarily by plaintiffs, thereby skewing the remaining cases in plaintiffs' favor. Similarly, defendants may settle cases that are strong for plaintiffs. Unless the consent is revocable in these circumstances, it is not clear how a consent requirement would solve the problem. Perhaps consents to trial in the MDL transferee court could include some sort of "opt out" provision to deal with the skewing concern. Perhaps a rule could require trial to occur in all the selected cases, but that might be unduly rigid, wasteful and unworkable.

Permitting MDL transferee judges to order live trial testimony by party witnesses: The American Association for Justice has proposed that rule changes would improve trials in MDL litigation by enabling judges to order that party witnesses (including employees of a party) appear at trial to testify live. That proposal re-raises issues partly addressed during the Committee's review of proposed changes to Rule 45 during 2011-12.

Among the amendments to Rule 45 that the Committee proposed in mid-2011 was what is now Rule 45(c) regarding the distance a subpoena can compel a witness to travel to testify at a deposition, hearing, or trial. A conflict had emerged about interpretation of Rule 45 as then written. Some courts had treated it as authorizing a subpoena for party witnesses to testify at trial even though they would have to travel more than 100 miles from another state to do so. The most prominent example of such an order was in an MDL proceeding – the *Vioxx* litigation. But it is worth noting that the discussion in 2011-12 was not limited to MDL litigation, or particularly focused on it. It was much more general.

The preliminary draft of amended Rule 45 published for public comment in August 2011 included a new Rule 45(c) that rejected the *Vioxx* interpretation that a subpoena could compel a party witness to attend trial more than 100 miles from the place of his or her residence or employment. But it also included an Appendix inviting comment on whether a new Rule 45(c)(3) should be added to the amendment package:

> (3) **Order to a party to testify at trial or to produce officer to testify at trial.** Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alterative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

After the public comment period, the Committee decided not to include this amendment in the package recommended for adoption.

This proposal could be revisited. It might be that such a provision could be expanded beyond party officers to include others associated with a party. (Note that Rule 37(d)(1)(A)(i) authorizes sanctions against a party when a party's "officer, director, or managing agent" – or a person designated under Rule 30(b)(6) – fails to appear for a properly noticed deposition.)

As a contrast, it might be noted that courts do have authority to order party attendance at other events. For example, a deposition notice may direct a party to appear for deposition in the forum district, and may order a party to attend a settlement conference in the forum. But the question whether the justification for such orders also applies to attendance to testify live at trial would have to be evaluated.

E. Settlement Promotion/Review/Approval

The Committee has just completed a thorough review of Rule 23(e)'s procedures for judicial review of class-action settlements; those rule changes went into effect on Dec. 1, 2018. By rule,

such settlements are binding on class members unless they opt out, a feature that substantially explains the requirement of judicial review of the merits of proposed settlements.

There is no similar rule authorizing or requiring judicial review of settlements in MDL proceedings for fairness, or authorizing the court to bind parties in MDL proceedings to the terms of a collective settlement, as Rule 23(e)(3) authorizes in class actions. But settlement in MDL proceedings might be said to be the de facto equivalent of class action settlements governed by Rule 23(e). Transferee judges have invested considerable efforts in achieving settlements – sometimes "global" – and some appear to regard achieving resolution without the need for remand as an important goal. On occasion, courts have invoked the idea of a "quasi class action" to support some orders in MDL proceedings (often regarding attorney fee common fund arrangements and "caps" on contingent fees). Certainly, traditionally at least, the experience has been that remands are the exception rather than the rule. Probably settlements after centralization are an important explanation for the low rate of remands. Perhaps the analogy to class actions is strong enough to support rulemaking about some settlements in MDL litigation. One difference, of course, is that in MDL proceedings each plaintiff has his/her own individual lawyer to review and advise on any settlement proposal.

As noted in § 13.14 of Manual (4th), there are other situations in which court approval of proposed settlements is required (e.g., shareholder derivative actions, actions in which a receiver has been appointed, consent judgments involving antitrust actions initiated by the U.S., other specialized representative actions). The sort of mass tort actions that have been the focus of discussions with the Subcommittee about MDL procedures do not require such approval, and it is unclear whether the Enabling Act would permit rules to mandate judicial approval. On the other hand, some MDL proceedings include class actions, and therefore presumably involve judicial review of at least some part of the settlement under Rule 23(e).

A beginning might be to focus on judicial involvement in efforts to negotiate settlement terms to be offered to all claimants in an MDL proceeding. At least in some such proceedings, a common set of settlement terms has been so offered, sometimes with a proviso that settlement depends on participation by virtually all claimants. Such a situation might be analogized to development of a proposed settlement of a Rule 23(b)(3) class action, with settlement premised on certification of a class and individual class members permitted to opt out, and the defendants having the option to back out of the settlement if the opt-outs reach a certain level. Even though an analogous situation in an MDL proceeding would not involve a rule-based binding effect, as in a class action, there might be a basis for a rule in light of the court's role in development of the settlement. Defining when that rule would apply could, however, present a considerable challenge; it likely could not apply with regard to individual settlements or settlements by individual plaintiff lawyers with "inventories" of claims.

Presently, Manual (4th) §§ 22.92-22.927 provide considerable advice for judicial review of proposed settlements in mass tort class actions that might also guide MDL transferee judges. Though settlement looms large in MDL proceedings, the Subcommittee has not heard many proposals for rulemaking attention specifically keyed to settlement. One focus (mentioned in Part C above) has been on common funds and awards to leadership counsel, usually following settlement. Another suggestion is that the proposed terms for settlement in MDL proceedings should be made public in the same way that Rule 23(e) requires that the terms of proposed class-action settlements be made public.

Despite the absence of specific proposals for rules in MDL proceedings focused on settlement, the general topic remains on the list of possible topics due to its importance.

F. Third Party Litigation Funding (TPLF)

The Subcommittee has heard a great deal about this topic, including during the George Washington University event the day after the full Committee's Nov. 1 meeting. In terms of the overall portfolio of the Subcommittee, it is important to note that TPLF is not distinctly, much less uniquely, a feature of MDL litigation.

There seems little doubt that there has been very considerable growth in litigation funding. A recent article referred to "a flood of money moving into litigation financing." Cadman, For the World's Super Rich, Litigation Funding is the New Black, Bloomberg Law Class Action Reporter, Aug. 28, 2018.

These developments have prompted interest in many quarters. A number of courts of appeals have local rules requiring disclosure of the interests of such investors in the outcome of pending cases, as have several district courts. These rules seem designed to identify situations that might call for recusal. In addition, one state (Wisconsin) has by statute adopted a requirement of disclosure, and one district (N.D. Cal.) has a local rule requiring disclosure in class actions. *See also* the Litigation Funding Transparency Act of 2018, S. 2815, introduced on May 10, 2018.

There seem to be two prominent categories of litigation funding arrangements that have been involved in MDL proceedings. One involves financing provided to lawyers and law firms. The range of forms of financing of law firms is rather wide. At one end may be conventional bank lines of credit to law firms, perhaps secured by the firm's receivables. At another end are loans to lawyers or law firms keyed to one specific case, and non-recourse – keyed to success in that specific case. In between are arrangements that may give a lender an interest in a portfolio of cases being handled by a law firm. This description focuses on funding for the prosecution of cases, although it seems that somewhat similar arrangements have been made with regard to the defense of litigation.

But third party litigation funding is a field that is evolving rapidly. Leading funders emphasize that major corporations and major law firms use their services as methods of dealing with litigation risk, on both the plaintiff and defendant sides. The variety of forms of such funding could pose definitional challenges for a rulemaking effort. There is a viable argument for refraining from developing a national rule on TPLF at this time, in favor of permitting the common law to develop in this rapidly evolving area.

Regarding funding provided to lawyers, concerns have been raised about professional responsibility rules concerning sharing of attorney fees with non-lawyers. The New York City Bar, for example, has recently adopted the position that lawyers there may not enter into agreements with funders that provide that payment to the funder is contingent on the lawyer's receipt of legal fees. See Formal Opinion 2018-5 (Litigation Funders' Contingent Interests in Legal Fees).

A distinct form of litigation-related financing might be called "consumer" oriented. These arrangements ordinarily arise between plaintiffs and lenders and do not directly involve lawyers or involve issues of sharing legal fees. These loans may resemble payday loans, and have high rates of interest. Plaintiffs' counsel who have discussed this form of financing with the Subcommittee unanimously say that they urge their clients not to enter into such arrangements because the terms

are often onerous. Some states have adopted legislation to regulate such lending, focusing on such things as interest rates and required disclosures.

Neither the professional responsibility nor the consumer protection aspects of TPLF seem suited to attention within the civil rules. Two decades ago, the Standing Committee spent considerable time studying the possibility of Federal Rules of Attorney Conduct, but eventually decided not to pursue this possibility. Though TPLF is a much narrower topic than was under study then, possible professional responsibility questions do not seem to be central to the rulemaking effort. Neither do the "consumer protection" features of some state legislation seem attuned to an Enabling Act effort.

Even if such efforts were in general suitable objectives for Enabling Act attention, it must be remembered that TPLF is not uniquely focused on MDL proceedings, and efforts focused on MDL proceedings would not naturally lead to TPLF measures. In terms of the financing agreements some lenders reach with lawyers, it seems that most of the plaintiff-side lawyers the Subcommittee has heard from do not enter into such agreements. But "consumer" agreements may occur in MDL proceedings, just as they occur in other litigation. Indeed, on occasion, when an MDL proceeding has reached the settlement phase the financial commitments made by individual plaintiffs can leave them "upside down," unable to cover the indebtedness with the payout afforded by the proposed settlement.

Initial disclosure possibility: In 2014, the Committee was presented with a proposal to add certain TPLF arrangements to Rule 26(a)(1)(A)(iv). The proposal was advanced as consistent with the existing requirement that defendants disclose insurance agreements that might cover a judgment in the action. Essentially the same disclosure proposal was renewed in 2017.

The existing disclosure provision in Rule 26(a)(1)(A)(iv) is limited to an agreement by "an insurance business" to indemnify the defendant. Drafting issues would likely be presented to adapt to the TPLF situation. It does not seem that the disclosure possibility is designed to reach so far as, for example, applying to a relative's loan to a plaintiff for living expenses or even filing fees, with the explicit or implicit expectation that the loan would be repaid only if the litigation were successful.

Need for disclosure: The proposal to require disclosure of TPLF is justified in part as enabling defendants to know what and whom they are up against in the litigation. Some proponents of disclosure have told the Subcommittee that they are not interested in the amount or terms of the funding, but only the fact of funding and the identity of the funder.

Recusal concerns: As noted above, there are local rules in many courts of appeals and district courts that seem designed to enable judges to determine whether a funder's interest might provide a ground for recusal. Although some are skeptical about the frequency with which federal judges have invested in funders (supposedly often hedge funds), disclosure for this purpose would seem satisfied with disclosure of the fact of funding and the identity of the funder.

Disclosure of the terms of the funding agreement: A current amendment proposal would require that the entire funding agreement be disclosed to the opposing party. This disclosure has been justified in part on the ground that the agreement may either give the funder some say in the decision whether to settle, or provide that the funder can withhold further funds in a way that might make settlement likely or unavoidable. At least for funding provided to lawyers, such arrangements

might run afoul of professional responsibility prohibitions on lawyers consigning control of litigation to non-lawyers. Whether a procedural rule is a suitable way of addressing that concern is debatable.

Discovery about funding arrangements: A major concern of those resisting disclosure is that disclosure will lead to time-consuming and expensive discovery efforts. These efforts, in turn, might intrude into work product because litigation counsel might sometimes provide candid reports about litigation prospects to the funder, and the funder may offer litigation evaluations and advice.

Aspects of TPLF that may be of particular importance in MDL proceedings: As already noted, TPLF is not distinctively a feature of MDL litigation, but is found in many sorts of litigation. But some aspects of TPLF may be particularly important in MDL proceedings.

One such feature is the possibility that some individual plaintiffs in MDL proceedings who obtain "consumer" financing might find themselves "upside down" when settlement crystallizes, particularly if the originally favorable prospects of the litigation have been scaled back. Though that can happen in any litigation, it can be a particular challenge to achieving settlement in some MDL proceedings.

Another is that some "new entrants" to leadership positions (*see* Part C) may need funding in order to participate even though it seems that well-established leadership presently may not. This issue would focus on TPLF financing of lawyers or law firms, rather than individual plaintiffs.

A different concern that might be important in MDL litigation but not significant in ordinary litigation is the burden and difficulty of providing disclosure for "consumer" type funding obtained by individual plaintiffs. As noted above, the plaintiff-side counsel the Subcommittee has talked to uniformly say they urge their clients not to enter into such transactions, but they recognize that clients sometimes do so nevertheless. For larger MDL proceedings, the burden of monitoring and disclosing as to hundreds or thousands of individual plaintiffs could be considerable. And the question whether that burden falls on the PSC or only on the IRPAs might be difficult to answer.

Concerns about control of litigation and settlement: As suggested above, one prime concern is whether funders might inappropriately control litigation decision-making. That concern is a reason for rules against fee-sharing by lawyers. Litigation funders who have addressed the Subcommittee emphasize that they do not have or want any control over the litigation. Indeed, some say they could not come close to having the personnel to review and monitor the day-to-day progress of litigation even if they wanted to and had authority under their agreements to do so.

Proponents of disclosure counter that neither they nor the courts should have to take such assurances at face value. They also point to examples they contend raise concerns that some funders may be exercising or able to exercise substantial control – or at least influence – over settlement decisions.

Disclosure to the court in camera: One way to address some of the concerns that have emerged but avoid some of the problems that have been identified would be a rule calling for disclosure of litigation funding (properly described) to the court in camera. That need not lead to a discovery battle, but would enable the court to be fully apprised of the various forces bearing on potential settlement and continued litigation as well as recusal information. In the ongoing MDL litigation about opioids the court has ordered such disclosure.

One objection to this approach is that it permits a form of ex parte communication between the court and plaintiff's counsel that excludes the defendants. Whether the information involved bears sufficiently on the conduct of the litigation to give force to this objection may be debated.

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The Subcommittee is continuing to explore all these specific issues as well as the broader questions relating to the desirability of specialized rules for MDL proceedings.

II. Subcommittee on Social Security Disability Review Actions

The Social Security Disability Review Subcommittee's task has been described in earlier reports. The Subcommittee was formed to study a proposal made by the Administrative Conference of the United States and strongly supported by the Social Security Administration. The proposal asks that "the Judicial Conference develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides for review "by a civil action." The provisions of the proposal include rules providing that the complaint be substantially equivalent to a notice of appeal; that the administrative record be "the main component" of the Commissioner's answer; and that the review be first focused by the claimant's opening merits brief.

The arguments made to support the proposal draw from the sheer numbers of disability review actions and the disparity of district-court practices. Some 17,000 to 18,000 review actions are filed each year. They count for approximately 7% of the federal docket. But the methods used to process them vary widely from one court to another. At least 62 local district rules for these actions have been identified, and they are not at all alike. The Commissioner is represented by the local United States Attorney, but in many districts the bulk of the work is done by Social Security Administration (SSA) attorneys who frequently practice in more than one district and who need to become familiar with distinctive local practices. The SSA estimates that adopting a uniform set of good national rules could free tens of thousands of hours of staff attorney time for more productive uses. Beyond that, the SSA believes that many local practices are counter-productive. One practice encountered in some courts requires the parties to prepare a joint statement of facts, a time-consuming exercise that may obscure the issues more than advance them. Summary judgment is used in several districts to frame the review, a practice that proves useful in requiring citation to specific facts in the administrative record but can be distracting because other aspects of Rule 56 procedure – including the inapposite standard for decision – are not suited to review on an administrative record. Nor is it only the SSA that would benefit from good, uniform procedures. Claimants would benefit as well, including those who attempt to proceed pro se. And claimants' representatives who practice in different courts also would benefit.

The Subcommittee has had only preliminary discussions about the ultimate question whether it will be desirable to recommend any new rules. While SSA supports comprehensive new rules, DOJ is neutral and bar groups of claimants' representatives do not believe they are needed. An immediate caution is one that confronts any proposal to adopt rules of procedure for a specific substantive area. Deep knowledge of the substantive law is needed to craft rules specifically adapted to its needs, knowledge that can be gained only from those who work regularly with that law. Important considerations may be lost in translating from substantive experts to procedure generalists. The more specific the rules, the greater the loss of the flexibility to adapt to individual cases that characterizes the transsubstantive character of the Civil Rules. More than one of those who have advised the Subcommittee have advised that a uniform set of national rules could be a good thing, but only if they are good rules.

There is a longer-range concern as well. Powerful justifications can be found for the three separate sets of rules that now are integrated with the Civil Rules. The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions began as a necessary component of merging the formerly separate Admiralty Rules into the Civil Rules. They carry forward distinctive parts of once separate rules that respond to the historically distinctive characteristics of admiralty

practice. The Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings respond to the blended civil and criminal characteristics of those proceedings: Rule 12 of the § 2254 Rules invokes the Civil Rules when not inconsistent with the § 2254 Rules or statutory provisions, while Rule 12 of the § 2255 Rules similarly invokes both the Civil Rules and the Criminal Rules. Similarly powerful reasons should be demanded to begin a process of expansion that could easily invite ever more requests for separate and specialized rules of procedure.

Even if not cast as a separate set of supplemental rules, adding to the Civil Rules provisions for specific subject matters runs the same risks. And, in the words of one participant, adopting Civil Rules may be worse than adopting supplemental rules because it begins a process of turning the Civil Rules into a code for special interests.

The Subcommittee has not yet decided whether any rules that might be proposed should be framed as supplemental rules or as rules integrated into the body of the Civil Rules. If they are to be placed in the Civil Rules, the location may be influenced by the number of rules. The most recent draft is framed as three rules, a format that could neatly fill the space opened by the abrogation of former Rules 74, 75, and 76 in 1997. Another possibility is to draft the same provisions as a single rule – in the current version it would not be especially long – and cast it either as Rule 74 or as Rule 71.2 to follow the provisions of Rule 71.1 for condemnation actions.

The scope of any rules that might be proposed is gradually nearing a consensus in the Subcommittee. The current draft applies the rules only to "an action in which the only claim is made by an individual or personal representative for review on the administrative record * * *." The vast majority of review actions fit this model. A small number venture further. There even have been a few class actions that assert jurisdiction under § 405(g). Some early drafts applied the social security rules to the part of a more complex action that involves review of a single claimant's arguments about substantial record evidence, leaving other parts to the regular Civil Rules. The claims that venture beyond the record may at times justify active pretrial management, discovery, and summary judgment. But if the parties and court use those and other procedures that go beyond appeal-like review on the administrative record, it may make sense to use those procedures for the case as a whole. The choice to apply the social security rules only in pure administrative review actions reflects that view. But it may be possible to carry forward with a suggestion in the draft Committee Note that the draft pleading rules can be applied to the claim for review on the administrative record. And the Subcommittee will explore the question whether the reference to "an individual or personal representative" accurately captures all the actions that might be fit into the rules. If there are circumstances in which two or more people can seek review of a single administrative decision on a single administrative record, the scope provision might be changed to include such actions.

Successive Subcommittee drafts have reduced the subjects addressed by the review rules. They now focus on pleading, briefing, and timing.

The pleading rules have not fully resolved the tensions between two models. One model, favored by the original proposal, clings close to appeal procedure. The complaint would be limited to a simple statement identifying the decision to be reviewed, much as a notice of appeal. The answer would consist of the administrative record. The actual issues would be identified and argued in the briefs. The competing model would allow the plaintiff to embellish the fact and law arguments in the complaint. The answer would include the administrative record, as required by statute, and any affirmative defenses. Further discussion will focus on the next step: whether the SSA must respond to all the allegations in the complaint that go beyond simple assertions of error in law or

fact. The SSA is concerned about the burdens entailed in combing the record at the pleading stage, and also fears that occasional failures to deny will result in unintended admissions under Rule 8(b)(6). The draft presented to the Committee in November split the difference, allowing the Commissioner to respond to allegations in the complaint but also providing that "Rule 8(b) does not apply." That compromise seems an odd departure from ordinary practice, and may not survive further scrutiny.

Other issues remain with the pleading rules. Attention continues to focus on a provision that would require the plaintiff to state an address and the last four digits of the social security number. These elements raise substantial concerns about privacy and identity theft. The SSA insists that it needs this information to make sure that it identifies the underlying administrative decision and record – hundreds of thousands of claims annually reach the administrative law judge hearing stage, multiple claimants may have the same names, and possible alternatives will not do the job. The SSA will be pressed to elaborate this argument.

The draft rules include a provision that eliminates traditional Rule 4 service of summons and complaint. Instead, the court notifies the Commissioner by transmitting a Notice of Electronic Filing. Some districts have adopted this procedure with the consent of the Social Security Administration and the local United States Attorney. It works well. It has been approved, often enthusiastically, in initial reviews of the draft rules. Small details remain to be resolved, but the concept seems secure.

The briefing rule provides for the plaintiff's brief, followed by the Commissioner's brief, with an opportunity for a plaintiff's reply brief. All briefs are required to support fact arguments by citations to the record. Two questions remain open.

The first question is whether the plaintiff should be required to accompany the brief with a motion for the relief requested in the complaint. The request could easily be included in the brief. But the draft provides for the motion. Under Rule 7(b), a motion is the traditional means to make a request for a court order. The motion will provide a useful flag that focuses the court on the case. And experience suggests that the motion will be no more than a page or two. Whether to require a motion remains a subject for further discussion.

The second question is timing. The draft allows the plaintiff 30 days after the answer is filed, and the Commissioner 30 days after service of the plaintiff's motion and brief. These periods were selected as a means to promote prompt disposition. But they may prove unrealistic. Periods of 60 days may be substituted, although that would be a slower track than is routinely provided for briefing dispositive motions.

A third aspect of briefing has not really proved to be a question in Subcommittee or Committee discussions. The Social Security Administration would like provisions that set page limits. Although the Appellate Rules set page or word limits, the Civil Rules have not addressed briefs, much less page limits. This is an issue that seems better left to local district practice and preferences absent any showing of pressing problems.

The Subcommittee has worked actively with interested groups. In between the April and November meetings of the Civil Rules Committee it held a conference call with representatives of the SSA and a separate conference call with a group of claimants' representatives gathered by the American Association for Justice. It has received comments from another organization of claimants'

representatives, and has received comments from some of these organizations and from the SSA on the current draft and the discussion at the November meeting. It will continue to gather information to address whether it is desirable to go beyond the information-gathering stage to begin developing specific rule proposals.

The draft considered at the November Committee meeting is attached to illustrate the basic current approach. Further revisions are being made. If this work succeeds in producing a thoroughly reviewed draft, the Subcommittee may be in a position by the April 2019 Advisory Committee meeting to recommend whether the draft offers sufficient promise to justify further work to prepare draft rules that might be recommended for publication.

Rules 74, 75, 76

Rule 74. Scope

(a) Section 405 (g). [This rule applies] [Rules 74,75, and 76 apply] to an action in which the only claim is made by an individual or personal representative for review [on the administrative record] of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).

(b) Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure also apply to a proceeding under [this rule] [Rules 74, 75, and 76], except to the extent that they are inconsistent with [this rule] [these Rules].

Committee Note

This rule establishes a simplified procedure that recognizes the essentially appellate character of claims to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g). See[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III).

Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as the sole defendant and seek only review on the administrative record as provided by § 405(g). This rule governs only these actions, and is supplemented by the general provisions of the Civil Rules that are not inconsistent with this rule.

Some [— apparently very few —] actions, however, may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a claim or defendant for relief beyond review on the administrative record. Such actions fall outside this rule and are governed by the other Civil Rules alone. [But pleading the § 405(g) review parts of such actions may properly rely on the model provided by Rule [75].]

Rule 75. Initiating the Action; Complaint; Service; Answer

(a) The Complaint. The complaint in an action for review under § 405(g) must:

[(1) Identify the final decision to be reviewed;]

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf—or on whose wage record —the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State [generally {and without reference to the record}] that the final administrative decision is not supported by substantial evidence [or must be reversed for errors of law]; and

(5) State the relief requested.

(b) Serving the Complaint. The court must[, through its Case Management and Electronic Case Files system,] notify the Commissioner [of Social Security] of the commencement of the action by transmitting a Notice of Electronic Filing [with a link to the complaint] [to the Commissioner,] to the [appropriate] regional office of the Social Security Administration, and to the United States Attorney for the district. The plaintiff need not serve a summons and complaint under Rule 4.

(c) The Answer; Motion; Voluntary Remand; Time.

(1) (A) {*Alternative 1*} The answer must include a certified copy of the administrative record and any affirmative defenses under Rule 8(c). Rule 8(b) does not apply.
{*Alternative 2*} A certified copy of the administrative record and a statement of affirmative defenses [under Rule 8(c)] suffices as an answer.

(B) The answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 75(b) unless a later time is provided by Rule 75(c)(2)(C).

(2) (A) A motion under Rule 12 must be made within 60 days after notice of the action is given under Rule 75(b).

(B) A motion to voluntarily remand the case to the Commissioner may be made at any time.

(C) Unless the court sets a different time or a later time is provided by Rule 75(c)(1)(B), serving a motion under Rule 75(c)(2)(A) or (B) alters the time to answer as provided by Rule 12(a)(4).

Committee Note

Section 405(g) provides for review of a final decision "by a civil action." Rule 3 directs that a civil action is commenced by filing a complaint. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal. The elements specified in Supplemental Rule 75(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one brought under § 405(g). A bare assertion that the Commissioner's decision is not supported by substantial evidence suffices to state a claim—the facts are developed in the administrative record and, along with the law, are known to the Commissioner. Stating the relief requested provides the proper focus.

Rule 75(b) provides a means for giving notice of the action that supersedes Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices. The plaintiff need not serve a summons and complaint under Rule 4.

Rule 75(c)(1)(A) builds from this part of § 405(g): "As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are made." The record

suffices as an answer unless the Commissioner wishes to plead any affirmative defenses. Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the Commissioner may wish to address in the pleadings.

The time to answer is set at 60 days after notice of the action is given under Rule 75(b) unless a later time is provided under Rule 75(c)(2)(C). The time to file a motion under Rule 12 is set at 60 days after notice of the action is given under Rule 75(b). If a timely motion is made under Rule 12, the time to answer is governed by Rule 12(a)(4) unless the court sets a different time.

The Commissioner at times seeks a voluntary remand for further administrative proceedings before the action is framed for resolution by the court on the administrative record. Rule 75(c)(2)(B) recognizes that the Commissioner may move to remand before or after filing and serving the record.

Rule 76 Plaintiff's Motion for Relief; Briefs

(a) Plaintiff's Motion for Relief and Brief. The plaintiff must serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief within 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 75(c)(2)(A) or (B), whichever is later. The brief must support arguments of fact by citations to the [parts of the] record [on which the plaintiff relies].

(b) Defendant's [Response] Brief. The defendant must serve a response brief on the plaintiff within 30 days after service of the plaintiff's motion and brief. The brief must support arguments of fact by citations to the [parts of the] record [on which the defendant relies].

(c) Reply Brief[s]. The plaintiff may, within 14 days of service of the defendant's brief, serve a reply brief on the defendant.

Committee Note

Rule 76 addresses the procedure for bringing on for decision a § 405(g) review action that has not been remanded to the Commissioner before review on the record. The plaintiff serves a motion for the relief requested in the complaint or any amended complaint. The motion need not be lengthy; it is supported by a brief that is similar to a brief supporting a motion for summary judgment, citing to the parts of the administrative record that support the argument that the final decision is not supported by substantial evidence. The Commissioner responds in like form. A reply brief is allowed. The times set for these briefs may be revised by the court when appropriate.

III. Consent to Magistrate Judge: Rule 73(b)(1)

Three questions have been raised about the procedure for consenting to referral of an action for trial before a magistrate judge. The first is the problem that launched this subject, arising from an uncorrectable feature of the CM/ECF system. The system defeats the provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. The second asks whether the rule should be amended to address the means of securing consent in courts that make initial referrals to magistrate judges as part of the random assignment of cases as they are filed. This question remains alive in Committee deliberations. The third asks whether the rule should address the issues that arise when a new party is joined after the original parties have consented to a referral. That question has been put aside.

Anonymity was adopted in Rule 73(b)(1) to implement the command of 28 U.S.C. § 636(c) that "Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." The problem caused by the design of the CM/ECF system was discussed at the June 2018 Standing Committee meeting. When a party files an individual consent the system automatically sends a notice to the judge assigned to the case. So much for anonymity, or at least the assurance of anonymity. Apparently it is not feasible to program this feature out of the CM/ECF system. Nor are clerks' offices enthusiastic about the prospect of a rule calling for parties to lodge individual consents with the clerk, to be filed by the clerk only if all parties consent. The administrative burden, with the prospect of inevitable lapses, seems too much.

The CM/ECF problem could be addressed by a relatively simple change in Rule 73(b)(1):

> To signify their consent, the parties must jointly ~~or separately~~ file a statement consenting to the referral.

The method of securing joint consent could be left to resolution by local rules or practice. The Southern District of Indiana has established a practice that provides a consent form to the plaintiff when an action is filed. If the plaintiff wishes a referral, the plaintiff seeks consents from the other parties and files the joint consent form if all consent.

It may be desirable to offer slight redrafting of the present rule text. One addition that has met some favor would be to add an explicit reminder: "No party may file a consent filed by fewer than all parties." That would provide guidance for pro se parties, and perhaps a caution to any party that might be tempted to file a separate consent.

The Committee plans to develop this proposal for presentation at the June Standing Committee meeting.

The means of securing consent after a random initial referral to a magistrate judge present more complex questions. Some courts now place magistrate judges in the rotation for random initial assignment of cases. This practice may be growing, and does not of itself seem a subject for review by the Civil Rules Committee. But it may pose questions about the means to implement the statutory command that rules for referral "shall include procedures to protect the voluntariness of the parties' consent."

As with referral after initial assignment to a district judge, it is necessary to ensure that any party may undo an initial referral to a magistrate judge by withholding consent. It remains uncertain,

however, whether the text of Rule 73(b) need address this question separately. The initial language of Rule 73(b) seems to cover all circumstances of referral or assignment to magistrate judges. Rule text that requires joint consent could suffice — if a joint consent is not filed, it is up to the court to withdraw the reference, no matter how it was first initiated. The Committee Note might say as much, without offering any advice on the means to effect withdrawal.

Consideration of the initial random referral practice would be shaped by surveying consent practices in the courts that follow this practice. It may be that satisfactory practices are followed now, leaving only the common question whether to leave things as they are or whether instead to capture the best practice in national rule text. The clerk's notice to the parties of their opportunity to consent, for example, could be framed in a way that addresses consent when there has been an automatic referral to a magistrate judge for all purposes and also when there has not. Before automatic withdrawal of an automatic reference for lack of a joint consent, the Rule 73(b)(2) reminder could be framed to reflect the initial reference.

The Committee will consider this issue further, recognizing that any exploration of the various means of utilizing magistrate judges among the district courts could involve sensitive issues.

The decision not to take up questions of consent by late-added parties reflects two concerns. First, although a number of decisions address these issues, there is no apparent sense that the problems are sufficiently serious to require explicit rule provisions. Second, the question arises in several different contexts. New parties may be joined under the rules for permissive joinder of plaintiffs or defendants, or under Rule 19 for mandatory joinder, or as added parties to crossclaims or counterclaims, or as third party defendants, or as intervenors. There even has been some dispute about the role of class members once a class is certified (consent does not seem to be required). Joinder might come soon after the referral, or only after substantial development of the case before the magistrate judge. There may be a risk that joinder decisions could be affected by a desire to defeat the referral. Crafting a good rule to address these issues would present a real challenge.

IV. Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and analogous Appellate, Bankruptcy, and Criminal Rules is the subject of several suggestions. The suggestion to revise Rule 7.1 to include a nongovernmental corporation that seeks to intervene, so as to parallel Appellate Rule 26.1 and proposed Bankruptcy Rule 8012(a), will likely be proposed for publication. The first disclosure statement rules were crafted by a process that sought to achieve rules as similar as possible in light of differences in the contexts presented by each set of rules. Maintaining uniformity remains a desirable goal. The other suggestions, and the recent revisions of the Appellate and Bankruptcy Rules on different schedules, raise the question whether the time may have come to take a broader, all-committees review. No recommendation is offered on the broader review question. It is identified only to open an initial discussion.

A. Rule 7.1

The task of making Rule 7.1 parallel to the new Appellate Rule and proposed Bankruptcy Rule is easily accomplished:

> (a) A nongovernmental corporate party and a nongovernmental corporation that seeks to intervene must file 2 copies of a disclosure statement that: * * *

Although it is possible to imagine arguments that would distinguish civil actions from appeals and bankruptcy proceedings, none seem persuasive. Recusal on a motion to intervene may be as important as recusal after intervention is granted.

The Bankruptcy Rules Reporter has advised that there is no need to add to Rule 7.1 a provision similar to the Appellate Rule 26.1 provision for disclosure of debtors in bankruptcy cases. The Bankruptcy Rule will carry over to proceedings in the district court.

It might be possible to proceed with this proposal as a technical or conforming amendment that simply picks up identical proposals that have been examined in two separate periods of publication and comment. Nonetheless, it seems better to follow the ordinary path of publication and comment. Something unexpected might yet appear. Beyond that possibility, there may not be any urgency about this proposal. If a broader examination of disclosure statements is to be undertaken, Rule 7.1 might be held back for inclusion in a broader package rather than publish proposed amendments only a year or two apart.

B. Parties' Full Names and Addresses

The National Association of Professional Background Screeners has proposed a rule that would require natural persons who are parties to any civil action or criminal prosecution to disclose their full names and addresses. This information is described as not sensitive, but the proposal is to make it available only as a search criterion in the PACER system so that it can be found only in response to a search that identifies the full name and address. The purpose is to support more complete reports to prospective employers, landlords, and other customers. The Committee was not able to identify any procedural purpose that would be served by the proposal. The Criminal Rules Committee rejected a similar proposal made in 2005, and has rejected it again. It has been removed from the Civil Rules agenda.

C. Diversity Jurisdiction: Members and Owners of LLCs, Trusts, and Entities

Judge Thomas Zilly has proposed a rule that would require "disclosure of the names and citizenship of any member or owner of an LLC, trust, or similar entity." The proposal grows out of his experience in a case that went to judgment after a 10-day trial, only to be remanded on appeal for a determination of the citizenship of four LLC parties, including the plaintiff and three defendants.

Looking first to LLCs, Rule 8(a)(1) may not provide satisfactory assurances that diversity jurisdiction is accurately pleaded. An LLC takes the citizenship of each of its owners. If an owner is itself an LLC, all of its owners must also be counted. Still deeper layers of owners and citizenships are possible. A plaintiff LLC ordinarily should have a good idea of the citizenships attributed to it. But even if that is true, the plaintiff may not have access to comprehensive information about the citizenship of a defendant LLC. Ignorance may be bliss if a diversity-destroying citizenship is never uncovered, but it can lead to waste, and perhaps great waste, if it is uncovered – or revealed after a deliberate cover-up – after substantial proceedings have been had. Rather than impose the burden of defining jurisdiction on the uncertain foundation of Rule 8(a)(1), a disclosure requirement that requires each party to reveal its own citizenships may be more efficient.

Since diversity jurisdiction is a problem in civil actions, it may be that a disclosure requirement would be lodged in the Civil Rules and perhaps in the Appellate Rules as well.

The proposal extends beyond LLCs to a "trust or similar entity." A wide variety of organizations take on the citizenship of their members for diversity purposes. It may prove difficult to develop a workable catalogue, even if the purpose is confined to ensuring the basis for diversity jurisdiction.

Developing a catalogue of noncorporate entities might take on a different color if the purpose is to support better-informed recusal decisions. The cross-committees subcommittee that developed the initial disclosure statement rules considered local rules and found a wide array of details. Some rules extended to partnerships, limited partnerships, joint ventures, business trusts, and on through occasionally exotic entities. Some simply sought identification of anyone with a financial interest in the outcome of the action. A similar variety of local rules persists.

The challenge of identifying suitable subjects for disclosure statements may not be easily met. Lengthy itemization might generate substantial volumes of essentially irrelevant information. Reliance on something as open-ended as "financial interest in the outcome" could again lead to more disclosure than anyone wants or needs, and pose awkward questions for those who are not familiar with recusal standards. A party's dependent children, parents, siblings, spouse, or others, for example, could easily qualify as financially interested in the outcome.

Whether disclosure for purposes of informing recusal decisions should be reexamined may depend on experience in the courts. Is there any sense that, without expanded disclosure statements, judges will often fail to recognize grounds for recusal? It might be argued that there is little need for disclosure so long as the judge is unaware of the interests that may support recusal, but the problem of appearances remains.

D. Third Party Litigation Funding

The work of the MDL Subcommittee, described earlier in this Report, illustrates another dimension of disclosure. Third party litigation financing arrangements are proliferating. Some local rules may be read to require disclosure now. Courts have ordered or invited disclosure in a variety of forms in several different settings. Funding arrangements take a wide variety of forms, include many different kinds of terms, and reach across many types of litigation both great and ordinary. Several proposals have been made to require disclosure, ranging from modest proposals to disclose simply the fact of funding and the funder's identity to providing copies of the funding agreement to all parties. A disclosure statement may provoke demands for discovery, with inevitable disputes about privilege and work-product protection. This topic was originally assigned to the MDL Subcommittee because MDL proceedings are one of the contexts in which it is openly encountered. The Subcommittee has gained substantial information, drawn from several sources and conferences, but if anything this information serves mostly to highlight the need for still more information.

Third party financing can occur for the first time on appeal. It has emerged in bankruptcy practice. Disclosure statement questions will arise at least in these areas. Some civil defendants have found third party financing attractive. Whether that presages inventive means of funding criminal defense expenses remains to be seen; the inventiveness of funders suggests that this possibility cannot be discarded out of hand.

Disclosure of third party funding arrangements may be sought for reasons independent of recusal. The reasons often will prove controversial, and are likely to verge into arguments for substantive regulation. Problems also will arise in relation to the role to be played by rules of professional conduct and responsibility.

Related issues will involve the difficulty of defining the kinds of third party funding arrangements that might be included in a disclosure rule. There seems to be general agreement that a loan from a family member need not be disclosed, even if repayment is expressly or tacitly dependent on the outcome. So too, a general loan or line of credit extended to a law firm seems an unlikely candidate for disclosure. But it seems likely that any inquiry should extend beyond partial sale of a claim or a nonrecourse advance to fund a single specific litigation.

The value of disclosure for recusal purposes does not encounter similar concerns, but may not be as simple as it seems. Most judges agree that it is quite unlikely that a judge will invest in any of the prominent third party funding organizations. But at least for the moment, third party funding is expanding at a rapid pace. It may come to include more traditional lenders.

This bare sketch illustrates the reasons for anticipating that any consideration of disclosure statements for third party litigation financing will require much effort and will involve continuing attempts to remain informed of evolving practices. There is a viable argument for refraining from developing a uniform national rule at this time in favor of permitting the common law to continue to develop in this rapidly evolving area.

The difficulty of confronting disclosure statements for third party financing could lead in different directions. It could support deferring any study of third party financing disclosure while taking up more familiar disclosure statement questions now. The familiar questions could include proposals aimed at the need for informed recusal decisions, those aimed at determining diversity jurisdiction, or both. Or the challenges posed by third party funding could support deferring all

further work on disclosure statements, apart from bringing Rule 7.1 into line with the new Appellate and Bankruptcy Rules.

These questions are posed for initial discussion without any recommendation as to what steps might be undertaken beyond a conforming amendment to Rule 7.1. It is likely that a Rule 7.1 amendment will be proposed for publication next summer unless further consideration provides reasons to blend it into a larger project.

V. Final-Judgment Appeals in Consolidated Actions

The Committee has taken up consideration of the effect on final-judgment appeal jurisdiction of consolidation in the district court of two or more cases that were commenced as independent actions. Authority to address this question is confirmed by 28 U.S.C. § 2072(c), which extends the Enabling Act to include rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." In addition to this express authority, the most likely place for new rules provisions will be Rules 42(a) and 54(b). Rule 54(b) has provided for entry of a final judgment disposing of less than all claims in an action since 1938, and was amended several times before the amendment that added § 2072(c).

As noted below, the Appellate Rules Committee is interested in this topic but has suggested that "this matter is appropriately handled by the Civil Rules Committee." The Civil Rules Committee will coordinate its work with the Appellate Rules Committee through a process that enables both committees to proceed in tandem.

The impetus for this project is *Hall v. Hall*, 138 S.Ct. 1118 (2018). The Court ruled that cases consolidated under Rule 42(a) retain their separate identities for purposes of appeal finality, no matter how complete the consolidation. A judgment that disposes of all claims among all parties in what began as a separate action is a final decision that establishes the right to appeal under 28 U.S.C. § 1291. At the same time, Chief Justice Roberts concluded the Court's opinion by observing that "changes with respect to the meaning of final decision 'are to come from rulemaking, . . . not judicial decisions in particular controversies.'" If the Court's interpretation of Rule 42 "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend provisions accordingly." Although it might appear to be too early to conclude that practical problems have arisen from the Supreme Court's decision, there is already substantial relevant historical information and the multi-year rulemaking process should yield more.

As explored below, this suggestion about possible rulemaking may be bolstered by the grounds of decision. The Court relied almost entirely on what it viewed as an unbroken line of decisions that began with the first explicit authorization of consolidation by an 1813 statute. Practical considerations barely figured in the opinion.

The Appellate Rules Committee considered *Hall v. Hall* and made this report to the Standing Committee in June:

> * * * [T]he Committee considered the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed.R.Civ.P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. While this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved, the Committee decided that this matter is appropriately handled by the Civil Rules Committee. The Committee expects to keep an eye on the trap-for-the-unwary concern and may consider whether provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, p. 86.

Hall v. Hall in Detail: The litigation in *Hall v. Hall* began as a single action, but spun into two actions. The underlying dispute involved family relationships and money. The first action was brought by a mother, in her own capacity and as trustee of her inter vivos trust, against her son and his law firm. Her "claims – for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment – concerned the handling of her affairs by [her son] and his law firm * * *." When the mother died she was replaced by her daughter as trustee and personal representative. The defendant brother initially counterclaimed against her in both capacities for intentional infliction of emotional distress, as well as for other wrongs that eventually were dropped from the case. But confronting an "obstacle" that his sister was not a party in her individual capacity, the defendant brother filed a separate action against her on the same claims. The district court consolidated the two actions under Rule 42(a), "ordering that '[a]ll submissions in the consolidated case shall be filed in' the docket assigned to the trust case." Just before trial began the brother dismissed his counterclaims filed in the original action.

The jury returned a verdict for the brother in his action, but the court granted a new trial and that "case remains pending before the District Court." The jury returned a verdict against the sister in her representative capacity. Judgment was entered on the verdict and the sister appealed.

The Third Circuit dismissed the appeal, 679 Fed.Appx. 142 (2017). It characterized the consolidation as made "for all purposes." The sister moved to sever the cases for trial, but the district court did not respond to the motion and tried them together. Separate judgments were entered in the two actions; the court of appeals described them as "final judgments" or "styled as a final judgment." The Third Circuit opinion began with a general view that when two cases are consolidated for all purposes, "a final decision on one set of claims is generally not appealable while the second set remains pending." But "we do not employ a bright line rule and instead consider on a case-by-case basis whether a less-than-complete judgment is appealable." Factors to be considered include "'the overlap among the claims, the relationship of the various parties, and the likelihood of the claims being tried together.'" Consideration also is given to serving justice and judicial economy. For this case, all claims had initially been tried together before a single jury. "That counsels in favor of keeping the claims together on appeal." The record "illustrates some overlap of evidence among the claims." The same witnesses would inevitably testify, and both sets of claims turned on the mother's reactions to her son's conduct. There were likely to be overlapping issues on appeal once the still-pending action was resolved. The "appeal is not properly before us at this time."

The Supreme Court reversed in a unanimous opinion, ruling that each originally separate action retained its separate character, so that entry of final judgment in one of them was an appealable final judgment.

The Court began its explanation by looking to an 1813 statute that "authorized the newly formed federal courts" to "consolidate" "'causes of like nature, or relative to the same question,'" when consolidation appears reasonable. Examining its own decisions ranging from 1852 to 1933, the Court found an unwavering rule that actions filed separately remain separate actions for application of the final judgment rule:

> Several aspects of this body of law support the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. (138 S. Ct. at 1128)

Turning to Rule 42(a), the Court pointed to the 1938 Committee Note. The Note stated that Rule 42(a) "is based upon" the successor to the 1813 statute, "but in so far as the statute differs from this rule, it is modified." Despite the tantalizing suggestion that Rule 42(a) somehow modified the statute, the Court concluded:

> No sensible draftsman, let alone a Federal Rules Advisory Committee, would take a term that had meant, for more than a century, that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do. (138 S. Ct. at 1130)

The Committee Note "did not identify any specific instance in which Rule 42(a) changed the statute, let alone the dramatic transformation" that would defeat finality upon complete disposition of all claims among all parties to what began as a separate action.

Nor did arguments from the full text of Rule 42(a) prevail. Rule 42(a) says:

> (a) If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.

Seeking to support dismissal of the appeal, the defendant brother argued that paragraphs (1) and (3) show that "consolidate" has taken on a new meaning, distinct from the orders that fall short of consolidation. "Consolidation" means to transform originally separate actions into a single action. Lesser measures of coordination, such as a joint hearing or trial on some or all matters at issue, or "any other orders," leave the actions separate. Consolidation does not. The Court disagreed. It found in Rule 42(a)(2) authority to consolidate cases for limited purposes, such as motions practice or discovery, not qualifying as a joint hearing or trial under (1).

The Court supplemented this textual history and analysis with one pragmatic concern:

> Forcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a "matter of right." (138 S. Ct. at 1128)

The character of the Court's opinion leaves the way open to consider possible rules amendments without implying any disrespect for its decision. As quoted above, the Court expressly recognized the Committees' freedom to take up these questions of finality. Beyond that, the opinion is framed as a matter of historic textual analysis, with no more than a hint of pragmatic concerns. If pragmatic concerns suggest a different approach to finality in consolidated actions, the Committees should not hesitate to explore possible amendments.

Proceedings consolidated by the Judicial Panel on Multidistrict Litigation for pretrial purposes can be put aside at the outset. Under *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015), they remain separate actions for application of the final judgment rule. The Multidistrict Litigation Subcommittee is considering various proposals that seek to increase the opportunities for interlocutory appeals in MDL proceedings, and has encountered no contrary arguments to cut back the rule of appealable finality upon complete disposition of any single action in the MDL proceeding.

At least two pragmatic reasons may weigh against going further now. One is the concern expressed by the Court: At least any party that resisted consolidation of a once-separate action should not be forced to defer – in the worst case, for years – any opportunity to appeal until final disposition of every other action in the consolidation. The other is the value of clear rules on finality. Ambiguity invites premature appeals and also creates a risk of forfeiture by failing to appeal within the time measured from some event that was not recognized as an appeal-time trigger.

The values of case-specific discretion, on the other hand, are illustrated both by the Third Circuit's decision to dismiss the appeal in *Hall v. Hall* and by the experience of other courts. Some courts anticipated the Supreme Court's decision, while others took different approaches. A summary is provided by the text in 15A Federal Practice & Procedure: Jurisdiction § 3914.7, pp. 603-608, omitting the footnotes and the additional cases described in the 2018 supplement, pp. 529-536:

> Turning first to consolidation, the First Circuit has adopted a rule that actions commenced independently remain independent for purposes of the final judgment rule, no matter how completely they may have been consolidated. Under this approach, complete disposition of all matters involved in any one action establishes finality without regard to Rule 54(b). The Ninth and Tenth Circuits, on the other hand, have adopted a rule that following consolidation an order disposing of less than the entire consolidated proceeding can never be final unless judgment is properly entered under Rule 54(b). Either rule has the virtue of clarity. The rule that consolidated actions remain independent for purposes of finality has the added virtue that it recognizes that the desirability of consolidated trial court proceedings does not automatically extend to appeals. The contrary rule that consolidation always creates a single action within Rule 54(b) has the contrary virtue of recognizing that the relationships that justify consolidation for trial often make consolidation on appeal desirable as well. Most courts have rejected both of these rules, however, in favor of an intermediate position that turns on the purpose and extent of consolidation. If consolidation was intended to be for all purposes, Rule 54(b) applies as if the consolidated proceedings were a single action. If consolidation was for more limited purposes—commonly for trial—the original actions retain an independent identity, and Rule 54(b) does not apply when there is a complete disposition of any of the original actions. This position may be the most workable, particularly if it is coupled with a presumption that Rule 54(b) applies. The presumption that Rule 54(b)applies provides a substantial element of clarity, but protects against the risk that consolidation undertaken for [limited] purposes may have unforeseen consequences for appealability. Perhaps astute administration of Rule 54(b) could protect against any untoward consequences and provide the even greater clarity of a requirement that the rule always applies, but reliance on astute administration may not yet be fully justified. Whatever the best answer may prove to be, it will be important to ensure that it does not lead to confusion over the running of appeal time.

This summary survey suggests that many courts of appeals have, in one way or another, resisted the position ultimately adopted by the Supreme Court. They have sought more effective ways to advance efficient litigation in both trial courts and appellate courts. There may be ways to advance this cause without sacrificing the virtues of clear lines for determining finality.

Since 1938 the Civil Rules have sought through Rule 54(b) to bring the district court into the determination of finality in actions that present multiple claims, and more recently in actions that involve multiple parties. Rule 54(b) provides clear guidance in actions that began as a single action. An order that disposes of fewer than all claims among all parties can be made final, but only by directing entry of judgment after expressly determining that there is no just reason for delay. The trial judge is enlisted as "dispatcher," charged with considering the importance of immediate enforcement, the ways in which an immediate appeal likely would advance or impede further development of the action in the trial court, and the ways in which an immediate appeal might cause the court of appeals to invest time in studying the record and deciding the case only to repeat the process on a later appeal.

The Advisory Committee did not overlook Rule 54(b) when it propounded both Rule 42(a) and Rule 54(b). The final paragraph of the 1938 Committee Note for Rule 42(a) observed: "For the entry of separate judgments, *see* Rule 54(b) (Judgment at Various Stages)."

Rather modest amendments of Rule 42(a) and Rule 54(b) might well establish a procedure that provides bright lines, supports consideration of a losing party's interest in a prompt appeal, and establishes the most effective integration of continuing trial-court proceedings with the interests of the court of appeals.

Clear delineation of authority and responsibility does not mean that the task always will be easy. Far from it. A trial judge is likely to focus an initial consolidation order on the advantages of joint proceedings on related matters, without being able to foresee the subsequent developments that will lead to complete disposition of all claims among all parties to a case that was commenced as an independent action. The calculus of appeal timing can be made with greater assurance when what began as an independent action is completely resolved. But at that point, the trial judge has much to contribute. And the result will provide a clear line: Finality is established by a Rule 54(b) order and appeal time starts to run. Absent a Rule 54(b) order there is no final judgment, appeal cannot be taken, and appeal time does not start to run.

Rule 54(b) itself has generated a rich lore of decisions on what count as separate claims (separate parties are easier to define) and on the breadth of trial-judge discretion. It requires careful deliberation by the trial judge, and stimulates more than a few reexaminations of appeal jurisdiction by appellate courts. But on the whole, it works well. There are strong reasons to believe that it can work as well when two or more independent actions are consolidated in the trial court as when multiple claims and parties are joined from the beginning in a single action. A simple illustration would be two plaintiffs injured in the same automobile accident and intent on suing the same defendant. They might join in a single action. Or they might file separate actions in the same court, only to be met by consolidation. If the two actions are consolidated for all purposes, including trial (if there is to be a trial), the appeal calculus is essentially the same. A more complex illustration is provided by *Hall v. Hall* itself. The defendant initially attempted to bring all his claims as a counterclaim in the original action, but concluded that because the plaintiff had come into the action only in representative capacities he could not bring a counterclaim against her in her individual

capacity. A more daring defendant might have tested the question whether he could counterclaim against her in her representative capacity and then join her in her individual capacity as an added party to the counterclaim. So long as there is a viable counterclaim addressing the representative capacity, a court might well allow this procedure, keeping everything within a single action that would be indistinguishable for all appeal purposes from the consolidated proceedings that actually occurred.

It is too early to offer initial sketches of the integrated amendments that might be made to Rule 42(a) and Rule 54(b). Rule 42(a) should preserve flexibility to order common – "consolidated" – proceedings in all combinations short of complete consolidation for all purposes. But it also should continue to allow complete consolidation for all purposes, including creation of a single action that would come within Rule 54(b). Rule 54(b) could be amended in a way that is little more than a cross-reference to Rule 42(a): "When an action – including one that consolidates actions under Rule 42(a) – presents more than one claim for relief * * * or when multiple parties are involved * * *" a partial final judgment can be entered. The integration might be perfected by recognizing that the Rule 42(a) complete consolidation might be ordered at the time of entering judgment under Rule 54(b), but that question will require further thought.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 1, 2018

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 1, 2018. Participants included Judge John D. Bates, Committee Chair, and Committee members Judge Jennifer C. Boal; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; Ariana J. Tadler, Esq.; and Helen E. Witt, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair; Professor Daniel R. Coquillette, Reporter (by telephone); Professor Catherine T. Struve, Associate Reporter (by telephone); and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar 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., Julie Wilson, Esq., and Ahmad Al Dajani, Esq., represented the Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Jason Batson, Esq. (Bentham IMF); Amy Brogioli, Esq. (AAJ); Fred Buck, Esq. (American College of Trial Lawyers); Jason Cantone, Esq. (FJC); Bob Chlopak (CLS Strategies); Stacy Cloyd, Esq. (National Organization of Social Security Claimants' Representatives); Andrew Cohen, Esq. (Burford Capital); Alexander Dahl, Esq.(Lawyers for Civil Justice); David Foster, Esq. (Social Security Administration); Joseph Garrison, Esq. (NELA); William T. Hangley, Esq. (ABA Litigation Section liaison); Ted Hirt, Esq. (DOJ Ret.); Brittany Kauffman, Esq. (IAALS); Zachary Martin, Esq. (Chamber Institute for Legal Reform); Benjamin Robinson, Esq. (Lawyers for Civil Justice); Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer; Susan H. Steinman, Esq. (AAJ); and Andrew Strickler (Law360 Reporter).

Judge Bates welcomed the Committee and observers to the meeting. He noted the Committee is sad that former members Barkett, Folse, Matheson, and Nahmias have completed their terms and have rotated off the Committee. Judge Shaffer, who has resigned the bench, is in the thoughts and prayers of all members. All Committee members are pleased to welcome new members, and soon-to-be friends Boal, Hunt, Jordan, Lee, Rosenberg, Sellers, and Witt.

Judge Bates further reported that in June the Standing Committee had a lively discussion of Rule 30(b)(6), made some minor adjustments in the rule text, and approved publication for comment. Rule 30(b)(6) was published in August; hearings are scheduled in January and February. The work of the MDL Subcommittee also was

described and was discussed briefly.

Judge Bates also noted that the only Civil Rules business at the September meeting of the Judicial Conference was a brief information report from the Standing Committee on the work of the MDL and Social Security Subcommittees.

April Minutes

The draft Minutes for the April 10, 2018 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the legislative report. She noted that most of the bills listed in the agenda materials are familiar. There has been no legislative movement on the bills that were described last April. Some new bills have been introduced. The Litigation Funding Transparency Act provides for disclosure of third-party funding in class actions and MDL proceedings. The Federal Courts Access Act would make several changes in federal diversity jurisdiction, particularly in Class Action Fairness Act cases. The Injunctive Authority Clarification Act would address nationwide injunctions by prohibiting orders that purport to restrain enforcement against a non-party of any statute or like authority, with exceptions for representative actions. And the Anti-Corruption and Public Integrity Act includes provisions that would Amend Civil Rule 12 to prohibit dismissal under Rule 12(b)(6), (c), or (e) in terms that essentially undo the Supreme Court decisions in the *Twombly* and *Iqbal* cases.

Two other bills were noted. A Judiciary Reform and Modernization of Justice Act is being considered by the Committee on Court Administration and Case Management; its provisions include internet streaming of court proceedings. Another bill would modify the structure of the Ninth Circuit, dividing it into divisions.

Rules Amendments in Congress

Judge Bates noted that amendments to Rules 5, 23, 62, and 65.1 are pending in Congress, to take effect this December 1 unless Congress intervenes before then. He also observed that the early stages of Committee work on Rule 23 included provisions addressing cy pres remedies; those provisions were deleted, and a case involving cy pres questions was argued in the Supreme Court the day before this meeting.

Judge Bates also noted that as published in August, the proposal to amend Rule 30(b)(6) directs the parties, or a nonparty subjected to a deposition subpoena, to confer about the number and description of the matters for examination, and also to discuss the identity of the persons who will testify for the entity named as deponent. Few comments have come in so far, but there are likely to

be a fair number. The direction to discuss the identity of the witnesses has encountered substantial resistance. "We look forward to comments from all parts of the public."

Report of the MDL Subcommittee

Judge Bates introduced the Report of the MDL Subcommittee by noting that this is one of the two current major subcommittees. Chaired by Judge Dow, with Professor Marcus as principal Reporter, the subcommittee has been hard at work for a year. It has drawn from many sources, and has met with several outside groups.

Judge Dow began the report by noting that several Subcommittee members and Judge Bates attended the annual transferee judges conference of the Judicial Panel on Multidistrict Litigation on October 31. About 150 transferee judges attended the morning session. The Subcommittee members had a meeting in the afternoon with between 20 and 25 of the most experienced transferee judges. "Every time we sit down with a group it's very fruitful." The November 2 Roundtable on third-party litigation funding at George Washington University Law School will add still further insights, both as to the role of financing in MDL proceedings and as to more general issues.

The judges at the JPML meeting were perhaps more interested than the Subcommittee has been in some of the familiar topics that have been on the Subcommittee's short list for particular study. They were particularly interested in sorting out supportable individual claims, appellate review, and in third-party funding not only in MDL proceedings but more generally. There also is interest in the analogies between MDL proceedings and class actions. Many MDL proceedings include class-action cases, and Rule 23 procedures come into play whenever disposition includes class certification, ordinarily for purposes of settlement. The possibility of creating formal rules to apply like procedures to non-class MDLs may deserve closer study, in part because many judges now apply them by analogy. The Subcommittee had not much focused on the proposals that every plaintiff in an MDL should pay an individual filing fee, an issue that arises with actions "directly filed" in the MDL court after consolidation. The MDL judges were interested.

Judge Bates added that the MDL judges agreed on many issues. On others there was a variety of views. There was some discussion of the question whether formal rules are needed. "They thought not, except perhaps for a few issues." "Information gathering will not stop." It may be that empirical research by the Federal Judicial Center will be requested. The Judicial Panel has provided much useful information. So have several conferences. "But there may be

more conferences and events."

Professor Marcus added that "We want reactions, not our own views," on agenda topics. Six major categories are identified at p. 142 of the agenda materials.

Real concern is shown in many quarters about the number of plaintiffs that appear in some MDLs without any supportable claim. Is there an effective remedy — perhaps by imposing heightened pleading requirements, or enhanced Rule 11 requirements for plaintiff's counsel, or plaintiff fact sheets? How should any such requirements apply to cases filed before the MDL consolidation, or outside the MDL court after consolidation?

The need for increased opportunities for interlocutory appellate review has been stressed by many, mostly representing defendants' interests. Common examples include Daubert rulings on the admissibility of expert testimony and rulings on preemption. If new appeal opportunities are to be created, should the appeals be as a matter of right? If an exercise of discretion is required, should it include both the district court and the court of appeals?

The process of forming and funding plaintiffs' steering committees is another area of continuing interest. Creative approaches have been adopted, including appointments for one-year terms that enable the MDL judge to evaluate performance and encourage vigorous development of the proceedings. Common-benefit funds to compensate lead counsel generate much interest, including caps on fees. Related questions ask whether the court can limit fees charged by individual plaintiffs' lawyers who do not participate in the leadership and who contribute to, rather than gain from, common benefit funds. Do Rule 23(g) and (h) on class counsel appointment and fees provide useful models?

Trial questions have focused on "bellwether" trials, and particularly on the question whether party consent is required if the MDL court is to hold a bellwether trial. Bellwether trials usually proceed with party consent.

Settlement promotion and review are a central feature of MDL proceedings. But writing a rule for reviewing settlements by analogy to Rule 23(e) is a challenge because it will be difficult to define the distinction between truly individual settlement of individual actions in the MDL proceeding and settlement efforts that seek to generate common terms for groups of cases or all cases.

Third-party litigation funding occurs in MDL proceedings as well as others. It can provide essential resources to develop the

case, and may support efforts to diversify the ranks of those who appear in leadership roles. Proposals for court rules have focused on disclosure, often raising issues similar to those that are addressed in considering third-party funding as a more general phenomenon. Should disclosure be limited to the fact there is funding, and the identity of the funder? Should it include more detailed information about the funding arrangements — and if so, should the disclosure be made in camera, or should it be made to all parties? To the world?

I Unsupported Claims: Judge Dow noted that there is "some consensus" that substantial numbers of unsupported claims are a problem, at least in large mass-tort MDL proceedings. Judges Fallon and Barbier are experts, who agree that any rule that might be adopted to address the problem should allow flexible responses by MDL judges. In turn, that raises the question — much discussed in the Subcommittee — whether a rule framed at a high level of generality "will be much of a rule"? Perhaps the most that should be attempted is to identify this as a subject for discussion in Rules 16 and 26.

Judge Bates added a reminder that at any time there are rather more than 200 pending MDL proceedings. The focus of concern is on about ten percent of them, mostly mass torts, and among the mass-tort proceedings mostly medical devices and pharmaceutical products. It seems probably true that there is an issue with unsubstantiated claims in these proceedings. But there is not as much agreement on what causes the problem. The perspective of judges is different from plaintiffs' perspectives or defendants' perspectives. Defendants add business concerns such as the impact of sheer claim numbers on SEC filings and regulatory filings. Should such business concerns, of themselves, be a reason for generating new rules?

A judge observed that plaintiff fact sheets are an option for identifying unsubstantiated claims: may that be a sufficient remedy? Judge Dow responded that various approaches were discussed at the October 31 MDL conference, including fact sheets, enhanced Rule 11 enforcement, and other means. The variety of approaches underscores the value of flexibility. "Most experienced MDL judges think the tools are there." It is an open question whether one tool, such as plaintiff fact sheets, should be elevated over others. "The judges often suggested we should not tie their hands. Many judges focus more on getting the parties on a settlement track."

Another judge reported that one MDL judge said he did not want to go through hundreds of fact sheets. And there was a sense that the time frame for fact sheets could be a problem — a plaintiff's

attorney may not be able to gather the information requested by a fact sheet within, for example, 60 days after filing. Still, there was agreement that fact sheets work well.

A Committee member asked whether it would be useful to have a rule that presumes plaintiffs must file fact sheets unless there is a special showing they are not needed? Judge Dow replied that the judges at the conference likely think such a rule would be too specific. Judge Bates added that a rule that adds fact sheets as a subject for discussion at Rule 16 and 26 conferences would be acceptable, although this approach "has few teeth." And "remember we are talking about a subset of MDL proceedings."

Another Committee member asked whether a fact sheet is a pleading subject to a Rule 12 motion? A judge answered that one role for fact sheets can be to take the place of an individualized pleading in a direct-filed case. Prompt filing may be needed for limitations purposes. "The problem is that some causes of action are easier than others to identify in 30 days." Most fact-sheet responses are general, addressing such questions as when the injury occurred.

A different judge reported that in a medical-product MDL the parties proposed there should be a master complaint and plaintiff fact sheets. They recognized that it would be "too much" to insist on individual complaints, individual answers, and individual Rule 12 motions. The MDL was formed after 50 cases had been filed. The plaintiffs advertised. The MDL now counts 5,000 cases — 300 were filed last week alone. The master complaint "pleads every plausible claim." Plaintiffs file a short-form complaint identifying the product and injury, and checking the boxes on which of the claims in the master complaint they are asserting. Then they have 60 days to file a specific fact sheet that is like discovery; the order says that the fact sheet is treated as answers to interrogatories, so Rule 37 applies. Defendants have 20 days to tell the plaintiff of perceived defects in the fact sheet. The plaintiff has 20 days to respond. Then the defendant can request dismissal. No motions to dismiss have been made, nor have any challenges been made to the adequacy of individual fact sheets. The defendants go forward with discovery guided by the fact-sheet information about who the plaintiff is, and what the product is. Daubert motions are made. Taken together, the fact sheets inform the defendants of the value of the aggregate claims for settlement.

Still another judge noted that a variety of approaches are taken to winnowing out unsupported claims. Some judges use "Lone Pine" orders. The master-complaint approach just described is typical of many mass torts. Judges say it works, that there is no need for a rule.

A Committee member asked whether it would help to add a special disclosure rule for mass tort cases to Rule 26(a)(1)? This approach is discussed at pages 146-147 of the agenda materials. One question is whether the consequences of inadequate Rule 26(a)(1) disclosures under Rule 37(c)(1) provide sufficient incentives to deter unsupported claims. Defendants want a rule that can be the basis for early dismissal of unsupported claims. That could extend to requiring the judge to consider individual plaintiffs, perhaps in unmanageable numbers. Another Committee member added a reminder that "mass torts are only a slice of it." Many class actions are gathered in MDL proceedings. "A rule for all MDL cases would be a problem."

This question was developed by asking how a fact sheet translates into winnowing out unsupported claims. A judge replied that 95% of the cases in MDLs "never get transferred back. The winnowing occurs in settlement." Both sides have an understanding of the value of different categories of claims, including, for example, a category of claims that are worthless because the plaintiffs have no injury. It is a good question whether fact sheets are useful for winnowing out unsupported claims early in the case. Defendants want to litigate some plaintiffs out of the MDL early-on. Perhaps a survey could ask MDL judges for their views. It was suggested that if a survey is to be done, practitioners should be surveyed as well to ask about all the procedures that have been used to identify unsupported claims and about how well they work.

A judge said that fact sheets can be used for early winnowing. A procedure has been set up in her MDL after talking with other judges. The defendant has an opportunity to tell the court what is a deficient fact sheet. Once a case has been on the monthly docket two times, the defendant can move to dismiss because the fact sheet is inadequate. "Cases do fall by the wayside." The procedure takes the place of Rule 8, especially with advertising to gather more plaintiffs and no direct-filing fee for direct-filed cases. A master complaint makes a difference. And individual cases can be dismissed with prejudice when there is no response at all to the order for a fact sheet. Other judges agreed that fact sheets can be used to identify unsupported claims, but it may help to study this further. "We get the sense that a lot of it washes out at the end." It seems likely that most MDL judges follow pretty much the same procedures. An example of dismissals for inadequate showings by individual plaintiffs is provided by the decision in Barrera v. BP, P.L.C. (5th Cir. No. 17-30122 October 18, 2018).

Some proposals made to the Committee, or reflected in pending legislation, would require the judge to deal with each plaintiff on the basis of the fact sheet. In proceedings with large numbers of plaintiffs, that is a real problem for the judge. In the same vein,

a Committee member asked whether it is clear that plaintiffs have an adequate opportunity to find the facts they are required to provide in fact sheets? If we do a survey, we should ask whether MDL judges are satisfied that plaintiffs have a fair chance, including through discovery.

Discussion moved to the role of individual filing fees, a topic discussed at the October 31 conference. A judge who did not require individual filing fees for direct-filed cases expressed regrets about the decision. There was some sense at the October 31 conference that more judges will move toward requiring filing fees for each plaintiff, but some have not. If there is to be a survey, perhaps this practice should be included.

II Interlocutory Appeals: Judge Dow noted the range of questions that have been raised by proposals that there should be more opportunities for interlocutory appeals from orders in MDL proceedings that may add cost and delay that would be spared by appeal and reversal. Any actual rule proposals will be coordinated with the Appellate Rules Committee, to our advantage. The first question may be to learn whether there is a gap that somehow makes inadequate the opportunity to appeal on certification under § 1292(b), adding in the prospect of partial final judgments under Rule 54(b) and extraordinary writs under § 1651 when special circumstances warrant. Is it possible to identify particular kinds of cases that deserve new appeal rules? Should any new appeal opportunity be a matter of right? If permission is required, should permission be required from both courts, only the district court, or only the court of appeals? District judges express concern about the prospect that appeals will delay trial-court proceedings, even if there is no formal stay. It may be useful, but difficult, to determine whether new appeal opportunities should be provided only for particular categories of cases. And it will be interesting to speculate about the amount of work that would be generated for the courts of appeals by either permissive or mandatory appeal rights — some proponents have suggested that no more than one or two appeals per circuit per year are likely, but that is only speculation.

A Committee member asked about the views of MDL judges about § 1292(b) — should we find out more by including this as a question in any survey that may be made? A judge said that most MDL judges think that § 1292(b) is adequate to the appeal needs of MDL proceedings. Another judge suggested that if MDL judges are surveyed, it would be good to learn how many requests are made for § 1292(b) appeal certification, and how many are granted by the district court and then the court of appeals. An example of a recent district-court certification was noted. Another question could ask about the effects of an accepted appeal on delay. In a

class action, not an MDL, a § 1292(b) appeal was certified from an order that, choosing among conflicting circuit precedents, denied summary judgment. The appeal was accepted. The decision was made 27 months later. Delay of that magnitude "gives pause." In an MDL, the same judge denied a motion to dismiss that asserted state-law claims were preempted, and denied certification for appeal because the answer seemed clear and the first bellwether trial was almost ready to begin.

Another judge repeated that proponents of expanded appeal opportunities predict that there will be few appeals, perhaps one or two per circuit per year. Predictions are likely to be shaped by the types of MDL proceedings included in any proposed rule. But delay remains an issue.

Further discussion suggested that the criteria for certifying a § 1292(b) appeal are treated differently in different circuits. Some take more formal, less flexible, approaches. Although most MDL judges believe § 1292(b) suffices, their views may depend on the approach of the local circuit.

The defense bar argues that they will win a good number of appeals, yielding gains that will offset any delay in district-court proceedings.

Another judge asked who are the proponents of expanded appeal opportunities? If MDL judges do not think new opportunities are needed, we should know who feels the need and what motives drive their views. A judge responded that "we have the equivalent of a survey" in meetings with the defense bar. Another judge added that "part of it is a view of fairness." Defendants argue that when a defendant wins a ruling that defeats a plaintiff, the plaintiff can appeal. But if the defendant loses the ruling on the same issue, there is no appeal and huge expenses follow. Preemption issues are frequently advanced as an example. "Defendants are confident these are good motions. And many defendants are repeat players." Some defendants also think that some MDL judges are too reluctant to certify appeals that should be allowed, whether from fear of reversal, a sense that the cases will settle anyway, or a preference for settlement over dismissal without any remedy.

Defendants also urge that delay can be reduced if appeals are expedited. But the committees have been reluctant to adopt rules that require expedition on appeal. There are too many competing demands on the time of appellate courts. When, for example, would an interlocutory appeal in an MDL proceeding deserve priority over criminal appeals? A Committee member noted that rule 23(f) appeals are attempted in almost every class action, and that the impact is delay. We might try to find out more about the frequency of §

1292(b) appeals in MDL proceedings. It is important to remember that the cost of delay is not simply money. In medical product cases delay may mean that some plaintiffs die before the case resolves. "If we're looking at a very thin slice of cases, why not be transsubstantive"?

A further suggestion was that if cases are to be counted, we might look at how often courts of appeals grant permission for § 1292(b) appeals, and in which types of cases.

One judge thought that at the October 31 conference some MDL judges showed they did not understand the discretion they have under § 1292(b). Could it be useful to adopt a rule that clarifies this?

Another judge noted that MDL judges have discussed the effect of remanding a case to the court where it was filed, often in a circuit other than the circuit for the MDL court. Although there is a prospect that differences in circuit law could defeat rulings made by the MDL court, it is agreed that this is not a problem because the MDL rulings are treated as the law of the case.

III PSC Formation and Funding: Judge Dow opened this topic by saying that nothing new was discussed at the October 31 conference. No rule-based proposal has yet been made.

Professor Marcus noted that in drafting the amendments to Rule 23(g) on appointing class counsel, the Committee drew from experience in appointing lead counsel in MDL proceedings. "This is a two-way street." So it is common for MDL judges to draw on analogies to Rule 23(g) in appointing lead counsel. Judge Dow agreed, adding that MDL judges think the analogy to Rule 23(g) provides guidance enough without any need for a new rule. Judge Bates also agreed, noting that in both settings courts are concerned with the adequacy of the resources available to counsel to properly develop the case.

A Committee member asked whether there is an interaction between unsupported claims and the composition of the Plaintiffs' Steering Committee. Judge Dow responded that the Subcommittee has often heard that having a large number of clients is a ticket to a role on the steering committee. "Some lawyers may seek to pump it up by advertising." But judges do not think we need a rule.

This view was expanded by another judge. Very experienced judges think they are handling the appointment of steering committees quite well. They look to the credentials of the lawyers who vie for appointment. Some make one-year appointments, a practice that can easily lead to flushing out lawyers who have

garbage lists of clients. And a lot of attention is being paid to the repeat-player problem, both by MDL judges and the JPML. Still another judge pointed out that MDL judges are making active efforts to expand the ranks of steering committee participants, looking to expand the MDL bar to more lawyers and more diverse lawyers. A website is available and the JPML provides resources.

Professor Marcus pointed to estimates that the cost of preparing a single bellwether trial is at least a million dollars, not counting lawyer time. Third-party financing may be a means for "those who are not over-rich" to play a role.

IV Trial Issues: Judge Dow reported that the October 31 conference supports the view that a number of MDL judges are not doing bellwether trials. There is no groundswell of support for rules addressing this practice. Here, as elsewhere, MDL judges want flexibility. Lexecon "workarounds" are used, but there may be a trend toward more frequent remands to other courts for trial, both in actions filed elsewhere and then transferred to the MDL and in actions direct-filed in the MDL but naming the court where the case should be remanded for trial. Some MDL judges ask to be transferred with the case so they can try it in the remand court. Again, there is no sense of a need for new rules.

Judge Bates formed the same sense of the views expressed at the conference. He added that there is a feeling that cases are dropped on the eve of a scheduled bellwether trial, that the plaintiff dismisses or the defendant settles. There is a risk of strategic maneuvering to gerrymander the selection of bellwether cases. Judges devise procedures to respond. One procedure, for example, is to list a number of bellwether trials on a set schedule; if one drops, the next case on the list is advanced for trial on the date set for the drop-out. "We did not even hear much in terms of proposed rules."

Another judge observed that in his MDL, the lawyers asked for bellwether trials. In other MDL proceedings, lawyers may feel that bellwether trials are forced on them. Further conversation among the judges suggested that MDL judges are not likely to force bellwether trials, but that they want to move cases, and to have a pool of defendants willing to waive the Lexecon limits on transfer for trial. Judges have not expressed concerns on this score, but proposals have been made to require all parties' consent. If we undertake a survey of lawyers, perhaps questions could be asked about these concerns.

A judge noted one response to the risk that cases set for bellwether trials will be dismissed or settled to skew what was intended to be a representative sample: he told the parties that

once a list of bellwether cases had been set, he would end the bellwether process if the cases started to dismiss or settle, and would remand them all for trial. Another approach would be to allow defendants to substitute a case for one dismissed by the plaintiff, and to allow plaintiffs to substitute a case for one settled by the defendants.

V Settlement: Judge Dow began the discussion of settlement by noting that many MDLs include class actions, so that settlement brings compliance with Rule 23(e). Many non-class settlements reflect involvement of the judge, but without the Rule 23 process: is this a problem? The Subcommittee members at the October 31 conference made the possibility of a rule regulating settlement a major focus. There was a lot of discussion. But the Subcommittee has not yet given much thought to these questions, nor developed them as well as might be.

Judge Bates added that conversations with MDL judges suggest that they have pushed for settlement in proceedings that never would have been certified as a class. Or they have suggested to the parties what criteria might lead them to promote a settlement. "There is something like Rule 23(g) only if the judge puts it in place." It is easy to imagine that the Supreme Court might be concerned about settlements accomplished without the guidance and protection of something like Rule 23(g).

A Committee member suggested a need to ask whether the MDL court must look after the interests of individual plaintiffs. What harms need to be guarded against? What role does the court have when every plaintiff has a lawyer?

Professor Marcus responded that Individually Retained Plaintiffs Attorneys sometimes feel they do not have much influence in the proceedings, and may feel pressure to accede to a proposal for common settlement. A rule could tie settlement review to selecting the plaintiffs' steering committee, making court involvement a major feature. It seems likely that judges consider factors similar to Rule 23(g) in appointing steering committees.

The caution was repeated: The Subcommittee has not much got into these questions. But perhaps there is not much there. Still, the questions remain.

VI Third-Party Litigation Funding: Judge Dow opened the topic of third-party funding by noting that the Subcommittee has benefited from several meetings that included representatives of litigation funding firms. There is a broad diversity among funding arrangements. Often a sharp distinction is drawn between two settings. One involves small loans made directly to individuals in

ordinary litigation. The other involves large loans made to litigants or law firms in complex or high-stakes actions. Many models of disclosure have been advanced. Judge Pollster's order in the Opioids MDL directing disclosure of funding agreements for in camera inspection, supplemented by affidavits about actual practice under the agreements, is one model. Another is disclosure to all parties — perhaps of the agreements themselves, or perhaps only of the fact of funding and the identity of the funder. Yet another is to supplement disclosure with some discovery. The purposes of disclosure also may vary. One purpose is to support recusal decisions by the judge. Another is to decide whether a funder should be involved in settlement conferences. Yet another is to determine whether a funder has influence or even a veto power over settlement.

Judge Bates noted that judges at the October 31 MDL conference were not opposed to a disclosure rule, and thought there might be some benefit. But the discussion left open the same questions whether disclosure should be confined to the fact of funding and the identity of the funder; whether disclosure should be made in chambers, or to all parties; whether the full agreement should be disclosed, and to whom; and whether discovery should be allowed.

A Committee member asked how third-party funding would be defined for purposes of any disclosure rule. "Different funders define terms differently." Should a rule aim only at case-specific funding? At funding of a firm's inventory of cases? At funding of an individual client? One or all law firms in a case that involves many firms? "We aren't always talking about the same thing." This caution was repeated in later parts of the discussion.

The Committee was reminded that disclosure is complicated by overlapping regulatory regimes. Professional responsibility organizations are considering this.

A Committee member asked whether MDL judges generally require disclosure. Judge Dow responded that there is a trend toward disclosure, especially given the order in the Opioid litigation, but it is not yet a practice. Another judge agreed — more and more judges are directing disclosure. The member followed up by asking whether a rule should start at the modest end of limited disclosure, or should aim higher?

Professor Marcus suggested that it is useful to consider actual current practice in framing a rule. The Rule 5 limits on filing discovery materials with the court, for example, were adopted after about half of the districts had adopted rules that limited or prohibited filing. "You've got to put the sidewalks where people are walking." But it would be a mistake to approach

disclosure of third-party funding only for MDL proceedings. A broader approach should be considered. Judge Bates followed up this advice by reminding the Committee that third-party funding has been lodged with the MDL Subcommittee because disclosure had been proposed as part of package proposals for MDL proceedings, and because this tie avoided the need to form a third major subcommittee. The Subcommittee recognizes that the inquiry is not limited to MDL proceedings, and that funding occurs in many forms.

This discussion framed the question whether disclosure should be approached incrementally. One possibility would be a rule that requires only disclosure of the fact of funding and identity of the funder, supplemented by a Committee Note stating that the rule sets a floor that can be supplemented by the court on a case-by-case basis.

The question of professional responsibility regulation returned. Most districts incorporate either the ABA Model Rules or the local state rules of professional responsibility. So Massachusetts could adopt a rule that would thus be incorporated in the local rules for the District of Massachusetts. The prospect of varying state rules, incorporated into district-court rules, should be taken into account.

A judge noted that third-party funding happens without the knowledge of judges. "A number of my colleagues are not even aware that it happens." Learning about the phenomenon generates an interest in disclosure. "You cannot do anything about what you do not know about."

Another judge suggested that if there is a survey of judges, MDL or more generally, it could ask what is done about third-party funding. And whether, when there is disclosure, it leads to recusals. Judge Dow noted that a survey of MDL judges by the Panel this year asked about experience with third-party funding. "There is an interest in the recusal problem."

A familiar question was asked: do we know about what kinds of investments judges make that might lead to recusal because of third-party funding? There are some big funding firms that everyone recognizes. It may be that judges are quite unlikely to invest in them. But there are perhaps a few dozen more, not all well known. More importantly, third-party funding has expanded rapidly in just a few years. It is possible that many other forms of lenders will emerge, but uncertain whether many lenders will be interested in the case-specific or nearly case-specific types of lending, and particularly non-recourse lending, that give rise to the most pressing recusal issues.

November 26 draft

A judge asked how third-party funding plays into settlement. And if the judge knows there is funding, does that affect the judge's approach? One reply was that one concern is that the lawyer advises the client on settlement, and the advice may be affected by the fact and terms of funding even if the funding agreement explicitly denies any role for the funder. As one example, a lawyer who repeatedly deals with a funder may be influenced simply by knowing that the funder wants an early settlement in a particular case.

A Committee member returned to the professional responsibility rules that deal with outside influence: Are they adequate to deal with funding that does not of itself pay the lawyer's fees?

The discussion came back to MDL-specific issues by noting that Rule 23(a)(1)(A)(iv) provides that in appointing class counsel, the court must consider the resources that counsel will commit to representing the class. An MDL judge has a similar concern to appoint lawyers who can fund the MDL. In one MDL the plaintiffs' lawyers have invested tens of millions of dollars in expenses. If courts want to bring new lawyers into the ranks of lead and coordinating counsel, they likely will need third-party funding.

When asked, a Committee member said she had not seen the question of third-party funding come up in designating lead counsel. Lawyers seeking appointment simply state that they have adequate resources. The questions do not go further to ask whether the lawyers are self-funding, have a line of credit, or whatever. And remember that third-party funding occurs on the defense side as well. It can be used to pay a defense firm every month. Is this any different from funding for plaintiffs? She went on to ask what actions by the court might we contemplate after disclosure? And she urged that third-party funding opens opportunities to lawyers, including minorities and young lawyers. "MDLs are extremely costly. Most lawyers are working for contingent fees. Fee requests are often cut, especially in class actions."

Judge Dow noted that some MDL judges say that they ask about third-party funding when "people not in the usual mix" seek leadership positions.

Judge Dow concluded the Subcommittee report by suggesting that if the Subcommittee is to go about gathering more information along the lines suggested in the Committee discussion, it may be another year before the Subcommittee will be in a position to narrow the range of subjects that might be developed into actual rules proposals.

Social Security Disability Review

November 26 draft

Judge Bates introduced the Report of the Social Security Review Subcommittee by noting that the Subcommittee has worked for a year gathering information and considering what it is learning. Questions remain about the wisdom of developing rules for a specific substantive area, about the scope of any rules that might be adopted, and whether rules can effectively reduce the problems that inspired the request that the Committee take up these questions.

Judge Lioi began the report by summarizing the overall questions it addresses.

The task has been taken up in response to a recommendation by the Administrative Conference of the United States based on an in-depth study of practices around the country. Since the Committee meeting last April, the Subcommittee has held a conference call with the Social Security Administration; another with a group of plaintiff attorneys gathered by the American Association for Justice; and three additional calls among Subcommittee members to consider and continually revise draft rules.

The current draft rules are limited to actions with one plaintiff, one defendant — the Commissioner of Social Security, and no claim beyond review on the administrative record for substantial evidence.

Among the questions that remain are how detailed the complaint should be, and whether the answer should be anything more than the administrative record.

The draft also dispenses with Rule 4 service of the summons and complaint, substituting a notice of electronic filing sent to social security officials and the United States Attorney. A few details remain to be worked out, but this proposal has met with approval on all sides.

The draft rules set the times and order of briefing and require specific references to the record. After considerable discussion, they require that the plaintiff begin with a motion for the requested relief, supported and explained by the plaintiff's brief. The plaintiff is given an option to file a reply brief.

The draft does not include several provisions requested by the Social security Administration. It does not set page limits for briefs. It does not prohibit the practice in some courts that require the parties to file a joint statement of facts, although that practice should be found inconsistent with the pleading and briefing rules. Nor does it take up the proposal to address requests for attorney fees based in services on judicial review

under § 406(b).

Several drafts framed these rules as a new set of supplemental rules. The current draft brings them into the body of the Civil Rules, providing three rules to replace abrogated Rules 74, 75, and 76. It is possible that the three will be collapsed into a single rule. The result would not be remarkably long, simply leaving more white space as rules become subdivisions and on down to items. And the benefit would be to retain two vacant rules slots for future use. Some thought has been given to framing a single new rule as a Rule 71.2, coming immediately after Rule 71.1 for condemnation actions. Whether as Rule 74 or Rule 71.2, the new rule would fit into Title IX for "Special Proceedings.

The Subcommittee will seek another round of comments on the current draft by the Social Security Administration and plaintiffs' representatives. This draft was prepared too late to seek their review before today's meeting. Representatives of these groups are observing this meeting, and will provide comments on the draft and the discussion here today within three weeks. All of this information will be considered in preparing the next draft and seeking comments on it.

Discussion began with Rule 74, which defines the scope of the rules. It limits Rules 74, 75, and 76 to actions in which a single claimant names only the Commissioner of Social Security as defendant and seeks no relief beyond review on the record under 42 U.S.C. § 405(g). If there is more than one plaintiff, or a defendant in addition to the Commissioner, or a request for relief that goes beyond review for substantial evidence in light of correct law, the new rules do not apply. The draft Committee Note includes in brackets a possible suggestion that even in actions that are not directly governed by the new rules, it may be appropriate to rely on the pleading standards of Rule 75 for the parts of the action that seek review on the administrative record. The decision to narrow the scope of the new rules reflects in part the value of avoiding the complications that arise from efforts to integrate the simple review rules with the full sweep of procedure that is commonly invoked in more complicated actions. The vast majority — likely nearly all — of § 405(g) review actions fit the simple model. It seems better to separate out such things as class actions. Very few class actions seek to base jurisdiction on § 405(g), and it seems better to leave them out of the new rules.

Draft Rule 74(b) is a relic of the drafts framed as supplemental rules. It says that the Federal Rules of Civil Procedure also apply except to the extent they are inconsistent with the new rules. There is no need for this subdivision if the new rules are swept into the regular body of Civil Rules.

November 26 draft

The first question was whether two claimants can join in a single Social Security Administration proceeding? The consensus was that this cannot be done, but this is a point that must be made certain. If two claimants can proceed together before the Administration, it likely will make sense to permit them to join in a single action for review.

The next observation went to where any rules should be located. The tentative decision to put them in the main body of the Civil Rules should be reconsidered. Placing them in the body of the rules risks setting a precedent that will lead to expanding the rules into a set that resembles the Internal Revenue Code, a collection of special-interest rules. Making them supplemental rules poses less of a threat. Supplemental rules emphasize that this is a separate universe and make it easier to resist other efforts for special rules.

The Committee was asked to remember that this project comes from a request by the Administrative Conference, joined by the Social Security Administration. Their goal is to achieve a nationally uniform set of procedures for the 17,000 to 18,000 review cases that are filed every year. The concern is that different districts follow markedly different procedures, including 62 districts that have local rules for social security review cases. The hope is that a nationally uniform practice would provide great benefits to the Social Security Administration, and would also provide real benefits to plaintiffs' counsel. Although the Administration is represented by local United States Attorneys, Administration lawyers commonly bear the brunt of the work and at times are appointed special Assistant United States Attorneys. Administration lawyers frequently appear in different districts and need to learn the local procedures. A uniform set of national rules might save as much as two or three hours per case; if so, something like 35,000 hours of attorney time could be freed up for more productive uses. In addition, the Administration believes that some local practices are undesirable. Some courts, for example, require plaintiff and Commissioner to prepare a joint statement of facts, a process that wastes time and can cause difficulties. Several courts rely on summary judgment to frame the review, a practice that has the benefit of specific provisions for citing to the record but that may cause difficulties because several provisions in Rule 56 are inapposite to administrative review and the standard for summary judgment — no genuine dispute as to any material fact — is inapposite to review on an administrative record.

It is important to remember that much of the delay in processing social security disability claims occurs in the administrative process. New rules for district-court review will not affect that, and are not likely to affect the high rate of

remands. It is important to provide as efficient and prompt review as possible, but the Committee should take care to remember that new rules will not do much to cure problems that primarily arise from an understaffed administrative structure.

The argument for the values of uniform national procedures was met with the observation that there are many areas of the law that encounter wide variations in local practice. But the rejoinder is that social security review brings 17,000 to 18,000 cases to the district courts every year, accounting for seven percent of the docket. And it is common to find district courts spending more time on a case than was devoted to it in the administrative process.

A different response was that if local practices are indeed undesirable in this setting, it may be important to ensure that the new rules foreclose local rules that undermine the goals of uniformity and efficiency. This approach might even extend to setting page limits for briefs, although the Civil Rules have never done that and there are good reasons to allow local variations that conform to local practice in other types of cases.

Rule 75 came up next. In many ways it is the heart of the new rules, addressing the complaint, service, answer, the time to answer, and the effect of motions on the time to answer. In some ways it is a hybrid that blends an effort to analogize the proceedings to appeal procedure with the greater detail customarily provided in civil pleading. Many questions remain about the success of this blend. The effects of the blend are not limited to the complaint. As drafted, the rules allow the Commissioner to answer by filing the administrative record and stating any affirmative defenses, making it optional whether to respond to the allegations in the complaint.

As drafted, Rule 75(a) does not specifically state that the complaint must identify the decision to be reviewed. Perhaps that should be added to the rule text.

The first information that the complaint must include is the plaintiff’s name and address, along with the last four digits of the plaintiff’s social security number. It also must identify "the person on whose behalf — or on whose wage record — the plaintiff brings the action." Serious questions have been raised about requiring the address and the last four digits of the social security number. Plaintiffs in other actions are not required to provide these details about themselves, and there is an inevitable risk in providing them. The Social Security Administration insists that it needs these details to make sure that it has identified the proper administrative proceeding and can file the correct record. With more than a million administrative proceedings each year,

there often are many claimants with the same name. This insistence apparently reflects the absence of any other means to identify the administrative docket, but it might be asked whether the Administration should protect itself by developing a separate system to identify individual proceedings.

The next item specified for the complaint is "the titles of the Social Security Act under which the claims are brought." One question is whether this is necessary. Although it is borrowed from a draft prepared by the Social Security Administration, it is not clear why the Administration needs to know anything more than the identity of its own proceeding: is new law, not invoked in the administrative proceeding, often invoked on review? Is it simply that § 405(g) review provisions are adopted by some other statutes? And for that matter, is "titles" a term sufficiently understood by practitioners to convey the intended meaning? The Subcommittee will press the Administration for more information on these questions.

After that, the complaint must name the Commissioner of Social Security as a defendant. That is required by statute, but it may be useful to remind plaintiffs, particularly pro se plaintiffs, of the proper form. Complaints in fact sometimes name a wrong defendant.

These three elements roughly correspond to Rule 8(a)(1), establishing the grounds of the court's jurisdiction.

The fourth element provides the analogue to Rule 8(a)(2), stating the core requirement that a claim be stated by asserting that the decision is not supported by substantial evidence or must be reversed for errors of law. The reference to errors of law might be surplusage, since a substantial-evidence argument can be framed by arguing that there is not substantial evidence when the record is reviewed under the proper law. But it may be helpful. The draft includes in brackets possible language that would limit the complaint to a general statement that the decision is not supported by substantial evidence, "without reference to the record." These words would emphasize the analogy to a notice of appeal. But it may be better to allow a plaintiff who wishes to plead greater detail about the lack of substantial evidence to do so. Among other things, more detailed pleading might educate the Administration to the reasons that lead to the frequent motions for a voluntary remand to correct deficiencies in the administrative decision.

The fifth and final element is a request for the relief requested. This corresponds to Rule 8(a)(3).

The first question raised about Rule 75(a) was why it requires so much detail? And what happens if the plaintiff does not include more? In two different districts, located in different regions of

the Social Security Administration, "I have never seen any issue of finding the right record." Nor was the Administration ever defaulted for failure to respond.

The next question asked about the plaintiff's name and address. The Committee on Court Administration and Case Management has proposed that district courts should describe plaintiffs in social security disability opinions only by first name and last initial because the opinions themselves often include detailed personal information. Should these rules adopt a similar limit? Is it protection enough that Rule 5.2(c)(2) limits nonparty remote electronic access to the file in an action for benefits under the Social Security Act to the docket maintained by the court and the court's opinion, "but not any other part of the case file or the administrative record"? Nonparties can have access to the complaint at the courthouse, but not by remote electronic means. The same holds true for Rule 12 motions. The opinion, on the other hand, is available on PACER. But, again, why does the Administration need the last four digits to identify the proper record? If the complaint identifies the date of the final administrative decision, as required to establish jurisdiction, why is that not enough? the decision becomes final when the Appeals tribunal affirms or denies review. There is never a doubt as to what is the final substantive decision. The administrative law judge's decision is not the trigger for appeal, but the decision "is the front of the record."

Another Committee member expressed concern about having "all this personal information all at one time in one place." It is easily accessible for identity theft and other misuse. Yet another member suggested we should learn more about why the Social Security Administration cannot identify the proper record by other means. The Subcommittee "will press them on that."

Separately, it was urged that draft Rule 75(a)(4) should retain the phrase "or must be reversed for errors of law."

A separate question was raised as to the phrase in draft Rule 75(a)(1) asking for the identity of the person "on whose wage record" the action is brought. This phrase was offered by the Social Security Administration, and they have offered assurances that it is the proper phrase to reflect substantive rights.

A Committee member observed that a bare bones complaint seems to work: why require more? The proceeding is really an appeal. It should work to frame the complaint as a notice of appeal. The draft rule creates unnecessary complexity. We can call it a complaint, to conform to the statutory direction that review is initiated by commencing a civil action and to Rule 3. So what is the need to plead more? Do local rules now require more? This ties to the

answer. The Social Security Administration believes that the administrative record is a sufficient answer. In practice, complaints typically are one page, or at most two. They say "I am me. I am appealing."

The question of local rules returned to an earlier theme. The Social Security Administration urges that tens of thousands of attorney hours can be saved by adopting uniform national rules. But this depends on the expectation that the national rules will supersede local rules. It will be necessary to identify what 62 sets of local rules — and perhaps more than 62 — now provide, and whether they may persist in the face of new national rules. This is a perennial problem: if a national rule does not say expressly that it preempts local rules, it may not effectively do that. But if we start adding express preemption provisions here and there, we may create a risk that the absence of an express preemption provision will be read to justify undesirable local rules.

A judge noted that the local rule in his court has five paragraphs detailing what must be in the opening brief. If the brief asks for a remand to take additional evidence, it must describe what the evidence is. Local rules like this are likely to persist so long as they are not inconsistent with a set of simple national rules. A short national rule may not save any time for the Social Security Administration.

Draft Rule 75(b) provides that the court must notify the Commissioner of a review action by transmitting a Notice of Electronic Filing. The draft provides for notice to the regional Social Security office and to the local United States Attorney; it leaves open the question whether notice should also be sent directly to the Commissioner. The Commissioner's position on that question will be important in moving toward any rule that might be proposed for publication. This description of the draft elicited no further discussion.

Draft Rule 75(c) addresses the Commissioner's answer. It complements the provisions for the complaint in a rather unusual way. The Commissioner would prefer a rule that states that filing the administrative record is the answer. The draft provides that the answer must include the administrative record and any affirmative defenses under Rule 8(c). One version says simply that these responses suffice as an answer. Another version says explicitly that Rule 8(b) does not apply. Ousting Rule 8(b) responds to the Commissioner's concern that it is a waste of scarce attorney time to require a point-by-point response to any allegations in the complaint that go beyond asserting a lack of substantial evidence. If Rule 8(b)(6) applies, however, there is a risk that failure to deny will become an admission. The draft

Committee Note supplements the rule text by stating that the Commissioner is free to address any allegations in the complaint that the Commissioner wishes to address.

Discussion began with the observation that it seems odd to leave it to the Commissioner to decide whether to respond to allegations in the complaint. It can be predicted that different regional offices and different United States Attorneys will respond to such rules in different ways, undercutting uniform practice. In turn, this prospect leads to the question whether there is any problem with ordinary rules for complaint and response — do the perceived problems that lead to a desire for uniform national rules arise instead during later stages of review litigation?

Judge Lioi responded that the Social Security Administration complains of the differences in practices among different districts. In the Northern District of Ohio there is no apparent problem with pleading. But the Administration wants to streamline the process, relying on the administrative record as the only answer. She also noted that delay does not seem to be a problem at the district-court level.

The next suggestion was that these questions might be put aside by adopting a practice analogous to a notice of appeal, addressed by filing the administrative record. "Why bother to plead more"? But is there a problem of affirmative defenses? — if they are not pleaded, the plaintiff will file the opening brief without addressing them. It does not seem likely that many cases will involve affirmative defenses. Res judicata is one possible example. Still further, is there a risk that the Administration will not yet have identified possible affirmative defenses when it files the answer? Is it likely that a bare bones complaint will give the Administration notice of what affirmative defenses might be available? Res judicata, for example, may not be apparent on the face of a complaint that does not note that review of the same administrative decision was sought in a separate action. Other issues may arise from filing in the wrong district, something that likely would be apparent if the complaint must include the plaintiff's address, but not otherwise, especially as plaintiffs may move after the date of the address provided in the administrative proceeding. Exhaustion of administrative remedies also might be an issue, although in this context it might be treated as a matter of jurisdiction by analogy to the requirement that there be a final administrative decision. This part of the discussion concluded by noting that the risk is that affirmative defenses will be waived if not timely pleaded, and by asking whether anyone present had seen a review action that included an affirmative defense. No one had. But it was suggested that in some districts it may be routine to advance half a dozen affirmative

defenses.

However that may be, it makes sense to address the complaint and answer, but why go beyond that? Support was provided for this suggestion. The goal is to develop a streamlined and uniform practice. "We should have a rule that says 'do not do anything more.'" The purpose of uniform national rules can be undercut by persisting in different local practices. National rules should expressly preempt them.

Another observation was that these pleading rules seek to streamline the process. It is an appeal on a record. Why not go straight to briefing? But even uniformity at that opening level will not prevent the continuation of different methods of processing cases in different districts. And of course uniformity of outcomes could be achieved only by harmonizing the views of different circuits on social security law, a matter outside the Rules Enabling Act.

Discussion of pleading led to a statement that the Department of Justice is concerned about treating subsets of cases differently. The Executive Office of United States Attorneys has prepared a model local rule that includes e-service, a mode of service that might creep into other kinds of cases. "Efficiency is a concern." Combining a national rule with local rules could lead to inefficiencies. That prospect will not please the Social Security Administration.

The final comment on pleading was that the discussion had not shown that the draft rules would save time for the Social Security Administration, unless we delete any provision for answers that go beyond filing the administrative record. "All the problems seem to be post-pleading."

Draft Rule 76 provides for briefing. The first step is a motion by the plaintiff for the relief requested in the complaint, accompanied by a brief that must support arguments of fact by citations to the record. The brief must be filed within 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 75(c). The Subcommittee has debated at length the question whether a motion should be required in addition to the brief. This draft retains the motion, in part because it is the traditional means of asking the court for an order that will protect against losing sight of a brief filed without a motion. The motion is not likely to exceed a page or two, and will not impose a serious burden on the court or parties.

The plaintiff's brief is followed by the Commissioner's brief, due 30 days after service of the plaintiff's motion and brief. This

brief too must support arguments of fact by citations to the record.

The final step is draft Rule 76(c), which gives the plaintiff an option to file a reply brief.

The motion requirement was addressed by suggesting that the question is related to the analogy to a notice of appeal. It is a fair question whether a motion will often serve an important purpose. But the burden will be slight.

A response suggested that the motion is an unnecessary piece of paper. Why not just file the brief? That will avoid arguments that the motion does not cover the arguments made in the brief.

The time periods suggested by the draft were questioned. One court has a local rule that provides 60 days from answer to opening brief, and the court frequently gets requests for an additional 30 days. The same holds for the Administration's answer. The Subcommittee actually began with 60-day periods, but thought it unwise to allow so much time. It is important to expedite district-court proceedings for the benefit of plaintiffs. The importance of helping plaintiffs toward speedy resolution is reflected in the six-month reporting period for motions that remain undecided.

Discussion of the draft social security review rules concluded by observing that many of the provisions seem designed for the benefit of the Social Security Administration. Do they also provide benefits for claimants? "We should be careful to consult with plaintiffs." Judge Lioi noted that representatives of the Social Security Administration, the American Association for Justice, and the National Organization of Social Security Claimants Representatives are present for the discussion. She has asked them to respond to the draft and to the discussion here today within three weeks. The draft will be revised further, and the Subcommittee will plan to meet with them to discuss the next version. It would be helpful to arrange an in-person meeting, but it may be that only telephone conferences will be possible.

Judge Bates thanked the Subcommittee for its work.

Rule 73: Consent to Magistrate Judge Trial

Judge Bates introduced the question that has been raised about Rule 73(b)(1). The Rule applies when a magistrate judge has been designated to conduct civil actions or proceedings. It implements the requirement of 28 U.S.C. § 636(c)(2) that when an action is filed the clerk shall notify the parties of the availability of a magistrate judge to exercise trial jurisdiction. "The decision of

the parties shall be communicated to the clerk of court. * * * Rules of Court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." Rule 73(b)(1) seeks to protect voluntariness by providing that "the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral."

The problem arises from the automatic operation of the CM/ECF system. The system automatically sends notice of an individual consent to the judge assigned to the case, destroying anonymity. The Committee has been informed that it is not possible to program this feature out of the CM/ECF system. Nor does it seem practicable to pick up on the lead of the statute by providing that the parties lodge individual consents with the clerk of court, to be filed only if all parties consent. There is too much burden on the clerk's office, with an accompanying risk that something will go astray in the process.

The agenda materials illustrate alternative possible approaches to the anonymity question, and also address two other questions that have emerged in early discussions. One asks whether Rule 73(b) should be revised to address the problem of consent in courts that automatically assign cases to magistrate judges for trial. The other asks whether the rule should be revised to address the problems that arise when a new party is joined after all original parties have consented to a referral.

The simplest amendment of Rule 73(b)(1) would simply delete the reference to separate consents: "the parties must jointly ~~or separately~~ file a statement consenting." This approach could be implemented by local procedures like the procedure adopted in the Southern District of Indiana. A notice and consent form is delivered to the plaintiff. If the plaintiff wishes to consent, the plaintiff is responsible to gather consents from all other parties. The form is filed only if all consent.

A somewhat more complex revision might substitute these words: "The parties may consent by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than all parties.]" Reference to a joint statement seems a bit more direct than reference to joint filing.

Discussion began with a suggestion that the part in brackets should be retained in the rule. There is a risk that some party may seek an advantage by filing a separate consent. Another judge observed that there are a lot of pro se complaints, and pro se plaintiffs do not understand the difference between a reference for

trial and a reference for discovery. The prohibition on consents filed by fewer than all parties should remain in the rule. Yet another judge observed that in the District of Massachusetts pro se plaintiffs get separate notices. They are instructed to send consents to the magistrate judge's clerk, who gathers consents from all sides.

A related observation was that in many districts there is an effort to get consents for more referrals. Judges require the parties to discuss referral at the Rule 26(f) conference. The result may be a Rule 26(f) report that expressly identifies parties who consent to referral and those who do not.

It was agreed that the question of joint consents should be developed further.

The next questions address party consent when a court routinely assigns some cases to magistrate judges for trial as part of the random initial draw. This practice seems to be increasing; although it does not seem to be followed in a majority of districts, it likely is followed in more than a handful. The Committee may need more information about the prevalence of this practice, and about the possible effects on it that would flow from different rule approaches.

A judge noted that districts vary in their uses of magistrate judges. In the Northern District of Illinois cases are assigned at the outset, "off the wheel," to both a magistrate judge and a district judge. Some district judges automatically refer all discovery to the magistrate judge. Other district judges keep discovery for themselves. Local terminology uses "reference" to designate assignment to a magistrate judge for specified purposes, while "consent" is used to designate assignment for all purposes, including trial.

Practice in the Southern District of Florida is similar. Cases are automatically assigned to a district judge and a magistrate judge. Some judges automatically refer all discovery to the magistrate judge. "My order has a very clear description." At times when a particular motion is assigned to a magistrate judge for a report and recommendation the magistrate judge may get the parties to consent to a referral for decision of that particular motion. It was noted that this practice fits within § 636(c)(1), which provides that a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case * * *." An order granting dismissal or summary judgment can be made the judgment of the court, for example.

In the District of Massachusetts, magistrate judges are on the initial case draw, but all parties must consent to make the referral effective.

The draft of Rule 73(b)(1) in the agenda materials undertakes to illustrate the consent issue, but in an awkward form. The illustration would work better if it is divided into separate paragraphs. Paragraph 73(b)(1)(A) would adopt whatever provision is proposed for party consent when the case is initially assigned to a district judge, Paragraph 73(b)(1)(B) might look like this:

> (B) If a case is initially assigned to a magistrate judge without the parties' consent, any party may refuse consent by [filing a refusal][lodging a refusal with the clerk]. [Refusal by any party withdraws the action or proceeding {from the magistrate judge}.] [A district judge or magistrate judge may not be informed of any party's refusal to consent.]

Further discussion noted that referrals for pretrial proceedings under § 636(b) do not need party consent. The Northern District of California has had magistrate judges "on the wheel" for many years. The right approach is to make it clear that the court is obliged to determine that all parties consent to the reference. We should learn more about how this is accomplished in all the districts that make referrals before all parties consent. At the same time, it may be necessary to address the question of implied consent, lest parties play along with the referral until one is displeased by something the magistrate judge does.

The suggestion that local rules should be examined prompted the observation that the search may not be entirely straightforward. In Minnesota the question is addressed in Social Security Local Rule 7.2 because those cases are the only cases that are routinely referred to magistrate judges.

Discussion concluded with the observation that automatic initial assignments to magistrate judges raise a number of issues. Further thought should be given to the question whether they should be taken up now, when the only proposal directly put to the Committee addresses the effects of the CM/ECF system on anonymity.

Finally, the question of consent by late-added parties might be addressed. The agenda materials sketch two possible approaches. One would require the new party to give consent within 30 days of joining the action. That approach might disrupt referrals more frequently than the alternative of requiring that a refusal be filed within 30 days. Neither approach would protect anonymity.

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Anonymity could be protected by requiring all parties, old and new, to file a joint consent after a new party is joined. That would open the way for second thoughts by a party dissatisfied with the direction of proceedings before the magistrate judge.

Professor Marcus noted that it may be better to leave the question of consent by new parties where it lies. Courts have found different ways of coping with the question of consent by new parties. The questions arise in different settings, and have elicited different responses. An extreme example is provided by an argument that after class counsel and the defendant have agreed to a referral and a class is certified, any class member can defeat the referral by objecting. That argument did not succeed. But what of an intervenor? Courts have said that an intervenor must accept the case as it is. But what of a Rule 19 party joined by court order? Or other later-added parties?

Brief discussion led to the conclusion that there is no need to pursue a rule-based solution to the variety of questions that may be raised by consent of late-added parties.

Rule 7.1 Disclosure Statements

Three distinct sets of questions have been raised about Rule 7.1 disclosure statements. Each can be approached separately.

Intervenors: The first questions arise from proposals before other advisory committees. A proposal has been made to amend Appellate Rule 26.1 to require a disclosure statement from a nongovernmental corporation that seeks to intervene. This proposal has been published, approved for adoption, and prescribed by the Supreme Court. It is on track to take effect this December 1. A proposal to adopt a parallel amendment to Bankruptcy Rule 8012(b) was published this summer.

The Appellate and Bankruptcy Rules were initially adopted as part of a package developed by a subcommittee of the Standing Committee. The goal was to have disclosure rules in the Appellate, Bankruptcy, Civil, and Criminal Rules that are as nearly uniform as the different contexts permit. The desire to have uniform provisions provides strong reason to make a parallel change in Rule 7.1(a):

> (a) A nongovernmental corporate party and a nongovernmental corporation that seeks to intervene must file two copies of a disclosure statement that: * * *

A potential complication was pointed out. New Appellate Rule

26.1 calls for a nongovernmental corporation disclosure statement by a debtor that is a corporation. Is a parallel provision needed in Rule 7.1 to cover cases on appeal from the bankruptcy court? Bankruptcy Rule 8001(a) provides that the Part VIII Rules, which include Rule 8012, govern the procedure in a district court and BAP on appeal from a judgment, order, or decree of a bankruptcy court. That seems to be enough to do the job without further amending Rule 7.1. But there may be a complication. Bankruptcy Rule 7007.1(a) calls for a corporate disclosure statement by any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit. The advice of the Bankruptcy Rules Committee will be sought on the need to add to Rule 7.1 something about bankruptcy appeals to the district court. (Inquiry showed that there is no need to further complicate Rule 7.1.)

The Committee agreed that this conforming amendment should be recommended for publication, subject to answering the bankruptcy appeal question. The simple form of the amendment might be recommended for adoption without publication as a noncontroversial adoption of a proposal that has been examined in two separate publications by other committees. But it likely is better to go through the full publication and comment process. The no-publication practice should be indulged sparingly, mostly for purely technical amendments. And the possibility of bankruptcy appeal complications may counsel publication even if the committees are satisfied there is no need to address bankruptcy appeals in Rule 7.1.

Natural Persons' Names and Birth Dates: The second disclosure proposal, 18-CV-W, was advanced by the National Association of Professional Background Screeners. They propose a new rule that would require all natural persons who are parties to civil and criminal cases to file a disclosure statement of the person's full name and full date of birth. The proposal, drawing from Bankruptcy Rule 1007(f), would make the information available as a search criterion in the PACER system — a nonparty who already has the information could put it into the PACER system and learn whether the person identified by this information is a party to any civil or criminal case. The information is described as not sensitive. The purpose of supporting the search would be to support more complete reports to prospective employers, landlords, and others. The same proposal was made to the Criminal Rules Committee in 2005 and was rejected. The Criminal Rules Committee has again rejected it at its October meeting.

The first question for the Committee is whether a procedural purpose can be identified for the proposed disclosure. Rules should be adopted and amended to pursue procedural goals, not to serve outside interests.

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Discussion failed to identify any procedural purpose for this proposal. It was removed from the agenda.

Citizenship of LLCs, Trusts, and Similar Entities: The third disclosure proposal, 18-CV-S, is advanced by Judge Thomas Zilly. It calls for "disclosure of the names and citizenship of any member or owner of an LLC, trust, or similar entity."

The proposal is inspired by experience with the difficulty of determining the citizenship of some forms of entities for the purpose of establishing diversity jurisdiction. Judge Zilly describes a case that went to judgment after a 10-day trial, only to be remanded by the court of appeals to determine the citizenship of the LLC parties — the plaintiff and three defendants. An LLC is a citizen of every owner's state. If an owner of an LLC is itself an LLC, the citizenship of each of the LLC owner's owners must be determined. Often this information is not readily available. Indeed it may be that an LLC itself does not know all of the citizenships ascribed to it for establishing or defeating diversity jurisdiction.

This proposal draws from practical experience that diversity jurisdiction may not be adequately ensured by the Rule 8(a)(1) requirement that a pleading that states a claim for relief must contain a short and plain statement of the grounds for the court's jurisdiction. The pleader may not have ready access to the required information. And serious inefficiencies arise if a diversity-destroying citizenship is uncovered only after substantial progress has been made in an action. One judge noted an experience with a late-arising question. Another noted a slip-and-fall case that involved half a dozen LLCs as parties, and urged that requiring disclosure of the owners' citizenships often will not be an onerous requirement. Another judge has a standard order, reflecting the common involvement of LLCs as parties and the frequent lack of understanding of the rules that govern diversity jurisdiction. Yet another court has an order to disclose, but has found that some parties would rather discuss the question than disclose their owners and their citizenship.

Diversity jurisdiction does not seem likely to be a concern of the Bankruptcy and Criminal Rules. But LLC ownership may bear on recusal as well as diversity jurisdiction. The subject deserves discussion among the rules committees. The Civil Rules Committee can take the lead in raising the issue.

The proposal extends beyond LLCs to a trust or a similar entity. Here too the questions extend beyond diversity jurisdiction to information useful in knowing possible grounds for recusal. A wide variety of entities may be involved. Some local court rules

list many of them. Others speak generally of disclosing anyone with a financial interest in the outcome. Discussion of financial interests ties back to the MDL Subcommittee's exploration of proposals to require disclosure of third-party litigation funding arrangements. It may be time to ask whether these broader issues should be considered by an all-committees group.

Final Judgment in Consolidated Cases: Rule 42(a)(2)

Judge Bates introduced this topic. In *Hall v. Hall*, 138 S.Ct. 1118 (2018), the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2) they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. Complete disposition of all claims among all parties to what began as a separate independent action establishes a final judgment. The opinion concludes by observing that changes in the meaning of a "final judgment" "'are to come from rulemaking, * * * not judicial decisions in particular controversies.'" If the always-separate approach "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend provisions accordingly."

The Appellate Rules Committee has considered this question, noting that the always-separate approach may create inefficiencies for courts of appeals by generating separate appeals involving the same controversy and essentially the same record. The Committee also noted that the rule may generate traps for the unwary, who do not realize that the time to appeal has begun to run. It decided that "this matter is appropriately handled by the Civil Rules Committee."

The immediate question is whether the Committee should wait to see whether practical problems in fact emerge, or whether there is enough experience already to justify taking up this topic for consideration now.

The question of practical effects was not much explored in the Court's opinion. Primary reliance was placed on a century's worth of interpretations of the 1813 statute that first explicitly authorized consolidation of federal-court cases. The always-separate rule was firmly established, most recently in 1933. The Court concluded that the Federal Rules Advisory Committee must surely have been aware of the established final-judgment rule, and must have intended the rule to carry forward in the original Rule 42(a) language that authorized the court to "order all actions consolidated." But the Court also noted one pragmatic concern — forcing a party to wait for "other cases" to conclude would substantially impair the right to appeal.

The Court's decision can be set against the background of appellate decisions construing Rule 54(b). Two clear rules were adopted, along with a more flexible middle ground. One rule was the rule adopted by the Court: actions that begin life as separate actions are always separate for purposes of final-judgment appeal, no matter how completely they have been consolidated with other cases in a single trial-court proceeding. The opposing rule was that consolidation for all purposes makes formerly separate actions a single action; complete disposition of all claims among all parties to what was a separate action is appealable as a final judgment only on entry of a partial final judgment under Civil Rule 54(b). In between these rules, several circuits — including the Third Circuit in *Hall v. Hall* — looked to several factors to measure finality, including the overlap among the claims, the relationship of the various parties, the likelihood of the claims being tried together, and "serving justice and judicial economy."

Several courts of appeals, in short, subordinated the important value of bright-line rules of appeal jurisdiction to the belief that better results can be achieved by flexible consideration of the many interests that bear on identifying the occasions for appeal. The trial court may have a strong interest in maintaining control of closely related proceedings, serving the purposes that prompted consolidation. The trial court also may have an interest in deciding whether it is better to have an immediate appeal that will settle issues common to the matters that remain, or instead to move ahead with the matters that remain so that related issues will be resolved on one appeal that considers the full context of the entire proceedings. The appeals court has an interest in avoiding the prospect of reexamining the same basic disputes in two or even more appeals. And the parties have parallel interests. If one party has interests that would be advanced by an immediate appeal, or quite different interests in moving promptly to execute a favorable judgment, other parties may have competing interests that align with the interests of the trial and appeal courts.

This array of interests may be quite the same whether the proceeding began life as a single multi-party, multi-claim action, or instead began as separate actions that were consolidated. When the proceeding begins as a single action, Civil Rule 54(b) plainly controls. It vests the initial decision whether to enter a partial final judgment in the district judge, often characterized as the "dispatcher." The wisdom of this approach may apply almost indistinguishably when separate actions are consolidated, although the fact that the parties may have deliberately chosen not to join in a single action must be considered if Rule 54(b) is to be invoked after consolidation.

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Several sketches of possible rule amendments were provided to illustrate the approaches that might be taken if *Hall v. Hall* is to take a place on the agenda. In short, it may be best to amend both Rule 42(a) and Rule 54(b). One approach would be to revise Rule 42(a)(2) to provide that the court may "consolidate the actions for all purposes." Anything less than melding the actions into a single action would be covered by (a)(1) and (3): "(1) join for hearing or trial any or all matters at issue in the actions; * * * (3) issue any other orders to avoid unnecessary cost or delay." Rule 54(b) would be amended in parallel: "When an action — including one that consolidates [formerly separate] actions under Rule 42(a)(2) — presents more than one claim for relief * * * or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines * * *."

Discussion began with the question whether it is wise to "dive in now," or might be better to wait to see what practical problems may emerge.

A judge suggested that there are practical problems now. That is why different circuits took different approaches. The Third Circuit had settled law that guided its decision to dismiss the appeal in *Hall v. Hall* by an unpublished decision that looked to all the factors that bear on appeal timing. "The history sheds enough light to take a look at it." There is a problem in the risk that failure to recognize the need to take a timely appeal will prove a trap for the unwary. And efficiencies in the system, in both trial and appeals courts, are important.

Another judge asked whether the Court might take it amiss if the Committee were to begin immediate consideration of its decision. Would it be more seemly to wait for a while?

A judge responded that the Court seems to have opened the door, to have invited the Committee to decide whether to take these questions up now. Others noted that it is not rare for the advisory committees to take up questions promptly after a Supreme Court decision. Rule 15(c) on the relation back of pleading amendments changing the party against whom a claim is asserted was taken up promptly after a "plain meaning" interpretation of the former rule. The proposed amendment was accepted without apparent difficulty. Rule 4(k)(2) was added in prompt response to a suggestion by the Court that it might be good to adopt a rule for serving process on internationally foreign defendants that fall within the reach of federal personal jurisdiction power but that could not be reached without an implementing rule for service. The Evidence Rules Committee has reacted promptly to a ruling on the admissibility of past convictions.

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It also was noted that these problems can be considered without reopening the rather recent ruling that individual actions consolidated for multidistrict pretrial proceedings under § 1407 remain separate for final-judgment appeals. That question is distinct from Rule 42(a) consolidation of cases that are before the court for all purposes. Nor do these problems have any direct bearing on the proposals to expand the opportunities to appeal in MDL proceedings in other directions.

Reporter Coquillette observed that the Court understands there are things the Committees can do that the Court cannot do, studying a problem over time, gathering information, and proposing solutions informed by a variety of perspectives outside the pressures of adversary positions in a single action.

Judge Bates concluded that no one had expressed a need to hesitate. A structure will be devised for taking the next steps.

Naming Parties in Social Security Review Opinions

Judge Bates reported a recommendation by the Committee on Court Administration and Case Management that opinions in social security review cases should identify the claimant only by first name and last initial. The recommendation is initially addressed to courts, but includes, 18-CV-L, a suggestion that Rule 5.2(c) might be amended. Rule 5.2(c) limits remote electronic access by nonparties to the court file, but subdivision (c)(2)(B) expressly allows remote electronic access to the court's opinion. Opinions often include substantial amounts of personal and medical information. The recommendation is being made to all courts without awaiting development of a national court rule. There are good reasons to hesitate about writing into Rule 5.2 provisions that dictate opinion-writing practices. It may be wise to wait to see how courts respond. The agenda materials include as an example a proposal by the Second Circuit Local Rules Committee that would respond to the CACM suggestion.

A judge reported on experience in the Appellate Rules Committee considering sealing practices. One view is that a party who seeks court action should be prepared for public access to information about the case. "We may learn by waiting."

A contrary view was expressed: "We should take it up."

The outcome was to keep this item on the agenda, but to wait for a year before considering it again.

Time to Decide Motions

Judge Bates reported on 18-CV-V, a proposal to adopt court rules that mandate decisions on motions in a specific number of days, perhaps 60 days or 90 days. He noted that there are many competing demands on court time. "It is difficult to manage dockets by court rule." The Judicial Conference has long opposed docket priorities in rules or proposed legislation.

This item will be removed from the docket.

Pilot Projects

Judge Campbell reported on the initial discovery pilot projects in the District of Arizona and the Northern District of Illinois. In short compass, they require initial discovery by providing other parties with facts and documents, favorable and unfavorable. The project has been under way in Arizona for 18 months, and for 17 months in Illinois. The Federal Judicial Center, led by Emery Lee, is doing good work in gathering data to evaluate the success of the pilots.

No real problems have emerged in Arizona, most likely because the initial discovery rules closely parallel initial disclosure rules that Arizona has implemented for many years. The bar is comfortable with the procedure. Some mid-stream changes have been made in the rules. A real test of success will come if motions emerge to exclude evidence at summary judgment or trial because it was not revealed in the initial discovery process. Judge Bates added that although not many cases have proceeded to this point, so far this seems OK.

Judge Dow reported that attorneys have not reported problems with the initial discovery process in individual conversations, but that an anonymous survey showed a need to modify the process to allow delaying disclosure when a motion to dismiss is filed. "Overall our judges feel pretty good about it." It has been reasonably smooth from the judges' perspective. The court has stressed that rolling discovery production is allowed in heavy discovery cases. "We're getting statements of compliance."

A Committee member reported that there is still some unhappiness in the Northern District of Illinois, "especially on the defense side." When lawyers consider choice-of-court clauses, defense lawyers counsel against picking the Northern District of Illinois because of the initial discovery project. But there is a lot of behind-the-scenes cooperation to work on deadlines.

Responding to a question, Judge Campbell noted that Arizona lawyers "had angst" for the first three years of the Arizona state-court rules, but came to accept it. One of its virtues is that it

gets the parties talking to each other.

Emery Lee reported that the FJC has completed three rounds of attorney surveys in closed cases in Arizona and Illinois. Data will soon be available. "We're starting to see Rule 56 cases." The survey response rate has been 30%. They hope for a better rate in future surveys. Judges will be surveyed soon.

Judge Bates noted that efforts continue to recruit district courts to engage in the pilot project for expedited disposition practices.

Emery Lee also reported that the employment disclosure protocols that have been adopted by some 50 district judges began life in 2011. A 2018 report can be found at FJC.gov. Comparing cases governed by the protocols with other cases shows that the protocol cases are not moving faster, and are resolving in the same ways. The median cases resolve in 10 to 11 months. They mainly involve Title VII claims. There are fewer discovery motions in the protocol cases, but it has not been possible to tell whether that is because judges who use the protocols also do other things to manage discovery.

Next Meeting

The next Committee meeting is scheduled to begin at 12:00 noon on April 2, 2019, in San Antonio, Texas. It is scheduled to conclude at 12:00 noon on April 3.

Closing

Judge Bates thanked all present for their input and hard work.

Respectfully submitted,

Edward H. Cooper
Reporter

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