ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
October 29, 2019

AGENDA

Meeting of the Advisory Committee on Civil Rules
October 29, 2019
Washington, DC

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Robert M. Dow, Jr.	D	Illinois (Northern)	2013	2020
Joan N. Ericksen	D	Minnesota	2015	2021
Joseph H. Hunt*	DOJ	Washington, DC	----	Open
Kent A. Jordan	C	Third Circuit	2018	2021
Thomas R. Lee	JUST	Utah	2018	2021
Sara Lioi	D	Ohio (Northern)	2016	2022
Brian Morris	D	Montana	2015	2021
Robin L. Rosenberg	D	Florida (Southern)	2018	2021
Virginia A. Seitz	ESQ	Washington, DC	2014	2020
Joseph M. Sellers	ESQ	Washington, DC	2018	2021
A. Benjamin Spencer	ACAD	Virginia	2017	2020
Ariana J. Tadler	ESQ	New York	2017	2020
Helen E. Witt	ESQ	Illinois	2018	2021
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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. A. Benjamin Goldgar *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
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TAB 1

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TAB 1A

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 25, 2019 | Washington, DC

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Washington, DC, on June 25, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew D. Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Washington, DC. This meeting is the last for two members, Judge Susan Graber and Judge Amy St. Eve. Judge Campbell thanked Judge Graber for her contributions as a member of the Committee and for her service as liaison to the Advisory Committee on Bankruptcy Rules. Judge Campbell thanked Judge St. Eve for her contributions as a member of the Committee and her leadership on the Task Force on Protecting Cooperators and wished her luck on her new assignment as a member of the Budget Committee. Judge Campbell also noted this would be the last Standing Committee meeting for Judge Donald Molloy, Chair of the Advisory Committee on Criminal Rules, and thanked him for his many years of service to the rules process. Judge Campbell also recognized Scott Myers for twenty years of federal government service, which has included time as a member of the United States Marine Corps, a law clerk, and counsel to the Rules Committees.

Rebecca Womeldorf reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that the rules adopted by the Supreme Court on April 25, 2019 will go into effect on December 1, 2019 provided Congress takes no contrary action.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the January 3, 2019 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules.

Action Items

Final Approval of Proposed Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). Judge Chagares asked the Committee to recommend final approval of proposed amendments to Rules 35 and 40 which will set length limits applicable to a response filed to a petition for en banc review or for panel rehearing. The proposed amendments were published for public comment in August 2018. The one written comment received was supportive and Judge Chagares reported receiving informal favorable comments from colleagues. No revisions were made after publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 35 and Rule 40 for approval by the Judicial Conference**.

Publication of Proposed Amendments to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares asked the Committee for approval to publish for public comment proposed amendments to Rule 3(c) regarding contents of the notice of appeal, along with conforming amendments to Rule 6 and Forms 1 and 2. Judge

Chagares noted by way of background the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act.

Judge Chagares explained that this proposal originated in a 2017 suggestion that pointed to a problem in the caselaw concerning the scope of notices of appeal. Some cases, the suggestion noted, apply an *expressio unius* approach to interpreting the notice of appeal. Under that approach, for example, if the notice of appeal designates a particular interlocutory order in addition to the final judgment, such courts might limit the scope of the appeal to the designated order rather than treating the notice as bringing up for review all interlocutory orders that merged into the judgment. Extensive research revealed confusion on the issue both across and within circuits. Professor Harnett noted another problematic aspect of the caselaw: numerous decisions treat notices of appeal that designate an order that disposed of all remaining claims in a case as limited to the claims disposed of in the designated order. Judge Chagares noted that the Advisory Committee's goal in proposing amendments to Rule 3(c) is to ensure that the filing of a notice of appeal is a simple, non-substantive act that creates no traps for the unwary.

Professor Hartnett reviewed the rationale behind the Advisory Committee's proposed amendments. Professor Hartnett noted that one source of the problem was Rule 3(c)(1)(B)'s current requirement that a notice of appeal "designate the judgment, order, or part thereof being appealed." Some have read this provision to require designation of any order that the appellant wishes to challenge on appeal, rather than simply designation of the judgment or order that serves as the basis of the court's appellate jurisdiction and from which time limits are calculated.

The Advisory Committee proposed four interrelated changes to Rule 3(c)(1)(B) to address the structure of the rule and to provide greater clarity. First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the terms "judgment" and "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result requires the appellant to designate the judgment – or the appealable order – from which the appeal is taken. To underscore the distinction between an appeal from a judgment and an appeal from an appealable order, Professor Hartnett noted, the proposed conforming amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and a Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court).

Other proposed changes address the merger rule. A new paragraph (4) was added to underscore the merger rule, which provides that when a notice of appeal identifies a judgment or order, this includes all orders that merge into the designated judgment or order for purposes of appeal. The Advisory Committee also added to the Committee Note a paragraph discussing the

merger principle. In addition, the Advisory Committee added a fifth paragraph to the rule addressing two kinds of scenarios where an appellant's designation of an order should be read to encompass the final judgment in a civil case. In one scenario, some pieces of the case are resolved earlier, and others only later; a notice of appeal designating the order that resolves all remaining claims as to all parties should be read as a designation of the final judgment. In the other scenario, a notice of appeal designates the order disposing of a post-judgment motion of a kind that re-started the time to appeal the final judgment; that notice should be read to encompass a designation of the final judgment. In both scenarios, the proposed rule operates whether or not the court has entered judgment on a separate document.

A new sixth paragraph was added providing that "[a]n appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal." The final sentence was added to expressly reject the *expressio unius* approach. The Advisory Committee settled on this approach to avoid the inadvertent loss of appellate rights while empowering litigants to define the scope of their appeal.

Finally, the Advisory Committee recommended conforming changes to Rule 6 to change the reference to "Form 1" to "Forms 1A and 1B," and conforming changes to Form 2 to reflect the deletion of "part thereof" from Rule 3(c)(1)(B). The Advisory Committee consulted with reporters to the Advisory Committee on Bankruptcy Rules regarding the amendments to Rule 6.

A member asked why the Advisory Committee referenced but did not define the merger rule in the rule text. Professor Hartnett explained that the Advisory Committee did not want to limit the merger principle's continuing development by codifying it in the rule. The rule's reference to the merger rule will prompt an inexperienced litigant to review the Committee Note for more information. Judge Campbell observed that an attempt to define the merger rule in the Rule text could change current law by overriding existing nuances. Two judge members expressed concern that the Rule needs to be understandable to pro se litigants and unsophisticated lawyers. One of these members asked why the Rule text could not state in simple terms the outlines of the merger principle – e.g., "an appeal from a final judgment brings up for review any order that can be appealed at that time"? Professor Hartnett responded that the Advisory Committee was concerned that such a formulation in the Rule text might alter current law; he stated that the Advisory Committee wanted to alert litigants to the merger rule in the rule itself and provide additional guidance for litigants in the Committee Note. An attorney member suggested that the proposed draft offered the most elegant solution – using Rule text that serves as a placeholder for the merger doctrine. A judge member expressed agreement with this view.

That judge member next asked why the Advisory Committee proposed to retain, in new subdivision (c)(6), the appellant's ability to designate only part of a judgment or order. Professor Hartnett suggested that a designation of just part of a judgment might serve the interest of repose by assuring other parties that the scope of the appeal was limited. Professor Cooper offered as an example an instance in which the plaintiff's claims against both of two defendants have been dismissed but the plaintiff has no wish to challenge the dismissal as to one of the defendants; a

limited notice of appeal, in such a case, would reassure the defendant whom the plaintiff no longer wishes to pursue.

A judge asked about the potential for over-inclusion in notices of appeal as a result of the proposed amendments, and whether there is a benefit to requiring that parties be specific about what they are appealing. Professor Hartnett responded that the notice is not the place to limit the issues on appeal. A notice is just a simple document transferring jurisdiction from the district court to the appellate court. The scope of the appeal can be clarified in the ensuing briefing.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rules 3 and 6 and Forms 1 and 2.**

Professor Struve congratulated the Advisory Committee and Professor Hartnett for a clever solution to a very tough problem. Professor Hartnett thanked Professor Cooper for his assistance.

Publication of Proposed Amendments to Rule 42(b) (Voluntary Dismissal). Judge Chagares stated that the Advisory Committee sought publication of proposed amendments to Rule 42(b). Rule 42(b) currently provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Prior to the 1998 non-substantive restyling of the Appellate Rules, Rule 42(b) used the word "shall" instead of "may" dismiss. Following the 1998 restyling, some courts have concluded that discretion exists to decline to dismiss. Attorneys cannot advise their clients with confidence that an action will be dismissed upon agreement by the parties. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals.

Judge Chagares explained that the phrase "no mandate or other process may issue without a court order" in current Rule 42(b) has caused confusion as well. Some circuit clerks have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. These issues are avoided – and the purpose of that language served – by deleting the phrase and instead stating directly, in new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them."

A member suggested that language from the proposed Committee Note be moved to the rule itself, creating a new subdivision stating that the Rule does not affect any law that requires court approval of a settlement. Four other members expressed agreement with the idea of putting such a caveat into the Rule text. A motion was made and seconded to amend the proposal to include such a caveat; the motion passed. The Committee discussed how to draft the caveat; it started by considering language that had been used in a prior draft, as follows: "If court approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand to consider whether to approve it." Following a break and extensive discussion of

possible language, including suggestions from the style consultants, Judge Chagares proposed instead to add a new subdivision (c) which would modify both preceding paragraphs of Rule 42 and state as follows: "(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration." The Committee Note was revised to add a cite to "F.R.Civ.P. 23(e) (requiring district court approval)" and to explain that the "amendment replaces old terminology and clarifies that any order beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order." By consensus, this new subdivision (c) was incorporated into the proposed amendments to Rule 42, upon which the Committee proceeded to vote.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 42.**

Information Items

Possible Additional Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares advised that the Advisory Committee continued to study whether amendments were warranted to clarify and codify practices under Rules 35 and 40.

Rule 4 (Appeal as of Right – When Taken). Judge Chagares explained that the Advisory Committee has been considering whether to amend Rule 4(a)(5)(C) (which deals with extensions of time to appeal) in light of the Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). In *Hamer*, the Court distinguished time limits imposed by rule from those imposed by statute, characterizing time limits set only by rules as non-jurisdictional procedural limits. Professor Hartnett noted that the Advisory Committee tabled its consideration of the issue pending the Court's decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). In *Nutraceutical*, the Court held that a mandatory claim-processing rule was not subject to equitable tolling. After reviewing this holding, the Advisory Committee decided not to take action on a possible amendment to Rule 4(a)(5)(C).

Potential Amendment to Rule 36. The Advisory Committee considered an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Consideration was tabled pending the Court's decision *Yovino v. Rizo*, 139 S. Ct. 706 (2019), addressing whether a federal court may count the vote of a judge who dies before the decision is issued. The Court answered this question in the negative, explaining that "federal judges are appointed for life, not for eternity." Since the Court has resolved the question, the Advisory Committee removed this item from its docket.

Suggestion Regarding the Railroad Retirement Act and Civil Rule 5.2. Judge Chagares noted that the U.S. Railroad Retirement Board's General Counsel submitted a suggestion that cases brought under the Railroad Retirement Act should be among the cases excluded (under Civil Rule 5.2) from certain types of electronic access. Petitions for review of the Railroad Retirement Board's final decisions go directly to the courts of appeal, not the district courts; thus, any change would need to be to the Federal Rules of Appellate Procedure. Judge Chagares has appointed a subcommittee to consider the suggestion and to investigate whether any other

benefit regimes would warrant similar treatment. The subcommittee is consulting with the Committee on Court Administration and Case Management.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules.

Action Items

Judge Dow first addressed proposed amendments to three rules published for comment last August: Rule 2002 (Notices), Rule 2004 (Examination), and Rule 8012 (Corporate Disclosure Statement).

Final Approval of Proposed Amendments to Rule 2002 (Notices). Judge Dow explained that Rule 2002 generally deals with requirements for providing notice in bankruptcy cases, and that the proposed changes affect three subparts of the Rule. The first change involves Rule 2002(f)(7), which currently directs notices to be given of the "entry of an order confirming a chapter 9, 11, or 12 plan." Although it is unclear why the rule does not currently require notice of the entry of a Chapter 13 confirmation order, the Advisory Committee concluded that notice of a confirmation order is appropriate under all bankruptcy chapters. The one comment addressing this change argued that the amendment was not needed because at least one court already serves orders confirming Chapter 13 plans. Because that comment addressed a local practice only, however, the Advisory Committee recommended final approval of the amendment as proposed.

The Committee had no questions and Judge Campbell suggested that the Committee vote separately on the proposed amendments to each of the three relevant subparts of Rule 2002. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(f)(7) for approval by the Judicial Conference**.

The second change pertains to Rule 2002(h) which authorizes the court to direct that certain notices to creditors in chapter 7 cases be sent only to creditors that timely file a proof of claim. The proposed amendment would allow the court to exercise similar discretion in chapter 12 and 13 cases and would also conform time periods in the subdivision to the respective deadlines for filing proofs of claim set out in recently amended Rule 3002(c).

One of the comments on Rule 2002(h), while generally supportive, raised two issues. The first issue concerned whether the clerk's noticing responsibilities in a chapter 13 case should extend 30 days beyond the proof-of-claim deadline to give the debtor or trustee time to file a claim on behalf of a creditor. The Advisory Committee rejected this suggestion because the rule does not currently address such a situation in a chapter 7 case and the purpose of the proposed amendment is simply to extend the rule to chapter 12 and 13 cases. In addition, because the rule is permissive, a court already has authority to continue to provide notices until after the expiration of a debtor or trustee's derivative authority to file a proof of claim on behalf of a creditor.

The second issue raised was whether notice of the proposed use, sale, or lease of property of the estate and the hearing on approval of a compromise or settlement should be given to all

creditors otherwise entitled to service of the noticed motion, even if they have not timely filed a proof of claim. No justification was provided for this suggestion and the Advisory Committee saw no reason to amend the rule in this respect. It recommended that Rule 2002(h) be approved as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(h) for approval by the Judicial Conference**.

The final amendment to Rule 2002 concerned subdivision (k) which addresses providing notices under specified parts of Rule 2002 to the U.S. trustee. The change adds a reference to subdivision (a)(9) of the rule, corresponding to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The change ensures that the U.S. trustee will continue to receive notice of this deadline.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(k) for approval by the Judicial Conference**.

Judge Dow next addressed the proposed amendments to Rule 2004. He explained that the rule provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case, and that it includes provisions to compel the attendance of witnesses and the production of documents. The Advisory Committee received a suggestion that the rule be amended to impose a proportionality limitation on the scope of the production of documents and electronically stored information.

The Advisory Committee considered this issue over three meetings. By a close vote, the Committee ultimately decided not to add proportionality language because the rule already allows the court to limit the scope of a document request, and because the change might prompt additional litigation. The Advisory Committee did, however, decide to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

After considering the comments, the Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. Two of the three comments submitted supported the proposal as published. Although a third comment urged inclusion of proportionality language, the Advisory Committee declined to revisit that issue as it had been carefully considered and rejected by the Advisory Committee prior to publication.

Judge Campbell recalled discussion at the Advisory Committee meeting of the fact that debtor examinations in bankruptcy are intended to be broad in scope and of a concern that adding proportionality language might signal an intent to limit those examinations. Judge Dow agreed.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2004 for approval by the Judicial Conference**.

Final Approval of Proposed Amendments to Rule 8012 (Corporate Disclosure Statement). Current Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is based on Federal Rule of Appellate Procedure 26.1. Amendments to Rule 26.1 were promulgated by the Supreme Court on April 25, 2019 and are scheduled to go into effect December 1, 2019 absent contrary action by Congress.

The Advisory Committee's proposed amendments to Rule 8012 track the relevant amendments to Appellate Rule 26.1. An amendment to 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors, and a new subsection (b) requires disclosure of debtors' names and requires disclosures about nongovernmental corporate debtors. Publication of the proposed amendments to Rule 8012 elicited three supportive comments and no suggestions for revision.

Judge Dow noted that, during the consideration of the proposed amendments, one member of the Advisory Committee suggested a need for additional amendments that would extend the Rules' disclosure requirements to a broader range of entities. Judge Dow said such an undertaking would require coordination with the other advisory committees and should not delay the current round of amendments, which are designed to conform Rule 8012 to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 8012 for approval by the Judicial Conference**.

Judge Dow then addressed several proposed amendments that the Advisory Committee considered to be technical in nature and appropriate for the Standing Committee's final approval without publication.

Proposed Amendments to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Rule 2005(c), which addresses conditions to ensure attendance and appearance, refers to provisions of the federal criminal code (previously codified at 18 U.S.C. § 3146) that were repealed more than 30 years ago. The Advisory Committee considered the matter and recommended a technical amendment updating the statutory citation in the rule to 18 U.S.C. § 3142, the part of the criminal code that now addresses conditions to ensure attendance or appearance. Judge Dow explained, however, that after the Standing Committee's agenda book was published there was discussion among the reporters about whether such a change would be appropriate without publication.

Professor Struve explained her concerns with a technical amendment. Current Section 3142 contains a number of features that were not present in the old Section 3146. For example, it refers to statutory authorization for the collection of DNA samples. Presumably it is implausible to think that a debtor apprehended under Rule 2005 would be subjected to DNA collection as a condition of release. But, she suggested, such differences between the former and

present statutory provisions provided reason to send the proposed amendment through the ordinary process of notice and comment.

Professor Capra raised the issue of whether statutory citations should be included in the Rules at all given that statutes change. Perhaps it would be better for the Rule to direct the court to consider "the applicable requirement in the criminal code" in considering conditions to compel attendance or appearance. Professor Kimble suggested that a general reference would not help readers. If a particular statute is relevant it should be cited and updated as needed.

A member suggested that there was little risk that inapposite provisions of § 3142 would be applied under Rule 2005(c), and Professor Bartell stated that bankruptcy debtors are not arrestees, so there is not a realistic danger that they would be subjected to DNA collection.

Judge Campbell observed that the Committee must decide whether citation to an updated statutory cross reference was appropriate, or whether the prior statutory language should be inserted into the rule. In addition, even if only a statutory cross reference was appropriate, the Committee also needed to decide the separate issue of whether approval would be appropriate without public comment.

Professor Garner suggested that "applicable" or "relevant" be inserted prior to the Rule's reference to the "provisions and policies of" the statutory provision.

After further discussion Judge Campbell observed that it seemed clear that the Committee did not support amending the rule as a technical matter without publication, and Judge Dow amended the request on behalf of the Advisory Committee to seek the Standing Committee's approval to publish the amendment for public comment, with a slight revision. Instead of a simple change to replace the existing statutory citation with the new statutory citation, the proposed amendment to Rule 2005(c) would state that in determining the conditions that would reasonably ensure attendance the court would be "governed by the **relevant** provisions and policies of title 18 U.S.C. § **3142**." In addition, a new sentence was added to the Committee Note: "Because 18 U.S.C. § 3142 contains provisions bearing on topics not included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the 'relevant' provisions and policies of § 3142."

The Committee approved the proposed amendments to Rule 2005(c) for publication in August 2019.

Judge Dow next discussed proposed technical conforming amendments to Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The amendments would revise these Rules to accord with the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system and would revise Rule 8015 to accord with the pending amendment to Rule 8012.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendments to Rules 8013, 8015, and 8021 for approval by the Judicial Conference without prior publication**.

The final recommended technical change concerned Official Form 122A-1, the first part of a two-part form used to calculate the debtor's disposable income and to determine whether it is appropriate for the debtor to file under Chapter 7 of the Bankruptcy Code. An instruction at the end of Official Form 122A-1 tells the filer not to complete the second part of the form (Official Form 122A-2) if the box at line 14a is checked. Line 14a, in turn, should be checked if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. The Advisory Committee received a suggestion that the instruction at the bottom of the form is often overlooked, and that it should also be included at the end of line 14a. The Advisory Committee agreed that the suggested amendment would make it more likely that the forms would be completed correctly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendment to Official Form 122A-1 for approval by the Judicial Conference without prior publication.**

Professor Gibson next reported on three proposed amendments recommended for publication.

Rule 3007 (Objections to Claims). The proposed amendment addresses the narrow issue of how credit unions should be served with objections to their claims. Rule 3007 was amended in 2017 to clarify that objections to claims are generally not required to be served in the manner of a summons and complaint, as provided by Rule 7004, but instead may be served on most claimants by mailing them to the person designated on the proof of claim. Rule 3007 contains two exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." Rule 3007(a)(2)(A)(ii). The purpose of this exception is to comply with a legislative mandate (enacted as part of the Bankruptcy Reform Act of 1994 and set forth in Rule 7004(h)) providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The Advisory Committee concluded that the exception set out in Rule 3007(a)(2)(A)(ii) is too broad because it does not qualify the term "insured depository institution" by the definition set forth in section 3 of the Federal Deposit Insurance Act, as is the case in Rule 7004(h) itself. Rule 7004(h) was added by the Bankruptcy Reform Act of 1994 which required special service requirements for insured depository institutions as defined under the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under Rule 3007(a)(2)(A)(ii). The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 3007.**

Rule 7007.1 governs disclosure statements in the bankruptcy court. Like the amendment to Rule 8012 discussed earlier, the proposed amendment to Rule 7007.1 would conform the rule to the pending amendments to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7007.1.**

The proposed amendment to Rule 9036 would implement a suggestion from the Committee on Court Administration and Case Management that high-volume-paper-notice recipients (initially defined as recipients of more than 100 court-generated paper notices in a calendar month) be required to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 is changed to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Proposed amendments to Rule 2002(g) and Official Form 410 were previously published in 2017. These proposed amendments (like the proposed amendments to Rule 9036) are designed to increase electronic noticing and service. The proposed amendments to Rule 2002 and Form 410 would create an 'opt-in' system at an email address indicated on the proof of claim. The Advisory Committee has not yet submitted those proposed amendments for final approval, however, because the comments recommended a delayed effective date of December 1, 2021 to provide time to make needed implementation changes to the courts' case management and electronic filing system. Because that is the same date the proposed changes to Rule 9036 would be on track to go into effect if published this summer, the recommended changes to Rules 2002(g) and 9036 and Official Form 410 could go into effect at the same time.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 9036.**

Information Items

Professor Bartell reported on two information items, beginning with the ongoing project to restyle the bankruptcy rules. The style consultants provided an initial draft of Part I to the reporters in mid-May, and the reporters have given the consultants comments on that draft. Professor Bartell reported that she and Professor Gibson have been delighted at what the style consultants have done. She thinks the bench and bar will welcome the improvements to the Rules. She praised the style consultants for their work. When the consultants respond to the reporters' comments and produce another draft, the Restyling Subcommittee will consider it. The consultants will also be producing an initial draft of Part II soon, which will be handled in the same way.

The second information item concerns part of a larger project within the judiciary to address the problem of unclaimed funds in the bankruptcy system. The Committee on the Administration of the Bankruptcy System created an "Unclaimed Funds Task Force" to address this issue. Among other things, the Unclaimed Funds Task Force proposed adoption of a Director's Bankruptcy Form (along with proposed instructions and a proposed order) for applications for withdrawal of unclaimed funds in closed bankruptcy cases. The Advisory Committee concluded that standard documentation would be appropriate, made minor modifications to the draft submitted by the task force, and recommended that the Director of the Administrative Office adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

Judge Campbell praised the restyling effort and observed that the Advisory Committee is on track to consider the first batch of restyled rules at its fall 2019 meeting. Judge Campbell noted that the time is ripe to send a letter to the appropriate congressional leaders making sure they know the restyling effort is underway.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates provided the report of the Advisory Committee on Civil Rules, with support from Professors Cooper and Marcus. Judge Bates noted the Advisory Committee had two action items, one for final approval and the second for publication, and several information items.

Action Items

Rule 30(b)(6). The Advisory Committee recommended final approval of an amendment to Rule 30(b)(6), the rule that deals with depositions of an organization. This issue drew intense interest from the bar. After the proposed amendment was published for comment in August 2018, two public hearings were held. The first hearing in Phoenix drew twenty-five witnesses. Fifty-five witnesses testified at the second hearing in Washington, DC. Some 1780 written comments were submitted, although that number overstates the substance of the comments as many of those comments repeated points made in previous comments.

After considering the public comments, the Advisory Committee approved a modified version of the proposed amendment that was published for comment. Compared with the current rule, the central change made by the revised proposal is to require the party taking the deposition and the organization to confer in advance of the deposition about the matters for examination. Many commenters observed that conferring in advance of the deposition reflects best practice; this modest proposed rule change did not cause great concern from commenters and was uniformly supported by the Advisory Committee. The Advisory Committee made several changes to the proposed amendment as compared with the version that went out for comment. It deleted the proposed requirement that the parties confer about the identity of the witnesses that the organization would designate, and it also deleted the requirement that the parties confer about the "number and description of" the matters for examination. Because the conferring-in-advance requirement would be superfluous in connection with a deposition by written questions, the Advisory Committee added to the Committee Note the observation that the duty to confer about the matters for examination does not apply to depositions by written questions under Rule 31(a)(4).

Other proposed changes to Rule 30(b)(6) were the subject of active discussion and debate, although the Advisory Committee ultimately decided not to recommend them. One change considered by the Advisory Committee would have required the organization to identify the designated witness or witnesses at some specified time in advance of the deposition. Another change would have added a 30-day notice requirement for 30(b)(6) depositions. It was agreed that these changes would have likely required re-publication. After a great deal of discussion, the Advisory Committee determined, in a split but clear vote, not to pursue these amendments.

Professor Marcus agreed with the summary of the process of considering changes to Rule 30(b)(6) as related by Judge Bates and noted that the Standing Committee had also engaged in a vigorous discussion of the issues at previous meetings. Judge Bates noted that the Advisory Committee voted to approve the Committee Note language line-by-line, and virtually word-by-word. The ultimate proposal reflects the hard work of a subcommittee chaired by Judge Joan Ericksen.

A member voiced support for changes to a rule both sides of the bar agree is problematic but wondered whether much is accomplished by imposing a requirement to confer without specifying what must be discussed; this member suggested that the proposed amendment had "no meat on the bone." The Committee Note could provide additional guidance, but the current version does not do so. The member noted the difficulty in changing the rule given the differing views on what should be a required disclosure prior to a deposition. A judge member echoed the concern that the modest amendment does not add that much given that Rules 26 and 37 provide a process to handle any objection to a 30(b)(6) notice.

Judge Bates agreed that the amendment is modest and will not lead to a wholesale change in 30(b)(6) deposition practice. The amendment does put existing best practice in the rule itself, which may lead to improvements in some cases. The Advisory Committee ended up with this limited recommendation because it found agreement within the bar on this narrow issue, while in general other suggestions were met with intense disagreement from one side or the other.

A judge member stated that he understood the disagreement and the reasons for it but wondered why the Committee should endorse such a limited change given the presumption that something notable has changed. Judge Campbell responded that often rules are written for the weakest lawyers and gave his view that the modest change would improve practice in some cases. In his experience, the most frequent complaint from one side is that the witness is not adequately prepared while the most frequent complaint by the other is that the notice is not precise enough on what the matters are for examination. These complaints usually come to him from the lawyers who do not talk to each other in advance of the deposition. He has often thought if you could get people to talk in advance of the deposition both sides would have greater understanding going into the deposition and a better-prepared witness. It is a marginal change but one that will help. Judge Bates stated that this was the sentiment of the Advisory Committee.

Responding to the suggestion that Rules 26 and 37 already provide a process to handle disputes over Rule 30(b)(6) depositions, Professor Marcus noted that those rules address the handling of disputes that have already become combative; the proposed amendment to Rule 30(b)(6), by contrast, would require the parties to confer *before* conflict has a chance to arise. A member noted that he viewed the amendment as a warning of sorts not to engage in gamesmanship. If this does not work, this rule will come back to the Committee. Judge Bates noted that this rule comes back to the Advisory Committee every few years. The Federal Magistrate Judges Association, Professor Marcus noted, supported the proposed amendment while also suggesting that further changes might be warranted depending on how this change works in practice.

Professor Beale complimented the Advisory Committee on the consideration of a huge amount of input received from the public. She stated that Professor Marcus's presentation of that input could serve as a model for how to handle a large volume of comments. Judge Bates and Professor Coquillette echoed similar praise for the work of the Advisory Committee and Professor Marcus. Professor Coquillette emphasized that it is not just the result that matters, it is the public perception of the process. The Reporters and the Committee, he observed, had done much to build confidence in that process among members of the bar. Another member emphasized that with this particular rule, most changes proposed by one party were changes thought to alter the negotiating balance vis-à-vis the opposing party. The Advisory Committee's careful and impressive effort had been to improve the Rule without seeming to favor one side or the other.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 30(b)(6) for approval by the Judicial Conference**.

Rule 7.1. Judge Bates introduced the second action item from the Advisory Committee, a proposal to publish for comment amendments to Rule 7.1, the rule concerning disclosure statements. The first proposed amendment conforms Rule 7.1 to pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) so that a disclosure statement is required of a nongovernmental corporation that seeks to intervene. The proposed amendment also deletes the direction to file two copies of the disclosure statement, as that requirement has been rendered superfluous by electronic court dockets.

A second proposed amendment would add a new subsection 7.1(a)(2) requiring parties to disclose the name and citizenship of those whose citizenship is attributable to the party for purposes of determining diversity jurisdiction. A prominent example of the need for this amendment arises in cases where a party is a limited liability company (LLC). Many judges now require the parties to provide detailed information about LLC citizenship. This practice serves to ensure that diversity jurisdiction actually exists, a significant matter, and it protects against the risk that a federal court's substantial investment in a case will be lost by a belated discovery − perhaps even on appeal – that there is no diversity.

Judge Bates observed that a member of the Standing Committee had raised a question about the applicability of 7.1(b)(2), which requires a supplemental filing whenever information changes after the filing of a disclosure statement. Given that diversity is determined at the time of filing, a supplemental filing is irrelevant for diversity purposes. Accordingly, Judge Bates suggested a slight modification of the proposed language to 7.1(a)(2) to state: "at the time of filing." This would remove the obligation to make a supplemental filing when it is not relevant to the diversity determination.

A judge member spoke in favor of the proposal, as modified by the friendly amendment just described. He suggested a conforming change to the Committee Note (at page 232, line 273 of the agenda book).

Judge Campbell pointed to the language "unless the court orders otherwise" in proposed new subdivision (a)(2) as a safety valve for situations in which a party has a privacy concern connected to disclosure. In such an instance, the party could seek court protection from public disclosure of the information but would still need to provide the information bearing on the existence (or not) of diversity jurisdiction.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7.1.**

Information Items

Consideration of Proposals to Develop MDL Rules. Judge Bates reviewed the continuing examination of proposals to formulate rules for multidistrict litigation (MDL) proceedings, the work on which has been done by the MDL Subcommittee, chaired by Judge Robert Dow. Judge Bates described efforts by the subcommittee to obtain information on this complex set of issues. He noted that the Judicial Panel on Multidistrict Litigation (JPML) has been very helpful and engaged. Judge Bates observed that the consideration of possible MDL rules has generated a great deal of discussion among lawyers and judges, and the MDL process will likely be improved as a result, even if rules are not ultimately proposed.

Judge Bates described the focus of ongoing work, primarily on four subjects: (1) the use of Plaintiff Fact Sheets (PFSs) – and perhaps Defendant Fact Sheets (DFSs) – to organize MDL personal injury litigation, particularly in MDLs with a thousand or more cases, and to "jump start" discovery; (2) the feasibility of providing an additional avenue for interlocutory appellate review of district court orders in MDLs; (3) addressing the court's role in relation to global

settlement of multiple claims in MDLs; and (4) third-party litigation funding (TPLF), which is not unique to the MDL setting.

TPLF. Judge Bates noted that the general topic of TPLF has received a great deal of attention. TPLF is not unique to MDL proceedings, and indeed might be less prevalent in MDLs than other settings. Many courts require disclosure of TPLF information. TPLF is a rapidly evolving area. The TPLF topic remains on the subcommittee's agenda; it is not clear whether the subcommittee will recommend a rules response to this issue.

Judicial Involvement in MDL Settlements. The subcommittee continues to study judicial involvement in review of MDL settlements. Both the plaintiffs' and the defense bar would like to avoid rules that would require more judicial involvement in settlements. Current practice varies a lot by judge; transferee judges are split on it, with some being very active in settlements and others not. The issues are different than in a class action because every individual MDL plaintiff has an attorney.

PFSs/DFSs. Judge Bates stated that most of the subcommittee's attention has focused on PFSs and interlocutory appellate review. PFSs are used in some 80% of the big MDLs, although there is some definitional issue about what counts as a PFS. DFSs are also often used in large MDLs. A more recent proposal concerns something called an initial census of claims, which is similar to a PFS but more streamlined, and would be used early in the litigation to capture exposure and injury, not expert testimony or causation. This proposal has some support from both sides of the bar, which may mean there is no reason to have a rule. One problem with a PFS is the length of time to get those negotiated – sometimes as long as eight months – as well as the time necessary to produce responsive information. Something simpler that could be routinely used might be advantageous. The subcommittee continues to look for ideas that could get support from transferee judges as well as the plaintiffs' and defense bars.

Interlocutory Review. Judge Bates described the subcommittee's ongoing examination of issues concerning interlocutory review in MDL proceedings, a subject on which plaintiff and defense counsel have very different perspectives. One area of dispute is the utility of review under 28 U.S.C. § 1292(b). Different studies have reached different conclusions. The Advisory Committee received one study on the subject compiled by the defense bar. At a recent event in Boston, the plaintiffs' bar presented additional and contrary data in an oral presentation. The Advisory Committee asked the plaintiffs' bar to put their empirical data in writing. The defense bar felt it had not responded fully to the plaintiffs' presentation. The subcommittee is awaiting further information from both sides of the bar.

Professor Marcus noted that the process of considering rulemaking has generated good discussion about best practices that may ultimately be more beneficial than new rules.

A member asked whether the subcommittee had analyzed the grant rate for § 1292(b) applications by circuit. This member has asked an associate to look at this question but the research is not completed yet. The question, this member suggested, is whether the district court should continue to serve as a gatekeeper for these interlocutory appeals. This member noted that Rule 23(f) works well in the class action context and wondered about comparing the grant rate for Rule

23(f) petitions. Judge Bates responded that the bar is providing that data, and sometimes conflicting data. One might also investigate whether the defense bar sometimes opts not to seek review under § 1292(b). Professor Marcus indicated that the data are currently contested.

A judge member asked why the proposal under discussion would expand the availability of interlocutory review only for mass tort MDLs and not other complex litigation. Professor Marcus characterized the current issue as responding to the "squeaky wheel" and pointed to proposed legislation that addresses claims in the MDL setting. Professor Marcus noted that in rulemaking applicable to one type of case, you will always have to define what the rule does not apply to, which can be difficult. An attorney member suggested that expanded interlocutory review should apply to all MDLs, not merely a subset of them. Judge Bates observed that the more one increases the number of MDLs eligible for expanded interlocutory review, the harder it would become to provide expedited treatment for those appeals.

Judge Campbell noted that requiring PFSs in cases over a certain threshold, for example, MDLs over a thousand cases, will raise the issue that MDLs grow over time; by the time a given MDL hits the threshold, it might be late to require a PFS. Professor Marcus noted that because MDL centralization may often occur before a given threshold number of cases is reached, it is difficult to draft an applicable rule. Who monitors this, and how do you write that in a rule? Judge Bates stated this is an example of why transferee judges say they need flexibility.

Another judge member noted that there are two different things going on with regard to PFS proposals. The first is use of the PFS to jump start discovery. The second is use of the PFS to screen out meritless cases. These are two different objectives, which may require different solutions.

Social Security Disability Review. The Social Security Disability Review Subcommittee continues to work toward a determination whether new Civil Rules can improve the handling of actions to review disability decisions under 42 U.S.C. § 405(g). This proposal originated from the Administrative Conference of the United States. Professor Cooper has worked on this effort along with the chair of the subcommittee, Judge Sara Lioi.

The Social Security Administration (SSA) is very enthusiastic about the idea of national rules, even the pared-down discussion draft that the subcommittee has discussed with SSA and other groups most recently. The DOJ is not as enthusiastic but is not voicing an objection. The plaintiffs' bar is coalescing in opposition to national rules, which it views as unnecessary. The subcommittee met on June 20, 2019 with claimants' representatives, the SSA, the DOJ, magistrate judges, and others who are familiar with present practices. The purpose of the meeting was to focus on getting input from the claimants' bar. It was a good meeting with positive input that will lead to changes in the working draft.

Professor Cooper stated the subcommittee hopes to make a recommendation at the Advisory Committee's October meeting on whether to proceed further with a rulemaking proposal on this topic. Such rulemaking, he noted, would be in tension with the important principle of trans-substantivity in the rules. Even so, Professor Cooper cautioned that the subcommittee should not lightly turn away from a proposal that could improve the lives of those

who deal with these cases. Social Security cases, he observed, constitute a large share (8%) of the federal civil docket. Another issue is how to draft a rule that would supersede undesirable local rules while permitting the retention of valuable ones.

Professor Coquillette emphasized the need to exercise caution when departing from the principle of trans-substantivity in rulemaking. As soon as one permits the insertion into the national Rules of substance-specific provisions, one increases the risk of lobbying by special interests. If there is a need for rules on Social Security review cases, one solution might be to create a separate set of rules for that purpose.

Other Information Items. Judge Bates briefly summarized the following additional information items:

(1) Questions have arisen about the meaning of the provisions in Civil Rule 4(c)(3) for service of process by a United States marshal in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S. Marshals Service.

(2) The Civil and Appellate Rules Committees have formed a joint subcommittee to consider whether to amend the rules – perhaps only the Civil Rules – to address the effect (on the final judgment rule) of consolidating initially separate actions. *Hall v. Hall*, 138 S. Ct. 1118 (2018), established a clear rule that actions initially filed as separate actions retain their separate identities for purposes of final judgment appeals, no matter how completely the actions have been consolidated in the trial court. Complete disposition of all claims among all parties to what began as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291. The subcommittee has begun its deliberations with a conference call to discuss initial steps. The opinion in *Hall v. Hall* concluded by suggesting that if "our holding in this case 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 revisions accordingly."

(3) Rule 73(b)(1) was reviewed after the Advisory Committee received reports that the CM/ECF system automatically sends to the district judge assigned to a case individual consents to trial before a magistrate judge. That feature of the system disrupts the operation of the rule that "[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." No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to defeat the automatic notice feature, but there may be a work-around that would obviate the need for a rule. The Advisory Committee has suspended consideration of possible rule amendments while a system fix is explored.

(4) The Advisory Committee continues to consider the privacy of disability filings under the Railroad Retirement Act. The Appellate Rules Committee is taking the lead because review of those cases goes to the courts of appeals in the first instance.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules. Judge Livingston explained that the Advisory Committee had one action item – the proposed amendment to Rule 404(b) for final approval – and three information items related to Rules 106, 615, and 702.

Proposed Amendment to Rule 404(b) (Character Evidence; Crimes or Other Acts). The Advisory Committee sought final approval of proposed amendments to Rule 404(b). Professor Capra explained that the Advisory Committee had been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. He stated that the Advisory Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law because such amendments would make the rule rigid and more difficult to apply without achieving substantial improvement.

The Advisory Committee determined, however, that it would be useful to amend Rule 404(b) in some respects, especially with regard to the notice requirement in criminal cases. As to that requirement, the Committee determined that the notice should articulate the purpose for which the evidence will be offered and the reasoning supporting the purpose. Professor Capra noted issues that the Committee had observed with the operation of the current Rule. In some cases a party offers evidence for a laundry list of purposes, and the jury receives a corresponding laundry list of limiting instructions. Some courts rule on admissibility without analyzing the non-propensity purpose for which the evidence is offered. And some notices lack adequate specificity.

Professor Capra stated that the proposal to amend Rule 404(b) was published for comment in August 2018. Given how often 404(b) is invoked in criminal cases, Professor Capra expected robust comments, but only a few comments were filed, and they were generally favorable. In response to public comments and discussion before the Standing Committee, the Advisory Committee made two changes to the proposed Rule text as issued for public comment. Most importantly, the Committee changed the term "non-propensity" purpose to "permitted" purpose. Secondly, the Committee changed the notice provision to clarify that the "fair opportunity" requirement applies to notice given at trial after a finding of good cause.

A Committee member suggested replacing the verb "articulate" in the proposed amendment because, he suggested, the term usually refers to a spoken word rather than written material. He noted that the term is not used elsewhere in the Federal Rules. Professor Capra pointed out that the proposed amendment was an effort to get beyond merely stating a purpose. The terms "specify" or "state" were suggested as substitutions for "articulate." Judge Campbell stated that the use of the term "articulate" suggests both identifying the purpose and explaining the reasoning. Professor Capra noted that the word "articulate" is what the Advisory Committee agreed to, and it suggests more rigor. A DOJ representative noted that the language in the proposed amendment was the subject of painstaking negotiation, and that she preferred to retain

the negotiated language to avoid unintended consequences. The Committee determined to retain the term "articulate."

A judge member noted that the Committee Note still used the term "non-propensity" purpose even though that term had been removed from the text of the rule. Professor Capra explained that the use of the term was intentional and resulted from significant discussion at the Advisory Committee's meeting. Judge Campbell added that part of the reason for retaining the language in the Committee Note was to provide guidance to judges in applying the rule. Judge Livingston explained that the term propensity is embedded in caselaw and the Committee Note's use of that term would provide a good signal to readers to focus their caselaw research on that term.

Another judge member asked about the use of the term "relevant" in the Committee Note's statement that "[t]he prosecution must … articulate a non-propensity purpose … and the basis for concluding that the evidence is relevant in light of this purpose." Judge Livingston explained that this passage reflected a complex underlying discussion, and that the Committee was attempting to avoid undue specificity in the Committee Note.

Upon motion by a member, seconded by another, and on a voice vote: **The Committee decided to recommend the amendments to Rule 404(b) for approval by the Judicial Conference**.

Professor Capra thanked the DOJ for all its work on the rule. A DOJ representative noted the sensitivity of Rule 404(b) and thanked Professor Capra, Judge Livingston, and prior chair Judge Sessions for more than five years' work on the rule.

Information Items

Professor Capra summarized the Advisory Committee's ongoing consideration of possible amendments to Rule 106, sometimes known as the rule of completeness. The Advisory Committee is considering two kinds of potential amendments – one that would provide that a completing statement is admissible over a hearsay objection, and another that would provide that the rule covers oral as well as written or recorded statements. In an illustrative scenario, the defendant makes the statement "this is my gun, but I sold it two months ago," and the prosecution offers the first portion of the statement and objects to the admission of the latter portion on hearsay grounds. Some courts admit a completing oral statement into evidence over a hearsay objection, but other courts do not admit the completing statement. The Advisory Committee reached consensus on the desirability of acting to resolve the conflict but is carefully considering how such an amendment should be written and what limitations should govern when such a completing statement should be admitted over a hearsay objection. The Advisory Committee has received information about how completing oral statements are handled in other jurisdictions, including California and New Hampshire.

The next information item concerns Rule 615, the sequestration rule. The Advisory Committee is considering whether to propose an amendment addressing the scope of a Rule 615 order. The Rule text contemplates the exclusion of witnesses from the courtroom; one question is

whether a Rule 615 order can also bar access to trial testimony by witnesses when they are outside the courtroom. Most courts have answered this question in the affirmative, but others apply a more literal reading of the rule. The Advisory Committee is considering an amendment that would specifically allow courts discretion to extend a Rule 615 order beyond the courtroom. The rule would not be mandatory. One potentially challenging issue is how to treat trial counsel's preparation of excluded witnesses.

Professor Capra next reported on the Advisory Committee's ongoing work with regard to Rule 702. In September 2016 the President's Council of Advisors on Science and Technology issued a report which contained a host of recommendations for federal scientific agencies, the DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of possible changes to Rule 702. Judge Livingston appointed a Rule 702 Subcommittee to study what the Advisory Committee might do to address concerns relating to forensic evidence. In fall 2017 the Advisory Committee held a symposium on forensics and *Daubert* at Boston College School of Law.

Following discussion by the Advisory Committee, the main issue the subcommittee is considering concerns how to help courts to deal with overstatements by expert witnesses, including forensic expert witnesses. Professor Capra noted that the DOJ is currently reviewing its practices related to forensic evidence testimony, and some have suggested waiting to see the results of the DOJ's efforts. Judge Livingston stated that one threshold issue is whether the problems should be addressed by rule, or perhaps by judicial education. Judge Livingston thanked the DOJ and Professor Capra for putting together a presentation for the Second Circuit on forensic evidence that is available on video. Professor Capra noted that there will be a miniconference in the fall at Vanderbilt Law School to continue discussion of these issues and *Daubert*.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy presented the report of the Advisory Committee on Criminal Rules, which consisted of four information items.

Judge Molloy first reported on the Advisory Committee's decision not to move forward with suggestions that it amend Rule 43 to permit the court to sentence or take a guilty plea by videoconference. The Advisory Committee has considered suggestions to amend Rule 43 several times in recent years. The first suggestion came from a judge who assists in districts other than his own and who sought to conduct proceedings by videoconference as a matter of efficiency and convenience. The Advisory Committee concluded that an amendment to Rule 43 was not warranted to address that circumstance.

The second suggestion to amend Rule 43 came from the Seventh Circuit's opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), which included the specific statement that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. In *Bethea*, the defendant's many health problems made it extremely difficult for him to come to the courtroom, and given his susceptibility to

broken bones, doing so might have been dangerous for him. After Bethea was permitted to appear by videoconference for his plea and sentencing as requested by his counsel, Bethea appealed and argued that the physical-presence requirement in Rule 43 was not waivable. The Seventh Circuit in *Bethea* concluded that even under the exceptional facts presented "the plain language of Rule 43 requires all parties to be present for a defendant's plea" and "a defendant cannot consent to a plea via videoconference." *Id*. at 867. Advisory Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment.

A subcommittee that was formed to consider the issue and chaired by Judge Denise Page Hood recommended against amending the rule to permit use of videoconferencing for plea and sentencing proceedings. The subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of videoconferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three reasons. First, and most important, the subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where videoconferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Finally, the subcommittee was concerned that there would inevitably be constant pressure from judges to expand any exception to the requirement of physical presence at plea or sentencing. The Advisory Committee unanimously agreed with the subcommittee's recommendation not to amend Rule 43.

Shortly after that determination, the Advisory Committee received a request for reconsideration of that determination. Judges who serve in border states asked for the ability to use videoconferencing for pleas and sentencing. These judges explained that their courts were dealing with thousands of cases brought under 8 U.S.C. § 1326 against defendants charged with illegal reentry. Their districts cover vast distances and, under existing rules, either the judge must travel, or the U.S. Marshals Service must transport defendants. While sympathetic to the issue, the Advisory Committee determined that it would be undesirable to open the door to videoconferencing for these critical procedures. There is a slippery slope and once exceptions are made to the physical presence requirement, exceptions could swallow the rule in the name of efficiency.

Professor King noted that several years ago when the rules were reviewed with an idea of updating them to account for technological advancements, including enhanced audio/visual capabilities, some rules were amended but Rule 43's physical-presence requirement was left unchanged.

Judge Molloy next addressed the Advisory Committee's consideration of a suggestion received from a magistrate judge to amend Rule 40 to clarify the procedures for arrest for violations of conditions of release set in another district. The issue arises from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3). Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily be heard by the judicial officer who ordered the release. After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Advisory Committee decided Rule 40 could benefit from clarification but agreed with an observation by Judge Campbell that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Advisory Committee decided to take no action at this time. Judge Bruce McGiverin greatly assisted the Advisory Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

Judge Molloy next introduced the Advisory Committee's consideration of Rule 16, an issue he noted ties in with the Evidence Rules Advisory Committee's report about expert testimony as well as Civil Rule 26's requirements for expert discovery. Judge Molloy noted that he has served on the Advisory Committee for eleven years and for most of that time Rule 16 has been on the agenda. Judge Kethledge chairs the Rule 16 Subcommittee that has been asked to review suggestions to amend Rule 16 so that it more closely follows Civil Rule 26's provisions for disclosures regarding expert witnesses. Back in the early 1990s, there was a suggestion that discovery rules on experts in criminal cases be made parallel to rules governing civil cases. The Criminal Rules did not change, although changes to Civil Rule 26 went forward.

To address the questions before the subcommittee, Judge Kethledge convened a miniconference to discuss possible amendments to Rule 16. There was a very strong group of participants, from various parts of the country, including six or seven defense practitioners, and five or six representatives from the DOJ. Most had significant personal experience with these issues and had worked with experts.

Judge Kethledge organized discussion at the miniconference into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule. Second, they were asked to provide suggestions to improve the rule.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures with sufficiently detailed information to allow them to prepare to cross examine the witness. In contrast, the DOJ representatives stated that they were unaware of problems with the rule and expressed opposition to making criminal discovery more akin to Rule 26.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, participants made significant progress in identifying some common ground. The DOJ representatives said that framing the problems in terms of timing and sufficiency of the

notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the DOJ personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The subcommittee came away from the miniconference with concrete suggestions for language that would address timing and completeness of expert discovery.

Judge Molloy stated that the subcommittee plans to present a proposal to amend Rule 16 at the Advisory Committee's September meeting.

A DOJ representative noted that the Department views this less as a need for a rule change and more as a need to train lawyers so that prosecutors and defense counsel alike understand what the rules are. Prosecutors need to understand what the concerns are and the Department needs to conduct training to ensure this understanding. The DOJ has worked with Federal Public Defender Donna Elm to highlight the problematic issues; a training course presented by the DOJ's National Advocacy Center will be shown to all prosecutors. Even if a rule change were to go forward, it would take years. Collaboration on training means that the Department can begin to address problems now.

Judge Molloy provided a brief update on progress in implementing the recommendations of the Task Force on Protecting Cooperators. Task Force member Judge St. Eve reported on the status of efforts by the Bureau of Prisons to implement certain recommendations. One recommendation is to adopt provisions for disciplining inmates who pressure other inmates to "show their papers."

Judge Campbell thanked the advisory committee chairs and reporters for all the work that goes into the consideration of every suggestion. He noted that even a five-minute report on a given issue may be the result of long and painstaking effort.

OTHER COMMITTEE BUSINESS

Proposal to Revise Electronic Filing Deadline. Judge Chagares explained his suggestion that the Advisory Committees study whether the rules should be amended to move the current midnight electronic-filing deadline to earlier in the day, such as when the clerk's office closes in the respective court's time zone. The Supreme Court of Delaware has adopted such a practice. Judge Campbell delegated to Judge Chagares the task of forming a subcommittee to study the issue and provide an initial report at the January meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019, and she described several bills have been introduced or reintroduced that are of interest to the rules process or the courts generally. There has been no legislative activity to move these bills forward. Ms. Wilson reviewed several pieces of legislation of general interest to the courts. Scott Myers provided an overview of H.R. 3304, a bipartisan bill introduced the week before the Committee meeting that would extend for an additional four years the existing exemption from the means test for chapter seven filers who are certain National Guard reservists. The bill is expected to pass; absent passage, an amendment to the

Bankruptcy Rules would be required. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Judge Campbell discussed the Judiciary's strategic planning process and the Committee's involvement in that process. He solicited comments on the Committee's identified strategic initiatives and the extent to which those initiatives have achieved their desired outcomes. Judge Campbell also invited input on the proposed approach for the update of the *Strategic Plan for the Federal Judiciary* that is to take place in 2020. Judge Campbell will correspond with the Judiciary's planning coordinator regarding these matters.

Procedure for Handling Public Input Outside the Established Public Comment Period. Judge Campbell summarized prior discussions by the Committee concerning how public submissions received outside the formal public comment period should be handled, including submissions addressed directly to the Standing Committee. Professor Struve explained the revised draft principles concerning public input during the Rules Enabling Act process and welcomed additional comments on the draft. These procedures are proposed to be posted on the website for the Judiciary. *See* Revised Draft Principles Concerning Public Input During the Rules Enabling Act Process (agenda book, p. 495).

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the principles concerning public input.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Phoenix, Arizona on January 28, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1B

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Agenda E-19 (Summary)
Rules
September 2019

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3

2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 6-10

3. Approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 13-15

4. Approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 20-21

The remainder of this report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 25, 2019. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and discussed four information items.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term "answer" in Rule 40(a)(3) to the term "response," making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that "it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology." The Advisory Committee sought final approval for the proposed amendments as published.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure

and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 3, 6, and 42, and Forms 1 and 2, with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3 (Appeal as of Right – How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendments address the effect on the scope of an appeal of designating a specific interlocutory order in a notice of appeal. The initial suggestion pointed to a line of cases in one circuit applying an expressio unius rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order rather than treating a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment. Research conducted after receiving the suggestion revealed that the problem is not confined to a single circuit, but that there is substantial confusion both across and within circuits.

Rule 3(c)(1)(B) currently requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. However, some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal – the one

serving as the basis of the court's appellate jurisdiction and from which time limits are calculated – and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Advisory Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the term "judgment" and the term "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result would require the appellant to designate the judgment – or the appealable order – from which the appeal is taken. Additional new subsections of Rule 3(c) would call attention to the merger principle.

The proposed amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court). Having different suggested forms for appeals from final judgments and appeals from other orders clarifies what should be designated in a notice of appeal. In addition, the Advisory Committee recommended conforming amendments to Rule 6 to change the reference to "Form 1" to "Forms 1A and 1B," and to Form 2 to reflect the deletion of "part thereof" from Rule 3(c)(1)(B).

Rule 42 (Voluntary Dismissal)

Current Rule 42(b) provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." Prior to the 1998 restyling of the rules, Rule 42(b) used the word "shall" instead of "may" dismiss. Although the 1998 amendment to Rule 42 was intended to be stylistic only, some courts have concluded that there is now discretion to decline to dismiss. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals.

In addition, current Rule 42(b) provides that "no mandate or other process may issue without a court order." This language has created some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court.

The issues with the language "no mandate or other process may issue without a court order" are avoided – and the purpose of that language served – by deleting it and instead stating directly in new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Information Items

The Advisory Committee on Appellate Rules met on April 5, 2019. Discussion items included undertaking a comprehensive review of Rules 35 and 40, as well as a suggestion to

limit remote access to electronic files in actions for benefits under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v.

Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

As detailed above, the proposed amendments to Rules 35 and 40 published for public comment in August 2018 create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider discrepancies between Rules 35 and 40. The discrepancies are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could "suggest" rehearing en banc. The Advisory Committee determined not to make the rules more parallel but continues to consider possible ways to clarify practice under the two rules.

Privacy in Railroad Retirement Act Benefit Cases

The Advisory Committee was forwarded a suggestion directed to the Advisory Committee on Civil Rules. The suggestion requested that Civil Rule 5.2(c), the rule that limits remote access to electronic files in certain types of cases, be amended to include actions for benefits under the Railroad Retirement Act because of the similarities between actions under the Act and the types of cases included in Civil Rule 5.2(c). But review of Railroad Retirement Act decisions lies in the courts of appeals. For this reason, the Advisory Committee on Appellate Rules will take the lead in considering the suggestion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021, and Official Form 122A-1, with a recommendation that they be approved and transmitted to the Judicial Conference. Three of the

rules were published for comment in August 2018 and are recommended for final approval after consideration of the comments. The proposed amendments to the remaining three rules and the official form are technical or conforming in nature and are recommended for final approval without publication.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

The published amendment to Rule 2002: (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six comments were submitted. Four of the comments included brief statements of support for the amendment. Another comment suggested extending the clerk's noticing duties 30 days beyond the creditor proof of claim deadline because a case trustee or the debtor can still file a claim on behalf of a creditor for 30 days after the deadline. Because the creditor would receive notice of the claim filed on its behalf, the Advisory Committee saw no need for further amendment to the rule. The comment also argued that certain notices should be sent to creditors irrespective of whether they file a proof of claim, but the Advisory Committee disagreed with carving out certain notices. Another comment opposed the change that would require notice of entry of the confirmation order because some courts already have a local practice of sending the confirmation order itself to creditors. The Advisory Committee rejected this suggestion because not all courts send out confirmation orders.

After considering the comments, the Advisory Committee voted unanimously to approve the amendment to Rule 2002 as published.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment would add explicit authorization to compel production of electronically stored information (ESI). The proposed amendment further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Three comments were submitted. Two of the comments were generally supportive of the proposed amendments as published, while one comment from the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan urged that the rule should state that the bankruptcy judge has discretion to consider proportionality in ruling on a request for production of documents and ESI. Prior to publishing proposed Rule 2004, the Advisory Committee carefully considered whether to reference proportionality explicitly in the rule and declined to do so, in part because debtor examinations under Rule 2004 are intended to be broad-ranging. It instead proposed an amendment that would refer specifically to ESI and would harmonize Rule 2004(c)'s subpoena provisions with the subpoena provisions of Civil Rule 45. After consideration of the comments, the Advisory Committee unanimously approved the amendment to Rule 2004(c) as published.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a

statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019).

At its spring 2018 meeting, the Advisory Committee considered and approved for publication an amendment to Rule 8012 to track the pending amendment to Appellate Rule 26.1 that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019. The amendment to Rule 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors. New Rule 8012(b) requires disclosure of debtors' names and requires disclosures by nongovernmental corporate debtors. Three comments were submitted, all of which were supportive. The amendment was approved as published.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of their Appellate Rules counterparts, the Advisory Committee recommended conforming technical changes to Bankruptcy Rules 8013(a)(1), 8015(g), and 8021(d). The recommendation was approved.

Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income)

The Advisory Committee received a suggestion from an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California. He noted that Official Form 122A-1 contains an instruction at the end of the form, after the debtor's signature line, explaining that the debtor should *not* complete and file a second form (Official Form 122A-2) if

the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. He suggested that the instruction not to file also be added at the end of line 14a of Form 122A-1, where the debtor's current monthly income is calculated. The Advisory Committee agreed that repeating the instruction as suggested would add clarity to the form and recommended the change. The Standing Committee approved the change.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revision of Official Bankruptcy Form 122A-1 and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036 with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

Judge Brian Fenimore of the Western District of Missouri noted that Rule 2005(c) – a provision that deals with conditions to assure attendance or appearance – refers to now-repealed provisions of the Criminal Code. The Advisory Committee agreed that the current reference to 18 U.S.C. § 3146 is no longer accurate and recommended replacing it with a reference to 18 U.S.C. § 3142, where the topic of conditions is now located. Because 18 U.S.C. § 3142 also

addresses matters beyond conditions to assure attendance or appearance, the proposed rule amendment will state that only "relevant" provisions and policies of the statute should be considered.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007 clarifies that only an insurance depository institution as defined by section 3 of the Federal Deposit Insurance Act (FDIA) is entitled to heightened service of a claim objection, and that an objection to a claim filed by a credit union may be served on the person designated on the proof of claim.

Rule 3007 provides, in general, that a claim objection is not required to be served in the manner provided by Rule 7004, but instead can be served by mailing it to the person designated on a creditor's proof of claim. The rule includes exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." The purpose of this exception is to comply with a legislative mandate in the Bankruptcy Reform Act of 1994, set forth in Rule 7004(h), providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The current language in Rule 3007(a)(2)(A)(ii) is arguably too broad in that it does not qualify the term "insured depository institution" as being defined by the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under the rule. The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in

Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Rule 7007.1 (Corporate Ownership Statement)

Continuing the advisory committees' efforts to conform the various disclosure statement rules to the pending amendment to Appellate Rule 26.1, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1.

Rule 9036 (Notice by Electronic Transmission)

The proposed amendment would implement a suggestion from the Committee on Court Administration and Case Management requiring high-volume-paper-notice recipients to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 will change to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Information Items

The Advisory Committee met on April 4, 2019. The agenda for that meeting included a report on the work of the Restyling Subcommittee on the process of restyling the Bankruptcy Rules. The Advisory Committee anticipates this project will take several years to complete.

The Advisory Committee also reviewed a proposed draft Director's Bankruptcy Form for an application for withdrawal of unclaimed funds in closed bankruptcy cases, along with proposed instructions and proposed orders. The initial draft was the product of the Unclaimed Funds Task Force of the Committee on the Administration of the Bankruptcy System. The Advisory Committee supported the idea of a nationally available form to aid in processing unclaimed funds, made minor modifications, and recommended that the Director adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 30(b)(6), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, appears regularly on the Advisory Committee's agenda. Counsel for both plaintiffs and defendants complain about problematic practices of opposing counsel under the current rule, but judges report that they are rarely asked to intervene in these disputes. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the identified problems. The Advisory Committee added the issue to its agenda once again in 2016 and has concluded, through the exhaustive efforts of its Rule 30(b)(6) Subcommittee, that discrete rule changes could address certain of the problems identified by practitioners.

In assessing the utility of rule amendments, the subcommittee began its work by drafting more than a dozen possible amendments and then narrowing down that list. In the summer of 2017, the subcommittee invited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;

2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;

3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;

4. Forbidding contention questions in Rule 30(b)(6) depositions;

5. Adding a provision to Rule 30(b)(6) for objections; and

6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

More than 100 comments were received. The focus eventually narrowed to imposing a duty on the parties to confer. The Advisory Committee agreed that such a requirement was the most promising way to improve practice under the rule.

The proposed amendment that was published for public comment required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. As published, the duty to confer requirement was meant to be iterative and included language that the conferral must "continu[e] as necessary."

During the comment period, the Advisory Committee received approximately 1,780 written comments and heard testimony from 80 witnesses at two public hearings. There was

strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as to the directive that the parties confer about the "number and description of" the matters for examination. However, many commenters supported a requirement that the parties confer about the matters for examination.

After carefully reviewing the comments and testimony, as well as the subcommittee's report, the Advisory Committee modified the proposed amendment by: (1) deleting the requirement to confer about the identity of the witness; (2) deleting the "continuing as necessary" language; (3) deleting the "number and description of" language; and (4) adding to the committee note a paragraph explaining that the duty to confer does not apply to a deposition under Rule 31(a)(4) (Questions Directed to an Organization). The proposed amendment approved by the Advisory Committee therefore retains a requirement that the parties confer about the matters for examination. The duty adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 7.1, the rule that addresses disclosure statements, with a request that it be published for comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7.1 would do two things. First, it would require a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to proposed amendments to Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019) and Bankruptcy Rule 8012 (to be considered by the Conference at its September 2019 session). Second, the proposal would amend the rule to require a party in a diversity case to disclose the citizenship of every individual or entity whose citizenship is attributed to that party.

The latter change aims to facilitate the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of an individual or entity attributed to a party. For example, a limited liability company takes on the citizenship of each of its owners. If one of the owners is a limited liability company, the citizenships of all the owners of that limited liability company pass through to the limited liability company that is a party in the action. Requiring disclosure of "every individual or entity whose citizenship is attributed" to a party will ensure early determination that jurisdiction is proper.

Information Items

The Advisory Committee met on April 2-3, 2019. Among the topics for discussion was the work of two subcommittees tasked with long-term projects, and the creation of a joint Appellate-Civil subcommittee.

Multidistrict Litigation Subcommittee

As previously reported, since November 2017, this subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC.

Subcommittee members have also participated in several conferences hosted by different constituencies, including MDL transferee judges.

At the Advisory Committee's April 2019 meeting, there was extensive discussion of the various issues on which the subcommittee has determined to focus its work. The Advisory Committee agreed with the subcommittee's inclination to focus primarily on four issues: (1) use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery; (2) providing an additional avenue for interlocutory appellate review of some district court orders in MDL proceedings; (3) addressing the court's role in relation to global settlement of multiple claims; and (4) third-party litigation funding. It is still too early to know whether this work will result in any recommendation for amendments to the Civil Rules.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases 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).

The subcommittee developed a preliminary draft rule for discussion purposes, including for discussion at the Advisory Committee's April 2019 meeting. On June 20, 2019, the subcommittee convened a meeting to obtain feedback on its draft rule. Invited participants included claimants' representatives, a magistrate judge, as well as representatives of ACUS, the Social Security Administration, and the DOJ. One of the authors of the study that forms the basis of the ACUS suggestion also attended. Each participant provided his or her perspective on the draft rule, followed by a roundtable discussion.

The subcommittee will continue to gather feedback on the draft rule, including from magistrate judges. The subcommittee hopes to come to a decision as to whether pursuit of a rule is advisable in time for the Advisory Committee's October 2019 meeting.

Subcommittee on Final Judgment in Consolidated Cases

The Civil and Appellate Rules Advisory Committees have formed a joint subcommittee to consider whether either rule set should be amended to address the effect on the "final judgment rule" of consolidating initially separate cases.

The impetus for this project is *Hall v. Hall,* 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case 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 revisions accordingly." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. If so, the subcommittee will determine the value of any rules amendments to address those problems.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on May 7, 2019. The bulk of the meeting focused on work of the Rule 16 Subcommittee, formed to consider suggestions from two district judges that

pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the robust expert disclosure requirements in Civil Rule 26. The Advisory Committee charged the subcommittee with studying the issue, including the threshold desirability of an amendment, as well as the features any recommended amendment should contain.

Early on, the subcommittee determined that it would be useful to hold a mini-conference to explore the contours of the issue with all stakeholders. At its October 2018 meeting (in anticipation of the mini-conference), the Advisory Committee heard a presentation by the DOJ on its development and implementation of policies governing disclosure of forensic and non-forensic evidence.

Participants in the May 6, 2019 mini-conference included defense attorneys, as well as prosecutors and representatives from the DOJ, each of whom has extensive personal experience with pretrial disclosures and the use of experts in criminal cases. The discussion proceeded in two parts. First, participants were asked to identify any concerns or problems with the current rule. Second, they were asked to provide suggestions on how to improve the rule.

The defense attorneys identified two problems with Rule 16 in its current form: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Defense practitioners reported they sometimes receive summaries of expert testimony a week or the night before trial, which significantly impairs their ability to prepare for trial. They also reported that they often do not receive sufficiently detailed disclosures to allow them to prepare to cross examine the expert witness. In stark contrast, the DOJ representatives reported no problems with the current rule.

As to the subcommittee's second inquiry concerning ways to improve the rule, participants discussed possible solutions on the issues of timing and completeness of expert

discovery. Significant progress was made in identifying common ground; the discussion produced concrete suggestions for language that would address the timing and sufficiency issues identified by defense practitioners. The subcommittee plans to present its report and a proposed amendment to Rule 16 at the Advisory Committee's September 2019 meeting.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted considering the prosecution's expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term "non-propensity purpose" to "permitted purpose."

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on May 3, 2019. The agenda included discussion of possible amendments to Rules 106, 615, and 702. The Advisory Committee also continues to monitor the development of the law following the decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

Possible Amendments to Rule 702 (Testimony by Expert Witnesses)

A subcommittee on Rule 702 has been considering questions that arise in the application of the rule, including treatment of forensic expert evidence. The subcommittee, after extensive discussion, made three recommendations with which the Advisory Committee agreed: (1) it would be difficult to draft a freestanding rule on forensic expert testimony because any such amendment would have an inevitable and problematic overlap with Rule 702; (2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note

because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and (3) it would not be advisable to publish a "best practices manual" for forensic evidence.

The subcommittee expressed interest in considering an amendment to Rule 702 that would focus on the important problem of overstating results in forensic and other expert testimony. One example: an expert stating an opinion as having a "zero error rate" where that conclusion is not supportable by the methodology. The Advisory Committee has heard extensively from the DOJ on its efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Advisory Committee is considering other ways to aid courts and litigants in meeting the challenges of forensic evidence, including assisting the FJC in judicial education. In this regard, the Advisory Committee is holding a mini-conference on October 25, 2019 at Vanderbilt Law School. The goal of the mini-conference is to determine "best practices" for managing *Daubert* issues. A transcript of the mini-conference will be published in the *Fordham Law Review*.

Possible Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)

The Advisory Committee continues to consider whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. A suggestion from a district judge noted two possible amendments: (1) to provide that a completing statement is admissible over a hearsay objection; and (2) to provide that the rule covers oral as well as written or recorded statements.

Several alternatives for an amendment to Rule 106 are under consideration. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

Possible Amendments to Rule 615 (Excluding Witnesses)

The Advisory Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order and whether it applies only to exclude witnesses from the courtroom (as stated in the text of the rule) or if it can extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony. Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Advisory Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Advisory Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the scope of the order is desirable. The investigation of this problem is consistent with the Advisory Committee's ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given increasing witness access to information about testimony through news, social media, or daily transcripts.

At its May 2019 meeting, the Advisory Committee resolved that any amendment to Rule 615 should allow, but not mandate, orders that extend beyond the courtroom. One issue that the Advisory Committee must work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

OTHER ITEMS

The Standing Committee's agenda included four information items. First, the Committee discussed a suggestion from the Chair of the Advisory Committee on Appellate Rules that a study be conducted to determine whether the Appellate, Bankruptcy, Civil, and Criminal Rules should be amended to change the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone.

The Chair authorized the creation of a joint subcommittee comprised of representatives of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, and delegated to Judge Chagares the task of coordinating the subcommittee's work. The subcommittee plans to present its report to the Committee at its January 2020 meeting.

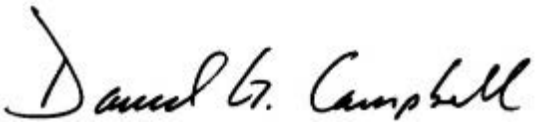
Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, based on feedback received at the Committee's January 2019 meeting, the Reporter to the Committee drafted revised proposed procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. The Committee discussed and approved those procedures.

Fourth, at the request of the Judiciary Planning Coordinator, Committee members discussed the extent to which the Committee's current strategic initiatives have achieved their desired outcomes and the proposed approach for the 2020 update to the *Strategic Plan for the*

Federal Judiciary, and authorized Judge Campbell to convey the Committee's views to the Judiciary Planning Coordinator.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Form (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

Appendix D – Federal Rules of Evidence (proposed amendment and supporting report excerpt)

TAB 1C

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Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the "three day rule."	
AP 29	An exception added to Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using "bond or other security."	CV 62, 65.1
BK 8002(a)(5)	Adds a provison to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond"; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Revised August 2019

Effective (no earlier than) December 1, 2019

Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019)

REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Published in 2016-17. Eliminates unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Unpublished. Technical amendments to remove the term "proof of service."	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Proposed subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	

Revised August 2019

Effective (no earlier than) December 1, 2019 Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019) REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised August 2019

Effective (no earlier than) December 1, 2020 Current Step in REA Process: approved by the Standing Committee (June 2019) REA History: approved by the relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 2005	Unpublished. Replaces updates references to the Criminal Code that have been repealed.	
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifiies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised August 2019

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. The phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3) with "[a] court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised August 2019

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised August 2019

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
APRIL 2-3, 2019

The Civil Rules Advisory Committee met in San Antonio, Texas, on April 2 and 3, 2019. 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 Catherine T. Struve, Reporter (by telephone); Professor Daniel R. Coquillette, Consultant (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 Jennie Lee Anderson, Esq.; John Beisner, Esq.; Amy Brogioli, Esq. (AAJ); Fred Buck, Esq. (American College of Trial Lawyers); Danielle Cutrona, Esq. (Burford Capital); Alexander Dahl, Esq.(Lawyers for Civil Justice); Joseph Garrison, Esq. (NELA); William T. Hangley, Esq. (ABA Litigation Section liaison); Brittany Kauffman, Esq. (IAALS); Robert Levy, Esq. (Exxon Mobil); Ellen Relkin, Esq.; Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer; Brittany Schultz, Esq. (Ford Motor Co.); and Susan H. Steinman, Esq. (AAJ).

Judge Bates welcomed all participants and reported that there was a good discussion of Multidistrict Litigation issues at the January meeting of the Standing Committee. There were no "Rules matters" discussed at the March meeting of the Judicial Conference.

Judge Bates further reported that amendments of Rules 5, 23, 62, and 65.1 took effect as scheduled on December 1, 2018. Some of these changes are significant, especially the changes in Rule 23. The Committee will monitor implementation of these rules as practice develops.

November 2018 Minutes

The draft Minutes for the November 1, 2018 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the legislative report. The agenda materials list three bills that would amend the Civil Rules, either directly or effectively. Some of the topics are familiar from earlier Congresses, including disclosure of third-party litigation funding agreements and prohibitions on "nationwide" injunctions. A third bill would amend Rule 23 to add a requirement for class certification that the class does not allege misclassification of employees as independent contractors.

In addition to these bills, a bill on minimum-diversity jurisdiction has been introduced. No action has yet been taken on it.

Rule 30(b)(6)

Judge Bates introduced the Rule 30(b)(6) Subcommittee Report by suggesting that it probably will prove to be the major item for discussion at this meeting. The proposal to require a conference of the noticing party and the deponent about a Rule 30(b)(6) deposition of an organization was published last August. Hearings were held this January and February, drawing some 80 witnesses. Reporter Marcus records a count of 1,780 written comments; many of the comments were repetitive — they did not reflect 1,780 different viewpoints.

The Subcommittee has recommended revisions of the published proposal in response to the testimony and comments. They recommend that the amended rule continue to require a conference about the matters for examination. But they also recommend deleting the proposed requirement to confer about the identity of the witnesses to appear for the organization, and to delete the requirement to confer about the number of matters for examination. Related changes also are recommended.

The Subcommittee also advances, without a recommendation either way, an alternative that would add a requirement that 30-days notice be given of a Rule 30(b)(6) deposition, and that some number of days before the deposition the organization name the witnesses who will appear.

Judge Ericksen delivered the Rule 30(b)(6) Subcommittee Report. She began by noting that "the hearings were very helpful." They, and the written comments, led the Subcommittee to recommend revisions of the published draft. The Subcommittee is unanimously behind the recommended revisions. They are solid. With these revisions, the Subcommittee recommends that the Committee recommend adoption of the proposal. It also presents two possible alternative additions for consideration, without recommendation.

The most "vociferous" comments addressed the published proposal's requirement that the conference include discussion of the identity of the persons who would appear as witnesses for the organization. Everyone agrees that the organization retains sole discretion to designate who its witnesses will be. What, then, is the point of conferring? There also was some concern that knowing the identity of the witnesses would lead to the misuse of social media research to turn the deposition into a personal deposition, not an organization deposition.

The testimony and comments also expressed concern about requiring discussion of the number of matters for examination. Many suggested that if the number of matters described for examination is reduced, the matters will be described with greater breadth. Broad descriptions, even if not vague, make it difficult to focus witness preparation and to conduct the deposition without disagreements. The Subcommittee long since abandoned any idea of prescribing a numerical limit on the number of matters for examination. Requiring discussion of the number could lead some lawyers to assert an implied right to limit the number.

Withdrawal of the requirement to confer about the identity of the witnesses led to a recommendation to withdraw the words that the parties confer, "continuing as necessary." Those words were inserted because it was recognized that an organization cannot determine who its witnesses will be until it knows what the matters for examination will be. They are no longer needed for this purpose, and could become an occasion for mischief. To be sure, conferring still may need to be continued in stages to satisfy the good-faith requirement, but a careful balance is needed when adding possible points for strategic posturing. The constant precept to do no harm supports deletion of "continuing as necessary."

Judge Ericksen went on to describe the two alternatives presented by the Subcommittee without recommendation. They grow out of deliberations about the withdrawn recommendation to require discussion of the identity of the witnesses to be designated by the organization. Rather than discuss identity, the organization could be required to name them at some interval before the time designated for the deposition. To make this work, it seems necessary to set a minimum notice period. The alternative draft therefore would add a requirement that the notice of a Rule 30(b)(6) deposition be given at least 30 days before the designated time. The time for the organization to name the designated witnesses could be 7, or 5, or 3 days before the deposition — those alternatives are offered as illustrations without suggesting a choice among them. One important reason for identifying the designated witnesses is that the organization may designate more than one, assigning them to different matters for examination. The party taking the deposition should know what matters will be addressed by each witness as it prepares to depose them. Alternative 2A reacts to the fears that advance notice of witness

names will foster misuse by requiring that the organization specify, without naming them, which witness will address which matters for examination.

The Subcommittee believes that if either version of Alternative 2 comes to be recommended, it should be published for comment. Much testimony and many comments addressed the advantages and disadvantages of requiring that the organization's witnesses be named in advance, perhaps in such detail that the Committee would not likely learn anything more by republication. But there has been no opportunity to address the advance notice requirements.

Professor Marcus added the suggestion that it might be better to defer discussing the number of days set for the notice provisions until there is at least a tentative Committee position on Alternatives 2 and 2A.

Judge Bates expressed the Committee's thanks to Judge Ericksen, Professor Marcus, and the Subcommittee. He noted that some comments have been addressed to the Subcommittee Report as it appears in the agenda book for this meeting. Lawyers for Civil Justice supports adoption of the revised proposal, adding a 30-day notice requirement but not adding a requirement that witnesses be named before the deposition. They urge that republication would not be required. Several organizations support Alternative 2, requiring the organization to name its designated witnesses before the deposition, and supporting the 7-day period.

Judge Bates also noted that the limited advance allocation of unnamed witnesses to different matters for examination set out in Alternative 2A might, by example, discourage organizations that now name witnesses in advance from continuing to do so. Several comments have said that the best practice of the best lawyers now provides names in advance. It would be unwise to discourage it. Resistance to advance naming of witnesses arises from distrust of the not-so-good lawyers who may misuse the names for social media research that supports efforts to convert the occasion from an organization deposition into a personal deposition of the witness.

Judge Bates also suggested that the prospect of republication should not deter consideration of the advance-naming proposal. The Committee should generate the best rule possible. The notice provisions might well require republication. If so, so be it. The fear of bad practices that seek to convert the deposition to a personal deposition are offset by the advantages of advance identification. Among the advantages are those that arise when the same witness has previously testified for the organization on the same matters — the transcript may be available to support better focus in taking the deposition, and it may be possible to select documents shown to be familiar to the witness.

Members of the Subcommittee then provided further views.

One Subcommittee member was "not a proponent of Alternative 2." Naming the witness might lead to gamesmanship. Questions may be prepared that seek the witness's personal information, not information the organization has had an opportunity to prepare the witness to understand and relate accurately. The questions may elicit "I don't know" responses, creating a false appearance of inadequate preparation.

Another Subcommittee member offered some support for requiring advance notice of witness names. Without this requirement, the direction to confer about the matters for examination "is pretty weak sauce." The fear that requiring advance notice will deter lawyers from continuing their present best practices — for example by shortening the period of advance notice down to the required minimum — seems overdrawn. The less we require, the more room there will remain for controversy about the desirable more.

Still another Subcommittee member said that Subcommittee discussions had been robust. "Concerns were expressed on both sides of the 'v.'" about requiring advance notice of witness names. The purpose of discovery is to provide information for the efficient and just resolution of litigation. Advance disclosure of witness identities can advance that goal. Yes, there is an opportunity to abuse social media information and bleeding over into making it an individual deposition. But good lawyers can handle these extreme situations when they occur. The alternative that would simply allocate unidentified witnesses to different subsets of the matters for examination is interesting, but it does not add enough — it does not advance preparation for inquiring into each matter.

A Committee member began the all-Committee discussion by suggesting that the rule should be guided by, and should reinforce, best practices. Testimony at the February hearing revealed that some lawyers are reluctant to reveal witness identity in advance. "That gave me pause." But identification — not conferring about it — is a good thing. "Social media are part of how we live today." Abusive questioning can be managed. And advance identification can be useful if the witness has testified for the organization on other occasions. "I support Alternative 2."

Another Committee member "inclined" toward the revised version of the published proposal. "Rule 30(b)(6) is a unique tool to get information from an organization." It is not designed to get individual knowledge. "The overlap between corporate and personal is a problem now," creating problems in sorting out what is "binding" on the organization. And forgoing a requirement of advance naming can lead to desirable trading — for example, an agreement to provide names in advance in return for identification of the documents that will be used in examining the witness. We should be careful to not get in the way of current best practices.

This initial discussion was punctuated by a reminder that if Alternative 2 is approved, it will be for republication. If views continue to be divided, republication will provide an opportunity to gather more information.

The 30-day notice provision won support as something that could be added to the original proposal. "You need it to prepare the witness." Judge Ericksen responded that this view had been expressed by many organizations. But the Subcommittee is not recommending it. The 30-day notice provision was inserted in Alternatives 2 and 2A — remember that the Subcommittee advanced them for discussion without making any recommendation — because it seemed a necessary support for a provision requiring disclosure of witness names at any interval before the time for the deposition.

Another Committee member offered support for Alternative 2. The downside that advance identification of the organization's witness will lead to social media searches for personal information does not seem much entrenched by advance notice. Millennial lawyers can undertake a comprehensive search even if the witness is identified only at the moment the deposition begins. Even for the Subcommittee's recommended revision of the published rule, the draft Committee Note, p. 105, lines 193-194 of the agenda materials, suggests that it may be productive to discuss at the conference the numbers of witnesses and the matters on which they will testify. Is this a tentative backdoor approach to embracing Alternative 2?

Judge Ericksen responded that "the mandated conference could include lots of things. We hear of many things that are discussed now." Professor Marcus added that there is a legitimate concern about "legislating by Committee Note," but this is a pretty soft sentence. It says only that "it may be productive" to discuss a few suggested topics. It does not support any argument that there is a right to confer about them. These responses were accepted as fair.

The Department of Justice does not favor identification of witnesses before the deposition. The organization is the deponent, not the individual. The deposition is not about the individual witness. Better practice is to have the parties frame the matters for examination, but not to name the witnesses.

A Committee member went to the Notes on the February 22 Subcommittee conference call, pointing to lines 692-694 at page 120 of the agenda materials. That sentence observed that it might be useful to add to the Committee Note for the recommended amendment a statement about the value of specifying which topics the various witnesses would address as part of the conference about the matters for examination. There are concerns about the need to change witnesses at the last minute before the deposition, and about misuse of the fruits of social media research, but why not at least suggest in the Committee Note that it may be helpful to discuss

which matters which witness will address? The response was that this suggestion in fact appears in the draft note, p. 105 at line 194. But the rejoinder was that at this point the Note might refer to discussing the identity of the witnesses. Another Committee member agreed — if it is best practice to discuss the identity of witnesses, why not refer to it in the Note?

The characterization of best practice was questioned. The hearings and comments repeatedly emphasized that the best lawyers regard discussion of witness identity as the best practice "when they choose to do it." It is the best practice in the right circumstances. "We should not strip professional judgment out of what is best practice." It would not be the end of the world to adopt Alternative 2 and require advance notification of witness identity, but that is not the same as hinting that best practice, even if not rule text, requires discussion of witness identity. We should remember that the possibility of requiring advance naming of witnesses arose during the January hearing as Committee members raised it as one possible response to the difficulties of requiring that the conference include discussion of identity. Another Committee member noted that advance identification of witnesses was not included among the many proposed Rule 30(b)(6) amendments that the Subcommittee considered and rejected, as described beginning at line 738 of page 121 of the agenda materials. It is a new-found issue. Yet another Committee member agreed. Advance identification of witnesses arose as an alternative to the many protests about requiring discussion of witness identity.

Broader doubts were raised about recommending any Rule 30(b)(6) amendments at all. There is a good bit of anecdotal information about problems in some cases, but it is not clear that this is enough to support any amendments. The revised proposal recommended by the Subcommittee could lead to gamesmanship. The proposed rule text direction to confer about the matters for examination does not embrace all of the six things the Committee Note recommends for discussion. The rule does not require discussion of those things. They should be put into rule text, or removed from the Note.

These doubts expanded to consider the discussion of "good faith" in the draft Note. Even after deleting "continuing as necessary" from the proposed rule text, the Note says that a single conference may not suffice. It also says that agreement is not required. So what does good faith require — when can it be established without reaching agreement? The Note seems to suggest that if the parties fail to agree, they should ask the court for guidance. Why not rely on Rule 26(c) without revising Rule 30(b)(6)? A motion for a protective order must be preceded by conferring or attempting to confer in good faith, accomplishing the same purpose — a conference among those affected.

Judge Ericksen agreed that the Note does speak to matters not included in the rule text. But the Note provides insight into what can be accomplished in conferring about the matters for examination, and to encourage it. "It's hard to convey the breadth of what can be ironed out" by conferring. And requiring a conference is useful — witnesses have told us that they attempt to initiate discussion of the matters for examination and are rebuffed.

Professor Marcus noted that generalized discussions of what constitutes "good faith" are always possible. But good-faith conferring is already required in other discovery rules, see Rule 26(c) and 37(a)(1), and has worked. We can give examples of good practices in the Committee Note, even if some of them extend beyond the obligation to discuss in good faith the matters for examination. This is not legislating by Committee Note, but simply offering observations about what might happen during the conference. It is better to discuss things in advance than during a partially failed deposition.

Professor Coquillette agreed that a Committee Note cannot add to, or withdraw from, the rule text. But this draft Note does not run afoul of that precept.

This discussion led to the suggestion that perhaps the Committee Note should add to the second paragraph that appears on p. 105 the express statement that appears in the third paragraph, recognizing that the opportunity to discuss does not imply any obligation to agree.

Moving back to the recommended rule text, it was noted that the Federal Magistrate Judges' comment on the published proposal observed that Rule 30(b)(6) raises issues that are often litigated. They think that a rule will help — indeed they support the published proposal that requires conferring about the choice of witnesses.

A different perspective on the recommended rule text was offered. The MDL Subcommittee continually encounters the question whether any MDL-specific rules should be detailed or general. The need to preserve wide margins of discretion is often expressed. The recommended revision of the published proposal is more open-ended than the Alternative 2 requirement to name witnesses in advance of the deposition, and to give at least 30 days notice of the deposition. These concerns suggest that it is safer to stick with the less aggressive changes in Alternative 1.

More hesitating support was offered for Alternative 2. The argument that it will promote gamesmanship does not seem persuasive at first. But caution is warranted by the observation that naming the witnesses before the deposition date is the best practice only in the right circumstances. Still, there are obvious advantages in

advance naming.

A counter concern was offered. It often happens that just before the deposition "you realize the first chosen witness won't work." If you change to a different witness, the noticing party will take that as a signal to take a personal deposition of the first-named witness. That is not harmless — the withdrawn witness may have no personal knowledge, but have been instructed in organization knowledge to some uncertain extent and with uncertain results. When subjected to an individual deposition, the witness may get it garbled, confusing a distorted version of organization information with personal knowledge. Beyond that, Rule 26(c) already includes an obligation to confer, or to attempt to confer. And the recommended proposal does not state any consequences for failing to agree.

The concern about the last-minute need to change witnesses was addressed by asking whether the risk would be reduced by adopting a brief period for providing the names. Perhaps the 3-day alternative in the draft, or even less — 2 days, or even 1.

The distinction between deposing the organization and a personal deposition of the same witness was noted again. The two should not be conflated, even when the witness is a fact witness as well as an organization's designated witness. The confusion can be aggravated when the witness is named in advance. The confusion can be dispelled in part by scheduling back-to-back depositions, one confined to deposing the organization through the individual and the other to deposing the individual, but the lines are not always observed.

A Committee member suggested that requiring that witnesses be named in advance would inevitably draw the parties into discussing who the witness should be. The noticing party will say that it is the wrong person, we need to discuss the choice. There is an argument that requiring advance naming is a step back toward requiring the parties to confer about the choice.

Another member agreed that requiring names can lead to talking about the choice, but Alternative 2 does not require the organization to confer. The organization has the prerogative to refuse to discuss its choice. Professor Marcus observed that the sequence of steps appears clear enough, but something still more explicit could be added to the Note: First, there must be at least 30 days notice. Then, before or promptly after the notice, the parties must confer about the matters for examination. Then, having settled the matters for examination however well the conference permits, the organization chooses its witness or witnesses and names them at the required interval before the deposition.

Discussion returned to the question whether Rule 30(b)(6) should be amended at all. A judge said that "this may be the most

used, most valuable discovery tool. It is used in almost every case. We do not want to weaken it." The Committee studied it intensely twelve years ago. The complaints, then as now, went to both sides. Organizations protested that there were too many possible matters for examination. Deposing parties complained that organization witnesses were not adequately prepared. The best lawyers confer before the deposition now, and the most we think we can do by amending the rule is to require them to confer. But requiring them to confer has a potential to solve a lot of the problems. "This will not cause the structure to fail." Disputes happen at depositions now, and will continue to occur no matter what.

The same judge added that experience with 30(b)(6) depositions, although some years ago, suggests that it is not necessary to know the name of the organization's witness. The inquiring party has a lot of information from documents. The questions can be asked no matter who the witness is. And there are potential downsides in requiring advance notice of witness names. But if the Committee finds substantial reasons to inquire further, it may be wise to go ahead and republish for comments on witness naming.

Another judge agreed with these thoughts. And yet another agreed. Advance naming may upset the balance of what good lawyers do now. Experience as a judge shows frequent encounters with disagreements about the number of matters for examination, but none about the identity of the organization's witnesses.

A different Committee member thought these observations by three judges make sense. But the problem remains with the draft Committee Note for the revised proposal. It seems to expand on what good faith means for discussing issues beyond defining the matters for examination, and to encourage parties to ask the court for guidance.

Another Committee member suggested that a value of conferring about the matters for examination is often to reduce the number. A party can agree to provide the requested information in documents, suggesting that there will be no need for a witness if the inquiring party is satisfied by the documents. As to identifying the organization's witnesses, there have been cases where my colleagues refuse to provide names as a bargaining tactic to seek tradeoffs. "Gamesmanship happens on both sides." But we would like for more lawyers to follow best practices, and that can be encouraged by establishing them in rule text.

A different judge said that the rule should retain the meet-and-confer requirement. And it is desirable to provide a Committee Note that, in the very beginning, suggests discussion of other topics. The draft Note discussion of good faith, appearing at p. 106 of the agenda materials, "accomplishes a lot." But what about

the sentence that suggests the parties seek guidance from the court if they reach an impasse?

Professor Marcus responded that the suggestion about seeking guidance from the court is a suggestion, not a command. It responds to many comments that the rule does not provide any means to resolve disputes when the parties do not reach agreement. A related suggestion appears in the next-to-final paragraph of the draft note, noting that when the parties anticipate the need for Rule 30(b)(6) depositions they may be able to begin planning during the Rule 26(f) conference and in Rule 16 pretrial conferences. All of these suggestions are aimed at avoiding combative positions — "Give me what I want or I'll make a motion." The open-ended suggestion to seek guidance reflects the practice of many judges to entertain discovery disputes without requiring a formal motion. A judge noted that the note does not tell lawyers they have to go to the court, and, even without this sentence, they know they can seek the court's help. The same observation was extended to the suggestions in the preceding Note paragraph about other matters the parties may find appropriate for discussion.

Judge Ericksen added that many magistrate judges and district judges who do discovery disputes report that they like to be available by phone to facilitate discussions without the formality of a motion.

William Hangley reminded the Committee that the letter from active members of the ABA Litigation Section that launched the current Rule 30(b)(6) project noted that the Civil Rules do not provide for anything short of motion practice to resolve disputes. They asked for language like the Note draft, suggesting that the parties "confer" with the court. He further noted that some courts will rule against objections by a party that has not sought a protective order. Counsel often suggest that moving for a protective order is the only way to resolve disputes. "That's a wasteful way of doing it." He added that it is a mistake to think that organizations want to provide a witness whose response is "I do not know." That means another deposition. "We want to produce the most knowledgeable person."

An observer noted that the proposed rule applies to nonparty organizations as well as party organizations. It imposes obligations akin to Rule 45 obligations to produce documents, but it lacks the safety valve remedies in Rule 45(d)(1)(B). Protections are not provided even for nonparties that are not within the jurisdiction of the court where the action is pending. The misuse of social media research when a witness is named in advance is an issue, but so is the ability of the inquiring lawyer to go to the networks of lawyers to find out about the witness's testimony in other cases and use it to shape the deposition.

The drafting of this sentence in the proposed rule text was questioned: "A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party." It might be better if the provisions were flipped: "its duty to confer with the serving party and to designate each person who will testify." A different suggestion was to simplify it: "must advise a nonparty organization of these duties." This was resisted by suggesting that it is better to revise current rule text as little as possible, and that "these duties" may not be sufficiently specific. It was agreed that the rule text should spell out the duties, that this is not a point where brevity is a virtue.

Discussion returned to the question whether either alternative version calling for advance notice of witness names should go forward. Experience suggests that there are fewer disputes when people exchange more information. Perhaps further advice should be sought, as from the Federal Magistrate Judges rules committee?

Judge Bates suggested that the discussion had moved to a point to support a decision whether to approve the revised Rule 30(b)(6) recommended by the Subcommittee. The draft Committee Note need not be included in the vote. If the proposal is approved, voting can turn to the alternatives that would require advance notice of witness identity, or at least assignment of unnamed witnesses to particular matters for examination. All of the Subcommittee recommended amendment is included in the alternatives, so this path avoids the prospect of approving an alternative and then gutting it. But it does not make sense to approve a recommendation that the Subcommittee proposed amendment be adopted, and also to approve publication for comment of an alternative. Only one proposal for adoption should be made, whether now or after a year's delay for republication.

A motion to recommend adoption of the Subcommittee's proposed amended Rule 30(b)(6), with the style revision noted above, was approved, 12 votes for and 2 votes against.

Discussion of Alternatives 2 and 2A began with the suggestion that if republication is approved, the Committee need not choose between the bracketed alternatives that would require 7, or 5, or only 3 days' notice of witness names. Committee practice has included publication of proposals with bracketed alternatives, or even with complete alternative provisions, as a means of stimulating comments on issues that seem likely to benefit from further discussion. A Committee member added that absent any opportunity to address the time for naming or allocating witnesses in comments on the published proposal, it would be a mistake for the Committee to attempt to choose a single time period in a republished proposal. A suggestion to narrow the focus by publishing with only 7- or 3-day alternatives was met by a decision to set out all three alternative periods in brackets.

A motion to approve publication of Alternative 2, including 30-day notice of a Rule 30(b)(6) deposition, advance naming of organization witnesses, and alternative naming times of 7, 5, or 3 days failed, 6 votes for and 9 votes against.

A motion to approve publication of Alternative 2A, including notice periods similar to Alternative 2, but requiring only advance designation of which matters for examination would be addressed by which unnamed witnesses failed, 2 votes for and 13 votes against.

The first day's discussion of Rule 30(b)(6) concluded with these votes. The questions raised by discussion of the draft Committee Note were carried forward for consideration on the next day of such revisions as might be prepared by the Subcommittee in overnight deliberations.

Deliberations on the Committee Note resumed the next day. Judge Ericksen thanked Judge Goldgar for style suggestions. The revised draft retained the substance of the second paragraph, but with style improvements. The third paragraph was revised to make it clear that it does not suggest there is an obligation to confer about anything other than the matters for examination.

Further style changes were suggested and accepted: "and enable the ~~responding party~~ organization to ~~identify~~ designate and * * *.

The next suggestion was to recognize the value of discussing witness identity: "It may be productive also to discuss * * * the number and identity of witnesses * * *." This suggestion was resisted, in part by offering an analogy to the changes in rule text. The published rule required discussion of the identity of each person the organization will designate to testify, and also discussion of the number of matters for examination. Both of these requirements were deleted from the amendments recommended for adoption. The references to each in the published Committee Note have been deleted. It would be a mistake to bring back a suggestion to discuss witness identity, even though it is a suggestion, not a command. Strong agreement was offered — bringing this back to the Note would seem to retract the revision of the rule text.

The proponent responded that the suggestion is only precatory. And the comments showed that discussing the number of topics can be counterproductive. Efforts to reduce the number lead to increasingly broad and vague descriptions of the matters for examination. Many comments showed that witness identity is often discussed to good effect. A Note suggestion that it may be helpful to discuss witness identity is not likely to add much to the burden of conferring. Putting this in the Note does not imply a suggestion to discuss the number of matters for examination. Another participant agreed that there is no known tendency to interpret a Committee Note discussion of one topic to imply anything about a matter not discussed, much less to draw the implication from a

decision to withdraw a provision that appeared in the rule text published for comment. The proponent added that courts do cite Committee deliberations in interpreting rules.

Adding "and identity" of the witnesses was resisted. It would move back toward the published rule and Note that drew 1,780 comments, mostly negative on the requirement to confer about witness identity. Some comments said that this should not be in the Note. Another member agreed with this view. The rule text proposed for adoption does not impose a duty to discuss witness identity. Adding it to the Note might generate disputes. Another participant added that Committee Notes should not, and do not, give advice on how to practice law.

Discussion continued with a question whether it would be wise to delete the entire sentence that enumerates issues that might be discussed. One member answered that it is useful to encourage the good practices identified in the public comments. Another suggested that "We're giving useful advice, based on the public comment process, not telling people how to practice law." Yet another member agreed generally, but opposed adding a suggestion to discuss witness identity. Discussing witness identity was removed from the published rule text for good reasons. A prompt in the Committee Note is not needed to enable discussion of witness identity by parties who wish to do so. The proponent rejoined that the discussion can be productive, and it is useful to remind the parties of its value.

A different part of the draft Committee Note was addressed by asking what it means to advise about seeking guidance from the court if the discussion reaches "an impasse." Professor Marcus replied that this sentence reflects a hope that the parties and the court will have used Rule 16 to establish a procedure for resolving discovery disputes. We could leave it to Rule 26(c) protective-order practice, "or to trying to iron it out as a deposition mess." A reminder in the Note can help. The many suggestions in the 2018 Committee Note for amended Rule 23 provide a useful illustration.

Judge Ericksen added that this Note sentence relates to the inability to agree about the matters for examination.

Another Committee member observed that lawyers know they can seek the court's guidance on discovery disputes. This sentence comes close to telling lawyers how to practice law.

The suggestion to strike the entire sentence illustrating issues that it might be productive to discuss was renewed, along with a suggestion to delete the sentence on seeking court guidance when an impasse is reached. Lawyers will react to these observations in the Note, arguing that the Note says they should discuss these things but they do not want to.

Another participant observed that "impasse" means "can't move forward." It is the organization that will want to take disputes to the court, not the noticing party.

Judge Ericksen noted that there had been a lot of pressure to add an express objection procedure to Rule 30(b)(6). Many judges will not hear a dispute about the matters for examination without a Rule 26(c) motion for a protective order. Another participant noted that the comments sought some uniform method for resolving disputes. Some courts refuse to entertain Rule 26(c) motions before the deposition, insisting that disputes be brought to the court only as problems arise during the course of the deposition. The Subcommittee considered adopting an objection procedure and decided not to. The duty to confer expedites the process by starting with the conference that would have to precede any Rule 26(c) motion.

Doubts about the "impasse" sentence were expressed in other terms. One question asked whether it adds anything of value. Another observation suggested that it may hint that there *is* an objection procedure, and will encourage arguments to the court that a party is not conferring in good faith.

This discussion led to a suggestion to delete the Note statement that the obligation to confer in good faith "does not require the parties to reach agreement."

The participant who first asked about the meaning of "impasse" said that the discussion showed that this sentence can be useful to suggest that difficulties can be brought to the court by means short of a formal motion. They might be raised in a status conference, or by other means.

Attention turned to this Note sentence: "The duty to confer continues if needed to fulfill the requirement of good faith." Professor Marcus noted that good-faith conferring requirements appear in Rule 26(c) and Rule 37(a)(1). "Walking out of the room does raise an issue of good faith." The purpose of requiring a conference could be defeated by an approach that automatically accepts "once is enough." But it was rejoined that an earlier sentence already says that the process of conferring may often be iterative. Judge Ericksen agreed to delete the "continuest as needed" sentence.

Style suggestions were accepted, adding two words to the list of things it might be productive to discuss: "the number of witnesses and <u>the</u> matters on which each <u>witness</u> will testify * * *." Another accepted suggestion was "The process of discussion ~~will~~ <u>may</u> ~~often~~ be iterative."

The Committee moved to voting on the Committee Note.

The first paragraph was accepted without a formal vote.

Adding "the" before matters on which each witness will testify was approved by vote, 10 for and 3 against.

Adding a suggestion to discuss the identity of witnesses was rejected by vote, 2 for and 11 against.

The Note language suggesting that it might be productive to discuss "the documents the noticing party intends to use during the deposition," not earlier discussed, was challenged. Many comments opposed this practice as interfering with work-product protections. A motion to delete this suggestion was adopted by vote, 8 for and 5 against.

Another part of a sentence was challenged: "The process of conferring will often be iterative, *and a single conference may not suffice*." A motion to delete the "single conference" clause was adopted by vote, 12 for and 1 against.

The sentence stating that the amendment does not require the parties to reach agreement was examined next. A Committee member urged that it is important to say there is no obligation to agree. And a suggestion to combine this statement with the next sentence about seeking guidance from the court was resisted on the ground that a single sentence would discourage efforts to work things out in favor of running to the court. A motion was made to reorganize the sentence to read: "Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement." The motion was adopted, 10 for and 3 against.

A motion was made to revise the "impasse" sentence" to read: "In some circumstances, it may be desirable to seek guidance from the court." The motion was adopted, 8 for and 5 against.

A motion to strike the Note sentence stating that "The duty to confer continues if needed to fulfill the requirement of good faith" was adopted, 11 for and 1 against. (The Subcommittee Report recommendation to delete the preceding sentence from the Committee Note as published was accepted without discussion. This sentence read:"But the conference process must be completed a reasonable time before the deposition is scheduled to occur.")

A motion to adopt the final two paragraphs of the draft Committee Note was adopted, 13 for and 0 against.

MDL Subcommittee Report

Judge Bates introduced the MDL Subcommittee Report. The Subcommittee has been hard at work. It has gathered a lot of information, especially from the Judicial Panel on Multidistrict Litigation. It remains an open question whether it will be useful to propose any MDL-specific rules. The overall number of MDL

proceedings may be declining. More importantly, the problems seem to be concentrated in the "mega-MDLs" that aggregate thousands and tens of thousands of cases. Drafting rules that distinguish the many smaller MDLs might prove difficult. And it seems clear that any rules must take care to preserve the creative flexibility that has generated sound procedures for the often unique circumstances of particular MDL proceedings.

Judge Dow delivered the Subcommittee Report. The Report provides an overview of the Subcommittee's work. Subcommittee members have attended many MDL-focused events, and will attend still more. Special appreciation is due to the Judicial Panel on Multidistrict Litigation, Judge Vance, and the JPML's Panel Executive Ms. Duncan for their help. Emery Lee and the FJC research division also have provided great help. Still, the November Committee meeting pointed to the need to gather more information. Is there a problem? Are there potential rule-based solutions?

In approaching these questions, it is important to remember that multidistrict proceedings are created under the aegis of a statute, 28 U.S.C. § 1407. And the statute is implemented by the Judicial Panel. The Panel has an active approach to educating MDL judges, and a vastly improved web site that provides guidance on many questions.

The Subcommittee is focusing on a small number of MDL proceedings, but they are the large proceedings that, taken together, include a large fraction of the total number of cases pending in federal courts at any moment.

The Subcommittee has framed a list of six topics for current attention. The list is not fixed. New topics may emerge as the work proceeds. And some may soon be dropped.

Four topics have come to the center of current work:

Early vetting of individual cases in an MDL to weed out those that have no shadow of merit has been sought by many defendants. A group of plaintiff and defense lawyers has been working with the Emory Law School Institute for Complex Litigation to frame a proposal on this issue. There seems to be some measure of agreement that there is a problem with unfounded individual cases, but not so much agreement on the prospect of finding a solution in a court rule.

Opportunities for interlocutory appellate review have been sought, again primarily by defendants. The earlier proposals sought to establish categories of appeals as a matter of right, with no input from the MDL court and directing speedy decision of the appeal. Each of those features has been challenged vigorously. But there still may be room for some expansion of appeal opportunities.

Settlement review has been urged on the ground that at least in the MDLs that include a great many cases settlement negotiations come to resemble class actions but without the protective features built into Rule 23. The fear is that plaintiffs represented by lawyers who do not participate in the centralized steering committee structure are not afforded a genuine opportunity for meaningful individual settlement negotiations. One approach might be to make the court responsible for some supervision of the plaintiffs steering committee. Another might seek review by some form of independent entity. As it is, some MDL judges become very much involved in settlement terms.

Third-party litigation funding has generated many proposals for disclosure. Comments have been coming in on a regular and continuing basis. The November 2 conference at George Washington Law School provided a lot of information. "It's complicated." Local rules are popping up. And there seem to be many MDL judges who are not even aware of the phenomenon of third-party funding or of its existence in their cases. The Subcommittee may undertake a survey of MDL judges this summer through the FJC. If a survey is made, pointed questions about third-party funding will be included.

Professor Marcus added that two other subjects round out the top-six list. Filing fees and "master complaints" have been the subjects of many comments. But this kind of thing can change, and so the list of topics changes. Perhaps these two should be put aside. More generally, it is important to continue to ask what are the significant problems in MDL practice, and what a rule solution might look like.

Screening Claims: Discussion turned first to the question whether a rule might be devised to encourage early screening of individual claims. Defendants urge a "field of dreams" problem: creating an MDL proceeding invites filing claims without any investigation of possible merit. Pejorative terms are used, speaking of "1-800-call-a-lawyer" operations and a "get a name, file a claim" approach. The perception is that in an MDL, "everyone gets paid." These concerns are reflected in H.R. 985, introduced in the last Congress. Its provisions required plaintiffs to disclose a great deal of information within 45 days after an action is transferred to the MDL court or directly filed there; required the judge to determine the sufficiency of each submission within 30 days, and to dismiss without prejudice if the submission is insufficient; and required the judge to dismiss with prejudice if a sufficient submission was not filed within 30 days after the dismissal without prejudice.

Courts have adopted various means of developing information about individual claims that go beyond fact-pleading minimums. One common device is the plaintiff fact sheet. Plaintiff profiles are similar. Defendant fact sheets may be required. Many questions arise: should plaintiff fact sheets, for example, be required in all MDL proceedings, or only some? Who drafts the PFS? How early in

the proceeding should a PFS requirement be imposed? And what should be done with them?

Emery Lee reported that the FJC has studied the frequency of PFS orders, along with plaintiff profiles, DFS orders, and short-form complaints. Their report is included in the agenda materials at page 229. The study included 39 mega proceedings over its entire period, with about 25 pending at any one time. The FJC reviewed all case-management orders in them. The plaintiff fact sheets "tend to be pretty similar." They were ordered in many mega proceedings; the frequency of requiring fact sheets increased as the number of cases in the MDL increased. The study did not reveal whatever reasons may have led to not using PFSs in the proceedings that did not use them. Plaintiff profiles tend to be briefer than fact sheets. Both devices should be distinguished from "Lone Pine" orders. All include information about using the product and injury. But only Lone Pine orders require showing expert opinion evidence on causation. Some plaintiff fact sheets included questions about third-party funding.

It is not clear who starts the PFS process. Usually the form is negotiated by the parties and submitted to the judge for approval. The median time from centralization to entry of the PFS order was 6.2 months, the average 8 months.

A judge suggested that plaintiff fact sheets are not screening techniques that serve to knock out frivolous claims. They give the defendant basic information, to prepare an inventory of types of cases. Dismissals are entered for failing to comply with the order to file a PFS, not for failure to provide enough to support a claim. Another judge observed that there still may be a connection — failure to file a fact sheet may reflect an inability to provide the required information. A plaintiff who never used a challenged product may not be willing to provide details of when it was used.

Another participant thought that fact sheets have been used to weed out frivolous claims. In an era of television advertising for clients, the fact sheet helps to ensure the lawyer has some contact with the client, has taken a look at the case. Some of the clients do not have any connection to the events in suit. It is not a Lone Pine order, but it is screening of a sort.

Professor Marcus suggested that concern about screening individual claims should be modulated by asking whether it is important to undertake this screening at an early stage of the MDL proceeding. Screening "is early discovery-disclosure that helps move the case along." It may fold into other discovery. Fact sheets are used differently in different MDLs. They may reduce the over-supply of claims, but it is not clear that screening the fact sheets is the first thing that should occupy the MDL court's attention. As an alternative, a rule might encourage a process similar to the Rule 26(f) discovery conference, urging the parties

to confer about questionable claims to sharpen the issues.

Defendant fact sheets also are frequently used. They often include information about the defendant. But they also often include information the defendant has about the plaintiff.

Judge Dow noted that it is important to preserve flexibility. An MDL judge may find it important to focus on things other than screening individual claims.

Another Committee member observed that the concerns with screening seem to be driven by a small number of mega-MDLs. MDL judges frequently argue against rules that might tie their hands. How can we fashion rules that do not affect cases where screening is not needed? Is it better to leave these questions to be handled by standing orders, the Manual for Complex Litigation, or guidance by the Judicial Panel? A different Committee member echoed these questions: Can one size fit all MDLs? Can mega-MDLs be distinguished? "How are MDL judges educated"?

A judge responded that the JPML web site provides great guidance. So does the annual conference of MDL judges. "New MDL judges are not left to their own."

Judge Dow emphasized that the critical point is that these concerns arise in a small fraction of all MDL proceedings. But there may be a need. The question is whether we can frame a rule that helps in the cases where help is needed without interfering with the more general run of MDL proceedings.

A Committee member suggested that the need is to ensure that an MDL is managed by responsible groups of attorneys on both sides. Rule-based solutions may be hard to find.

Another Committee member suggested that devising rules might, by being available to all, make it possible to expand the number of lawyers participating in MDL proceedings beyond the in-group of present practice.

Dr. Lee also noted that large mass-tort MDLs tend to resolve by aggregate settlements because they are not suitable for certification of a settlement class under Rule 23. Smaller MDLs with fewer cases tend to be resolved through Rule 23.

Interlocutory Appeals: Judge Dow observed that expanding opportunities for interlocutory appellate review of MDL court rulings cannot be accomplished by best practice guides, provisions in the Manual for Complex Litigation, or like endeavors. A court rule or legislation are the only available means.

Professor Marcus began by pointing to the appeal provision in H.R. 985. That provision directed that the court of appeals "shall

permit" an appeal from any order in an MDL proceeding, "provided that an immediate appeal from the order may materially advance the ultimate termination of the proceeding." Wherever this provision may lie on a spectrum from complete discretion to a right to appeal, the Subcommittee has not thought to create opportunities for appeal as a matter of right.

It may be that appeals by permission of the district court under § 1292(b) suffice to the needs of MDL proceedings. But questions are raised about the MDL judge's absolute veto — the court of appeals cannot grant permission if the district court has not. Questions also are raised about the risk that each of the three criteria set out in § 1292(b) can raise undesirable obstacles. The district court must state that there is "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." John Beisner undertook a comprehensive review of § 1292(b) appeals in MDL proceedings that shows quite infrequent use.

If an attempt is made to draft an appeal rule, it must address such questions as the role of the MDL court: is it necessary that the MDL court approve the appeal? If not, should the MDL court have a means to offer advice to the court of appeals about the potential costs and benefits of an immediate appeal? Should appeals be available only from defined categories of orders? Should the court of appeals have wide-open, certiorari-like discretion?

A judge posed the first question: Should any proposal for interlocutory appeals include a requirement that the court of appeals decide the appeal quickly? This judge ruled on a preemption question in an MDL. Immediate appellate review might have been helpful. But local circuit experience showed that the earliest a decision might be had would be two years. That much delay was too much to contemplate, so no § 1292(b) appeal was certified. It is difficult to craft a rule that requires prompt appellate decision, but some limit on the time for appellate decision should be linked to any new appeal opportunity.

The need to provide for prompt decision on appeal prompted the question whether the prospect of a 2-year or even longer delay may be peculiar to a single circuit? In another circuit, decision within three to nine months is routine. It was pointed out that the Ninth Circuit encounters 14,000 cases a year; decision in a few months would be hard to accomplish. And about one-third of all MDLs are in the Ninth Circuit.

Judge Sutton, former chair of the Standing Committee, has urged that lawyers should ask for expedited disposition of appeals in class actions or MDL proceedings. But discussion in the Standing Committee has shown reluctance about mandating prompt disposition.

Yet a rule might encourage consideration of the prospect of a speedy or delayed decision as a factor in deciding whether to permit an appeal. And lawyers themselves could cooperate in expediting the appeal briefing schedule. But in the Ninth Circuit, argument is likely to be had 18 months after briefing.

A judge suggested that § 1292(b) is not effective because of concern that the time taken to reach an appellate decision defeats the element that asks whether an appeal will materially advance the ultimate termination of the litigation. Rule 23(f) does not have any comparable factor, but leaves the decision whether to permit appeal to the discretion of the court of appeals. There is a natural inclination to grant permission "only when it looks good." But it would help to provide an opportunity for the district court to weigh in on the decision whether to permit an appeal. A rule mandate for expeditious decision, however, will run into serious problems. One concern is delaying the decision in other cases — for example an appeal by someone who will remain in prison until the appeal is decided.

The prospect of addressing delay on appeal was considered further. Would an appeal rule apply to all MDL proceedings? Only some? Only to some identified categories of orders?

Beyond these concerns, it was agreed that any consideration of a rule creating new appeal opportunities would have to be developed in cooperation with the Appellate Rules Committee.

Discussion turned to asking why § 1292(b) is not much used in MDL proceedings. The Beisner report does not clearly show whether the criteria that limit § 1292(b) appeals are an obstacle. Attempting to find out much more by an FJC study would likely be difficult — for example, how would you find whether lawyers considered asking for permission to appeal and why they decided not to? Is there perhaps some parallel in the use of § 1292(b) for appeals in class actions before Rule 23(f) was adopted? The one-time "death knell" version of final-judgment appeals from orders denying class certification, and even "reverse death-knell" appeals from orders granting certification was recalled; some courts of appeals liked this opportunity for appeals before the Supreme Court rejected the doctrine. Mandamus has always been available, but is used sparingly.

An observer identified herself as engaging in practice for plaintiffs in medical device cases. A year to appellate decision is the best that could be hoped for. Many plaintiffs are elderly. Some will die while the appeal is pending. Any provision for an automatic right of interlocutory appeal would be undesirable. New York state courts provide frequent interlocutory appeals, and cases there can drag out through eight to ten years of appeals.

A Committee member asked whether a permissive interlocutory rule could be entirely open-ended, providing certiorari-like discretion? Rule 23(f) is like that. So for the question whether an appeal would stay proceedings in the MDL court — like § 1292(b) and Rule 23(f), a new appeal provision could explicitly provide that an appeal does not stay proceedings in the MDL court unless the district judge or the court of appeals orders a stay.

Settlement Review: Professor Marcus suggested that the authors of § 1407 were not thinking about settlement in MDL proceedings. The statute is contemporary with the 1966 Rule 23 amendments; the 1966 Committee Note suggests a lack of serious concern with settlement because it simply echoes the 1966 rule text. Since then, "settlement has become a big deal." MDL practice has not developed in the way Rule 23(e) has. The conceptual reason is that settlement of some cases in an MDL proceeding does not bind other cases — every plaintiff remains free to settle, or not settle, on individual terms. Each plaintiff, moreover, has an individual lawyer. There are no rules for review by the MDL judge, unless class certification is chosen as the vehicle for settlement. But some MDL judges become involved in framing a global settlement. A rule might provide for review by way of building on rule provisions for appointing and reviewing the activities of a plaintiffs steering committee. Some judges refer to MDL proceedings as quasi-class actions; an MDL rule might build on the Rule 23(g) model for appointing class counsel.

Judge Dow noted that the MDL proceedings he has been assigned have involved 30 or fewer individual actions. But a recent conference of judges and special masters in mega-MDL proceedings reflected concern that the end-game settlement process may at times be unfair to groups of inventory plaintiffs. Some judges have been supervising settlements in ways that may not be supported by formal authority. If pressed, they may find authority in their obligation to police the ethical behavior of the lawyers that appear before them. They are concerned that settlements should be equitable as to similarly situated plaintiffs. There is a concern that individual plaintiffs may be only "sort of" represented by their individual lawyers.

Another judge with experience in a mega-MDL had the same sense of the situation. Mega-MDL judges agree that an MDL proceeding is not of itself a class action governed by Rule 23, "but it may feel like a class action to plaintiffs and lawyers not on the steering committee." The large number of client-attorney relationships is a thicket that may be difficult to penetrate. "We know that lawyers on the steering committee and lawyers not on the committee will not agree on distributing a common fund." Settlement review should be studied. But when there is a stipulation to dismiss an individual action in an MDL, "I do not inquire further."

Still another judge reported on a mega-MDL that is approaching the fourth and final bellwether trial. The parties have been told that after that last bellwether all cases that remain unsettled will be remanded for trial. That surprised the lawyers on the steering committee. They had expected the cases would linger on to settle. One immediate reaction was a flurry to add more cases to the MDL, some 2,000 of them. The defendants have retained a separate law firm to negotiate individual case settlements, not only with lawyers on the steering committee but with all other attorneys. The negotiations produce settlement terms sheets that set out the terms of settlement, with sliding scales of payment depending on which version of the product was used. Each plaintiff lawyer has six months in which to deal with each client to see about settling. The plaintiffs' lawyers are acting in good faith. They do not seem to be forcing settlements, nor to be giving some clients better deals than others. They tell their clients they are prepared to try the cases if they are remanded without settlement.

The question returned: The form of MDL proceedings that do not lead to class certification is that each constituent action remains an individual action. It is not clear how far that concept matches reality. "We need to know more." But a response suggested that it is not clear whether this is a matter for an Enabling Act rule. And a reminder was provided that as an MDL proceeding appears to be winding down toward the time for remand the parties may negotiate disposition by winning certification of a settlement class.

The same themes reappeared in further discussion. Some MDL judges take a much more active approach than others in promoting settlement. There may be a tension between an MDL judge asking to be included in the loop of settlement and the view that, absent class treatment, the judge cannot do more. But every judge asks to be informed — the judge is on the spot if the settlement does not seem fair. Still, it will be hard to frame a rule if there is uncertainty about the judge's authority.

The judge's role in appointing lead counsel or committees for plaintiffs, and perhaps also for defendants, was again pointed to as a source of authority. Responsibility for appointing leadership includes responsibility to supervise the leaders' discharge of their appointed authority.

Still, it was asked how a judge would enforce a negative review of a settlement proposed by a plaintiffs steering committee? The view of some MDL judges that they have an obligation to review the responsible performance of professional duties was repeated. But if unprofessional conduct is found, is the judge obliged to do something more than reject the settlement? Or is it enough that judges expect to be listened to? And heard?

A related question asked what is the authority for ordering bellwether trials as a device that may promote settlement? The

answer is consent. One judge reported that in a mega-MDL the lawyers asked for bellwether trials. They provided written consents from plaintiffs and defendants. Following the announcement that unsettled cases would be remanded after the last bellwether trial, the lawyers asked for a six-month delay, but did not ask for review of individual settlements. Time will be given to delay remand of cases covered by settlement terms sheets presented to the court. Other cases will be remanded on a regular basis. This process is designed only to give time for individual settlements. And when an individual plaintiff and defendant appear and announce that they have settled their case, "how am I to review it"?

A similar view was expressed. MDL judges at the annual conference seemed to want not to be involved in non-class settlements. There are too many cases. But a judge can encourage settlement. And the judges at the conference seemed to pretty much agree that it would not be a good idea to adopt a rule that either encourages or limits involvement in settlement.

A Committee member asked whether a bellwether trial is more an arbitration than an exercise of jurisdiction, even though it yields a final and binding judgment? Discussion responded that there should be federal subject-matter jurisdiction for every case in the MDL; that cannot be waived. Although the MDL court cannot use § 1404 to transfer constituent actions to itself for trial, personal jurisdiction and venue objections can be waived. Pretrial proceedings authorized by § 1407 enable the MDL court to resolve the merits by ruling on motions to dismiss for failure to state a claim, or for summary judgment. Trial provides a more complete procedure for deciding the merits.

Third-party Litigation Funding: Professor Marcus opened this topic by noting that third-party litigation funding is a very interesting topic. It involves increasingly large amounts of money, and is growing rapidly. What might be counted as third-party funding, and where it may be going, remains unclear. It does not appear to play a distinctive role in MDL litigation as compared to other forms of litigation, although prominent examples have occurred in the NFL concussion MDL and in the national opioids MDL. In other forms, there seem to be real distinctions between a $5,000,000 nonrecourse funding for a patent action and an advance of living expenses to an individual personal injury plaintiff. There is great interest in this topic, but it is not clear whether this Committee should be interested in considering possible rules, whether for MDL proceedings or more generally.

Judge Bates seconded the observation that third-party funding is not unique to MDL proceedings. Indeed it may be more prevalent elsewhere.

A Committee member focused on the several submissions that urge disclosure of third-party funding. Rule 7.1 requires

disclosure for the purpose of informing the court of issues that bear on recusal. Why should third-party funding be any different? The survey prepared for the Committee by Patrick Tighe suggested that 24 districts and six circuits have local rules that seem to point toward disclosure of third-party funding. And this is not an issue limited to MDL proceedings.

Professor Marcus agreed that support for recusal decisions is one reason for disclosure. But that purpose can be served by disclosing the fact of funding and the identity of the funder. Those who urge disclosure want more than that. They argue an analogy to the disclosure of liability insurance. But difficult distinctions need to be drawn. There is no proposal that law firms should be required to disclose a general line of credit extended to the firm on regular commercial terms. Nor has it been argued that disclosure need be made of an uncle's undertaking to pay the rent until a plaintiff's case has been resolved.

Judge Dow noted that the analogy to liability insurance is advanced by suggesting that the defendant (and perhaps the judge) needs to know who is controlling the litigation. And the research on local district and circuit rules will be updated.

Another judge reported hearing that it has become common practice to ask about third-party funding in discovery. Plaintiffs commonly respond by saying that they have funding, and will not say anything more. And defendants can respond by taking the question to the court. One task will be to determine whether a common-law of discovery is already being developed. That in itself may be a reason to leave the way open for practice to evolve through discovery and local rules.

Individual Filing Fees: The inquiry into individual filing fees was prompted by suggestions that individual fees were often shirked for multi-plaintiff proceedings, and that individual fees should be required for every plaintiff as a means of encouraging lawyers to be more careful in filing.

Emery Lee reported on an FJC study of filing fees. The study has been facilitated by an origin code that since 2016 identifies direct-filed cases that includes a line for fee status. The study is not complete because the new code is not uniformly used by all MDL courts. But in the proceedings that were studied, filing fees were paid in about 99% of the direct-filed cases.

Professor Marcus added that filing fees are governed by statute. Rule 20 allows multiple plaintiffs to join in a single action. Some suggestions look to Rule 21 as authority to sever plaintiffs into separate proceedings so as to increase the number of fees. But there is no information to suggest that a rule addressing filing fees would have much effect in reducing unfounded filings.

Further discussion found agreement that MDL judges overwhelmingly require individual filing fees for each action in the MDL. It was agreed that if anything, this is a matter to be addressed by a guide to best practices, not by an Enabling Act rule.

Master Complaints: Professor Marcus stated that master complaints have been used to manage large aggregations. A master complaint does not supersede the complaints in individual actions unless it is intended to do so. So long as the master complaint is used only as a convenient management tool, complete disposition of any single action in an MDL proceeding establishes a final judgment that must be appealed then or never. But if a master complaint supersedes individual complaints, dismissal of some claims set out in the master complaint may not of itself establish finality even if some plaintiffs have individually pleaded only the claims that were dismissed. The effect of acting on parts of a master complaint on appeal jurisdiction remains uncertain.

A master complaint may be adopted when the MDL court finds it would not be useful to focus on individual complaints. It can be a management tool to focus on some issues first. Preemption, for example, can be a common issue that transcends myriad issues that might be framed by individual complaints.

Emery Lee noted that short-form complaints built around a master complaint are often used, especially for direct-filed cases. They include forms to check which claims in the master complaint are asserted by an individual plaintiff, and call for some additional plaintiff-specific information.

Further discussion noted that a master complaint allows consolidated filings, and can be a huge time-saver for the clerk's office. But multiple motions to dismiss may be entertained in smaller-scale MDLs.

A judge reported that in a mega-MDL the parties stipulated to a master complaint. Each direct-filing plaintiff pays a filing fee, checks the boxes, and adds some individual information. The short-form complaints are not subject to motions to dismiss.

A judge asked whether it would be useful to add a reference to master complaints to the Rule 7 list of pleadings that are allowed. Discussion suggested that it would not provide any appreciable benefit as a stand-alone rule for MDL proceedings. And it might be difficult to explain proper use of a master complaint. Courts are using them now, successfully. Why run the risk of undue complications?

The Committee agreed that the Subcommittee can remove master complaints from the list of subjects for active study. But this and all other subjects can be brought back if reason appears.

Judge Bates noted the Committee's thanks to Judge Dow, the MDL Subcommittee, and Professor Marcus for their fine work.

Rule 73(b)(1)

The agenda materials include draft amendments to the Rule 73(b)(1) procedure for obtaining the parties' consent to trial before a magistrate judge. The impetus for the proposal arose from a feature of the CM/ECF system that automatically sends individual consents to the judge as they are filed. That feature undermines the promise of anonymity that underlies Rule 73 and the statutory direction that rules of court for referring civil matters to a magistrate judge shall include procedures to protect the voluntariness of consents.

Initial reports were that there is no way to thwart this automatic feature of the CM/ECF system. But recent information suggests that it may, after all, prove possible to design a procedure that, without imposing undue burdens on the clerk's office, continues to allow separate filings of consent that do not come to the attention of either magistrate or district judges unless all parties file consents.

There is no apparent reason to revise Rule 73(b)(1) if it continues to be feasible to allow each party to separately file a consent to magistrate judge jurisdiction. And carrying the rule forward without amendment may avoid the need to consider other possible issues that have not been raised on any front but that arise when amendments are considered.

This topic will be deferred pending examination of the opportunities to adjust operation of the CM/ECF system.

Rule 7.1 Disclosure

Discussion began by noting four different proposals to expand the disclosures required by Rule 7.1.

Disclosure of third-party financing arrangements is being studied by the MDL Subcommittee. The questions are not unique to MDL proceedings. Indeed, as discussed with the MDL Subcommittee report, the questions arise in many different categories of litigation. The MDL Subcommittee will continue its work.

The MDL discussion at this meeting also touched on the original reason for adopting Rule 7.1. It is designed to elicit information relevant to recusal decisions. That topic is common to at least the Appellate, Bankruptcy, Civil, and Criminal Rules. The original initial disclosure rules were framed by a joint subcommittee of all the advisory committees. Any revisions aimed at informing recusal decisions should be considered by a like process. There have been occasional indications that it might be useful to

initiate the inquiry. Discussion at the January Standing Committee meeting as part of the MDL rules discussion, however, suggested that the time has not yet come.

One of the two disclosure topics that remain is straightforward. An amendment of Appellate Rule 26.1 is on track to take effect this December 1. A parallel amendment of Bankruptcy Rule 8012(a) was published last summer and seems to be on track for a recommendation to adopt. These amendments can be illustrated by the parallel amendment that would conform Rule 7.1 to them:

Rule 7.1. Disclosure Statement

(a) Who Must File. A nongovernmental corporate party <u>and a nongovernmental corporation that seeks to intervene</u> must file 2 copies of a disclosure statement that * * *."

It is desirable to have uniform provisions in all three rules. The Appellate and Bankruptcy rules amendments have been tested by the public comment process and there is little reason to believe that civil actions present different considerations that warrant distinctive treatment. The case for adopting this parallel amendment is so strong that it might be recommended for adoption without publication. But there is no apparent urgency about establishing uniformity, and it is possible that public comment might reveal reasons to reconsider. It seems better to recommend publication of the amendment for comment.

A separate question is whether the rule should continue to require 2 copies of the disclosure statement. Electronic docket practices were not uniformly established when Rule 7.1 was adopted. The copy was thought useful as a means of facilitating distribution to the judge assigned to the case. But there have been repeated indications that electronic docket practices have evolved to a point that makes the "2 copies" requirement superfluous. Does it mean that the party must send the same disclosure twice by the same electronic means?

Discussion noted that some judges like to have paper copies of many different sorts of filings. But the rules do not require that two copies of other filings be provided. And a judge can make arrangements to have printed copies of whatever electronic filings the judge wishes to have on paper. A judge's judicial assistant can also make sure that all disclosure statements are provided to the judge as soon as they are filed.

The Committee agreed that this proposed amendment should delete the 2-copies requirement.

The final disclosure question was raised by Judge Thomas Zilly. He suggests mandatory initial "disclosure of the names and citizenship of any member or owner of an LLC, trust, or similar

entity." His suggestion was inspired by experience with a case that went through a 10-day trial. On appeal the court of appeals remanded for a determination whether the citizenship of four LLC parties satisfied the complete diversity requirement for diversity jurisdiction.

The risk that diversity jurisdiction may not exist arises from the rule that an LLC is a citizen of every state of every owner's citizenship. If an owner is itself an LLC, the owner's citizenships are determined by the citizenships of its owners. The opportunities to defeat diversity by finding common citizenship between even one plaintiff and one defendant are manifest. The problem arises with respect both to plaintiff LLCs and defendant LLCs. And the problem is aggravated by the broad proliferation of LLCs and the secrecy that often shrouds information about LLC members. A plaintiff's attempts to satisfy the Rule 8(a)(1) obligation to plead a short and plain statement of the grounds for the court's jurisdiction may well fall short. It is easily possible that a plaintiff may not even be entirely sure of its own citizenship. Pleading the citizenship of a defendant LLC may be well beyond the plaintiff's ability.

LLC parties are only one part of the problem. Many other entities or quasi-entities take on the citizenship of their participants for the determination of complete diversity. Partnerships, limited partnerships, at least some labor unions, trusts, "joint ventures" created in various ways, foreign-law entities, and still others provide examples. Any attempt to write an all-inclusive catalog into a court rule would fall short, and might inadvertently test the rule that Enabling Act rules cannot expand or limit subject-matter jurisdiction.

The difficulty of enumeration prompted preparation of a generic draft for the agenda materials. The draft would recast present Rule 7.1(a) into two paragraphs. The first paragraph would be present Rule 7.1(a), as it would be amended by the addition of the intervenor provision described above. The second paragraph would require a disclosure statement as follows:

> (2) A party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a disclosure statement that identifies the citizenship of every person whose citizenship is attributed to that party.

This incorporation of § 1332(a) includes the provisions of § 1332(c) that define the citizenship of an insurer sued in a direct action and the citizenship of the legal representative of an estate, an infant, or an incompetent. It should not create problems for diversity jurisdiction under the Class Action Fairness Act, § 1332(d), since that jurisdiction depends on minimal diversity, not the general complete diversity rule. It might be noted, however,

that § 1332(d)(10) includes a distinctive definition of citizenship for an unincorporated association. And it seems likely that courts will bypass the potential complexities of determining the citizenship of class members for purposes of § 1332(d)(3) and (4) provisions when more than one-third but less than two-thirds of class members and the primary defendants are citizens of the state in which the action was filed, or greater than two-thirds of class members are citizens of the state where the action was originally filed, etc.

Judge Bates opened the discussion by noting that he had had an action to enforce a California diversity judgment. It became apparent that the California court in fact did not have diversity jurisdiction. That led to questions about the consequences for enforcing the judgment, an issue not addressed by the proposed amendment. The proposal seems fairly direct.

Another judge stated that "this is serious. It does come up." Like it or not, the rule for determining the citizenship of an LLC has been settled by the Supreme Court. Perhaps the rule should be reconsidered, but that is not a question for the Committee or lower courts. There are many LLCs. Many of the people involved with them hope for privacy. It is possible that a person wishing to discover the ownership of an LLC might file a purported diversity action simply for the purpose of disclosing the ownership. We should provide discretion for the court to protect anonymity of the information.

This observation suggested a question about the proposed rule draft. All the draft would require is a statement identifying citizenships; it does not require naming the persons whose citizenships are attributed to the party. But perhaps the text should be "a disclosure statement that names and identifies the citizenship of every person * * *." Or, if that is not done, the Committee Note could underscore the point that the rule text does not require identifying the persons by name.

The discussion continued by pointing out that an LLC might decide not to challenge jurisdiction because it prefers not to reveal its owners, or instead because it prefers to be in federal court although disclosing all of its citizenships would defeat diversity.

Another possibility would be to provide for disclosure in camera. That would put the court in a position to work with the issue, without always defeating privacy interests.

A rule, or the Committee Note, might point out that a plaintiff may plead citizenships for diversity jurisdiction "on information and belief" as to other parties.

A judge pointed out that for a long time she was the only judge on her court who refused to accept a simple pleading that "the defendant is an LLC whose principal place of business is in Wisconsin." She has a standard order for cases in which citizenship is pleaded on information and belief, and another order where the allegations are plainly incomplete. An opportunity to disclose in chambers is provided. These orders issue routinely in three or four cases every month. It is useful to have a disclosure provision in the rules.

Another judge agreed that these citizenship questions should be raised at the beginning of an action. "Privacy is important, however."

The question whether the rule should include an "unless otherwise ordered" provision was addressed by asking whether this qualification should be expressed in rule text or in the Committee Note.

Another judge agreed on the need for disclosure. Judges are engaged in this process now. And the problem arises not only from LLCs. The same problem can arise with partnerships, and can go down several levels.

A judge suggested an alternative approach. He has an order that directs the parties to discuss diversity citizenship in the Rule 26(f) conference. He often finds that lawyers do not know a party's citizenship or have not made the inquiry.

A judge observed that the draft Committee Note does not tell a plaintiff what to do in the complaint when it does not know the defendant's citizenship. A judge responded that the Committee Note might say that pleading on information and belief suffices.

The same two judges suggested that it would be enough to draft the rule to require only identification of a party's attributed citizenships, and to comment in the Committee Note that the disclosure requirement does not extend to the names of the persons whose citizenships are identified.

Two other judges asked what should be done when a defendant wants to challenge diversity jurisdiction. The draft rule text requires the plaintiff as well as other parties to disclose all of its citizenships, but a defendant may not trust the disclosure. Discovery should be available to probe behind the disclosure, just as it is available to explore other matters bearing on a determination of subject-matter jurisdiction that cannot rest on the pleadings alone. Another judge agreed. Courts manage discovery. But the Committee Note should reiterate that disclosures that identify citizenship need not also name the persons whose citizenship is attributed to the party.

In moving toward a vote on the Rule 7.1 proposals, it was agreed that a vote on rule text could be made on the basis of the ongoing discussion. If rule text is approved with a recommendation for publication, the draft Committee Note can be revised to reflect the discussion and submitted to the Committee for voting by e-mail messaging.

A question about rule text asked whether a requirement to "identify the citizenship of every person" might be read to imply a duty to disclose names as well as citizenship. One approach might be to change the language to "states the citizenship." A similar suggestion was that the rule text should require disclosure of the "states of citizenship."

A judge responded that "there are parent LLCs. I want them named."

A different judge suggested that it is appropriate to empower the judge to protect the identity of even first-tier participants in an LLC party. It might suffice to recognize this power in the Committee Note. If you need to know, you can get it in discovery. But it might be wise to anchor this authority in rule text by introducing paragraph (2) with "Unless otherwise ordered by the court." This was accepted as sufficient to the needs of the unusual case.

The question of naming the persons whose citizenship is disclosed returned. "An LLC is an amalgamation of people. Anonymity should be the exception."

This discussion led to proposals that the rule text should read:

> (2) Unless otherwise ordered by the court, a party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a disclosure statement that names — and identifies the citizenship of — every person whose citizenship is attributed to that party.

The Committee Note can build on the "otherwise ordered" clause to say that the court can limit disclosure of names by a protective order.

A question was addressed to "person": does it include artificial entities, for example an LLC that is an owner of an LLC party? The answer was that rule style conventions use "person" to include any form of entity.

An observer suggested that there may be great difficulties in unraveling all of the citizenships that are attributed to a party. There are exotic forms of organization that may include many people holding interests in multiple and overlapping layers. He had an

experience with such an organization, and after much discovery was able to show citizenships that defeated diversity jurisdiction. This lament was accepted by observing that the complications arise from the rules that measure diversity jurisdiction. The accepted rules are that the parties cannot waive or forfeit subject-matter jurisdiction questions. And the court has an obligation to ensure that it has subject-matter jurisdiction in every case. As complicated as the search for citizenships may become, the value of initial disclosure at the beginning of the action is important. So all that is needed is to search far enough to find one citizenship that defeats complete diversity. The obligation to search is imposed alike on parties who wish to invoke diversity jurisdiction and on those who wish to defeat it.

A Committee member observed that the rule text limits the obligation to disclose to the persons whose citizenship is attributed to the disclosing party.

A motion to recommend publication of the amendment of Rule 7.1(a)(1) set out at page 285, lines 1864-1865, striking the "2 copies of" provision and including disclosure by a nongovernmental corporation that seeks to intervene was approved, 13 yes and 0 no.

A motion was made to begin the addition of new Rule 7.1(a)(2) set out at lines 1869-1871 with "Unless otherwise ordered by the court." The motion included addition of "names" before "identifies." (This addition was styled to read: "statement that names — and identifies the citizenship of — every person * * *.") The motion was approved, 13 for and 0 against.

The Committee Note will be revised to reflect this discussion and the amended rule text. The revised Committee Note will be circulated to the Committee for an e-mail vote.

Social Security Review Subcommittee Report

Judge Lioi delivered the Report of the Social Security Review Subcommittee. The early drafts that divided the potential provisions among three rules have been revised to include all provisions in a single rule. The draft included in the agenda materials is tentatively framed as new Rule 71.2. Representatives of the Social Security Administration, the National Organization of Social Security Claimants Representatives, and the American Association for Justice attended the November 1 Committee meeting and provided helpful comments on the Committee discussion of the draft rules included in the November agenda materials.

The Subcommittee has met by a series of conference calls since the November Committee meeting. A small working group held a series of conference calls to deliberate detailed questions of drafting. Those calls were very successful, but many issues remain open for further consideration.

The next step, apart from at least one Subcommittee meeting by conference call, will be to hold a conference on June 20. The conference will bring together representatives of the organizations that have provided advice in the past. It also will ask for participation by the Department of Justice and a representative of the Federal Magistrate Judges rules committee. Professor David Marcus, one of the authors of the study prepared for the Administrative Conference of the United States, will be there. The first meeting with representatives of these groups before the November 2017 meeting provided a lively exchange of views. Bringing them together again, with augmented forces, is likely to provide the same benefits. It remains possible that separate meetings may be arranged with some of these groups, but nothing definite has been planned.

The draft rule in the agenda materials is likely to be revised further before it is distributed to participants in the June 20 conference.

The Subcommittee's first objective is to pursue development of an illustrative draft that will provide a foundation for deciding whether to recommend that the Committee work to develop a draft that can be published for comment. The recommendation may be that repeated exploration of the potential pitfalls shows that the potential advantages of adopting a good and uniform national rule are not sufficient to justify an excursion into a rule that is specific to a particular substantive topic.

Final Judgment Appeals in Consolidated Cases

The Committee decided at the November 2018 meeting that it should consider the possibility of developing Civil Rules to revise the ruling about final-judgment appeals after cases that began as separate actions are consolidated in the district court. In *Hall v. Hall*, 138 S.Ct. 1118 (2018), the Court ruled that each originally separate action remains separate for purposes of final-judgment appeals under 28 U.S.C. § 1291. Disposition of all claims among all parties in an initially separate action is a final judgment. At the same time, the Court suggested that the Enabling Act provides the appropriate process for revising the final-judgment rule.

Judge Bates announced that this question will be considered by a joint subcommittee drawn from the Civil Rules and Appellate Rules Committees. Subcommittee members will be Judges Bybee, Jordan, and Rosenberg, and Professor Spencer. Professors Cooper and Hartnett will serve as reporters.

Initial sketches illustrate possible approaches that would revise Rule 42 and Rule 54(b). The object is to achieve two goals. One goal is to take advantage of the district court's opportunity to act as "dispatcher," determining whether an immediate appeal is desirable after weighing the several competing interests that

affect continuing proceedings in the district court, the parties' interests in achieving repose and executing the judgment, and the best use of appellate court resources. The other goal is to maintain a bright-line approach that protects against loss of the right to appeal by inadvertent failure to recognize that a final judgment has entered.

Judge Goldgar noted that Civil Rule 42 applies in bankruptcy, and that the Bankruptcy Rules Committee will be interested in this subject. Judge Bates said that the Bankruptcy Rules Committee can participate if it wishes.

Railroad Retirement Act

The General Counsel of the Railroad Retirement Board has suggested that Rule 5.2(c) should be amended to include actions for benefits under the Railroad Retirement Act in the categories of cases that allow only limited remote electronic access to court files. The records in these cases include the same kinds of personal information as the records in social security cases. But it is not clear whether Rule 5.2(c) is the appropriate rule to address this question. Actions for review are filed in a court of appeals. Appellate Rule 25(a)(5) could be amended to the same effect. The Appellate Rules Committee is considering this question. If they conclude that the best course is to amend Rule 25(a)(5) without a parallel amendment to Rule 5.2(c), their advice will be a great help to this Committee.

Rule 4(c)(3): Serving Process in Forma Pauperis Actions

Judge Furman, a member of the Standing Committee, has raised questions about Rule 4(c)(3).

28 U.S.C. § 1915(d) provides that when a plaintiff is authorized to proceed in forma pauperis, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases."

Rule 4(c)(3) comprises two sentences. The first says that "[a]t the plaintiff's request," the court may order service by a United States marshal. The second says "The court *must so order* if the plaintiff is authorized to proceed in forma pauperis * * * or as a seaman." Different interpretations of this rule by different courts show a potential ambiguity: does "must so order" refer back only to ordering service by a marshal, or does it also include the predicate requirement that the plaintiff request service by a marshal? This ambiguity appeared in rule text, although in different form, before Rule 4(c)(3) was restyled in 2007.

A related question is raised by the position taken by at least some marshal's offices that they cannot request waiver of service under Rule 4(d).

Additional questions surround these direct questions. Rule 4(b) provides that the plaintiff may present a summons to the clerk for signature and seal. Rule 4(c)(1) provides that "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m)." An immediate question is whether Rule 4(c)(1) bears on interpreting Rule 4(c)(3) — if the plaintiff is responsible for service, that could imply that the plaintiff is responsible for requesting service by the marshal. Beyond that, questions arise as to the plaintiff's responsibility to assist the marshal in making service: need the plaintiff, for example, provide an address where service can be made? And is it plausible to suppose that a marshal's failure to effect timely service within Rule 4(m) limits should be attributed to the plaintiff without an automatic extension of time under the "good cause" provision?

Brief discussion reflected that one court automatically orders the marshal to effect service when i.f.p. status is granted. And waivers of service are routinely accepted when service is to be made on any of the local governmental institutions that have agreed to blanket waivers of service.

The next step will be to work with the Marshals Service to discover whether they indeed have uniform practices around the country, what variations in practice may exist, what practical concerns they have, what reasons might prompt a refusal to take the seemingly easy step of requesting waivers — do they think Rule 4(d) does not authorize it?, and any additional information that may inform further consideration of the Rule 4(c) issues.

Rules 25, 35: 18-CV-Z

Judge Bates reported that the questions raised about Rules 25 and 35 in 18-CV-Z appear to rest on misreading these rules.

The Committee voted to remove this matter from the agenda.

IAALS Initial Discovery Protocols

Judge Bates noted that IAALS has adopted a third set of initial discovery protocols. This one covers First-Party Property Damage Cases Arising From Disasters. It follows in the wake of the earlier protocols for Employment Cases Alleging Adverse Action and Fair Labor Standards Act cases. It was developed by a similar careful process involving plaintiff and defense lawyers, federal government lawyers, and guided by an experienced federal judge and an experienced state judge. Some courts have high numbers of these cases. The protocols are very well done. They will be helpful to the judiciary. IAALS is to be commended.

Another judge observed that an arbitration association has adopted the employment protocols and finds them very helpful.

Initial Discovery Pilot Project

Judge Campbell reported that the mandatory initial discovery pilot project is approaching the end of its second year in the District of Arizona. It has been smooth. Emery Lee is sending out a survey for closed cases, and is generating data from the docket. The project will end in May 2020, and in June 2020 in the Northern District of Illinois. "We should have good data." Two years of implementation has yielded a number of cases that have reached the summary-judgment or trial stage. Those cases provide a test of success, and so far there have been few problems arising from motions to exclude evidence for failure to provide it by initial discovery.

Judge Dow said that experience in the Northern District of Illinois has been similar to the experience in Arizona. The court has come to recognize a judge's discretion to not require that discovery go forward pending a motion to dismiss. The project seems to be going smoothly.

Emery Lee reported that in a week or two the FJC expects to complete the fourth round of closed-case surveys. "It's going pretty well."

Judge Bates closed the meeting by thanking all Committee members for their great work.

The next meeting will be in Washington, D.C., on October 29.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 3

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	· 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	· 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Federal Courts Access Act of 2019	**S. 297** *Sponsor:* Lee (R-UT)	CV	**Bill Text:** https://www.congress.gov/116/bills/s297/BILLS-116s297is.pdf **Summary:** Amends title 28, U.S.C., to modify the amount in controversy requirement and remove the complete diversity requirement. **Report:** None.	· 1/31/19: Introduced in the Senate; referred to the Judiciary Committee
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	· 2/13/19: Introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsor:* Durbin (D-IL)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) to require that federal judges in criminal proceedings issue an order confirming the obligation of the prosecutor to disclose exculpatory evidence. Specifically, the rule would be amended by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	· 5/8/19: Introduced in the Senate; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	· 5/9/19: Introduced in the Senate; referred to Judiciary Committee

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	· 5/15/19: Introduced in the Senate; referred to Judiciary Committee
HAVEN Act (Honoring American Veterans in Extreme Need Act of 2019)	**H.R. 2938** *Sponsor:* McBath (D-GA-6) *Co-Sponsors:* 38 (D-35, R-3) **S. 679** *Sponsor:* Baldwin (D-WI) *Co-Sponsors:* 41 (D-19; R-21; I-1)	BK Official Forms 122A-1, 122B, & 122C-1 lines 9-10	**Bill Text:** https://www.congress.gov/bill/116th-congress/house-bill/2938/all-actions?loclr=cga-bill **Summary:** Not posted. The bill introduction states: "**A BILL** To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense." **Report:** None.	· 8/26/19: became P.L. No. 116-52 · 7/23/19: Passed/agreed to in House. · 3/06/19: Introduced into the Senate, referred to the Committee on the Judiciary.

Small Business Reorganization Act of 2019	**H.R. 3311** *Sponsor:* Cline (R-VA) *Co-Sponsors:* 3 (D-2, R-1) **S. 1091** *Sponsor:* Baldwin (D-WI) *Co-Sponsors:* 41 (D-19, R-21, I-1)	BK 1020, 2007.1, 2009, 2012, 2015; Official Form 201	**Bill Text:** https://www.congress.gov/bill/116th-congress/house-bill/3311/all-actions?loclr=cga-bill **Summary:** Not posted. The bill introduction states: "**A BILL** To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes." **Report:** None.	· 8/26/19: Became P.L. No. 116-54. · 7/23/19: Passed/agreed to in House. · 6/16/19: Introduced in House · 4/09/19: Introduced into the Senate, referred to the Committee on the Judiciary.
N/A	N/A	CV 26	**Bill Text:** None. *But see* H.R. 1164/S. 2064 "Electronic Court Records Reform Act of 2019." In addition, during the hearing, Rep. Nadler indicated that he intends to reintroduce the Sunshine in Litigation Act. **Summary:** Topics discussed in the hearing included PACER, cameras in the courtroom, and sealing of court filings. Link to list of witnesses and documents: https://judiciary.house.gov/legislation/hearings/federal-judiciary-21st-century-ensuring-public-s-right-access-courts	· 9/26/19: House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet hearing held – "The Federal Judiciary in the 21 Century: Ensuring the Public's Right of Access to the Courts"

TAB 4

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4. Social Security Disability Review Subcommittee

The Social Security Subcommittee brings two sets of questions to the Committee. One set comprises the familiar sorts of questions that remain after working through more than a dozen successive rule drafts. The other set, which might well be considered first, reopens the issues that surround any project focused on a specific category of substantive litigation.

Three draft social security rules were discussed at the November 2018 meeting. Later drafts have abbreviated the rules and consolidated them in a single Rule 71.2. A Rule 71.2 draft was presented for the brief discussion reflected in the Minutes for the April 2019 meeting. The Subcommittee noted that it would continue to develop the draft, hoping to produce a rule as refined as can be achieved without the benefit of publication and the ensuing hearings and comments. The Subcommittee held further conference calls after the April meeting, and on June 20 gathered valuable information at a meeting that brought together representatives of claimants, the Social Security Administration (SSA), and the Administrative Conference of the United States (ACUS). Notes on the June 20 meeting and Subcommittee conference calls are attached. The current draft Rule 71.2 also is attached.

The Subcommittee had one further meeting scheduled before this Committee meets. On October 3 it met with a few magistrate judges to review local practices and gain one more set of reactions to the current draft and the potential advantages and disadvantages of recommending a uniform national rule. The lessons of that meeting will be described in a supplemental memorandum.

This project serves modest ambitions. The goal is to determine whether uniform national rules can be developed to meet the hopes of the ACUS and the SSA for improved district court procedures. Improved procedures in individual review actions might, by reducing burdens on the SSA's legal staff, achieve some quite modest opportunities to improve administrative procedures. But no one believes that a better judicial review process will have any significant effect on the problems that beset administrative review of individual claims. The volume of claims that reach the administrative law judge stage is staggering. The corps of administrative law judges is designed to handle a far smaller number of claims. One consequence is that the rate of judicial remands for further administrative proceedings, although greatly variable, varies from a bottom range that seems high to a top range that is truly troubling. Amelioration of these problems must be sought elsewhere, not in the Civil Rules.

The Subcommittee's next task is to determine whether to recommend that the Committee work toward preparing a rule draft that would be published for comment in the ordinary process for adopting or amending Civil Rules. The current draft has been developed about as well as can be without review by the full

Committee and, if publication is recommended, scrutiny in the public comment process. Support for the approach taken in the draft can be found in the successful experience in districts that have local rules that resemble the draft. The central question is not so much the quality of the draft rule as whether it is wise to adopt a rule that is tightly bound to a specific substantive regime. This enterprise tests the tradition that Enabling Act Rules should apply generally to all subjects of civil litigation. Only a good rule can justify making the test. But it can be assumed for now that a good rule can be proposed. That assumption can frame initial discussion of the broader issue.

Review

The project was introduced to the magistrate judges by a brief summary that is adapted here as a reminder of the basic project. This outline should suffice to support discussion of the wisdom of pursuing the work to the point of recommending publication of a proposed rule. The Subcommittee recognizes that the current draft rule can be polished further, but believes that it has come as far as it can with its internal resources and the great help that has been provided by meetings with interested constituencies and comments from them.

At the end of 2016 the ACUS recommended that "the Judicial Conference of the United States develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review" under § 405(g). The recommendation grew out of a detailed study of district court practices, Jonah Gelbach & David Marcus, *A Study of Social Security Litigation in the Federal Courts* (report to the Administrative Conference of the United States)(July 28, 2016). The study showed wide variations in practice, and suggested that some local practices may not be as effective as others.

The SSA has strongly supported the suggestion that uniform national rules should be adopted.

The recommendation that the Judicial Conference develop rules was assigned to the Civil Rules Advisory Committee. The Civil Rules Committee appointed a Social Security Review Subcommittee to study the proposal. The Subcommittee has worked through more than a dozen successive drafts, continually reducing the length and detail of possible court rules. Its work has included more than a dozen meetings by conference calls as well as working with representatives of groups interested in the issues. Numerous exchanges have been had with the American Association for Justice, the National Organization of Social Security Claimants Representatives, the SSA, and the Department of Justice. Meetings with those groups were held at the beginning of Subcommittee deliberations, and again in June, 2019. Representatives of the ACUS participated in those meetings. And representatives of these various groups have been present at Civil Rules Committee meetings that discussed Subcommittee

progress.

The draft rule reflects the fact that § 405(g) cases are appeals, not ordinary civil actions. The case is usually decided on the administrative record, as it may be expanded on a remand for further consideration. Although district courts entertain other forms of actions for review of administrative action, often on an administrative record, Social Security cases are distinctive. There are a great many of them, averaging between 17,000 and 18,000 actions a year, and accounting for 7% to 8% of the federal civil docket. These features account for the early decision to work on a rule aimed only at Social Security review, not a more general rule for district court review of administrative actions.

The appellate character of Social Security review actions ordinarily displaces most of the Civil Rules and affects the operation of others. The draft rule reflects this belief. Little purpose is served by detailed pleading of the arguments that the record lacks substantial evidence to support the Commissioner's decision, or that the decision is wrong as a matter of law. Those arguments are more efficiently and effectively developed in briefs. So too summary judgment, although often used as a convenient vehicle for framing the arguments, may prove misleading. The administrative record provides the basis for decision, not the procedures of Rule 56(c). If the Commissioner's decision meets the substantial evidence threshold, summary judgment is granted even though the decision could go either way on the administrative record. And discovery is almost never involved.

Drafting a potential rule, however, is complicated by the experience that in a small fraction of § 405(g) cases there may be an occasion for discovery. It is even possible that a class action may be framed that rests in part on § 405(g). Beyond those rare cases, a great many of the Civil Rules remain important to govern such matters as filing, notices, docketing, motions, and so on.

These competing considerations account for the basic applicability provision that introduces draft Rule 71.2: "These rules govern * * *." The Civil Rules apply, "except that in an action that presents only an individual claim these procedures apply * * *." This scope provision is critical. The simplified, appeal-like procedures that follow will be all that is required for efficient disposition of the vast majority of § 405(g) cases that present only a challenge to the Commissioner's final decision on the administrative record. The small number of cases that go beyond this limit are governed by the general Civil Rules without regard to the special Social Security review provisions.

A simplified complaint satisfies Rule 8(a), although a claimant who wishes to plead in greater detail may do so. The administrative record and any Rule 8(c) affirmative defenses

constitute the answer. Rule 8(b) does not apply, relieving the Commissioner of the obligation to respond to the allegations in the complaint, although here too the Commissioner is free to do so. Service on the Commissioner is made by the court by transmitting a notice of electronic filing, a practice that has been adopted by some courts with great success. Motion practice is similar to general motion practice; many earlier drafts included separate provisions for motions to remand, particularly "voluntary remands," but in the end they seemed to accomplish nothing more than to recite the three separate remand provisions found in sentences four and six of § 405(g).

In many ways the central feature of the draft rule is the subdivision (d) provision for presenting the case through the briefs. That is how an appeal is effectively presented. One feature of this draft may deserve special attention: is it useful to require the claimant to file a motion for relief along with the opening brief, or can the same purposes be achieved more efficiently by relying on the brief alone to frame and explain the request for relief?

It may be useful to note two proposals that were considered and eventually abandoned. One would have set page limits for the briefs. The other would have ventured into the thicket of motions for attorney fees. Page limits could be set readily enough, but it may be better to leave that matter to local practice. The attorney-fee issues are complex, and there is a risk that rule text might trespass beyond procedure into the realm of substance.

Transsubstantivity Concerns

The Subcommittee does not believe that further work will significantly improve draft Rule 71.2, either in overall approach or in the detailed implementation. That assumption sets the foundation for exploring the advantages of establishing a uniform national practice for §405(g) review cases. The advantages must be weighed against the risks of adopting a rule for a single substantive subject.

Uniform national procedures are inherently important. Uniformity is the central purpose of the Rules Enabling Act. Uniformity is why local rules must be consistent with national rules.

The ACUS and the SSA believe that additional practical reasons make it important to establish a nationally uniform core procedure for § 405(g) review actions. At least 62 districts have local rules for social security review actions. Standing orders add to the variety, and individual judges may have individual practices. This diversity of practices imposes substantial costs on the SSA, which points out that many lawyer years could be freed up by saving even an average of one hour of SSA lawyer time in the 17,000 to 18,000 § 405(g) cases brought to the district courts every year.

The costs imposed by local practices are not limited to the need to remain current on a wide range of diverse practices. Added costs arise from local practices that seem unproductive. Nine districts, for example, require the claimant and the SSA to produce a joint statement of facts, a practice said to require a great deal of time and to yield little or no benefit for the parties. As noted above, Rule 56 is often used to establish the framework for presenting the case for decision. This practice can be beneficial if it is used to produce competing designations of the parts of the administrative record that support the parties' positions, much as designations of the record are required in an appellate brief. But it can lead to confusion if other parts of Rule 56 are invoked, and would lead to fundamental error if the summary judgment standard for decision were to displace the § 405(g) substantive evidence standard.

The arguments for a uniform national rule advanced by the ACUS and the SSA deserve careful attention.

The counter arguments begin with a direct challenge to the need for uniformity. The national rules are supplemented across the country by local rules, standing orders, individual docket practices, and the like. A lawyer practicing across districts must become familiar with the local practices and adhere to them. Wide differences in local practices may reflect significant differences in local conditions. Claimants' representatives make this point specifically for social security review cases, and add a further argument that claimants are better served by adhering to practices that please local judges. A judge who must discard favored practices may be less efficient when forced to operate under a new national practice. And local practices are hardy things — whether viewed as flowers or weeds, a new national rule may trim them but will not eradicate them.

The entrenched tradition of transsubstantivity presents a more significant challenge to using the Rules Enabling Act to establish a uniform national rule that applies only to social security review actions. Section 2072(a) provides: "The Supreme Court shall have the power to prescribe *general* rules of practice and procedure * * * for cases in the United States district courts * * *." Section 2072(b) admonishes: "Such rules shall not abridge, enlarge or modify any substantive right." Does a social security-only rule qualify as a "general" rule? Would it create an uncontrollable risk of abridging, enlarging, or modifying substantive rights created by the Social Security Act?

Earlier discussions have looked for examples of substance-specific rules. Perhaps the clearest example is Supplemental Rule G, which "governs a forfeiture action in rem arising from a federal statute." Rule 71.1 applies to "proceedings to condemn real and personal property by eminent domain." Rule 5.2 establishes limits on remote access to court files in social security and immigration proceedings. Supplemental Rules are established for admiralty and maritime cases, § 2254 proceedings,

and § 2255 proceedings. All of the supplemental rules invoke the Civil Rules at least in part. Rule 5.2 does no more than recognize the particular risks to privacy from electronic access to court records that include intense amounts of personal individual information. Rule 71.1 qualifies the general rules only in specific and limited ways, and applies to condemnation actions under any statute that brings the action to the district court.

None of these examples conclusively answer concerns about the substance-specific character of a social-security review rule. The present draft, and any other draft that seems likely to respond to the proponents' arguments, is more intensely focused on a single substantive statute than any of the analogies. That focus intensifies abstract concerns about the limits of a "general" rule of practice and procedure.

Practical interests add to doubts about developing a substance-specific rule. Two years of hard work have demonstrated the many twists of social security law that must be reckoned with in framing a rule. A proposal to include a procedure for seeking attorney fees for service in the district court provides an example that has been omitted from the outset. Many misadventures have been identified and set to rights. Many detailed provisions have been pared away, largely for fear of substantive entanglement. What remains is modest. But it is difficult to be confident that the Subcommittee has been able to identify and adapt to all of the most important substantive elements and to anticipate the procedures that best accommodate those elements. Expert advice has been offered from many quarters, but risks remain.

At least one more concern gives pause. The competing interests affected by a narrow substance-specific rule may be more clearly drawn than the interests affected by transsubstantive rules. Any rule that is adopted may inadvertently favor one set of interests over another, and even if it achieves a scrupulously neutral balance is likely to be perceived as the product of favoritism by at least one, and perhaps all, sides. Many claimants in fact have reacted to successive drafts with the view that the rule would advance the SSA's interests at some cost to claimants. And it may be wondered how far it is appropriate to address the SSA's needs that arise from inadequate staffing that results from inadequate funding.

A final concern is that adopting even one purely substance-specific rule will generate increased pressures to adopt others. Arguments will be made that one or another substantive areas present needs for specific uniform rules as great as social security review, if not greater. One breach makes it impossible to say such rules are never adopted. The Committees are constituted to resist such pressures, but informed resistance takes time away from other projects.

The tradition of transsubstantivity, bolstered by these concerns, has great force. But the pragmatic concerns supporting a social-security review rule remain. On this view, the general Civil Rules have been continually revised to address problems presented by a small subset of troublesome cases. The general run of federal cases may not be well served by general rules shaped to accommodate the cases with the highest monetary or public policy values, the deepest level of aggressive advocacy, the most sweeping opportunities for weapons of mass discovery, and so on. The pressures that arise from specific categories of litigation might better be addressed by specific sets of rules, if only wisdom enough can be gained.

These tensions have been recognized from the beginning of the Subcommittee's mission. Brief excerpts from Advisory Committee meetings serve to recall some highlights:

November 7, 2017, Minutes:

> Professor Coquillette provided a reminder that there are dangers in framing rules that focus on specific subject-matters. Transsubstantivity is pursued for very good reasons. The lessons learned from rather recent attempts to enact "patent troll" legislation provide a good example. It would be a mistake to generate Civil Rules that take on the intricacy and tendentiousness of the Internal Revenue Code. But § 405(g) review proceedings can be addressed in a way that focuses on the appellate nature of the action, distinguishing it from the ordinary run of district court work. Even then, a rule addressed to a specific statutory provision runs the risk that the statute will be amended in ways that require rule amendments. And above all, the Committee should not undertake to use the supersession power.

April 10, 2018, Minutes:

> Judge Bates suggested that the stakeholders are not likely to address the question whether it is appropriate to develop rules that address a specific substantive subject. The Committee must continue to deliberate this question. One alternative would be to broaden any new rules to apply generally to all district court actions for review on an administrative record.
>
> A Committee member responded by suggesting that it is improper to have special rules for special parts of the docket, at least unless special needs are shown to justify the specific focus. Another Committee member shared this concern, but added that we can continue to explore the need for any rules. Judge Lioi pointed out that the Subcommittee Report touches on these questions, beginning at line 47 on page 243. The Report in turn points to the discussion at the November Committee

meeting, as reported in the November Minutes.

November 1, 2018, Minutes:

> 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.
>
> 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.'

These excerpts point the way to a more broadly transsubstantive approach. A new rule might apply to all administrative review actions in the district courts. That would, however, be a new and very broad undertaking. The Subcommittee has not explored this alternative to the point of seeking detailed information on the varieties and total number of all administrative review actions. Many of them are brought under the Administrative Procedure Act, but even those involve a wide range of underlying substantive statutes. Several concerns have counseled hesitation. The sheer variety of agencies, substantive law, and administrative procedure presents far more diverse needs than do single-claimant social security actions for what is in effect appellate review on a completed administrative record. Nor has any other specific substantive area been identified that produces anything that remotely approaches the sheer volume of § 405(g) cases. Concerns about transsubstantivity should not be assuaged by expanding this project to encompass all actions for administrative review in a district court, or even a carefully curated set of these actions. Proposed Rule 71.2 is modest. It addresses a category of cases that lie at the extreme end of the spectrum that blends appellate procedure with more general litigation procedure.

These excerpts also provide a reminder that the earliest drafts were framed as a set of supplemental rules. The Subcommittee chose to locate its draft within the Civil Rules for at least two reasons. First, the general rules continue to govern all but a few of the ways in which § 405(g) cases progress through the district courts. Second, only a few departures are made. The special rules displace formal service of summons and complaint on the Commissioner, establish reduced thresholds for pleading, address some details of motion practice, and establish

an essentially appellate procedure for submitting the case for decision on the briefs. Requiring cross-reference from supplemental rules to the main body of Civil Rules would impose unnecessary complications. Rule 71.1 provides a reassuring model. These practical advantages overcome the uncertain arguments whether supplemental rules or a new Civil Rule are more likely to invite proposals for additional substance-specific rules.

A possible decision that a social security review rule is not yet ready to become a Civil Rule need not mean that the work has been for naught. The draft could become the basis for a model local rule. The Department of Justice has drafted a model local rule that has had some adoptions. The model is quite similar to draft Rule 71.2. A somewhat revised model might be developed and find a sponsor.

Improving the Draft

Apart from matters of detail that have been pretty much worked out, four central questions and one matter of detail deserve such discussion as time allows.

(1) Draft Rule 71.2 begins with a paragraph that identifies the actions that fall within the four special rules of subdivisions (a), (b), (c), and (d) for § 405(g) cases that present only an individual claim. This provision has emerged from several earlier efforts. Is it clear enough?

(2) Draft Rules 71.2(a) and (c) address pleading. Together they set a low threshold for the complaint and permit an answer that consists only of the administrative record and any affirmative defenses. Those features seem secure. But they also leave the way open to include more detail in the complaint. If more is included in the complaint, the Commissioner is free to address it, but also may choose not to do so. That combination of features is unique. It is designed to provide an opportunity for the claimant to educate the Commissioner without imposing added work on the SSA's staff at the pleading stage. Can this much eccentricity be endured?

(3) Draft Rule 71.2(d) is in many ways the keystone. The case is submitted for decision on briefs that support the parties' arguments by specific citations to the record. This practice implements the analogy to appellate review. The question that remains arises from the direction that the plaintiff serve a motion for the relief requested along with the brief. The motion requirement has been vigorously discussed within the Subcommittee. The proponents believe that it is an important part of the ordinary Rule 7(b)(1) process for asking for an order, provides an anchor for fitting the case into regular docket management processes, and is not burdensome since the motion will be very brief. The doubters believe that a motion adds nothing to the request for relief in the brief, and that existing docket

management practices provide ample tracking means to ensure prompt attention to the case. One important issue is empirical: is there a risk that docket management practices in some districts may not keep § 405(g) cases on track for prompt attention?

(4) The last central question reflects the oft-encountered difficulty in finding means to protect national uniformity against resurgent impulses toward local departures. The inherent preemptive effect of the national rule is relied on by the Committee Note for one or two observations. The Note says that the rule displaces summary judgment as a means of presenting the action for decision. A bracketed provision says that it also displaces such devices as a joint statement of facts. The Note might be expanded to refer to the § 2071(a) and Rule 83(a) requirement that local rules be consistent with the national rules. It might be good to establish clear provisions for preemptive effect in rule text, but enumeration of specific prohibitions might be taken as implied permission for other departures. And a complete enumeration would be difficult to accomplish.

The troublesome question of detail is familiar. Draft Rule 71.2(a)(2) requires that the complaint state the last four digits of the social security number of the person for whom benefits are claimed and of the person on whose wage record benefits are claimed. The threat to privacy and identity theft from such disclosure seems to grow as technology advances. The SSA, however, insists that it faces so many administrative proceedings that it needs this much disclosure to ensure that it identifies the proper administrative record to file with the court. This position has met some skepticism. One response is that the SSA should develop better internal procedures for tracking its own proceedings. Another, perhaps more pragmatic, is that in practice any uncertainties are easily resolved by a telephone call to the claimant’s lawyer — a response that may come up short when a pro se plaintiff is not willing to trust a telephone voice to be a government lawyer. The Subcommittee, after repeatedly struggling with this question, has carried the last-four-digits provisions forward for continued discussion. The main consideration has been that Rule 5(b)(2) exempts the record of an administrative or agency proceeding from redaction, and Rule 5(c) limits nonparty remote electronic access to an electronic court file. The last four digits in the complaint are as much protected as the full social security numbers that appear repeatedly in the administrative record.

Rule 71.2. Review of Social Security Decisions [Under 42 U.S.C.A. § 405(g)]

APPLICABILITY OF THESE RULES. These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security, except that in an action that presents only an individual claim these procedures apply:

(a) COMPLAINT. The complaint satisfies Rule 8(a) if it:

(1) States that the action is brought under § 405(g) and identifies the final decision to be reviewed;

(2) States:
(A) the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed, and
(B) the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and

(3) Identifies the type of benefits claimed.

(b) SERVICE. The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district. The plaintiff need not serve a summons and complaint under Rule 4.

(c) ANSWER; MOTIONS; TIME.
(1) (A) 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.
(B) The answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 71.2(b) unless a different time is provided by Rule 71.2(c)(2)(B).
(2) (A) A motion under Rule 12 must be made within 60 days after notice of the action is given under Rule 71.2(b).
(B) Unless the court sets a different time or a later time is provided by Rule 71.2(c)(1)(B), serving a motion under Rule 71.2(c)(2)(A) alters the time to answer as provided by Rule 12(a)(4).

(d) MOTION FOR RELIEF; BRIEFING.
(1) *Plaintiff's Motion for Relief and Brief.* The plaintiff

must serve on the Commissioner a motion[1] for the relief requested 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 71.2(c)(2)(A), whichever is later. The brief must support arguments of fact by citations to the record.

(2) *Commissioner's [Response] Brief.* The Commissioner must serve[2] 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 record.

(3) *Reply Brief.* The plaintiff may, within 14 days after service of the Commissioner's brief, serve a reply brief on the Commissioner.

COMMITTEE NOTE

Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) are generally governed by the Civil Rules. This new Rule 71.2, however, establishes a simplified procedure that recognizes the essentially appellate character of actions that seek only review of claims of an individual on a single administrative record. 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 an individual. But the plaintiff may be a representative or someone whose claim derives from a worker. What counts is that the action seek review on a single administrative record based on a single claim for relief.

All actions for review under § 405(g) are governed by all the Civil Rules. Application of the Civil Rules is modified only by applying Rule 71.2 to the matters covered by subdivisions (a), (b), (c), and (d) in an action brought by a single plaintiff for relief on a single claim.

Some actions may plead a claim for review under § 405(g) but

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[1] If the direction to file a motion is omitted, this would be: "must serve on the Commissioner a brief for the requested relief within 30 days * * *."

[2] If the plaintiff is required to make a motion for the relief requested in (1), some participants have suggested adding a cross-motion requirement to (2): "The Commissioner must serve motion for the requested disposition and a [response] brief * * *."

also join more than one plaintiff, or add a claim or defendant for relief beyond review on the administrative record. Such actions fall outside Rule 71.2 and are governed by the other Civil Rules alone.

Rule 71.2(a) through (d) apply, supplementing the general Civil Rules, in an action in which the only claim is made by [or for] an individual. They establish a uniform procedure for pleading and serving the complaint in an action to which they apply; for answering and making motions under Rule 12(b); and for presenting the action for decision by briefs. Rule 71.2 supersedes the general Civil Rules in only a few ways. The Rule 71.2(d) procedure for presenting the action for decision displaces summary judgment [or such devices as a joint statement of facts] as the means of review on the administrative record.[3] But for the most part, there is no conflict between Rule 71.2 and the general rules. Rule 9(a)(1)(B) is an example — a plaintiff suing in a representative capacity need not plead authority to sue in a representative capacity. And as described below, a plaintiff remains free to plead more than the elements listed in Rule 71.2 (a), while the Commissioner may choose to respond to the plaintiff's allegations even though Rule 71.2(c)(1)(A) provides that Rule 8(b) does not apply.

The relationship between Rule 71.2 and the general Civil Rules rests on Section 405(g), which provides for review of a final decision "by a civil action." Rule 3 directs that a civil action be 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 Rule 71.2(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one brought under § 405(g). Failure to plead all the matters described in Rule 71.2(a) should be cured by leave to amend, not dismissal. A plaintiff who wishes to plead more than Rule 71.2(a) illustrates is free to do so.

Rule 71.2 (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, so long as it provides a means of electronic access to the complaint. Notice to the Commissioner is sent to the appropriate regional office. The plaintiff need

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[3] Discussion of the joint statement of facts approach emerged in working group sessions. The purpose may be to protect against shifting the obligation of clear presentation from the parties to the court. Some judges have found that the parties do not, on their own, have the discipline to focus the briefs on the issues that guide appraisal of the fact evidence and understanding of the legal issues as related to the facts. There also has been substantial opposition to this approach. Discussion at the June 20 conference continued to be divided.

not serve a summons and complaint under Rule 4.

Rule 71.2(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." In addition to filing the record, the Commissioner must plead any affirmative defenses under Rule 8(c). 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 71.2(b) unless a different time is provided under Rule 71.2(c)(2)(B). The time to file a motion under Rule 12 is set at 60 days after notice of the action is given under Rule 71.2(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.

Rule 71.2(d) addresses the procedure for bringing on for decision a § 405(g) review action that is governed by Rule 71.2. The plaintiff serves a motion for the relief requested. The motion need not be lengthy; it is supported by a brief that is similar to an appellate brief, citing to the parts of the administrative record that support an 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.

Residual Drafting Question:

Is there a miscue in (c)(1)(A), suggesting that the answer must contain a copy of any affirmative defenses? A comma would fix it -- "The answer must include a certified copy of the administrative record, and any affirmative defenses."

RULE 71.2

Rule 71.2. Review of Social Security Decisions [Under 42 U.S.C.A. § 405(g)]

APPLICABILITY OF THESE RULES. These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security, except that in an action that presents only an individual claim these procedures apply:

(a) COMPLAINT. The complaint satisfies Rule 8(a) if it:

(1) States that the action is brought under § 405(g) and identifies the final decision to be reviewed;

(2) States:
(A) the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed, and
(B) the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and

(3) Identifies the type of benefits claimed.

(b) SERVICE. The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district. The plaintiff need not serve a summons and complaint under Rule 4.

(c) ANSWER; MOTIONS; TIME.
(1) (A) 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.
(B) The answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 71.2(b) unless a different time is provided by Rule 71.2(c)(2)(B).
(2) (A) A motion under Rule 12 must be made within 60 days after notice of the action is given under Rule 71.2(b).
(B) Unless the court sets a different time or a later time is provided by Rule 71.2(c)(1)(B), serving a motion under Rule 71.2(c)(2)(A) alters the time to answer as provided by Rule 12(a)(4).

(d) MOTION FOR RELIEF; BRIEFING.

(1) *Plaintiff's Motion for Relief and Brief.* The plaintiff must serve on the Commissioner a motion for the relief requested 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 71.2(c)(2)(A), whichever is later. The brief must support arguments of fact by citations to the record.

(2) *Commissioner's [Response] Brief.* The Commissioner 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 record.

(3) *Reply Brief.* The plaintiff may, within 14 days of service of the Commissioner's brief, serve a reply brief on the Commissioner.

NOTES
SOCIAL SECURITY REVIEW SUBCOMMITTEE
Conference Call September 11, 2019

The Social Security Review Subcommittee met by conference call on September 11, 2019. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Judge Jennifer Boal; Joshua Gardner, Esq.; Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq. Julie Wilson, Esq., represented the Rules Committee Support Office. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi described a three-part agenda. The first question is whether, after meeting with a committee of magistrate judges on October 3, the Subcommittee should attempt to gather still more information from interested groups. The second is whether still further work should be done to refine the current draft Rule 71.2. And the final question is whether, if the question has been made ripe by outside consultation and drafting work, the Subcommittee is ready to make a recommendation whether to press the project toward a recommendation that a rule be published for comment.

The Subcommittee agreed that the resources available for pre-publication consultation have been thoroughly developed, to great advantage. There is not likely to be much advantage in working further with them at this stage. The June 20 meeting with all interested groups was particularly helpful.

Drafting Questions

Turning to rule drafting questions, the first suggestion was to rearrange the introductory paragraph of draft Rule 71.2:

> These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security~~, except that in an action~~ that presents only an individual claim ~~these procedures apply~~ except as otherwise provided by this rule:

The change was supported on the ground that it makes the rule more readable. It is closely modeled on Rule 71.1(a), which provides that these rules govern "except as this rule provides otherwise." But it was questioned because it literally does not say that these rules govern all actions under § 405(g). The Social Security Administration has said that jurisdiction is asserted under § 405(g) in some actions that present more than an individual claim. The draft clearly applies the Civil Rules to all § 405(g) actions. As revised, application to actions that present more than an individual claim is left to inferences supported by the Rule 1 provision that these rules govern all civil actions and proceedings

in the district court. Rule 71.1 is different because it clearly states that the Civil Rules apply to all condemnation actions. Assuming that the suggested revision makes for easier reading, the tradeoff is not clear. This question was left for further consideration rather than attempt to draft a final answer on the meeting floor.

A second drafting question pointed out that draft Rule 71.2(a)(2)(A) requires a statement in the complaint of the county of residence of the person for whom benefits are claimed, while paragraph (B) does not require a statement of residence for the person on whose wage record benefits are claimed. Why in (A), but not in (B)? These provisions have been drafted with considerable input from SSA. There is room to speculate as to the difference. Identifying the person whose wage record supports the claim may not need a county of residence if benefits are claimed for someone else. All that is needed is help in identifying the administrative record, a need met by supplying the last four digits of the social security number. Indeed a claim for survivors' benefits may be made on the wage record of a deceased worker. But the county of residence of the person for whom benefits are claimed may be useful for purposes of ensuring payment of any benefits awarded to the proper person. In some circumstances, this provision may be a helpful prompt to secure a social security number — one of the examples in past discussions is an action brought by a foster parent claiming benefits for a foster child. In addition, § 405(g) sets venue in "the judicial district in which the plaintiff resides, or has his principal place of business." Treating the county of the person for whom benefits are claimed may be a good working answer. It was agreed that this question should be developed further with SSA representatives.

A third drafting question asked why draft Rule 71.2(d)(1) directs that the plaintiff's brief must support arguments of fact by citations to the record. This provision draws from two sources. One, focusing on the appellate nature of § 405(g) review, is Appellate Rule 28(a)(8)(A), which requires a brief on appeal to include "citations to the authorities and parts of the record on which the appellant relies." Earlier Rule 71.2 drafts included the full formula of "parts of the record on which the plaintiff relies." But it was stripped back to "citations to the record." The other source is Civil Rule 56(c)(1)(A), an analogy supported by the practice in many districts that frame § 405(g) review by a motion for summary judgment: The motion must be supported by "citing to particular parts of materials in the record * * *." This provision also reflects SSA's strong argument for displacing the joint statements of fact required in some courts.

A fourth drafting question asked whether court clerks will be burdened by the provision in subsection (b) that dispenses with service of a summons and complaint, substituting a Notice of

Electronic Filing sent by the court to the local SSA office and the local United States Attorney. Laura Briggs reports that this practice is used in her court and works well. It has been reported that it has been adopted in other districts as well. To satisfy Rule 4 as it stands, local United States Attorneys file blanket consents to electronic notice. This is the one provision of the draft that has met universal acclaim on all sides.

The fifth drafting question began with a familiar issue. Draft Rule 71.2(d)(1) requires the plaintiff to serve a motion for the requested relief along with the brief. Some participants have argued that the motion serves no purpose. The brief spells out the arguments, as on an appeal, and concludes with a request for relief. Others have urged that the motion complies with the command of Rule 7(b) that a request for a court order must be made by motion. In addition, the motion may improve the way in which the case is tracked through the court's case-management system. The opposing considerations draw in part from different analogies.

The analogy of a § 405(g) action to an appeal from a district court to a court of appeals suggests that a brief alone is the most efficient way to present the case to the court. The complaint is no more a request for an order than the complaint in any civil action — judgment follows disposition of the claim presented by the complaint, without any need for a separate motion. The arguments in the briefs provide the basis for a judgment that affirms, vacates and remands, or in some cases directs a final disposition. Section 405(g) itself explicitly provides the court with "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner, with or without remanding the cause for a rehearing."

The argument for requiring a motion draws on analogy to the summary-judgment practice followed in several districts. It was recognized that Rule 56(f)(1) authorizes the court to grant summary judgment for a nonmovant after giving notice and a reasonable opportunity to respond. The "nonmovant," however, is SSA, which has explicit notice from the plaintiff's brief and an explicit opportunity — indeed an obligation — to respond by its own brief.

These competing perspectives led to discussion about the possible advantages an explicit motion would provide in a district court's case-management system. Subcommittee members were uncertain about the ways in which the need to tend to a § 405(g) case is called to a judge's attention. The "6-month reporting" period is triggered, at least in some courts, by the filing of the administrative record. Often the record is filed as the SSA answer, although it might be filed earlier. The plaintiff's brief would come later. At least one judge further suggested that the motions report has a separate section for social security cases, but that section does not specifically identify motions. These questions will be pursued further if they are made ripe by a recommendation to publish a rule for comment. It is important that any new rule

not adversely affect court administration.

A related question asked whether, if the plaintiff is required to make a motion for the requested relief, the Commissioner should be required to make a cross-motion specifying the requested judgment. This prospect may intersect the question of motions to remand. Sentences four and six of § 405(g) include three distinct provisions for remand to SSA. The Subcommittee considered several versions of rule text for motions to remand and concluded that nothing useful could be accomplished. The only course that avoids the risk of serious intrusions on actual practice would be rule text that simply paraphrases the statute. Nor is there any clear reason why a cross-motion would help the court. The Commissioner will not ask the court to take evidence and decide the claim. The alternatives are to affirm, vacate and remand, or grant the relief requested by the plaintiff without further administrative proceedings. The brief can address those alternatives. Nonetheless, this possibility will be addressed at least by adding a footnote to draft rule 71.2(d)(2) illustrating a possible cross-motion provision: "the Commissioner must serve a motion for the requested disposition and a [response] brief * * *."

The final drafting question suggested that one word be transposed in the Committee Note: "In an action that seeks ~~only~~ review only on the administrative record * * *."

What Next?

The drafting choices that remain do not affect the determination whether a social security review rule should be carried forward toward a recommendation to publish for comment. The choices are confined to small issues, some of them involving only differing judgments about clear expression. The Subcommittee agreed that the time has come to ask the full Committee whether work should continue toward a proposal for publication.

The first observation, offered by one who professed to be relatively detached, began by noting that the Administrative Conference strongly supports adoption of a uniform national rule. SSA eagerly agrees. NOSSCR is the most opposed, but their main argument seems to be that a uniform national rule that displaces established local practices will make some judges unhappy. The October 3 discussion with a small group of magistrate judges will shed more light on this question. As matters stand now, the argument for publication draws force from the prospect that comments on the published proposal will provide a great deal of information on the value of the project. But it is difficult to believe that any significant dissatisfaction will remain if a rule is adopted and put into practice for three or four years. It is worthwhile to go ahead.

A second observation listed the pros and cons of going

forward. The reasons to press ahead begin with the strong support of ACUS and SSA. The current draft would make more significant changes in some courts than in others, but overall the changes are modest. The level of uniformity across the country will increase. And there will be some measure of relief from the inefficiencies that SSA suffers because of inadequate staffing.

The arguments against going forward, however, are considerable. A central problem is that this draft, or any other proposed rule, is not transsubstantive. Adopting one substance-specific rule will inevitably encourage proposals for others. There is substantial opposition from "one side of the v," organizations of plaintiffs' representatives. The draft, further, is quite modest. It does not include all of the things that SSA asked for at the outset. Even a modest rule, moreover, still raises the question whether national court rules should be framed to alleviate problems caused by inadequate SSA funding and staffing. It even is possible that displacing familiar local practices, adapted to the circumstances of individual districts, will lengthen the time to disposition. Prompt disposition is particularly important in this category of cases — claimants engage the administrative process for several years, and usually have urgent financial needs. Why not leave these civil actions to the same rules as govern all others?

Another member was "on the fence" whether, in the end, a social security rule should be adopted. But putting it out for publication would be useful. Even if the result is to abandon the proposal, people will have been made to think about the problems. Another member agreed with this view.

The Department of Justice has not yet developed a view on the value of going forward toward a national rule. It has crafted a model local rule. Some United States Attorneys are supporting local adoption of the model rule, and some districts have adopted it. Information about how it works in operation will be gathered.

A question was asked about Standing Committee views on adopting a rule that is not transsubstantive. Clearly there is hesitation about considering rules that are substance-specific. Part of the concern is practical. Development of this proposal has confirmed the need for deep familiarity with the substantive law and actual procedures that have been adapted to implement it. Successive drafts have gradually pared away many details, either because they seemed ill-advised or because it became apparent that there were too many uncertainties of both substance and procedure. A related practical concern is that if these risks are accepted in adopting one substance-specific rule, demands for others will soon follow. Antitrust rules? Securities rules? RICO rules?

Discussions of a social security rule with the Standing Committee have taken practical concerns to the level of debating the proper location for any such rule. Early drafts were framed as

three supplemental rules. The closest model is the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Those are in some measure substance-specific. The Admiralty Rules grew out of the merger of separate admiralty practice into the general civil rules, preserving supplemental rules to address the specific traditions and needs of admiralty practice. The civil forfeiture rule was added as Supplemental Rule G, in part because it incorporates Supplemental Rules C and E in addition to the Civil Rules. The supplemental rules for § 2254 and § 2255 cases, which also incorporate the Civil Rules, are a somewhat more distant example.

The supplemental rules approach was eventually put aside. One reason was the analogy to Civil Rule 71.1, which governs condemnation actions. Draft Rule 71.2 leaves a great many matters to be governed by the full body of Civil Rules. It establishes a small set of specific procedures for the vast majority of individual social security review actions, no more. Lawyers and pro se litigants unfamiliar with social security practice, further, may be more likely to find a rule located in the main body of rules.

Concerns about implicit messages encouraging new demands for substance-specific rules also complicate the choice between a Civil Rule and a new set of supplemental rules. One view has been that supplemental rules serve as an open-ended invitation to adopt a continually expanding set of supplemental rules. A high threshold of resistance for adopting new civil rules might be defended more successfully. An opposing view has been that substance-specific rules would pollute the transsubstantive Civil Rules. They should be marked as something distinctive.

Deeper concerns spring from the text of the Rules Enabling Act, which establishes Supreme Court power "to prescribe *general* rules of practice and procedure." Many rules enthusiasts believe that only transsubstantive rules qualify as "general" rules. In addition, the direction that the rules "shall not abridge, enlarge or modify any substantive right" also points away from rules that focus on a particular area of substantive rights.

Transsubstantivity has long been accepted as an imperative by many of those who study and work with the Enabling Act process. But there is a clear counter view that substance-specific rules should be explored. This view draws from concerns that the Civil Rules are continually amended in attempts to address the problems engendered by a small fraction of cases. The amendments continue to frame rules that apply in all actions, risking a spread of problems from the troublesome cases to other cases that would have been better handled by simpler rules.

One set of examples of substance-specific rules has been provided under the auspices of the Institute for the Advancement of the American Legal System. Three sets of initial discovery

protocols have been developed, starting with individual employment litigation, moving to FLSA cases, and then on to first-party insurance damage cases arising from disasters. The employment litigation protocols were inspired by work on amending the discovery rules. They have been adopted in many districts and seem to be working well.

The example of these protocols may suggest that a comparable approach should be taken for social security cases, perhaps framed as a model rule. The Department of Justice model local rule could be a good and perhaps sufficient beginning. But a participant observed that the types of litigation addressed by the protocols are typical of general civil litigation. They do not share the appeal-like character of social security cases. Social security cases are qualitatively different, and there are a lot of them.

A different perspective on the substance-specific question was offered. Turning back to the very beginning of this project, the first step was to consider adopting a general rule for review of actions that seek district court review of administrative action. A single rule that embraces all administrative review would be transsubstantive. Without knowing the total volume of such actions, it is a fair guess that the sheer number of social security review actions overwhelms the number of all other administrative review actions. But there a good many actions, often under the Administrative Procedure Act. A rule could be framed to govern actions that ask the district court to act in an appellate capacity. So what reasons justify a narrow focus on social security cases alone?

One response was that social security cases lie at one end of the spectrum that blends trial procedure with appellate procedure. Almost all of them involve nothing more than appellate review on the administrative record. The general provisions of the Civil Rules are necessary to fit the cases into the district-court system. Draft Rule 71.2(c) on motions is an example. The blend in other administrative-review actions is often different. APA cases "vary a lot by substance, agency, and complexity. Social security cases have a sameness that makes them different. But they are not totally different."

These reflections tied together in two observations. The specific focus on social security cases may make it possible to draft a good rule adapted to the distinctive needs of these cases. Any attempt to capture the full range of actions that challenge administrative action would face far greater challenges. Apart from that, the sheer number of social security cases may justify a rule for those cases only.

The reasons for considering a rule for social security review cases were questioned from a different angle. SSA laments that the vagaries of local practices consume unnecessary amounts of staff

lawyer time. Across an annual volume of 17,000 to 18,000 cases a significant number of lawyer-years would be freed by saving an hour or two per case. That sounds good. But it raises the question whether national rules should be adopted for the purpose of alleviating problems caused by administrative staffing problems resulting from inadequate budgets.

A still different consideration was recalled. Both Committee and Subcommittee have doubted that improved district-court procedure will have any impact on the high rate of remands for better administrative consideration. The remand rate arises from problems endemic to limited administrative resources. The number of cases that an administrative law judge must consider in a year ranges from 400 to 500, and the judge is responsible for ensuring that the record in each case has been adequately developed for both the claimant and SSA. Modest savings in the resources expended in district-court review actions are not likely to have any measurable impact on the administrative process. SSA itself has not made this argument.

Discussion turned toward the prospect for framing a recommendation whether to move ahead in developing a proposal for publication.

The first comment "leaned against" going ahead. The potential benefits are outweighed by the costs. The proposal violates the transsubstantivity norm. And it will invite other demands for substance-specific rules.

Another participant suggested that the competing concerns and hopes require more deliberation. "There is no sign we will suddenly come together." The best approach may be to lay out the competing considerations for the full Committee in October.

This suggestion was met by asking whether a Subcommittee should be responsible for making a specific suggestion one way or the other, not a mere request for guidance.

Doubt was expressed about the need for a "yes" or "no" recommendation. The present draft is about as good as it can be made before publication. But the dilemma of adopting a substance-specific rule merits careful debate in the full Committee. The debate can be opened in October, and will be fully informed by the current draft. The outcome may be to overcome the fears of venturing down the substance-specific path, leaving the way open for a polished proposal for consideration at the meeting next April. Or it may be to conclude that the time has not come to establish a precedent for a rule so narrowly substance-specific, sparing the need for any further work. And it might be sufficient uncertainty to carry the question over to April, recognizing that the Subcommittee may not need to devote substantial effort to final refinements of the draft rule.

The Subcommittee agreed to present these questions for open debate in the full Committee.

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NOTES
SOCIAL SECURITY REVIEW SUBCOMMITTEE
Conference Call July 18, 2019

The Social Security Subcommittee met by conference call on Thursday, July 18, 2019. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Judge Jennifer Boal; Joshua Gardner, Esq.; and Laura A. Briggs, Clerk Liaison. Rebecca A. Womeldorf, Esq. and Julie Wilson, Esq., represented the Rules Committee Support Office. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi began the discussion by identifying two tasks. The Subcommittee must soon determine whether to recommend that work on a social security review rule continue toward publishing a proposed rule for comment. The long succession of continually streamlined rule drafts, framed in consultation with many advisers, has proceeded about as far as makes sense.

Discussion at the June 20 meeting found substantial opposition to any new rule by those who represented the National Organization of Social Security Claimants Representatives. This position seemed to vary from the more receptive positions suggested by individual NOSSCR representatives in earlier discussions. The June 20 position seemed to rest on familiarity with the many different practices adopted in different districts and with a preference for presenting review cases in a way that is familiar, and thus agreeable, to each particular judge. In some part, the present reactions may be influenced by concern that the proposal for a uniform national procedure comes from the Administrative Conference and the Social Security Administration. A proposal focused on a specific subject, as compared to the transsubstantive standard, and advanced by the party that appears as defendant in all these cases, may seem suspect.

Earlier discussions have regularly expressed caution about making a rule for a specific substantive area. This fundamental discussion is better deferred until a full Subcommittee meeting can be convened.

The other, and immediate, task is to work through the most recent draft rule text and Committee Note to address the questions identified by marked-up text and footnotes.

Turning to rule text, the first suggestion was that the paragraph that introduces proposed subdivisions (a) through (d) will seem more complete if a few words, modeled in Rule 34(b)(2)(E), are added: "except that in an action that presents only an individual claim these procedures apply:" This revision was accepted.

Other words were deleted from the introductory paragraph as unnecessary: "for review on the ~~administrative~~ record," and "an individual claim ~~for benefits~~."

The first lines of subdivision (a) were revised by deleting "the complaint ~~in an action governed by this rule~~ * * *." The question whether to refer specifically to Rule 8(a) was resolved by deciding to keep (a). Subdivision (a) is the part of Rule 8 that addresses the complaint, draft Rule 71.2(c) refers to specific subdivisions (b) and (c) of Rule 8, and it is better to avoid any possible confusion about the role of Rule 8(d) and (e).

Rule 71.2(a)(2) was accepted as set out in a form revised to track advice from SSA on what they need to identify the record. They seem to want the last four digits of the social security number of the person for whom benefits are claimed and also, if it is a different person, the person on whose wage record benefits are claimed. Supplemental security income claims do not require that there be a wage record, but disability claims do.

Rule 71.2(a)(3) was approved in a form that deletes reference to the titles of the Social Security Act under which the claims are brought, substituting "the type of benefits claimed." The change was made to avoid confusing plaintiffs who may not readily understand the distinction between different titles. But it seems likely that most plaintiffs will automatically plead the title underlying the claim.

Earlier paragraphs 71.2(a)(4), (5), and (6) were deleted in keeping with earlier discussions. There is no need to require that the complaint name the Commissioner of Social Security as defendant — stating that the action is brought under § 405(g), and identifying the final decision to be reviewed, suffices. Nor is anything accomplished by stating that the decision is not supported by substantial evidence or must be reversed for errors of law, or by a statement of the relief requested. Those points can be made in the plaintiff's brief. It is better to pare the complaint as close to a notice of appeal as can be when the plaintiff does not wish to plead more.

Rule 71.2(b)'s provision for service by directing a notice of electronic filing to the Commissioner and the local United States Attorney has found ready acceptance on all sides. The language chosen seems awkward, calling for notice to the "office within the * * * Office of General Counsel." But this is the language suggested by SSA, and the awkwardness stems only from the difference between the "Office of General Counsel" as an institutional entity and "office" as a geographically distinct subdivision. The language will remain.

Rule 71.2(c)(2)(B) was an attempt to capture in rule text the three different types of remand reflected in the fourth and sixth sentences of § 405(g). Discussion at the June 20 meeting persuaded the Subcommittee that there is no need to duplicate the statute in

rule text, while there may be some potential confusion in attempting to fit the rule text to received practices. It will be deleted. Superseded cross-references to it in what will become (c)(2)(B) and in (d)(1) will be deleted.

Newly redesignated Rule 71.2(c)(2)(B) incorporates Rule 12(a)(4) to set the time to answer after a motion under Rule 12. It was accompanied by a footnote that illustrated possible rule text if the Subcommittee should decide to accept SSA's request that it be allowed 30 days after notice of the court's action on the motion. The Subcommittee concluded to drop the 30-day alternative.

Discussion of Rule 71.2(d)(1) brought back the recurring question whether the plaintiff should be required to file a motion for the relief requested in addition to filing a brief. The competing concerns were recognized without need for further development. It was decided to retain the motion in rule text, adding a footnote to illustrate different drafting if the motion requirement is deleted: "must serve on the Commissioner a brief for the requested relief within 30 days * * *."

The Subcommittee also decided to delete as unnecessary words drawn from Appellate Rule 28(a)(8)(A): "citations to the ~~parts of the~~ record ~~on which the plaintiff relies~~."

Discussion turned to the draft Committee Note.

References in the first and second paragraph to an individual "worker" were revised to delete "worker." Some claims do not require that there have been a worker or wage record.

The final sentence in the first paragraph was deleted. It was added to quell fears that a remand for further administrative proceedings might somehow change the character of the action as one for review on the administrative record. That fear seems ephemeral.

The second paragraph was shortened by deleting the suggestion that it may at times be appropriate to invoke Rule 42(a) to consolidate separate actions, each of which is brought by a single plaintiff for review on a single administrative record. There is no need for this redundant reminder of Rule 42(a).

The fourth paragraph was revised by deleting from the description of actions that plead a claim for review under § 405(g) but join more than one plaintiff or otherwise complicate matters the observation that there are "apparently very few" such actions. It was further revised by deleting the suggestion that even though Rule 71.2 does not apply to these more complex actions, Rule 71.2(a) and (c) might properly be invoked by analogy for the parts of the claim and answer that involve review of an individual claim on a single administrative record. Practice pointers of this sort

should be used sparingly.

Parts of the draft Committee Note that invoked paragraphs 71.2(a)(4), (5), and (6) were deleted to reflect deletion of those paragraphs.

The suggestion that failure to plead all the matters described in Rule 71.2(a) should be cured by amendment, not dismissal, was revised to: "cured by leave to amend." There should not be any room to argue that the court is responsible for amending the complaint. This change also supports deleting the suggestion that the court may dismiss for repeated failure to obey an order to amend. The plaintiff’s failure to respond appropriately on leave to amend justifies dismissal without resort to Rule 41(b).

Other modest changes were made in the Committee Note to reflect the changes in rule text noted above.

NOTES
Social Security Review Subcommittee
June 20,2019 Meeting with Social Security Review Parties

On June 20, 2019, members of the Social Security Review Subcommittee convened a meeting at the United States Courthouse in Washington, D.C., with representatives of parties to Social Security Review litigation and representatives of the Administrative Conference of the United States.

A list of those who attended is attached.

Judge Bates, chair of the Advisory Committee, welcomed participants to the meeting, with special thanks to those who had traveled to Washington to attend.

Judge Lioi, chair of the Subcommittee, repeated the welcome and thanks. Many of those at the meeting have already provided valuable assistance to the Subcommittee as it has worked through several and continually evolving drafts of a possible Civil Rule to govern parts of review actions brought under 42 U.S.C. § 405(g). Every aspect of the current draft Rule 71.2 has been improved by this advice.

The central question at this meeting is whether this beginning can be developed further to become a rule that would advance the goals of Civil Rule 1: "the just, speedy, and inexpensive determination" of § 405(g) review actions.

The current draft recognizes that all of the Civil Rules apply to § 405(g) actions as civil actions, but provides special elaborations for some aspects of actions that involve only review on the record of a final SSA order that resolves the claims of one individual. These aspects include initiating the action; e-service by the court, displacing Rule 4 service of the summons and complaint; the Commissioner’s answer and motions to remand; and presenting the case for decision on the merits by briefing.

This project was brought to the Judicial Conference by the Administrative Conference of the United States. The Administrative Conference rested its proposal on an elaborate and painstaking study undertaken by Professors Jonah Gelbach and David Marcus. Professor Marcus came to this meeting to provide an overview of the study.

Professor Marcus described the study and its recommendations in helpful detail. His notes for his presentation are attached. A succinct summary might be that "there is no good reason for the mess that is current district court procedure." If local rules are in some ways procedural anomalies, the proliferation of local rules, general orders, and judge-specific orders that establish a dizzying array of disparate procedures for § 405(g) review is a leading example. National uniformity is desirable. Draft Rule 71.2 "goes a long way."

The first question put to Professor Marcus was whether it is important to think of § 405(g) cases as more peculiarly "appeals" than the general range of other administrative review actions brought in the district courts, particularly actions under the Administrative Procedure Act. Professor Marcus reframed the question to ask why not adopt a general Civil Rule for review of administrative agencies. Some administrative review proceedings go directly to the courts of appeals under specific statutory provisions. Immigration matters occupy a big part of federal appellate dockets. But for the actions that are confided to the district courts, the range of agencies subject to review is wide, the nature of the disputes they engender is equally diverse, and review of any one agency is likely to be relatively infrequent. Framing a general review rule likely would be difficult.

Judge Bates followed up by asking whether district courts should have less, or rather more, involvement in reviewing social security orders? Professor Marcus responded that a judge can be intensely involved under Rule 71.2. In response to a related question, Professor Marcus agreed that one reason for a special social security rule is the sheer volume of cases, running around 18,000 a year. No district is immune. And the bar that litigates these cases is relatively large. Many districts believe that special procedures are warranted, as reflected in local rules and orders.

Professor Alan Morrison said that he does not litigate social-security benefit cases, apart from participating in an occasional appeal from a district court, but that he was a member of the committee of the Administrative Conference that studied these questions. APA cases are different than social security cases in the district courts. Some APA cases are limited to review on the record, but others involve some discovery. All social security cases are decided by an administrative law judge, with initial review within the appeals council. If a district judge believes that additional evidence should be considered, the case is remanded for the administrative law judge to take the evidence and decide on it. A district judge never makes an independent decision based on the evidence, but is limited to reviewing for substantial evidence. Litigation in the district courts is generally handled by social security administration lawyers who have special experience, although in some districts they may be designated as special assistant United States attorneys. Some 18,000 of these cases come to the district courts every year. They really are like appeals. But even though appeals, there are good reasons for not giving initial review jurisdiction to the courts of appeals. There are too many of them. And they do not require initial review by a panel of three judges.

Professor Morrison continued by suggesting that local rules

and orders make it more difficult for lawyers. A uniform rule will be good. And there should be some "strong admonitions" against local departures, even if a way cannot be found to preempt local rules.

The Administrative Conference recommendation was a significant action by the Conference. But it was supported broadly in the committee, where no one thought the present system is good. There may be some room for concern about the impact of a national rule on pro se litigants; it will be important to avoid rule technicalities that will cause forfeitures. Professor Marcus added that there are not many pro se § 405(g) cases — the number likely is around ten percent.

A quick overview of some of the prominent questions raised by draft Rule 71.2 followed.

The first important challenge is to find a way to define the scope of the special provisions. Draft Rule 71.2 draws from Rule 71.1 for the broad proposition that the general Civil Rules govern § 405(g) actions, but goes on to provide four subdivisions of special provisions that apply "in an action that presents only an individual claim for benefits." Is there a better way to describe the vast majority of these actions that the rule is intended to cover, excluding a small set of more complex actions that are excluded from the four subdivisions?

The provisions for the complaint are designed to be quite simple. The Subcommittee has already thought that it may not be necessary to provide rote statements in the complaint that the Commissioner's decision is not supported by evidence or is contrary to law, nor to require a statement of the relief requested. Beyond that, the draft rule allows a plaintiff to plead more than the draft provides will satisfy Rule 8(a) if the plaintiff wishes to give notice of more specific issues. At the same time, the draft rule provides that Rule 8(b) does not apply — the Commissioner may confine the answer to the administrative record and any affirmative defenses under Rule 8(c). This structure may seem eccentric as compared to the usual rules that require a responsive pleading to respond to every allegation. But it may be useful in this setting. That is another question worthy of discussion.

The provisions for timing the answer and motions include a provision for remands that was drafted in an attempt to mirror the three distinct provisions for remands in sentence four and sentence six of § 405(g). This is no more than a reminder to lawyers of this structure, including the provision that seems to require that the Commissioner move to remand "for further action by the Commissioner" before filing an answer. At the same time, it suggests that other motions to remand may be made at any time, and that such motions may achieve the goal of supporting further action

by the Commissioner. The Social Security Administration has reacted to this draft by suggesting that it should be deleted as superfluous.

Finally, the provision that directs the plaintiff to present the case for decision on the merits by brief includes an additional requirement that the plaintiff serve a motion for the requested relief within the time allowed for filing a brief. The motion requirement has met a mixed reaction in the Subcommittee. Some members have thought a motion is superfluous — the brief will clearly specify the relief requested. Others think the motion serves a useful role in tracking the case through the district court and making sure the court keeps track of progress.

Matthew Wiener, acting Executive Director of the Administrative Conference, began by supporting Professor Marcus's "compelling" presentation of the need to adopt a uniform national rule. The Conference recommendation "says it all." He described the Conference as an independent federal executive agency, with many voting members and a somewhat smaller number of nonvoting members that include members of the federal judiciary. The Committee on Judicial Review carefully debated the Gelbach-Marcus recommendation. The result was a consensus — likely unanimity — in the Committee, and again in the Conference Assembly. The Conference addressed only judicial review, not the parts of the study that address procedures within the Social Security Administration. Compared to proceedings to review administrative action that are lodged by statute in the courts of appeals, § 405(g) brings these actions to the district courts. Many other administrative review proceedings that come to the district courts are in fact like appeals, but they have not generated the great variety of local rules and orders that have emerged for § 405(g) cases. Still, the Conference will be looking at more than 800 other statutes for judicial review.

In response to a question Director Wiener noted that the Conference recommendation to the Judicial Conference included some outlines of general rule provisions that made the process look like appellate review, but did not attempt to recommend detailed provisions. There was some debate whether to send the recommendation to Congress for drafting new procedure rules, but the decision to send it to the Judicial Conference reflects recognition that Judicial Conference procedures are better adapted to drafting rules of procedure. Professor Morrison added that "all we thought was that it should be an appeal-like process. Rule 71.2 fits that bill."

Another question observed that the Appellate Rules are pretty specific on such matters as the length and form of briefs. The Social Security Administration has proposed similar provisions for the Civil Rules. Did the Conference have a position on this? The

answer was that the Conference contemplated deadlines and page limits "as appropriate," but took no particular position on these matters. Professor Morrison added that Conference participants did agree that "the plaintiff should go first," rejecting some local rules that require the defendant to go first, a procedure that makes no sense. Director Wiener agreed that having the plaintiff go first reflects the appeal model. Further discussion noted that local rules proliferate on many subjects. If the national rule does not address page limits, local rules surely will. But the Conference qualification in addressing such page limits as may be "appropriate" does not address that.

The "plaintiff goes first" observation prompted some initial discussion. A plaintiffs' attorney suggested that a bright line may not make sense. The Commissioner could go first by making a Rule 12(b)(6) motion to dismiss for failure to state a claim. The plaintiff can respond by pointing to the record.

Another suggestion about who goes first was provided later by a magistrate judge's observation that when a pro se plaintiff does not file a brief, the judge must review the record to imagine the arguments that the plaintiff might make. That is hard to do. It is important to have the plaintiff develop the arguments that the Commissioner can respond to, and that the court can evaluate as made. Another judge agreed that in most cases, it is useful to read the brief rather than the motion it supports, because the brief is what really frames the issues.

The same attorney added that page limits should be approached with care. Some cases generate voluminous records, followed by a remand that supplements the record; in the old days before electronic records, he had one case in which he literally needed a Red Flyer wagon to wheel the administrative record into court. Stingy page limits could impede proper presentation of the case. Professor Marcus noted that he and Professor Gelbach had envisioned something closer to the Appellate Rules than draft Rule 71.2 is, but that in retrospect "I appreciate the difficulty of fitting appellate rules into the Civil Rules." At any rate, their recommendations leave open the question of page limits for briefs.

The role of magistrate judges was the next general subject for discussion. Judge Lioi pointed out that a magistrate judge may be assigned to make a report and recommendation for decision by a district judge, may become responsible for entering judgment by the parties' consent, or may be assigned to a case "from the wheel" subject to later consent by the parties.

Judge Boal reported that there is a wide range in practices in bringing magistrate judges into § 405(g) review actions. In her district, magistrate judges are on the wheel; parties generally consent. The District of Massachusetts does not have a local rule

for these cases, but there is a procedure order that most judges use. This procedure requires the Commissioner to file an answer in addition to the administrative record. The parties must file both a motion and a memorandum.

Judge Peebles noted that he has been recalled to duty for a term of three years, to be devoted to § 405(g) cases. The Northern District of New York had 400 of these cases last year; the Western district had 1,400. This is 20% of the Northern District docket. "I inherited 80 cases last year." Most stay with the magistrate judge by consent. That is good because the report and recommendation process is inefficient. The local order encourages consent, beginning with the general consent of the United States to magistrate judge jurisdiction in all § 405(g) cases, subject to the right to withdraw consent in a particular case. This procedure has worked well. An answer is not required. The United States Attorney's Office and the regional Social Security office have consented to CM/ECF notice as a substitute for serving process. The underlying mode of presenting the case for decision is not really any of the familiar motions under Rules 12(b)(6), 12(c), or 56, but the cases are effectively treated as submitted for decision on cross-motions for judgment on the pleadings, treating the administrative record as the answer. The local summary-judgment procedure calls for a statement of undisputed facts that does not fit § 405(g) cases. "I look to the briefs to find the issues." And, although it is not required, many parties adopt a model "bare bones" complaint the district provides.

Judge Peebles holds oral arguments by telephone in every § 405(g) case. The lawyers appreciate this opportunity to be heard, and it enables him to get answers to the questions that arise on reading the briefs. He delivers his decision on the court record, and it is attached to the case record. This process is more efficient than the report and recommendation procedure — before the local procedure for encouraging consent to decision by the magistrate judge, he used to tell the lawyers that he could render a prompt and straightforward decision after oral arguments, and speed them on the way to the court of appeals if anyone wanted to appeal. Because the court of appeals reviews the case de novo on the administrative record, what the district-court decides should not make any difference. But it takes more time to prepare a formal report and recommendation, and then to have review by the district judge.

General Counsel Agarwal provided comments for the Social Security Administration. They are pleased that the Subcommittee has devoted so much hard effort to this work. "We love the Northern District of New York order." The deliberate process of consulting all those who have stakes in these questions is good.

The Administration strongly endorses the project. "It will

save us thousands of hours of lawyer time. Even slight improvements in efficiency add up over thousands of cases every year." Uniform rules will help us. And efficiencies that save time on other matters will free more time to prepare better briefs. Plaintiffs also will be helped, in part because attorneys can more readily practice across district lines, affording a broader range of choice in selecting counsel. A uniform national rule also will make the procedure more accessible to pro se plaintiffs, who may not even know about local rules.

The Administration also fully agrees that any national rule should be neutral, seeking benefits for plaintiffs equally with the Administration. The current draft seems to achieve this goal. Nor is there reason to fear that adopting a subject-specific rule for § 405(g) cases will lead to a proliferation of other Civil Rules for other substantive areas. "The 18,000-case phenomenon has no parallel. There is no slippery slope here."

Professor Marcus noted that some district judges insist that an Assistant United States Attorney be in the courtroom, and sign all pleadings. He asked whether some courts require that a plaintiff's attorney be locally admitted? A response for the Administration was that in routine cases, the Administration attorney handles the case; coordinating with an Assistant United States Attorney is wasteful. A second Administration response was that in one local district — and likely several others — the Administration attorney is appointed as a special assistant United States attorney. And the Department of Justice experience is that there is a wide divergence in the degree of involvement by assistant Untied States attorneys. It was agreed on all sides that this is not a topic that should be addressed by a national rule.

Further discussion began with a plaintiffs' lawyer who is admitted to practice in five districts. She works within local rules and, although she does not associate with local counsel, encounters no particular obstacles in the local rules.

Another plaintiff's lawyer who also practices in five districts suggested that differences in local practices present nothing more than an internal management question for his firm. He assigns a lawyer who is admitted in the district, or who knows its local practices. "Different districts have different needs, and local practices fit them." Yes, it makes for added work, and "more work *is* more work. But I'm responsible for doing what the magistrate judge wants." If it's a separate statement of facts, OK. If it is a statement of facts to be included in a brief that must be fit into a 15-page limit, OK. It is important to the client that the lawyer fit into local preferences. This observation was supplemented by another lawyer's observation that different districts have different volumes of cases — what works in one district may not work in another.

The meeting then turned to initial presentations by organizations of plaintiffs' attorneys.

The American Association for Justice has a social security section. The AAJ members at this meeting are section members. "We align generally on this rule."

The biggest concern AAJ has goes to the way of fitting a substance-specific rule into a set of generally transsubstantive rules. That is not to say that AAJ is opposed to draft Rule 71.2, but only about starting out in this general direction. The ongoing MDL Subcommittee inquiries are a sign of another possible rule targeted to a specific area. There is a direct risk that rules might be proposed for reviewing other administrative agency actions — "other agencies might want one too." "Can anyone ask for a rule for a specific substantive area"?

More pointedly, the provision for including the last four digits of the relevant social security number in the complaint is a problem. This is not good practice. There is no reason to create opportunities for still more work for AAJ members who litigate data breach and privacy cases.

The National Organization of Social Security Representatives urged that "specialized rules are not necessary." Many agencies take actions that are subject to closed-record review in the district courts. And there are § 405(g) cases that have discovery and go beyond review on a closed administrative record. Local rules serve the needs of local judges. "Our members find it manageable." Uniform rules may impede access to the courts. A model local rule would be a better approach. (Later discussion noted that the Department of Justice has prepared a model local rule that has been adopted in some districts.)

This introduction stimulated a side question asking when is there a reason for discovery in a § 405(g) case? One plaintiff's lawyer offered examples of two situations he has encountered. One situation involves disputes about evidence that was excluded from the administrative record. Another involves evidence considered by the appeals council even though it was not in the record compiled by the administrative law judge. Another plaintiff's lawyer observed that other situations as well may justify discovery in a § 405(g) action. And an analogy was offered to the occasional need to look outside the record when a court of appeals conducts the initial review of administrative action.

Open discussion of the Rule 71.2 draft followed.

Judge Lioi began by noting that there seems to be universal agreement that Rule 71.2(b)'s provision for substituting CM/ECF notice from the court to the Commissioner and United States

Attorney for Rule 4 service is good. All indeed agreed.

And there seems to be agreement on much of the other provisions. Perhaps the remaining differences go more to issues of detail than to the general direction. "We want a very neutral rule that will help all parties."

But even if the detailed provisions make general sense, and can be improved to be even more sensible, that leaves the question whether the prospect of achieving important advantages from national uniformity outweighs to risks of disrupting the possible advantages local courts achieve from distinctively local practices.

That opening led another judge to ask whether there are other areas where practitioners will ask for something like Rule 71.2 for their fields of practice? That has happened, but not often. Fair arguments can be made that parallel the arguments for a special rule for § 405(g) cases, apart from differences in the sheer volume of cases. A response was that veterans' benefit cases may seem to be parallel to social security cases, including in volume, but in fact they are very different and are handled in a different system of courts.

A Social Security Administration lawyer asked whether the NOSSCR view that a special rule is not necessary is supplemented by a concern that a rule might do harm? The answer was that in some areas, a uniform national rule might make litigation more difficult.

Another lawyer asked whether NOSSCR is comfortable with a rule that has the plaintiff "go first." A NOSSCR participant responded that the Rule 71.2 draft "silences special, unique cases. Sometimes, at least, a magistrate judge determines that SSA should go first. We should not discourage that." One judge responded that perhaps a local rule could address and accommodate such special situations. Another judge observed that the expectation for all cases, and all appeals, is that the movant — in the district court, the plaintiff — goes first. Why should it be different here? A lawyer noted that on summary judgment, the defendant often goes first. A different lawyer suggested that if a plaintiff argues that evidence was destroyed, and discovery is needed, it may be that in some sense the defendant should go first in showing whether, and if anything, what was destroyed.

An SSA representative asked what should SSA do if it is directed to "go first"? What can it say beyond a bland observation that the final decision is indeed supported by substantial evidence on the record? Sequential briefing, with the plaintiff first, should be a strong presumption for § 405(g) cases.

Further discussion recognized that there will be circumstances

in which SSA is the first to ask the court for action. The most obvious illustrations are motions that point to the lack of a final decision, or expiration of the time allowed to file the action, or choice of an improper court. SSA may even "go first" if it seeks judgment on the basis of an affirmative defense, such as res judicata, rather than evidentiary support in the record or errors of law. It is a mistake to fall into the trap of generalizing about who "goes first." The question presented by draft Rule 71.2(d) is whether the plaintiff should begin presentation of the case on the merits by a brief that shows the ways in which the plaintiff claims a lack of substantial evidence or an error of law.

A Subcommittee member asked whether there are any local rules that require the defendant to be the first to address the merits of the action for review. A plaintiff's attorney responded that when there is a long and complicated record a magistrate judge may want cross-motions for summary judgment, filed simultaneously.

Discussion then turned to a general observation for NOSSCR that the broad question is not so much whether draft Rule 71.2 cures problems as "do we need it"? We do not. The general Civil Rules give us what we need. A judge responded that the very proliferation of local rules suggests that the Civil Rules do not. (A later observation was that the Middle District of Florida adopted a local rule, lamenting that the Civil Rules do not provide guidance for these cases. The Northern District of Ohio local rule was adopted for similar reasons.) But the response for NOSSCR was to ask what is the best remedy when different judges have different needs? So, a Subcommittee member observed, a rule that works in a court that has 400 cases a year may not work in a court that has 1,400 cases a year. Another participant suggested that local rules are good if they help magistrate judges keep on top of their cases.

An SSA representative then noted that 9 districts require joint statements of fact. Last year SSA had to participate in framing something like 900 of them. Although it tries to talk courts out of this process, "it's slow going." Plaintiffs too are unhappy with this. It requires great investments of time by both the plaintiff's attorney and the SSA attorney, to little benefit. A NOSSCR representative agreed that plaintiffs also dislike joint statements of fact, "but we should not override that if it helps the judge." A judge asked whether plaintiffs fear that courts will be slower to decide cases if deprived of joint statements of fact. A NOSSCR participant said that they do have this fear. The joint statement helps the judge to avoid the need to synthesize the facts.

A judge asked how do joint statements become part of substantial evidence review? A plaintiff's attorney responded that the joint statement is a part of advocacy. So without it, imagine a doctor's note that says the plaintiff says she is doing well, but

also says that the plaintiff reports that she does not have the strength to get out of a chair more than twice a day. Without the joint statement, the plaintiff will cite to the part that says she cannot get out of a chair, while SSA will point to the part that reports she says she is doing well. Another NOSSCR representative repeated the point: Why abolish a practice that some judges find helpful?

A magistrate judge responded that it was hard to understand why a joint statement is helpful. "This is not like a summary-judgment motion. A joint statement makes harder work."

A plaintiff's lawyer said that in St. Louis magistrate judges seek a statement of material facts, so "we know what fact we're arguing about." Not all magistrate judges in the district do this; two "still use the old system. We can handle such differences in a single district."

A judge observed that the Committee must look for the best uniform rule, even though it may not please every magistrate judge.

In later discussion, two participants urged strongly that the Committee Note should say, perhaps more emphatically than the present draft, that a local practice requiring a joint statement of facts is inconsistent Rule 71.2's briefing procedure.

Specific Draft Provisions

Discussion turned to detailed questions about particular provisions of draft Rule 71.2.

The draft rule introduction, drawing from Rule 71.1, begins by stating that "these rules apply." Then it introduces an exception designed to capture the dominant run of § 405(g) cases that deserve special treatment. The expectation is that the special provisions for pleading, electronic service on SSA and the United States Attorney, motions, and presenting the case for decision by the briefs, will apply in the vast majority of cases. Resort to the rest of the Civil Rules will be a matter of routine for such matters as captions, docketing, entry of judgment, and the like. Joinder of parties and claims, class actions, discovery, summary judgment, and other features will seldom be involved. The draft seeks to identify the cases that qualify for the exceptions to the general rules as "an action that presents only an individual claim [for benefits]."

The first question is how far § 405(g) itself extends. It reaches beyond the disability claims that feature prominently in discussions to include Supplemental Security Income cases, retirement benefit disputes, and even some issues under Medicare Part D. A judge noted that even some cases brought by people who

provide services are brought under § 405(g). Beyond that, the draft Committee Note describes another set of other statutes that tie into § 405(g) to establish judicial review. The question is whether, against this array of claims, there is a risk that including "for benefits" in the description of Rule 71.2 cases will exclude some cases that ought to be included. Brief discussion concluded that "for benefits" should be deleted.

The draft rule introduction also refers to actions for review on "the administrative record." SSA has been concerned that describing the record as the "administrative" record may cause confusion when, for example, a district court remands for further proceedings, new evidence is taken, and a supplemental record is generated. Will reference to the "administrative" record somehow narrow review on return to the district court, so that only the original or supplemental record is considered? But if common-sense interpretation will avoid that dysfunctional result, may there be problems in other directions? Evidence may be excluded by the administrative judge because of the "5-day rule" that requires notice before the hearing. Or post-hearing "new evidence" may be an issue. A consensus emerged that "for benefits" should be deleted.

Discussion turned to examples of § 405(g) actions that will not come within the exceptions. Familiar examples have been claims of ex parte contacts or bias. Evidence of such matters is not likely to appear in the record, and discovery may well be needed. A participant suggested that the Committee Note should include these illustrations.

Draft Rule 71.2(a)(3) provoked inconclusive discussion. It directs that the complaint should identify the "titles of the Social Security Act under which the claims are brought." Will "titles" confuse some litigants, particularly pro se plaintiffs? Why is this needed? One possible use is to simplify actions in which more than one title was invoked in the SSA proceedings, but one or more are abandoned on appeal. But the plaintiff’s brief should provide all the guidance needed by SSA in framing its own brief, and by the court. An SSA participant, however, said that identifying the "titles" in the complaint helps SSA to characterize cases for internal purposes. A possible alternative might be "nature of the benefits claimed." A further observation was that pro se litigants face so many obstacles that this additional hurdle may not be important; the draft Committee Note "handles it well."

The draft rule provision directing that the complaint include the last four digits of a social security number prompted two questions: the broad question is whether any part of the number should be included. The narrower question is whose number it should be.

The Subcommittee, after repeated discussions, decided that the

last four digits might as well be included. SSA has argued vigorously that it often needs this much of the number to make sure that it has properly identified the administrative proceeding that underlies the action and can begin the work required to assemble the record. Assembling the record is a laborious process. This argument has been met by wondering how often the plaintiff's name and identification of the Commissioner's final decision provide inadequate guidance. Several practitioners have said that when there is some uncertainty, SSA need only call the plaintiff's lawyer. "We exchange social security numbers by telephone." And if it is a pro se plaintiff, e-filing is not likely to be permitted and the complaint must be mailed, opening another opportunity for appropriation of the number. The Subcommittee, however, tentatively concluded that because the full social security number permeates the administrative record that is filed with the court, including the last four digits in the complaint raises no more than a negligible additional risk. If the last four digits are at times useful to SSA, it is good to facilitate one small efficiency in the process.

A twist on this question was suggested by looking to the order for social security actions in the Northern District of New York. The order directs the plaintiff to the court's web site for a "social security identification form." The form includes the plaintiff's full name and complete social security number; if the application for benefits was filed on another person's wage record, that person's complete social security number must be provided. The plaintiff must file the form with the complaint. The form is "lodged in CM/ECF as a restricted document" and sent to SSA and the United States Attorney. When the record is filed, the form is removed from the docket. This is an alternative to including any part of the number in the complaint. Is it something that might do as an alternative?

The question of whose last four digits should be provided was opened without real closure. A participant offered an example: suppose a foster parent brings a claim for benefits to a foster child, based on the wage record of, for example, a birth parent? An SSA representative agreed that SSA does not need the number of the foster parent. What is needed is the number of the person who will receive benefits if the claim is allowed.

Draft Rule 71.2 directs that the complaint name the Commissioner of Social Security as defendant. Brief discussion led to consensus that this element is unnecessary. 71.2(a)(4) should be deleted.

Draft Rule 71.2(a) includes paragraphs (5) and (6), set off by brackets to indicate uncertainty whether they belong in the rule. (5) directs that the complaint state that the final administrative decision is not supported by substantial evidence or must be

reversed for errors of law. (6) directs that the complaint state the relief requested. Brief discussion concluded that both (5) and (6) should be deleted. The arguments and requested relief will be set out in the plaintiff's brief, and that is time enough. The plaintiff, moreover, may not be able to frame evidence or even law arguments clearly until the record is compiled and filed.

Draft Rule 71.2(b) provides that the court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to SSA and the United States Attorney for the district. This provision has been universally approved by all who have seen it. The draft tentatively identifies the place for notice to SSA as the "appropriate regional office." SSA suggested that this be changed to "the appropriate office of the Social Security Administration's Office of the General Counsel." Every district court is within a single appropriate office for this purpose. The appropriate office is designated by provisions in C.F.R. and the Federal Register. Every district clerk will know automatically where to send the notice. The draft further provides that the plaintiff need not serve a summons and complaint under Rule 4. A participant asked whether pro se litigants will understand this provision. Responses were that it seems clear enough, and that clerk's offices generally assist pro se litigants by providing a sheet of general instructions and in dealing with problems as they arise.

Draft Rule 71.2(c)(1)(A) complements the provision of 71.2(a) that establishes a minimal floor that satisfies Rule 8(a) but leaves the plaintiff free to plead more than the minimum in the complaint. (c)(1)(A) directs that the answer must include the administrative record and affirmative defenses under Rule 8(c). It further provides that Rule 8(b) does not apply. The combination of (a) and (c)(1)(A) means that the plaintiff may plead matters that SSA need not answer. That departs from the standard Rule 8 practice that requires a responsive pleading to address every allegation in the initial pleading. This seeming imbalance may be useful. A plaintiff who pleads more than the required minimum may educate the defendant in ways useful both for the plaintiff and the defendant. Learning the defendant's position by admissions and denials, even general denials, would help to further focus the issues. But SSA maintains that scarce attorney staff resources would be wasted by requiring an attorney to work through the record once to answer, and again to prepare a brief on the merits. As noted earlier in the discussion, it takes time to prepare the record; there may not be much time to go through it for purposes of preparing an answer. Little would be gained by pleading a lack of sufficient knowledge or information, and that response appears unseemly when it is SSA that has the record.

Discussion of the role of Rule 8(b) responses began with a plaintiff's representative who said that it is important that SSA

respond to everything the plaintiff chooses to include in the complaint. This is the general pleading process, and it is good for § 405(g) cases as well as others. The general rules should apply; there is no need to change pleading rules just to make life easier for SSA. "The record is useful, but not sufficient. SSA can simplify by a general denial." But a government attorney responded that "Answers tend to be useless — deny, deny, deny." A different plaintiff's attorney responded that from time to time there is "something of a special issue" that makes it helpful to have a pleading response. If there are questions about timeliness, venue, who is the proper plaintiff, or the like, "I start talking with SSA counsel." A different plaintiffs' representative said that we do not see this problem. In response to a question, an SSA representative said that in districts that treat filing the administrative record as the answer, SSA does not plead anything beyond filing the record. But there may be special occasions for pleading more — for example, if the complaint advances an Appointments Clause challenge to the legitimacy of an administrative law judge. And it may be that, whether or not addressed in an answer, an SSA attorney looks at the case earlier when the complaint includes "extra allegations." That may, in turn, lead to an earlier remand. In response to a question whether a Rule 8(b) obligation to answer would prompt the SSA attorney to take an earlier look at the case, a plaintiff's lawyer said that "we put it in the complaint, and follow up with a call, so it does work like this in districts where the record is the answer."

Turning to draft Rule 71.2(c)(2)(A), setting the time for a motion under Rule 12 at 60 ways after notice is given, no participant had anything to say when this provision was first addressed. Later, however, SSA was asked whether it would be comfortable with fewer than 60 days. Why are government agencies generally given more time than other parties? Is it simply a matter of bureaucratic inertia? To be sure, SSA does not begin to compile the record if it plans to make a Rule 12(b) motion, but perhaps the grounds for such motions should be readily apparent in most cases? The question came back at the end of the meeting with an observation that 60 days may not be needed, given the speed of providing notice to SSA by a Notice of Electronic Filing. This time SSA observed that motion practice ties to building the administrative record to get the materials needed for the motion; a start is made on assembling the record, although it is not completed. And a judge suggested that perhaps this connects to providing the last four digits of the social security number: getting them may expedite the process of locating the record.

Draft Rule 71.2(c)(2)(B) provides for motions to remand that attempt to capture the three separate remand provisions in the fourth and sixth sentences of § 405(g). The first part of the sixth sentence provides that the Commissioner may move to remand for further action by the Commissioner "before the Commissioner files

the Commissioner's answer." Draft (c)(2)(B) rests on an interpretation of these provisions that would allow SSA to move to remand to hear new evidence or for rehearing after filing an answer. The question is whether there is any need for — or possibly some risk in — a rule that does no more than set out an interpretation of the statute. SSA has suggested that this provision is unnecessary and should be deleted. A plaintiff's lawyer agreed. There are separate remand provisions. A rule that recognizes a right of either party to move at any time to remand adds little for plaintiffs, who are not likely to file a motion after filing a brief. A judge observed that he had never seen a *motion* to remand. Remand is always accomplished by stipulation of the lawyers. A plaintiffs' representative said that plaintiffs want SSA to file the record with a motion to remand, so the plaintiff will know whether to stipulate to remand. But she added that when SSA cannot find the record, they cannot be required to file the record before moving to remand. A judge observed that this approach raises a problem in a district that treats the record as the answer: does that mean that a motion to remand should not be made until the record is filed, in apparent conflict with sentence six? The response was that if a new rule is to be written, it should be written to allow the plaintiff to inspect the record before responding to a motion to remand. Another plaintiff's lawyer said that a motion to remand comes when there is a problem.

The discussion ended in consensus that the provision for motions to remand should be deleted.

Draft Rule 71.2(c)(2)(C) invokes Rule 12(a)(4) to govern the time for SSA to file an answer after a court denies a motion under Rule 12 or to remand, or postpones disposition of the motion. The time is 14 days. SSA believes it should have 30 days. A plaintiff's representative asked why SSA should have more time than other government agencies, especially since most records are now electronic. SSA responded that it does not prepare a record when it moves to dismiss. It needs 30 days to prepare the record if the motion is denied or postponed. A different plaintiffs' attorney observed that by the time a § 405(g) action is filed, the claimant has been through years of administrative proceedings. Claimants "are in real need." A judge noted that this concern to keep court proceedings moving as promptly as possible after completion of lengthy SSA proceedings prompted the choice to adhere to Rule 12(a)(4). But a 14-day period is likely to provoke SSA motions for an extension of time; a 30-day period might at least reduce the frequency of these motions, and 16 additional days are not much in the life-cycle of an action. We need a rule that works. Another judge responded that it remains to be seen why SSA deserves more time than other agencies that have to compile often massive records and get only 14 days in this setting. SSA responded that the problem arises from the sheer volume of § 405(g) cases in relation to SSA staff resources. "We do not often see denials of Rule 12(b)

motions," so there is little reason to begin the work of preparing a record before the rare decisions that deny or defer the motion.

Draft Rule 71.2(d) sets the procedure for presenting a § 405(g) case for decision on the merits. The times for filing briefs have prompted repeated discussions, moving between 30 days for the plaintiff's brief, followed by 30 days for SSA's brief, and 14 days for an optional reply brief, to periods of 60, 60, and 21 days. The 30-day periods are favored by those who are anxious to move judicial review as promptly as possible after conclusion of drawn-out administrative proceedings. SSA wants 60 days to reflect the volume of cases, frequently lengthy administrative records, and staffing levels that require each SSA attorney to write 30 to 40 briefs a year. But the 14-day reply period is fine. A plaintiff's representative agreed that 60 days for the plaintiff, followed by 60 days for SSA, are fine, but argued for 21 days for the reply brief. SSA agreed that 21 days for the reply brief would do no harm. A judge added that giving more time to prepare the briefs would provide a benefit to judges in the form of better briefs. But another judge responded that there is a lot of pressure to move these cases along. Many courts set briefing schedules at less than 60 days. Why should a new national rule set it at 60?

Further discussion of briefing times suggested that, considering motions for extension of time, 60 day periods reflect what happens now. A lawyer added that more time to brief will indeed help courts by supporting better briefs. The judge replied that lawyers tend to procrastinate; a later deadline will not lead to more time spent on the brief, but only to starting the task later. But SSA replied that more time may give its lawyers more time for thorough analysis.

SSA added that perhaps the time question should be addressed by adding limits on brief length as SSA has long proposed. "If the plaintiff's brief is shorter, we can answer faster." A plaintiffs' representative answered that "page limits are a problem." If page limits were to be adopted, SSA should have fewer pages because it is easier to say that the administrative law judge got it right. But 60 days may generate better briefs. The briefs are more likely to be dispositive in these cases than in other cases. Another plaintiffs' lawyer observed that "it takes time to read a 1,500-page record." And another participant noted that in other civil actions, a plaintiff has had a long lead time to know the case and the core parts of the record before a briefing time limit is triggered. Here, the trigger is filing the answer, usually at the same time as the record. "This is different from what is possible in other cases. More time is defensible."

Another participant suggested that perhaps a compromise might be reached at 45 days. The General Order in the Northern District of New York sets the time for the plaintiff's brief at 45 days

after the record is filed, and 45 days for SSA to respond. That seems to work. Judge Peebles noted that requests to extend these times are made by plaintiffs and SSA with equal frequency. A plaintiffs' representative suggested that it would be unwise to adopt an approach that will open the way to more requests for extensions of time in other cases.

A final observation on this point was that 14 days sounds like adequate time to prepare a reply brief, but in the real world of multiple obligations on an attorney's time, 21 days is more workable. Commitments to other courts must be kept.

Draft Rule 71.2(d) presents a different question that has been much discussed. It directs that the plaintiff serve a motion for a the relief requested along with the brief. Is this a necessary step, given that the brief will include a request for relief?

A Judge asked what would the motion say? He also observed that some courts want a draft order to be filed with a motion.

Further discussion suggested that Rule 7 should work here, but without saying what work it should do. It also was noted that motions may implicate calculation of times to disposition. In the Northern District of Ohio, reporting requirements are triggered by filing the administrative record.

A judge offered a different perspective. In most cases, regardless of the subject, motions add nothing much, but occasionally they do. Dispensing with a motion here might be a step toward abandoning motions in other settings, which may not be a good idea. And "to get relief, you need a motion."

A different judge observed that "other motions serve a purpose. Not so here." The relief requested ordinarily is a remand for further proceedings, but may be entry of judgment for the plaintiff.

The position of AAJ is that generally a motion is not needed, but the plaintiff should be free to file a motion if desired. "A motion seems redundant." The procedure should be streamlined.

NOTES
SOCIAL SECURITY REVIEW SUBCOMMITTEE
Conference Call May 14, 2019

The Social Security Subcommittee met by conference call on Tuesday, May 14, 2019. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Judge Jennifer Boal; Laura A. Briggs, Clerk Liaison; Joshua Gardner, Esq.; Ariana J. Tadler, Esq.; and Professor A. Benjamin Spencer. Rebecca A. Womeldorf, Esq., represented the Rules Committee Support Office. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi opened the meeting by expressing thanks to Judge Bates for arranging space in the federal courthouse for the June 20 meeting in Washington. She noted that Judge Boal is arranging for magistrate judges to attend the meeting. Professor David Marcus, co-author of the study that led the Administrative Conference to recommend rulemaking, will be there. A representative of the Conference is expected to attend. In addition the SSA, AAJ, and NOSSCR will be represented. They will be asked to include lawyers who have experience practicing in more than one district..

This meeting was called to take one more look at the current Rule 71.2 draft before it is sent to the participants in the June 20 conference.

The first questions to be explored were raised by the remand provisions in draft Rule 71.2(d)(2)(B). They are modeled on the fourth and sixth sentences in 42 U.S.C. § 405(g). The attempt to reflect the statutory language leads to somewhat obscure distinctions. More importantly, some observers have hinted that actual practice does not conform to the statute. The most important example is what is often called the "voluntary remand" provision in the first part of Sentence Six. The statute provides for remand on motion by the commissioner "made for good cause shown before the Commissioner files the Commissioner's answer." It may be that in practice motions are made and granted after the Commissioner files an answer. That practice, however, may be accommodated by the other provisions in the draft rule that allow a motion at any time to remand to hear new evidence or for rehearing. The Subcommittee decided to retain the draft language, and to ask for discussion on June 20.

Scope: The next topic addressed the persisting difficulty of defining the extent to which the particular procedures established by Rule 71.2 supplant the regular rules. Draft Rule 71.2(a) began by looking to Rule 71.1(a) for a model — all of the Civil Rules apply "except as this rule provides otherwise." That model remains attractive, in part for uniformity between the two rules. But it has been questioned. One concern has been that many § 405(g) actions are brought by pro se plaintiffs or by lawyers who have little experience in the area. They might have difficulty in understanding the role of Rule 71.2 (b), (c), (d), and (e). Nor is

it apparent that the relationship between Rule 71.2 and the general rules should be entirely the same as the relationship between Rule 71.1 and the general rules. Rule 71.1 provides an extensive set of procedures that often are markedly different from the general rules. Rule 71.2 provides only a small set of procedures designed to establish simplified pleading, allow low-cost service of the complaint, adapt motion practice (including the frequent motions to remand to SSA), and for presenting the merits by briefs that reflect the appellate character of the review.

The Rule 71.2(a) draft that emerged from the most recent conference call provides that the civil rules govern, "except that this rule governs [applies in] an action in which the only claim is made by an individual." That language may be misleading. A literal reading might lead to arguments that only Rule 71.2 applies in an action in which the only claim is made by an individual. But it is clear that many provisions of the general rules should continue to apply.

Several alternatives were considered: "(1) except that this rule applies to the part of an action that presents an individual[’s] claim [for benefits]." Or "(2) except that in an action that presents only an individual claim [for benefits], this rule governs the matters addressed by subdivisions (b),(c), (d), and (e)." A third alternative substituted descriptions of what subdivisions (b), (c), (d), and (e) govern; it was barely discussed for reasons reflected in the discussion of the second alternative.

The second alternative providing that Rule 71.2 governs the matters addressed by subdivisions (b), (c), (d), and (e) was challenged on the ground that it forces unsophisticated litigants to follow the cross-references. And it seems clunky. A revision was suggested: "except that in an action that presents only an individual claim [for benefits], this rule governs the matters addressed by it." Or the active voice might be used: "governs the matters it addresses." These variations were questioned as seeming somehow empty.

Yet another alternative raised a question of style because it begins the rule with a block of text before enumerating the subdivisions:

> These rules govern an action under 42 U.S.C. § 405(g) for review on the administrative record of a final decision of the Commissioner of Social Security, except that in an action that presents only an individual claim [for benefits]:
>
> (a) the complaint must:
>
> (1) State that * * *;
>
> (b) The court must notify the Commissioner * * *;

(c) (1)(A) The answer * * *; and

(d)(1) The plaintiff must serve * * *.

This version won support as clear. It will be submitted to the Style Consultants for advice whether the structure that begins with text before enumerated subdivisions is acceptable. Rule 29 is structured on this model, so perhaps it will pass muster, aided by its direct clarity.

A decision on what model to submit to the June 20 participants will be made after hearing from the Style Consultants.

This discussion prompted a series of questions that have not been considered in earlier meetings.

The first question asked whether the rule text directing that this rule "governs" or "applies" excludes resort to Rule 16 to revise these rule provisions. There should be no problem as to the Rule 71.2 provisions that directly recognize authority to modify a particular requirement. Scheduling orders are routinely entered in these cases, commonly without a scheduling conference. Lengthy discussions of the time periods to be set for filing briefs have assumed that the court can alter the times, even though the rule text does not say so. The question is one of potential tension between the general provision that "these rules govern" and the specific direction, however expressed, that subdivisions (b), (c), (d), and (e) govern the complaint, service of the complaint, answer and motions, and presenting the case for decision on the briefs.

A similar question was asked about the provision that requires naming the plaintiff and the person on whose behalf — or on whose wage record — the plaintiff brings the action. It seems likely that a plaintiff claiming on behalf of someone else — for example a guardian — or a plaintiff seeking personal benefits on the wage record of another person will have been the party in the administrative proceedings. Simply naming the plaintiff in the complaint seems appropriate. But still, it might be argued that the plaintiff must plead the facts that make the plaintiff a real party in interest, for example as a party authorized by statute, see Rule 17(a)(1)(G). More directly, help may be found in the provision of Rule 9(a)(2): a pleading need not allege a party's authority to sue or be sued in a representative capacity. What, however, of the situation in which the claimant in the administrative proceeding dies in circumstances that do not lead to substitution of a representative, but a representative seeks review as a survival claim?

It may be that these questions will not trouble experienced practitioners. Or it may be that they can be resolved readily, particularly if the rule text provides that this rule "applies," rather than "governs." "Applies" does not have the implied

preemptive force that might be found in "governed." It can mean simply that these provisions apply, supplemented as needed by the rest of the Civil Rules. If participants in the June 20 meeting are comfortable with the scope provision, that will help.

This indeterminate initial discussion will be followed by further consideration of possible alternative drafting.

Identifying the "plaintiff": Continuing problems remain with draft Rule 71.2(b)(2): The complaint must "state the name, county of residence, and the last four digits of the social security number of the person on whose behalf — or on whose wage record — the plaintiff brings the action."

The problem arises from sensitivity about pleading even the last four digits of a social security number. Earlier discussions have gone back and forth on this requirement, but for the moment have accepted the representations of SSA that this information is required to ensure that SSA can accurately identify the administrative decision challenged by the action for review. "Taylor C. Smith, a resident of Calhoun County," is not enough. Concerns about identity theft are mollified by the appearance of the social security number at many places in the record filed with the court, and by the Rule 5.2(c)(2) limits on remote electronic access to the court record by nonparties. The purpose of pleading the four digits, however, is limited to identification of the record. There is no apparent need to have this identifying information for a plaintiff who is suing on behalf or on the wage record of someone else. The numbers that help identify the administrative proceeding should suffice.

The draft rule was questioned on the ground that it seems awkward when applied to the vast majority of actions in which an individual plaintiff seeks personal relief. To say that a plaintiff is suing on behalf of the plaintiff, not someone else, is unusual. But it was pointed out that a proposed alternative was itself ambiguous: "the last four digits of the social security number of the plaintiff or the person on whose behalf * * *" could be read to allow a plaintiff suing on behalf of someone else, or on someone else's wage record, to plead only the plaintiff's own four numbers. That would defeat the purpose of requiring the numbers, but common-sense reading cannot be assumed. Discussion continued with the observation that the initial and very long draft rule submitted by SSA required the last four digits both for the plaintiff and the person on whose behalf, etc. That can be clearly drafted, but seems too much.

Discussion returned to the question of the need to plead the grounds that establish a plaintiff's authority to sue in a representative capacity. Is it important to supersede Rule 9(a)(2)? If so, Rule 71.2 should be made explicit. If not, further drafting may not be needed. This is one of the questions that should be

addressed to SSA.

After this discussion, it was pointed out that rule 71.2(d)(2)(B) refers to a "later" time provided by Rule 71.2(d)(2)(C), while (C) refers to a "different" time. (B) should be made consistent with (C), most likely by changing "later" in (B) to "different."

June 20 Conference: Participants will be provided a revised draft of Rule 71.2 well in advance of the June 20 conference. They will be reminded of the history of this project, and asked to address the many questions identified in footnotes as well as other questions that arise from their experience. And they will be asked whether, considering the current draft and their discussion, it is desirable to carry this project toward preparing a draft rule for public comment.

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5. Multidistrict Litigation Subcommittee

Since the Advisory Committee's April meeting, the Multidistrict Litigation (MDL) Subcommittee has continued to explore and gather information about the issues it has been considering. It has held three conference calls — on May 13, 2019, July 1, 2019, and Sept. 12, 2019. Notes on these three calls are in this agenda book.

The Subcommittee has also continued its information-gathering efforts. Those efforts have included and will include attendance and participation by representatives of the Subcommittee at the following events:

Lawyers for Civil Justice membership meeting, Washington, D.C., May 3, 2019 — session with members of LCJ on issues pending before MDL Subcommittee.

Emory Law Institute for Complex Litigation and Mass Claims conference on MDL issues, Boston, MA, May 9-10, 2019.

American Association for Justice annual convention, San Diego, CA, July 27, 2019 — special session addressing issues under study by Subcommittee.

UC Berkeley Law program on Ethics in Litigation Funding, Berkeley, CA, Sept. 10, 2019.

Emory Law Institute for Complex Litigation and Mass Claims conference on interlocutory appeal in MDL proceedings, Washington, DC, Oct. 1, 2019.

ABA 25th Annual National Institute on Class Actions, Oct. 17-18, Nashville, TN. Subcommittee representatives are to be on a panel entitled "'Top of the Charts': Potential MDL Rule Changes and Their Effect on Your Practice."

As it has throughout the Subcommittee's work, the Judicial Panel on Multidistrict Litigation has been very supportive and helpful.

In addition, the Subcommittee has received an extensive research memorandum from the Rules Law Clerk on experience under 28 U.S.C. § 1292(b) in MDL proceedings, as well as some advice from Emery Lee of the FJC on data on such appellate review.

As before, this work is ongoing. The Subcommittee does not have a recommendation to the full Committee for action at this meeting. Originally, the Subcommittee's focus included a number of topics that have since been moved off the "front burner." Examples include adding specific references to "master complaints" in the rules; adopting a rule requiring that each plaintiff pay an individual filing fee; modifying Rule 20 to forbid joinder of multiple plaintiffs in situations where joinder

might now be authorized; adopting rules for the formation or funding of a plaintiffs' steering committee; expanding initial disclosure requirements in certain MDL proceedings; authorizing MDL transferee courts to compel attendance at trial by party witnesses located beyond the subpoena power; and adopting particularized pleading requirements for certain claims asserted in MDL proceedings. The problems the Subcommittee has been studying are challenging, and solutions sometimes seem somewhat elusive. It remains unclear whether rule changes would be helpful.

This report therefore updates the full Committee on the work of the Subcommittee since the April meeting and invites reactions from the members of the full Committee. Since the April full Committee meeting, the Subcommittee has focused on four topics — (1) early "vetting" of individual claims; (2) enhanced opportunities for interlocutory appellate review of certain rulings by the MDL transferee court; (3) providing some authority by rule for the MDL transferee judge to review proposed settlements; and (4) third-party litigation financing. The Subcommittee has concluded that the last of those topics, though important, does not present issues that are distinctive in MDL proceedings. Therefore, it recommends that this topic be retained on the full Committee's agenda although it does not contemplate making a recommendation for rule amendments on the subject.

Third-Party Litigation Financing

The full Committee's attention was first called to third-party litigation financing (TPLF) in 2014, when a proposal was made to add a disclosure requirement regarding such funding to Rule 26(a)(1). At that time, the Committee concluded that not enough was known about the operation of this sort of funding to justify serious consideration of a rule amendment about it.

When this Subcommittee was created after the full Committee's November 2017 meeting, TPLF was included on its agenda because it appeared that it might be of particular importance in some MDL litigation. Based on what the Subcommittee has since learned about TPLF, it seems clear that the topic is an important one.

Many reports say that the dollar volume of such funding is growing, and there are reports that litigation is regarded by some as an attractive investment opportunity. Press reports indicate that on occasion large sums are loaned. Some articles in the legal press even report on law firm announcements that they have funding to pursue certain types of claims. Major law firms have reportedly begun to pursue contingency work for plaintiffs as a way to bolster profits. And academic commentary has suggested that such funding may operate as a "back door" route around the general prohibition against lawyers sharing fees with non-lawyers.

The variety of situations in which litigation funding may occur is quite broad and may be growing. As a starting point, one may distinguish between "commercial" and "consumer" sorts of litigation funding. The former category may involve large sums of money and focus on such potentially lucrative claims as patent infringement. The latter category seems normally to involve smaller sums, and may take the form of direct loans to plaintiffs to cover litigation costs and living expenses as they await resolution of their personal injury claims. Yet another category might be "social activism" funding of litigation thought to pursue socially desirable goals. There probably are other arrangements (*e.g.*, loans or gifts from family members) that might be considered in some sense to constitute litigation funding.

The variety of possible legal responses to this evolving phenomenon is considerable. Focusing on the "consumer" category, regulators might wish to emphasize protections like disclosure requirements and limits on interest rates. Some states have adopted such requirements. Focusing on the "commercial" category, as suggested above, one might consider relaxing existing prohibitions on non-lawyer investment in law firms. In other countries (Australia and the U.K.), legislative initiatives have approved such non-lawyer investment in law firms subject to restrictions spelled out in the legislation. In this uncertain and evolving area, there seem to be many legal issues that may need to be resolved.

For purposes of this Subcommittee, however, the most salient point is that it has not heard that TPLF plays a substantial role in MDL proceedings. The plaintiff-side lawyers the Subcommittee has heard from say they do not employ TPLF in their litigation; indeed, when they become aware that their clients have been approached by "consumer" funders they say that they urge the clients not to accept the financing if they can avoid doing so.

Under these circumstances, the Subcommittee has concluded that rule amendments keyed to MDL litigation would not be justified. Moreover, it may be that the better course given the evolving nature of this complex area is to allow the issues to develop further in the courts before rulemaking is undertaken. At the same time, the Subcommittee appreciates that the growing importance of TPLF more generally justifies retaining the topic on the full Committee's agenda. Given the growth and evolution of the field even since the Subcommittee was formed two years ago, it seems reasonable to expect that there will be further growth and evolution. Whether the legal issues involved should be regarded as "procedural" may be debated, but until it becomes clearer what those issues are that remains unknown.

Early Vetting, PFS and DFS Requirements, and a "Census" of Claims

This topic responds to what might be called the "Field of Dreams" problem – sometimes JPML centralization of litigation is followed by the filing of a large number of new claims. "If you build it, they will come." It appears to the Subcommittee that there has been a significant shift in the positions of attorneys about how best to address these issues as Subcommittee discussions have also evolved.

One response was included in H.R. 985, the Fairness in Class Action Litigation Act, passed by the House of Representatives in March 2017. That proposed legislation would have required all personal injury claimants in MDL proceedings to submit evidentiary support for their claims of exposure and injury within 45 days and require the court to rule on the sufficiency of those submissions within 90 days after that. The Senate did not act on this proposed legislation, and with the arrival of a new Congress in January 2019, it lapsed.

This legislation appeared to build on the plaintiff fact sheet (PFS) practice that had emerged in many MDL personal injury proceedings. That practice called for plaintiffs to provide certain specifics and materials without formal discovery. (It was different from a *Lone Pine* order, which usually would also require plaintiffs to provide expert causation evidence.)

FJC research investigated the use of PFS orders, and found that they were already used very frequently in larger MDL proceedings, and used in virtually all of the "mega" MDL proceedings with more than 1,000 cases. In most of those proceedings, there were also defendant fact sheets (DFS) required, often calling for defendants to provide information to the plaintiffs without the need for formal discovery.

One view of PFS and DFS practice is that it is an effective way to "jump start" discovery in larger MDLs. Another view of this practice is that it is a way of screening out unsupportable claims. To some extent, plaintiff's counsel favor efficient methods of screening out unsupportable claims, so there emerged some agreement on both sides of the "v." that methods of determining whether there were unsupportable claims might be desirable.

At the same time, there was resistance to rules requiring plaintiffs to provide discovery before they were allowed to take discovery. And the point was also made that, even if some proportion of the claims were not supportable, the rest should be allowed to go forward without undue delay.

The FJC research also showed that PFS and DFS requirements, while often having similarities from one case to another, were almost always tailored to the specific MDL proceedings before the

court. And that tailoring often took considerable time to complete. Beyond that, some viewed the PFS and DFS requirements in some MDL proceedings as excessive and overly demanding. These concerns made the prospect of drafting a rule for all MDL proceedings of a certain sort exceedingly challenging.

That challenge was compounded by the recurrent point made by experienced MDL transferee judges that they needed flexibility in designing appropriate procedures for the cases before them. One size would not likely fit all, the Subcommittee was repeatedly told.

As these discussions proceeded, the views of the participants seemed to evolve. It might even be that the Subcommittee's attention served as a small catalyst to this evolution. By the time of the Emory meeting in Boston in May 2019 mentioned above, the focus had shifted somewhat. In place of reliance on PFS/DFS practice, the more promising idea came to be known as a "census," an effort to gain some basic details on the claims presented — *e.g.*, evidence of exposure to the product at issue — so as to permit an initial assessment of them. This need not be a substitute for a PFS, but instead an initial supplement.

This census idea has been the focus of work since the May 2019 gathering. The reported plan is to use it in an MDL pending before Judge Rodgers in the N.D. Fla. As of this writing, that effort has not been completed.

For the Subcommittee, what this means is that it is awaiting information about the use of this census method. If that proves successful, it may offer a useful model for responding to the Field of Dreams problem. That might mean that a rule-amendment proposal would be in order, but it might mean that this is simply a management technique that judges may employ as appropriate. If so, the most effective method of introducing it might well be as part of the program the JPML provides each year for transferee judges.

Interlocutory Review of Orders in MDL Proceedings

If the positions of the parties have moved closer together in regard to the census idea above, no similar confluence has occurred with regard to facilitating interlocutory review of rulings by MDL transferee judges.

A starting point in the Subcommittee's consideration of this issue was the provision in H.R. 985 requiring courts of appeals to accept appeals of any order in an MDL proceeding if review "may materially advance the ultimate termination of one or more of the civil actions in the proceedings."

The proponents of rules facilitating interlocutory review in MDL proceedings have urged that orders in those cases may have much greater importance than orders in ordinary civil actions. In

particular, when orders effectively apply in a multitude of individual cases the importance of interlocutory review increases appreciably. Moreover, proponents of expanded review cited several recurrent critical issues — preemption and *Daubert* decisions on admissibility of expert testimony, for example — that could resolve most or all cases in the MDL. As to these sorts of "cross-cutting" issues, they contended, there was inequality of treatment: a victory by defendants would result in a final judgment that would permit plaintiffs to appeal, while a victory by plaintiffs would not.

Opponents of rule-based expansion of interlocutory review in MDL proceedings emphasized that there are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). Expanding review would lead to a broad increase in appeals and produce major delays without any significant benefit, particularly when the order was ultimately affirmed after extended proceedings in the court of appeals. And, of course, the "inequality" of treatment complained of is a feature of our system for all civil cases, not just MDLs.

Both proponents and opponents of rule amendments have submitted detailed reports on the actual experience under § 1292(b) in MDL proceedings. The Rules Law Clerk has provided an extensive report to the Subcommittee on transferee judges' decisions whether to certify issues for appeal.

One concern the Subcommittee had about whether § 1292(b) might not be suited to MDL proceedings was that it authorizes a district court to certify an order for immediate appeal only on finding that (i) there is a "controlling question of law" as to which (ii) "there is substantial ground for difference of opinion" and (iii) that immediate review would "materially advance the ultimate termination of the litigation." These statutory criteria might not be suited to the sorts of situations raised by the proponents of review. Some issues (*e.g.*, *Daubert* decisions) might not present a "controlling question of law." Immediate review might not, in sprawling MDL proceedings, "materially advance the ultimate termination of the litigation."

Research has not disclosed a significant number of instances in which the issues cited by proponents of rulemaking were advanced under § 1292(b). Instead, a wide variety of orders have prompted § 1292(b) requests in MDL proceedings. Moreover, judges asked to certify orders in those proceedings do not suggest that the statutory standards constrain their ability to grant certification if appropriate, although they scrupulously examine each factor and frequently comment on their circuit's receptivity to § 1292(b) appeals. No district judge, in denying certification, did so because of inflexibility of the statutory criteria. And given the wide variety of issues actually presented as grounds for § 1292(b) review in MDL proceedings, there may be at least some basis for worrying that efforts to obtain review

might occur more frequently and in regard to many kinds of orders beyond those cited by the proponents of expanded opportunities for interlocutory review.

In sum, the research to date seems to support the following conclusions:

(1) There are not many § 1292(b) certifications in MDL proceedings.

(2) The reversal rate when review is granted is relatively low (about the same as in civil cases generally).

(3) A substantial time (nearly two years) usually passes before the court of appeals rules.

(4) The courts of appeals (and district courts) appear to acknowledge that there may be stronger reasons for allowing interlocutory review because MDL proceedings are involved.

As reflected in the Advisory Committee report to the Standing Committee for its June 2019 meeting, during the May 2019 Emory event in Boston, the case for expanded review was not convincingly made.

The October 1 Emory event provided a very thorough discussion that permitted Subcommittee members to get a clear picture of the competing views on this topic. It showed that the proponents and opponents of change continue to disagree fundamentally, but also that the discussion has evolved.

The proponents of expanding interlocutory review emphasize that in MDL mass tort litigation defendants have found it difficult or impossible to obtain review of core legal issues such as preemption until after a bellwether trial, and perhaps not even then if defendants win at trial. In particular, in their view § 1292(b) does not work well because the statutory standard is too confining and because it provides something like a “veto” to the district judge. The argument is that this state of affairs denies defendants access to authoritative and timely resolution of legal issues.

The response from the plaintiff side is that the final judgment rule is a key aspect of our judicial system, and that § 1292(b) and Rule 54(b) provide safety valves for instances in which interlocutory review is appropriate. From this perspective, the showing has not been made that these existing routes to interlocutory review fail in MDL litigation, or that MDL litigation is so different from other litigation that it justifies a special appealability rule.

The Subcommittee has held one conference call about these issues since the Oct. 1 conference, and during the full

Committee's meeting Subcommittee members may provide their insights. To introduce the issues, however, it seems useful to identify some points on which participants appeared largely to agree: (1) the goal is not to provide an appeal of right, but instead to enable the court of appeals (as under Rule 23(f)) to decide in its discretion whether to accept the appeal; (2) the goal is not to preclude the district judge from expressing views on whether an immediate appeal is justified, perhaps in a manner like the certificate of appealability in habeas cases; (3) the focus is not on a limited set of legal issues (*e.g.*, preemption, *Daubert* rulings) so long as the issues are important to resolution of a significant number of cases; and (4) it is not certain whether any rule should be limited only to some MDLs (*e.g.*, "mass tort" MDLs, or "mega" mass tort MDLs), but there is no effort to expand it beyond MDL proceedings. But notwithstanding these areas of agreement, there remains a fundamental disagreement on the need for a rule expanding access to interlocutory appeals.

The Subcommittee invites views of the full Committee on how best to proceed.

Relevance of Hall v. Hall *Subcommittee Issues*

Elsewhere in this agenda book is a report on the work of a Subcommittee involving representatives of the Civil Rules Committee and the Appellate Rules Committee. This undertaking seems worth noting because one might say that the concern there points in a different direction from the issues before the MDL Subcommittee, and that the *Hall v. Hall* question involves issues that can come up in MDL proceedings.

Hall v. Hall, 138 S. Ct. 1118 (2018), involved two litigations between a brother and sister about an inheritance. The district court consolidated them for trial and, after that combined trial occurred, ordered a new trial in one case but not the other. That produced a final judgment leading to an appeal in one of the cases while the "sibling" case remained pending in district court.

The question how to regard finality for purposes of appeal of judgments in some but not all consolidated cases had produced four strands of analysis in the courts of appeals. Relying on a 1933 decision it had made before the Federal Rules were adopted, the Supreme Court held in *Hall v. Hall* that the fact the two cases were consolidated for trial did not mean that appellate review must await the final judgment in the second case. It also indicated that it thought Rule 42 was not, when adopted in 1938, meant to change the rule announced in its 1933 decision.

Hall v. Hall was a simple litigation, but *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015), involved an MDL proceeding, though not a personal injury matter. In that MDL proceeding, a final judgment had been entered in one of the constituent actions. The argument was that this "final judgment" should not trigger immediate review because the rest of the MDL cases remained pending in the district court. The Court held that

appellate review could proceed even though most of the cases remained unresolved. Justice Ginsburg, writing for the Court in that 2015 case, recognized that sometimes a "merger" of the consolidated cases might defer appealability. Absent such a "merger" (which did not occur in the MDL proceeding before the Court), each case in the MDL proceeding was separate for purposes of the final judgment rule.

The reason to mention the *Hall v. Hall* Subcommittee's work is that the Advisory Committee also has before it the question whether the final judgment rule should be revised to defer appealability, somewhat the obverse of the issue before the MDL Subcommittee. Judge Rosenberg, a member of the MDL Subcommittee, is Chair of the *Hall v. Hall* Subcommittee.

Settlement Review, Attorney's Fees, and Common Benefits Funds

Effective Dec. 1, 2018, further amendments to Rule 23(e) fortified and clarified the courts' approach to determining whether to approve proposed settlements in class actions. In 2003, Rule 23(e) was expanded beyond a simple requirement for court approval of class-action settlements or dismissals, and Rules 23(g) and (h) were also added to guide the court in appointing class counsel and awarding attorney's fees and costs. Together, these additions to Rule 23 provide a framework for courts to handle these problems that was not included in the 1966 revision of the rule. Indeed, one could say that the framers of that 1966 revision did not seem to appreciate how important settlements would be in class actions. Since then, much effort has been spent developing a legal framework for class action settlements.

In class actions, a judicial role approving settlements flows from the binding effect Rule 23 prescribes for a class-action judgment. Absent a court order certifying the class, there would be no binding effect. But the 1966 rule was seemingly designed principally with litigated class outcomes in mind. Despite that orientation, settlement became more of a norm for resolution of class actions, and certification solely for purposes of settlement also became common. Courts began to see themselves as having a "fiduciary" role to protect the interests of the unnamed (and effectively otherwise unrepresented) members of the class certified by the court.

As the law has been refined by judicial decisions and rule amendments, unnamed class members (even class representatives) may object to the proposed settlement, but class counsel are obligated under Rule 23(g) to pursue the best interests of the class as a whole, even if not favored by the designated class representatives. The court may approve a settlement opposed by class members who have not opted out. The objectors may then appeal to overturn that approval; otherwise they are bound despite their dissent.

Now, under amended Rule 23(e), class action settlements must be reviewed and approved by the court. There are specific requirements for counsel and the court to follow in the approval process.

MDL proceedings are different. Ordinarily all of the claimants have their own lawyers. Section 1407 only authorizes transfer of pending cases, so claimants must first file a case to be included. ("Direct filing" in the transferee court has become fairly widespread, but that still requires a filing, usually by a lawyer.) As a consequence, there is no direct analogue to the appointment of class counsel to represent unnamed class members (who may not be aware they are part of the class, much less that the lawyer selected by the court is "their" lawyer). The transferee court cannot command any claimant to accept a settlement accepted by other claimants, whether or not the court regards the proposed settlement as fair and reasonable. And the transferee court's authority is limited, under the statute, to "pretrial" activities, so it cannot hold a trial unless that authority comes from something beyond a JPML transfer order.

Notwithstanding these structural differences between class actions and MDL proceedings, one could also say that the actual evolution of MDL proceedings over recent decades — particularly "mass tort" MDL proceedings — has somewhat paralleled the emergence of settlement as the common outcome of class actions. Almost invariably, the transferee court appoints "lead counsel" or "liaison counsel" and directs that other lawyers be supervised by these court-appointed lawyers. The Manual for Complex Litigation (4th ed. 2004) contains extensive directives about this activity:

§ 10.22. Coordination in Multiparty Litigation — Lead/Liaison Counsel and Committees
§ 10.221. Organizational Structures
§ 10.222. Powers and Responsibilities
§ 10.223. Compensation

So sometimes — again perhaps particularly in "mass tort" MDLs — the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs — individually represented plaintiffs' lawyers), they may have a limited role in managing the course of the MDL litigation. A court order may forbid them to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed by the court as leadership counsel.

At the same time, it may appear that at least some IRPAs have gotten something of a "free ride" because leadership counsel have done extensive work and incurred large costs for liability discovery and preparation of expert presentations. Manual for Complex Litigation (4th) § 14.215 provides: "Early in the litigation, the court should define designated counsel's functions, determine the method of compensation, specify the

records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions."

One method of doing what the Manual directs is to set up a common benefit fund and direct that in the event of individual settlements a portion of the settlement proceeds (usually from the IRPA's attorney's fee share) be deposited into the fund for future disposition by order of the transferee court. And in light of the "free rider" concern, the court may also place limits on the percentage of the recovery that those non-leadership counsel may charge their clients, sometimes reducing what their contracts with their clients provide.

The predominance of leadership counsel can carry over into settlement. One possibility is that individual claimants will reach individual settlements with one or more defendants. But sometimes MDL proceedings produce aggregate settlements. Defendants ordinarily are not willing to fund such aggregate settlements unless they offer something like "global peace." That outcome is guaranteed by court rule in class actions, but there is no comparable rule for MDL proceedings. Nonetheless, various provisions of proposed settlements may exert considerable pressure on IRPAs to persuade their clients to accept the overall settlement. On occasion, transferee courts may also be involved in the discussions or negotiations that lead to agreement to such overall settlements. For some transferee judges, achieving such settlements may appear to be a significant objective of the centralized proceedings. Indeed, some have wondered whether the growth of "mass" MDL practice is in part due to a desire to avoid the greater judicial authority over and scrutiny of class actions and the settlement process under Rule 23.

The absence of clear authority and/or constraint for such judicial activity in MDL proceedings has produced much uneasiness among academics. One illustration is Prof. Burch's recent book Mass Tort Deals; Backroom Bargaining in Multidistrict Litigation (Cambridge U. Press, 2019), which provides a wealth of information about recent MDL mass tort litigations. In brief, Prof. Burch urges that it would be desirable if something like Rules 23(e), 23(g), and 23(h) applied in these aggregate litigations. In somewhat the same vein, Prof. Mullenix has written that "[t]he non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation." Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 Rev. Lit. 129, 135 (2018). Her recommendation: "[B]etter authority for MDL judicial power might be accomplished through amendment of the MDL statute or thorough authority conferred by a liberal construction of the All Writs Act." *Id.* at 183.

Achieving a similar goal via a rule amendment might be possible by focusing on the court's authority to appoint and

supervise leadership counsel. That could at least invoke criteria like those in Rule 23(g) and (h) on selection and compensation of such attorneys. It might also regard oversight of settlement activities as a feature of such judicial supervision. However, it would not likely include specific requirements for settlement approval like those in Rule 23(e).

But it is not clear that judges who have been handling these issues feel a need for either rules-based authority or further direction on how to wield this authority. Research has found that judges do not express a need for greater or clarified authority in this area. And the Subcommittee has not, to date, been presented with strong arguments from experienced counsel in favor of proceeding along this line. All participants — transferee judges, plaintiffs' counsel and defendants' counsel — seem to prefer avoiding a rule amendment that would require greater judicial involvement in MDL settlements.

For the present, then, the Subcommittee is not yet prepared to propose to develop rule-amendment drafts dealing with appointment or compensation of leadership counsel or settlement review.

One more recent development deserves mention, however. On Sept. 11, 2019, Judge Polster granted class certification under Rule 23(b)(3) of a "negotiation class" of local governmental entities in the opioids MDL pending before him in the N.D. Ohio. Paragraph 13 of the certification order explains:

> The order does not certify the Negotiation Class for any purpose other than to negotiate for the class members with the thirteen sets of national Defendants identified above. Accordingly, this Order is without prejudice to the ability of any Class member to proceed with the prosecution, trial, and/or settlement in this or any court, of an individual claim, or to the ability of any Defendant to assert any defense thereto. This order does not stay or impair any action or proceeding in any court, and Class members may retain their Class membership while proceeding with their own actions, including discovery, pretrial proceedings, and trials. In the event a Class Member receives a settlement or trial verdict, it may proceed with its settlement/verdict in the usual course without hindrance by virtue of the existence of the Negotiation Class.

In re National Prescription Opiate Litigation, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019) (memorandum opinion, not accompanying order). Paragraph 8 of the order provides additionally:

> Class Counsel and only Class Counsel are authorized to (a) represent the Class in settlement negotiations with Defendants, (b) sign any filings with this or any other Court made on behalf of the Class, (c) assist the court

with functions relevant to the class actions, such as but not limited to maintaining the Class website and executing a satisfactory notice program, and (d) represent the Class in Court.

It is not clear what will come of this initiative. But if it provides a vehicle for judicial involvement in settlement of an MDL proceeding under the auspices of Rule 23, it may illustrate the sort of authority and guidance discussed above without the need for a rule amendment.

Miniconference Possibility

As should be apparent, the Subcommittee's work is not done, but it is not presently moving toward drafting possible rule amendments addressing the topics it still has under study. During the Subcommittee's extensive outreach efforts over the past two years, it has heard from many lawyers on both the plaintiff and defendant sides, and also from many of the transferee judges who have experience handling "mass tort" MDLs. Other subcommittees have found miniconferences to be effective methods of exploring potential ideas for rule amendments. Since this Subcommittee has not yet determined to proceed with specific amendment ideas, holding a miniconference remains a premature idea.

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Notes of Conference Call
MDL Subcommittee
Advisory Committee on Civil Rules
September 12, 2019

On Sept. 12, 2019, the MDL Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Robert Dow (Chair, MDL Subcommittee); Judge John Bates (Chair, Advisory Committee), Judge Joan Ericksen, Judge Robin Rosenberg, Virginia Seitz, Ariana Tadler, Helen Witt, Joseph Sellers, Emery Lee (FJC Research), Rebecca Womeldorf & Julie Wilson (Rules Committee Staff), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, MDL Subcommittee).

Meeting during AAJ Convention

In July, 2019, several representatives of the Subcommittee met with about 30 members of the American Association for Justice during the AAJ annual convention in San Diego. The session proved very helpful; kudos are due to AAJ for organizing it. Nonetheless, it did not seem that any striking new ideas or initiatives came out during the session. In general, there was virtually no support for adopting rules for the topics under study by the Subcommittee. Though this response was not a surprise, it was a worthwhile session and augmented the Subcommittee's information base.

Rules Law Clerk memo on § 1292(b)

The extensive memo from the Rules Law clerk on each of the efforts to employ § 1292(b) in MDL proceedings that he found contains a wealth of detail. In summary, it seems to point to several conclusions: (1) There is not a lot of § 1292(b) activity in MDL proceedings; (2) The reversal rate when review occurs is relatively low (about the same as in general civil cases); (3) A substantial amount of time often passes before the court of appeals rules; and (4) the courts of appeals (and district courts) do recognize that MDL proceedings may present stronger reasons for allowing interlocutory review than ordinary cases. One more observation was suggested based on the extensive description of district court decisions denying motions for § 1292(b) certification in MDL cases —— it does appear that many district judges write fairly extensive explanations for their refusals to certify, so if a rule called for them to do that it would not necessarily be adding significantly to their workload.

Discussion turned to a comparison of the law clerk memo to the submissions from John Beisner and Brian Devine that the Subcommittee has already seen. The Beisner memo used a method much like the one that FJC research would use to identify instances of MDL § 1292(b) review. The Devine memo used a different method. Beisner found 56 such instances of § 1292(b) activity, and Devine found a total of 115. The JPML also has a

record of interlocutory review requests in proceedings that is a source of some additional information.

Altogether, the data do show that § 1292(b) review is uncommon in MDL proceedings. They also do show that a considerable amount of time typically elapses when review is granted, before the court of appeals decides the appeal. And as noted above, the usual outcome is an affirmance. The law clerk's research indicated that about 21 months was the median time to court of appeals decision, while the Devine memo found that it was 23 months. But it may be that the two were using different starting points; the law clerk looked to the time from the order under appellate review and the Devine memo looked to the time from the date of the certification under § 1292(b). It might sometimes be that there is a considerable lag time between the order under review and the decision to certify the order for review.

It was also noted that, even when the district court has certified orders for immediate review, courts of appeals often decide not to take the appeals, as the statute permits.

On October 1, there will be session in Washington, D.C., with lawyers from both the plaintiff and defendant camps about interlocutory review. Emory has arranged this session, which is a follow-up to the discussion during the Emory event in Boston in May. At that Boston event, the proponents of review felt that they needed another opportunity to explain their concerns and objectives. At the Oct. 1 session, they will probably try to do that. Jaime Dodge of Emory has told the participants that they do not need to submit more material to the Subcommittee, but it is possible that some additional material will come in before the Oct. 1 event. It would be good for Subcommittee members to become familiar with the entire memo from the law clerk, and refresh their recollections of the Beisner and Devine submissions as well, before the Oct. 1 event.

Survey of Judges

On several occasions, the Subcommittee has discussed whether to send transferee judges a survey to obtain more information bearing on the issues it is considering. There have been several email exchanges about what topics might be usefully included in such a survey. Put briefly, designing such a survey would be somewhat challenging.

At the same time, focusing on the sort of MDL proceedings that have occupied the Subcommittee's attention suggests that a survey would not necessarily add greatly to its information base. The number of judges who have actual experience with the kind of MDLs the Subcommittee has heard about (sometimes called "mega" MDLs) is relatively limited. Indeed, representatives of the Subcommittee may already have met with most of those judges. Asking judges without experience in this sort of MDL proceeding

to answer questions about them would not likely be productive.

After discussion, a consensus emerged that the idea of surveying transferee judges should be tabled for the present.

Pending “front burner” issues

Early vetting/census: The Subcommittee began its consideration of these issues with the very exacting model of H.R. 985 before it. It seems clear from many discussions that there is not now any enthusiasm for a rule with such detail, rigidity, and such a short time for compliance (and judicial activity). Judges in particular emphasize the need to tailor PFS and DFS treatment to the given case and regulate the timing in a way that suits the case.

At the same time, it also seems that in almost every personal injury MDL proceeding with a significant number of cases some version of a PFS (and often a DFS) is in fact used. These are developed for the specific MDL, and use of them is becoming nearly universal. Even a modest rule change, such as including a “nudge” to consider the utility of PFS/DFS treatment in an MDL in Rule 26(f) and Rule 16, may be unnecessary.

At the May 2019 Emory event in Boston, the census idea was presented as an intriguing alternative. Many agree on the concept, but the particulars remain indefinite.

The current situation is that the hope of proponents of this idea is to try it out in a current MDL proceeding. It had been hoped that the roll out would already have occurred, but it has not. It is not clear whether there are any obstacles to pursuing the idea, or only that it is taking a bit longer than originally hoped. In any event, it would be best to get as accurate a description as possible on the status of this initiative for inclusion in the agenda book for the Oct. 29 full Committee meeting.

The original recommendation was to allow about a year for the experimental use of the census technique to be put to the test. For the present, it seems that the wisest course is to await developments.

Interlocutory appeals: The Subcommittee had already discussed this issue. The focus regarding this topic is the Oct. 1 meeting in D.C.

Settlement promotion/review: A starting point on this topic is that there seems to be almost no enthusiasm for developing rules or encouraging more judicial activity among plaintiff lawyers, defense lawyers, or judges. There may be notable academic support for such action, however.

One way of looking at that academic concern is to focus on Prof. Elizabeth Burch's recent book. The book urges that it could be desirable if something like Rules 23(e), 23(g), and 23(h) applied in MDL mass tort proceedings in pretty much the way these rules apply in class actions.

At the same time, it was noted, there is a potential authority problem for MDL rules along these lines. The reason for the class-action provisions noted above is that the court order certifying the class in effect supplants choices ordinarily left to the parties. The judge can approve a settlement even though some class members oppose it. The judge can, in effect, make class counsel the lawyer for the entire class even though the great majority of the class members never met, much less hired, class counsel.

At least in form, MDL proceedings are significantly different. Almost invariably, every claimant has a lawyer of his or her own. The court cannot, by order, force any claimant to accept a settlement.

There is a real sense, however, that in a significant number of MDL proceedings the analogy to class actions fits the litigation reality even though MDLs are different in form. Often judges appoint leadership counsel in MDL proceedings, and order that they run the litigation. So other counsel may feel that —— though they are in form representing their individual clients —— in reality they have little or no control over the course or conduct of the case. And when settlement emerges in the MDL setting, there may be very forceful pressures brought to bear on individual claimants and their attorneys to accept the overall settlement package. As a matter of form, claimants may be free to accept or reject the proposed settlement, but as a practical matter they may not really have that freedom.

One interesting development was the entry of a class certification order by Judge Polster in the Opioids MDL in the N.D. Ohio. That order appoints a committee of lawyers to negotiate toward a global settlement on behalf of a class of local government entities. This is a creative use of Rule 23 that might lead toward application in some MDL proceedings of Rules 23(e), (g), and (h). Whether this is a unique case, and whether this inventive initiative will be upheld, are both uncertain at this time. To the extent this method can be used again, it might support an argument that the current rules have a vehicle for achieving the sort of judicial involvement some endorse.

The Subcommittee has already discussed the possibility that a rule addressing judicial authority in appointing leadership counsel could be a way to introduce the desired judicial authority regarding MDL settlements into the civil rules. Nonetheless, there is little enthusiasm for proceeding in that direction right now.

Third-party litigation funding: This general area continues to grow and evolve rapidly. For example, a recent conference at UC Berkeley on The Ethics of Litigation Funding involved two of the law professors who addressed the Subcommittee during the George Washington University all-day conference on TPLF issues in November, 2017. Those two law professors urged that (a) trying to define litigation funding would be extremely challenging, and (b) the growing importance of litigation funding may serve as something of a "back door" around the ABA Model Rules' prohibition on fee sharing between lawyers and non-lawyers. It might even enable the "Walmartization" of legal services. The main point was that this new phenomenon raises a host of legal issues, and that they are not really procedural issues.

The U.C. Berkeley event also highlighted another challenge of application for any rule, in terms of what "litigation funding" is to be covered. The head of The Impact Fund, the largest funder of social justice litigation in the nation, explained that her group provides what she describes as "micro-loans" for litigation it deems to be pursuing social justice concerns. This funding is not a loan, but a grant, and it only covers out-of-pocket expenses such as travel costs, expert fees, and the like. It does not cover attorney fees, and the organization gets repaid only if a court award of costs covers those expenses. So this is far from the model of either "commercial" or "consumer" funding that the Subcommittee has heard about. It highlights the importance of familiarity with evolving practice that would be presented by trying to draft a rule in this area.

But one thing does seem to emerge from the information the Subcommittee has received —— this is not mainly an MDL issue, and may be much more important in cases very different from those involved in the sort of MDL proceedings the Subcommittee has heard about. Indeed, the plaintiff-side MDL lawyers the Subcommittee has heard from universally say that they do not themselves have such funding, and that they urge their clients not to accept it. A consensus emerged that this Subcommittee should not presently be pursuing a rule change addressing TPLF. It is an important matter that should remain on the full Committee's agenda, but not suited for action now by this Subcommittee.

Hall v. Hall Subcommittee and appealability issues

Another subcommittee is considering whether and how the rules might be revised in light of the Supreme Court's 2018 decision in *Hall v. Hall* that consolidated cases remain separate for purposes of the timing of appeals. There are some links between the issues addressed in regard to *Hall v. Hall* and those before this Subcommittee.

For one, *Hall v. Hall* followed another Supreme Court ruling involving an MDL proceeding —— *Gelboim v. Bank of America*, in which an argument was made that although one of the cases in an MDL centralization had been fully resolved the resulting judgment should not be immediately appealable because the rest of the MDL litigation was ongoing. The Court ruled against that and upheld appealability. So there is an MDL aspect to the *Hall v. Hall* set of issues.

It is worth noting that the question what might be the best rule on appealability in regard to consolidated cases had produced four strands of circuit rulings before the Court embraced one of them. If the Court's resolution produces problems, the question might be to determine whether a different treatment should be implemented by rule. One might even say that the question presented by *Hall v. Hall* is the reverse of the one brought before this Subcommittee —— whether the ordinary final judgment rule for appeal timing permits appeal to occur too soon when closely related matters involved in consolidated litigation remain pending in the district court. The issue before this Subcommittee is whether the final judgment rule interferes with prompt review in some MDL proceedings and therefore whether a new rule should facilitate such review.

Yet another overlap is suggested by the possibility that before an MDL transfer various cases may have been consolidated, even "merged," in the transferor court. What is the treatment of those case after the Panel transfers them? If the Panel transfers cases from other districts to the one in which the filings there were consolidated and "merged," does that mean that judgments in the cases transferred by the Panel could be appealable while judgments in the some but not all of the cases consolidated before the Panel's transfer order do not?

For the present, what matters is to be aware that these issues are, at some level, related. It is fortunate that Judge Rosenberg, who is Chair of the *Hall v. Hall* Subcommittee, is also a member of the MDL Subcommittee.

Miniconference

The final topic addressed was the possibility that a miniconference might be informative. Already the Subcommittee had discussed the idea of surveying transferee judges, and concluded that doing so does not presently appear useful. At least at some point, perhaps when the Subcommittee is closer to a resolution of its recommendation to the full Committee, gathering together experienced judges and lawyers to discuss the issues in a miniconference setting might be useful. But it seems too early now to make a judgment about that question. It should be held in mind.

Notes of Conference Call
MDL Subcommittee
Advisory Committee on Civil Rules
July 1, 2019

On July 1, 2019, the MDL Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Robert Dow (Chair, MDL Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Joan Ericksen, Judge Robin Rosenberg, Virginia Seitz, Joseph Sellers, Edward Cooper (Reporter, Advisory Committee), and Richard Marcus (Reporter MDL Subcommittee), Emery Lee (FJC Research), and Ahmad Al Dajani (Rules Law Clerk).

Judge Dow introduced the call as permitting the Subcommittee to review recent developments and chart a course for future work.

Emory Conference in Boston

All three judicial members of the Subcommittee and Judge Bates attended a conference in Boston in May that was the latest in a series of Emory conferences about MDL litigation and possible rule changes that might improve that practice. During that conference, there was a considerable amount of discussion about expanded appellate review of at least some presently unappealable orders in MDL proceedings.

Appellate Review

At the Boston conference, there was a presentation of the perspective on these issues from plaintiff-side lawyers. To some extent, it countered the defense-side presentation submitted by John Beisner in late 2018. Last week, Brian Devine submitted a 25-page presentation of views on interlocutory appeal in MDL proceedings. That has been posted on the A.O. website, and presumably come to the attention of the defense-side lawyers who have been involved in these discussions.

Toward the end of the Boston conference, it emerged that some on the defense side wished to make a further presentation to the Subcommittee of their views. That desire has been reiterated since the Boston conference. At least some on the defense side would prefer to make their presentation to the Subcommittee separately from the plaintiff lawyers. The Emory events have involved lawyers from the defense and plaintiff sides, as well as judges. The proposal was for something different.

This possibility prompted considerable discussion about various issues. A primary one is the Subcommittee’s critical need for transparency. Presentations to rules committees cannot be under cloak of confidentiality. True, representatives of the this Subcommittee and other Advisory Committee subcommittees have on occasion met with representatives of one “side” without insisting upon or ensuring involvement of the other “side” or

"sides." And at least some of those events are policed in such a way as to exclude representatives of other groups.

But those meetings with only one side have ordinarily been during events being put on by bar groups such as AAJ or LCJ, and have been "quasi public" conventions or other events that are publicized on group websites, etc. They were not in events organized by the Advisory Committee. Those events, such as miniconferences, are designed to include representation of the full array of views rather than only one viewpoint. Going forward, it will be critical to preserve transparency.

A different concern is that an event involving only one "side" of an issue might be considerably less useful to the Subcommittee than one in which both sides are called upon to address the points made by the other side. One possibility might be a three-phase interaction, with each side making a separate presentation to the Subcommittee, followed by a joint session, perhaps focused on specific questions presented by the Subcommittee.

This discussion prompted a reaction: All that is presently before the Subcommittee is the question whether to pursue and perhaps present to the full Advisory Committee some rule that might expand appeal opportunities in MDL proceedings. If the idea goes forward in a fully formal way, it would lead to a public comment period. This is hardly the last time the interested parties could offer their views. After all, that is what a public comment period is for.

It was also observed that the three-phased approach mentioned above would seem to involve a very large effort focused on only one of the various issues the Subcommittee has on its plate. Is it really worth it? True, this seems presently to be the "hottest" topic, but nevertheless it's hard to see it as warranting such a production.

Yet another point was that, although the Subcommittee is nowhere near a decision about what, if anything, warrants formal drafting, there seems to be only limited support for a rule guaranteeing a right to appeal. It seems, moreover, that the defense side lawyers are themselves divided on the importance of a right to appeal, and some might react favorable to some expanded discretionary authority to permit appellate review. To the extent a separate session with the proponents of rulemaking would emphasize mandatory review along the lines included in H.R. 985, that does not presently seem to justify an event lasting a day and a half. The Subcommittee must keep an open mind, but also should take account of what it has learned so far.

The consensus was to approach the idea of a conference about interlocutory appeal with caution.

PFS/Census Ideas

The discussion of topics covered in the Boston conference turned to PFS practice and the new "census" idea first raised during that event. One starting point seems to be that the focus of the attorneys involved in the Emory events has shifted from something like the PFS practice that has been adopted (in varying forms and at varying speeds) in large MDL proceedings to this new idea.

And the new idea is only beginning to take shape. It appears that there is a sustained effort to devise something along these lines for the 3M MDL before Judge Rogers in Florida. The present expectation is that this effort will take considerable time, perhaps a year or so. Then the hope is that the 3M experience will provide a basis for evaluating the new method.

This possibility prompted the question how that evaluation would be done. This effort does not appear to have the hallmarks of a "pilot project" of the sort the Advisory Committee or FJC Research has conducted. It is not clear that there is any "control group," or a way of measuring how the litigation would have proceeded in the absence of the "census" process. And it may be that there will be something a lot like a "traditional" PFS in the future of this litigation.

Another possibility raised was whether there are other MDL proceedings in which something like the "census" approach could be used in order to provide some way to consider whether —— assuming it looks to have been a good thing in the 3M MDL —— it would be useful in other MDL proceedings. But we are not aware of any other existing MDL proceedings that would be suitable vehicles for evaluating the new idea. And the decision whether the census method has sufficient promise would have to be made by the presiding judge in any such proceeding. As we know from prior discussions, one of the prime concerns about a rule with PFS specifics is that it would intrude on the latitude that is critical to management of MDL proceedings.

Another point was raised —— the requirement that each claimant pay an individual filing fee has seemingly proved helpful in quite a few large MDL proceedings. Indeed, it seems to be "happening almost all the time." There does not seem to be a need for a rule about that, assuming that a rule would be a way to address it.

For the present, the best course seemed to be to contact Jaime Dodge, who is heading up the Emory project, and find out what she expects will be the method used to evaluate the experience in the 3M proceedings. Judge Dow will reach out to arrange such a conversation. It would be good if Emery Lee of the FJC could participate in a call with Jaime Dodge.

Standing Committee Discussion

The call shifted to the discussion of MDL issues during the Standing Committee meeting on June 25. There was less discussion of these issues than during the January meeting of the Standing Committee. The topic that got the most attention was appellate review. At least one member of the Standing Committee seemed to regard expanded appellate review as desirable, but that did not seem to be a widespread attitude of the members of that committee. And this issue is highly fact-driven. The recent submission from the "plaintiff side" about experience with § 1292(b) came in during the Standing Committee meeting, but a copy of that report was provided to the member most interested in the subject later in the day. It was not before the Standing Committee, as the Beisner submission had been before it during its January 2019 meeting.

Another thing that emerged during the Standing Committee meeting was that one member seems to have had a law firm associate attempt to collect information about Second Circuit experience with § 1292(b) review more generally, not just in MDL proceedings. That information might prove useful for the Subcommittee, but it was noted that the Subcommittee's only focus is MDL litigation. To expand attention to section 1292(b) practice more generally would be beyond the Subcommittee's commission and would call for a significantly different effort to gather input from the bench and bar.

Survey of Judges

There was some discussion about the topics suitable for a survey of judges, perhaps limited to judges with MDL transferee experience. Ed Cooper had circulated a list of ideas. That would be recirculated, with the understanding that there may be wide gaps in it. At the same time, it is worth taking note of the need to be selective in what to ask judges to report. The JPML already sends a fairly extensive survey to transferee judges, and we do not want to duplicate that survey or overburden these judges.

Rules Law Clerk Research

The Rules Law Clerk has already provided a valuable memorandum on the current rule and statutory provisions regarding Third Party Litigation Funding. It appears that library research could provide additional valuable information about several topics:

(a) Judicial interpretation of the criteria for § 1292(b) review. The basic focus is on whether there is reason to think that one or more of the statutory criteria —— a "controlling" "question of law" whose immediate resolution would advance the "ultimate termination" of the litigation —— could be causing transferee judges to decline to certify

orders for interlocutory review when they would do so if given more latitude. It may be that court of appeals interpretation, or district court interpretation, of these statutory standards shows that a rule modifying one or more of them would be desirable for MDL proceedings.

(b) Case law on the authority of MDL transferee judges to review, oversee, or influence the settlement of MDL proceedings. This topic could include attention to appointment of lead and liaison counsel, creation of common benefit funds to pay for the work of these lawyers for the benefit of all claimants, and authority for judges to modify or cap fee entitlement under attorney-client contracts. A possible starting point for the Subcommittee's discussion of these issues is whether "inherent authority" to address these topics is so well-established that a rule creating such authority would not solve problems.

(c) Application of § 3.18 of the ALI Principles of Aggregate Litigation ("Limited Judicial Review for Non-Class Aggregate Settlements"). This effort might supplement the research in (b) above.

Reflection on "Front Burner" Issues

PFS/DFS: Given the evolving "census" idea, it seemed that the best plan on this point at present is to await developments. The call has already suggested outreach to the Emory group to learn more, particularly about plans for evaluating the results of the experiment in the 3M MDL litigation. Additional efforts are not presently indicated.

Appellate review: The basic question emerging is why § 1292(b) review is inadequate to the task in MDL proceedings. The case law research outlined above may shed light on that question. In addition, it may be that the defense side attorneys will provide a written counterpoint to the plaintiff side submission of last week, though the effort involved in developing such a document may mean that it will not be forthcoming soon.

Sometime very soon, however, the Subcommittee probably needs to focus on exactly it needs to know more about. Empirical data can be very helpful, but only if they are about a subject that is what the Subcommittee thinks most important. The submissions received so far from the two sides seem to focus on different things. For example, it is difficult to determine how to evaluate the idea that lack of appellate review is deterring settlement. Yet that idea recurs in defense side presentations, while the plaintiff-side presentation emphasized the frequency of affirmance in MDL proceedings that reach the courts of appeals. If even affirmances clear the way for settlement, that could be a reason to provide an expanded avenue for appellate review. But it may not be possible to provide much empirical information to assess that possibility.

Settlement review/appointment of leadership counsel: One view of this topic is that a rule could "put the path where the judges and lawyers are walking." MDL transferee judges are in fact appointing leadership, limiting the discussion of settlement (at least of settling the MDL proceedings en masse) to leadership, creating common funds to pay leadership counsel, and revising the contractual fee entitlements of attorneys for claimants. A rule that recognizes this activity could also regularize it. To the extent some transferee judges shy away from some of these activities because they are uncertain about their authority, such a rule could assist them. Creating a framework and regularizing this activity would be useful.

Going down this path could also raise objections about the breadth of rulemaking authority. Some may say that some of these topics are really the proper subject of rules of professional responsibility, not procedure rules. Regulation of the fees of non-leadership counsel is likely to raise particularly sensitive issues. Tying these measures to MDL proceedings would perhaps strengthen the procedural anchor for such a rule.

A caution was stressed: Thus far it appears that the lawyers we have heard from oppose rules authorizing judicial involvement in the settlement process. And it seems that most transferee judges do not want such rules, and do not think they need them. Given that we have heard mainly from MDL "insiders," and given the likelihood that some "outsiders" (the lawyers who find a portion of their fees assigned to a common benefit fund and paid to "insider" lawyers in leadership positions) could resist any such rules, caution is in order.

TPLF: This seems to be a fast-moving area, and further work on this topic at present does not seem necessary.

Notes of Conference Call
MDL Subcommittee
Advisory Committee on Civil Rules
May 13, 2019

On May 13, 2019, the MDL Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Robert Dow (Chair, MDL Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Joan Ericksen, Judge Robin Rosenberg, Virginia Seitz, Ariana Tadler, Joseph Sellers, Helen Witt, Edward Cooper (Reporter, Advisory Committee), and Richard Marcus (Reporter MDL Subcommittee). Rebecca Womeldorf and Julie Wilson represented the Rules Committee Staff.

Judge Dow introduced the call as providing an opportunity to reflect collectively on what had been learned recently. On May 3, Lawyers for Civil Justice had hosted several Subcommittee members at an event in Washington, D.C., exploring the issues that have drawn attention over the last two years. The LCJ participants were mainly drawn from the defense side. Then on May 9-10, the Emory Law School Institute for Complex Litigation and Mass Claims (which also organized a similar conference in Newport Beach, Calif., in late February) hosted a conference in Boston that included attorneys from both the plaintiff and defense side, as well as a number of judges with broad experience in MDL litigation. All the judicial members of the Subcommittee and Judge Bates attended that event.

There is at least one additional event in the works. On the morning of Saturday, July 27, 2019, the American Association for Justice is organizing a discussion event for Subcommittee members during its annual convention, which is occurring this year in San Diego. It is hoped that the Subcommittee can send several representatives to that event.

In general, it is apparent that these events, and the Subcommittee's ongoing interaction with members of both the bar and bench, have contributed to a significant evolution of positions on both sides of the "v" in regard to the issues under discussion. The objective is to determine where to go from here.

(1) Unsupported claims and early vetting

There has been much evolution in attorneys' views about the importance of eliciting basic information up front from claimants about their claims. The two main concerns are (1) a basis for saying that this person was exposed to the allegedly toxic substance, and (2) a basis for saying that this claimant who was so exposed also suffered or developed the pertinent medical condition within what might be called the "causation window" —— long enough after the exposure for the condition to have resulted from the exposure, but not so long after the exposure that the condition could not have been caused by exposure.

The May 9-10 Emory event showed that there had been a substantial change in positions on this general subject. Although defense side lawyers might most want something like the very demanding burden the Fairness in Class Action Litigation Act (H.R. 985) would have imposed on the transferee judge to require plaintiffs to submit support for their claims right at the start of every case and to monitor the evidentiary support submitted by plaintiffs, the focus has changed to a different proposal —— a prompt "census" of claims. This idea was introduced at the May 9-10 conference in Boston. This may be one instance in which the interest shown by the Advisory Committee has been a partial catalyst supporting attorney creativity and flexibility. That is to the good.

There seems to be considerable support for something like this "census" method among plaintiff lawyers as well as defense lawyers. It seemed that transferee judges were receptive to the concept, providing that it did not become cumbersome or elaborate, as PFS requirements can be. Indeed, one idea might be to proceed now to see if a sketch of a rule calling for consideration of this method could be devised so that the discussion could be more concrete. Probably the place to do this would be in connection with Rule 26(f) and Rule 16(b).

The idea of beginning drafting of an amendment sketch now drew a caution: There are some sticky points about such a rule assuming that all are agreed that in general some initial prima facie showing of exposure and injury is necessary. One set of problems has to do with identifying the proceedings to which this rule would apply. The Emory approach refers to "mass MDLs," seemingly meaning only conventional personal injury tort cases. That might well exclude, for example, that VW diesel MDL pending in San Francisco. But devising rule language to specify which sorts of claims are covered could prove difficult.

Another potential difficulty is related: The idea is that this new requirement would apply only to "mass" MDLs involving this sort of claims. Probably the most workable way to determine which MDLs are "mass" is to focus on the number of claimants or number of actions. The cutoff frequently used is 1,000 actions for a "mega" MDL. But such MDLs don't start out with 1,000 cases. Indeed, they don't start out being MDLs. The Panel may transfer when there are far fewer actions, and tag-alongs (or direct filings) can swell the number of cases in an MDL. If there is a specific numerical cutoff, someone must monitor the MDL and determine when that trigger has been reached.

Assuming that there are enough actions to trigger the new rule, using the Rule 26(f) approach would involve telling the lawyers to confer then about what should be included in the "census" for this MDL. Based on that conference, the lawyers could be called upon to make a report to the court, and an amendment to Rule 16 could address the court's handling of the issues. But the issue might not often be ripe for inclusion in

the Rule 16(b) scheduling order the rules now require under the schedule in Rule 16(b)(2) (within 90 days of service on any defendant or 60 days after any defendant has appeared).

Alternatively, it might be that Rule 26(a)(1) initial disclosure could be adapted to this "census" concept. That would also present timing issues. Current Rule 26(a)(1) operates on a timetable tied to the current Rule 26(f) conference. But when there are multiple separate cases, that timetable may be more difficult to apply, particularly as to tag-along or direct-filed actions that arrive some time after the MDL proceeding has been centralized.

A more basic issue is that beginning drafting may be interpreted as indicating that "the train has left the station," or is about to leave. It is far from clear that a rule is in order, and possible that a premature drafting effort —— even characterized as a "cartoon" rather than a "sketch" —— might be misinterpreted.

Another even more basic issue emerged: We are not at all certain what this "census" would look like. We have a general idea that it is to provide information about whether a given plaintiff has been exposed to a given substance (or had a certain medical instrument inserted or used). We are fairly clear that this "census" is different from a PFS. The idea is that drafting a PFS takes a long time and a lot of work, and then analyzing the resulting information also takes a long time and a lot of work. So this simplified procedure has potential. But at the same time, it can't be called a "best practice" because it's not really a practice at all, as yet. It seems risky to try to draft something that embodies a procedure that has not yet been used.

Another participant agreed. This sounds somewhat like the "ascertainability" issue that so roiled the class action bar several years ago. Before we draft something, we should be very careful about how it is expressed, or we risk being inundated by unfavorable comment and triggering much unnecessary controversy.

This observation drew further agreement. The Emory idea is about what the Emory folks call a "pilot project," but it is not really like the pilot projects the Advisory Committee has done and is doing. Those are organized with input from the FJC Research folks and designed to include a control group. Where will the control group come from for this effort? It seems that, out of 23 current "mega" MDLs, only two have not used a PFS. [Another participant noted that the only two that had not included a PFS requirement were the VW Diesel MDL (handled as a settlement class action with a claims process), and the talc litigation, where the issue is general causation and therefore not focused on the case-specific issues addressed by the current census idea.]

An alternative way of viewing this new concept is that it is mainly a case management method. If that's right, it would seem initially that investigation of the new idea should be done under the auspices of the JPML. Beyond that, it seems that the Emory Institute expects to play a major role in organizing, supervising, and evaluating this new idea. That's quite different from a pilot project organized and evaluated by FJC Research.

Despite these concerns, it was suggested, some "doodling" about how a rule might look, for internal use of the Subcommittee, could be useful. It's important to realize at the same time that this new idea is not seemingly meant to replace the "traditional" PFS, but only to be a precursor that will permit more focused drafting of a PFS. So for the present, it would probably be best for the Subcommittee to stay on the sidelines.

Again, it was pointed out that drafting something leads to the risk of over-reaction. The 30(b)(6) experience may be instructive. During the public comment period, we continued to hear about ideas left on the cutting room floor long before; a large number of the comments were not about the actual proposal but instead about ideas that had been discussed by that Subcommittee and then discarded. On the other hand, an extensive list of pretty precise and aggressive 30(b)(6) ideas was included in the Fall 2016 Advisory Committee agenda book and the January 2017 Standing Committee agenda book without producing an avalanche of adverse comment. The initial outpouring of comment occurred in the middle of 2017 when the Subcommittee invited comment on a shorter list of "issues," without rule sketches included. So rule sketches do not automatically lead to adverse volunteered commentary, and adverse public comment does not depend on rule sketches.

An effort at a tweak of the Rule 26(f)/16(b) pairing might be instructive, in part to illuminate the difficulties that could attend implementation. Additional attention would probably be needed for the "enforcement piece" —— is this to be self-enforcing like Rule 26(a)(1) (enforced by Rule 37(c)(1)), or is enforcement depending on defendant making some sort of motion?

A conclusion was suggested: There are lots of issues to be considered. A little hypothetical drafting might be a good way to explore and illustrate those issues. Perhaps that could be limited to internal discussion of the Subcommittee. But it is important to keep the Advisory Committee's commitment to transparency in mind. It is no secret that the Subcommittee has had the Rule 26/Rule 16 combination in mind for some time. It need not follow that drafting to flesh out what that might look like implies a strong commitment to proceeding with something along those lines.

At the same time, the idea of a "census" seems still somewhat unformed, and it would probably be better to remain in a holding pattern pending further explanation and activity from the Emory Institute folks. It would be good to find out more about what that further action by those folks would be and when it would occur. For the present, the report to the Standing Committee should not get into specifics about this new idea, though it will be important to alert the Standing Committee to this possible development.

(2) Interlocutory appeal

A starting point on this topic is that the plaintiff and defendant sides seem very far apart. The plaintiff side seems to regard John Beisner's submission of November 2018 concerning use of § 1292(b) in MDL proceedings as incomplete. One of the plaintiff lawyers in Boston seemed to have competing data. That prompted the idea that it would be important to find out what those data show.

More generally, the treatment of this issue during the Boston event showed rather strong opposition to any rule change to expand avenues for interlocutory appeal. Indeed, toward the end of the Boston event defense-side lawyers requested a chance to regroup and make a further presentation toward.

Meanwhile, Subcommittee representatives expect to be meeting with AAJ members on July 27. It was noted that it is very important to hear fully from both (or all) sides about these important issues. Assuming the defense-side lawyers want to make a further proposal, it would be important to permit the plaintiff-side lawyers to see that proposal and comment on it.

As things presently stand, there is very great concern among plaintiff lawyers and judges about delay due to interlocutory appeals. It will be important to keep the bilateral nature of submissions in mind.

A substantive question was raised. One of the issues about use of § 1292(b) was that the "materially advance the ultimate termination" standard in the statute may be ill suited to the MDL context, suggesting that the Bankruptcy Act standard stressing only that immediate review would materially advance the proceeding might be preferable. Is there a difference?

The answer was that the "ultimate termination" focus of § 1292(b) might not be suited to the MDL setting. The centralization, after all, is only for pretrial purposes. And it's not focused on any single case. Indeed, even the proponents of broadening immediate appealability do not urge that there be a rule permitting such review of matters important for only one case. Instead, they speak of "cross-cutting" issues. That is the idea behind the Bankruptcy Act analogy —— that immediate resolution of certain issues could move the overall proceeding

forward.

In somewhat the same vein, the defense lawyers have increasingly said that appellate resolution of certain issues can expedite completion of the MDL proceedings even if they lose. For example, their clients may be unwilling to accept a preemption ruling by the transferee judge, but willing to proceed to serious settlement talks if the court of appeals affirms the district judge's ruling. Making them await fully final judgment may draw things out. Under this approach, one idea might be to allow the MDL transferee judge to certify for immediate review whenever this standard seems satisfied.

It also seems that the defense-side lawyers have recognized that any new arrangement would include an important role for the district court in determining whether to permit immediate appellate review. That is different from the interlocutory review provision that was included in H.R. 985, which gave the district court no role in the decision and required the court of appeals to accept the appeal.

A possible library research topic was suggested: Is there reason to believe that existing § 1292(b) case law shows that there is a serious difficulty with obtaining review because of the statute's focus on the "ultimate termination"? It may be too difficult to answer this question, but since the issue is whether that feature of the existing statute impedes review in situations in which we would want it to be available, it behooves us to find out whether there is a basis in case law for this concern.

Besides library research, it would be important to obtain the data amassed by the plaintiff side on actual experience under § 1292(b) in MDLs. Nonetheless, it was cautioned, that won't tell us much about when or whether tactical considerations explain a decision not to seek § 1292(b) review. The statute's provision of a district court "veto" could make data hard to interpret if what we are discussing is a setup that does not involve such a veto and depends instead on court of appeals' decisions, as under Rule 23(f). But even that standard would likely depend heavily on the district court's view, which the court of appeals ordinarily would find highly persuasive.

Another point is that any action on this front would need to involve the Appellate Rules Committee. It will be important to alert that Committee to this possibility.

It might also be possible to work up a list of issues in advance of the July 27 AAJ event that could focus discussion.

(3) Settlement

The starting point is that "the lawyers are unanimous —— the rules should not be changed to address the judicial role in settlement of MDL litigation." There was a particularly vehement

plea against such rules from one of the in-house counsel at the LCJ event.

At the same time, the consensus of the lawyers is that judges have plenty of "inherent authority" to do all the things they should be doing. They say that settlement promotion is part of the "pretrial" authority of judges under § 1407. The judicial attitude is not so unanimous. At least one transferee judge seems receptive to clarifying the existence of such authority in the rules, however.

That possibility drew a statement of concern: There could be a downside to trying to draft a rule provision that adequately addresses and confines this authority. The Rule 23 experience may offer a distant analogy. One of the issues considered at length during that process was the question of *cy pres* treatment for some funds in the settlement context. It is clear that some courts of appeals —— perhaps most —— have fairly well-established *cy pres* case law. Despite that, fashioning a rule that did not go too far in granting authority for such provisions and also did not undercut existing practice proved extremely difficult, and it was eventually abandoned. (At the same time, the Committee Notes accompanying the amendments to Rule 23(d) that went into effect in December 2018 do advert to the desirability of addressing use of unclaimed funds.)

One suggestion was that this topic is suitable for some library research. What exactly is the case law on judicial authority regarding settlement under § 1407? Is it broader than the ordinary authority of a judge in the pretrial mode?

At the same time, developing a good screening or "census" method (topic (1) above) might relieve some pressure on this issue. A prime concern is the "inventory" settlement involving the "get a name file a claim" sort of attorney practice.

There might also be a risk that moving into the rulemaking mode in this setting would promote something like the objector behavior we have just tried to cut off in the class action setting with amended Rule 23(e)(5). The situation is different, however, because the individual plaintiff can simply refuse to assent to the deal, and then the deal's off.

On the inventory settlement issue, another focus might be the role of professional responsibility limitations on attorney action. On this point, a good place to look would be the ALI Aggregate Litigation project. There was a great deal of anguish during that project about exactly these issues. We should look into that work product.

(4) TPLF

There was limited discussion of the various issues raised by this topic. For one thing, it does not seem to play a prominent

role in existing MDL “mega” proceedings. At least, the judges presiding over those proceedings are not aware of such arrangements in relation to their cases.

On the other hand, TPLF is also an emerging concern in MDLs. For example, Judge Paul Grimm recently asked all candidates for leadership positions on the plaintiff side to report on whether they had any TPLF arrangements. And the FJC found that several PFS questionnaires included questions about TPLF.

A basic problem was raised: What exactly does TPLF mean? It’s not about a line of credit from Citibank. How do lawyers know for sure what the judge is getting at when asking about TPLF arrangements?

Another problem is a problem of timing —— at the outset, nobody may be resorting to this. But later, when the call goes out for leadership lawyers on the plaintiff side to contribute substantial funds to the conduct of the litigation, TPLF may become important. Is there to be an ongoing duty to report? A response was that all these things are intensely case-specific.

Another participant noted that the N.D. Cal. has for some time had a local rule about disclosure in class actions. Can we get information about the experience under that rule?

Although there are these uncertainties, it was also noted, we cannot entirely close our eyes to the possibility that important control issues could emerge.

Gathering more information about experience in the N.D. Cal. and elsewhere is important. For example, how do these local rules define TPLF? Is it limited to funding from publicly traded companies (focusing on the recusal issue)? Is it limited to non-recourse funding? Is it limited to funders in the “business” of funding?

In terms of MDL litigation, is non-consumer funding even important? Contrast patent litigation, where funders may play a larger, or at least a different, role.

This rapidly changing topic should stay on the Subcommittee’s agenda.

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6. Appeal Finality After Consolidation Joint Subcommittee

In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court ruled that no matter how complete a Rule 42(a) consolidation of cases initially filed as separate actions may be, final disposition of all claims among all parties to any component that began as a separate action is a final judgment. A final judgment appeal therefore may be taken under 28 U.S.C. § 1291. And to all appearances, the opportunity to appeal is forfeited if an appeal is not taken within the mandatory and jurisdictional time set by Appellate Rule 4.

The Court rested its decision on a line of cases describing the effects of "consolidation" that stretched back more than a century before the original version of Rule 42(a) was adopted in 1938. At the same time, it suggested that the Rules Enabling Act process is the proper place to address any problems that might result from its decision.

The Joint Subcommittee, composed of members from both the Appellate Rules Committee and the Civil Rules Committee, has met twice by conference calls. It has also participated in several exchanges with Dr. Emery Lee to shape a Federal Judicial Center study to see what relevant data may be gleaned from court records.

Dr. Lee has begun work with docket searches in four districts, examining cases filed in 2015, 2016, and 2017. He believes that court records will support identification of the frequency of Rule 42(a) orders; how many cases seem to have been consolidated "for all purposes," merging into a single case; how often it happens that, as in *Hall v. Hall*, a court reaches a complete and final disposition of all parts of what began as a separately filed action, while something remains to be done in other parts of the consolidated actions; and what appeal patterns unfold after that — whether appeals are timely taken after the final disposition of the originally separate action, whether belated attempts are made to appeal after the entire proceeding is wrapped up by final judgment, and whether the belated attempts are flagged for dismissal or instead are accepted for decision with the rest of the appeal.

The next step will be to expand the initial survey to include a total of 12 districts. The results may be available in time for this meeting. They will help provide guidance for the next steps. Some time will be required. The four districts sampled for the first round yielded more than 500 consolidated cases, rather more than expected. For all district courts the total is likely to run in a range between 8,500 and 25,000 consolidated cases over the period from 2015 to 2018. If that number proves out, it may be necessary to rely on sampling for manual data selection. The project can easily extend into next spring.

Cases filed from 2015 through 2017 are not likely to yield many relevant examples of one-component-case final dispositions made after *Hall v. Hall* was decided. If the results for the earlier cases seem useful, the study is likely to expand to include cases filed in 2018, 2019, and 2020.

MDL proceedings add further complications that may resist any reasonable effort to sort through docket data. An MDL transfer consolidates the transferred actions only for pretrial purposes. The Supreme Court has ruled that each transferred action remains a separate action, so that final disposition in the MDL proceeding is a final decision appealable under § 1291. The Joint Subcommittee does not plan to reconsider that ruling. But related actions may be consolidated in the court where they were filed before they are transferred. A *Hall v. Hall* issue could arise if an originally independent action is finally decided by the MDL court while other actions in the pre-transfer consolidation remain pending. Similar problems could arise if the MDL court itself consolidates originally independent actions, for example actions originally filed in the MDL court. These variations may resist even determined efforts to unravel docket data. If work goes ahead to draft rules amendments, however, it may prove possible to resolve these ambiguities by rules that extend Rule 54(b) to allocate to the district court full control over the entry of a final judgment.

It is too early to know whether the data generated by the FJC study will be sufficiently precise. But even the most precise data may not answer the most important questions about the effect of *Hall v. Hall*.

The best response to appeals after Rule 42(a) consolidations will be a system that achieves two goals. One is a bright-line rule that tells parties when they may appeal and also protects against forfeiture for failure to recognize that appeal time has started to run. Apart from forfeiture, the parties to the once-separate action also may prefer to delay any appeal until it can be joined by other parties to the proceedings.

The other goal is a rule that best meets the needs of the trial court and the appellate court. The trial court is interested in the efficient management of the matters that remain before it, free from concern about the prospect that an immediate appeal will involve issues that bear on the parties and claims that remain. The appellate court is interested in avoiding multiple appeals that may force wasteful reconsideration of essentially the same record, and also may worry that completion of the trial record may shed a new and different light on the issues presented by an early appeal. The parties that remain in the trial court also may have an interest in participating in an appeal that involves issues common to them.

Experience after *Hall v. Hall* may not provide particularly clear lessons on the shape of the best rules. The trial judge

will not have the opportunity to defer an appeal, except by failing to enter judgment on a separate document — an uncertain ploy, given Rule 58(c)(2)(B) — or, worse, by forgoing the efficient path of disposition to avoid a complete decision of any originally separate action. The court of appeals remains vulnerable to multiple appeals, and perhaps to appeals that are compelled by Appellate Rule 4 but are premature from the perspective of appellate court efficiency. All parties may be caught up in a cycle of appeals they would prefer to avoid.

The Subcommittee will continue to consider the possibility of developing illustrative draft rules while the FJC study is progressing.

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7. E-filing Deadline Joint Subcommittee

(Suggestion 19-CV-U)

The 2009 rules amendments generated by the Time Computation Project established uniform definitions of the "last day" for filing by electronic means — the last day ends at midnight in the court's time zone. Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); and Criminal Rule 45(a)(4). A different time, however, can be set by statute, local rule, or court order.

Judge Michael A. Chagares, Chair of the Appellate Rules Committee, has suggested that these rules might be amended to end the last day "when the clerk's office is scheduled to close." A joint subcommittee representing the Appellate, Bankruptcy, Civil, and Criminal Rules Committees has been appointed to study the proposal.

Some experience is offered to support the proposal. In 2014 the District of Delaware set the time at 6:00 p.m., and in 2018 — after deep study reflected in a long report from the Delaware Bar — the Supreme Court of Delaware set the time at 5:00 p.m.

Many reasons are offered to support the proposal. Work-life balance for lawyers and their staffs, a matter of increasing concern in the profession, is a prominent concern. Judges too may be affected: notices of docket activities or of electronic filings that now arrive after midnight could arrive at a time in the evening when the judge can meaningfully review the notices to determine whether anything requires urgent attention. Disadvantages for some litigants also may flow from midnight filing, not only for pro se litigants who lack the resources or permission for electronic filing, but also for small-firm and solo practitioners that lack staffs to bear the burden. And filing may be postponed deliberately, not to polish the filing but to disadvantage an adversary.

These concerns may be counterbalanced by the occasions when the last full measure of time is needed, not for procrastination but for as much careful work as possible.

The Subcommittee is in the initial stages of gathering information. Many potential subjects could prove important: How many courts have local rules that set the end of the day before midnight? What number of filings are made between the close of the clerk's office and midnight? Is there an identifiable pattern of late-evening filing — for example, are late filers associated with large firms, small firms, government offices, or other groups? What times do clerks' offices close, and are hard copy filings accepted after closing? What courts permit electronic filing by pro se litigants, and how many pro se litigants file electronically? What percentage of cases have at least one pro se party? Subcommittee work will pursue these and other questions.

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19-AP-E
19-BK-H
19-CR-C
19-CV-U

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.

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TAB 8

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8. Rule 4(c)(3): Service by the U.S. Marshals Service in In Forma Pauperis Cases

(Suggestion 19-CV-A)

At the January 2019 meeting of the Standing Committee, Judge Jesse Furman raised questions about the meaning of the Rule 4(c)(3) provisions for service of process by a marshal in i.f.p. cases. These questions are being explored with the U.S. Marshals Service. Initial discussions show that practices vary from one district to another. The Service would welcome greater national uniformity on some practices, but it is not clear whether amending the Civil Rules can usefully do more than remove an apparent ambiguity in the rule text.

Rule 4(c)(3):

> (c) SERVICE. * * *
>
> (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

"must so order": Among several questions that might be raised, the central question arises from an ambiguity in the second sentence. When is it that the court "must so order"? The two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require the order whether or not the plaintiff has made a request. There is some disarray in the cases that address this ambiguity. Drafting a repair is easy. The question is which way the ambiguity should be fixed. The rule could say clearly that an i.f.p. plaintiff or seaman must move for a court order. It could say clearly that the court must enter the order automatically in every i.f.p. or seaman case. Or a more direct rule could say that the marshal must make service without a court order, changing the present practice that provides service by a marshal only if the court so orders. As noted below, they would not be likely to welcome that approach.

Rule 4(c)(3) has its roots in 28 U.S.C. § 1915(d), which provides that when a plaintiff is authorized to proceed in forma pauperis, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." The statute does not limit the category of officers to marshals. Apparently some clerks' offices actively facilitate service in i.f.p. cases. Facilitating service by issuing process is consistent with the statute's direction that the officers of the court shall issue process — that is a clerk job, not the marshal's. The clerk's actually making service, for example if state law allows service

by mail, is consistent with the statute for the same reason. Section 1915(d) is also consistent with a rule directing service by a marshal without requiring a court order — "[t]he officers of the court shall * * * serve all process * * *."

The ambiguity in Rule 4(c)(3) may be an artifact of the 2007 Style Rules. The immediate predecessor, Rule 4(c)(2) read:

> (2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. *Such an appointment* must be made when the plaintiff is authorized to proceed in forma pauperis [etc.] * * *.

Saying that "such an appointment must be made" is more direct than "must so order." It does not seem to tie to "a request of the plaintiff." Still, "such an appointment" might refer to an appointment made on a request of the plaintiff, never mind that "appointment" is used in the preceding sentence only to refer to an "other person or officer," not a marshal.

Reading former Rule 4(c)(2) to mean that the court must order service by a marshal in all i.f.p. and seaman cases without waiting for a request by the plaintiff does not fully resolve the question. Reason still might be found to require a request by the plaintiff. The most likely concern might be that the plaintiff prefers to make service, perhaps because the plaintiff expects to do it sooner than the marshal might. A secondary reason might be that the U.S. Marshals Service would prefer to be called on to make service only when that is necessary. The alternative approaches remain open.

Amending Rule 4(c)(3) to require service without waiting for a request by the plaintiff could take several forms. A simple but inelegant fix: "The court must so order without a request by the plaintiff if the plaintiff is authorized to proceed * * *."

Amending Rule 4(c)(3) to require a request even by an i.f.p. or seaman plaintiff again could take several forms. A simple fix: "The court must so order if the request is made by ~~the~~ a plaintiff who is authorized to proceed * * *." [Or: "by a plaintiff ~~is~~ authorized to proceed * * *."]

Amending Rule 4(c)(3) to require service by the marshal without waiting for a court order might look like this:

> (3) *By a Marshal or Someone Specially Appointed.*
> (A) At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person

specially appointed by the court.

(B) Service must be made by a United States marshal or deputy marshal [or by a person appointed by the marshal] ~~The court must so order~~ if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915(d) or as a seaman under 28 U.S.C. § 1916 [, unless the plaintiff elects to make service].

Practical considerations should guide the choice to be made, subject to the statutory direction that the officers of the court shall serve all process. Providing for service by someone appointed by the U.S. Marshal — or, more conservatively, by the court — could reduce the burden imposed on the marshals.

It would be possible to venture further, considering a first-ever authorization for service of the summons and complaint by electronic means. The concerns that have thwarted electronic service as a general matter might be reduced if the marshal, or possibly the court clerk, were making the determination that e-service is likely to work for a particular defendant. But further work would be required before seriously considering this alternative.

Request to waive service: A second question is whether a marshal can request a waiver of service before undertaking to make service. U.S. Marshals Service Policy Directive 11.8 takes the position that an i.f.p. party cannot require the marshal to request a waiver, but that the marshal can request a waiver if that seems useful to avoid the costs of actual service and support a claim for the costs of service if the request is refused. Sometimes a court order refers to sending waiver forms. The national office encourages waivers, but in many circumstances it is easier just to make service. The potential advantage of recovering the costs of service if waiver is refused is apparently reduced by a practice of not seeking to recover. And the potential advantage of avoiding physical or other actual service is reduced by the fact that most defendants in i.f.p. actions are government employees who do not execute waivers, although some courts have local arrangements that support waivers.

Current U.S. Marshals Service policy seems consistent with Rule 4(c)(3) and 4(d). It would be possible to amend Rule 4(d) to enable an i.f.p. or seaman plaintiff to require the marshal to request a waiver of service. But that judgment may best be left to the marshal's discretion, leaving it to the plaintiff to make the request if the plaintiff wishes.

Other questions: Further questions have been raised about the interplay between Rules 4(c)(1) and (3). None of them have been vigorously pressed. It may be wise to put them aside.

Rule 4(c)(1) says this: "The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service." The extent of an in forma pauperis or seaman plaintiff's obligation to facilitate service by a marshal is not clear from the face of the rule. In some measure the marshal expects the plaintiff to provide information as to the defendant's name and address by filling in those spaces on Form USM-285, the form for "process receipt and return." But some clerks' offices fill out the form, and often locate the defendant. Internet resources often facilitate the process of locating the defendant, and there is case law that requires the marshal to make good-faith efforts to locate the defendant and make service.

The prospect that the marshal may fail to make service within the time allowed by Rule 4(m) is of some concern. But Rule 4(m) provides that the court must extend the time for service if the plaintiff shows good cause for failing to make service within 90 days. The marshal's failure should automatically qualify as good cause, unless perhaps the plaintiff shirked good opportunities to assist the marshal with important information. Courts can be relied upon to act sensibly. There is no apparent need to amend Rule 4(m).

A similar question arises from Rule 4(b), which provides that the plaintiff may present a summons to the clerk for signature and seal. U.S. Marshals Service Policy Directive 11.8 seems to indicate that the clerk issues the summons "upon presentation by the plaintiff." But in practice the clerk often acts without presentation by the plaintiff. Remember that § 1915(d) directs that the officers of the court shall issue all process. Absent information about serious problems in practice, this question too may better be put aside.

In all, there are reasons to doubt whether Rule 4 might usefully be amended to allocate responsibilities between i.f.p. plaintiffs and the marshal when the marshal is ordered to make service.

Customs and good practices: Informal discussions with the U.S. Marshals Service have indicated that it would be good to identify good local practices and make them national. No examples have been provided. It seems likely that this task is best left to the U.S. Marshals Service without attempting codification in the Civil Rules.

A caution: The history of Rule 4 reflects abiding concerns about imposing duties to serve process on the U.S. Marshals and their deputies. Caution is appropriate. Repairing the ambiguity in Rule 4(c)(3) seems worthwhile. The other questions noted here may not deserve further development despite the opportunity to join further amendments if a proposal is made to resolve the ambiguity.

From: Jesse M Furman/[redacted]
To: David Campbell/[redacted], John D. Bates[redacted]
Date: 01/03/2019 02:31 PM
Subject: Two thoughts regarding Fed R Civ P 4

John and Dave:

I hope this finds you well. I'm writing with two thoughts about Rule 4 prompted by our Chief of Pro Se Litigation, Maggie Malloy.

She has tried in various ways to make service more efficient (e.g., by negotiating e-service agreements with repeat defendants, etc.) and, to that end, has worked closely with the USMS. In doing so, she came across a slightly weird anomaly in Rule 4 (perhaps a product of when the Rules were changed so that the Marshals were not required to serve in all cases). Specifically, while a plaintiff can request a waiver of service under 4(d), the court is required to order the Marshals to serve the complaint in IFP cases. See 28 USC 1915(d); FRCP 4(c)(3).

Interestingly, the USMS apparently takes the position that courts cannot order them to request a waiver - they can only require them to serve. See https://www.usmarshals.gov/process/pauper-seaman.htm ("Although the U.S. Marshal is required to serve a summons and complaint on behalf of paupers and seamen, waiver of service is not actual service of summons and complaint. Consequently, the U.S. Marshal may not be required to prepare and send the notice of lawsuit and request for waiver forms, along with the complaint, to the defendant. This may be done by the pauper and seaman plaintiff or the clerk of court. The waiver, however, is optional for a plaintiff; thus, the pauper or seaman plaintiff cannot be compelled to initiate the waiver process.").

Perhaps there is a good reason for that difference. But I think it would be worthwhile to consider whether Rule 4(d) should be amended to allow the court or the USMS to ask a defendant to waive service in IFP cases. I suspect it could save a lot of time and money across the country.

Maggie raises one other Rule 4 issue that may be worth considering, concerning Rule 4(c)(3), which reads as follows:

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

I gather that the majority of courts of appeals interpret this language to require courts to order the Marshals to serve whenever the plaintiff is authorized to proceed IFP. The first sentence allows courts, upon the plaintiff's request, to order the Marshals to serve in non-IPF cases (but does not authorize waiver of the service fee; the Marshals will sometimes send things back when a judge orders them to serve in a non-IFP case). I gather, however, that the Second Circuit - unlike some other Circuits - has read the "request" language to apply as well to the second sentence. *Compare, e.g.*, *Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007) (per curiam) ("Absent a request from the plaintiff, nothing in the text of Rule 4 requires the district court to appoint the Marshals to effect service after granting pauperis status to the plaintiff."), *with Laurence v. Wall*, 551 F.3d 92, 94 (1st Cir. 2008) (per curiam) ("To the extent that some of our sister circuits suggest that the IFP plaintiff must request service of process by the United States Marshal or take other affirmative action to ensure that service is effectuated, e.g., Romandette v. Weetabix Co., Inc., 807 F.2d 309, 311 (2d Cir. 1986), we believe that under the plain language of section 1915(d) and Rule 4(c)(3), it is not necessary for the IFP plaintiff to request service of process by the United States Marshal."). In other words, at least in the Second Circuit, courts can – and sometimes do - dismiss for failure to prosecute if a pro se plaintiff never "requests" that the court order the Marshals to

serve (e.g., if the plaintiff names a new defendant in an amended complaint and has no idea what is supposed to happen next). It's not clear to me that that is a correct reading of the Rule and, in any event, there is some virtue in the Rule being consistently applied across Circuits.

I'm attaching a memo that Maggie wrote to me that summarizes some of the relevant cases in this area in case it is helpful.

Let me know if you want to discuss or have any questions. Otherwise, thanks for considering these thoughts.

Yours,
Jesse

Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York
[redacted]

TAB 9

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9. Rules 4 and 5

(Suggestion 19-CV-N)

These suggestions from a prisoner pro se litigant, Dennis R. Brock, address Rules 4(a)(E)[sic – apparently 4(a)(1)(E)], 4(c)(3), and 5. It is not clear that any of them deserve more detailed development.

Rule 4(c)(3): The Rule 4(c)(3) question does not involve the ambiguity about service by a marshal in pro se cases already on the agenda. It arises from an action in which Mr. Brock paid the filing fee, and says he in some (unspecified) way requested service by a marshal. The court notified him that he should serve the complaint promptly. The court clerk "never answered" a question about this. Mr. Brock then made service by mail. (The docket in his case reflects that on the date of filing he was sent a notice that he is responsible for making prompt service. Copies of the summons were mailed to him the same day. He filed a proof of service by mail three weeks later. Although he filled out an AO Form 285, he did not request service by the marshal.)

Mr. Brock asks whether "the applicable statutes" should be included in rule text. The "applicable statutes" appear to be the later provisions of Rule 4 that describe the need for service or waiver, and provide the manner of service. Something might be added to Rule 4(c)(1):

> (1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served in the manner provided by these rules or by statute within the time allowed by Rule 4(m) * * *.

Referring to "these rules" extends beyond Rule 4 to such provisions as Rule 71.1(d)(3), which cross-refers to Rule 4 for serving notice of a condemnation action. (Rule 14 refers to service of a summons and complaint to bring in a third-party defendant, apparently incorporating Rule 4 by tacit cross-reference.) Referring to "statute" covers the several provisions in Rule 4 that refer to service authorized "by law," and various federal statutes that authorize service of process, although all may be incorporated in Rule 4 in one way or another.

On balance, it seems better to forgo an attempt to add language that may be entirely redundant, that may confuse some readers even as it helps others, and that may have undesirable consequences if it is not entirely redundant.

Rule 4(a)(1)(E): Rule 4(a)(1)(E) says:

> A summons must * * * (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint.

This suggestion reflects an assumed practice in the Northern District of Ohio that the 21-day response time — apparently referring to Rule 12(a) — does not begin until after an Initial Phone Status Conference. Mr. Brock is concerned that a plaintiff may file an ill-considered motion for entry of default because the national rules do not include notice of the local practice. He suggests that notice be added to the rule text.

The docket in his case reflects that the notice sent to him on the day of filing states that the court will hold an initial phone status conference. "No Motion to Dismiss may be filed in advance of this Conference. The responsive pleading deadline will be automatically tolled until that time."

Case-specific notice of this local practice seems at least as effective as a provision in the national rules, however it might be drafted.

Rule 5(b): The suggestion is framed around the abrogation in 2018 of former Rule 5(b)(3), which authorized use of the court's facilities to accomplish electronic service under former Rule 5(b)(2)(E). The proposal is that the court should provide a notice of electronic filing, illustrated by filing a brief without getting notice of the document number assigned to the brief, risking serious harm "when the electronically notified defendant refers to a particular document by number." The assertion is that the Northern District of Ohio generally does not provide a notice of electronic filing, while the Southern District regularly does.

The Clerk for the Northern District of Ohio reports that pro se litigants are sent copies of filings issued by the Clerk or the Court, such as the summons or orders. They are not sent copies of their own filings with the CM/ECF header. Practice is the same in the Southern District of Ohio.

There may be a connection to the provisions in new Rule 5(d)(3)(B) that permit a person not represented by an attorney to file electronically only if allowed by court order or by local rule. The question may be tied to the design of the CM/ECF system, generating electronic notices of filing only to parties who are permitted to file electronically. For the moment, it is not clear whether any rules amendments should be considered.

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Secretary;

I am an inmate in an Ohio prison facility. I recently filed a Pro Se significant complaint as my first attempt at a Federal civil suit. I filed a 42 USC §1983 suit against my trial court judge for lack of jurisdiction which was not dismissed as frivolous due to exceptional circumstances. (Ohio, Northern District, Western Division, Case No. 3:19-cv-00082-JZ) and ran into several critical areas which are not provided for and severely prejudice me as a Pro Se litigant. I am reasonably proficient at Ohio criminal law, and had no problems filing a 28 USC §2254as well as file for certificate of appealability in the Sixth Circuit Court and several writs of certiorari into the United States Supreme Court. The problems are serious enough that I hope the court grants my request for appointment of counsel.

(1.) Rule 4(c)(3) I filed the necessary paper work requesting Federal Marshal Service. Even though I am an inmate, I paid the $400 filing fee. The court sent notification that my case was filed and I was to serve it promptly. I immediately wrote the clerk questioning the Federal Marshal Service request. The clerk never answered. Several weeks later I served the summons and complaint by U.S. Certified Mail, return receipt requested. At the least, for Federal Marshal Service for other than in forma pauperis, shouldn't the applicable statute(s) be included?

(2) Rule 4(a)(E) should be changed to reflect notification in the summons that if by local rule an Initial Phone Status Conference must first take place before the 21 day response time begins. This is to clarify that the time for a default judgment does not begin until after this conference: State that local rules requiring such conference must be stated in their summons.

My complaint was served January 28, 2019 and on the third week of March I

was preparing to write a motion for default judgment when a fellow inmate with considerable experience in Federal Court cautioned me that if I filed it all it would do is make the judge mad and he could kick my case out because nothing starts until after the initial phone scheduling conference. The statement in the summons, as written, and if taken at face value, would have severely prejudiced me.

(3.) The 2018 rule change to Rule 5(b)(3) (abrogated) leaves a question which prison law clerks here are unsure and cannot agree on. Do the court clerks no longer do certificate of service electronically, or are they all required to do it. This has become a serious question in my case as the court clerk has provided me no notification of electronic filing as is the custom in the Ohio Southern District Courts. My request for a copy of the case docket went unanswered and as a result I felt compelled to file an amended petition strictly on the certificate of service issue. Without notification of electronic filing, the Pro Se litigant has no idea what the document number of the brief he just filed is, which can be cause of serious harm when the electronically notified defendant refers to a particular document by number. The Southern District of Ohio always provides such notification. To date the Northern District has not provided any such notification, which makes this Pro Se litigant's difficult job even more difficult than it would be for a regular lawyer.

It is not my desire to appear as a complainer. I have many years in major manufacturing as a production supervisor, and that experience has taught me that an instruction must be both simple and complete to be properly understood. I hope I have presented issues you consider valid.

Most Respectfully,

Dennis R. Brock, # 519506
Ross Correctional Institution
16149 St.Rt. 104, P.O. Box 7010
Chillicothe, Ohio 45601

TAB 10

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10. Rule 12(a)(2)

(Suggestion 19-CV-O)

Rule 12(a) sets the time to serve a responsive pleading. As a general matter, (a)(1) sets the time at 21 days after being served. Paragraph (a)(2) sets the time at 60 days for the United States, a United States agency, or a United States officer or employee sued only in an official capacity. Paragraph (a)(3) also sets the time at 60 days for a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

Rule 12(a)(1) begins with an exception that is unique among these three provisions: "Unless another time is specified by * * * a federal statute." An example of such a statute is 28 U.S.C. § 1608(d), part of the Foreign Sovereign Immunities Act, allowing a foreign state, subdivision, or agency 60 days after service to file an answer or other responsive pleading to the complaint.

The question is whether an exception for times specified by a federal statute should be added to (a)(2) and perhaps (a)(3).

19-CV-O points out that a provision of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(c) requires the defendant to serve an answer or otherwise plead within 30 days after service. This provision cuts in half the time allowed by Rule 12(a)(2).

Initial research also points to another provision in the Open Meetings part of the Freedom of Information Act, 5 U.S.C. § 552b(h)(1), which directs that the agency serve "his" answer within 30 days after service of the complaint.

Whether Rule 12(a)(2) or a statute prevails under the supersession provision in 28 U.S.C. § 2072(b) depends on which came first. The original 1938 version of Rule 12(a) included the 60-day answer provision for the United States or an officer or agency. Rule 12 was amended at intervals after 1938, overlapping enactment of the Freedom of Information Act. There is little reason to attempt to untangle the sequence of amendments with an eye toward determining the scope of supersession. There is no apparent reason to assert the carefully guarded supersession power. The statutory period should prevail.

It would be difficult to design a research program that could exclude the possibility that some other federal statute also sets a time different than Rule 12(a)(2). The initial research found 28 U.S.C. § 2410(b), which, like 12(a)(2), gives the United States "sixty days to appear and answer, plead or demur" when it is a party in state or federal court to an action to quiet title, foreclose a mortgage or lien, or the like. There is no apparent inconsistency, unless it arises from some ambiguity about the time that starts the 60 days. Service is to

be made by serving the United States Attorney for the district or serving an assistant United States Attorney or a clerical employee designated by the United States Attorney. Service also is to be made by mail to the Attorney General. These provisions for service pretty much map on the service provisions in Rule 4(i)(1). It is not entirely clear whether 60 days "after such service" starts to run only after service on both the Attorney General and the United States Attorney. Rule 12(a)(2) starts the 60 days after service on the United States Attorney.

Another discovery is 28 U.S.C. § 3205(c)(5), part of the procedure for collecting federal debts. It applies to a garnishment proceeding to satisfy a judgment against the debtor. Subsection (c) provides for garnishment; (c)(4) provides for an answer of the garnishee; (c)(5) permits the judgment debtor or the United States to file a written objection to the garnishee's answer within 20 days after receiving it. This provision does not seem to affect the time to answer a complaint under Rule 12(a)(2).

Another statute directed to the time to answer is 25 U.S.C. § 346, which applies to a petition for an allotment of Indian lands. It directs the United States Attorney to file a plea, answer, or demurrer on the part of the Government within 60 days after service. Again, there is no apparent inconsistency with Rule 12(a)(2).

Without a firm answer to the question whether some statute other than the Freedom of Information Act is inconsistent with Rule 12(a)(2), the Act — whether its separate provisions count as one statute or two — seems sufficient reason to amend Rule 12(a)(2) to bring it into line with 12(a)(1):

* * * * *

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* Unless another time is specified by a federal statute, ~~T~~the United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States Attorney.

* * * * *

What, then, of Rule 12(a)(3)? Recall that it applies when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Rule 4(i)(3) directs that service in such an action be made on the officer or employee and also on the United States. The employee is allowed to answer within 60 days after service on the employee or after service on the United States attorney, whichever is later. This

provision allows an orderly period for the United States to determine whether to provide a defense for the officer or employee. Given the proximity to (a)(1) and (2), there is something to be said for establishing uniformity across these closely related provisions.

A conservative approach would delay amending Rule 12(a)(3) to parallel (a)(1) and an amended (a)(2) until an inconsistent statute is found. Why add what may be an empty proviso? Is it reason enough that there may be some statute on the books now that, because enacted earlier than (a)(3) would be superseded by it, and that some statute might be enacted in the future and supersede an unprepared (a)(3)? The comparison to the provisos in (a)(1) and (2) would underscore the supersession if (a)(3) came later in time, or emphasize the unpreparedness of (a)(3) if the statute comes later.

Amending Rule 12(a)(3) in the face of ignorance would be easy, but perhaps pointless. It might seem useful at least to recognize the preemptive force of any future statute, but that approach could apply to many other rule provisions. Perhaps it is as well to leave (a)(3) untouched for now?

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April 12, 2019

Rebecca A. Womeldorf, Esq.
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ms. Womeldorf:

I write to invite the attention of the appropriate Advisory Committee to a problem inhabiting Rule 12(a)(2) of the Federal Rules of Civil Procedure and to offer a suggestion for an improvement.

The Situation which Brought the Problem to my Attention

On April 8, 2019, I filed in the Northern District of Illinois an action seeking the IRS's compliance with the Freedom of Information Act (*Hartnett v. IRS*, Case No. 1:19-cv-2350 (N.D. Illinois). We prepared the summonses using the 30-day time within which the IRS must appear and defend provided in FOIA, at 5 U.S.C. § 552(a)(4)(C), and electronically submitted the summonses to the Clerk for authentication. Initially, the Operations Department personnel at the Clerk's office refused to issue the summonses with the 30-day deadline to appear and defend, pointing to 1) the 60-day limit provided for in Rule 12(a)(2), and 2) The Computer, which permits one of two entries, 60 days for federal government defendants or 21 days for non-federal defendants, but no other. Fortunately for us, the Clerk's office personnel with whom we dealt were bright, patient, thoughtful and willing to listen. They agreed that 30 days was correct and promptly found a way to issue the summonses.

The Problem

Rule 12(a)(2) prescribes only one time within which federal defendants must appear and defend: 60 days. FOIA, at 5 U.S.C. § 552(a)(4)(C) provides that "Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown." In this

situation, Rule 12(a)(2)'s one-size-fits-all 60-day deadline is incorrect.

The Scope of the Problem

I don't have a sense of how many exceptions to the 60-day answer deadline Congress has authorized. Nor do I have a sense of how often the problem arises even under the FOIA exception. Anecdotally, the Operations Manager at the Clerk's Office in Chicago told me that in his ten years he had not encountered this problem before, and neither had his colleagues with even greater experience. Perhaps that's simply an artifact of underreporting. Maybe plaintiffs just endure the 60-day-period; maybe plaintiffs accept the 60-day period for starters and later move to amend the summons under Rule 4(a)(2) to pick up the shortened answer date; or maybe there's some other work-around.

No matter how widespread the problem, Rule 12(a)(2) can be improved, and some amount of unnecessary delay or expense can be avoided by making a small change.

A Proposed Solution

Whether the mismatch between Rule 12(a)(2) and other law is limited to the FOIA situation, or arises in other contexts also, a Rule 12 solution is pretty easy: borrow the lead-in language from Rule 12(a)(1), "Unless another time is specified by. . . a federal statute" and tack it onto Rule 12(a)(2), either at the beginning or the end so that it would read:

> Unless another time is specified by a federal statute, the United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

OR

> The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney, unless another time is specified by a federal statute.

Should the Advisory Committee deem it appropriate to recommend altering Rule 12(a)(2), it would also be appropriate to recommend adjustment of the software used by the Clerks' offices to accommodate both the 60-day answer deadline and such shorter deadlines as are allowed by law.

Thank you very much for considering my thoughts on this topic.

Very truly yours,

CLARK HILL PLC

Daniel T. Hartnett

DANIEL T. HARTNETT

DTH/sr

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TAB 11

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11. Calculating Filing Deadlinesand In Forma Pauperis Standards

(Suggestions 19-CV-Q and 19-CV-R)

Sai, a close student of federal court rules, has submitted two proposals. The first, 19-CV-Q, seeks to establish uniform and better standards for recognizing in forma pauperis status. I.f.p. status may be sought for a litigant who is represented by a lawyer, but approaches to this proposal are likely to focus on difficulties encountered by pro se litigants. The second proposal, 19-CV-R, seeks to ameliorate problems that arise from failures to correctly recognize and understand deadlines for seeking court action, including appeals. This proposal is framed in general terms that apply whether or not an action includes a pro se litigant, but the difficulties that confront pro se litigants add emphasis to the argument.

The deadlines proposal is addressed to the Appellate, Bankruptcy, Civil, and Criminal Rules. The i.f.p. proposal is addressed to the Appellate, Civil, and Criminal Rules. Coordination with the other advisory committees will be necessary in pursuing each proposal to a conclusion, whatever the outcome may be and however early in the process it may be reached.

Each proposal is treated separately, as it must be. Together, however, they evoke a longstanding dilemma surrounding pro se litigants. It is possible to write rules that distinguish between represented and unrepresented problems. The new Rule 5(d)(3) provisions for electronic filing are an example. (Sai participated actively and constructively in the deliberations that generated the new rule.) The challenges faced by pro se parties are frequently considered in developing amendments or new rules. The Committee, however, has traditionally been reluctant to establish separate rules for pro se litigants. Pro se and represented litigants have been treated alike, for example, when “simplified” rules have been considered with the thought that some cases may not need, or be able to bear, the full force of the procedures developed for the most complex and demanding cases. The present proposals most likely should not prompt a new project to evaluate all the Civil Rules to determine how many might be amended to make special provisions, either for pro se parties alone or for all parties to an action that includes at least one pro se party. But the impact of the rules on pro se litigants remains an important consideration.

19-CV-Q: Uniform In Forma Pauperis Standards

Sai requests court rules that address four separate aspects of applications for leave to proceed in forma pauperis. The questions of access to federal courts for litigants with few resources are important. Opening the door is only a first step, particularly for those who proceed pro se, but it is a vital first step.

There are good reasons to believe that action may be warranted on some parts of these proposals. There are reasons, however, to ask whether it is better that action be taken by bodies outside the Enabling Act process. Each part of the proposal involves substantive interpretation of 28 U.S.C. § 1915. That alone is a serious reason for caution. Courts acting in specific cases are obliged to interpret and apply the substance of § 1915. That does not mean that an Enabling Act Rule can properly attempt to prescribe specific interpretations, no matter that a national rule could be framed in ways that bring about much greater uniformity than seems to be reflected in current practice. However any hesitation on that score might be resolved, other sources of guidance may work better than the Enabling Act process. The Administrative Office of the United States has created forms to apply for i.f.p. status, forms that might be reconsidered and revised after considering Sai's proposals.

Each of the four proposals presents overlapping issues.

Standards to qualify for i.f.p. status: Sai states that no court "has given a clear statement of the rules for IFP qualification."

28 U.S.C. § 1915(a) offers no guidance. It is a drafting misadventure, apparently because it was amended to address prisoner parties as well as nonprisoner parties. A court may authorize a party to proceed without prepayment of fees or security "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." Not much of a substantive standard there.

A recent article found that different districts and judges impose quite different floors on the levels of income and assets that disqualify a party from i.f.p. status. See Andrew Hammond, *Pleading Poverty in Federal Courts*, 128 Yale L.J. 1478 (2019). There appears to be no uniformity of standards in practice. A national rule could achieve some measure of uniformity, depending in part on the terms chosen. Just how much uniformity is appropriate seems a fair question. The costs of living are much higher in some parts of the country than others — a constant level of income could entail true poverty in some places, and at least barely adequate resources in another. On the other hand, the costs of conducting litigation may also vary — a party living in a sparsely populated area at a long distance from the courthouse may eat deeper into available assets simply to carry on the action.

The problem of disuniformity is not reduced by the prospect that many courts may find it easy to grant or deny i.f.p. status with little difficulty. That uniform standards might impose more work in some circumstances does not belie the importance of equal treatment of all applicants.

One indication of the potential complexity of i.f.p. standards is provided by Sai's suggestion that a rule should incorporate Legal Service Corporation regulations. "If you qualify for LSC, you qualify for IFP." It is not evident that the measures of eligibility for LSC services serve "an identical purpose" as opening the courthouse door. The ability to come up with the filing fee does not ensure ability to pay a lawyer. Sai's description, moreover, tells us that the standards delegate many determinations to local LSC organizations. Adopting them by reference would lead to variations (and hence disuniformity) among judicial districts, a potentially troubling issue even if the lines of local LSC organizations correspond neatly with federal district lines. Further disuniformity could result from the suggestion, p. 3 & n. 10, that the LSC has multiple distinct standards. There is a risk that LSC standards, whatever and whichever, would disqualify a party that should be eligible for i.f.p. status. Sai addresses this risk by suggesting, footnote 9, that those who do not meet LSC standards still may be granted i.f.p. status so long as courts act under standards clear enough to guide other applicants.

One aspect of Sai's argument for LSC standards, however, is more objective. Recipients of aid under established assistance programs might automatically be granted i.f.p. status. The examples Sai offers include "SSI, SNAP, TANF, and Medicaid."

An added problem relates to the "ambiguous terminology" questions raised in the third suggestion. Adopting LSC standards by reference — and apparently delegating to LSC the responsibility of revising the standards — could easily generate real problems of interpretation for i.f.p. applicants.

In short, there are serious questions whether it is proper to attempt any substantive definition of i.f.p. standards by Enabling Act rules, whether the problem is aggravated by incorporating LSC standards even if rule drafting is made simpler, and whether the result of undertaking to establish standards in one way or another would improve the lot of i.f.p. applicants.

Updating for changed circumstances: If substantive standards can be adopted, there should be little problem of Enabling Act legitimacy in a rule that prescribes a duty to update the required information. But it may be asked whether the rule could provide better guidance than Sai's proposal: a party must update the information when they become aware that they no longer meet the standard.

Ambiguous forms: Sai asserts that AO Forms 239 and 240 are so indeterminate as to be unconstitutionally vague. There are no definitions for such matters as "income," who is a "spouse" or "family," whether crypto currencies qualify as cash, and so on through many examples. Here too the proposal is to invoke external standards, beginning with LSC definitions of "assets"

and “income,” and looking to IRS regulations for many other definitions. Forms 239 and 240 should be amended, the proposal suggests, to incorporate definitions of every term identical to those “in regulations that the Committees identify.” The regulations should be listed by citation in an appendix to each form.

These questions of definitions are as much substantive as the questions of standards. And the wisdom of avoiding difficult tasks of definition by falling back on definitions created for different purposes is equally open to doubt. Perhaps as importantly, it seems quite unlikely that i.f.p. parties in general would be assisted by having an appendix that cites to definitions elsewhere. Even if they should find the definitions, working with them would be difficult. An applicant for LSC representation, for example, is likely to be assisted by LSC personnel in grappling with the definitions. A pro se i.f.p. applicant may find some help from the clerk’s office, but a national rule, even if self-contained, might augment the burden on the clerk’s office rather than reduce it.

Unauthorized information: Sai recounts many of the kinds of information requested by both the long and short AO forms, 239 and 240. He asserts that the questions “are not limited to assessing the affiant’s actual, current poverty.” They seem to ask for judgments about the applicant’s life style and unrealized potential to earn income. And they often ask for information that the applicant cannot legally provide, such as financial information about nonparties. The reasons for asking about spouse’s income, assets, and debts serve an obvious purpose. Likewise for asking about employment and employment history, expenses, phone number, age, and so on. Perhaps the pragmatic reasons for asking are insufficient to justify the questions. But in some ways these concerns deepen the substantive character of the issues: what practical information can properly be sought in seeking to apply whatever substantive standard might be adopted? How are the competing substantive concerns to be weighed and balanced?

19-CV-R: Calculating Filing Deadlines

This proposal begins with an observation: “Frequently, parties run into difficulties with filing deadlines. This can be due to inattention; failure to consider applicable holidays; lack of clarity as to the triggering event (such as what constitutes a ‘judgment’); misinformation by a clerk; etc.” Lawyers encounter these problems, and pro se litigants encounter them frequently.

The proposed solution rests on the assumption that “[t]he court knows what the times are, [and] has the authority to define them conclusively.” Clerks, moreover, “already have to calculate deadlines regularly, in order to enter ‘set/reset deadline’ entries in CM/ECF.” Many versions of CM/ECF provide the calculations. So why not make the court perform the calculations

for all possible party responses to every court action and instruct all parties?

This approach is embodied in a draft to be added at the end of Civil Rule 6(e), Appellate Rule 26(d), Bankruptcy Rule 9006(h), and Criminal Rule 45(d):

> 1. For every applicable date or time specified under these Rules, or any order, the court shall give immediate notice, by order, to all appeared filers, of
>   a. the calculated time certain, including time zone, of every[7] event not completed or adjudicated;
>   b. whether and how the time may be modified, and any conditions for such a modification under all applicable rules and orders; and
>   c. whether the event is optional or expired.
> 2. All filers shall be entitled to rely on the court's computed times.
>
> [7] This is deliberately cumulative. The most recent calculation order should be the full calendar of a case listing all available, pending, or issued events, and their respective deadlines.

This proposal will stir a sympathetic response from every lawyer and team of lawyers that has struggled to make confident determinations of filing deadlines. The fear of procedural forfeiture for a miscalculation is ever-present. In the Civil Rules, Rule 6(b) provides some relief by authorizing extensions, even after the time has expired, although extensions are forbidden for the times to act set by Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

These concerns have not been overlooked in setting timing requirements. Timing requirements, however, are set for good reasons. Litigation cannot drag on forever. And the Rule 1 goal of achieving the "speedy . . . determination of every action and proceeding" requires a firm point of finality. The "mandatory and jurisdictional" appeal times set by statute and reflected in Appellate Rule 4 (together with the provisions of the Civil Rules that are integrated with Rule 4) are vitally important. Qualms about forfeiture of procedural opportunities are overcome by the need for clear and binding rules.

It may be that some timing requirements have become overly complex. No one wants the rules to be needlessly obscure or complicated. Some measure of complexity, however, regularly emerges from the competition between distaste for forfeiture and the need to establish meaningful deadlines enforced by forfeiture. The best illustration is Appellate Rule 4, a rule

subject to great pressure by the ruling that its statutory foundations make it not only mandatory, but jurisdictional as well. Rule 4 is regularly revised in efforts to save unwary litigants from newly discovered traps. Even if it is assumed that no further amendments will be needed, the result has moved far from simplicity itself.

It has not been long since the Time Computation Project undertook a comprehensive review of the timing requirements in all four sets of rules of procedure. That need not forestall consideration of further comprehensive proposals. The present proposal, moreover, does not envision revision of any particular timing provision. Instead it seeks to transfer the burdens of complexity, forgetfulness, and miscalculation from litigants and their lawyers to judges and their staffs.

If some form of comprehensive action is considered, many detailed choices must be confronted. Sai's draft requires a court order giving immediate notice of "every applicable date or time specified under these rules." The order must include "the calculated time certain * * * of every event not completed or adjudicated." Many time periods run from events that are not immediately known to the court, and may not ever be known. The times to respond to discovery requests run from service, but requests not served by filing with the court's electronic filing system are not filed, and a certificate of service is not due, until they are used in the action. A more complex example is provided by Appellate Rule 4(a)(6)(B), which allows the court to reopen the time to appeal when notice of the entry of judgment under Rule 77(d) is not received within 21 days, but ties the time to reopen to the earlier of 180 days after the judgment is entered or 14 days after the moving party receives notice of the entry, and allows a party to give notice. Or the time may start before the event — Rule 6(c), for example, directs that a written motion and notice of the hearing be served at least 14 days before the time specified for the hearing, and allows exceptions. Drafting a workable rule would be a complex task.

So the question comes to a point: should courts be charged with some explicit measure of responsibility for protecting litigants — all litigants, or perhaps especially pro se litigants — from the perils of missed deadlines? It seems likely that, in different measures and in different circumstances, court clerks now act to offer helpful suggestions. Local rules for pro se litigants may offer some guidance. Scheduling orders provide clear notice for many events. Indeed, many district judges now set or adjust most deadlines for filing through court orders of one type or another (*e.g.*, scheduling orders or orders on enlargement motions). Rule 6(b) might be amended to soften the "good cause" standard for granting extensions, perhaps with special attention to pro se parties. Imposing affirmative duties on the court and court clerks by national rule provisions, however, would be a major and serious innovation. Mistaken advice will be given, forcing reconsideration whether reliance on

explicit advice provided by the court defeats forfeiture, even when that means extending deadlines that are not only mandatory but jurisdictional as well. The great breadth of Sai's proposal need not close off consideration of lesser measures, but it may not be appropriate to undertake a canvass of all rule-set deadlines without some specific focus.

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19-AP-C
19-CR-A
19-CV-Q

Dear AOUSC Committees on Civil, Criminal, and Appellate Rules —

There are four major problems with the current civil, criminal, and appellate IFP[1] rules and forms:

1. There is no publicly known definition of what financial standards qualify a person for IFP status.
2. There is no clear rule as to when an IFP litigant needs to update the court about a change in their financial conditions.
3. The IFP forms use ambiguous terms, for which the courts have not given clear definitions.
4. The IFP forms ask for information outside the legitimate scope of 28 U.S.C. § 1915.

All poor litigants deserve to know the rules for IFP qualification, definitions of terms used in forms, and when they must update a court about a change in their financial circumstances; to have uniformity in IFP determinations, know, and to be free of invasive questions that are unnecessary to making IFP determinations. Third parties also have rights to not have their information disclosed without consent; making an IFP application does not convey any right to violate others' privacy.

Pursuant to the Rules Enabling Act and APA, I hereby petition the Committees for rulemaking to cure each of the above, as detailed below. I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[2]
legal@s.ai
+1 510 394 4724

[1] For the purposes of the criminal rules, I use "IFP" synonymously with "CJA".
[2] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

1. **Financial qualification rules for IFP status**

Not one court in the country has given a clear statement of the rules for IFP qualification, such as an objective standard of counted assets or income, qualifying thresholds, or discretionary elements.

This is despite the fact that two appellate courts — the Third Circuit[3] and Fifth Circuit[4] — permit *clerks* to grant IFP applications (and in the Fifth, to *deny* them as well). Since clerks have no Article III authority, and it would be improper for them to be vested to exercise discretion, we can infer that both courts have a policy dictating the qualifying standards. Neither court has published it.[5]

Certainly, courts have a duty to guard the public purse from improper claims of poverty. That duty extends to IFP applicants as well, to not *make* an IFP claim unless it is justified — but with no clear standard, it is impossible for potential IFP applicants to make an informed decision.

Contrast the Legal Services Corporation regulations, 45 C.F.R. Part 1611, which implement an identical duty and for an identical purpose. The LSC is a Federal 501(c)(3) corporation, which grants Federal funds to pay for legal aid for millions of poor people throughout the United States. It has promulgated regulations to determine financial eligibility including multiple discretionary factors, excluded assets, etc. It delegates to local LSC organizations determinations such as asset thresholds, costs of living, and assistance programs (e.g. SSI, SNAP, TANF, or Medicaid) whose recipients automatically qualify. *See* e.g. Utah Legal Services' Financial Eligibility Guidelines.[6]

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[3] 3rd Cir. standing order of January 22, 1987
[4] 5th Cir. R. 27.1.17
[5] Courts must publish all "rules for the conduct of the business", "order[s] relating to practice and procedure", and "operating procedures". 28 U.S. Code §§ 332(d)(1), 2071(b), & 2077(a). *See In re Sai*, No. 19-5039 (1st Cir. *filed* May 15, 2019).
[6] https://www.utahlegalservices.org/sites/utahlegalservices.org/files/Financial%20Eligibility%20Guidelines%202.19.pdf

The LSC's regulations for financial qualification for government-funded free legal services are reasonable, well-tested, regularly updated[7], and Congressionally approved. They set out clear asset and income thresholds, asset carve-outs for e.g. work supplies and homes, etc. They were thoroughly debated with low-income legal aid advocates, and were promulgated through notice and comment rulemaking.[8] They therefore make for a very easy and clear reference by which the judiciary can craft a fair and uncontroversial rule, already well familiar to the judiciary, which needs little to no further elaboration: "if you qualify for LSC, you qualify for IFP".

Adopting these standards would protect IFP litigants' privacy, while simultaneously making decisions more transparent than they are now. Court orders granting IFP status could simply say "[litigant] has demonstrated IFP qualification under the standards set forth in 45 C.F.R. § 1611.3(c)(1) + (d)(1)". No further detail of the applicant's finances is needed, and this names a clear standard.

I therefore petition that the Rules Committees promulgate rules stating that a § 1915 IFP applicant shows sufficient[9] basis for qualification if they meet any of the Legal Services Corporation's standards[10] of financial qualification, 45 C.F.R. Part 1611, as elaborated by the applicant's local[11] LSC recipient(s) per § 1611.3(a).

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[7] https://www.federalregister.gov/documents/2019/02/04/2019-00889/income-level-for-individuals-eligible-for-assistance (84 FR 1408 (2019), adjusting for 2019 federal poverty guidelines)

[8] https://www.federalregister.gov/documents/2005/08/08/05-15553/financial-eligibility (70 FR 45545 (2005), revising 45 C.F.R. Part 1611 in entirety)

[9] This is deliberately phrased as "sufficient" — not "necessary". Courts would retain discretion to grant IFP status under circumstances not covered by LSC's standards — so long as they state the standard that they have applied with enough clarity to enable IFP litigants to comply with their obligation to update the court (*see* below).

[10] Part 1611 has *multiple* distinct standards: (1611.3(c)(1) or 1611.5(a)(1–4)) plus (1611.3(d)(1) or (d)(2)); or 1611.4(c).

[11] For applicants living outside the United States, the court should substitute the LSC recipient in the court's jurisdiction with a population most socioeconomically analogous to the applicant's.

2. Requirements to update the courts on change in circumstances

It is neither feasible, nor desirable to anyone, that IFP litigants update courts of *every* change in financial status. Nobody cares if an IFP litigant receives a Christmas gift of $100, or if their expenses in a given month vary a bit from what they set out in their IFP application. Filing updates about minor changes would risk sanctions for "multipl[ying] the proceedings in any case", 28 U.S.C. § 1927, burden courts with immaterial filings, and expose litigants to unnecessary invasion of privacy..

Yet if an IFP applicant were to unexpectedly win a million dollars one month after they receive IFP status, they surely must update the court, withdraw from IFP status, and pay the fee. Failure to do so would subject the previously-IFP litigant to the severe sanction of dismissal "at any time" if "the allegation of poverty is untrue", 28 U.S.C. § 1915(e)(2).

Somewhere between these two extremes lies a threshold triggering obligation. The obvious place for this trigger is at the qualifying threshold. This is the rule used by the LSC, 45 C.F.R. § 1611.8.

I therefore petition that the Rules Committees promulgate rules stating that a person with IFP status

A. need not update the court so long as they remain within the standard under which they qualified, but
B. must update the court when they become aware that they no longer meet that standard.[12]

[12] This does not mean automatic disqualification — the litigant may still qualify under a different standard, e.g. one which requires a discretionary exemption, under 45 C.F.R. § 1611.5(a)(4) — but it does create a clear point at which the court should reëxamine financial qualification.

This necessarily also implies that a court granting IFP status must *clearly state* the standard under which it granted IFP status. It is impossible for a litigant to comply with their obligation to update about a change that might alter their qualification unless they know the standard that was applied.

3. Ambiguous terminology in IFP forms

The courts have given no precise definition of the specific terms in the standard IFP affidavits..

Certainly the terms in the IFP affidavits, such as "income", *can* have clear, specific meanings.

The problem is that they don't have any specified meanings in *this* context — and they are amenable to multiple reasonable interpretations.[13] In fact, many of them *do* have specific meanings in other contexts, such as under IRS or Social Security regulations — and those meanings differ between agencies, proving that they are facially vague.

IFP applicants have a due process right to know the precise meaning of terms to which they are expected to swear under penalty of perjury. They risk an unjust accusation of perjury — and dismissal — if their interpretation differs from a court's (thus far secret) interpretation. Without clarification, the IFP forms are unconstitutionally vague.

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[13] For example: Is an unmarried, unregistered partner a "spouse" or "family"? What about common-law spouses (and by which jurisdiction's definition)? Do Patreon donations constitute "self-employment income"? Does Bitcoin constitute "cash" or "other financial instrument", and how does one treat its appreciation or depreciation? Is a Bitcoin exchange, or PayPal, a "financial institution"? Are outgoing donations "support paid to others"? Are domain names, software, inventions, etc. "assets"? Is "value" the original price, currently obtainable resale price, cost to re-acquire, depreciated value by some formula, hypothetical market value, velc.? Is PACER research "expenses … in conjunction with this lawsuit"? Are art, disability-related modifications, musical instruments, appliances, printers, etc. "ordinary household furnishings"? Is an expense occurring once every few years, such as purchase or repair of a computer, a "regular" expense? Does a UOCAVA "voting residence" count as a "legal residence"? Are sales taxes, VAT, or the NHS healthcare surcharge "taxes"? Are visa costs "expenses"? What of joint property? Are litigation settlements or fee/cost awards "income"? What is a large enough change to be "major"?

All of the above are actual questions that I personally must know the answer to in order to correctly fill out FRAP Form 4, but for which there is no available answer in the context of an IFP application.

This clarification can be very readily provided, by simply adopting the definitions of dedicated regulatory bodies as defining the terms used in IFP forms.

The LSC defines "assets" and "income", 45 C.F.R. 1611.2. Crucially, both are limited to what is "currently and actually available to the applicant". This rule was adopted in preference to making a distinction between "liquid" and "non-liquid" assets, and focus on the practical requirements that apply to poor people seeking legal aid. 70 FR 45545, 45547 (2005).

The IRS defines virtually all other financial terms that could be relevant to an IFP application, including e.g. "household" (26 C.F.R. § 1.2-2), "self-employment" (26 C.F.R. § 1.1402(a)-1), "spouse" (26 C.F.R. § 301.7701-18), "gifts" (26 C.F.R. § 25.2503-1), etc. It has also issued guidance for evolving issues such as Bitcoin (IRS Notice 2014-21).[14]

I therefore petition that the Rules Committees:

A. promulgate rules stating that every term used in FRAP Form 4, AO 239, AO 240, and CJA 23 is defined to be identical to those terms' definitions in regulations that the Committees identify;
B. give preference to LSC and then IRS regulations; and
C. amend FRAP Form 4, AO 239, AO 240, and CJA 23 to add an appendix listing the regulatory definition for each term used, by citation.

[14] https://www.irs.gov/pub/irs-drop/n-14-21.pdf

4. Courts' IFP forms request information not authorized by 28 U.S.C. § 1915.

The IFP statute contemplates that courts will assess a prisoner's assets and income, and all IFP affiants' general poverty. However, the IFP forms go much further than the statute permits. *See*[15] e.g.:

A. spouse's income, assets, or debts (unless the affiant has a legal right to expend them for litigation, e.g. if jointly owned), or employment history
B. identities of third parties (spouse, debtor, creditor, financial institution, credit card company, department store, supporter or supportee, etc.)
C. employment & employment history (rather than just current income)
D. sources that can't be used to pay litigation costs (e.g. non-fungible/unavailable[16] or exempt[17])
E. expense breakdowns more detailed than broad categories (e.g. "mandatory costs", "costs of living / working", "exempt", or "discretionary / luxury")
F. make, model, year, and registration # of vehicles
G. legal residence (except as relevant to cost of living & poverty guidelines[18])
H. phone number
I. age
J. years of schooling

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[15] *See also* FRAP Form 4 question re SSN last 4 digits, removed pursuant to my proposal to AOUSC, suggestion 15-AP-E, and promulgated by Supreme Court order of April 26, 2018.
[16] 45 C.F.R. § 1611.2(d): ""Assets" means cash or other resources of the applicant or members of the applicant's household that are *readily convertible to cash*, which are *currently and actually available to the applicant*." (emphasis added)
[17] § 1611.2(i): "… [Income] do[es] not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute."
[18] Only Alaska & Hawaii are distinguished. https://aspe.hhs.gov/poverty-guidelines

These questions are not limited to assessing the affiant's actual, current poverty. Many serve only to pass judgment on the affiant's lifestyle, assess the affiant's ability to earn money (which is not the standard), or otherwise exercise a paternalistic inquiry into the affiant's finances. These are not authorized objectives under 28 U.S.C. § 1915.

By requiring such questions of IFP applicants, courts violate applicants' privacy and dissuade qualified litigants from filing for IFP status.

Furthermore, it is often illegal to answer questions identifying third parties, let alone stating anything about their finances.[19] As a US citizen residing in the UK, obligated to obey UK and EU law, I am subject to very strict legal restrictions under the EU GDPR and UK Data Protection Act 2018. Courts must not demand information that is illegal to give. Here, there is no valid statutory basis for requesting third-party information at all. § 1915 only talks about the *applicant's* poverty; it says nothing about their spouse, creditors, debtors, supporters, etc.

I therefore petition that the Rules Committees amend FRAP Form 4, AO 239, AO 240, and CJA 23 to remove or amend all questions requesting information listed above.

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[19] Under 12 U.S.C. § 3403 (Right to Financial Privacy Act), 5 U.S.C. § 552a(g) (Privacy Act), 18 U.S.C. § 1030(g) (Computer Fraud and Abuse Act), 15 U.S.C. § 1681b *et seq* (Fair Credit Reporting Act), 15 U.S.C. § 1692c *et seq* (Fair Debt Collection Practices Act), and 47 U.S.C. § 227(b)(3) (Telephone Consumer Protection Act), disclosure of such information without consent is unlawful.

Third parties' information disclosed on an IFP affidavit, as with affiant's spouse, creditors, and debtors, also implicate independent privacy rights. *See Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990). An IFP affiant publicly disclosing creditor or debtor information may violate the FDCPA, §§ 1692b, 1692c, & 1692k. This information is also a "consumer credit report", for which public disclosure would likely be actionable under the FCRA. *See* 15 U.S.C. §§ 1681b, 1681n, & 16810.

Dear AOUSC —

Frequently, parties run into difficulties with filing deadlines. This can be due to inattention; failure to consider applicable holidays; lack of clarity as to the triggering event (such as what constitutes a "judgment"); misinformation by a clerk; etc.[1] This is especially true for *pro se* parties, who are held strictly to deadlines that are often confusing even to lawyers.[2] The consequences can be fatal[3].

The current rules require every party to personally calculate all applicable times anew every time. This is a waste of energy for all parties, clerks, and judges.[4] It is also totally avoidable. The court knows what the times are, has the authority to define them conclusively. The court could keep a single regularly updated document listing all deadlines by computed time, noticed to all parties upon any update — including optional events such as appeals or motions to extend.[5]

Clerks already have to calculate deadlines regularly, in order to enter "set/reset deadlines" entries in CM/ECF. Many (but not all) versions of CM/ECF itself provide such calculations as part of docket entries. Clerks sometimes make errors, however, and courts have ruled that parties may not rely on a clerk's erroneous docket entry or advice by phone — even if done entirely in good faith. Deadline calculations should therefore be issued as a simple clerk's order.

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[1] *See e.g.* W. Kelly Stewart & Jeffrey L. Mills (Jones Day), *E-Filing or E-Failure: New Risks Every Litigator Should Know*, For The Defense p. 28 (June 2011)

[2] *See e.g. Woodford v. Ngo*, 548 US 81, 103 (2006) (5-3; "prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines").

[3] *See e.g. Jackson v. Crosby*, 375 F. 3d 1291 (11th Cir. 2004) (denying appeal of capital murder case as untimely; majority of panel, C.JJ. Black and Carnes, concurring specially that result is compelled but unjust).

[4] Time computation arises not just when there are disputes about timeliness, but also for drafting opinions & orders, determining timeliness of an appeal, and everyday matters like calendaring.

[5] Rather than ordering e.g. "the deadline for an opposition is extended by 7 days", a court could — with only trivial extra upfront effort — add "the opposition is now due January 1, 2020, at 11:59 pm EST; the reply is now due January 8, 2020 at 11:59 EST; and both deadlines may be modified by motion under [rule] before the deadline (requiring conferral with opposing counsel), or by *post hoc* motion under [rule]."

Therefore, I hereby petition for rulemaking to add the following rule at the end of each rule on computing time, i.e. at FRCP 6(e), FRCrP 45(d), FRBP 9006(h), FRAP 26(d), and Sup. Ct. R. 30(5):

1. For every applicable date or time specified under these Rules, or in any order, the court shall give immediate notice, by order, to all appeared filers, of
    a. the calculated time[6] certain, including time zone, of every[7] event not completed or adjudicated;
    b. whether and how the time may be modified[8], and any conditions for such a modification under all applicable rules and orders[9]; and
    c. whether the event is optional[10] or expired.
2. All filers[11] shall be entitled to rely on the court's computed times.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[12]
legal@s.ai / +1 510 394 4724

---

[6] This includes deadlines expressed in days, e.g. to explicitly differentiate filings due by the close of court from those due by midnight.

[7] This is deliberately cumulative. The most recent calculation order should be the full calendar of a case, listing all available, pending, or missed events, and their respective deadlines. This includes expiration dates of court orders, deadlines to request or correct transcripts, deadlines under internal operating procedures (such as *en banc* calls), etc. This would also serve as a comprehensive list of all events pending adjudication, and all missed deadlines.
Generally, the clerk should be able to copy the previous calculation order, add new or amended deadlines, mark expired deadlines, and delete completed or adjudicated deadlines — resulting in the new and complete calculation order.

[8] Modification includes, e.g., extension, acceptance out of time, or *nunc pro tunc* motion.

[9] Applicable orders include, e.g., any standing orders of the court or judge, or any standing orders in a given case. Conditions include, e.g., a requirement to confer with opposing counsel or with chambers, a deadline for filing for extension that is earlier than the deadline of the filing, or the required showing for an extension to be granted.

[10] Optional events include, e.g., a response or appeal. By implication, such orders shall give notice of whether an appeal may be taken (or requested) — either under the final judgment rule or as a collateral appeal, e.g. under *Cohen*.

[11] Filers includes not just current parties, but also e.g. amici who have not yet filed an appearance,

[12] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

UNITED STATES DISTRICT COURT

for the

_____ *Plaintiff/Petitioner*	)	
v.	)	Civil Action No.
_____ *Defendant/Respondent*	)	

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (Long Form)

Affidavit in Support of the Application

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested. I declare under penalty of perjury that the information below is true and understand that a false statement may result in a dismissal of my claims.

Signed: _____

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: _____

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly income amount during the past 12 months**		**Income amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property *(such as rental income)*	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child support	$	$	$	$

Retirement *(such as social security, pensions, annuities, insurance)*	$	$	$	$
Disability *(such as social security, insurance payments)*	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance *(such as welfare)*	$	$	$	$
Other *(specify)*:	$	$	$	$
Total monthly income:	$ **0.00**	$ **0.00**	$ **0.00**	$ **0.00**

2. List your employment history for the past two years, most recent employer first. *(Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. *(Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

4. How much cash do you and your spouse have? $ _____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	**Type of account**	**Amount you have**	**Amount your spouse has**
		$	$
		$	$
		$	$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Assets owned by you or your spouse	
Home *(Value)*	$
Other real estate *(Value)*	$
Motor vehicle *#1 (Value)*	$
Make and year:	
Model:	
Registration #:	
Motor vehicle *#2 (Value)*	$
Make and year:	
Model:	
Registration #:	
Other assets *(Value)*	$
Other assets *(Value)*	$

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
	$	**$**
	$	**$**
	$	**$**

7. State the persons who rely on you or your spouse for support.

Name (or, if under 18, initials only)	**Relationship**	**Age**

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment *(including lot rented for mobile home)* Are real estate taxes included? ❒ Yes ❒ No Is property insurance included? ❒ Yes ❒ No	$	$
Utilities *(electricity, heating fuel, water, sewer, and telephone)*	$	$
Home maintenance *(repairs and upkeep)*	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$
Transportation *(not including motor vehicle payments)*	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance *(not deducted from wages or included in mortgage payments)*		
Homeowner's or renter's:	$	$
Life:	$	$
Health:	$	$
Motor vehicle:	$	$
Other:	$	$
Taxes *(not deducted from wages or included in mortgage payments) (specify):*	$	$
Installment payments		
Motor vehicle:	$	$
Credit card *(name)*:	$	$
Department store *(name)*:	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$

Regular expenses for operation of business, profession, or farm *(attach detailed statement)*	**$**	**$**
Other *(specify)*:	**$**	**$**
Total monthly expenses:	**$ 0.00**	**$ 0.00**

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

❒ Yes ❒ No If yes, describe on an attached sheet.

10. Have you spent — or will you be spending — any money for expenses or attorney fees in conjunction with this lawsuit? ❒ Yes ❒ No

If yes, how much? $ _____

11. Provide any other information that will help explain why you cannot pay the costs of these proceedings.

12. Identify the city and state of your legal residence.

Your daytime phone number: _____

Your age: _____ Your years of schooling: _____

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UNITED STATES DISTRICT COURT

for the

_____ *Plaintiff/Petitioner*	)	
v.	)	Civil Action No.
_____ *Defendant/Respondent*	)	

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: _____. If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are:

My gross pay or wages are: $ _____, and my take-home pay or wages are: $ _____ per *(specify pay period)* _____.

3. *Other Income.* In the past 12 months, I have received income from the following sources *(check all that apply)*:

(a) Business, profession, or other self-employment	❒ Yes	❒ No
(b) Rent payments, interest, or dividends	❒ Yes	❒ No
(c) Pension, annuity, or life insurance payments	❒ Yes	❒ No
(d) Disability, or worker's compensation payments	❒ Yes	❒ No
(e) Gifts, or inheritances	❒ Yes	❒ No
(f) Any other sources	❒ Yes	❒ No

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

4. Amount of money that I have in cash or in a checking or savings account: $ _____ .

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: _____ _____

Applicant's signature

_____

Printed name

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TAB 12

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12. Rule 68 Offers of Judgment

(Suggestion 19-CV-S)

Retired Judge Mark W. Bennett, now Director of the Institute for Justice Reform & Innovation at Drake University Law School, has submitted an article by one of his colleagues as a proposal to amend Rule 68.

The Article is Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev. 865-937 (2007). It accepts Rule 68 pretty much as it is, recognizing but putting aside the more dramatic proposals that the Committee has considered at regular intervals over the years. The focus instead is on increasing the clarity of offers of judgment, for the benefit both of the party making the offer and the party receiving it. Forcing clarity through specific rule language will, it is argued, increase the frequency of offers, encourage acceptance, and avoid collateral litigation over just what the offer meant, whether it was accepted or rejected.

Many pages are devoted to examining cases that reflect struggles to determine whether an offer is ambiguous and, if ambiguity is found, to resolve the ambiguity. One frequent source of ambiguity arises from uncertainty whether a specified amount of money is intended to include “costs,” or whether it is intended that the court will add “costs” to the amount specified. A closely related source of ambiguity arises from the distinction between statutes that provide for an award of attorney fees as “costs” and those fee statutes that do not characterize the award as costs.

The proposed remedy is provided in an amended Rule 68 set out at pages 923-925. Because the article appeared in 2007, the amendments are grafted onto the pre-Style version of Rule 68, but adjustments to fit the 2007 Style Rule are easily made.

The core of the proposal forces all offers into one or the other of two categories. A “damages only” offer may include nonmonetary relief as well as money. It “must be construed as inclusive of any applicable prejudgment interest then accrued and as not inclusive of costs then accrued or any applicable attorneys’ fees then accrued.” If the offer is accepted, the court must decide what fees are added to the judgment. No distinction is made between fees that are characterized as “costs” by the relevant statute and fees that are not characterized as costs by the statute or by a contract provision for fees. A party may not make a damages-only offer that includes costs but not attorney fees. Although the proposed rule text does not seem clear on first examination, clear text could be drafted to support comparison of a rejected offer to the judgment. The likely provision would compare the offer, including fees and costs incurred at the time of the offer, to the judgment stripped of fees and costs awarded for post-offer activities. A damages-

only offer leaves the offeror uncertain as to what its total liability will be if the offer is accepted, a matter that may be significant or vitally significant in fee-shifting cases.

The "damages only" model reduces uncertainty in another way by eliminating the distinction between fees-as-costs and other fees. This feature can help parties who do not pause to reflect on the distinction. It also helps those who reflect, but remain uncertain — a dilemma that can be particularly acute when the basis of the claim is uncertain, or when parallel claims are based on different statutes that treat fees differently or do not address fees at all. Uncertainty will remain as to the amount of a fee award when the offer is accepted, and perhaps as to what are "applicable attorney fees then accrued." Like uncertainty will remain when the offer is rejected and the judgment is not better than the offer--the determination of what fees are applicable and their amount may surprise the party who rejected the offer.

The alternative permissible offer is a "lump sum" offer that must include the exact language of the amended Rule: "This offer is being made pursuant to Rule 68(h) and represents a lump-sum offer inclusive of prejudgment interest then accrued, costs then accrued, and any applicable attorneys' fees then accrued." The fees include those provided "by statute, rule, or contract for one or more of the claims resolved by the offer." "Attorneys' fees" include litigation expenses. An uncertainty in the case law whether an offer can disclaim liability is resolved by providing that an offer does not constitute an admission of liability, and that the offer may say so. When a lump sum offer is accepted, that should resolve all issues. If it is not accepted, problems of comparing the offer to the judgment will remain.

Pursuing this proposal need not adhere to the specific drafting. It may prove better to put aside the specific categories of "damages-only" and "lump-sum" offers in favor of an approach that details what an offer must specify. Most offers include — and are limited to — a sum of money. The rule could provide that the offer must state whether the sum is the total amount to be paid for any reason, what it does include (e.g., all damages), or what it does not include (e.g., attorney fees and costs to be determined by the court). The offeror would be encouraged to think through just what it hopes will encourage settlement, or at least provide a basis for cutting off post-offer costs(including fees). The claimant would know how to evaluate the offer, and would not be surprised by later discovering a misunderstanding.

The great virtue of this proposal is that it bypasses all of the deeper passions stirred by Rule 68. The Committee has repeatedly considered broader revisions, only to come up short. Many proposals ask that Rule 68 offers — and acceptances — be encouraged by providing fee-shifting sanctions. Others suggest that it is inherently unfair to provide for offers made only by a

party defending against a claim. A claimant should be allowed to make a Rule 68 offer, and to claim attorney fees as a sanction because little would be accomplished if the consequence of rejecting an offer is no more than liability for the costs that the defendant, having lost — indeed having lost more than the offer, would ordinarily bear in any event. Unfair consequences flow from directing an exact comparison of rejected offer and judgment — it can be reasonable to reject an offer that, in the unpredictable course of litigation, proves somewhat better than the judgment. Some express provisions should be made for successive offers. Perhaps something should be done to help compare an offer for specific relief — usually an injunction — with the actual judgment. And the Committee should reconsider the "plain language" ruling that because Rule 68 uses "costs" as a sanction, failure to better a rejected offer cuts off statutory fees if the statute characterizes the fees as "costs," but not otherwise.

Beyond those tendentious questions lies a deeper challenge. Even if it were made bilateral, Rule 68 can be challenged as a device that enables a defendant with enough assets to be risk neutral to take advantage of a plaintiff that is risk averse. There is little saving grace in producing more settlements, or avoiding trials by other means, given the very low rate of trials. The hope that settlements are reached earlier under the pressure of Rule 68 must be balanced against the prospect that a later settlement, reached after discovery reveals more about the case, might be quite different and more equable.

These broader questions are sketched for a simple purpose. Rule 68 continues to draw periodic requests for reform. The passions surrounding Rule 68 may make it difficult to take up the limited proposal described here without prompting a renewal of the many expansive proposals that have been made in the past. Those proposals do not bear directly on the present proposal, and can be relegated to past Committee study without further ado. But for those who are curious about past efforts, the Rule 68 agenda materials for the October 30-31, 2014 Committee meeting are attached, along with the Minutes of the Committee discussion and a one-page agenda item for the November 5-6, 2015 meeting.

That reason for caution leads to others. A defendant is free to draft an offer that is as clear as the proposed rule, and more detailed. Some uncertainty remains if the offer leaves an award of fees to be made by the court, not only as to amount but at times as to eligibility for fees. A precise offer for an injunction may present many problems, while neither plaintiff nor defendant may be attracted by an offer to submit to such injunctive relief as the court may draft with the parties' assistance. But a careful defendant can avoid many of the problems exhibited by the cases described by Professor Shelton.

A plaintiff is not as well protected by the defendant's freedom to draft a clear offer. Not all offers will be clear. The

plaintiff may not recognize the ambiguity, and may have to wrestle with recognized ambiguities. The Rule 68 offer may prompt further settlement negotiations that resolve the problems, often outside the Rule 68 framework, but that is not a sure thing.

Some caution also may be warranted by the passage of time since 2007. Professor Shelton describes a number of cases that have struggled to interpret Rule 68 offers, both those accepted and those rejected. Given the relatively infrequent use of Rule 68 offers, it may be that these are enough cases to justify the task of amending Rule 68. But it would be good to know whether the problems continue to appear with any frequency.

For the moment, the question is direct. If the Committee believes the time has come for another comprehensive review of Rule 68, Professor Shelton's proposal can fit comfortably into the project. If the Committee decides that it is better to avoid yet another battle with Rule 68, it will need to decide whether the opportunity to explore a proposal that addresses issues not directly considered in earlier deliberations warrants the effort to limit the scope of a Rule 68 project.

Drake
UNIVERSITY

19-CV-S
19-CV-T

Hon. Mark W. Bennett (Ret.)
Director, Institute for Justice Reform & Innovation
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June 17, 2019

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Re: Suggestions to change Rule 68 and Rule 26(b) (4) (E)

Dear Members of the Advisory Committee on Civil Rules:

By way of introduction I recently retired as a U.S. district court judge in the N.D. of Iowa after 24 years of service to become a fulltime academic. One of my colleagues here at the Drake University Law School, Professor Danielle M. Shelton, a 1995 *magna cum laude* graduate of the Harvard Law School, who also practices law, has written two excellent law review articles, which are enclosed.

Her articles brilliantly analyze specific problems encountered by courts and litigants with regard to Rule 68 and Rule 26(b)(4)(E). Perhaps even more helpfully, each article provides a practical and well thought-out solution.

I have never written any rules committee member before but because I was so struck by the profound wisdom of Professor Shelton's articles wanted to write each of you. I have personally encountered many of the problems Professor Shelton writes about and wholeheartedly endorse her proposed changes. These are not your typical law professor pie-in-the-sky solutions but very practical suggestions on how to improve each rule to achieve greater fairness, efficiency, and justice. The proposed changes would greatly reduce litigation expenses in these areas by providing much more clarity on issues that are frequently litigated. Thomas A. Edison observed: "There's a way to do it better – find it." Professor Shelton has done just that.

Sincerely,

Mark W. Bennett

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Bennett's SSRN page: https://ssrn.com/author=703083

"*The arc of the moral universe is long, but it bends towards justice.*" –
MLK, Jr. & Rev. Theodore Parker. The thing of it is it does not bend on its own.

This memorandum frames a broad question that has persisted on the agenda for many years: Has the time come to undertake a thorough study of the offer-of-judgment provisions of Rule 68? The study would embrace the multitude of suggestions for amendment and the astonishingly complex questions they raise. But it also would ask whether the best choice is to abrogate Rule 68. Any proposals that might emerge would be highly controversial. A sanguine view would be that the controversy would emerge from the belief that Rule 68 works well now. Less comforting views would emphasize the belief that Rule 68 is largely innocuous because it is seldom used outside cases where an offer can cut off a right to statutory attorney fees, and is not routinely used even in those cases; the compelling need to reconsider the rulings in two Supreme Court cases;[1] and the great difficulties of addressing the questions raised by the most common proposals for reform — extending the rule to offers by claimants and increasing the incentives to accept an offer by augmenting the adverse consequences for a party who rejects an offer and then fails to win a judgment more favorable than the offer.

The persistence of "mailbox" suggestions to revise Rule 68 is reflected in the number that have been carried forward on the agenda without further action. They include at least 13-CV-B, 13-CV-C, 13-CV-D, 10-CV-D, 06-CV-D, 04-CV-H, 03-CV-B, and 02-CV-D. The Committee has considered 06-CV-D and the three earlier suggestions and carried them forward for further consideration. The more recent four suggestions have not been considered.

These notes will begin by describing the suggestions that remain pending on the docket. Then come a variety of materials that describe past Committee work, going back to extensive work that was done twenty years ago. These materials include excerpts from Committee Minutes for October 20-21, 1994. The final paragraph of those Minutes

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[1] One ruled that a Rule 68 offer cuts off any right to statutory attorney fees if the plaintiff wins, but wins less than the offer — but only if the fee statute characterizes the award as "costs." *Marek v. Chesny*, 473 U.S. 1 (1985). That ruling has been criticized because it seems directly at odds with the congressional purpose to favor some categories of claims by providing for fee awards. It also can be criticized on the ground that there is little reason to suppose that fee statutes are always drafted with an eye to the effect the choice of words has on Rule 68. The other decision ruled if the plaintiff wins nothing after rejecting a Rule 68 offer, the defendant is not eligible for a Rule 68 award because the plaintiff has not obtained a judgment. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981).

expresses the conclusion that "the time has not come 0for final decisions on Rule 68. * * * It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices." Interest in revising Rule 68 has emerged spontaneously from the bar at regular intervals in the ensuing 20 years. But it seems fair to observe that the suggestions do not develop answers to the difficulties that arise in attempting to address the complexities that inevitably follow.

The Pending Suggestions

13-CV-B: This proposal emerges from experience in defending "patent troll" litigation. The purpose is to redress a perceived imbalance: "plaintiffs have no risk and minimal investment in bringing lawsuits, and * * * defendants are forced to pay millions of dollars in legal fees, discovery and expert witness fees * * *. The plaintiffs extort settlements based on this asymmetrical advantage." Suggested rule language is included. The suggestion would allow claimants to make Rule 68 offers. The proposed rule language describes an offer "exclusive of attorney fees"; provision to make an offer limited to a specific claim or claims; explicit statement of any prospective effect of the offer — such as whether the offeror obtains a paid-up license, a running royalty license, or a permanent injunction; allowing Rule 68 awards to a defendant who wins outright; and requiring an offeree who does not better the judgment to pay "reasonable attorney fees incurred by the offeror related to the claim, or claims, in the offer after the offer was made."

13-CV-C: The proposal itself is only that Rule 68 allow for offers by plaintiffs. The New Jersey rule allows plaintiffs to make offers, and it is "very effective in forcing the defendant to take a realistic view of the value of a case * * *." New Jersey Rule 4:58 is attached. The rule addresses several questions not addressed by Rule 68 text. The rule is limited to cases in which "the relief sought by the parties * * * is exclusively monetary in nature." There are detailed provisions for offers, and counter-offers and successive offers. There is a 20% safety zone: a plaintiff wins sanctions only on recovering 120% or more of the offer, while a defendant wins only if judgment for the plaintiff is 80% of the offer or less. "Allowances" for failing to improve on the offer by the prescribed margin include "all reasonable litigation expenses incurred following non-acceptance," augmented interest, and "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance." But allowances are not

awarded if they would impose undue hardship. Allowances to defendants are denied if the claim is dismissed, a no-cause verdict is returned, only nominal damages are awarded, or "a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court."

13-CV-D: This submission by the New York City Bar starts off on a seemingly modest note, but in fact is an ambitious exploration of many different Rule 68 issues. The only explicit recommendation is that offers by plaintiffs be brought into the rule. "[T]he Committee could not reach consensus on recommending drastic changes * * * such as including attorneys' fees within the costs awarded under it * * *." The cover letter recognizes that including plaintiffs' offers without adding a provision for fee awards would have little impact, but notes that an alternative such as a multiplier of recoverable costs might add some force to a plaintiff's offer.

One implicit theme is worth noting. The emphasis is not on promoting settlement — almost all cases settle if they are not otherwise disposed of before trial. The purpose of Rule 68 instead is seen as promoting early settlement, avoiding pretrial costs that now are incurred before the parties feel driven to settle or achieve the mutual information basis needed to support settlement.

The discussion of using awards of attorney fees as an incentive to accept an offer provides both sides of the debate. Fee awards "would deter plaintiffs from pursuing marginal claims beyond the point where the costs of litigation outstrip any potential recovery, and — if the rule were made symmetrical — deter defendants from using superior resources to 'wear out' plaintiffs."[2] The risk of unjust results could be met by allowing discretion to reduce or deny a fee award. Two state rules, from Alaska and California, are offered as illustrations. A margin of error may be introduced, denying fees if the judgment is within, for example, 10% of the offer. Adjustments may be made to reflect the complexity of the litigation, the reasonableness of the claims and defenses pursued by each side, "bad faith," the risk that onerous fees would deter future litigants, the reasonableness of the offeree's failure to accept, the closeness of the questions of law and fact, the offeror's unreasonable failure to disclose relevant information, whether the case included a question of significant importance not yet addressed by the courts, what relief might reasonably have been anticipated, the

[2] These effects are likely to be more complex and less easily calibrated than this summary suggests, but the tendencies are real.

amount of damages and other relief sought, the efforts made to settle, and a range of factors commonly considered in making fee awards for other reasons. It is recognized that if a plaintiff prevails but fails to improve on the offer, an award of fees to the defendant might be tempered or denied if the plaintiff's claim is made under a statute the allows fees to a prevailing plaintiff. And to make the rule truly symmetrical, a plaintiff entitled to a statutory fee award would have to be awarded a premium on the statutory fees award.

The arguments against fee awards begin with the fear of exerting undue pressure on plaintiffs to accept low offers rather than risk the outcome of trial. Inconsistency with "the American Rule" is an obvious concern. Going beyond that, it is urged that although settlement is important as a practical matter, "one of the rights of Americans is to have their disputes decided by an impartial judge." A plaintiff, moreover, may sue for reasons beyond damages or even an injunction: "A fair amount of litigation is brought, or defended, for purposes of obtaining vindication, to act as a test case, or for other legitimate purposes." Fee awards would, "in effect, fine them for exercising their right to obtain their legitimately sought objectives through the litigation system." Consider libel plaintiffs, or civil rights plaintiffs. The court system exists to decide cases; "[t]he main purpose of courts is to do justice."[3] Discretion to mitigate the harshness of fee awards in particular cases is not a workable solution — it will aggravate the problem by generating costly satellite litigation. And a fee-award system may "increase the acrimony of cases that don't settle, because litigants then need not only to win, but also to 'beat the spread.'"

After making these central points, the memorandum adds observations on many others. The rule that a defendant gets no Rule 68 award if the plaintiff takes nothing is often criticized as perverse, but others argue that defendants should not be able to make a nominal offer in the hope that it will defeat the court's discretion to deny defense costs even when the plaintiff loses.

Another possibility is to attach consequences "to every settlement offer," without requiring a formal offer

[3] These considerations closely parallel an avalanche of comments on the proposal to incorporate proportionality into the Rule 26(b)(1) scope of discovery. It is fair to suggest that a wide swath of the bar would react in similar ways to a proposal to add attorney fees to the catalogue of Rule 68 sanctions.

process. The offer is to settle, not for entry of judgment. Some settlements are not easily reduced to judgment, as confidential settlements and those that involve conditional obligations. But such a rule also could lead to a refusal even to discuss settlement in the early stages of a case. And cases with multiple possible outcomes on multiple claims may make it difficult to determine whether the outcome is better than the settlement offer. And this approach could deter settlement when a plaintiff insists on entry of judgment and a defendant specifically wants no judgment. If a plaintiff rejects the offer and obtains less money by judgment, still the value of an explicit judgment for the plaintiff may add up to something more favorable than the offer of money alone.

Finally, it is noted that many courts refuse to include the expenses incurred to retrieve and review electronically stored information as statutory costs of copying. It has been suggested that adding these expenses as Rule 68 sanctions could add real force to the rule. But opponents of this approach urge that the result could be to encourage unnecessary e-discovery in hopes of coercing settlement, and that here too the result would be extensive and costly satellite litigation.

10-CV-D: The central proposition here is that Rule 68 should not be available when a plaintiff claims nominal damages. A defendant need only offer $1.01, or $10, to be able to recover all post-offer costs if the plaintiff wins what is asked, $1. So too Rule 68 should not be available on a claim for punitive damages — punitive damages are not calculable and are imposed for social purposes. A further suggestion is that the plaintiff should be able to file a defendant's offer with the court for purposes other than a determination of costs, compare Rule 68(b). One purpose might be to seek relief from a bad-faith offer, here illustrated by the $1.01 offer that may frighten the plaintiff into abandoning the case, or settling for something less than vindication by judgment. A further related suggestion is that a Rule 68 offer is not a confidential settlement communication, cf. Evidence Rule 408.

06-CV-D: This is the Second Circuit opinion discussed in one of the attachments, "Rule 68: A Progress Report," which was the basis for earlier Committee discussion.

04-CV-H: Proposes expanding Rule 68 to allow plaintiffs to make offers. Section 998 of the California Code of Civil Procedure is attached as an illustration. The California statute allows an award of expert witness fees as a sanction for failing to beat the rejected

offer; the award does not appear to be limited to fees incurred after the offer.

03-CV-B: This is a letter from Judge A. Wallace Tashima, suggesting that plaintiffs should be authorized to make Rule 68 offers, pointing to the California statute. It includes a response by Judge David F. Levi, describing the Committee's earlier struggles with Rule 68: "In the end we were not able to develop a proposal that we had confidence in."

02-CV-D: This is a report "narrowly approved" by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. It offers interesting variations on familiar themes: Rule 68 should include offers by claimants; sanctions should be expanded to include expenses other than attorney fees, subject to reduction in the court's discretion; sanctions should be available against a claimant-offeree who loses all claims on dispositive motion or at trial.

The report begins with an explanation of the reasons why Rule 68 is little used. Quoting the Seventh Circuit, it "'bites only when the plaintiff wins but wins less than the defendant's offer of judgment.'" And even then the bite does not hurt much because offers often are made after most costs have been incurred — the post-offer costs are likely to be relatively small.

Suggestions that sanctions should be expanded to include attorney fees are resisted. That approach would cut too deeply into the American Rule. The suggestion instead is to award post-offer expenses, excluding attorney fees, for such things as "photocopying, deposition transcripts, travel and lodging for attorneys, witnesses, and other personnel, fees of testifying experts and other expert expenses recoverable under Fed. R. Civ. P. 26(b)(4)(c), and office services such as electronic imaging and storage." [If the report were written today, it might include post-offer expenses incurred in responding to ESI discovery demands.]

The award of expenses would be a matter of discretion. The court would consider: (1) the relation of the claim to any other claim in the action; (2) the relation of the expenses to the claim; (3) the reasonableness of the offer; (4) the burden on the offeree in paying the expenses; (5) the resources of the offeror; (6) the importance of the claim; and (7) the reasonableness of the rejection of the offer.

A final suggestion is not much explained. The circumstance is that an accepted Rule 68 offer and

ensuing judgment may include fewer than all claims among all parties. Rule 54(b) seems to mean that the judgment is not final. So Rule 68 would be amended to provide that the judgment, "if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment." There is no explanation of the reasons why either offeror or offeree would have grounds, or even standing, to appeal.

The letter transmitting the report provides the only explanation of the "strong dissent" from the "narrow[] approv[al]" of the report:

> The strong dissent in the Section was concerned that the proposal contained a significant and inappropriate disincentive to litigate imposed upon plaintiffs, especially less wealthy plaintiffs; contained a strong incentive for deep-pocket defendants to run up costs beyond what they would otherwise spend; and left it to the uncertain and undoubtedly non-uniform discretion of individual judges to ameliorate any unfairness in imposing expenses upon parties who reject settlement offers less [sic] favorable than the outcome after trial.

Past Efforts

Proposals to amend Rule 68 were published for comment in 1983 and 1984. They were not carried further. Brief notes on those proposals are added below, and the full texts are included as an appendix. The topic came back for extensive work, including FJC research, in the early 1990s. As noted above, the Committee abandoned the project without recommending publication of any proposal. "Mailbox" suggestions from the public, such as those noted above, have brought Rule 68 back for brief consideration at almost regular intervals. Each time, the decision was to put off any further consideration. Diffidence in the face of such persistent interest surely reflects the many complexities that appear on any close examination of the questions that seem to deserve an answer in rule text. The alternative of attempting a small number of relatively simple amendments has not seemed responsible. Of course that series of temporizing conclusions remains open to reconsideration. But continuing reluctance may reflect a still deeper concern. The 1994 Minutes quoted on the first page reflect a decision to carry forward a motion to "repeal" Rule 68. The motion could be supported by concerns of the sort expressed by the dissent to the New York State Bar Committee report described above. And failure to act on it could be supported by the thought that because Rule 68 is not much used, it does not cause much serious

mischief. Perhaps it is better to stick by a largely ineffective rule, although it is occasionally troublesome, than to attempt to frame a rule that effectively promotes earlier and desirable settlements without coercing frequent sacrifice of the fundamental right to judgment on the merits after trial.

Rather than recreate all of the past work, or even summarize it, the attachments begin with excerpts from Minutes for the April and October, 1994, Committee meetings. They are followed by a draft rule text and draft Committee Note of the sort the Committee then considered. Then come "Rule 68: A Progress Report" stimulated by 06-CV-D, and excerpts from Minutes for Committee meetings in April, 2007, November, 2007, and November, 2008. Even this provides quite a bit of reading. It does not support any immediate Rule 68 proposals. But it should provide a solid foundation for determining whether to take these questions back for sustained, even arduous, work.

Notes on the 1983 and 1984 Proposals

The 1983 proposal is readily found at 98 F.R.D. 337, 361-367. It [set] the time for the offer at 30 days before trial begins, not 10 days. Rather than an offer for judgment, it would be an offer "to settle a claim and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly." The offer must remain open for 30 days. Evidence of the offer would be admissible in a proceeding to enforce a settlement. Both plaintiffs and defendants could make offers. If the judgment is not more favorable to the offeree than the offer, the starting point is that the offeree must pay expenses, including reasonable attorney fees, incurred by the offeror after making the offer. If the offer was made by a claimant, interest on the amount of the claimant's offer would be added if not otherwise included in the judgment. The court would have authority to reduce the award of expenses and interest found to be "excessive or unjustified under all of the circumstances." Nor would costs, expenses, or interest be awarded if the offer was made in bad faith (the Committee Note uses a $1 offer as an example). The language of the text is revised to allow an award to a defendant when the judgment is for the defendant. Finally, class and derivative actions under Rules 23, 23.1, and 23.2 are excluded from Rule 68. The Committee Note explains that this is in part because the court must approve settlements under those rules, and because a representative party should not be exposed to a risk of heavy liability for costs and expenses — a prospect that could lead to a conflict of interests.

The 1984 proposal is readily found at 102 F.R.D. 432-437. It is different in many ways, some dramatic. Timing is changed: the offer may be made at any time more than 60 days after the service of summons and complaint on a party, but not less than 90 days (or 75 days for a counter-offer) before trial. The offer "shall remain open for 60 days unless sooner withdrawn." If an offer is not accepted, a subsequent offer can be made.

The most dramatic changes in the 1984 proposal are in the provisions for sanctions. These provisions obviously reflect the comments on the 1983 proposal.

The first step is to provide for a sanction. Sanctions depend on finding "that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation." This determination depends on "all of the relevant circumstances at the time of rejection." Six examples are provided: (1) the apparent merit or lack of merit of the claim; (2) "the closeness of the questions of fact and law at issue"; (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer; (4) whether the suit was in the nature of a 'test case,' presenting questions of far-reaching importance affecting non-parties; (5) the relief that might reasonably have been expected if the claimant should prevail; and (6) the amount of the additional delay, cost, and expense that the offeror reasonably could be expected to incur if the litigation should be prolonged.

The next step, if a sanction is ordered, is to determine the amount. In addition to the factors considered in determining to award a sanction, the court is to "take into account (1) the extent of the delay; (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection; (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept * * *; and (4) the burden of the sanction on the offeree."

These flexible sanctions provisions might have had a significant effect in reducing the risk that Rule 68 can be a device that enables a defendant to take advantage of a risk-averse plaintiff. But the work involved in implementing them is apparent.

October 30-31, 2014 Minutes
(Suggestions 13-CV-B, C, D; 10-CV-D; 06-CV-D; 04-CV-H; 03-CV-B; 02-CV-D)

Rule 68, dealing with offers of judgment, has a long history of Committee deliberations followed by decisions to avoid any suggested revisions. Proposed amendments were published for comment in 1983. The force of strong public comments led to publication of a substantially revised proposal in 1984. Reaction to that proposal led the Committee to withdraw all proposed revisions. Rule 68 came back for extensive work early in the 1990s, in large part in response to suggestions made by Judge William W Schwarzer while he was Director of the Federal Judicial Center. That work concluded in 1994 without publishing any proposals for comment. The Minutes for the October 20-21 1994 meeting reflect the conclusion that the time had not come for final decisions on Rule 68. Public suggestions that Rule 68 be restored to the agenda have been considered periodically since then, including a suggestion in a Second Circuit opinion in 2006 that the Committee should consider the standards for comparing an offer of specific relief with the relief actually granted by the judgment.

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

Another set of concerns is that any reconsideration of Rule 68 would at least have to decide whether to recommend departure from two Supreme Court interpretations of the present rule. Each rested on the

"plain meaning" of the present rule text, so no disrespect would be implied by an independent examination. One case ruled that a successful plaintiff's right to statutory attorney fees is cut off for fees incurred after a rejected offer if the judgment falls below a rejected Rule 68 offer, but only if the fee statute describes the fee award as a matter of "costs." It is difficult to understand why, apart from the present rule text, a distinction should be based on the likely random choice of Congress whether to describe a right to fees as costs. More fundamentally, there is a serious question whether the strategic use of Rule 68 should be allowed to defeat the policies that protect some plaintiffs by departing from the "American Rule" to encourage enforcement of statutory rights by an award of attorney fees. The prospect that a Rule 68 offer may cut off the right to statutory fees, further, may generate pressures on plaintiff's counsel that might be seen as creating a conflict of interests with the plaintiff. The other ruling is that there is no sanction under Rule 68 if judgment is for the defendant. A defendant who offers $10,000, for example, is entitled to Rule 68 sanctions if the plaintiff wins $9,000 or $1, but not if judgment is for the defendant. Rule 68 refers to "the judgment that the offeree finally obtains," and it may be read to apply only if the plaintiff "obtains" a judgment, but the result should be carefully reexamined.

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

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

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

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

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

A judge expressed doubts whether anything should be done, but asked what effects would follow from a provision for plaintiff offers? One response was that the need to add "teeth" would likely lead to fee-shifting, whether for attorneys or expert witnesses.

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

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

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

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

One value of studying offers of judgment was suggested: Arguments for this practice have receded from the theory that it increases the rate of settlement — so

few cases survive to trial that it is difficult to imagine any serious gain in that dimension. Instead, the argument is that cases settle earlier. If study shows that cases do not settle earlier, that offers are made only for strategic purposes, that would undermine the case for Rule 68.

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

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

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

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

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

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

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

Proposals for dramatic amendments of Rule 68 were published in 1983 and 1984 before the project was abandoned. Rule 68 was studied again twenty years ago; the elaborate draft developed then was put aside without publication. Spontaneous public suggestions for revisions are submitted regularly. In response to proposals made over several years, Rule 68 was discussed extensively at the meeting in October 2014. Rather than reach a conclusion, the Committee decided to sponsor research into similar state provisions to determine whether effective models for reform may be found. The AO was asked to help with the research. Resources were not immediately available. A brief report at the meeting last April held out hope that the work could begin later this year.

The Administrative Office hopes that advances in this work can be made soon. Some impetus may be provided by 15-CV-V, the most recent public suggestion. This suggestion points to New Jersey Court Rule 4:58 and urges that, like it, Rule 68 should provide for offers by plaintiffs. The New Jersey rule follows the lead of most of those who urge that Rule 68 should include plaintiffs — if a defendant rejects a plaintiff's offer that is lower than the judgment, the plaintiff is awarded "all reasonable litigation expenses incurred following non-acceptance," enhanced interest, and "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance." Recognizing that many cases present a range of potentially reasonable awards, these consequences are triggered only if the plaintiff recovers at least 120% of the rejected offer. The consequences for a plaintiff who fails to win at least 80% of a rejected offer are similar, but qualified by several features designed to protect the plaintiff against undue hardship.

Rule 68 remains on the agenda. It will be brought back when further materials become available.

TAB 13

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13. Rule 26(b)(4)(B)

(Suggestion 19-CV-T)

Retired Judge Mark Bennett (N.D. Iowa) is now the Director of the Drake University Law School Institute for Justice Reform & Innovation. He has submitted an article recently published by one of his academic colleagues for consideration as a basis for amending Rule 26(b)(4)(E)(i). *See* Bennett, *supra* at 295-98. That rule addresses situations in which a party has obtained discovery from another party's expert witness, and provides:

> (E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:
>
> (i) pay the expert a reasonable fee for the time spent in responding to discovery under Rule 26(b)(4)(A) * * *

The article is Danielle Shelton, *Discovery of Expert Witnesses: Amending Rule 26(b)(4)(E) to Limit Expert Fee Shifting and Reduce Litigation Abuses*, 49 Seton Hall L. Rev. 475 (2019). Judge Bennett sent copies of this article to all members of the Committee.

Prof. Shelton's article criticizes the "myriad ways" in which the rule's "lack of clarity" and "failure to address key questions" sometimes produce bad litigation behavior and seemingly inconsistent results. She proposes an extensive amendment of the rule, which is reproduced at the end of this memorandum.

Prof. Shelton has done very thorough research on the courts' handling of issues presented in relation to Rule 26(b)(4)(E)(i) and has identified many ways in which disputes may arise about its directive. Without going into such detail, one can certainly see that the current rule can provide challenges in implementation. Thus, § 2034 of the Federal Practice & Procedure treatise begins by explaining that "[t]he basic proposition is relatively straightforward" in requiring that the party seeking discovery from the expert witness should pay for the resulting expense to the hiring party, but goes on to observe:

> [P]otential difficulties and unfairness lurk below the surface. A starting point is that people designated as expert witnesses have spent time, and sometimes considerable time, preparing for their testimony without respect to whether there is a deposition or not. Certainly that effort could not easily be characterized as time spent "responding to discovery." Similarly, to the extent that the deposition process itself is a substitute for pretrial preparation of the expert that would have to be done anyway, this time may not properly be viewed as occasioned by the deposition.

This memorandum introduces the concerns Prof. Shelton's article raises about the current rule and offers some observations about them. Before doing so, for purposes of context, it offers some comparisons to the experience of the courts in addressing attorney's fee requests, some reflections on the way in which the rules more generally deal with the question of costs of responding to discovery, and some background on the evolution of expert discovery, particularly the Advisory Committee's most recent in-depth consideration of the rule.

A Possible Analogy — Attorney's Fee Awards

Since the Civil Rights Attorney's Fees Act of 1976 was adopted, authorizing the award of "reasonable attorney's fees" to the prevailing party in certain litigation, it has generated a lot of litigation about what is "reasonable," as well as who is "prevailing." (The latter concern ought not be important under Rule 26(b)(4)(E)(i), which does not make payment of the expert's fee dependent on which side wins the case.) The usual method of calculating attorney's fee awards is the "lodestar" — multiplying the hourly rate of the lawyer by the number of hours spent on the case. This is said to reflect the market for legal services, although it is often said that this market is increasingly shifting away from the hourly fee.

Among the many disputed topics that have emerged with using the lodestar method for attorney's fee awards under fee-shifting statutes are such things as whether the proposed hourly attorney fee is reasonable, whether an attorney who charges reduced rates for clients in "public interest" litigation could charge "Wall Street" rates when a fee-shifting statute directs that the defendant should pay the fee, whether the hours spent by the lawyer were needed for the claims that succeeded, whether the amount of attorney time spent on those successful claims was reasonable, and whether such fees should be "proportional" to the results obtained in the case. In class actions generating a "common fund," as recognized in the Committee Note to the 2003 adoption of Rule 23(h), courts have often preferred a percentage of the fund approach to undertaking to implement the lodestar hours times rate method.

These issues have produced a plethora of judicial decisions that might be said sometimes to be out of synch with other judicial decisions about attorney's fee awards. In *Hensley v. Eckerhart*, 464 U.S. 424 (1983), Justice Powell expressed the hope that "[a] request for attorney's fees should not result in a second major litigation." *Id.* at 437. In 1986, Judge Easterbrook offered cautions about this aspiration in *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986):

> The Supreme Court's oft-repeated wish that litigation about fees not turn into a second major lawsuit is an unattainable dream. The computation of hourly fees depends on the number of hours "reasonably" expended, the

> hourly rate of each, the calculation of the time value of money (to account for delay in payment), potential increases and decreases to account for risk and the results obtained, and a complex of other considerations under the heading of "billing judgment." The stakes * * * ensure that the parties will pursue all available opportunities for litigation.

Certainly the application of Rule 26(b)(4)(E)(i) is different, but as one reviews the multiple concerns raised by Prof. Shelton there do seem to be some analogies. Usually attorney's fee shifting is done by statute, so the absence of rule-based clarification over the decades since the judicial comments quoted above need not constrain efforts to provide specifics in this rule. But it is worth noting that the "common law" method (relying on case law development) seems to have provided solutions to many of these issues in fee-shifting situations, so perhaps the same process can effectively address the issues that lurk in the background of Rule 26(b)(4)(E)(i).

Handling of Costs of Responding to Discovery

The Supreme Court has recognized that the cost of responding to discovery ordinarily is borne by the responding party. Sometimes that cost can be considerable. In some circumstances, the rules do address such expense. Rule 26(b)(2)(B) was adopted in 2006 to excuse a responding party's failure to search "inaccessible" sources of electronically stored information in responding to a Rule 34 request. In 2015, Rule 26(c)(1)(B) was amended to provide explicit authorization for the court issuing a protective order to provide for the "allocation of expenses."

In other circumstances, very considerable expense can occur but the rules do not address it. During the recent consideration of the proposed amendment to Rule 30(b)(6) the Committee was repeatedly advised that preparing an organizational witness for such a deposition is an extremely costly endeavor. But though the amendment requires the parties to confer about the matters for examination (which may reduce the preparation effort necessary), it did not shift any expense to the party seeking discovery.

From time to time, the Committee has been urged to consider a "requester pays" approach more broadly, but it has not pursued those ideas. In part, that may be attributed to the difficulties that Prof. Shelton raises, as applied to other discovery. The potential expenditure on E-Discovery, for example, can be very considerable, and one might see cost-shifting as inviting parties to be less frugal than they might otherwise be in responding to discovery if assured that the other side would have to foot the bill so long as the expenditure was "reasonable." An Oxford professor has reported that the English rule that the prevailing party can recover its full costs of suit actually encourages spending on litigation:

> [O]nce it is clear that a dispute is destined to go all the way to trial, the indemnity principle tends to erode resistance to costs. * * * Indeed, a point may come where the parties would have reason to persist with investment in litigation, not so much in the sake of a favorable judgment on the merits as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject matter in issue.

Zuckerman, *Lord Woolf's Access to Justice: Plus ça Change*, 59 Modern L. Rev. 773, 778 (1996).

Rule 26(b)(4)(E)(i) is an exception to the rules' normal inclination to let the cost rest where it lies because the rules regard expert discovery as distinctive. The notion is that an expert witness is a hired witness, and different from fact witnesses for that reason. *See* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan. L. Rev. 455, 482-83 (1962) ("the expert, unlike an ordinary witness, has no unique knowledge"). As explored below, only very limited discovery was originally permitted from retained expert witnesses, and the reason for allowing that discovery was solely to enable the party to prepare adequately to cross examine the expert at trial. For that limited purpose, it was thought, the normal assumption that the responding party should pay the cost of responding should be relaxed.

Evolution of Expert Discovery

When the Civil Rules were adopted in 1938, there were no specific provisions about discovery regarding work done by specially retained experts. The cases decided under the new rules were divided about whether the general relevance standard was the only limitation on such discovery.

In 1970, Rule 26(b)(4) was added. It authorized an interrogatory to a party seeking information about the opinions that its expert witnesses would present at trial. The rule did not make depositions of testifying experts a right, however, leaving that to the district court's supervision on motion.

When the Federal Rules of Evidence were adopted in 1975, pressures for expert depositions grew. In particular, Fed. R. Evid. 705 abandoned the traditional requirement that the basis for expert opinion testimony be revealed in a hypothetical question. Instead, the new rule permitted the expert witness to testify to opinions "without first testifying to the underlying facts or data." The committee note to Rule 705 explained:

> If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner

> has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances in discovery of findings, underlying data, and even the identity of experts.

The reality came to be that expert depositions, though not provided as a matter of right, came to occur as a matter of course.

The 1993 amendments built on this experience, adding the expert report requirement in Rule 26(a)(2)(B) and providing in Rule 26(b)(4)(A) that there is a right to take the deposition of testifying experts, though that should not occur until after the expert report is served. Because the report requirement calls for a great deal of information, the Committee Note expressed the hope that expert depositions would not be needed in many cases, or at least that they would be shorter.

The cost of preparing the expert report is borne entirely by the party that seeks to rely on the expert witness. And that can be a considerable expense, with reports sometimes more than 100 pages long. If the report were done properly, one might hope that there really would be no need to supplement that information with a deposition. Indeed, at least some prominent lawyers reportedly declined to take expert depositions because they thought the depositions would only give the expert witness "practice" the witness could use to advantage at trial.

But expert witness depositions continued to occur after 1993, and a new controversy emerged. The report requirement included a directive that the expert disclose "the data or other information considered by the witness in forming the opinions." The accompanying Committee Note included the following observation:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

In many cases, according to what the Committee was told, the adoption of the 1993 disclosure requirement produced a new area of inquiry — the details of the communications between the expert witness and the hiring lawyer and production of any draft reports. These topics were often the focus of questioning, even the main part of the questioning, in an expert deposition. In August 2006 the ABA House of Delegates adopted a recommendation

that discovery rules be amended to direct that draft expert reports not be the subject of discovery, and that communications between the hiring lawyer and the expert be exempted from discovery. A lengthy report prepared by the Federal Courts Task Force of the ABA was submitted in connection with this recommendation.

The Discovery Subcommittee (chaired by Judge David Campbell) spent a great deal of time and energy on these issues. Two miniconferences were held in 2007, leading to the publication in 2008 of a proposed amendment changing the wording of the disclosure requirement to refer to "facts or data" considered by the expert witness. The Committee Note explained that this change was "meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." Rule 26(b)(4)(B) was added to provide protection under Rule 26(b)(3) for draft reports, and Rule 26(b)(4)(C) to protect communications between counsel and their expert witnesses.

The bar fairly uniformly supported these changes (though a group of respected law professors objected to them). What is worth taking away from this experience, however, is that it revealed and emphasized the difficulty and intricacy of revising the expert discovery rules. Not only were there two miniconferences about these amendment ideas, the Discovery Subcommittee had to hold a large number of conference calls (reflected in the agenda materials for Advisory Committee meetings in 2007 and 2008). It even had to convene an in-person meeting in Phoenix to work through difficult issues.

Throughout all this effort, there was no mention of problems associated with the Rule 26(b)(4) requirement that the noticing party pay the expert's fees for responding to discovery. In considering whether to pursue amendments directed to those issues, then, it is useful to appreciate that many difficult issues may emerge. As with Rule 30(b)(6) discovery, expert witness discovery is important, and making changes in the rules may prove more difficult than initially appreciated. Whether the issues raised this time are of such moment as the ones raised by the ABA in 2006 is not clear.

An Existing Model for a Rule Change?

Prof. Shelton notes that some courts have adopted standing orders to address "ambiguities in the rule." Specifically, she refers to the Deposition Protocol Regarding Tender & Payment of Expert Witnesses in MDL 875. A copy of this protocol is included in this agenda book.

The protocol addresses several of the issues raised by Prof. Shelton. It could provide starting points for possible rule amendments, and also indicates the level of detail that could be involved in such a rule:

Preparation and travel time: The protocol directs that the noticing party must pay for "time spent preparing for the deposition (not including time spent conferring with counsel), actual time spent in the deposition, and travel time to and from the place where the deposition is conducted."

Sharing of reimbursement among parties: The protocol directs that each defendant that participates in a deposition of an expert retained by a plaintiff must "pay its pro rata share of the expert's fee."

Timing of billing and payment: There should be an invoice for the expert's fee, and payment is due within 30 days after receipt by counsel responsible for the payment, but with a 15-day grace period thereafter.

Interest on unpaid amounts: If a party does not pay in time, interest is to accrue at a rate of 3.5% per month, and the party that has not paid may not "utilize the transcript of that deposition in any motion."

Withdrawn deposition notice: Any party that notices an expert deposition and later withdraws the notice must pay a reasonable fee for the expert's time "reserved for preparing for the deposition and the time reserved for participation in the deposition." Should there be a dispute about the reasonableness of the time so reserved, the expert's standard cancellation fee will apply.

Dismissed parties: The fact that a party is dismissed does not relieve it of its obligation to pay for its portion of the expert fee, even if the stipulation for dismissal says each party shall bear its own costs.

Disputes about fee: Any party disputing the reasonableness of an expert's deposition fee must bring a motion within 30 days of receipt of the expert's invoice.

Attorney's fees for motions: If a motion to compel payment of an expert fee is made and granted, the moving party "may be entitled to assess from the delinquent party the costs of collection, including reasonable attorney fees."

The protocol also includes other provisions. The point of the listing above is to illustrate some of the topics that might be addressed by rule. One could say that a major MDL proceeding is not the best model for a rule applicable in all cases. But the detail of this protocol suggests the sorts of issues that might be involved in designing a rule amendment.

Specific Issues

With that prologue, this memorandum turns to the specific issues raised by Prof. Shelton. For present purposes, there may

be two basic questions for the Committee:

(1) Are these significant problems? As Prof. Shelton illustrates, some courts have addressed these issues on which the rule does not provide specifics. Whether these issues have arisen frequently (as did happen with the concerns prompting the ABA resolution regarding draft reports and lawyer-expert communications in 2006, described above) is not clear. Nor is it clear whether, when these issues have arisen, they have been resolved without the need for court intervention. Committee members can reflect on the frequency of difficulties in their experience.

(2) Would a more specific rule be desirable? Assuming some of these problems have arisen with some frequency, there is the additional question whether a rule either resolving the issue or providing a presumption about it would be helpful. Devising a specific rule that would appropriately deal with the entire range of cases might prove difficult.

Reasonable fees: At least some courts look to the "prevailing market rate" analysis for attorney's fee awards as an analogy for expert fee charges. *See Draper v. Red Devil, Inc.*, 114 F.R.D. 46, 48 (E.D. Ark. 1987) (attorney's fee analysis an analogy for reasonableness issue under Rule 26(b)(4)(E)). As experience with attorney's fee awards has shown, however, determining what is a "reasonable" fee can be challenging.

For one thing, the expert, like some lawyers, may not have a routine hourly fee. Surely those experts whose services are offered by agencies that market expert witness services have a regular fee for such services. But many others (*e.g.*, treating doctors) may not have a regular hourly fee, particularly one for deposition testimony.

Experts who do have hourly fees may calibrate them differently for different services. A surgeon might charge a different fee for performing surgery compared to a consultation about whether surgery is indicated. Some experts who are not ordinarily "for hire" might prefer not to serve as witnesses at all and set their fees high as a result. If one uses a "market rate" approach to determining fees, should that refer to the fees usually charged by those who are on offer? Are Nobel Prize winners held to such schedules?

Should fees be charged by the hour or the day? A deposition may require an expert to set aside an entire day. The "cancellation fee" provision in the MDL protocol described above suggests that such might be routine for some experts who testify regularly. Should a daily fee be deemed not "reasonable" if the deposition takes only an hour? A cancellation fee would presumably come into play if the noticing party cancelled on the

morning of the deposition day. Should a daily fee be allowed if the deposition goes forward for only 15 minutes? Is an across-the-board rule useful in dealing with such questions?

It may appear dubious for the expert to charge the hiring party a lower hourly rate for work on the case than the amount billed to the adversary. But if it is permissible to have different hourly rates for different services, and reasonable to regard testimony as a more taxing activity, such disparities might be reasonable. Indeed, if the expert charges differently for testimony at trial and pretrial preparation that might support charging the adversary one rate for preparing and a higher rate for testimony at a deposition.

Another issue might be which market should be the referent in determining fees. With attorney's fee awards, it sometimes happens that the fee structure in a major city is quite a bit higher than in a rural area. For litigation in the rural area, should the big city rates apply? A response is sometimes that the party that hired the costly out-of-town lawyer must justify the decision to do so instead of hiring local counsel. A response is sometimes along the lines of "We hired the best lawyer we could get, and that one comes from the big city." Should the same sort of thing apply with expert witnesses?

Reasonable hours: Courts addressing attorney's fee motions using the lodestar method must determine whether the hours spent were reasonable. In terms of the actual deposition time (subject to the cancellation fee issue above), that should not be difficult to compute.

But the time spent in the deposition is not the only time that the deposition may require the expert to spend. The rule says payment is due for "the time spent in responding to discovery." Time spent preparing for a deposition could be within that. That time resembles time the expert spends generally preparing to testify for the hiring party, however. The goal of the rule is not to permit the hiring party to shift all its expert witness costs to the adversary, but only to make the adversary pay for the costs that the hiring party incurred due to the right to take the expert's deposition.

According to Prof. Shelton, most courts that include preparation time have adopted a ratio between deposition time and preparation time ranging from 1:1 to 3:1. 49 Seton Hall L. Rev. at 503. Although there is something of a 20/20 hindsight aspect to this approach (preparation is done before the deposition, and the actual duration of the deposition may then be hard to forecast), this may be a sensible treatment of the problem.

As in the MDL protocol described above, Prof. Shelton tells us that some courts exclude from preparation time the hours spent with counsel for the hiring party. That seems responsive to the concern that this interaction is a form of trial preparation

work, and perhaps not really time spent responding to discovery. But because depositions typically occur quite a while before trial, one might also say that this work is added to the overall workload of the expert (and attendant cost to the hiring party), and so should be compensable.

A different question is presented by the matter of time spent traveling to the place of deposition. As noted above, there might be situations in which a party justifiably hires an out-of-town expert. There may also be situations in which it is actually cheaper for the expert to travel to where the lawyers are than to have all of them travel to where the expert is located. Presumably the deposing party would have to pay only for its attorney or attorneys to attend the deposition. But having the expert travel might result in cost savings for all. Shifting the travel costs might thus be justified in some situations but not in others.

Should travel time be compensable at the same hourly rate as other time? Lawyers may have different views of this subject. Experts (like lawyers) might spend airplane time working, either preparing for the deposition or doing other work, perhaps for other clients. The hours expended might sometimes be reasonable and not be reasonable in other situations. Prof. Shelton tells us that the most common response of courts is that travel time is charged at half the hourly rate for work. One answer is that the rule only requires that the reimbursement cover the "time spent in responding to discovery." That would seem to include flight time spent actually preparing for the deposition, but not time spent doing other things, or nothing. If the expert charges the hiring party a per diem amount, including travel time, however, that might be different.

What should be the handling of air fare or hotel expenses? Should the rule be made clearer on this point? Those costs seem not to be included under the current rule, but they may be incurred solely because of the deposition. If the expert usually passes through those charges to the hiring party, perhaps the market treatment of them should call for reimbursing the party.

If it is clear that travel costs are reimbursable, that may raise questions about what are "reasonable" travel costs. Travel can be done cheaply or expensively; should a rule address that reality? Some courts dealing with attorney's fee awards have directed that travel be charged at coach rates. That sounds sensible, but what if the expert (say, a Nobel Prize winner) insists that the hiring party pay for business class travel? Should the hiring party have to pay the difference? Prof. Shelton urges that this activity requires courts "to play the role of a human resources officer." *Id.* at 498.

Assuming the expert has a relatively high hourly rate, should she have to delegate tasks to subordinates when their hourly rates are lower? Perhaps deposition preparation (as

compared with drafting the expert report) is singularly ill-suited to delegation. Some courts addressing attorney's fee motions scrutinize the use of partners rather than associates or paralegals to perform more routine tasks. Should the expert's failure to delegate make her hours unreasonable?

On the other hand, with lawyers there is often concern about "stacking," particularly if much time was spent in meetings among multiple lawyers. Perhaps similar stacking issues could result if delegation is required of expert witnesses seeking reimbursement for deposition preparation.

Prof. Shelton tells us that courts "frequently resort to policy considerations" due to the absence of specifics on these subjects in the rule. Perhaps one could regard that as preferable to providing specifics to be applied to all cases; different cases might warrant different treatment in light of the policy objectives.

Logistics: As suggested by the MDL protocol described above, the rule might say something about the logistics of billing for expert fees. The current rule says nothing about that subject. Rule 54(d)(2), by contrast, contains some specifics about motions for awards of attorney's fees. According to Prof. Shelton, under Rule 26(b)(4)(E)(i) disputes have developed about (1) whether the fees must be prepaid if the expert so demands, and (2) whether they must be billed within a certain time frame.

There could be difficulties with an advance payment requirement if the amount to be paid depends on the duration of the deposition since that cannot be known with certainty in advance. But Prof. Shelton cites the "all-too-common scenario" in which the expert refuses to appear unless paid in advance.

One reaction might be that the reimbursement for these expert fees really is due the retaining party, not the expert herself. With regard to attorney's fee awards, those are ordinarily treated as due the prevailing party, not the prevailing party's attorney. It could happen that the prevailing party recovers more from the opposing party than it pays to the lawyer. Thus, in *Blum v. Stenson*, 465 U.S. 886 (1984), the Court rejected the argument that the legal aid organization that prevailed in the underlying litigation using its staff lawyers was limited to the lawyers' low salaries (the cost to the organization), and held instead that the award should reflect the "prevailing market rates in the relevant community."

Whatever the expert is paid by the retaining party is presumably governed by the expert's agreement with that party and not dependent on payment by the opposing party. From that perspective, the retaining party would seem to be required to pay this portion of the fee in advance if the expert demands advance payment. Even apart from the agreement, a party who wishes to present an expert witness at trial is responsible for enabling

Rule 26(b)(4) discovery of the expert. If the expert insists on advance payment, the retaining party should bear this burden, not the inquiring party. And if time spent preparing is also shifted, does that mean the expert may refuse to begin preparing until tendered advance payment? One might regard this set of issues as involving gamesmanship. Whether a rule directive would improve matters is uncertain.

As Prof. Shelton notes, the Committee Note to the 1970 amendment recognizes that the court may "order payment * * * as a condition of providing discovery or after discovery has been completed." The MDL protocol described above is more specific. There seems little doubt that the court may make such orders. Whether the rule should prescribe either a required or presumed outcome is debatable. How common is the scenario of expert refusal to appear for a deposition if payment (of some amount) is not tendered in advance?

Another issue that might be addressed in the rule is the timing of the demand for payment of fees. Of course, it must be that the demand is made before the deposition if payment is due before the deposition. So if refusal to appear without advance payment is an "all-too-common scenario" it would seem that a pre-deposition request for fees may be quite common.

If advance demand does not occur, as in the MDL protocol described above, it may be desirable to establish a timetable. Rule 54(d)(2)(B)(i), for example, says that a motion for attorney's fees must be filed no later than 14 days after the entry of judgment. Setting a time limit for expert deposition fees might present some difficulty in defining the trigger point. It might be best to select the date of the deposition. But if the witness has asked to be able to review the deposition transcript, as may often happen, it would seem that the time spent doing that review could be seen as time spent responding to discovery. Focusing on that activity might introduce uncertainty, both in setting a time for a motion and in deciding whether review time must be paid by the inquiring party.

Putting aside the trigger point, it is uncertain what time should be allowed. The MDL protocol described above does not appear to require an invoice within a specified time, but instead imposes time limits for payment after delivery of the invoice. According to Prof. Shelton, some courts have refused to shift fees when the demand was made too late. Perhaps judicial discretion would be preferable to a specific time limit specified in the rule.

Prof. Shelton also suggests that the adequacy of the expert's report may bear on the propriety or reasonableness of the demand for fees. Certainly the idea behind the 1993 report requirement was that the report would be complete, making depositions of experts less important and perhaps unnecessary. And the expert's time preparing the report is not chargeable to

the noticing party. So it could be that parties would choose to stint on the report and leave it to the other side to find out about the details of testimony already prepared via the deposition "on its own nickel."

In terms of reported cases, however, that does not seem to have been happening. To the contrary, there are many reported cases that involve efforts to exclude expert testimony that goes beyond or modifies what is in the report. *See* § 2289.1 of Federal Practice & Procedure. Failure to provide a thorough expert report is a risky tactic under Rule 37(c)(1) because that rule directs the court to exclude new material that should have been disclosed unless the proponent of the evidence can show that the failure to disclose it at the right time was harmless. And since the other side could decide not to take the expert's deposition at all, it seems doubly dangerous to rely on the deposition to supply what is not in the report.

To make the Rule 26(b)(4)(E)(i) payment contingent on the adequacy of the report might encourage disputes about whether the report was adequate in situations in which those disputes would not otherwise occur. It certainly seems that a significant number of cases involve disputes about the adequacy of the expert's report, so perhaps invoking that consideration under the fee-shifting rule would not produce many more disputes. But the possibility is some reason for caution. And it is worth noting also that Prof. Shelton says that this issue is "not highly litigated."

Prof. Shelton recognizes that the courts "uniformly" place the burden of proof on the party requesting reimbursement. That seems right, and in keeping with attorney's fee shifting under Rule 54(d). But the objection is raised that the courts don't follow through because the rule "puts a thumb on the scale in favor of fee shifting." It seems that the problem raised is that only a minority of courts have actually "scrutinized and drastically limited the amount of fees that are shifted." Given the uniform treatment of the burden of proof, it is unclear what rule change would be useful.

Experts not required to provide reports: For experts not providing a written report, Rule 26(a)(2)(C) (adopted as part of the 2010 amendment package) requires that the attorney for the retaining party provide disclosure about the facts and opinions to which such witnesses will testify.

Prof. Shelton recommends that the rule be revised to excuse payment of the testimony fee for those experts who are not required to provide reports under Rule 26(a)(2)(B). She objects that the fundamental premise of the fee-shifting rule is that it is "'unfair' for the deposing party to get for free what the other party had to pay for — a proposition that has no validity in the context of an expert who has not submitted a report."

She also says that no fee should be required when the expert is the party's employee, noting that "only large corporate defendants are likely to have such employees and thus are the only parties who benefit from such a rule." (It may be that governmental entities such as the United States would question that assertion.)

The fee requirement has been in the rule since 1970, long before the disclosure requirement was added in 1993. The exemption from the extensive report requirement of Rule 26(a)(2)(B) for those not "specially retained" to work on the case is a recognition that asking a person not being paid to do the work needed to prepare such a report would not be easy. To take the most common example, asking the treating doctor to satisfy the requirements of Rule 26(a)(2)(B) would present huge problems for lawyers for personal injury plaintiffs. Until 1993 there was no right to take the depositions of expert witnesses at all. The 1993 amendments to Rule 26(b)(4)(A) created that right, but subject to the fee-shifting provisions of Rule 26(b)(4)(E).

* * * * *

The forgoing introduces the issues raised by this submission. The basic question is whether to begin work on these amendment ideas. The key inquiries seem to be the ones set out at the beginning — are these recurrent problems in current practice, and would rule provisions providing specifics for addressing them be helpful additions?

Prof. Shelton's Amendment Proposal[4]
See 49 Seton Hall L. Rev. at 523-24

Revised Rule Showing All Changes Proposed to Current Rule

~~Unless manifest injustice would result. The~~ Except as provided in part (vi), the court must require that the party seeking discovery ... pay ~~the~~ an expert who is required to submit a report under Rule 26(a)(2)(B) a reasonable hourly fee for time spent in responding to discovery under Rule 26(b)(4)(A):~~.~~

(i) "Time spent responding to discovery" includes only: (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript, or time otherwise relating to being deposed; and (2) time the expert spends responding to written discovery requests and/or subpoenas served by the opposing party that require the expert to perform work that is not already required under the disclosure rule.

(ii) In determining what constitutes "reasonable fees," the party that retained the expert has the burden to prove that the amount billed is reasonable, both in terms of hourly rate and the number of hours billed. The hourly rate that the retaining party actually paid for the expert's work is the presumptively reasonable rate.

(iii) The request for payment of fees may not be filed until after the expert discovery has occurred and must include an itemized statement that includes the date and purpose for the hours billed, the rate at which each hour was billed, and a statement of the hourly rate that the expert has been paid by the retaining party. The request must be personally signed and attested to by both the expert and the retaining attorney.

[4] Prof. Shelton's article does not address fees for discovery provided by non-testifying experts ordered to provide discovery under Rule 26(b)(4)(D). Current Rule 26(b)(4)(E)(i) also applies to those experts in regard to their time spent responding to discovery. But such discovery is extremely rare, and the larger cost for the inquiring party when it is allowed is likely that governed by Rule 26(b)(4)(E)(ii), which directs the court to order that the party seeking discovery reimburse the other side for "a fair proportion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions." That cost can far outstrip billings for time spend responding to discovery pursuant to the court's order allowing discovery. If the Committee decides to pursue the amendment ideas explored above, it will also be necessary to address the question of time spent responding to discovery by non-testifying experts ordered to provide discovery under Rule 26(b)(4)(D).

(iv) Any objection to the request for fees, including an objection arising under (vi)(4), must be filed within fourteen days of the date on which the request was filed or is deemed waived.

(v) Unless a resistance to the request for fees has been timely filed: (1) payment by the deposing party of the reasonable fees is due within thirty (30) days of the date on which the request for fees was filed; and (2) interest accumulates daily for any unpaid and due balance at the statutory rate for judgments, and is automatically added on to the amount due and owing. If a resistance to the request for fees was timely filed, fees are not due until the court enters an order specifying the amount, if any, that must be paid. If the resistance is deemed frivolous, the court shall order that interest be paid from the date on which payment was due absent the resistance.

(vi) No payment is required if: (1) the party that engaged the expert failed to comply with and serve complete and accurate disclosures and a report as set forth in Rule 26(a)(2)(B) seven or more days before the date of the expert's deposition; (2) the party that engaged the expert fails to file a request for fees that complies with part (iii) within 30 days after completion of the discovery to which the fee request relates; (3) the witness is the party's employee; or (4) manifest injustice would result due to the financial circumstances of the deposing party.

TAB 14

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14. Rule 26: ESI Production, Cost-Shifting

(Suggestion 19-CV-V)

Judge Michael Baylson, a former Committee member, has submitted two proposals for expanding Rule 26. His letter is attached.

These proposals grow out of discussions at a conference-seminar that addressed experience with the 2015 Civil Rules amendments. Judge Baylson was a member of a panel that discussed the relationship between proportionality and the use of technology in responding to discovery.

Suggestion No. 1

> The Court may require a party to disclose details of its application of these Rules to its production of electronically stored information relevant to the case.

Framing the suggestion in terms of "application of these Rules" indicates that it does not aim at the fraught questions that surround use of machine learning techniques to identify responsive and relevant materials in massive electronic information sources. The requesting party may seek assurance that the human beings that teach a computer to learn how to search used effective teaching techniques. The party asked to produce information may resist disclosure of its teaching techniques, asserting work product protection, privilege, confidentiality, and like arguments. These problems are acute, and do not yield to easy answers. If they are included in the suggestion, they must be approached with great care and an equal measure of reluctance.

The tie to proportionality may imply a different focus. Litigants on all sides continually lament the unceasing expansion of electronically stored information. A party requested to search and produce ESI may reasonably believe that the request should be read to ask for a proportional response, not a complete survey of every possible system and device. So it makes choices. Which custodians should be included? Which of their sources of information? How should the limits of relevance and responsiveness be defined? The same problems existed in the days of paper-only document production, but they have taken on new urgency. And they may be set in a framework of increasing distrust.

The tie to proportionality implicates a related problem that was frequently discussed at the meeting that inspired Judge Baylson. Who has the burden in a dispute about proportionality? Must the requesting party show that its request is proportional, and calls for only a proportional response? Or must the responding party show that a full response would be disproportional? The Committee Note to the 2015 amendment of Rule 26(b)(1) suggests that responsibilities are divided: the requesting party should explain the importance of the requested

information, and the responding party should show the burdens that would be incurred in making a full response. The Note adds this: "Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court."

To the extent that these problems arise from ESI discovery, further guidance may be found in Rule 26(b)(2)(B). A party resisting discovery of ESI from sources that are "not reasonably accessible because of undue burden or cost" must show the undue burden or cost. Even when that showing is made, the court can order discovery if the requesting party shows good cause.

The current rules already seem to provide at least a good foundation for inquiring into a party's "application of these Rules to its production of electronically stored information relevant to the case."

Suggestion No. 2

> In order to ensure proportionality, the Court may order the cost of discovery be shifted from one party to another party.

Cost shifting, sometimes called cost bearing, was considered extensively during the deliberations that led to the 2015 amendment of Rule 26(c)(1)(B). As amended, the rule authorizes a protective order "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery." The Committee Note observes that this authority already existed, and that making it explicit should forestall arguments that it does not exist. It continues: "Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

One way in which cost shifting might be tied to proportionality is to authorize discovery only if the requesting party pays the costs, whether only the costs of attorney services or also the costs incurred by the party itself. This device might be used in a more limited way by authorizing discovery of a limited sample of ESI at the requesting party's expense to determine whether useful information can be found. Examination of a set of backup tapes provided an early example, now largely superseded by superior technology.

Discussion at the meeting that inspired Judge Baylson included expressions of concern that a party should not be able to buy discovery by the expedient of paying for the costs of responding. One part of this concern may be fear that it is difficult to quantify all of the costs of disruption caused by discovery, even if the time spent by the party and its employees is directly compensated. A greater concern is that discovery can be deeply intrusive. On this view, a requesting party should not

be able to shred all protections of privacy by simply paying a price.

Given the authority now established in Rule 26(c)(1)(B), it may again be wise to defer further consideration until clear reasons appear to venture beyond the cautious step taken in 2015.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
Email: [redacted]

Chambers of
Michael M. Baylson
United States District Judge

Telephone: [redacted]
Fax:

June 26, 2019

Via Email: [redacted]

Advisory Committee on Civil Rules
c/o The Honorable John D. Bates, Chairman
United States District Court
E. Barrett Prettyman
United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I recently attended an outstanding seminar presented by Bolch Judicial Institute at Duke Law School and organized by John Rabiej, Esquire, former Staff Director of your Committee. This seminar examined, in great detail, with participation by very experienced lawyers and several judges, the "proportionality" amendment to the Federal Rules of Civil Prccoedure approximately five years ago. I was on a panel that specifically discussed the use of technology by counsel or the judge in determining what would be "proportional" in a particular case. As a result of this discussion, I would like to suggest two new amendments to Rule 26, which would serve as a guiding light for counsel and the court in recognizing the important role that technology plays in complex cases in today's litigation environment.

Suggestion No. 1

> The Court may require a party to disclose details of its application of these Rules to its production of electronically stored information relevant to the case.

Suggestion No. 2

> In order to ensure proportionality, the Court may order the cost of discovery be shifted from one party to another party.

I would be happy to answer any questions or present my reasons for these proposals to the Committee in any format.

Sincerely,

Michael M. Baylson

MMB/lkd

cc: Professor Edward Cooper, Reporter
John Rabiej, Esquire
The Honorable David Levi
The Honorable Lee Rosenthal

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TAB 15

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15. Rule 4(d): Constructive Waiver of Service
(Suggestion 19-CV-W)

This proposal by the American Association for Justice recommends an amendment of the waiver of service provisions of Rule 4(d) to defeat a practice described as "snap removal." The question arises from interpretation of 28 U.S.C. § 1441(b)(2):

> (2) A civil action otherwise removable solely on the basis of the [diversity] jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

The problem arises when removal is sought before any local citizen has been served. The focus in this proposal is on removal by the local citizen itself, drawing from cases that accept removal on a "plain language" reading of the statute. The protest against this practice is sharpened by looking toward vigilant defendants who regularly monitor state-court dockets to identify and remove actions before being served. The result is said to defeat the plaintiff's proper choice of forum — the action could not be removed if only the defendant had been served earlier. A defendant should not be allowed to accept the benefits of local citizenship and at the same time escape local courts. Pre-service removal also leads to delay, sometimes great delay, while the removal dispute is litigated.

Two appellate decisions are cited to describe the phenomenon. Neither involved electronic surveillance of court dockets and removal immediately after the case was filed. But each points toward the anticipated — and feared — interpretation of § 1441(b)(2).

Judge Chagares wrote for the court in *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147, 151-154 (3d Cir. 2018). An Illinois citizen sued a Pennsylvania citizen in a Pennsylvania state court. Before the action was filed the defendant's attorney agreed to accept electronic service of process. After receiving the notice together with an acceptance form, the attorney informed the plaintiff that he would accept service, but not until after removing the action. Removal was followed by acceptance of service. The court ruled first that the plain language of § 1441(b)(2), a "procedural rather than jurisdictional" rule, did not defeat removal. The defendant removed before being served through accepting service. Then the court asked whether the result was so absurd or bizarre as to defeat the plain meaning. It found that the purpose of ignoring a local citizen that has not been properly joined and served is to forestall attempts to defeat removal by "fraudulently" joining a local defendant without any purpose to claim against or even serve that defendant. Section 1441(b)(2)'s purpose to limit removal is not so far frustrated as to defeat the plain meaning.

The court added a suggestion, 902 F.3d at 153 n.4, that Congress is well-suited to address the issues that might arise if significant numbers of potential defendants take to electronic monitoring of court filings and quickly removing. (Finally, it concluded that the defendant was not precluded from removing by deliberately delaying the acceptance of service.)

Judge Sullivan wrote for the court in *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 704-707 (2d Cir. 2019). Two sets of removed cases were before the court. The first set included 33 actions that had been filed in a California state court, followed by voluntary dismissal and refiling in a Delaware state court against two Delaware citizens. The defendants, not yet served, removed two days later. The cases were transferred to an MDL proceeding in the Southern District of New York. A second set of new cases was filed in the Delaware state court, removed before service, and transferred to the MDL court. Upholding removal, the court began by agreeing with the Third Circuit on the plain meaning of § 1441(b). Then it also agreed that allowing removal was not an "absurd" result. Removal is generally allowed in diversity actions so an out-of-state defendant is not prejudiced. Barring removal by a state citizen, even when there is complete diversity, recognizes that a local citizen is not likely to be "home-towned." And limiting the bar to include only defendants properly joined and served defeats any attempt to defeat removal by joining a defendant the plaintiff does not mean to proceed against. In addition to preventing gamesmanship, the result is a bright line rule that is easier to administer than an inquiry into the plaintiff's intent whether to really proceed against an in-state defendant. Finally, it makes no difference that the result may be that removal is available in states — like Delaware — that require a delay between filing and service, while it is not available in states that permit service as soon as an action is filed. State-by-state variation is common in the federal courts.

Both courts recognized that district courts within their circuits had divided on this question.

AAJ proposes a new rule that would accept the interpretation of § 1441(b)(2) that allows removal before service, but that would bypass the interpretation by establishing a constructive date of service. The new rule would be added to the waiver-of-service provisions of Rule 4(d), but has meaning only if it establishes a time for service in the original state-court action. The constructive date of service is not the time of filing in the state court, however, but the time when "any defendant" has "actual notice" of the action. The "actual notice" term seems designed to include defendants that electronically monitor state-court dockets. "[D]efendants with actual notice who are trolling state filings would no longer be allowed to snap remove the case * * *." Beyond that, it gets complicated:

(6) Constructive Waiver. When any defendant has actual notice that a lawsuit has been filed against it, all defendants to the lawsuit will be deemed to have waived service of the summons, provided that formal service takes place within thirty (30) days of any action taken by any defendant so that all defendants have formal notice of the lawsuit and it shall be deemed that such service will relate back to the date of actual notice to any defendant.

The proposal is imaginative, perhaps ingenious. But it is not easy to untangle the drafting. A few observations and questions will be offered below.

Before turning to specific questions, however, the central question is whether it is appropriate to bypass Congress in an attempt to modify judicial interpretations of the removal statutes. However ingenious the proposed device is, there is no blinking this purpose. Rule 82 says that "[t]hese rules do not extend or limit the jurisdiction of the district courts." Care must be taken before undertaking any attempt to resurrect a statutory limit on removal jurisdiction — even if for other purposes it is viewed, as the Third Circuit says, as a matter of procedure rather than the subject-matter jurisdiction assumed to support complete-diversity removal. The courts are capable of reaching their best-available interpretation of the statute. If they feel the result constrained by statutory language is inappropriate but better cured by Congress, resort to the Enabling Act may be found inappropriate, or, worse, an attempt to adopt a rule that is not really a rule of "procedure" within the meaning of the Act.

Concerns about writing an Enabling Act rule to supersede judicial interpretations of § 1441(b)(2) may be deepened by considering the actual proposal. It relies on pure fiction — "deemed" is a sure sign. As noted earlier, it has meaning only if it establishes, at least for § 1441(b)(2), a definition of when service is deemed to have been made in the state-court action. And, as a second fiction, all defendants — not only what may be just one defendant with actual notice — are deemed to have waived service, although waiver occurs only if "formal service takes place within thirty (30) days of any action taken by any defendant so that all defendants have formal notice of the lawsuit." This could mean that constructive waiver and relation back occur only if some defendant, whether or not the first to get actual notice of the lawsuit, acts in a way that gives "formal notice" to all defendants. Or, because "so that" is an uncertain connector, it could mean that the plaintiff must make formal *service* within 30 days of any action taken by any defendant that gives formal *notice* of the lawsuit to all defendants. The purpose implied by that reading is uncertain.

Whatever else might be said, amendment of § 1441(b)(2) could provide a much simpler solution if a "solution" is needed.

Writing a similarly clear amendment of § 1441(b)(2) into an Enabling Act rule would be open to serious challenges. Writing a convoluted amendment to avoid these challenges is not likely to fare any better.

August 30, 2019

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Snap Removal Rule Change Proposal

Dear Ms. Womeldorf:

The American Association for Justice (AAJ) hereby proposes a change to Rule 4 of the Federal Rules of Civil Procedure to address the current tremendous burden on our federal courts associated with the problems and practice of "snap removal."

AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, and frequently utilize the Federal Rules of Civil Procedure, including Rule 4. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

What is Snap Removal?

In an effort to evade state court jurisdiction in which they are properly forum defendants, defendants have contorted an interpretation of the Federal Rules to achieve removal to federal court in a practice now commonly known as "snap removal." Defendants utilize this procedure to achieve "more favorable" federal court jurisdiction. Simply put, "[a] snap removal occurs when defendants exploit a loophole in federal law by removing a diversity case involving at least one forum defendant before any defendant has been served…."[1]

A look at the removal statutes illustrates how snap removal operates. Typically, an action filed in state court may be removed to federal court only when the action is between citizens of different states with a sufficient amount in controversy.[2] However, when one of the defendants is a citizen

[1] Valerie M. Nannery, *Closing the snap removal loophole*, 86 U. Cin. L. Rev. 541, 541 (2018), *available at* https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1274&context=uclr.
[2] *See* 28 U.S.C. § 1332.

of the state in which the action is filed and has been properly served, this type of removal is specifically *not* allowed.[3] This is known as the "forum defendant rule."

A recent relative outlier interpretation of this rule, *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018), is now making snap removal possible as defendants are routinely using absurd measures and proliferating an unintended race to the courthouse. Section 1442(b)(2) states that an action that is "otherwise removable solely on the basis of . . . [diversity of citizenship] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[4] Defendants, seeking to evade the very courts in states in which they reap the rewards of being corporate citizens, instead now look to move their case into what they view to be more favorable federal courts, and do so by seizing upon a contorted interpretation of the phrase "properly joined and served as defendants." In practice, defendants actually keep a constant, if not obsessive, watchful eye on online dockets and remove cases immediately when they see that they are a named defendant but *before* they have been formally served with the complaint.

Based on the plain meaning of the phrase "properly joined and served,"[5] some courts have allowed this practice.[6] This practice is snap removal. Enabled by the widespread use of electronic dockets and easy docket monitoring tools, the practice of evading duly proper state court jurisdiction has become astonishingly easy to accomplish.

Proposal

When a defendant monitors state case filings and then attempts to remove a case, that defendant undoubtedly has actual notice that a lawsuit against it has been filed, unbeknownst to the plaintiff. Though the defendant does not yet have formal notice, it nevertheless has been apprised of the lawsuit in such a way that allows it to act in its own interest (i.e. "snap removing" the case to federal court). This practice is antithetical to the purpose of the Federal Rules of Civil Procedure, which require courts and parties to construe, administer, and employ the rules to "secure the just, speedy, and inexpensive determination of every action and proceeding."[7] There is nothing just about allowing a defendant with knowledge of a lawsuit to remove a case to its preferred court before it has been formally served. Instead, this practice leads to added expense and delay for plaintiffs properly filing in their choice of forum.[8]

Studies show that snap removal leads to significant delay in litigation. After a case is removed, plaintiffs who file a motion for remand to attempt to return the case to the proper court "waited at

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[3] *See* 28 U.S.C. § 1441(b)(2).
[4] 28 U.S.C. § 1441(b)(2) (emphasis added).
[5] *Id.*
[6] *See, e.g.*, *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Selective Insurance Co. of S.C. v. Target Corp.*, 2013 WL 12205696 (N.D. Ill. Dec. 13, 2013) ("Read literally, the forum defendant rule only precludes removal when a forum defendant has been 'properly joined and served.'").
[7] Fed. R. Civ. P. 1.
[8] *See, i.e.*, *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("the party who brings a suit is master to decide what law he will rely upon").

least two months for a ruling on their motions" and "when judges did not rule on the plaintiff's motion…cases remained in federal court for extended periods."[9] This study determined that:

> If a case was remanded to state court after a snap removal, either *sua sponte* or on a motion to remand, it had been in the federal district court for an average of 152 days. The median number of days these remanded cases were in federal district court was seventy-nine. The shortest amount of time a case was in federal court before it was remanded was one day. The longest amount of time was 1,706 days, or almost five years, before the case was remanded.[10]

This further illustrates that even if in the end the plaintiff's choice to file in state court was proper, the defendant, by snap removing a case, has created lengthy delays and still prevented plaintiff from moving their case forward.

Thus, AAJ proposes a change to FRCP 4 to help achieve the intended result of the Rule and stop the specious result brought on by some defendants. Rule 4 provides for waiver of service. The inclusion of a new section in the rule relating to constructive waiver would adequately address issues that arise due to snap removal.

Specifically, under Rule 4(d), AAJ recommends that the following language be added:

> (6) Constructive Waiver. When any defendant has actual notice that a lawsuit has been filed against it, all defendants to the lawsuit will be deemed to have waived service of the summons, provided that formal service takes place within thirty (30) days of any action taken by any defendant so that all defendants have formal notice of the lawsuit and it shall be deemed that such service will relate back to the date of actual notice to any defendant.

The addition of a constructive waiver section to Rule 4 would simply provide that when any one defendant has actual notice that a lawsuit against it has been filed, all defendants will be deemed to have waived service of the summons so that service will relate back to the date of actual notice. Thus, defendants with actual notice who are trolling state filings would no longer be allowed to snap remove the case to federal court under § 1441(b)(2), and removal proceedings would instead be carried out as intended by the rules.

This will be the case providing that service occurs within 30 days of any action taken by any defendant. While under this proposed rule a defendant's attempt to remove indicates actual notice to all defendants and destroys the implicit permission to remove under 28 U.S.C. § 1441(b)(2), the waiver of service, for purposes of preventing snap removal, should still carry with it an obligation to assure that each defendant has formal notice of the lawsuit. Section 1441(b)(2) was enacted so that plaintiffs do not name, and then never serve, an in-state defendant in order to avoid removal, and the proposed rule's requirement of formal service within 30 days

[9] Nannery, *supra* note 1, at 569.
[10] *Id.* at 571-72.

would satisfy this concern.[11] If service does not occur within 30 days, then § 1441(b)(2) can take effect.

Additional Problems with Snap Removal

As the snap removal practice proliferates and courts wrestle with resolving the rush to the courthouse, inconsistent decisions from the courts have resulted. This inconsistency has created another unintended consequence: plaintiffs who properly file suits based on state law claims in state court now have to navigate relative uncertainty within the courts on the problem of snap removal. What is more, the problems resulting from snap removal span beyond discrepancies in how courts handle this practice. Snap removal undercuts state law, adds to delays in civil litigation, and results in arbitrary consolidation of some cases in federal courts.

The practice of snap removal "(1) produces an absurd result and (2) will lead to non-uniform application of the removal statute depending on the provisions of state law."[12] For example, state law service requirements vary, with some requiring a delay between filing and service.[13] In these states, plaintiffs are automatically put at a disadvantage when filing their cases in state court, as defendants are likely attempt to snap remove the case to federal court before the plaintiff has even been *allowed* to effectuate service.

It is well-settled that the plaintiff chooses the initial forum by filing an action. There are procedural protections in place should the defendant feel that the plaintiff's choice is improper. In the situations described and contemplated herein, however, actions were unarguably *properly* brought before state courts; thus, snap removal is not, and should not be considered, one of those protections. Nevertheless, snap removal is often described as a "loophole," "tactic," and way for defendants to "evade" state court jurisdiction and state law. For example, attorneys are now advising that "Given this [Third Circuit] holding, frequently sued parties may want to invest in electronic monitoring of state court dockets to identify suits pre-service and consider removing these cases to federal court before being served."[14]

This type of gamesmanship should not be permitted, and can easily be remedied by the Federal Rules of Civil Procedure.

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[11] *See Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1380-81 (N.D. Ga. 2018).

[12] *Encompass*, 902 F.3d at 705. Moreover, there are often added costs to plaintiffs due to this practice. For example, it costs almost twice as much to hire a process server to do immediate service on a defendant, which becomes necessary to avoid snap removal scenarios.

[13] For example, in Pennsylvania service of process must be commenced by the relevant county's sheriff's office, who has 30 days to effectuate service. *See, e.g.*, Pa. R. Civ. P. 400(a) ("…original process shall be served within the Commonwealth only by the sheriff"). Service by sheriff cannot be expedited to beat snap removal that occurs within minutes. In New Jersey, litigants must wait until a Track Assignment Notice is issued by the court clerk before they are permitted to serve a filed complaint upon a defendant; the clerk has 10 days to issue the Notice. *See* N.J.R.C.P. 4:5A-2.

[14] Katie A. Fillmore, *Third Circuit recognizes viability of "snap removal" by in-state defendant*, ABA (Feb. 5, 2019), *available at* https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/third-circuit-recognizes-viability-of-snap-Removal-by-in-state-defendant/.

Snap Removal in the Courts

Courts have demonstrated not only a divide over whether this practice should be accepted, but also as to the reasons why or why not. Even those courts that have approved of snap removal seem to suggest that their hands are tied and that the practice may "produce[ ] results that a court or litigant finds anomalous or perhaps unwise."[15]

The recent trend involves defense attorneys utilizing two opinions from the United States Courts of Appeals in the Third and Second Circuits to escalate and legitimize immediate snap removal practices nationwide.

In August 2018, the Third Circuit in *Encompass Ins. Co. v. Stone Mansion Rest. Inc.* considered whether Defendant Stone Mansion's pre-service removal is barred by the forum defendant rule. The court explained that "Encompass … argues that the District Court misinterpreted the forum defendant rule, ignoring its intent and construing it 'in a manner that necessarily would create a nonsensical result.'" The Third Circuit rejected this argument, and found the text of the forum defendant rule to be "unambiguous" because its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served. Only in a scenario where application of the plain meaning of the statute would lead to "absurd or bizarre results" should a court avoid the plain language. The court held that, therefore, pre-service removal in that set of circumstances is not inherently in violation of the forum defendant rule.[16]

In March 2019, the Second Circuit also addressed the practice of pre-service removal in *Gibbons v. Bristol-Myers Squibb Co.*, ultimately finding that removal before service is proper under the plain language of § 1442(b)(2).[17]

However, the *Encompass* court was permitting a method of pre-suit removal that is distinguishable from what defendants are currently practicing. In *Encompass*, the defendant removed the case *days* after it was filed.[18] The key issue in *Encompass* was whether the defense counsel's verbal agreement to accept service precluded his ability to remove the case before service was completed. Contrarily, defense attorneys are now snap removing filings within minutes and claiming *Encompass* permits the tactic. This particular snap removal practice hasn't yet been ruled on by a federal appellate court, but seems to be the type of "bizarre and absurd" result the *Encompass* court warned about, as snap removal – within minutes – functionally eviscerates the purpose of the forum defendant rule by prohibiting plaintiffs from filing a complaint in state court and diligently serving the forum defendant before an immediate electronic removal.[19] In effect, without the requested revision to Rule 4, forum defendants will continue to use *Encompass* and *Gibbons* as immunity from the forum defendant rule.

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[15] *Gibbons*, 919 F.3d at 705.
[16] *Encompass*, 902 F.3d 147 (3d Cir. 2018).
[17] *Gibbons*, 919 F.3d 699 (2d Cir. 2019).
[18] *Gibbons* also does not appear to involve snap removal within minutes of a complaint filing.
[19] Notably, the *Encompass* court specifically referenced the failure of the briefs to address a "race-to-the-courthouse removal scenario" or whether "the practice is widespread." *Encompass*, 902 F.3d at 154 n.4.

While these are the only two U.S. Courts of Appeals that have addressed snap removal, district courts have come to varying results. For example, the Southern District of West Virginia, Eastern District of Virginia, and District of New Jersey all held that a forum defendant cannot remove when it has not yet been served, and allowing otherwise would render the forum defendant rule meaningless.[20] In the Northern District of Illinois, the court found that removal was allowed, but also that remand was proper after the forum defendant was served.[21] Recently, in the Northern District of Georgia, the court declined to extend the *Encompass* ruling to the case at bar and remanded a case where snap removal occurred within 90 minutes of filing.[22] Other district courts have come to conclusions more similar to the Third and Second Circuits, or reached results that fall somewhere in the middle.[23]

The simple change to the Federal Rules of Civil Procedure proposed herein would prevent such absurd results, reduce gamesmanship, prevent delay, and allow the forum defendant rule to operate as was intended.

AAJ thanks the Committee for its time and consideration of this request.

Sincerely,

Bruce Stern
President
American Association for Justice

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[20] *Phillips Constr., LLC v. Daniels Law Firm, PLLC*, 93 F. Supp. 3d 544, 553 (S.D. W. Va. 2015) ("The Court is persuaded by those opinions that find the plain meaning . . . permits pre-service removal by a resident defendant, but a literal application of this plain meaning is contrary to congressional intent and creates absurd results"); *Campbell v. Hampton Rds. Bankshares, Inc.*, 925 F. Supp. 2d 800, 810 (E.D. Va. 2013) ("A removing defendant has actual notice of the case, and has become involved by seeking removal."); *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640 (D.N.J. 2008) (Court looked past plain meaning of § 1441(b) to give effect to purpose of *forum defendant rule* and warned of potential "gamesmanship – a hastily filing of a notice of removal" as being "demonstrably at odds with Congressional intent"). *See also* In *Vivas v. Boeing Co.*, 486 F.Supp.2d 726, 734 (N.D. Ill. 2007) ("Combining [these statutes] to allow a resident defendant to remove a case before a plaintiff even has a chance to serve him would provide a vehicle for defendants to manipulate the operation of the removal statutes.").

[21] *Grimard v. Montreal, Maine and Atlantic Ry., Inc.*, 2013 WL 4777849 (N.D. Ill. Sept. 5, 2013).

[22] *See Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372 (N.D. Ga. 2018).

[23] *See FTS Int'l Servs., LLC v. Caldwell-Baker Co.*, 2013 WL 1305330 (D. Kan. Mar. 27, 2013) (finding that the statute requires both joinder and service, but holding that cases are not removable until at least one defendant has been served).

TAB 16

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Report
on the
Mandatory Initial Discovery Pilot

Results of Closed-Case Attorney Surveys
Fall 2017–Spring 2019

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III and Jason A. Cantone

Federal Judicial Center

September 2019

Federal Judicial Center
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Executive Summary

This initial report on the Mandatory Initial Discovery Pilot (MIDP) summarizes the results of surveys, conducted by Federal Judicial Center (Center) researchers, of attorneys in MIDP cases in the District of Arizona and the Northern District of Illinois, closed through the spring of 2019. The MIDP replaces the initial disclosures required by the Federal Rules of Civil Procedure with broader disclosure requirements. More than half of survey respondents in the District of Arizona and about half of survey respondents in the Northern District of Illinois reported having participated in MIDP disclosures in pilot cases terminated on or before March 31, 2019.

Pilot participants were asked to evaluate their experience with the MIDP in closed cases. Survey respondents generally agreed that the MIDP resulted in relevant information being provided to the other side earlier in the case. Additionally, most survey respondents either disagreed with or were neutral to the concern that the required MIDP exchanges would result in disclosures that would not otherwise have occurred in the discovery process. They were more or less evenly divided on whether the MIDP focused discovery on important issues, reduced the volume of discovery requests, or reduced the number of discovery disputes in the closed cases. Plaintiff attorney respondents were more likely than defendant attorney respondents to agree that the MIDP enhanced the effectiveness of settlement negotiations, expedited settlement negotiation discussions among the parties, and reduced the number of subsequent discovery requests. In general, survey respondents tended not to agree that the MIDP reduced discovery costs or overall costs in the closed cases, nor did they agree that the disclosures reduced disposition times in the closed cases. Survey respondents were also invited to provide open-ended comments about the MIDP, which are included in the Appendix.

This is not a final report on the MIDP, as the participating districts continue to assign newly filed cases to the pilot. Center researchers will continue to conduct attorney surveys in terminated pilot cases on a regular cycle. In addition, Center researchers are collecting docket-level data on pilot cases and conducting interviews in the participating districts as part of a larger MIDP project.

Background

In June 2016, the Judicial Conference Committee on Rules of Practice and Procedure approved the MIDP for use in the district courts. The MIDP is based on the expectation that "civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice."[1] The pilot is modeled in part on "the robust initial disclosure rules used in various states," including state courts in Arizona.[2] In the participating districts, it applies broadly to all civil cases subject to mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1), except patent cases governed by local rules and those included in a multidistrict litigation consolidation. The MIDP disclosures are broader than those under the existing rule because they require disclosure of both favorable and unfavorable information; the existing rule requires a party to disclose only favorable information. Much more information about the MIDP can be accessed on the Center's public website.[3]

As part of the MIDP study, Center researchers have surveyed attorneys of record in recently closed pilot cases to measure participation in the pilot and participants' evaluations of it. The District of Arizona began using the MIDP in civil cases filed as of May 1, 2017, and a large number of judges in the Northern District of Illinois began using it in civil cases filed as of June 1, 2017. Both districts expect to apply the MIDP to newly filed civil cases for three years. Pilot cases are identified by searching each district's electronic records for closed cases in which the pilot standing order was docketed. In addition, certain kinds of case dispositions in which discovery is unlikely to have occurred, such as default judgments, are generally excluded from the surveys. The lists are deduplicated each round, so no attorney in either district should receive more than one survey per round. In both the District of Arizona and the Northern District of Illinois, closed-case attorney surveys have been conducted four times, as of this writing, on roughly a six-month cycle: fall 2017, spring 2018, fall 2018, and spring 2019. Each round of surveys includes pilot cases closed in the six months prior to the survey release. The first round of surveys in fall 2017 included the small number of pilot cases closed since the start of the MIDP a few months earlier.

Through four rounds, 1,612 surveys have been emailed in the District of Arizona, and 3,163 in the Northern District of Illinois. The overall response rate for the District of Arizona, as of this writing, is 29% (473 responses received).

1. Advisory Comm. On Civil Rules, Report to the Standing Committee, May 12, 2016, at 27 (available at https://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf).

2. *Id*. at 26.

3. https://www.fjc.gov/content/320224/midpp-standing-order.

For the Northern District of Illinois, the comparable figure is 35% (1,103 responses received). These response rates are consistent with response rates in similar Center surveys of attorneys.

In terms of representativeness, plaintiff attorneys and defendant attorneys responded in roughly equal numbers, and in similar types of cases, overall. Broadly speaking, respondents' cases are representative of the farraginous dockets of the federal courts: insurance and other contract actions, personal injury torts, civil rights, consumer credit, wage and hour litigation, trademark and copyright, and the catchall "other" statutory actions. The closed cases underlying this report are not representative of case dispositions, however. Some types of case dispositions are likely underrepresented, especially summary judgments, which take longer than most other types of dispositions, on average, and thus may not have closed. For example, if a pilot case was filed on the first day of the pilot and closed by March 31, 2019 (the end of the last survey period), it would have lasted 23 months in the District of Arizona and 22 months in the Northern District of Illinois. Cases filed more recently have, accordingly, had even less time to resolve. Survey responses from attorneys in longer-pending pilot cases will have to be analyzed in subsequent reports. Because the survey results presented in this report are, at best, representative of shorter duration cases, they should be interpreted with caution.

Results for the most part are reported separately for plaintiff attorneys and defendant attorneys because of the study's sampling design. For each closed case included in the study, a survey was distributed to both a plaintiff attorney and a defendant attorney, if possible. That means that in each round of surveys, some closed cases are represented by two responses (one each for plaintiff attorney and defendant attorney) and others by only one response. Reporting responses separately for plaintiff attorneys and defendant attorneys eliminates any double counting of cases that may occur. Reporting the responses separately can also reveal meaningful differences in evaluations of the pilot between plaintiff attorneys and defendant attorneys; these differences will be discussed where appropriate. Respondents' open-ended comments regarding the MIDP, provided in the Appendix, are also presented separately for plaintiff attorneys and defendant attorneys.

Participation in the Pilot

The surveys asked respondents to answer if, in the recently closed case, "either side provide[d] the other side with mandatory initial discovery, as required by the standing order." All respondents were informed that their answers applied only to the named closed case. Response options were, "Yes, all required exchanges were made," "Yes, my side did but all sides did not," "Yes, other sides did but my side did not," "No," and "I do not recall."

MIDP disclosures were reported in a majority of closed pilot cases in the District of Arizona, where 43% of plaintiff attorneys and 46% of defendant attorneys responded, "Yes, all required exchanges were made." Another 12% of plaintiff attorneys and 13% of defendant attorneys responded that at least one side, but not all sides, made the required exchanges. As shown in **Table 1**, for most of these responses the attorney noted that their side was the only one to make the required exchanges. At the same time, 37% of plaintiff attorneys and 36% of defendant attorneys reported that the MIDP exchanges were not made in the recently closed case. Additionally, 8% of plaintiff attorneys and 5% of defendant attorneys could not recall whether MIDP exchanges were made in the closed case.

	Plaintiff Attorneys	Defendant Attorneys
Yes, all	43%	46%
Yes, my side	10%	10%
Yes, other sides	2%	3%
No	37%	36%
I do not recall	8%	5%
N	231	236

Table 1: Pilot participation in the District of Arizona (Fall 2017–Spring 2019)

When survey respondents answered that the MIDP exchanges were not made in the closed case, they were asked a follow-up question about why the exchanges were not made. The primary reason Arizona respondents (N=467) gave for not making the MIDP exchanges was early resolution of the case. Fully 87% of plaintiff attorneys and 76% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. Only about 6% of Arizona respondents indicated that they had either stipulated that no discovery would be conducted or certified that they were engaged in good-faith settlement efforts.

In the Northern District of Illinois, 37% of plaintiff attorneys and 38% of defendant attorneys responded, "Yes, all required exchanges were made." Another 7% of plaintiff attorneys and 10% of defendant attorneys responded that at

least one side, but not all sides, made the required exchanges. Again, as shown in **Table 2**, almost all of these attorneys reported that it was their side that provided the required exchanges. At the same time, 48% of plaintiff attorneys and 46% of defendant attorneys reported that the MIDP exchanges were not made in the recently closed case. Additionally, 8% of plaintiff attorneys and 7% of defendant attorneys could not recall whether MIDP exchanges were made in the closed case.

	Plaintiff Attorneys	Defendant Attorneys
Yes, all	37%	38%
Yes, my side	7%	9%
Yes, other sides	0%	1%
No	48%	46%
I do not recall	8%	7%
N	531	533

Table 2: Pilot participation in the Northern District of Illinois (Fall 2017–Spring 2019)

The primary reason Illinois Northern respondents (N=498) gave for not making the MIDP exchanges was early resolution of the case. Fully 65% of plaintiff attorneys and 66% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. Only about 11% of respondents indicated that they had either stipulated that no discovery would be conducted or certified that they were engaged in good-faith settlement efforts. Relatively few survey respondents reported having made use of these specified exceptions. Many more respondents in Illinois Northern than in Arizona selected "Other," although their open-ended responses generally indicated that cases were resolved before the pilot's discovery obligations arose.

In considering rates of MIDP disclosures in both districts, it is important to keep in mind that the pilot's initial discovery obligations are triggered by the filing of a responsive pleading and that in many civil cases no responsive pleading is ever filed. Even when a responsive pleading is filed, many cases assigned to the pilot settle or are resolved without MIDP exchanges.

The extent to which these participation rates reflect opposition to the initial discovery obligations imposed by the pilot is difficult to estimate. It is impossible to know, for example, how many defendants sought an extension to file a responsive pleading to avoid triggering MIDP obligations. (Docket-level data will assist greatly in interpreting the survey results on participation rates.) It is clear, however, from MIDP disclosure rates and from open-ended survey responses, that many of the MIDP cases do not involve the required exchanges, especially in Illinois Northern.

To better understand the attorneys' reviews of the MIDP, the surveys also included two open-ended prompts:

- "Please provide any additional comments you have regarding the initial discovery in the above-named case."
- "Please provide any comments you have about the district's mandatory initial discovery pilot program."

The second prompt was only added to the survey for the Spring 2019 round. The appendix to this report provides all responses to these prompts, edited only for spelling and to remove identifying information (e.g., name of the case or client). The responses are briefly summarized in the discussion section of this report.

Participant Evaluations of the Pilot

Survey respondents who reported that at least one side provided MIDP exchanges in the closed case were then asked a series of twelve questions about their recent experience with the pilot and how they believed it affected their case. These questions were designed to address the goals of the pilot, such as reducing discovery disputes and motions practice, and, in a few instances, to address concerns that were raised about potential effects of the MIDP exchanges, such as disclosure of information that would not otherwise have been requested. Respondents stated agreement or disagreement with the following statements about the "exchange of initial discovery" in the closed case:

- Provided relevant information earlier in the case
- Led to disclosure of information that would not likely have been requested otherwise
- Focused subsequent discovery on the important issues in the case
- Enhanced effectiveness of settlement negotiations
- Expedited settlement discussions among the parties
- Reduced the number of discovery requests that would have otherwise been made in the case
- Reduced the volume of discovery required to resolve the case
- Reduced the number of motions filed in the case
- Reduced the number of discovery disputes that would have otherwise been made in the case
- Reduced the discovery costs in the case for my client
- Reduced the overall costs in the case for my client
- Reduced the time from filing to resolution in the case

Responses to each question are discussed in order below.

Participant Evaluations of the Pilot—Relevant information

Provided relevant information earlier in the case.

Respondents agreed with this statement at higher rates than with any other. As seen in **Figure 1**, 70% of plaintiff attorneys in Arizona either agreed (48%) or strongly agreed (22%) with this statement, compared to 14% who either disagreed (7%) or strongly disagreed (7%). Sixty-four percent of defendant attorneys in the same district agreed (53%) or strongly agreed (11%), compared to 20% who disagreed (14%) or strongly disagreed (6%). About one in seven respondents (13% of plaintiff attorneys and 15% of defendant attorneys) neither agreed nor disagreed.

Results for Illinois Northern are displayed in **Figure 2**. In that district, 69% of plaintiff attorneys either agreed (46%) or strongly agreed (23%) with this statement, compared to 16% who either disagreed (9%) or strongly disagreed (7%). Fourteen percent of plaintiff attorneys in that district neither agreed nor disagreed. Fifty-two percent of defendant attorneys in the same district either agreed (41%) or strongly agreed (11%), compared to 25% who either disagreed (18%) or strongly disagreed (7%). Twenty-one percent of defendant attorneys neither agreed nor disagreed.

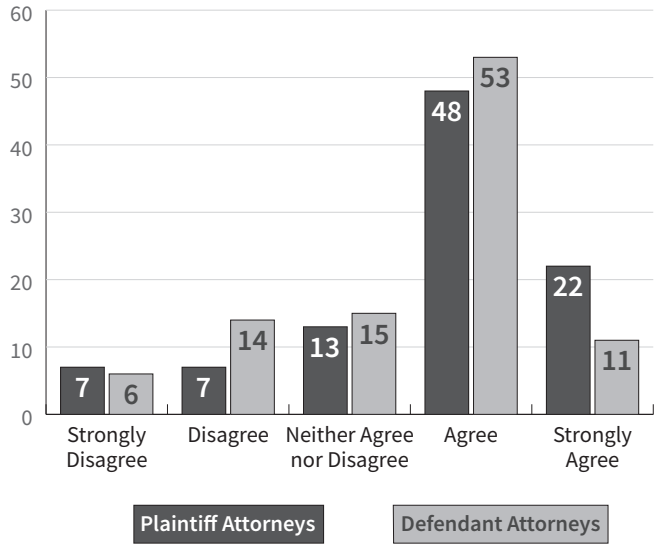

Figure 1: District of Arizona (N=254)

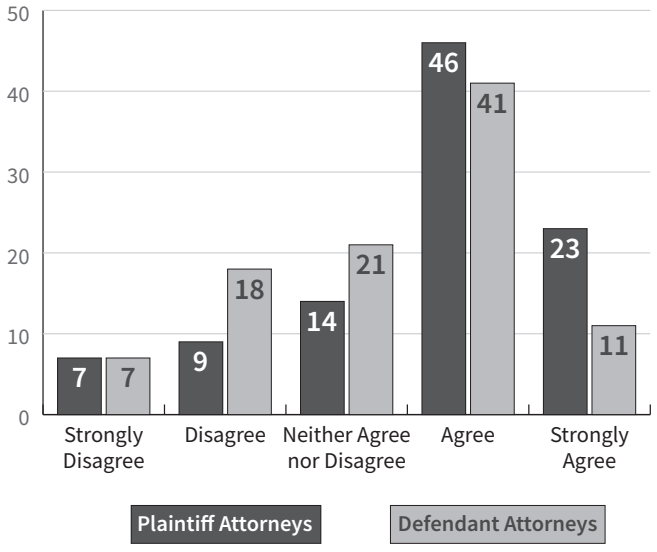

Figure 2: Northern District of Illinois (N=468)

Participant Evaluations of the Pilot—Disclosure of information

Led to disclosure of information that would not likely have been requested otherwise.

Respondents tended to disagree with or express neutrality toward this statement. In Arizona (**Figure 3**), 51% of plaintiff attorneys either disagreed (38%) or strongly disagreed (13%) with the statement, and another 25% neither agreed nor disagreed. Only 20% of plaintiff attorneys either agreed (14%) or strongly agreed (6%). Fifty-three percent of defendant attorneys either disagreed (39%) or strongly disagreed (14%), and another 33% neither agreed nor disagreed. Only 13% of defendant attorneys in Arizona either agreed (11%) or strongly agreed (2%).

Similarly, in Illinois Northern (**Figure 4**), 55% of plaintiff attorneys either disagreed (33%) or strongly disagreed (22%), and another 21% neither agreed nor disagreed. Twenty-two percent of plaintiff attorneys in that district either agreed (13%) or strongly agreed (9%). Sixty-four percent of defendant attorneys in the district disagreed (39%) or strongly disagreed (25%); 21% neither agreed nor disagreed, 9% agreed, and only 3% strongly disagreed.

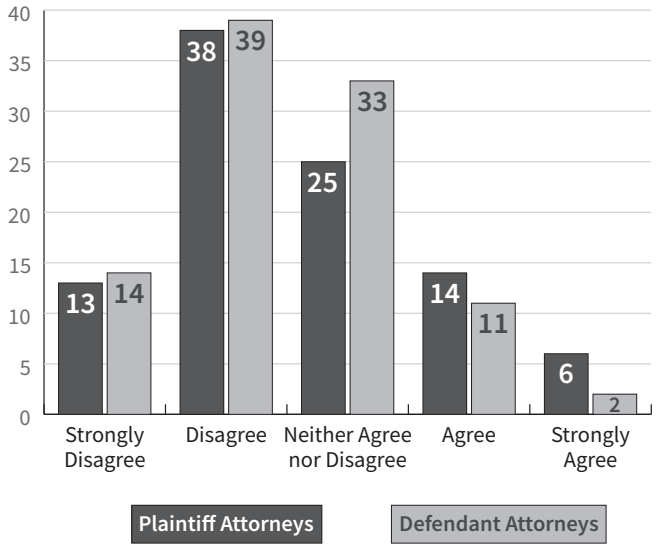

Figure 3: District of Arizona (N=255)

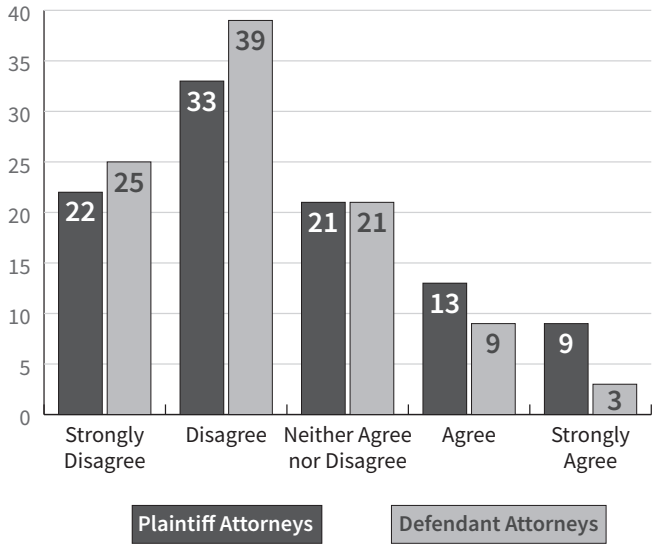

Figure 4: Northern District of Illinois (N=468)

Participant Evaluations of the Pilot—Focused discovery

Focused subsequent discovery on the important issues in the case.

Respondents tended to be evenly divided on this question, except defendant attorneys in Illinois Northern, who were more negative by a 2:1 margin. In Arizona (**Figure 5**), 35% of plaintiff attorneys either agreed (26%) or strongly agreed (9%), 35% neither agreed nor disagreed, and 22% either disagreed (13%) or strongly disagreed (9%). Among defendant attorneys, 27% either agreed (22%) or strongly agreed (5%), 36% neither agreed nor disagreed, and 31% either disagreed (20%) or strongly disagreed (11%).

In Illinois Northern (**Figure 6**), 38% of plaintiff attorneys either agreed (28%) or strongly agreed (10%), 31% neither agreed nor disagreed, and 29% either disagreed (18%) or strongly disagreed (11%). Among defendant attorneys, 19% either agreed (15%) or strongly agreed (4%), 32% neither agreed nor disagreed, and 43% either disagreed (26%) or strongly disagreed (17%).

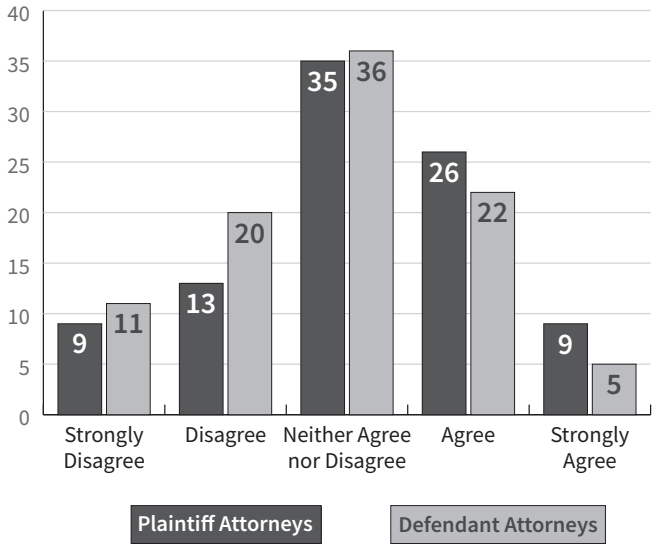

Figure 5: District of Arizona (N=254)

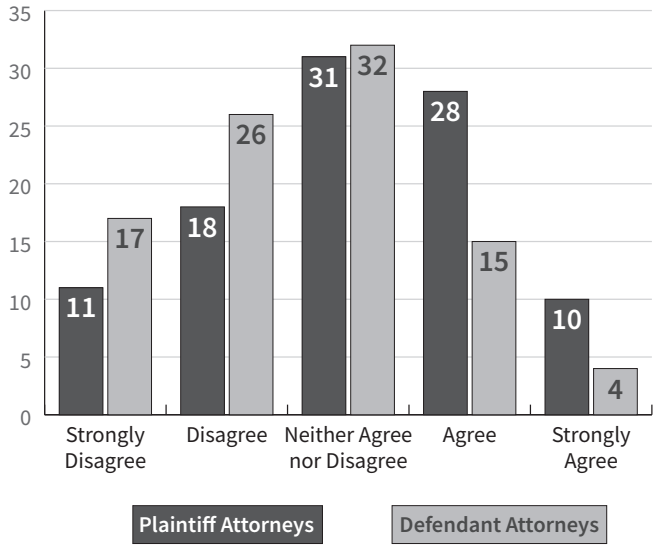

Figure 6: Northern District of Illinois (N=467)

Participant Evaluations of the Pilot—Settlement negotiations

Enhanced effectiveness of settlement negotiations.

Plaintiff attorneys were more likely to agree with this statement, and defendant attorneys were more likely to disagree. In Arizona (**Figure 7**), 44% of plaintiff attorneys agreed (33%) or strongly agreed (11%), 31% neither agreed nor disagreed, and 21% disagreed (12%) or strongly disagreed (9%). In contrast, 34% of defendant attorneys either agreed (25%) or strongly agreed (9%), 27% neither agreed nor disagreed, and 38% either disagreed (24%) or strongly disagreed (14%).

In Illinois Northern (**Figure 8**), 42% of plaintiff attorneys either agreed (29%) or strongly agreed (13%), 26% neither agreed nor disagreed, and 30% either disagreed (17%) or strongly disagreed (13%). In contrast, 26% of defendant attorneys either agreed (20%) or strongly agreed (6%), 28% neither agreed nor disagreed, and 42% either disagreed (26%) or strongly disagreed (16%).

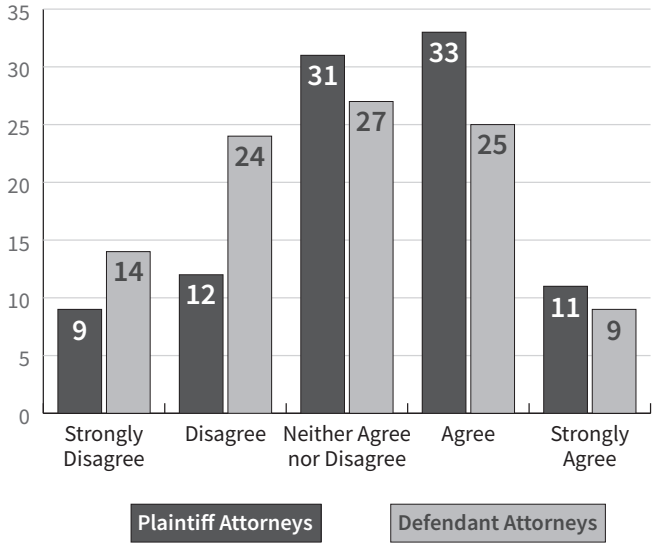

Figure 7: District of Arizona (N=256)

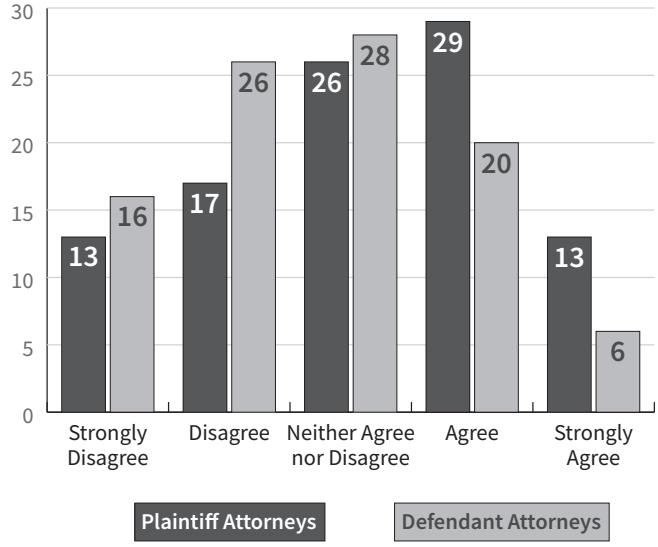

Figure 8: Northern District of Illinois (N=468)

Participant Evaluations of the Pilot—Settlement discussions

Expedited settlement discussions among the parties.

Similar to the preceding question, plaintiff attorneys were more likely to agree with this statement than defendant attorneys; defendant attorneys evenly split on the question in Arizona but were more negative in Illinois Northern. In Arizona (**Figure 9**), 44% of plaintiff attorneys either agreed (32%) or strongly agreed (12%), 27% neither agreed nor disagreed, and 24% either disagreed (17%) or strongly disagreed (7%). In contrast, 35% of defendant attorneys either agreed (24%) or strongly agreed (11%), 28% neither agreed nor disagreed, and 36% either disagreed (26%) or strongly disagreed (10%).

In Illinois Northern (**Figure 10**), 44% of plaintiff attorneys either agreed (31%) or strongly agreed (13%), 21% neither agreed nor disagreed, and 33% either disagreed (18%) or strongly disagreed (15%). In contrast, 29% of defendant attorneys either agreed (22%) or strongly agreed (7%), 25% neither agreed nor disagreed, and 43% either disagreed (30%) or strongly disagreed (13%).

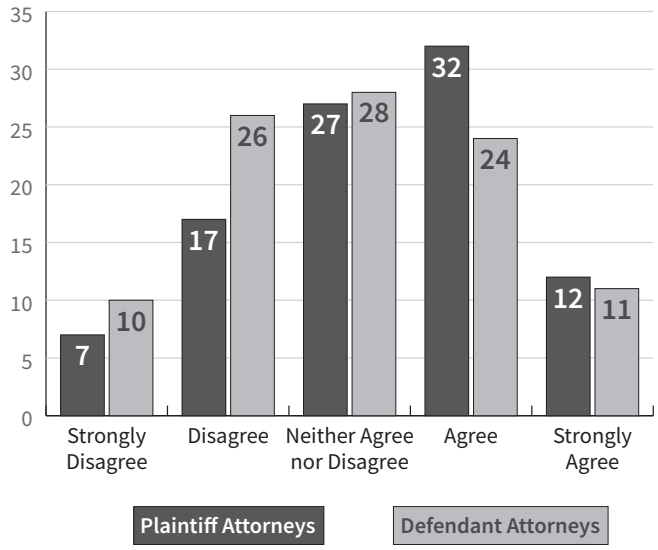

Figure 9: District of Arizona (N=256)

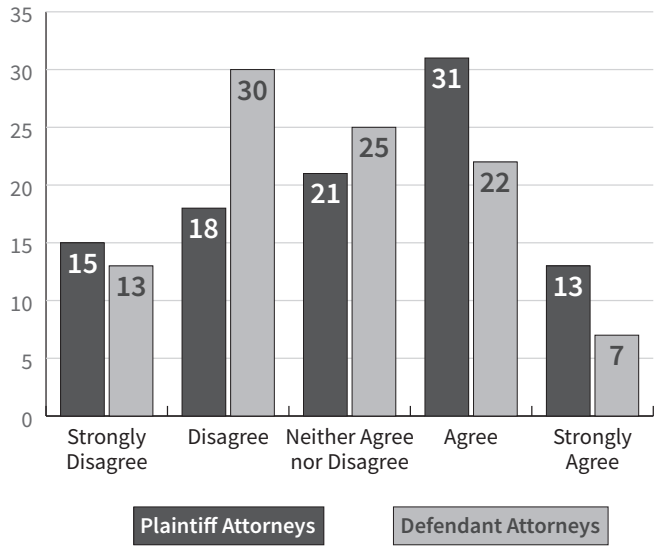

Figure 10: Northern District of Illinois (N=468)

Participant Evaluations of the Pilot—Number of discovery requests

Reduced the number of discovery requests that would otherwise been made in the case.

As with the preceding question, defendant attorneys in Illinois Northern evaluated the pilot's effects most negatively (and much more negatively than Arizona defendant attorneys. In Arizona (**Figure 11**), 49% of plaintiff attorneys either agreed (34%) or strongly agreed (15%), 20% neither agreed nor disagreed, and 21% either disagreed (15%) or disagreed strongly (6%). Forty-three percent of defendant attorneys either agreed (33%) or strongly agreed (10%), 23% neither agreed nor disagreed, and 27% disagreed (22%) or strongly disagreed (5%).

In Illinois Northern (**Figure 12**), 48% of plaintiff attorneys either agreed (36%) or strongly agreed (12%), 19% neither agreed nor disagreed, and 30% either disagreed (15%) or strongly disagreed (15%). In contrast, 23% of defendant attorneys either agreed (15%) or strongly agreed (8%), 22% neither agreed nor disagreed, and 49% either disagreed (30%) or strongly disagreed (19%).

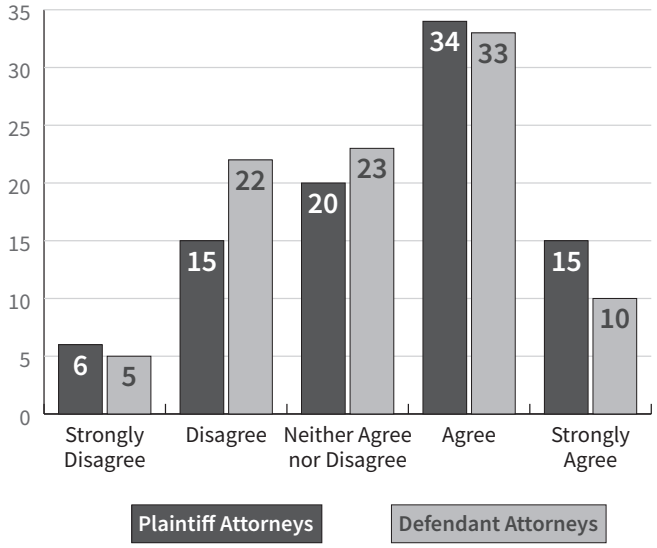

Figure 11: District of Arizona (N=256)

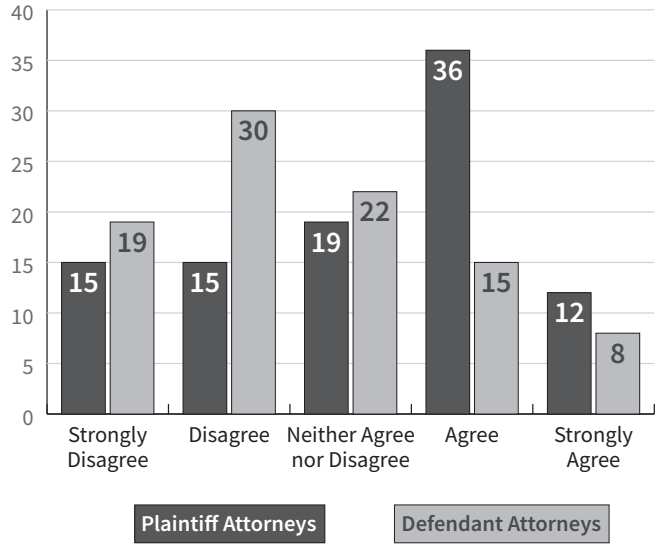

Figure 12: Northern District of Illinois (N=466)

Participant Evaluations of the Pilot—Volume of discovery

Reduced the volume of discovery required to resolve the case.

As with the prior two questions, defendant attorneys in Illinois Northern evaluated the pilot's effects most negatively. In Arizona (**Figure 13**), 38% of plaintiff attorneys either agreed (28%) or strongly agreed (10%), 28% neither agreed nor disagreed, and 26% either disagreed (17%) or strongly disagreed (9%). For defendant attorneys, about one-third (32%) either agreed (26%) or strongly agreed (6%), 26% neither agreed nor disagreed, and 37% either disagreed (25%) or strongly disagreed (12%).

In Illinois Northern (**Figure 14**), 36% of plaintiff attorneys either agreed (25%) or strongly agreed (11%), 25% neither agreed nor disagreed, and 35% either disagreed (21%) or strongly disagreed (15%). In contrast, 16% of defendant attorneys either agreed (12%) or strongly agreed (4%), 25% neither agreed nor disagreed, and 55% either disagreed (31%) or strongly disagreed (24%).

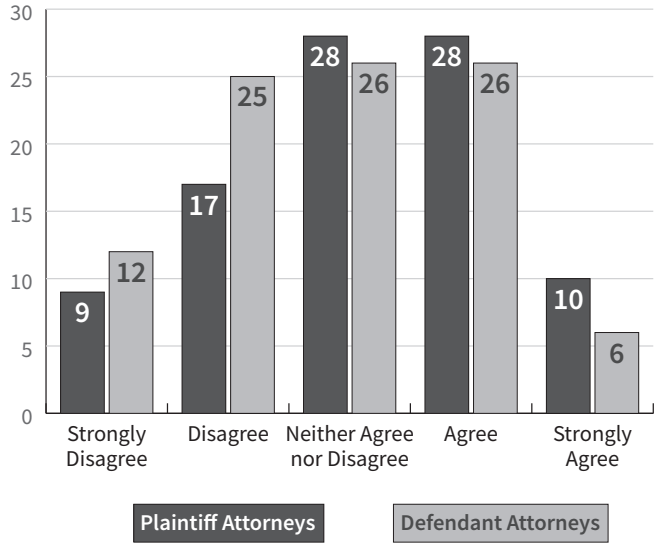

Figure 13: District of Arizona (N=256)

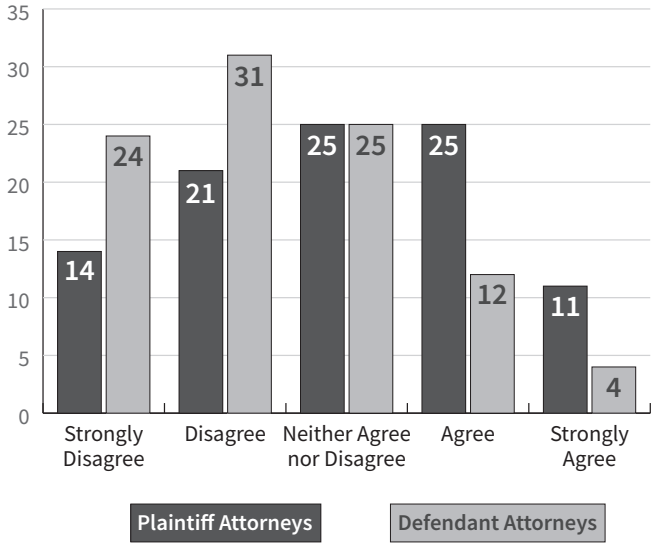

Figure 14: Northern District of Illinois (N=467)

Participant Evaluations of the Pilot—Number of motions filed

Reduced the number of motions filed in the case.

Respondents tended to respond neutrally or disagree with this statement and were unlikely to agree with it (except Illinois Northern plaintiff attorneys). In Arizona (**Figure 15**), 19% of plaintiff attorneys either agreed (15%) or disagreed (4%), 40% neither agreed nor disagreed, and 31% either disagreed (20%) or disagreed strongly (11%). Defendant attorneys either agreed (9%) or strongly agreed (6%) in just 15% of closed cases, neither agreed nor disagreed in 37%, and disagreed (26%) or strongly disagreed (13%) in 39%.

In Illinois Northern (**Figure 16**), 30% of plaintiff attorneys either agreed (22%) or strongly agreed (8%), 37% neither agreed nor disagreed, and 27% either disagreed (17%) or strongly disagreed (10%). In contrast, 12% of defendant attorneys either agreed (7%) or strongly agreed (5%), 40% neither agreed nor disagreed, and 38% either disagreed (25%) or strongly disagreed (13%).

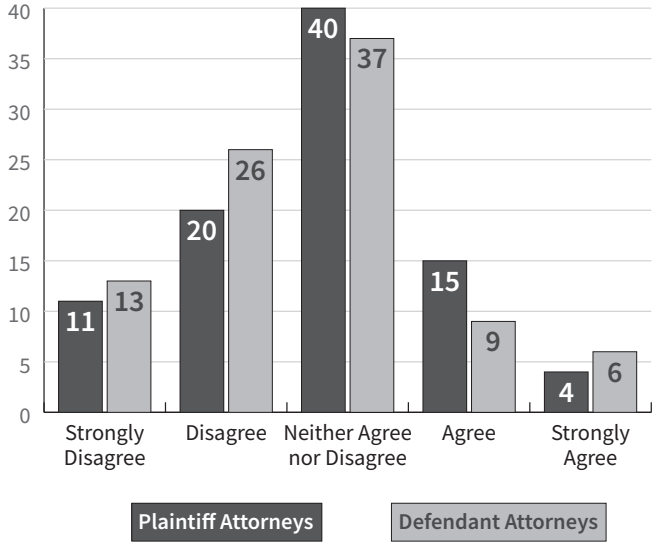

Figure 15: District of Arizona (N=256)

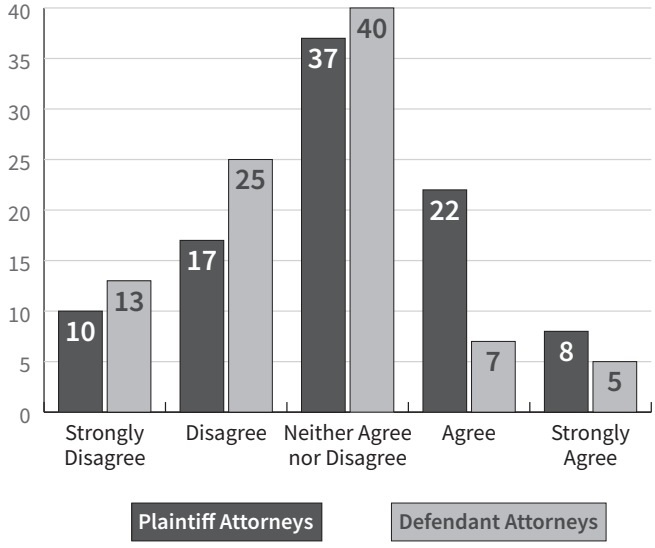

Figure 16: Northern District of Illinois (N=465)

Participant Evaluations of the Pilot—Number of discovery disputes

Reduced the number of discovery disputes that would otherwise have been made in the case.

Respondents tended to respond neutrally to this statement (except Illinois Northern defendant attorneys). In Arizona (**Figure 17**), 27% of plaintiff attorneys either agreed (20%) or strongly agreed (7%), 37% neither agreed nor disagreed, and 24% either disagreed (16%) or disagreed strongly (8%). Defendant attorneys agreed (13%) or strongly agreed (5%) in just 18% of closed cases, neither agreed nor disagreed in 38%, and either disagreed (23%) or strongly disagreed (8%) in 31% of closed cases.

In Illinois Northern (**Figure 18**), 28% of plaintiff attorneys either agreed (20%) or strongly agreed (8%), 35% neither agreed nor disagreed, and 30% either disagreed (20%) or strongly disagreed (10%). In that district, 18% of defendant attorneys either agreed (13%) or strongly agreed (5%), 31% neither agreed nor disagreed, and 39% either disagreed (25%) or strongly disagreed (14%).

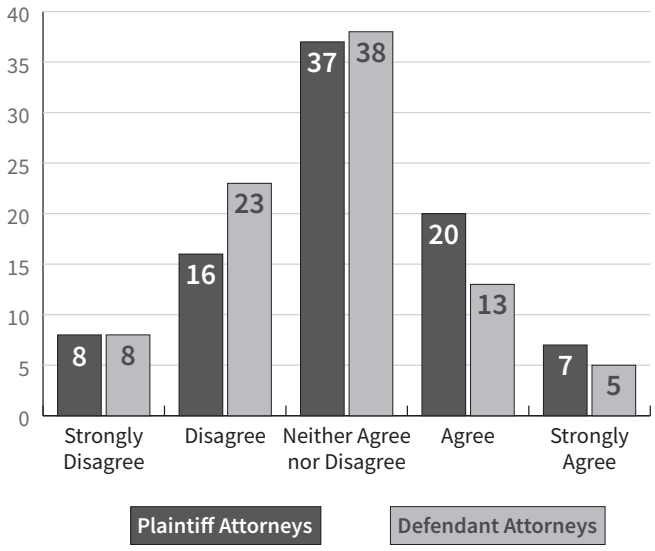

Figure 17: District of Arizona (N=256)

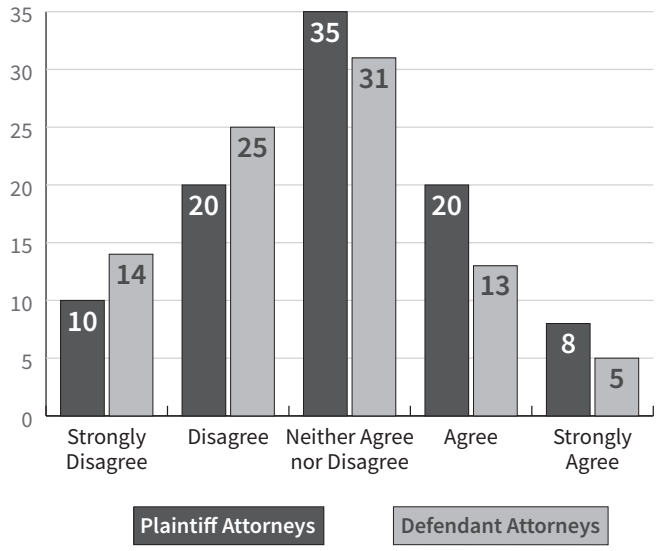

Figure 18: Northern District of Illinois (N=465)

Participant Evaluations of the Pilot—Discovery costs

Reduced the discovery costs in the case for my client.

Defendant respondents, in particular, tended to disagree with this statement, and all respondents expressed neutrality or disagreed at least 60% of the time. Defendant attorneys in Illinois Northern were, again, the most negative group in their evaluation of the pilot's effects. In Arizona (**Figure 19**), 29% of plaintiff attorneys either agreed (22%) or strongly agreed (7%), 32% neither agreed nor disagreed, and 31% either disagreed (20%) or strongly disagreed (11%). Defendant attorneys in that district either agreed (17%) or strongly agreed (9%) in 26% of closed cases, neither agreed nor disagreed in 23%, and disagreed (24%) or strongly disagreed (23%) in 47% of closed cases.

In Illinois Northern (**Figure 20**), 34% of plaintiff attorneys either agreed (23%) or strongly agreed (11%), 28% neither agreed nor disagreed, and 35% either disagreed (20%) or strongly disagreed (15%). Defendant attorneys in that district either agreed (14%) or strongly agreed (5%) in only 19% of the closed cases, neither agreed nor disagreed in 28%, and either disagreed (28%) or strongly disagreed (28%) in 56% of the cases.

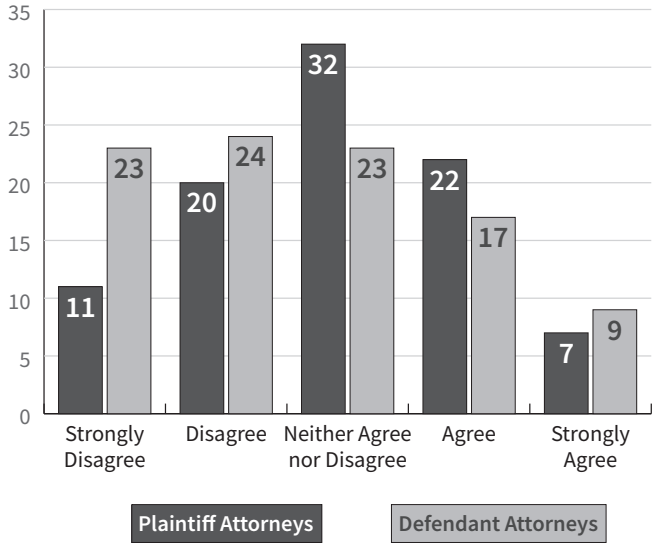

Figure 19: District of Arizona (N=256)

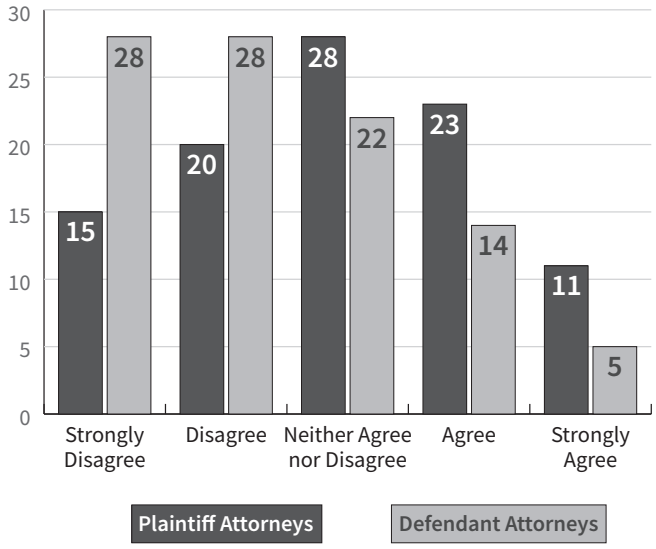

Figure 20: Northern District of Illinois (N=467)

Participant Evaluations of the Pilot—Overall costs

Reduced the overall costs in the case for my client.

In Arizona (**Figure 21**), 27% of plaintiff attorneys either agreed (21%) or strongly agreed (6%), 34% neither agreed nor disagreed, and 32% either disagreed (21%) or strongly disagreed (11%). Defendant attorneys either agreed (16%) or strongly agreed (8%) in 24% of closed cases, neither agreed nor disagreed in 25%, and disagreed (23%) or strongly disagreed (24%) in 47% of closed cases.

In Illinois Northern (**Figure 22**), 34% of plaintiff attorneys either agreed (21%) or strongly agreed (13%), 27% neither agreed nor disagreed, and 36% either disagreed (19%) or strongly disagreed (17%). Defendant attorneys in that district agreed (14%) or strongly agreed (4%) 18% of the time, neither agreed nor disagreed 21%, and disagreed (29%) or strongly disagreed (28%) in 57% of the closed cases.

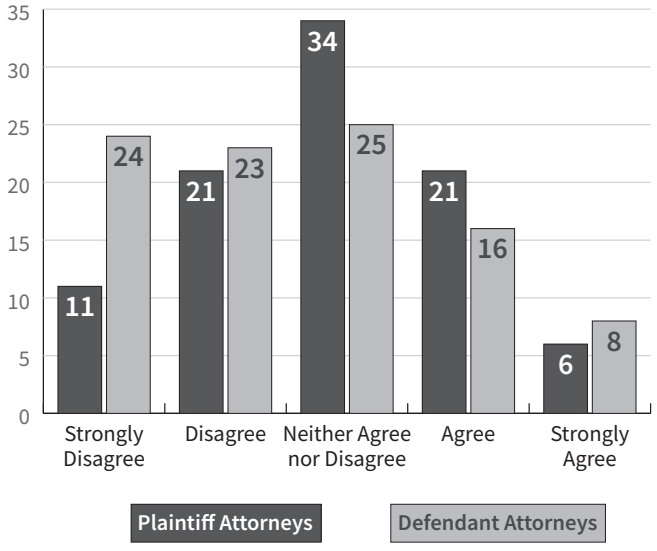

Figure 21: District of Arizona (N=255)

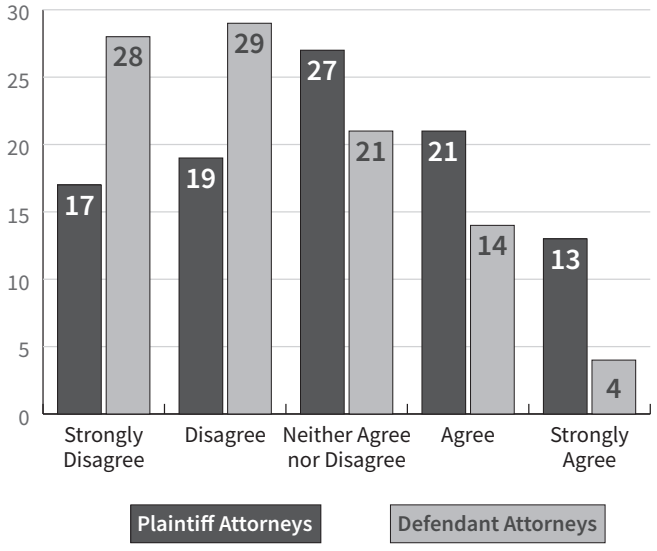

Figure 22: Northern District of Illinois (N=466)

Participant Evaluations of the Pilot—Length of case

Reduced the time from filing to resolution in the case.

Of course, docket-level data will provide a better measure of the effects of the pilot on disposition times, but this question rates participants' perceptions with respect to disposition times. Plaintiff attorneys were more likely to agree than defendant attorneys, and defendant attorneys were more likely to disagree than plaintiff attorneys. In Arizona (**Figure 23**), 35% of plaintiff attorneys either agreed (27%) or disagreed (8%), 30% neither agreed nor disagreed, and 26% either disagreed (19%) or strongly disagreed (7%). Defendant attorneys in that district either agreed (18%) or strongly agreed (8%) in 26% of closed cases, neither agreed nor disagreed 32%, and disagreed (25%) or strongly disagreed (14%) in 39% of closed cases.

In Illinois Northern (**Figure 24**), 38% of plaintiff attorneys either agreed (23%) or strongly agreed (15%), 27% neither agreed nor disagreed, and 31% either disagreed (17%) or strongly disagreed (14%). In that district, 27% of defendant attorneys either agreed (22%) or strongly agreed (5%), 26% neither agreed nor disagreed, and 43% either disagreed (25%) or strongly disagreed (18%).

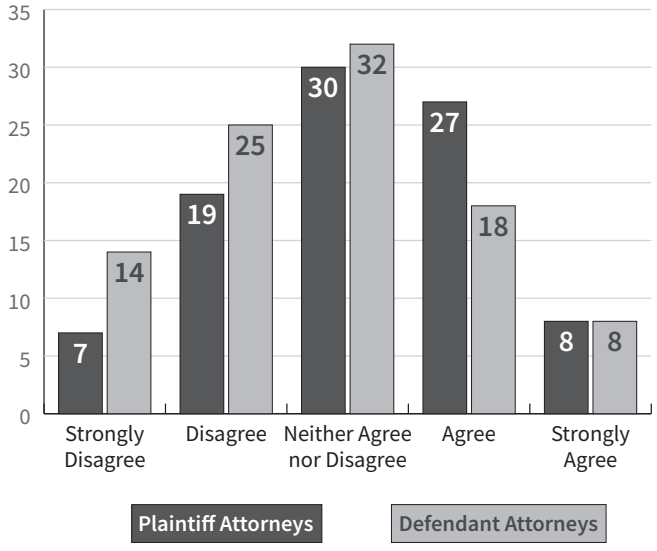

Figure 23: District of Arizona (N=256)

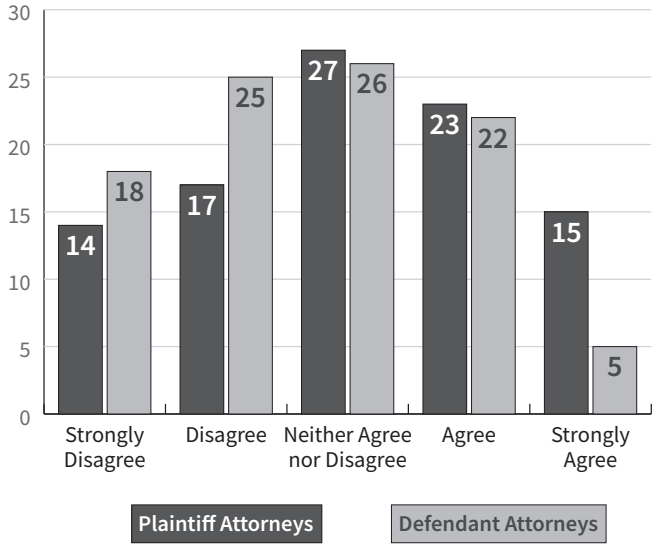

Figure 24: Northern District of Illinois (N=465)

Discussion

This is not a final report on the MIDP. These preliminary results represent the views of attorneys participating in only the relatively short-pending MIDP cases. Accordingly, the results presented here should be interpreted with a great deal of caution. It will be informative to see how attorneys in cases of longer duration evaluate the effects of the MIDP. Subsequent surveys will complement the figures presented here, as will analysis of docket-level data from pilot cases and structured interviews conducted in the participating districts.

Despite their preliminary nature, however, some of the survey results presented here merit discussion. It is noteworthy, for example, that participants generally did not rate the MIDP as having reduced discovery costs or overall costs for their clients in the closed cases about which they were surveyed. In the District of Arizona, for example, 29% of plaintiff attorneys and 26% of defendant attorneys agreed or strongly agreed that the MIDP reduced their client's discovery costs, and in the Northern District of Illinois, 34% of plaintiff attorneys and 26% of defendant attorneys agreed or strongly agreed that the MIDP reduced client discovery costs. Defendant attorneys were more negative about the pilot's effects on discovery costs, disagreeing or expressing neutrality in about three-quarters of cases in both districts and, in Illinois Northern, disagreeing or strongly disagreeing a majority of the time.

These evaluations can probably be explained, in some cases, by low expectations with respect to discovery in the first place. The MIDP can hardly be expected to reduce discovery costs in cases in which those costs typically would be limited regardless of the extent of the initial disclosures. At the same time, large pluralities of plaintiff attorneys tended to agree that the MIDP reduced the number of discovery requests in pilot cases—49% of the time in Arizona and 48% in Illinois Northern. That reducing the number of requests did not reduce overall costs, in some attorneys' estimation, may suggest that the disclosures made unnecessary some discovery requests that would typically be made but did not reduce the need for the discovery itself. But again, these findings are limited to the relatively short-pending MIDP cases that have already closed. If the MIDP is to have a demonstrable effect on discovery costs, it might be in longer MIDP pilot cases that have not yet become eligible for these surveys. Along these lines, majorities of both plaintiff and defendant attorney respondents agreed or strongly agreed that the pilot resulted in an earlier sharing of information than would otherwise have occurred.

In terms of reducing discovery disputes, respondents may have rated the MIDP neutrally because full-blown discovery disputes are likely relatively rare, especially in short-pending cases. As with the discovery costs question, one cannot expect the expanded disclosures that are part of the MIDP to influence cases where the problems it is aimed to address would not occur in the first place. To some extent, the same may be true of the question about focusing discovery on the important issues in the case. After all, if these are relatively straightforward from the outset, the MIDP can hardly be expected to focus discovery appreciably.

These preliminary survey results suggest that concerns that the MIDP will result in disclosure of information that would not otherwise come to light in the discovery process have been overstated. Majorities of respondents in both districts, and majorities of plaintiff and defendant attorneys, disagreed or strongly disagreed that such disclosure was an effect of the pilot.

In general, and consistent with some of the open-ended responses reproduced in the Appendix, plaintiff attorneys tended to evaluate the effects of the MIDP more positively and defendant attorneys more negatively. Plaintiff attorneys, for example, were more likely to assess the MIDP positively in its effects on the timing and effectiveness of settlement negotiations than were defendant attorneys. Similarly, plaintiff attorneys were more likely to agree that the MIDP reduced time to disposition in the closed case; defendant attorneys were more likely to disagree. Although, as shown in the Appendix, some plaintiff attorneys expressed negative views of the MIDP. The overall tendency of plaintiff attorneys to rate the MIDP positively makes sense in light of the observation that plaintiff attorneys are, broadly speaking, more likely to represent requesting parties in the discovery process and defendant attorneys producing parties. The bulk of discovery materials, and most deponents, are likely to be on the defendant side of most cases. Expanded disclosure requirements should, all things considered, benefit the requesting side more than the producing side. Some survey respondents also pointed out that, in terms of the timing of the MIDP obligations, plaintiff attorneys know what their claims will be and thus can make use of the pre-filing period to prepare disclosure materials, unlike defendants whose disclosure obligations are substantially based on plaintiffs' claims.

Appendix: Attorney Comments

District of Arizona

Question One

Responses to "Please provide any additional comments you have regarding the initial discovery in the above-named case."

Plaintiff Attorney Comments

All federal civil rules unfairly favor government parties, but MIDP is particularly unfair.

Ultimately the judge's unfair actions led to the final unfair outcome, but MIDP did nothing at all except raise costs for the plaintiff

As former Civil defense attorney for XX years and a small Plaintiffs only firm of 3 I found that the Pilot project made everyone a little more conscious of duties owed to the other side than the old way of doing things. It felt like in this "Products and Premises" case that Plaintiffs had to be very aware of all the prior medical issues and records while defendants had to focus on duties of disclosing prior accidents, claims and design drawings that could easily be delayed. The ordinary course of "producing" only after specifically being requested with a limited number forced upon Plaintiffs by the RFP rules. It is a good rule change.

Case settled almost contemporaneously with the exchange of the MIDP Responses

Case was remanded prior to the substantive exchange of discovery

Counsel for both parties were exceedingly passive and did almost nothing for 18 months. Their bills were large and in my opinions excessive, considering they got nothing done. Shortly after I was hired I started depositions, I insisted documents be exchanged, a private mediation be scheduled. With that, the case settled.

Defense counsel in this employment dispute did not seem to take its MIDP obligations seriously.

Their MIDP responses provided almost no meaningful information, and they clearly treated it as a pro forma obligation that could be met with minimal disclosures and a catchall phrase like "to be supplemented later," even though they should have and could have had the information before the initial MIDP deadline. Stronger oversight (such as having initial MIDP responses reviewed by the judge or staff) would help. MIDP was not helpful to achieve any of the above-identified goals because defense counsel knew its failure to comply would have no adverse consequences. Even if my client had the money to pay for me to pursue court intervention on these failures, it is likely that the only outcome would have been that they would have eventually complied with the order in a way that they should have done from the beginning.

Defense discloses nearly nothing in the MIDP responses other than the bare minimum, if that.

Requires judicial intervention to force production of relevant information despite disclosure clearly being required by the MIDP rules.

Exchanging MIDP disclosures provides an early deadline that can accelerate settlement of straightforward cases. Parties are eager to settle the case quickly before being forced to complete the disclosure.

Honestly, I don't quite get the purpose of the MIDP. Why not just stick with the initial disclosures under Rule 26 but move those deadlines up?

I believe it is a good idea, but the orders governing mandatory initial discovery should be simplified.

I generally appreciate the MIDP. However, requiring MIDP Responses while a motion to dismiss is pending is unnecessary for obtaining clear results—which was the reason articulated for the inflexible nature of the MIDP. In fact, doing so skews the results to make MIDP appear more productive than it really is, because meritless lawsuits regularly terminate early. And, of course, requiring early MIDP notwithstanding a pending motion to dismiss boosts the cost (and the shakedown value) of a meritless lawsuit.

In practice, the attorneys often do an incomplete/dumbed down version of the MIDP, which is unhelpful.

I think it's a great idea!

I think MIDP Responses provide LESS information, though it is earlier, than Initial Disclosures.

I was local counsel and was not involved with the discovery production to fully know its impact on the above issues.

It made it more difficult for me, because the timelines were too short. I have a small practice and need more flexibility.

It was already my custom as Plaintiff's counsel to provide almost all information required by the MIDP. Defendants behaved as they normally do: failing to timely or fully disclose evidence, witnesses, pushing off the burden of creating and filing the MIDP and pretrial order onto the Plaintiff, meanwhile providing as little as possible. In this case, I represented a Plaintiff against parties and counsel I am often opposite. While it is the Defendants tack to delay and embargo discovery, I have a high regard for the lawyers who represent the defendants. We have so much experience opposite each other that we were able to quickly assess the case, its value, and settle it fairly. The lawyers on the other side were extremely cooperative in the unique nature of litigating this case alongside a bankruptcy. However, they still didn't give us everything required by the MIDP.

Judge **** exhibited hostility towards MIDP and said that because nobody ever consulted with him prior to it being initiated that he wasn't going to care about it.

Judge **** is sharp. It was a pleasure to be before a judge who reviews the papers and treats litigants with courtesy.

Mandatory disclosures may well be advantageous in general, but are not always appropriate, and in my particular case, increased the overall expenses of all parties without corresponding benefit.

Mandatory discovery is a complete waste of time and the defense does not provide any items that were not in disclosure.

Mandatory discovery was required way, way before the parties were prepared to provide meaningful answers, and wasted fees in a time that they were working on settlement

MIDP should be used in ERISA cases, because it has helped when we have used it. Defendants should have to watch [the video] to understand the purpose of the MIDP. If utilized effectively, it will save costs and change the landscape of discovery for the better.

Most of the documents obtained through initial discovery were exchanged prior to the filing of the suit. It is difficult to assess the benefit of the program in this situation, as the parties had already exchanged previously.

Our case settled before the mandatory disclosures, so I don't have much to share regarding the program

Our case was an interpleader action and the discovery program did not seem well-suited for that type of case since the discovery it called for was duplicative of what the parties already had in their possession from the underlying lawsuits.

Overly burdensome

The actual rules and deadlines are irrelevant and ineffective if they are not enforced

The case settled before any substantial discovery occurred.

The case was voluntarily dismissed early in the proceedings with leave to re-file. I regret my answers could not be more substantively helpful.

The Defendant did what it always does. It produced a lot of material, but embargoed information required for class certification, provided non-responsive information and a lot of it, piecemealed responses, objected to all written discovery, required extensive meet and confers. The reasons we avoided contacting the court for compulsion are (1) we have litigated deeply against the defendant, (2) this was a related case to one we litigated deeply against Wells Fargo & so we knew most of what we needed; (3) the required face to face settlement conference. One thing that would be an effective adjunct to the MIDP is a settlement conference with a magistrate judge.

The Defendant treated the MIDP the same way defendants generally treat mandatory disclosures and discovery generally, with delay, incompleteness, and deception. I was not truly able to craft the RFPs, Interrogatories, and RFAs to be more targeted only because of the general refusal to produce information that it should have produced in the MIDP. I feel that the case settled after a long meet and confer process that produced almost nothing, several depositions, and the threat of a motion to compel. This was pled as a class action, and the only thing that enabled us to settle was pushing for the information about whether a class existed. Which should have been easy to determine at the MIDP stage, saving time and costs.

The MIDP process greatly increases the costs of litigation in the District. It should be abandoned as soon as possible.

The other side did not take its obligation to produce all relevant information seriously. There were two discovery conferences as a result, and there does not appear to be a clear enforcement mechanism for failure to produce all relevant information at the outset of the case.

The other side produced documents they intended to use but not all documents relevant to the case. We eventually sought a discovery conference pursuant to the judge's procedures, but the court vacated the conference without scheduling a new one after the other side stated they had a scheduling conflict but would continue to work towards a resolution of the discovery dispute. They were not working towards a resolution, and they did not work toward a good faith resolution after the court vacated the discovery conference. We ultimately had to request another discovery conference on the same issue months later after incurring thousands of dollars of attorneys' fees. My experience the pilot program has some benefit, but that benefit is greatly outweighed by the cost added to litigation.

The previous procedures were better.

The problem with any knew procedure is that it has to be enforced. Plaintiff did not get anymore by the mandated discovery than he would have in discovery. Surprisingly the same evasive answers were used and a minimum of documentation provided. Because of the opponent the settlement was not much effected It does put much of the cost upfront. It feels like another way to dissuade plaintiff' and will unless the opponent's answer's become real. Justice Zlacket used to say if it hurts then it is clearly needs to be disclosed.

There is a lack of uniformity between the divisions in the district court as to what is expected to be disclosed. I had a prior Case in the Tucson division and it was satisfactory. In the Phoenix division the Court believed my disclosures were not sufficient, even though they were essentially identical to what I did in Tucson.

This case did not have many factual disputes. The primary issue in the case was the legal effect of the agreed-upon circumstances.

This case was governed by ERISA which has its own set of limited discovery precedents. The controversy which required motion and threat of discovery motion related to the scope of guidelines by an insurance company relating to a specific decision made in terminating a claim. Anyone familiar with the industry knows that such guidelines exist internally. But it was continually denied, until an eventual agreement with a Protective Order allowed disclosure, the use of a protective order to shield embarrassing information which is relevant is an abuse which often occurs in these cases, but continues to exist because companies have no disincentive when caught in not providing information which should have been provided.

This gave us the Defendant's information far earlier, as in months than we would get it. Also, the game of objecting to all questions was not played. This enabled me to see what the real defense was and went a long way towards settlement.

This non-compete case involved a global restriction. We filed for judgment on the pleadings, which would have largely resolved the case in our client's favor if granted. Meanwhile the judge made clear he could not get to the motion quickly. Both sides spent hundreds of thousands of dollars in MIDP compliance, including ESI gathering and review. After six months, and large expenditures of fees, both sides agreed to settle. The MIDP was a disservice to both sides in this case.

Too complicated and confusing; inhibited resolution

Useful in forcing parties to move the case along promptly, be prepared much earlier.

We are currently still litigating. Therefore, my answers may be premature.

Defendant Attorney Comments

Absolutely unnecessary. Made the cost of litigation exponentially more expensive than it should have been. Parties should be able to opt out of the MIDP when the facts of the case call for it.

Briefly, the case settled relatively soon after MID, but it is seems unlikely, or at least hard to say, that settlement decisions were made based on those initial disclosures.

Case lacked merit and was settled for a very, very small amount, but costs related to mandatory disclosures were 100x more than settlement amount. Arizona state court rule is better—if case can be dismissed on motion to dismiss, no disclosures required. That saves litigation costs for defendants in cases clearly without merit.

Conducting discovery with a motion to dismiss pending ADDED costs in time and money to this matter. Court should have ability to stay discovery pending Motion to Dismiss.

Difficult to say. Plaintiff dropped case because it was meritless on our side filing Motion to Dismiss with our agreement not

to pursue costs. Early disclosure may have played a part in convincing them their case was meritless, or

Front loading disclosure / discovery costs, without any meaningful alternatives, is a significant burden in a case where the goal is early settlement.

I find that the United States complies with MIDP and most private parties do not. Rather that turning over discovery, private plaintiffs "identify" documents that everyone already knew existed and them the United States has to make repeated requests to obtain the actual documents. MIDP has not helped settle cases sooner. If parties really want to settle, they will make the necessary disclosures.

I get it, but I prefer the old system. Sometimes MIDP imposes too great a burden on the front end in cases that would settle quickly without compliance.

I served as local counsel in this matter. I was not involved in settlement discussions and the case did not proceed to a stage that allowed me to respond meaningfully to the majority of the questions asked.

I think the initial discovery under the MIDPP is generally more effective than historical requirements. It helps to understand the positions and weight of evidence early and reduces regular discovery. My disagreement that discovery in my case was not equally fair is probably because the Plaintiff in my recent case was Pro Per. I had to basically guide the ** on how the case gets litigated yet had to contend with his refusal to work together to get through discovery his lack of knowledge of the process made him distrustful and stubborn. The court expected me to and I complied in drafting all the preliminary documents and take the initiative to follow court rules and stay on schedule regarding meet and confer, joint report, joint case management order, even though the plaintiff was the one bringing suit. The plaintiff was late responding, did not effectively respond, belligerent and did not obey certain of the court's instructions. Because he is a Pro Per, the district court must treat the plaintiff leniently for fear of being chastised or reversed by the 9th Circuit. That situation is a disincentive to bring discovery disputes or missed deadlines to the judge because the Pro Per is going to get a pass. This dynamic lengthened the case and significantly lessened the efficacy of MIDPP requirements regarding initial discovery and meeting deadlines.

If the Court just required that parties follow the initial disclosure requirements imposed in Arizona state court, it would be much better. Instead, the process is strange and the other rules that are imposed (such as requiring an answer even when a motion to dismiss is filed) are very bad and costly.

In this case, the District Judge enforced its scheduling order. The other side did not provide timely disclosure and ultimately this was one of the reasons the plaintiff ended up dismissing the case.

It's a good thing. I would hope lawyers would be doing it anyway based on Rule 26, but hope springs eternal.

MIDP disclosures can make defending cases with nominal or marginal merit unnecessarily expensive for defendants.

MIDP is a GREAT program and is effective but only if both sides take it seriously. There needs to be some precedent of sanctions or other penalty when any party does not abide by the spirit and letter of the requirements. My experience is that the serial filers in consumer cases - on plaintiffs' side - just repeat in the MIDP the minimum they normally do in disclosure, and you have to press them to provide specifics, documents, and what seems to be required by the program.

MIDP makes me substantially less likely to settle cases because all my work has to be done up front. There's no benefit to settling. MIDP also takes the skill out of lawyering at the discovery stage, and when dealing with pro se litigants, it's a giant disaster that makes my job substantially harder and more frustrating.

MIDP seems to cause more expense when the other side is pro per and/or their claims have little merit.

My client provided all information (including electronic documents) up front. The other side did not.

My experience has been that in most cases, this program adds to the cost of litigation.

One size fits all should be re-examined and perhaps do something more like uniform interrogatories in Superior Court to avoid waste.

Plaintiff misread the MIDP rules to allow him to serve intentionally oppressive discovery with his Complaint so long as he also served MIDP responses. The instructions MUST be clarified to prevent this.

Plaintiff's counsel believed providing plaintiff's discovery responses with service of the complaint immediately entitled him to serve written discovery.

Plaintiff's" facts" in the MIDP were no more than a restatement of the allegations of the complaint and provided almost no details. The requirement for facts should be made

more explicit and strengthened to make all parties required to provide detailed facts relevant to claims or defenses.

Plaintiffs only facially, but not substantively, complied with the MIDP, which has been my experience in the two Arizona cases in which I have been involved. The case was so front loaded by discovery for a complying defendant that there was no value in settling to avoid discovery. As most work for defendant was done on the front end, there was a disincentive to settle.

Plaintiffs' claims in this case clearly lacked merit and were even subject to res judicata based upon a prior case. There was not, however, a vehicle for us to request that all discovery be stayed pending a motion to dismiss and that we be relieved from filing an answer. MIDP is a waste of resources where the claim is without prima facie merit and subject to a motion to dismiss.

Rule closely matches AZ Rule 26.1 Disclosure. Defense is placed at a somewhat disadvantage given the acceleration for disclosure as plaintiff had the case for some time.

Sanctions were awarded by the Court due to Plaintiff's failure to properly comply with his MIDP obligations, and Plaintiff agreed to voluntarily dismiss his case in exchange for avoiding such sanctions.

The 30-day timeline is so short that it undermines settlement, as it forces the parties to incur significant cost (particularly defendants) prior to the ability to have meaningful settlement discussions.

The burden of significant discovery early in the case does not speed up discovery, it incurs more costs. Not being able to file a motion to dismiss before filing an answer also incurs more costs.

The cost of complying with discovery was great given that we had to file and answer and exchange discovery even though we filed a motion for judgement on the pleadings.

The discovery is not geared toward different types of cases like labor and employment.

The discovery just does not apply to all cases - this was a wage and hour case and it was not tailored to that.

The early discovery costs more to start, but is worthwhile to have early and full disclosures and will save costs latter in the case

The judge in the case was too ridged in this case and did not allow the lawyers to professionally discover the case with flexibility. The discovery order and the court's management of the case made this a most unpleasant experience for the lawyers.

The Mandatory Initial Discovery was abused in this case and caused unnecessary expenses to be incurred and should not apply to cases where a motion to dismiss has been filed.

The MIDP nearly made this case impossible to settle because of the added costs. It only settled because my client agreed to overpay in settlement.

The plaintiff is this case was pro per, so the results of this case are likely atypical.

The problem with the MIDP is it requires an answer and MIDR even while a motion to dismiss for failure to state a valid claim is pending. This unnecessarily forced great expense.

The process is just so foreign. It would make more sense if they just amended Rule 26 (and if the requirements just mirrored state court, which does have slightly higher initial discovery requirements).

The program is unnecessarily time and cost heavy in the initial 60 days and is skewed toward forcing settlement that is based on cost, not substantive issues. In the four cases I have had under this program, the requirements strongly favored plaintiff in that defendant would be required to incur unrealistically high costs for compliance with the MID even if plaintiff's case was frivolous.

The rules should be clarified to prevent the abuse by the plaintiff's attorney, based on his claim that serving his client's MIDP responses allowed him to initiate discovery with the lawsuit, all to force an unjust settlement, which he did until he was suspended from the practice of law. The rules should say that completion of MIDP responses is a necessary but NOT sufficient condition on initiating discovery.

There should be CLE Credit provided for watching the Judges' panel on the MIDP program - it was excellent. I have had to encourage/persuade opposing counsel to live up to the requirements in the program though but the explicit text of the Order helps.

This case was unique because Plaintiff requested a mandatory injunction. So everything moved quickly, but it was not related to disclosures.

This case was unique given that Plaintiff was Pro Per.

This program is very similar to the disclosure requirements in Arizona state courts.

This was a case brought by a serial plaintiff. Costs were disproportionate on Defendant for frivolous litigation. Intent is good, but process needs refinement for type of case.

This was a small case and the mandatory discovery really didn't have much of an impact.

This was one of two cases involving ***. Both were dismissed early on, and the case is pending in state court, so my answers are not too valuable.

We already have mandatory discovery in state court and so the MIDP is already familiar.

We did not get passed initial motion practice, so initially discovery was not extensive. In addition, we were already debating discovery issues in a sister case in the State Court.

We filed a motion to dismiss for failure to state a claim and failure to complete service. However, because of the MIDP, the motions were not decided and the Defendants were obligated to prematurely provide disclosure of documents. We feel strongly that the basis for the motions to dismiss were valid and would have dismissed the case. Due to the obligation to comply with the MIDP, Defendants made the disclosures and Plaintiff's bargaining position was enhanced. A settlement was reached to avoid increased expenses, but the MIDP unnecessarily created many of those expenses. There needs to be a compromise when a motion is filed to stay the MIDP until the motions on the pleadings are resolved. This same issue has come up in multiple cases.

We never got that far in the litigation as we settled, but the threat of mandatory discovery and federal court rules/costs helped expedite settlement.

We were required to disclose and engage in discovery even though our motion to dismiss was granted six months after fully briefed.

You should offer CLE for the on-line video panel discussion available on the court's website. It is excellent and everyone should watch.

District of Arizona

Question Two

Responses to "Please provide any comments you have about the district's mandatory initial discovery pilot program."

Plaintiff Attorney Comments

An unnecessary burden that is a waste of time

As a general proposition, I believe it ought to be automatically delayed in the event a Rule 12 motion is filed. Otherwise, it's a needless expenditure of time and money.

Everything went smoothly

Fine with me

I am inclined to believe that the program is beneficial and should be continued.

I do not like the MIDP—this is based on my experience in other federal court cases. It does not materially advance the litigation.

I don't believe that it is helpful. It increases fees that affect an early settlement.

I have never participated in it. My cases involve challenges under the Administrative Procedure Act or similar statutes. No discovery takes places. Instead the case is decided based on the agency's administrative record.

I like it with one MAJOR exception: To require MIDP disclosure before an answer is filed (when a Rule 12 Motion is pending) is nonsensical and unhelpful. Many cases are filed that are frivolous or do not belong in that court. In those instances, the MIDP does nothing but compound costs unnecessarily. There is no purpose. The court's stated reason (to get a larger sample size of how the MIDP affects cases) is illogical. Frivolous and non-meritorious cases often have extremely short lives regardless of the MIDP. So the increased sample size will inaccurately skew shorter by requiring MIDP before an answer is filed. If that pre-answer MIDP policy continues, I would vehemently oppose MIDP. Other than that, I think it's great.

I think it is useful and should clear calendars quicker.

I think the pilot program has a lot of potential to achieve its goals. I have only litigated a handful of cases under the MIDP so far, and I have not noticed any change to Defendants behavior. It adds a substantial amount of time to Plaintiff's burden, and much of it is duplicative with the R. 16/26(f) order many judges require. Its overall effect is to multiple Plaintiff's attorney time. I already had a long standing practice of providing everything R. 26(a)(1) required, and the MIDP report together with the attorney conference report has substantially increased the time spent on this task to make it meaningful, while the Defendants still embargo information & documents. I believe that Defendants still abuse the protective order process to withhold information, produce documents in a cumbersome form despite agreement otherwise.

In my experience MIDP responses submitted by the parties are rarely substantial

Ineffective because the court did not require the other side to comply

It's a great program and should become standard procedure in civil cases, just need more guidance about what is expected in the disclosures. It's not a hardship whatsoever because we have been doing mandatory disclosures in Arizona State Court for 20 years.

It's a good idea.

Make it clear to all parties that they should be disclosing clearly relevant documents as part of MIDP responses. For example in a wage and hour case employers should disclosing records regarding wages paid and hours worked.

No real experience with it yet. This case settled as quickly as it began.

Overall, I think the mandatory initial discovery pilot program will assist in cases moving quicker as long as the courts ensure the parties comply with the disclosure requirements.

Sanctions should be automatic for Defendants who refuse to produce insurance policy information required already under Rule 26(a)

Satisfied

The case was decided at such an early stage I lack experience to opine

The program in my opinion puts a lot of requirements and causes much stress on attorneys – even where the merits of the case on the other side are frivolous.

Defendant Attorney Comments

Although it was not an issue in this case, in other cases, I do not believe that it has reduced the number of requests for production or interrogatories that are served on my client. Additionally, although my client provides full and robust MIDP responses, it has not been my experience that plaintiffs comply with the MIDP order. Most simply refer me to the complaint, and few produce documents with the MIDP responses. The MIDP has not alleviated the discovery burdens, but merely front-loaded them, and resulted in discovery rabbit holes about documents that are not relevant, and that my client does not intend to rely on.

As long time Arizonan practitioner, I was happy to see the Federal Court follow suit with what we have been doing in AZ State Court for 30 years

Because of significant delays in getting ruling on motions the expedited discovery program was not of value in our case.

Consider a final rule on mandatory initial discovery that does not require disclosure until after 12(b) motions are ruled on.

I believe it is a bad idea.

I believe the program is working well and generally as intended, as revised to postpone answers if a Rule 12 motion is filed.

I do not like it. I think it provides less information and makes discovery process more challenging given the time constraints imposed in Federal Court.

I like it and think it should be incorporated into the rules of civil procedure for all civil cases.

I think it is great. Would be more effective if the Rule 26f conference was not dispensed with, but rather the court at the hearing reinforced the seriousness of compliance with it

I think the mandatory initial discovery pilot program is a bit too rigid. For cases likely to settle, such as ours, I think it is in the interests of both the court and the parties to allow the parties to pursue settlement without incurring unnecessary discovery expenses.

I think the MIDP is a waste of time in most cases. We need to allow for additional time to serve MIDP so parties can work on dismissing improper Defendants or resolving dispositive motions

I was admitted pro has vice in this case, I did not have the opportunity to participate the discovery pilot project, but I believe the initial disclosure requirement will be of great benefit for the parties, the attorneys and the Court.

It made no impact on what I was already doing in providing disclosure statements.

It was fine

It works well in some cases and not well in others.

Makes no sense, even on paper. MIDP has added unnecessary waste of time and expense to civil litigation in the District. It improved slightly with amendments relating to pending MTDs. Also might make some since if limits were placed on discovery in exchange for MIDP. Apparently, that is discretionary and most divisions decline to limit written discovery if one side objects. Real problem is the inordinate amount of time it take to get even simple rulings from Court. If the Judicial Branch were serious about speeding the process, it would look to the real problem, rather than try to micro-manage the litigants

Mandatory discovery should not start until Motions to Dismiss have been resolved.

My firm represents corrections and detention defendants in Section 1983 claims. We have found that the expense and burden associated with the Mandatory Initial Pilot Project ("MIDP") has the opposite effect of its stated purpose. Specifically, it dissuades our defendant clients from possible early settlement given how entrenched in the discovery process the parties are at very early stages of litigation. Moreover, in light of the fact that plaintiffs can simply wait to have documentation provided to them rather than engage in discovery, we have found that plaintiffs are not as inclined to settle a case at an early stage. The time limitation to disclose all "relevant" evidence within thirty days of uncovering the same is extremely prohibitive, particularly for a defendant, who typically controls a majority of the evidence in most cases. Moreover, requiring both defense counsel and their clients to investigate, gather, review, organize, and produce all "relevant" evidence within such a restrictive time limit imposes a heavy and costly burden, one that is almost always one-sided. The lack of definitive parameters concerning "relevance" also creates unnecessary discovery channels, and broadens the entire scope of discovery and has significantly increased our clients' costs. Further, whether "relevant

evidence" encompasses impeachment evidence remains undefined by the MIDP. This determination is even more vexing because judges have expressed different opinions on the issue. Practically speaking, it is almost impossible to ascertain all of the impeachment evidence a party intends to use at the time of trial prior to the discovery deadline, and thus this requirement is problematic and could lead to unfair advantages at trial. Moreover, requiring that the parties disclose impeachment evidence under the MIDP goes against F.R.C.P. 26(a)(1) and 26(a)(3), which specifically exempts from disclosure evidence that would be used solely for impeachment

Not effective as most Plaintiffs' attorneys fail to provide any more information than under Rule 26(a) but significant cost to defendant

On balance, initial discovery under the MIDPP seems calculated to making discovery more efficient. But I have had little experience with it and that with a Pro Per, which I think diluted its effects. I think my view would be more helpful to you after I've gone through it a few times.

Positive experience from my other D of AZ cases were MIDP was exchanged.

See earlier comments

Staff was helpful when we inquired as to MIDP requirements for this case.

Terrible overall experience.

The disclosure of expert information was too soon relative to fact discovery.

The program is a bad idea and should be abandoned.

There should probably be more opportunities to suspend the order when dealing with pro per litigants.

Think it is a waste of attorney time and client resources

This case was closed so long ago that I have little memory of how the disclosures affected the case.

While the program results in the parties receiving more discovery early in the case, it tends to increase fees and costs early in the case. This tends to have a chilling effect on settlement efforts. In employment cases, the program puts more of a burden on defendant employers early in cases.

Northern District of Illinois

Question One

Responses to "Please provide any additional comments you have regarding the initial discovery in the above-named case."

Plaintiff Attorney Comments

After litigating numerous 1983 cases that have mostly concluded by settlement, I conclude that MIDP discovery is usually a waste of time. It ultimately impacts the discovery process no faster than the 26(a)(1) process. I think it is of very limited use, at best, in these cases. Even when there is complicated *Monell* discovery, I can think of no MIDP case where it made a difference. It is just a tiresome hassle for me and my opposing counsel to complete.

Case settled rather quickly.

Case settled while mandatory disclosures were in process but before either side had completed disclosures

Defendant company hid its documents, held back its key documents, including employee handbooks, and did not provide any full or fair disclosure, and unduly delayed producing key documents, and then filed a motion to compel arbitration, while hiding its key contrary documents. Plaintiff, on the other hand, was placed at a severe disadvantage because she produced all her documents up front. The defendant usurped the discovery process by hiding its key documents, despite repeated Plaintiff's repeated requests up front to disclose pertinent employee handbooks. These initial disclosure rules work if there is are cooperative counsel, acting in good faith, but when, as here, the defendant's/company's counsel delays for months and then, only after Plaintiff is forced to spend several months "pulling teeth" and repeated informal requests, does the Defendant produce key documents which it, in effect, hid, the process does not work and, indeed, works to the disadvantage of the litigants and sanctions the miscarriage of any "justice." See Rule 1, Fed. R. Civ. P., stating that the civil procedure rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

Defendant was very late with disclosures and provided the minimum. Initial discovery had no impact on the case

Defendant's MIDP disclosures were bare bones and did not include any actual documents, which is par for the course, in my experience.

Defendant's MIDP's provided virtually no information, and the only document produced related to insurance coverage. The parties also had to serve 26a1 disclosures, so the MIDP's did not add anything to the process.

Defendant's reluctance to produce documents directly led to settlement.

Defendants are not producing any documents as part of their disclosures, especially in TCPA litigation

Defendants did not take seriously their obligations under the MDIP. As a result, there were no time savings.

Defendants were allowed to question their employees about the Complaint litigated without the notice or participation of Plaintiff's Counsel

Despite the requirements of the disclosures demanded by both sides in the Model Pilot Program, Defendant's flout the Rules. There are no ramifications for a failing to make the proper disclosures, such as appropriate sanctions. Frankly, that would at least provide a fear factor in making a strategic decision by the defense to ignore the requirements dictated pursuant to the Model Pilot Program. In this case, I wrote consecutive, exhaustive F.R.C.P. 37 letters, and included the failings of proper disclosure under the Model Pilot Program. The case settled through private mediation within two weeks of the F.R.C.P. 37 letters being sent to counsel for the defense from my office.

Don't see how it was any different than 26a1 in actual effect

Due to the bankruptcy filing, the full extent and benefit of the discovery process was not available in this case. This is not a fair example.

I feel the opposing party did not adequately and in good faith identify the documents responsive to some of the MIDP requests. Rather, it stated that they were contained within tens of thousands of pages of documents produced, leaving me to review all those documents to identify the relatively few responsive ones. Although the case was resolved before this problem was formally raised with the Court, in this respect the MIDP mechanism did not work well for me.

I would agree that MIDP is more beneficial that Rule 26 Initial Disclosures

It is too minimal and toothless to be an improvement over R 26(a)(1)

It should be done in all cases—the discovery process is enormously expensive and tedious and this helps alleviate some of those issues.

It would be helpful to expand the classifications of cases exempt from the MIDP program, as ERISA delinquency cases typically do not require extensive discovery beyond basic payroll information. The MIDP disclosures require plaintiffs to produce substantially more records than they ordinarily would have, and records that are ultimately not relevant to resolution of the case.

Limited need for discovery.

MID's are generally useless make work.

MIDP process and deadlines associated with it make it difficult for Plaintiffs as they constantly need more follow up in a short timeframe

My adversary was particularly ethical and cooperative. This is not always the case with defense attorneys. There was insurance, which also made case easier to settle.

No discovery exchanged because settlement was reached before case progressed to that stage.

Other district courts should adopt the policy

Parties just end up responding to MIDP and then re-issuing discovery that includes MIDP issues. Objecting on that basis is not practical so we answer both.

Please note that this case was settled shortly after MIDPP disclosures were tendered.

The case settled before mandatory discovery was required. As such, the mandatory discovery had no impact on the case.

The concern I have is how the Discovery program integrates with the standard court rules. Does the discovery program supersede the rules or compliment them?

The effectiveness of MIDP will be found in larger cases where the volume of discovery would be greater. In small to modest cases, the MIDP does not have nearly the effect and at times in those small to modest cases, the MIDP in fact seems to create more work—at least in my employment cases (FLSA)

The increased expense of MIDP, and particularly for ESI, was significant. It ended up causing me client problems (client was upset with the cost of ESI and document review) that might have been somewhat lower under traditional discovery. My opponent also did not do things correctly the first time through, so MIDP resulted in inequity in expense and follow up.

The judge seemed confused by the mandatory requirements and did not control discovery.

The Mandate Disclosures are well worded and since they are from the Court, it's hard for parties to parse words or say things like: I don't understand, or object for vagueness, that's GOOD.

The mandatory disclosure rules do not effectively reduce the gamesmanship played during discovery. Stipulation of facts and documents must increase to reduce time for resolution of a case.

The mandatory disclosures are used as a sword when bringing motions to compel. Further, it is very annoying to have to be forced to work together with the other side because it's time consuming and childish, and if the two sides happen to not get along (which was not the situation in my case), it would be a very arduous and painful process.

The MIDP are an ineffective measure as defendants ignore them, or provide the rout nothing reflecting the non-answers of the Answer, and almost never provide a single document, and the Judges do not seem to enforce the proper implementation of the rule. I have not bothered to file a MTC as the rule does not seem to have any enforcement method, and the rule slows cases down, as defendants will use it as another hurdle/excuse for delay

The MIDP does not help alleviate discovery burdens. Instead, it adds to them as it basically just splits discovery into 2 phases

The parties began making progress on settlement after the initial discovery but before engaging in significant additional discovery. As a result, the initial discovery did not have a large impact one way or the other on the remaining discovery.

The parties do not take the MIDP seriously enough

The procedures would work well if parties actually followed them. In some cases, I have had defendants flaunt the rules and discovery actually has taken longer because of them. I do think the rules are a great idea but that there has to be stricter enforcement and consequences for violating them. I had a defendant wait over a year to produce any emails

which the rules required it to produce at the outset of the case and the defendant suffered no consequences and my client expended tens of thousands of dollars on discovery compliance. Too many lawyers for large corporations realize that there is no consequence for delaying and withholding discovery for prolonged periods. Most lawyers I deal with fortunately don't engage in such tactics.

The program seems to get the parties moving with discovery early in the case.

There is no immediate protective order which can be entered for documents pursuant to mandatory discovery so it still delays things if you need a protective order.

This case was resolved pursuant to an inspection of the property and the referral to a settlement conference. However, the initial discovery disclosures likely did expedite the parties' resolution.

This is the Worst. Program. Ever. Delayed my issuance of subpoenas to non–parties. And we issued the same document requests and interrogatories that we would have issued were we not compelled to follow this crazy process. Only difference is that we had to wait months until we were able to take control of our own case!

This was a Railway Labor Act case. The parties are very familiar, and exchanged all information prior to the case being filed. There was no discovery.

This was an administrative review case (where there already had been a trial) along with a civil right claim. My opponent insisted the mandatory discovery applied here even though there had already been discovery at the administrative level. So the mandatory discovery was a complete waste of time and money.

This was an ERISA claim for benefits, in which we generally have limited discovery due to extensive pre-litigation claim review, making the MIDP not helpful, but imposing more work on the parties and attorneys.

Very effective for FLSA case

Wasn't really helpful or necessary in our case

We had been assigned a very smart District Court Judge and a very good Magistrate Judge who was excellent at getting the parties to communicate and get the case resolved. The Initial Mandatory Discovery Disclosures had nothing to do with helping resolve this case. It was the assigned Judge and Magistrate that made the difference.

We had no discovery disputes. My opposing counsel was very professional

WE ONLY COMPLETED THE MANDATORY INITIAL DISCOVERY BEFORE CASE SETTLED

We still had to make specific discovery requests to obtain the necessary documentation

While Defendant served MID, no documents were produced and no substantive information was produced. Information obtained was no more than is usually furnished with R26(a)(1) disclosures

With ESI—usually there needs to be a meet and confer with search terms, custodians, etc. MIDP is helpful to identify relevant people but not really ESI. As long a Judges do not assume MIDP is complete discovery … there is not a problem. Problem arises when discovery is cut short or unrealistic time frame because of MIDP in some cases. It's a helpful starting point but not complete by any means

Defendant Attorney Comments

Disagree because I didn't notice any significant difference from pre-MIDPP initial disclosures.

1) They asymmetrically create burdens for corporate defendants in consumer cases. 2) Judge **** refusal to grant routine motions for extensions of time to respond to initial pleadings, even when agreed, is unfair to my clients. He cites the pilot program to justify the refusal, which is not supported by the text. 3) The requests themselves were poorly drafted (e.g., overbroad on their face), so I have to object to them, which causes Plaintiff's to continue issuing their own discovery.

Because of the nature of the case, it settled quickly. Plaintiff's counsel was dilatory in complying with discovery, but did eventually.

Because the MIDP expedited exchange of information, case settled before protracted discovery could commence.

Case settled very quickly so it is difficult to judge the impact of the MIDP discovery.

Case was resolved by court order prior to any discovery being required under rule

Disagree with having to conduct discovery in any case where a case dispositive motion to dismiss as to a party has been filed. I believe the program is otherwise productive, but requiring discovery where a motion to dismiss would get

my client out of the case if successful is not a good use of resources.

Don't think it has had the intended impact and would recommend getting rid of it.

From my perspective, the program has some very significant flaws. Foremost, the program presents a considerable tactical advantage to plaintiffs. Before filing suit, a plaintiff could essentially take as much time as its needs to prepare for the expedited discovery obligations, whereas a defendant has essentially no flexibility from the 70 day window to produce ESI. In certain cases, those obligations simply will not be physically possible to meet. Further, as interpreted in this case, the program was read to divest the Court with its otherwise inherent ability under Rule 16 to set pleading deadlines and further to require participation by any served defendant, including those who had not yet even appeared or otherwise were yet required to answer. In this case, a joint motion by both sides to extend the pleading deadline of defendant was denied based upon the MIDP. The result forced both sides to expend fees and resources that otherwise might not been incurred without any noticeable impact on settlement, as the parties had already been discussing a potential resolution. From my perspective, the program is also problematic in that it is not uniformly applied across the country, let alone even in this District. It does not seem fair.

From the defense side, all possible disclosure of information available in the first 30 days of the case were made. Plaintiff was not satisfied with the disclosures and attempted to argue that the initial disclosures were not adequate. However, documents were produced to plaintiff much earlier in the process than they otherwise would have been.

I am generally not in favor of the mandatory disclosure program

I answered neutral on most of the "Exchange of initial discovery …" questions because (a) the opposing party did not comply with mandatory discovery, and (b) it appears that he allowed the case to be DWPd with no reinstatement soon thereafter.

I believe that this is a useful experiment, but I do believe that the burden falls unevenly on the defendant in the kind of cases I typically litigate—that is, employment cases. In such cases, almost all of the discovery is in the possession of the defendant, and plaintiffs seldom produce any discovery of any real material use, other than their deposition testimony.

I do not normally practice in Illinois but found this program to be extremely favorable to plaintiffs who usually have little or no documents. The burden is, therefore, almost entirely shifted to the defendants at great expense.

I find it highly unfair to Defendants. Mandatory initial discovery allows the Plaintiff to conduct a fishing expedition and "form" his case/"facts" around the documents produced. That is what happened in this case.

I rather like the MIDP disclosure process- it makes the written discovery less onerous later on as you've already put together your responses. While I did not encounter this issue with one individual defendant in this case, I have several cases where I represent multiple (e.g. 25) individual defendant officers. The issue I've had there is the "certification" when representing multiple individual defendants, as I am gathering municipal documentation that the officers may not know the extent or even existence of certain types of documentation that is being produced. So for them to certify to the completeness of these disclosures under oath seems onerous. Perhaps the certification should be limited to the corporate or municipal entities procuring and producing the documents, as opposed to any individual named as a party.

In an FLSA case, the mandatory initial obligations are one sided in that the plaintiff has very little to produce but the burden to the defendant can be substantial and disproportionate to the rest of the matter.

In employment cases, the MIDPP benefits plaintiffs and disfavors defendants.

In this proposed class action, our client was named only on a theory of vicarious liability, and it did not have significant information to provide. So, the burden here was not great. However, in some class cases, the initial discovery may require extensive production, or defendant would face contentions of lack of compliance. Overall, the initial discovery requests do not appear well suited to proposed class actions.

Informal discussions by counsel of record were very helpful in the resolution of the case

It is unnecessary and increases the burden and cost on parties to litigate without any corresponding benefits.

It was only due to Magistrate Judge that the invalidity of Plaintiffs claim was exposed

It's duplicative of Rule 26(a)(1) and yet Courts require both (mandatory disclosures under Pilot Project and Rule 26(a)(1) disclosures)

MID did not help. It created more discovery requests, time and money.

MIDP does little to advance cases. It often is a road block to standard discovery. Plaintiff's take months, maybe years to file their case. Defendants then get hammered with MIDP requirements that if not met Plaintiffs use as leverage to stall Discovery.

MIDPP shifts the expense and burden to defendants in employment cases, and is not efficient or effective.

My case was defending against a pro-se defendant – not sure why it ended up in the pilot. An attorney was assigned and it worked ok then.

Other side still propounded discovery that duplicated what was provided and what was provided were things we all ask regardless.

Our Client was brought into the case later, after quite a bit of written discovery had been completed.

Parties need discovery extensions, which are not liberally granted.

Plaintiff did not participate in MIDPP

Plaintiff fell ill and decided to abandon her case while she pursued treatment

Plaintiff's counsel essentially send the exact same set of disclosures in all the cases which defeats the purpose of the MIDPP and flooded our side with irrelevant documents that we still had to sift through to make sure nothing new was added

Quickly went to settlement

The attorney who handled discovery has since left the firm

The mandatory discovery essentially resulted in our client having to respond to written discovery requests twice. We did not receive the information from the plaintiff that we likely should have received. The burden on the plaintiff is far less onerous and most plaintiff's counsel do not take seriously their obligations to provide fulsome information about mitigation, etc.

The MID process should not begin until all dispositive motions are concluded. A lot of time and effort and money was expended in this case unnecessarily because this matter was resolved at a motion to dismiss. I work for a governmental agency so the money that was wasted here was taxpayer dollars. But if it was two private entities as the parties to the suit then my client in this situation would have had to pay probably $80-$100k in legal fees for the discovery process that should not have even taken place because it was resolved on a motion to dismiss. That is a lot of money to a smaller employer who would have to defend a baseless suit like this one during a MID process.

The MIDP becomes overly burdensome at the outset on defendant employers who have the bulk of business records to provide in the typical employment dispute.

The MIDP procedure is a waste of time and does not produce the desired outcomes, as set forth in the standing order.

The one-size fits all does not work well and the tight deadlines increase the expense of the case. Also, requiring ESI discovery so early tends to undermine Rule 26(f)'s goal of any type of agreed ESI discovery process, like agreed search terms.

The plaintiff was a pro-se consumer whose complaint was facially invalid and was subject to a motion to dismiss. Discovery ought to have been stayed pending the outcome of the motion based upon the allegations present in the complaint

The program is certainly a good idea, however in my practice area it tends to be mostly unnecessary as we work with the same counsel very frequently and all parties know what should and shouldn't be produced in a given case. However, for litigation outside of this realm I believe that it will be a great program.

The survey questions do not apply: opposing party did not comply with MIDPP so the correct answer to these questions is N/A

The timing of having to file an answer and initial discovery per the MIDPP is not reasonable and convoluted

There should be a stay in discovery and filing of an Answer if there is a pending Motion to Dismiss

This case was a 12 b 6 motion so the discovery requirements were an additional and costly burden on the defendant, which was wholly unnecessary

This case was not a great example, since both sides already had exchanged a great deal of information and were negotiating prior to the litigation being filed.

This process does not work for consumer finance cases in general, or class actions specifically. The Defendant has all of the discovery—the Plaintiff provides virtually nothing—and the Defendant is under an unfair time constraint. This process may work for simple cases, but not complex ones.

This was a pension fund collection case and the discovery is usually driven by the audit and the documents produced during the audit. I would exempt these cases from the mandatory initial disclosures.

Too burdensome for frivolous cases. This case never should have been filed and was ripe for dismissal or summary judgment

We filed a MTD, which was never decided because under the MIDP protocol, we answered and nearly completed discovery without a decision, and finally settled. This matter would have been resolved sooner and with less expense if we had waited until a decision on the MTD before answering/ completing discovery.

We filed substantive Motion to Dismiss that was never ruled on, but we had to engage in initial discovery in Class Action. That puts all the burden on defendants. This is unfair and gives Plaintiffs a clear advantage.

We had to exchange initial disclosures while the motion to dismiss was pending. This drove up the costs of litigation. Our client spent more money than it would have spent as a result of the pilot program.

While the program provides for earlier discovery, the burdens are increased because you are doing discovery twice. The pilot program timetable for mandatory e discovery was not realistic nor were rules clearly defined. In the rush to meet the timetables, there was not enough meet and conferring and agreeing on search terms and custodians— each side did their own thing and fought about it later. Hard to even agree on search terms with opponents early in the case. Also hard to know what they have and trust them in early meet and confers during pilot program. Defendants are at huge disadvantage because Plaintiff before filing knows what they have discovery wise and has done due diligence and can intelligently meet and confer on discovery parameters. Defendant is busy trying to prepare MTD and learn legal issues and basic facts, but now has to be prepared to meet and confer in an educated way to assess if opponent is robustly producing during mandatory e-discovery prior to issuing any discovery requests.

While well-intentioned, so far my experience is that the program has front-loaded discovery costs in a fashion that expenses were incurred that might not have been had discovery proceeded in the ordinary course under the FRCP.

Worked pretty well to force each side to round up their responsive documents before receiving discovery requests—a plus all around

Northern District of Illinois

Question Two

Responses to "Please provide any comments you have about the district's mandatory initial discovery pilot program."

Plaintiff Attorney Comments

As an experienced attorney who has witnessed decades of discovery gamesmanship, I strongly support this program.

Defendants typically do not provide any substantive information in their disclosures and enforcement usually requires normal written discovery to take place first

Every judge who participates in this program should be compelled to litigate under it. Absolutely horrible.

Fair requirement of the parties; allows for initial discovery prior to first status, which is extremely helpful when litigating against the US Government

For ERISA Fringe Benefit Delinquency Matters, MIDP unnecessarily increases amount of fees incurred by the parties; many of the judges are willing to allow the parties to discuss settlement before complying. Most of these type of matters are resolved by settlement and keeping fees and costs to a minimum is beneficial to a timely resolution

Good program as full disclosure occurs soon.

Horrible—was not followed by the Judge—we needed the mandatory disclosures to respond to the motion to dismiss

I am not a fan based upon previous cases. Costly and unfair to cases which may otherwise be quickly resolved.

I am not in favor of the program as it is often not required for cases I am in and becomes burdensome to address.

I believe it is good intentioned but a bit too onerous in its breadth particularly with respect to stating relevant facts and legal theories (B.4) and the time of production of ESI (C.2.c). A party wishing to defer providing discovery (see A.3) should be required to file a motion or provide some notification well in advance of the due date for the disclosures.

I didn't get the opportunity to participate in it, but it looks like a good idea.

I don't find it very useful as most attorneys get this material rather quickly in the cases.

I don't have any experience with the program yet as we were not required to follow it in this case.

I have compiled with the MIDP in a number of cases now and find it to be more work, but not necessarily more productive or efficient

I have had cases where a defendant did not produce relevant material in the MIDP production, I moved for sanctions, and though an order compelling production was entered no sanction was entered.

I hope it is not continued after the pilot period

I practice trademark law and this program does not fit well.

I prefer 26(a). Paragraph B(3) is burdensome and creates unnecessary work in many cases.

I served in this case only as local counsel for plaintiff. My participation was limited to the local counsel designation. Plaintiff's lead counsel would be in a better position to answer these questions.

I strongly favor this process - there needs to be more detailed directive regarding documents and electronic materials

I think it expedites discovery and forces both sides to be diligent early on in the litigation.

I think it is helpful. Gives an early look into the evidence and the Defendant's position

I think mandatory initial discovery is a good idea as long as everyone keeps in mind that the litigants may not have all of the information as soon as the case is filed.

I think the mandatory disclosures are a success. I am involved in many bars and overall feel your approach is an improvement over Rule 26 standing alone. Good work and good luck with the program.

I think the MIDP has good goals but unnecessarily makes litigation more expensive earlier in the case, and therefore tends to make parties steel themselves after having invested significantly in the litigation.

I think the program is just adding expense, and not improving discovery at all. We rarely get any real information with the MIDP disclosures, and when it is provided it is the same info we would have received in 26a1 disclosures. However it is required automatically much earlier in the game, even if the case is on a settlement track or there is an MTD being briefed. This just adds costs for both parties.

I think there should be some threshold application for it instead of a blanket requirement for all cases filed, regardless of nature of the claims.

In general, I am in favor of the program, but it is difficult to resolve the tension on whether a motion to dismiss should stay discovery. Leaving it in the discretion of the district court judge appears to be the best approach.

In general, it appears to move cases along more quickly.

It does not make things faster. It does not help get to the heart of the issues. Initial discovery is initial discovery. It's from the initial discovery that you realize what important discovery items you really need and really need to hone in and the judges seem reluctant to go beyond the initial disclosures. So I don't think it's an effective program.

It has been a very helpful process early in the litigation. Contributes to productivity and focus of later discovery.

It is a burden to the small practitioner

It is a failure. Defense Counsel are uniformly asserting that MIDP trumps mandatory FRCP 13/19 Investigations and that Plaintiff is barred from third person non party investigatory subpoena. *** Judge **** is invited to use him as an example of what the MIDP does NOT mean as supported by ABA 34.

It is a good policy that will help speed cases through litigation

It is painful, unnecessary, and inflexible. Does not enhance the process.

It is salutary in purpose and intentions, but is often manipulated by defense attorneys to continue delays and evasive document production. The MID does not obviate the necessity to file Rule 34 requests and interrogatories. I often must remind defendants to produce their insurance policies and the plaintiff's complete personnel file. MID helps somewhat. Mandatory settlement conferences, like Judge **** conducted in every case, helps expedite settlements.

It makes the parties put up or shut up about their claims or defenses.

It might work in normal cases, but not when there was a 500 page administrative trial transcript already in existence.

It only works is the parties want it to work. In my experience, private corporate defendants take it seriously while the City of Chicago, a municipal corporation, does not.

It requires plaintiff to gather and provide too much information too early in the lawsuit. As a government Plaintiff, this is too burdensome.

It should be helpful in expediting discovery

It was a summary judgment immigration matter. The record was provided by DHS. No issues

It was not applicable in this case.

It's not taken seriously enough … particularly by defendants … much like Rule 26 disclosures ….

It's not well suited for most claims arising under 29 U.S.C. 1132(a)(1)(B)

It's useless and burdensome, particularly in cases where the primary relief sought is injunctive or declaratory.

It's useless make work.

Judges need more discretion (and should exercise that discretion) to limit mandatory discovery where it will be voluminous and costly

Mandatory initial discovery provides no benefit to the litigants.

Mandatory Initial Discovery should be tailored differently for different types of cases. For example, FLSA wage and hour cases typically zero in on a few discreet categories of business records, and these records should be explicitly named and required for initial disclosures. We continue to engage in discovery combat over the production of these records notwithstanding the MIDP Standing Order.

Much better than 26(a)(1).

My case work is typically ERISA collections. I find that it adds expense to the case. It doesn't add documents early on because the more specific records need to be requested and Defendants I filed suit against do not provide them without being asked—typically more than once.

My concerns in this case were less about MIDP and more about settlement in that we requested tax information which was never provided. This disadvantaged us in settlement negotiations.

My experience with the program has generally been quite negative. Defendants I have worked with don't take the obligations seriously, so it just delays the process of serving formal discovery requests without obtaining information up front. Additionally, whenever you update discovery responses, you have to update both the interrogatories and the mandatory initial disclosures, which seems like a waste of time.

Not really applicable to this case, which settled within 30 days of filing. But Judge **** was fantastic.

Often duplicative of written discovery requests

One potential recommendation would be to stay discovery and answer until motions to dismiss are decided

Overall a good idea—but there are exceptions ….

Parties aren't following it. Judges aren't consistently enforcing it.

See previous comment. I believe MIDP can be effective, but it also can be abused and I have to conclude that it was abused, to some extent, in this case.

Since the case settle fairly quickly after filing, the parties did not have a chance to engage in the process.

The Defendant still seemed to delay discovery and was not held to deadlines in discovery.

The exception to MIDP allowing for immunity-based defenses to be a basis to seek to stay discovery is not at all helpful. These cases are just as complex, if not more complex, as cases where immunity is not a defense and MIDP disclosures would have helped the settlement discussions in this case.

The initial discovery pilot program has decreased the number of discovery motions that were done in other cases that I've been involved.

The mandatory initial discovery is a must and very necessary to increase judicial efficiency and provide fair due process before any hasty compromise resulting from case

The mandatory initial discovery program makes little sense and does not help early resolution of cases. It drives up costs and takes energy at the initial stages of a matter that would be better spent on other efforts, e.g. settlement, motion practice, etc. Other districts where I practice have no problem with just the Federal Rules of Civil Procedure, as some judges in the Northern District only use the FRCP and have not signed onto the program. It would be best for the court to put the mandatory initial discovery program on the scrap heap where it belongs.

The MIDP are an ineffective measure as defendants ignore them, or provide the rout nothing reflecting the non-answers of the Answer, and almost never provide a single document, and the Judges do not seem to enforce the proper implementation of the rule. I have not bothered to file a MTC as the rule does not seem to have any enforcement method, and the rule slows cases down, as defendants will use it as another hurdle/excuse for delay

The MIDP program is a good idea in theory but, in practice and on balance, it creates unnecessary work on both sides. Many, indeed most, cases settle. With some unfortunate exceptions, counsel on each side usually provides the information/discovery necessary to effect settlement. It seems that, by and in large, the same disputes that arise in regular discovery arise in the MIDP - and cause counsel and the parties to expend resources unnecessarily, because such disputes would normally be held in abeyance pending productive settlement talks.

The process is not decreasing costs or increasing the speed at which key documents are produced.

Defendants still routinely fail to produce actual documents with their MIDP disclosures, and provide minimal information on witnesses. The requirement to state your facts and legal theories is also just creating work that does not advance the case.

The process makes a great deal of sense, but it does provide a burden on the litigants before they are at issue. I believe that the burden outweighs the benefit. I would recommend a similar program once the parties are at issue (i.e. after an answer is filed). It does not make sense to me to require discovery before an answer is filed to a complaint.

The program is well suited to personal injury and simple contract actions to define issues and aid pretrial resolution.

The standing order MIDPP required Defendants to answer the complaint even if there was a pending 12b6 motion as long as there was no pending motion to dismiss for immunity or jurisdiction. That order was not applied to the defendants in my case, however. Later, the district amended the order to not require the defendants to answer while there's a pending 12b6 motion.

Very helpful for smaller, simpler cases.

We did not utilize it in this case.

We were local counsel in this case, so it was not a good sample for your survey. Overall as plaintiff lawyer I applaud this new program

We would have followed protocols if case had proceeded

Defendant Attorney Comments

I find that the mandatory disclosures, as bright as they are, generally disfavor the premises liability defendant. It was often times surveillance footage of the event itself which when disclosed of front forms the basis of the plaintiffs' testimony. And more equitable approach is found where the plaintive has to commit to an account of the event before seeing the video.

A well-managed pretrial order process would be more efficient than is the MIDP's procedures.

Although not used in this case, seems redundant to Rule 26 and puts unnecessary additional burden on parties.

Because we were able to quickly resolve this case, the mandatory initial discovery pilot program had no impact. If we had been unable to quickly resolve the case, I expect that the MIDPP would have increased the parties' efforts and costs with no discernable benefit.

Compliance is expensive and labor-intensive.

Compliance unnecessarily increases costs of ESI discovery.

Does not accomplish anything the programs sets out to do. Having a giant list of potential witnesses without any idea of who will actually testify at trial is extremely unproductive.

FDCPA cases should be carved out of the requirement.

Fortunately, the requirement that the complaint must be answered has been done away with, as it required us in past cases to file a motion for judgment on the pleadings rather than a Rule 12(b)(6) motion to dismiss. Also, district courts have been cognizant that the mandatory discovery program frequently is inconsistent with the way ERISA cases are adjudicated (i.e., with little to no discovery based on the administrative record). Otherwise, my experience with the program has been negative in the ERISA area, because the disclosures increase litigation costs with no benefit to the litigation. Also, in most of my ERISA cases where we have been required to comply with the program, the plaintiff was late in complying and simply copied the defendant's disclosures. I encourage courts to be open to excusing compliance in ERISA cases.

From a defense perspective, most of our clients want to get through discovery (not just mandatory initial discovery) before considering settlement, mediation, etc. When this is the case, mandatory initial discovery does not seem to resolve the case any more quickly.

Good idea that needs to be more flexible in certain cases. Glad it was amended to account for motions to dismiss.

Having the clients sign the MIDPP verification forms only increases the costs.

I am not convinced that the discovery rules under the pilot program promote efficiency or reduce costs.

I appreciate that the court revised the MIDP as it ran up fees and costs for cases (such as this one) when early settlement is accomplished. I still do not see the benefits of the MIDP program and believe that the standard Rule 26 disclosures are the only disclosures to be made prior to formal discovery.

I believe it is generally too burdensome, particularly on defendants in complex commercial cases, and would support it being discontinued.

I believe that flexibility is important to the program relative to the timelines.

I believe that it is unduly burdensome in situations where a defendant is filing a motion to dismiss all claims. It can allow a plaintiff to collect a ransom for filing a frivolous case so as to avoid the cost of the burdensome discovery, as would have been the case here if the judge had required us to participate.

I believe the program benefits Plaintiffs more than it does Defendants, and for that reason find it to be a bit unfair.

I do believe the program is helpful in getting the parties to focus on the core issues in the case, and in lessening the time and expense of discovery generally

I do not find it useful. It is too pro forma and only delays genuine discovery.

I do not yet have sufficient experience with the pilot program to compare and contrast it with prior practice in this district.

I don't believe that mandatory initial discovery facilitates case resolution (early or otherwise). But serves only to add unnecessarily to the costs of litigation.

I exclusively practice in this court and the MIDP project has not changed anything about how I conduct discovery or how opponents respond to discovery. We should return to the old procedures that all other district courts in this country follow.

I feel stricter adherence to discovery deadlines (absent good cause for extensions) and more oversight (more frequent status hearings) would be more effective in pushing simpler cases to early and efficient resolution. Many NDIL judges are already very good at this. MIDP often does not fit larger/more complex cases and is a significant burden on parties with voluminous files/ESI.

I generally think the program is a good idea. However, when implemented and enforced where there is dispositive motion practice, it adds a cost (sometimes significant) to the parties that would not otherwise incurred if the motion is granted.

I have used in other cases. Discovery is still necessary because the automatic disclosures are not sufficient.

I like the program

I love it. It holds people's feet to the fire. There are circumstances, though, where it should be stayed and usually the Judge agrees. I am also a big fan of it because prior to the pilot, we agonized over objections. PP takes that away, because it's just relevant to a claim or defense, whether or helpful or harmful, should be provided. It doesn't make us worry so much about disclosures that hurt us ("volunteering information") because we just have to produce the documents.

I primarily handle patent infringement matters so I do not have experience with the Court's MIDP.

I strongly dislike. Electronic discovery is very expensive and time consuming, and I think it is important for the parties to be given time to give it a thoughtful approach. The quickness of the MPID creates problems for litigants, even those that are prepared.

I support the program but the magistrate judges need to be trained to help the parties comply, and be willing to grants motion to compel when there is no compliance. This is particularly true with ESI. I have one case where a magistrate judge held three hearings before filing entering an order requiring production of ESI, but then modified the order on bogus claims of burden. The program is only as good as the judges who enforce it. Because I have had no success in convincing a judge to enforce the provisions it has had no meaningful positive impact on my practice - which is frustrating because the concept behind early disclosure is both practical and positive. I hope the Court will continue to work on training and enforcement, as I do believe early disclosure could improve early settlement potential and diminish the overall need for protracted litigation.

I think it is a good idea, but having to answer a complaint and file a motion to dismiss is nonsense and defeat the purpose of reducing costs.

I think it is grossly unfair to defendants to require the costs and burdens of collecting and producing documents before a viable claim or complaint has been sustained.

I think it unnecessarily drives up defendant employer's costs at the outset, and as such is prejudicial to defendant employers.

I think it's a good idea in many ways, but I'm skeptical that recalcitrant parties will be forced by the Court to fully comply.

I think it's a good program overall and has facilitated discovery in other case we're involved in much faster.

I think the MID are actually more difficult- as it is harder to determine who to depose, in addition, I have not noticed a reduction in the amount of discovery completed because of MID.

I was pleased to learn amendment to standing order no longer requiring Answer if pre-Answer motion filed pursuant to Rule 12(b).

I'm happy to see that the NDIL moved away from requiring answers simultaneously with 12(b)(6) motions.

In more complex cases the mandatory discovery program may help assist in narrowing issues, but in smaller less complex cases the initial cost of responding to the discovery requirements increased the cost to clients that may have hampered settlement.

It does not appear fully effective or useful in cases brought under 29 U.S.C. Section 1132(a)(1)(B), which have their own rules pertaining to discovery (or rather the lack thereof)

It gives unfair advantage to Plaintiffs—especially those without legitimate claims. It places a higher burden and expense on Defendants

It is a good program but this particular case would have been fine without it.

It is not helpful and results in unnecessary burdens and expenses on defendants, particularly when a motion to dismiss is filed.

It is not workable in the class action context. There is an extraordinary burden on the employer and very little burden on the plaintiff

It remains ineffective because Plaintiff counsels produce almost nothing of substance because Plaintiff counsels expect to engage in the same costly discovery process the MIDP was intended to help control.

It seems like a good idea.

It would be helpful to clarify that ERISA benefit claim cases are not subject to the MIDP so as to not require seeking an exemption on a case by case basis.

It's worthwhile, but doesn't have make any earthshattering difference regarding case progress or volume of discovery.

MIDPP works as intended. However, opposing counsel often times asks for the same discovery in subsequent written discovery.

Not a fan. Just adds another layer of discovery and something to fight over. The EDI time frames are unrealistic in the vast majority of cases. Full discovery progresses after MIDP disclosures so what's the point.

Not effective. Costly. Not well received by clients

Not helpful in most cases

Only concern with the program was the former requirement that answers be filed simultaneously as 12(b) motions (which did not apply to this case, where qualified immunity was involved). With the amendment to remove that requirement, no complaints.

Please reconsider at least until valid Motions to Dismiss are decided.

Please see my last comment on my only issue in representing multiple individual officers, where I am putting together municipal or corporate documentation (and many times that entity may be separately represented), and the certification requirement as to individuals who may not be in a position to truly certify the responses. It seems the certification requirement should be that of the corporate or municipal entity only. I do like the program and it has helped us focus cases earlier than the conventional manner. Thank you.

Provides too much leverage to plaintiffs who file weak cases.

Rule 26 is sufficient

See above. The pilot should be discontinued.

See my comments in: ***

See previous response

Sometimes the program is a square peg in a round hole. Sending out discovery when the parties are actively settling is a problem.

THE BASIC PROBLEM WITH DISCOVERY IS IT IS VERY TIME CONSUMING AND LEADS TO EXORBITANT CLAIMS FOR ATTORNEYS FEES, DISCOVERY SHOULD BE TAILORED TO WHAT IS ACTUALLY NEEDED FOR THE PARTICULAR CASE RATHER THAN USE A SHOTGUN APPROACH, WHICH IS VERY BURDENSOME FOR THE CLIENT, AND MOST OF THE DISCOVERY REQUESTED IS IRRELEVANT TO THE ACTUAL ISSUES IN THE CASE.

The hardest provision is the requirement to answer while a motion to dismiss is pending. It is unfair to require an individual to answer a pleading (which can be later used against the party) where the claims are barred as a matter of law and it requires even more work and expense for the defendant. Most litigants ignore the rule to limit discovery after the initial disclosures to items not already produced and issue discovery before initial disclosures are due. I do not mind doing the initial disclosures though because it is all information we must produce anyway and it may keep the other litigants from arguing its relevancy.

The mandatory initial discovery program is very onerous, and favors plaintiffs as they generally have little or no ESI. I am not in favor of it.

The MIDP seems totally unnecessary and cumbersome. FRCP already has mandatory disclosures. I was happy to see the change that excepting MIDP where a motion to dismiss was to be filed.

The program is expensive and burdensome; it does not eliminate any discovery burdens.

The project provides laudatory structure to discovery in certain types of cases in which there is unlikely to be much legitimate dispute about the scope of discovery (but nonetheless might be delay and discovery disputes that waste the court's and parties' time). However, for complex cases or cases that present non-routine discovery issues, it is important that the court continue to recognize flexibility in removing or exempting appropriate cases from the pilot program.

The revised version is an improvement

Very good idea—provides parties with good initial information that they can communicate to their clients early in the litigation

We had no chance to participate in the program for this case due to early settlement

We were required to file an answer when we requested an extension, which was a total waste of time. We eventually filed a motion to dismiss which was granted. We should not have been required to respond to such a frivolous lawsuit.

While it did not have to be done for this case, I think the MIDP is unnecessary, incredibly burdensome and expensive.

While the program has its merits, a "one size fits all" approach in any case just does not work. I, for one, am not a fan of the MIDPP

Yes, it was helpful. The district court judge was very efficient.

You should keep this to simple, run-of-the-mill cases.

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