MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 25, 2017

The Civil Rules Advisory Committee met at the Ella Hotel in Austin, Texas on April 25, 2017. (The meeting was scheduled to carry over to April 26, but all business was concluded by the end of the day on April 25.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq. (by telephone); Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Professor Robert H. Klonoff; Judge Sara Lioi; Judge Scott M. Matheson, Jr.; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Hon. Chad Readler; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair; Peter D. Keisler, Esq.; and Professor Daniel R. Coquillette, Reporter (by telephone), 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., Lauren Gailey, Esq., Julie Wilson, Esq., and Shelly Cox represented the Administrative Office. Dr. Emery G. Lee, and Dr. Tim Reagan, attended for the Federal Judicial Center. Observers included Alex Dahl, Esq.(Lawyers for Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Frank Sylvestri (American College of Trial Lawyers); Robert Levy, Esq.; Henry Kelston, Esq.; Ariana Tadler, Esq.; John Vail, Esq.; Susan H. Steinman, Esq.; and Brittany Schultz, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that this is the last meeting for three members whose second terms have expired — Elizabeth Cabraser, Robert Klonoff, and Solomon Oliver. They have served the Committee well, in the tradition of exemplary service. They will be missed. Judge Bates also welcomed Acting Assistant Attorney General Readler to his first meeting with the Committee.

Judge Bates noted that the draft Minutes for the January Standing Committee meeting are included in the agenda materials. The Standing Committee discussed the means of coordinating the work of separate advisory committees when they address parallel issues. Coordination can work well. The rules proposals published last summer provide good examples. The Appellate Rules Committee worked informally with the Civil Rules Committee in crafting the provisions of proposed Civil Rule 23(e)(5) that address the roles of the district court and the court of appeals when a request for district-court approval to pay consideration to an objector is made while an appeal is pending. A Subcommittee formed by the Appellate and Civil Rules Committees and chaired by Judge Matheson worked to

47 coordinate revisions of Appellate Rule 8 in tandem with the
48 proposals to amend Civil Rules 62 and 65.1. Four advisory
49 committees have coordinated through their reporters, the Style
50 Consultants, and the Administrative Office as they have worked on
51 common issues on filing and service through the courts' CM/ECF
52 systems. The e-filing and e-service proposals will require
53 continued coordination as the advisory committees hold their spring
54 meetings.

55 *November 2016 Minutes*

56 The draft Minutes of the November 2016 Committee meeting were
57 approved without dissent, subject to correction of typographical
58 and similar errors.

59 *Legislative Report*

60 Julie Wilson presented the Legislative Report. She began by
61 directing attention to the summaries of pending bills that appear
62 in the agenda materials. There has been a flurry of activity in
63 February and March on several bills. Two, H.R. 985 and the Lawsuit
64 Abuse Reduction Act, have passed the House and have been sent to
65 the Senate.

66 H.R. 985 is the Fairness in Class Action Litigation and
67 Furthering Asbestos Claim Transparency Act of 2017. The bill
68 includes many provisions that affect class actions. Without
69 directly amending Rule 23, it would change class-action practice in
70 many ways, and the appeal provisions effectively amend Rule 23. It
71 also speaks directly to practice in Multidistrict Litigation cases,
72 and changes diversity jurisdiction requirements for cases removed
73 from state courts. Judge Bates and Judge Campbell submitted a
74 letter to leaders of the House and Senate Judiciary Committees
75 describing the importance of relying on the Rules Enabling Act to
76 address matters of procedure. The Administrative Office also
77 submitted a letter. Other Judicial Conference Committees are
78 interested in this legislation. The Federal-State Jurisdiction
79 Committee is charged with preparing a possible Judicial Conference
80 position on the legislation. It has not yet been decided whether
81 any position should be taken. Nothing has happened in the Senate.

82 Judge Bates noted that H.R. 985 has substantive provisions. It
83 also raises a "procedural" question about the role of the Rules
84 Enabling Act process in considering questions of the sort addressed
85 by the bill.

86 Judge Campbell stated that H.R. 985 went through the House
87 quickly. It has been in the Senate since early February. There is
88 no word on when the Senate may address it. It would significantly
89 alter class-action practices, even without directly amending Rule

90 23. And some of the provisions that address Multidistrict
91 Litigation would be unworkable in practice. These procedural issues
92 should be addressed through the Rules Enabling Act process. He also
93 noted the changes in diversity litigation that would direct courts
94 in removal cases to sever diversity-destroying defendants and
95 remand to state courts as to them, retaining each diverse pair of
96 plaintiff and defendant.

97 The Lawsuit Abuse Reduction Act of 2017, H.R. 720 and S. 237,
98 is a bill familiar from several past sessions of Congress. It
99 passed the House in early March. It remains pending in the Senate.

100 **I**
101 **RULES PUBLISHED FOR COMMENT, AUGUST 2016**

102 Judge Bates introduced the three action items on the agenda
103 arising from rules proposals published last August. Rules 5, 23,
104 62, and 65.1 would be amended. There were three hearings, including
105 a February hearing held by telephone. There were many helpful
106 written comments and useful testimony from some 30 witnesses. Most
107 of the comments and testimony addressed Rule 23. Judge Dow, who
108 chaired the Rule 23 Subcommittee, will present Rule 23 for action.

109 *Rule 23*

110 Judge Dow opened the Rule 23 discussion by describing the
111 Committee process as smooth. The summary of the hearings and
112 comments runs 62 pages long. The Subcommittee held two conference
113 calls after the conclusion of the comment period. The first
114 narrowed the issues; notes on that call are included in the agenda
115 materials. The second call pinned down the final issues. A few
116 changes were made in rule text words, and the Note was shortened a
117 bit.

118 Professor Marcus led the detailed discussion of the proposed
119 Rule 23 amendments. Very few changes have been made in the rule
120 text as published. In Rule 23(c)(2)(B), the new description of the
121 modes of service has been elaborated by adding a few words: "The
122 notice may be by one or more of the following: United States mail,
123 electronic means, or other appropriate means." The testimony and
124 comments showed surprising levels of interest in the modes of
125 notice. The added words reaffirm that the same modes of notice need
126 not be used in all cases, nor need notice be limited to a single
127 mode in a particular case. The idea is to encourage flexibility.
128 The value of flexibility is described in the proposed Committee
129 Note.

130 Proposed Rule 23(e)(2) addresses approval of a proposed
131 settlement. The published proposal added a few words to the present
132 rule: "If the proposal would bind class members under Rule 23(c)(3)
133 * * *." The Subcommittee recommends that these new words be
134 deleted. They were added to address expressed concerns that Rule
135 23(e)(2) might somehow be read to authorize certification of a
136 class for settlement purposes even though the requirements of Rule
137 23(a) and (b) are not met. The hearings, however, suggested that
138 adding these words may cause confusion. The Committee Note says
139 that any class certified for purposes of settlement must satisfy
140 subdivisions (a) and (b). It is better to delete the added words
141 from rule text.

142 Various style changes are proposed. Subparagraph (e)(2)(D) is
143 changed to the active voice: "the proposal treats class members

equitably relative to each other." The tag line for paragraph (e)(3) is changed by deleting "side": "Identification of ~~Side~~ Agreements." "Side" is a non-technical word commonly used, but not included in the rule text.

Subparagraph (e)(5)(B) also should be changed. As published, it addresses payment or other consideration "to an objector or objector's counsel." The hearings offered illustrations of payments made, not to objectors or their counsel, but to a nonprofit organization set up to receive payment. So the rule text is broadened by removing that limit: "no payment or other consideration may be provided ~~to an objector or objector's counsel~~ in connection with: * * *." A corresponding change is recommended for the tag line.

Turning to the Committee Note, Professor Marcus began by noting that the Note was revised to respond to the changes in the rule text. It also has been shortened a bit "to delete repetition that is not useful." In addition, parts that explore the genesis and purpose of the amendments are deleted as no longer useful.

Professor Marcus concluded this introduction by observing that it has been very useful to hear from the bar, but there was not much controversy over the proposed changes.

Discussion began with two words in the draft Committee Note for subdivision (e)(5)(B), appearing at line 376 on page 115 of the agenda materials: some objectors "have sought to *exact tribute* to withdraw their objections." "[E]xact tribute" seems harsh. The Committee agreed that the thought will be better expressed by words like this: "sought to obtain consideration for withdrawing their objections * * *."

A separate question was raised about the use of "judgment" in proposed item (e)(1)(B)(ii), which says that notice of a proposed settlement must be directed if "justified by the parties' showing that the court will likely be able to * * * (ii) certify the class for purposes of *judgment* on the proposal." The judge who raised the question said that he does not formally enter a judgment, but instead enters an order. The order may simply rule on the proposal. Discussion began by pointing to Rule 54(a), which states that a "judgment" "includes a decree and any order from which an appeal lies." A departure from the published proposal on this point should be approached with caution. One point that was made in the comments is that it is important to have a "judgment" as a support for an injunction against duplicating litigation in other courts. And "judgment" also appears in subdivision (e)(5)(B), dealing with payment for forgoing or undoing "an appeal from a *judgment* approving" a proposed class settlement.

188 Discussion of "judgment" went on to observe that Rule 58(a)
189 requires entry of judgment on a separate document at the end of the
190 case. The purpose of Rule 58(a) is to set a clear starting time for
191 appeals. As "judgment" appears in the provision for notice of a
192 proposed settlement, it is important as a reminder that the court
193 should be confident that notice is justified by the prospect that
194 the proposed settlement will provide a suitable basis for
195 certifying a class and deciding the case after the notice provides
196 the opportunity to object or to opt out of a (b)(3) class. The
197 purpose is to focus attention on the need to justify the cost of
198 notice by the prospect that the eventual outcome will be final
199 disposition of the action by a judgment.

200 The discussion of "judgment" led to related questions about
201 the relationship between items (i) and (ii) in proposed (e)(1).
202 "[C]ertify the class" appears only in (ii), after (i) refers to
203 approving the proposed settlement. But certification is necessary
204 to approve the settlement. Why not put certification first? The
205 response looked to the evolution of practice. When Rule 23 was
206 dramatically revised in 1966, the drafters thought that the normal
207 sequence would be early certification, followed by much work, and
208 eventually a judgment. But the reality has come to be that most
209 class actions are resolved by settlement, and that in most class-
210 action settlements actual certification and approval of the
211 settlement occur simultaneously. Subdivision (e)(1) frames the
212 procedure for addressing this reality, in terms that depart from
213 the common tendency to talk of "preliminary approval" of a proposed
214 settlement.

215 Items (i) and (ii) reflect that the court certifies a class by
216 an order. The ultimate purpose is entry of judgment. If a class has
217 not already been certified when the parties approach the court with
218 a proposed settlement, certification and settlement become part of
219 a package. The settlement cannot be approved without certification,
220 and both certification and settlement require notice — usually
221 expensive notice — to the class. If the proposed settlement fails
222 to win approval, class certification for purposes of the settlement
223 also will fail. The Committee Note reflects this consequence by
224 reminding readers that positions taken for purposes of certifying
225 a class for a failed settlement should not be considered if class
226 certification is later sought for purposes of litigation.

227 There was a brief suggestion that some other word might
228 substitute for "judgment." Perhaps "order," or "decision"?

229 The discussion of the relationship between items (i) and (ii)
230 in proposed (e)(1)(B) then took another turn. They might be read to
231 mean the same thing. (i) asks whether the court will likely be able
232 to "approve the proposal under Rule 23(e)(2)." Approving the
233 proposal includes certifying the proposed class. So what is

234 accomplished by "(ii) certify the class for purposes of judgment on
235 the proposal"? The first response was that approval of the
236 settlement is covered by subdivision (e)(2). "All that's happening
237 in (e)(1) is a forecast of what can be done later." Rule 58 "exists
238 on the side." No one brought up this question during the comment
239 period. All that (e)(1) does is to provide that notice is not
240 appropriate until the parties show that, after notice, the court
241 likely will be able to certify the class and approve the
242 settlement.

243 An alternative might be to combine (i) and (ii), although that
244 might reduce the emphasis: "showing that the court will likely be
245 able to certify the class and approve the proposal under Rule
246 23(e)(2)." This suggestion was echoed by a parallel suggestion to
247 retain the structure of (i) and (ii), but strike "for purposes of
248 judgment on the proposal" from (ii). "[F]or purposes of judgment on
249 the proposal" does not do any harm, but it says something that is
250 obvious without saying. Further discussion noted that perhaps it
251 makes sense to refer first to "certify the class," as (i), before
252 referring to approval of the proposed settlement. But care should
253 be taken to avoid backing into a structure that might be read to
254 create a separate settlement-class certification provision that the
255 Committee has resisted. Adequate care is taken, however, in the
256 Note discussion of subdivision (e)(1). The Note says specifically
257 that the ultimate decision to certify a class cannot be made until
258 the hearing on final approval of the settlement. The Note on
259 subdivision (e)(2), further, expressly says that certification must
260 be made under the standards of Rule 23(a) and (b).

261 One final question asked whether it would help to add one word
262 in (ii): "certify the class for purposes of <u>entering</u> judgment on
263 the proposal." Rule 58(a), however, seems to cover that.

264 This discussion concluded by unanimous agreement to retain (i)
265 and (ii) as published.

266 Consideration of the Rule 23 proposal concluded by discussing
267 the length of the Committee Note. It has been shortened during the
268 work that led to the published proposal, and the version
269 recommended for approval now is shorter still. But discussion of
270 the separate subdivisions at times becomes repetitive because the
271 interdependence of the subdivisions makes the same concerns
272 relevant at successive points. Occasionally almost identical
273 language is repeated. Committee practice allows continuing
274 refinement of Committee Notes up to the time of submitting a
275 recommendation for adoption to the Standing Committee.

276 The Committee voted unanimously to recommend for adoption the
277 text of Rule 23 as revised, and also to approve the Committee Note
278 subject to editing by the Subcommittee and the Committee Chair.

279 *Rule 5*

280 Provisions for electronic filing were added to Rule 5 in 1993
281 and have gradually expanded as electronic communication systems
282 have become widespread and increasingly reliable. Provisions for
283 service by electronic means were added in 2001. The several
284 advisory committees have taken care to make the respective rules on
285 these matters as nearly identical as possible in light of
286 occasional differences in the circumstances that confront different
287 areas of procedure.

288 The proposal to amend Rule 5 published last August again
289 reflects careful attempts to coordinate with the proposals advanced
290 by the Appellate, Bankruptcy, and Criminal Rules Committees.
291 Coordination has continued as public comments and testimony have
292 shown opportunities to improve the published proposals.
293 Coordination is not yet complete, because other advisory committees
294 have yet to meet. The determinations made on Rule 5 will be subject
295 to adjustment to maintain consistency with the other sets of rules.
296 Matters of style can be adjusted without further Committee
297 consideration. Matters of substantive meaning may require
298 submission for Committee consideration and resolution by e-mail or
299 a conference call.

300 No changes are suggested for the text of Rule 5(b)(2)(E) as
301 published. The amended rule will provide for service by filing a
302 paper with the court's electronic-filing system. The present
303 provision in Rule 5(b)(3) that requires authorization by local rule
304 is abrogated in favor of this uniform national authorization.
305 Consent by the person served is not required. The amended rule
306 will, however, carry forward the requirement of written consent to
307 authorize service by other electronic means. It also carries
308 forward the provision in present Rule 5(b)(2)(E) that service
309 either by filing with the court, or by sending by other electronic
310 means consented to, is not effective if the filer or sender learns
311 that the paper did not reach the person to be served.

312 Concerns about the consequences of knowing that an attempted
313 transmission failed, however, have prompted preparation of a
314 proposed new paragraph for the Committee Note. The new paragraph
315 describes the provision for learning that attempted service by
316 electronic means did not reach the person to be served and then
317 addresses the court's role. It says that the court is not
318 responsible for notifying a person who filed the paper with the
319 court's electronic-filing system that an attempted transmission by
320 the court's system failed. And it concludes with a reminder that a
321 filer who learns that the transmission failed is responsible for
322 making effective service.

323 The core proposed provisions for electronic filing appear in

324 Rule 5(d)(3)(A) and (B). No change is recommended in the published
325 proposals. Subparagraph (A) states the general requirement that a
326 person represented by an attorney must file electronically, unless
327 nonelectronic filing is allowed by the court for good cause or is
328 allowed or required by local rule. This provision reflects the
329 reality that in most districts electronic filing has effectively
330 been made mandatory. Subparagraph (B) states that a person not
331 represented by an attorney may file electronically only if allowed
332 by court order or by local rule, and may be required to file
333 electronically only by court order or by a local rule that includes
334 reasonable exceptions.

335 A witness who both submitted written comments and appeared at
336 a hearing suggested that pro se litigants should have the right to
337 choose to file electronically so long as they can meet the same
338 training standards that attorneys must meet to become registered
339 users. Important benefits would run both to the pro se party and to
340 the court and the other parties. Although other advisory committees
341 have not yet had their meetings, the consensus reflected in the
342 materials prepared for each advisory committee is that it is still
343 too early to move beyond case-specific permission or local rule
344 provisions.

345 Certificates of service have become the occasion for some
346 difficult drafting choices that remain to be resolved by uniform
347 provisions suitable for each set of rules. Most, perhaps all, of
348 the difficulty arises from the provision in Rule 5(d)(1) that
349 specified disclosure and discovery materials "must not be filed"
350 until they are used in the proceeding or the court directs filing.
351 The question is whether a certificate of service must be filed, or
352 even may be filed, before these materials are filed.

353 Present Rule 5(d)(1) says in the first sentence that any paper
354 after the complaint that is required to be served " — together with
355 a certificate of service — must be filed within a reasonable time
356 after service." The second sentence sets out the "must not be
357 filed" direction. Different readings are possible when confronting
358 a certificate of service for a paper that must not (yet) be filed.
359 Perhaps the more persuasive reading is that the "together" tie of
360 filing the certificate with the paper means that the certificate
361 must be filed only when the paper is filed. The time for filing the
362 certificate, set as a reasonable time after service, however,
363 confuses the question: it could be argued that a reasonable time
364 after service is measured by how long it takes to file after
365 service, not by the lapse of time when filing does not occur until
366 a time after completion of a reasonable time after service.

367 Whatever the present rule means, it is important to write a
368 good and clear provision into amended Rule 5. The published
369 proposal addressed the question in a new Rule 5(d)(1)(A) that also

370 addressed certificates for a paper filed with the court's
371 electronic-service system: "A certificate of service must be filed
372 within a reasonable time after service, but a notice of electronic
373 filing constitutes a certificate of service on any person served by
374 the court's electronic-filing system."

375 The transmutation of the Notice of Electronic Filing into a
376 certificate of service has come to seem indirect. In line with the
377 approach proposed by the Appellate Rules Committee, all advisory
378 committees have agreed that it is better to provide, as suggested
379 for a revised Rule 5(d)(1)(B), that "No certificate of service is
380 required when a paper is served by filing it with the court's
381 electronic-filing system."

382 The next step involves a paper served by means other than
383 filing with the court's electronic-filing system. The time for
384 filing a certificate of service can be set at a reasonable time
385 after service for any paper that must be filed within a reasonable
386 time after service. The problem of papers that must not be filed
387 within a reasonable time after service remains. The revised
388 provision prepared for the agenda materials addressed it in this
389 way: "When a paper is served by other means, a certificate of
390 service must be filed within a reasonable time after service or
391 filing, whichever is later." The idea was that if filing occurs
392 long enough after service as to be beyond a reasonable time to file
393 a certificate as measured from the time of service, the certificate
394 must be filed within a reasonable time after filing. It was
395 expected that ordinary practice would file the certificate along
396 with the paper. It also was intended that if a paper that must not
397 be filed until it is used never is filed, there is no obligation to
398 file a certificate of service. A reasonable time after filing is
399 later than a reasonable time after service, and never starts to run
400 when there is no filing.

401 The revised draft encountered stiff resistance. Much of the
402 difficulty seems unique to the Civil Rule provision directing that
403 most disclosure and discovery materials must not be filed. It seems
404 likely that the other rules sets will be drafted to omit any
405 provision that addresses certificates of service for papers that,
406 at the outset, must not be filed. A new version worked out with the
407 Style Consultants reads, adding words that emerged from continuing
408 Committee discussion, like this:

409 **(d)(1)(B). Certificate of Service.** No certificate of
410 service is required when a paper is served by filing it
411 with the court's electronic-filing system. When a paper

412 that is required to[1] be served is served by other means:
413 (i) if the paper is filed, a certificate of service must be
414 included with it or filed within a reasonable time after
415 service; and
416 (ii) if the paper is not filed, a certificate of service need
417 not be filed unless filing is required by local rule or
418 court order.

419 Under proposed (d)(1)(A), most papers must be filed within a
420 reasonable time after service. (B)(i) then directs that the
421 certificate of service be filed with the paper or within a
422 reasonable time after service. If different parties are served at
423 different times, the reasonable time for filing the certificate of
424 service will be measured from the time of service on each. This
425 provision should suffice for the other sets of rules.

426 (B)(ii) addresses the paper that is not filed because
427 (d)(1)(A) says that it must not be filed. (ii) says that a
428 certificate of service need not be filed. But under (i), a
429 certificate of service must be filed when filing becomes authorized
430 because the paper is used in the action, or because the court
431 orders filing. The time for filing the certificate is, as directed
432 by (i), either with the filing or within a reasonable time after
433 service. (Here too, the proposed language encompasses a situation
434 in which a party is served after the paper has been served on other
435 parties and has been filed upon order or use in the action.)

436 One more change is recommended for proposed Rule 5(d)(3)(C).
437 Present Rule 5(d)(3) provides that a local rule may allow papers to
438 be signed by electronic means. Displacing the local-rule provision
439 means adding a direct provision to Rule 5. The published proposal
440 was: "The user name and password of an attorney of record, together
441 with the attorney's name on a signature block, serves as the
442 attorney's signature." Comments on this proposal suggested some
443 confusion. The intent was that the user name and password used to
444 make the filing were not to appear on the paper, but the comments
445 expressed fear that the rule text might be read to require that
446 they appear. An additional concern was that evolving technology may
447 develop better means of regulating access than user names and

[1] The Style Consultants used "must" here. Current Rule 5(d)(1) says "that is required to be served." The published proposal for 5(d)(1)(A) carries that forward. Unless we change to "must" in 5(d)(1)(A), parallelism dictates "is required" here.

Parallelism concerns are a bit confused. Rule 5(a)(1), which we have not addressed, begins "the following papers must be served." But when it comes to (C), it says "a discovery paper required to be served on a party."

448 passwords — more general words should be used to accommodate this
449 possibility. And an attorney may not become an attorney of record
450 until the first filing — what then?

451 The reporters for the several advisory committees have reached
452 consensus on the version recommended in the agenda materials for
453 Rule 5(d)(3)(C):

454 (C) *Signing.* An authorized filing made through a person's
455 electronic-filing account, together with the person's
456 name on a signature block, constitutes the person's
457 signature.

458 Discussion began with a question prompted by the new Committee
459 Note language for Rule 5(b)(2)(E). How often does a court receive
460 a message bounced back from the intended recipient? The answer was
461 in two parts. Court systems come exquisitely close to 100% accuracy
462 in transmitting messages to the addresses provided. The problems
463 occur when a message bounces back because the address is not good.
464 Almost all of those returned messages have been sent to addresses
465 for secondary recipients — usually the address for the attorney of
466 record remains good, and the bad address is for a paralegal or
467 legal assistant.

468 Some puzzlement was expressed as to the original decision to
469 address learning that attempted service failed only with respect to
470 service by electronic means. Why should it be different if the
471 party making service learns that mail did not go through, that a
472 commercial carrier failed to deliver, that a paper left at a
473 person's home was not in fact turned over to the person, that a
474 misidentified person was served in place of the intended person?
475 The history is clear enough — the decision in 2001 to address
476 failed electronic service was prompted by the newness of this means
477 of communication and lingering fears about its reliability.
478 Failures of other means of service were left to the law as it was
479 and as it might develop without attempting to provide any guidance
480 in rule text.

481 The question of filing certificates of service for papers that
482 must not be filed was addressed from a new perspective. Earlier
483 reporter-level discussions asked whether there is any reason to
484 file a certificate of service for a paper that is not filed. Some
485 indications were found that filing the certificate would only add
486 clutter to the file. But in Committee discussion a judge reported
487 that he wants to have the certificates in the file because they
488 provide a means of monitoring the progress of an action. District
489 of Arizona Local Rule 5.2 provides that a notice of service of
490 discovery materials must be filed within a reasonable time after
491 service. That is useful. A practicing lawyer noted that it also is
492 useful for all parties to know what is going on; Rule 5(a)(1)(C)

493 directs that a discovery paper that is required to be served on a
494 party must be served on all parties unless the court orders
495 otherwise, but a certificate on the docket provides useful
496 reassurance. Will the proposed rule language that a certificate of
497 service "need not be filed" when the paper is not filed prevent
498 filing voluntarily or as directed by court order or local rule? And
499 it is important to know whether the answer, whatever it proves to
500 be, will change the present rule.

501 Discussion reflected the ambiguity of the present rule that
502 requires a certificate of service to be filed together with the
503 paper, but directs that some papers must not be filed. It is
504 difficult to be confident whether a clear new rule will change the
505 present rule. So too, it is difficult to be confident about the
506 implications that might be drawn from "need not be filed" standing
507 alone. It might imply a right not to file. One response might be to
508 redraft the rule to require that a certificate of service be filed
509 within a reasonable time after service, whether or not the paper is
510 filed. But it was concluded that the rule need not go so far; some
511 courts may prefer that certificates not be filed for papers that
512 are served but not filed. The conclusion was that words should be
513 added to the Style Consultants' version as described above: "(ii)
514 if the paper is not filed, a certificate of service need not be
515 filed <u>unless filing is required by local rule or court order</u>.

516 A motion to recommend the proposed Rule 5 amendments for
517 adoption, as revised in the agenda book and in the discussion, was
518 approved by 13 votes, with one dissent.

519 *Rules 62, 65.1*

520 Judge Matheson, Chair of the joint Subcommittee formed with
521 the Appellate Rules Committee, reported on the published proposals
522 to amend Rules 62 and 65.1.

523 Rule 62 governs district-court stays of execution and
524 proceedings to enforce a judgment. The published proposal revises
525 the automatic stay by extending it from 14 days to 30 days, and by
526 adding an express provision that the court may order otherwise. It
527 recognizes security in a form other than a bond. It provides that
528 security may be provided after judgment is entered, without waiting
529 for an appeal to be filed, and that "any party," not only an
530 appellant, may provide security. A single security can be provided
531 to govern post-judgment proceedings in the district court and to
532 continue throughout an appeal until issuance of the mandate on
533 appeal. The rule also is reorganized to make it easier to follow
534 the provisions directed to injunctions, receiverships, and
535 accountings in an action for patent infringement.

536 Rule 65.1 provides for proceedings against a surety or other

537 security provider. The proposed amendments were developed to
538 dovetail with proposed amendments to Appellate Rule 8(b). The only
539 issues that remain subject to further consideration are reconciling
540 the style choices made for the Appellate and Civil Rules.

541 Public comments were sparse. All expressed approval of the
542 proposals in general terms. No testimony addressed these rules
543 during the three public hearings.

544 Discussion began with a question pointing to the wording of
545 proposed Rule 62(b) stating that "a party *may* obtain a stay by
546 providing a bond or other security." Must a judge allow the stay?
547 This provision carries over from present Rule 62(d) — "the
548 appellant may obtain a stay * * *." The choice to carry it over was
549 deliberate. Earlier Rule 62 drafts included provisions recognizing
550 judicial discretion to deny a stay, to grant a stay without
551 security, and to take still other actions. They were gradually
552 winnowed out in the face of continuing arguments that there should
553 be a nearly absolute right to obtain a stay on posting adequate
554 security. Carrying "may" forward will carry forward as well present
555 judicial interpretations, which seem to recognize some residual
556 authority to deny a stay in special circumstances even though full
557 security is offered.

558 The Committee voted unanimously to recommend proposed Rules 62
559 and 65.1 for adoption, subject to style reconciliation with the
560 Appellate Rules proposal and to editorial revisions of the
561 Committee Notes.

562 **II**
563 **ONGOING WORK: RULE 30(B)(6) SUBCOMMITTEE**

564 Judge Bates introduced the Rule 30(b)(6) Subcommittee Report
565 as work that remains in a preliminary stage. The question brought
566 to the Committee by the Subcommittee is how to move forward.

567 Judge Ericksen introduced the Subcommittee Report by pointing
568 to the Memorandum on Rule 30(b)(6) prepared by Rules Law Clerk
569 Lauren Gailey, with assistance from Derek Webb. The Report shows
570 that the rule "creates a lot of work," as measured by the number of
571 cases that cite to it. "It is a focus of litigation."

572 The Report provides a ranking of possible new rule provisions,
573 moving from A+ through A, A-, and simple B. Professor Marcus
574 prepared the ranking after the last Subcommittee conference call.
575 The Subcommittee has not reviewed it. But it provides a good point
576 of departure in providing direction to the Subcommittee. What
577 should the Subcommittee do first?

578 Rule 30(b)(6) can be seen as a hybrid of interrogatories and
579 depositions. "It's a place where people release frustrations with
580 numerical limits in Rules 30, 31, and 33." This shows in the
581 continuing discussions of how to apply the Rule 30 limits of number
582 and duration to multiple-witness depositions under Rule 30(b)(6).

583 Supplementation of a witness's deposition testimony has been
584 a regular subject of discussion. The case law is pretty clear that
585 an answer can be supplemented. But people worry about it because
586 the Rule does not say it. "If we take away that worry, we may be
587 able to focus better on discovery of where in the organization an
588 inquiring party can find the desired information."

589 This first introduction prompted the observation that there is
590 a tension in what the Committee is hearing. "We hear it is a focus
591 of litigation." But in the Standing Committee, and here in this
592 Committee, judges say they do not see these problems. We need to
593 explore that. Judge Ericksen responded that "lawyers fight and
594 scream with each other, but are reluctant to take it to the court."
595 This observation led to an inquiry whether the many cases cited in
596 the research memorandum reflected mere mentions of Rule 30(b)(6),
597 or whether they involved actual disputes? Other Committee members
598 reported different numbers of cases citing to Rule 30(b)(6), citing
599 to the rule in conjunction with "dispute," or citing to the rule
600 with "dispute" in the same paragraph. Still different on-the-spot
601 e-search results were reported.

602 Professor Marcus described a new book that he has just read,
603 Mark Kosieradzki, *30(b)(6): Deposing Corporations, Organizations*
604 *& the Government* (2017). It runs more than 500 pages, including

605 appendices. It reflects a point of view — "it’s clear, and my side
606 wins." Pages 242-245 of the agenda materials reflect "a lot of
607 ideas that have been bouncing around."

608 The Subcommittee is still working on these ideas. It has not
609 yet reached firm conclusions. Some, for example the American
610 College of Trial Lawyers, tell us that reasonable lawyers can work
611 out the things that might have a default in rule text. But why
612 bother with new rule text when work-outs are common?

613 Looking to the most modest proposal, perhaps no one believes
614 it would hurt to say that lawyers should talk about Rule 30(b)(6)
615 depositions early in the litigation, although early discussions may
616 not prove helpful when the 30(b)(6) depositions come at a late
617 stage in discovery. So the only A+ ranking is awarded to the
618 possibility of adding Rule 30(b)(6) depositions as subjects for
619 possible provisions in a scheduling order and for discussion at the
620 Rule 26(f) conference.

621 What else might be useful? Is there a risk that adding
622 specific rule provisions will promote more disputes?

623 The A list begins with "judicial admissions," a topic that the
624 Rule 30(b)(6) book covers in three chapters. These questions
625 distinguish between giving a witness’s deposition testimony the
626 effect of a judicial admission that cannot be contradicted by other
627 evidence and simply making it admissible in evidence against the
628 entity that named the witness to represent it at the deposition.
629 The next item on the A list is supplementation of the witness’s
630 testimony, either as an obligation or as an opportunity. Then come
631 contention questions, attempts to use the witness to nail down the
632 legal positions taken by the entity that designated the witness;
633 objections to the "matters for examination" "specified with
634 reasonable particularity" in the notice, a matter now open only by
635 a motion for a protective order, and one that is made prominent in
636 the Rule 30(b)(6) book; and the durational limit questions noted
637 above.

638 The A- list begins with the practice of providing the witness
639 advance copies of exhibits that will be used as a subject of
640 examination; the Subcommittee has been reluctant to make this a
641 mandatory practice for fear of stimulating massive sets of
642 documents with a correspondingly massive obligation to prepare the
643 witness. Second is the possibility of requiring that notice of a
644 30(b)(6) deposition be provided a minimum period before the time
645 set for the deposition. The underlying concern is that, as compared
646 to other depositions, these depositions require the entity to
647 gather information and train the witness to testify to it. Some
648 local rules have general provisions setting notice periods, but
649 there is little focused specifically on Rule 30(b)(6). The third A-

650 topic asks whether questioning should be limited to the matters
651 specified in the deposition notice. The witness designated by the
652 entity named as deponent may have independent knowledge of the
653 matters in dispute, and it is efficient to explore that knowledge
654 in a single "deposition." But there are risks that the individual
655 knowledge may be incomplete or simply wrong. Finding an all-purpose
656 approach is difficult. The final two questions are whether a means
657 should be found to channel into Rule 33 interrogatories inquiries
658 about the sources of information, both witnesses and documents, and
659 whether Rule 31 depositions on written questions might be developed
660 as a similar alternative.

661 The B list includes nine subjects: Advance notice of the
662 identity of the witnesses designated by the entity-deponent; second
663 depositions of the entity; limiting Rule 30(b)(6) to parties, even
664 though it may be useful as to nonparty entities; requiring
665 identification of documents used in preparing a witness to testify
666 for the entity; expanding initial disclosures to reduce the need
667 for 30(b)(6) depositions that seek to identity witnesses and
668 documents, a possibility being explored by the Initial Mandatory
669 Discovery pilot project; forbidding other discovery that duplicates
670 matters subject to a 30(b)(6) subpoena; making more stringent the
671 "reasonable particularity" designation of matters for examination,
672 or limiting the number of matters that can be listed; adding to
673 Rule 37(d) a specific reference to Rule 30(b)(6), although the Rule
674 30(b)(6) book says that courts find it there now; and adding a
675 specific reference to Rule 30(b)(6) to the provisions of Rule
676 37(c)(1) that impose consequences — most notably exclusion of
677 evidence not disclosed — for inadequate witness testimony.

678 Summing up the A, A-, and B lists, Professor Marcus suggested
679 that attempting to address this many topics, many of them in a
680 single rule, will indeed induce the "headaches" suggested by a
681 member of the Standing Committee when a similar list was discussed
682 last January.

683 Judge Bates suggested that these summaries of the list and
684 grading of potential topics set the stage for discussing which
685 subjects deserve further exploration.

686 A Subcommittee member identified himself as an advocate for
687 doing more than prompting discussion of Rule 30(b)(6) depositions
688 in scheduling conferences and Rule 26(f) conferences. "Unless you
689 have a very active judge, in a complex case people will not yet be
690 able to anticipate what problems will arise" as discovery proceeds.
691 Subcommittee work has shown that there are problems that recur in
692 some types of civil litigation. And judges do not often see them.
693 This rule "is a time-consuming source of controversy in certain
694 kinds of litigation." Lawyers argue about the same issues in case
695 after case. Yes, they are worked out most of the time. "We can save

696 a lot of time and expense if we do it right." But we must do it
697 right. "We do not want a rule that will simply promote further
698 disputes." The conflicting pressures suggest a "less is more"
699 approach.

700 What issues most deserve close attention? "Judicial
701 admissions" is one. The case law may pretty much have it right. But
702 it is a lingering worry for many lawyers. It affects witness
703 preparation and objections.

704 Another issue is contention questions. At the deposition you
705 are not supposed to instruct the witness not to answer.

706 Yet another issue is questions that go beyond the scope of the
707 matters designated in the notice: this ties to the "binding" effect
708 of the answers. A distinction might be drawn by providing that a
709 witness's answers to questions beyond the scope of the notice are
710 not even admissible against the entity. A different line might be
711 drawn for questions that are within the scope of the notice when
712 the witness has not been adequately prepared to answer them.

713 Supplementation also might be usefully addressed. Allowing or
714 requiring supplementation creates a risk that witnesses will not be
715 prepared, returning to the old "bandying" practice in which each
716 successive witness says that someone else knows the answer.

717 It may not be useful to adopt rule text to say whether
718 examination of each witness designated by an entity counts as a
719 separate deposition, or whether the one-day-of-7-hours limit
720 applies to each witness or to all of the designated witnesses
721 together.

722 For a while it seemed attractive to require a minimum advance
723 notice of the deposition, to be followed by a defined period for
724 objections, to be followed by a meet-and-confer. All of that
725 happens now in practice. People work it out. There is no real need
726 to address it in rule text.

727 Finally, it would be better to put aside all of the topics in
728 the "B" list.

729 Another member agreed that "judicial admissions is an
730 interesting topic." It lies alongside the explicit Rule 36
731 provisions for obtaining binding admissions. The question is
732 different in addressing the effects of testimony by an entity's
733 designated witness at deposition. Any rule should be framed
734 carefully to guard against trespassing over the line that divides
735 substance from procedure.

736 A practicing lawyer reported a comment by the legal department

737 for a big company that seven hours is not enough time to complete
738 a Rule 30(b)(6) deposition when the entity designates a number of
739 witnesses. More generally, "we should continue our work." It may be
740 that the problems may be solved by case management in some cases.
741 But there also may be room for rule changes. In response to the
742 question asked by the American College of Trial Lawyers, rulemaking
743 can help. Adding explicit reminders of Rule 30(b)(6) to Rules 16(b)
744 and 26(f) will help. A recent case from the Northern District of
745 California is a worthy example. The notice listed 30 matters for
746 examination. The judge found that Rule 1, as amended, "favors
747 focus." Case management can help to cut out duplicative topics.
748 "There may be room for nudges that will prevent the infighting that
749 judges never see, or see only at times." Work should continue on
750 the A list topics.

751 A judge said that he had seen some Rule 30(b)(6) problems, but
752 in more than a decade and a half he could count the number on one
753 hand. He agreed that case management can get the lawyers to work on
754 the issues.

755 Another judge observed that he had never *ruled* on a Rule
756 30(b)(6) dispute — "we work through them on calls." Creating a
757 formal objection process might prove counterproductive by
758 entrenching a more formal dispute process requiring more formal
759 resolution.

760 A practicing lawyer noted that "we get objections now." The
761 available procedure is a motion for a protective order, which must
762 be preceded by a conference of the attorneys. Creating a formal
763 objection procedure could allow the deposition to go forward on
764 matters not embraced by the objections. Formalizing it will get
765 people talking, and will crystalize the dispute. But it must be
766 asked how much a formal process will slow things down, and what the
767 value will be. It is not clear whether a formal objection process
768 will slow things down as compared to current practice.

769 Judge Bates noted that the discussion had mostly involved
770 Subcommittee members, and urged other Committee members to address
771 the question whether the Subcommittee should move forward, and with
772 what focus.

773 A judge said that, like the other judges, "I don't get many
774 issues," although that may be because he refers discovery disputes
775 to magistrate judges. Still, his colleagues do not see many Rule
776 30(b)(6) disputes. "It's a lawyer problem." And lawyers seem to
777 work out the problems. "But there may be clear guidance that will
778 help lawyers at the margin. The trick is to not write provisions
779 that increase disputes." To this end, it may be useful to seek
780 advice from lawyer groups that we have not yet heard from.

781 Another judge reported that he too does not see many 30(b)(6)
782 disputes. It is hard to figure out what the core problems are. Are
783 they not providing the right witnesses? Failing to prepare
784 witnesses properly? It would help to get lawyers to identify the
785 three or four worst problems, and to help think whether anything
786 can be done to improve the means of addressing them. Adding
787 30(b)(6) to the lists of topics that may be addressed in a
788 scheduling order, and to the subjects of a Rule 26(f) conference,
789 may help to get lawyers thinking about the issues. But it may be
790 that the most useful approach will be to foster best practices
791 rather than add to the rules.

792 Yet another judge stated that in 14 years on the bankruptcy
793 court he has never encountered a 30(b)(6) problem, nor has he heard
794 of them.

795 A fourth judge also has had very limited experience with the
796 possible problems. He suspects it will be best to focus on a couple
797 of broad issues.

798 Speaking as a practitioner, another Committee member suggested
799 that disputes arise during the deposition, presenting questions
800 that are hard for the lawyers to address in advance. Other issues
801 may emerge as the case goes on, before the deposition itself, but
802 again the scheduling conference and Rule 26(f) conference may come
803 too early to enable useful discussion. This thought was echoed by
804 another lawyer, who suggested that moving the discussion to the
805 beginning of an action could increase the number of disputes. You
806 do not know what the actual problems will be until you see and hear
807 them.

808 The immediate response was that Rule 30(b)(6) depositions may
809 come at the very beginning of an action. Lawyers who represent
810 individual employment discrimination plaintiffs use them as an
811 initial discovery tool. "It depends on the kind of case."

812 A judge said that these topics deserve further development in
813 the Subcommittee. It will be useful to "kill" the idea of binding
814 judicial admissions — it makes no sense to bind a party to things
815 said by imperfect witnesses with imperfect memories. A rule can
816 properly provide that an answer is not an admission that cannot be
817 contradicted by other evidence. But in addressing other issues, it
818 will be important to avoid adding detailed rules that will provoke
819 disputes. And the last two items on the A- list — "substituting
820 interrogatories" and "Rule 31 alternative" — should be dropped.

821 Judge Ericksen reported that the Subcommittee will be helped
822 by knowing that the Committee supports continuing work. The
823 question of judicial admissions will be considered. The list of
824 topics will be studied to determine which should be dropped. Should

825 "contention" questions be kept on for more work? There is a
826 possibility of directing them to Rule 33 and Rule 36, perhaps by
827 new text in Rule 30(b)(6) that forbids a question of the sort
828 allowed by Rule 33(a)(2) as one that "asks for an opinion or
829 contention that relates to fact or the application of law to fact."

830 A judge followed up on this question by noting that lawyers
831 use contention questions as a catch-all, and usually work out the
832 disputes. They are concerned that answers to interrogatories may
833 not be as forthcoming as should be.

834 Judge Bates invited comments from observers.

835 An observer based her observations on many years in practice
836 and now as an in-house lawyer. "Rule 30(b)(6) is very expensive."
837 Often it takes days, even weeks, to prepare for a deposition that
838 takes one or two hours. It is not possible to overstate the time
839 required to prepare the witness. "The absence of case law does not
840 mean there is no problem." The notices often set out very broad
841 topics, going far back in time, and spread across all products, not
842 just the one in suit. "We object, file for protective orders, but
843 often are not successful." We work hard to address it in Rule 16
844 conferences, but that can be too early — the other side says that
845 they do not yet have our information, and cannot yet know what they
846 will have to seek through Rule 30(b)(6). Objections and attempts to
847 work through the objections often are met by a simple response: "We
848 want what we want." "Court rulings are not always satisfactory." As
849 to contention questions, they are often inappropriate. A witness
850 might be asked to state the basis for a limitations defense, a
851 question of law. Or the question might ask about vehicle
852 performance, a matter for an expert witness. And "we are getting
853 discovery on discovery" — questions about what documents were used
854 to prepare the witness, what documents were sought.

855 Another observer began with this: "There are people who abuse
856 it, but that does not mean the rule is broken." A scheduling
857 conference often is premature with respect to potential 30(b)(6)
858 issues. If 30(b)(6) is added to list of topics in Rule 16(b), the
859 parties will focus on it more, but it may be irrelevant to actual
860 discovery. Rule 30(b)(6) "is one tool among many. It should be used
861 wisely." The parties should, under Rule 1, cooperate by giving
862 notice of the subjects they want to explore before discovery
863 actually begins. Rule 30(b)(6) should be used only to get
864 information that has not come forth by other means. An effective
865 means of addressing the issues that do arise as discovery proceeds
866 may be a meet-and-confer process triggered by a potential motion.

867 Yet another observer expressed concern that nothing be done to
868 vitiate the utility of Rule 30(b)(6). From a plaintiff’s
869 perspective, it provides an opportunity to get by deposing one or

870 two witnesses information that otherwise would require seven or
871 eight depositions. Supplementation is appropriate when a witness
872 says something that is absolutely wrong. It is not clear whether
873 supplementation is otherwise useful.

874 Judge Bates concluded the discussion by noting that the
875 Subcommittee has learned that it should continue its work. The
876 Committee discussion will be helpful in focusing the work. There is
877 a clear caution that care should be taken to avoid unintended
878 consequences that generate more disputes than are avoided. Care
879 must be taken to avoid changes that move lawyers away from working
880 out their differences to taking them all to the court.

881 *Pilot Projects*

882 Judge Bates described progress with the Expedited Procedures
883 Pilot Project and the Mandatory Initial Discovery Pilot Project.
884 The people working hard to complete supporting materials and to
885 promote the projects include Judge Grimm, a past member of this
886 Committee, Judge Campbell, Judge Shaffer, Laura Briggs, and Emery
887 Lee, as well as others. The supporting materials will include video
888 presentations available online to all those participating in a
889 project. The work that lies ahead is to recruit a sufficient number
890 of courts to provide a basis for strong empirical evaluation of the
891 projects. Even some Committee members have found it difficult to
892 persuade other judges on their courts that they should participate
893 in one of the projects.

894 Judge Campbell said that the Mandatory Initial Discovery
895 project has come further along than the Expedited Procedures
896 project. It will be launched in the District of Arizona on May 1.
897 The general order implementing it is very close to the pilot-
898 projects draft. A check list for lawyers has been prepared; Briggs,
899 Lee, and others have prepared model documents. Two introductory
900 videos are available on the district web site. One is prepared by
901 Judge Grimm. The other features Arizona state-court judges and
902 lawyers who explain how comparable disclosure requirements work in
903 Arizona courts and what does — and does not — work. The video shows
904 that they believe in the system. It seems likely that Arizona
905 disclosure practice explains why 73% of lawyers who litigate in
906 both Arizona state courts and Arizona federal courts prefer the
907 state courts; across the country, only 45% of lawyers who litigate
908 in both state and federal courts prefer state courts. The District
909 of Arizona is a good place to start the project because Arizona
910 lawyers have 25 years of experience with sweeping initial
911 disclosure requirements. The first months of the program will be
912 studied in September to determine whether adjustments should be
913 made. One price has been paid for starting the project — the
914 successful protocol for discovery in individual employment cases
915 had to be stopped because it is inconsistent with the project.

916 The Northern District of Illinois will start the Mandatory
917 Initial Discovery project for many judges on June 1. Both the
918 Eastern District of Pennsylvania and at least the Houston Division
919 of the Southern District of Texas are "in the works."

920 The Expedited Procedures project still needs some work. The
921 Eastern District of Kentucky is going to participate. Other courts
922 need to be found. It may not be launched before the end of the
923 year.

924 The amendments that took effect in 2015 renewed the lesson

925 that many rules changes will be accepted only if they are supported
926 by hard facts. The hope is that the pilot projects will provide
927 support for rules that lead to greater initial disclosures and
928 still more widespread case management.

929 Emery Lee said that some time will be needed before we can
930 begin to measure the effects of either pilot project. Cases that
931 terminate early in the project period will not reflect the effects
932 of the project. Many cases that are affected by the project will
933 not conclude until some time after the formal project period
934 closes.

935 Strategies to attract participation were discussed briefly.
936 The standing order that establishes a project has been sent to
937 every court that has been approached. The videos that explain the
938 projects have not been; perhaps they should be used as part of the
939 recruiting effort. More courts are needed.

940 Judge Campbell noted that United States Attorneys Offices have
941 not been approached as such. The Department of Justice has
942 identified a couple of concerns with the Arizona Mandatory Initial
943 Disclosure project that can be addressed.

944 The final observations were that progress is being made, and
945 that the Committee on Court Administration and Case Management has
946 been helpful in promoting further progress.

947 **III**
948 **SETTING AGENDA PRIORITIES**

949 Judge Bates introduced five sets of issues that vie for
950 priority on the Committee agenda. Each will demand a significant
951 amount of Committee time when it comes up, and some will require a
952 great deal of time. The question for discussion today is which of
953 these projects should be taken up first, recognizing that any
954 present assignment of priorities will remain vulnerable to new
955 topics that emerge while these projects are considered.

956 The five current projects involve two that are new, at least
957 on the current agenda, and three that have been on the agenda. The
958 two new projects are a request from the Administrative Conference
959 of the United States that new rules be developed for district-court
960 review of Social Security Disability Claims and a suggestion from
961 the American Bar Association that Rule 47 should be amended to
962 ensure greater opportunities for lawyer participation in the voir
963 dire examination of prospective jurors. The three projects already
964 on the agenda involve several aspects of the procedure for
965 demanding jury trial, the means of serving Rule 45 subpoenas, and
966 the offer-of-judgment provisions of Rule 68.

967 It is possible that one or another of these projects will be
968 withdrawn from the agenda as a result of the discussion. But it
969 seems likely that most will survive in some form, although perhaps
970 reduced and perhaps deferred indefinitely.

971 Each project will be explored separately. Discussion aimed at
972 assigning priorities will follow.

973 *Review of Social Security Disability Claims*

974 The Administrative Conference of the United States has made
975 this request:

976 The Judicial Conference, in consultation with Congress as
977 appropriate, should develop for the Supreme Court's
978 consideration a uniform set of procedural rules for cases
979 under the Social Security Act in which an individual
980 seeks district court review of a final decision of the
981 Commissioner of Social Security pursuant to 42 U.S.C. §
982 405(g). These rules would not apply to class actions or
983 to other cases that are outside the scope of the
984 rationale for the proposal.

985 Apart from a general suggestion that new rules should promote
986 efficiency and uniformity, four specific suggestions are made. The
987 complaint should be "substantially equivalent to a notice of
988 appeal." A certified copy of the administrative record should be

989 the main component of the agency's answer. The claimant should be
990 required to file an opening merits brief, with a response by the
991 agency and appropriate subsequent proceedings should be provided.
992 The rules should set deadlines and page limits.

993 It seems clear that the request is to adopt the new rules
994 under the authority of the Rules Enabling Act, 28 U.S.C. § 2072.
995 Although less clear, and perhaps not an important element, it seems
996 to be a request to adopt the rules outside the Federal Rules of
997 Civil Procedure — there is an explicit suggestion that "the new
998 rules should be drafted to displace the Federal Rules *only* to the
999 extent that the distinctive nature of social security litigation
1000 justifies such separate treatment." This suggestion is illustrated
1001 by a footnote suggesting that the new rules could be embraced by
1002 adding to Civil Rule 81(a)(6) a provision that the Civil Rules
1003 govern proceedings under the new rules except to the extent that
1004 the new rules provide otherwise.

1005 Presentation of this proposal began with recognition that it
1006 must be treated with great respect because its source is the
1007 Administrative Conference. Respect is further entrenched by the
1008 support provided by a research paper authored by Jonah Gelbach and
1009 David Marcus. Important questions remain as to the process best
1010 fitted to developing any new rules that may prove appropriate, but
1011 those questions may be discussed after sketching the underlying
1012 administrative framework and the judicial review statute.

1013 Social Security disability claims, and claims under similar
1014 provisions for individual awards outside old-age benefits, begin
1015 with an administrative filing. If benefits are denied at the first
1016 administrative stage, review is provided at a second stage. If
1017 benefits are denied at that stage, review goes to an administrative
1018 law judge. The Social Security Administration has 1,300
1019 administrative law judges. The case load for each judge is
1020 enormous, looking for dispositions on the merits and after hearings
1021 in 500 to more than 600 cases a year. The administrative law judge
1022 has responsibilities that extend beyond the neutral umpire role
1023 familiar in our adversary system; the judge must somehow see to it
1024 that the record is developed to support an accurate determination.
1025 Once the administrative law judge makes an initial determination of
1026 how the claim should be decided, the case is assigned to a staff
1027 member to write an opinion. The administrative law judge then
1028 reviews the draft and makes any changes that are found appropriate.
1029 A disappointed claimant can then take an appeal within the
1030 administrative system.

1031 Section 405(g) provides for district-court review of a final
1032 determination of the Commissioner of Social Security "by a civil
1033 action." It further directs that a certified copy of the record be
1034 filed "[a]s part of the Commissioner's answer." Characterizing

1035 review as a civil action brings the review proceeding squarely into
1036 the Civil Rules, but of itself does not preclude adoption of a
1037 separate set of review rules, particularly if they are integrated
1038 with the Civil Rules in some fashion.

1039 The purpose of establishing special Social Security review
1040 rules lies in experience with appeals. About 17,000 to 18,000
1041 actions for review are filed annually. By case count, they account
1042 for about 7% of the federal civil docket. In 15% of them, the
1043 Office of General Counsel determines that the final decision cannot
1044 be defended and voluntarily asks for remand for further
1045 administrative proceedings. Of the cases that remain, the national
1046 average is that about 45% are remanded. Remand rates, however, vary
1047 widely across the country. The lowest remand rates hover around
1048 20%, while the highest reach 70%. It is a fair question whether the
1049 procedures that bring the review to the point of decision are
1050 likely to have much effect on the remand rate, either in the
1051 overall national rate or in bringing the rates for different courts
1052 closer together. Other factors may account for the variability in
1053 outcomes, including speculation that there are differences in the
1054 quality of the dispositions reached in different regions of the
1055 Social Security Administration.

1056 Another source of different outcomes may lie in differences in
1057 the procedures adopted by district courts to provide review. Some
1058 treat the proceedings as appeals. Some invoke summary judgment
1059 procedures, reasoning that both summary judgment and administrative
1060 review involve judicial action on a paper record. The analogy to
1061 summary judgment is imperfect, however. On summary judgment, the
1062 court invokes directed verdict standards to determine whether a
1063 reasonable jury could come out either way, assuming that most
1064 credibility issues are resolved in favor of the nonmovant and
1065 further assuming all reasonable inferences in favor of the
1066 nonmovant. On administrative review the question is whether, using
1067 a "substantial evidence" test that is subtly different from the
1068 directed-verdict test, the actual administrative decision can be
1069 upheld. Beyond that point lie a large number of other procedural
1070 differences. Both lawyers representing the government and private
1071 practitioners that have regional or national practices may
1072 experience difficulties in adjusting to these differences.

1073 Against this background, the initial questions tie together.
1074 Is it suitable to invoke the Rules Enabling Act to address
1075 questions as substance-specific as these? The Committees have
1076 traditionally been reluctant to invoke the authority to adopt
1077 "general rules of practice and procedure" to craft rules that apply
1078 only to specific substantive areas. One concern lies in the need to
1079 develop the detailed knowledge of the substantive law required to
1080 develop specific rules. General rules that rely on case-specific
1081 adaptation informed by the particular needs of a particular

1082 question as illuminated by the parties may work better. Another
1083 concern is that however neutral a rule is intended to be, it may be
1084 perceived as favoring one set of parties over other parties, and in
1085 turn may be thought to reflect a deliberate intent to "tilt the
1086 playing field." At the same time, there are separate rules for
1087 habeas corpus and § 2255 proceedings, and the Civil Rules have a
1088 set of Supplemental Rules for admiralty and civil forfeiture
1089 proceedings. And the nature of social security cases accounts for
1090 special limitations on remote access to electronic records in Rule
1091 5.2(c).

1092 One response to the concerns about substance-specific rules
1093 could be to adopt more general rules for review on an
1094 administrative record. The difficulty of taking this approach is
1095 underscored by the specific character of individual social security
1096 disability benefits cases described in the initial discussion. A
1097 great deal must be known to determine whether a generic set of
1098 rules for review on an administrative record can work well across
1099 the vast array of executive and other administrative agencies that
1100 may become involved in district-court review.

1101 If the Enabling Act process is employed, should it rely on the
1102 Civil Rules Committee as it is, drawing on experts in social
1103 security law and litigation as essential sources of advice, or
1104 should some means be found to bring one or more experts into a
1105 formal role in the process? Given the statutory direction that
1106 review is sought by way of a civil action, the Civil Rules
1107 Committee is the natural source of initial work, then to be
1108 considered by the Standing Committee and on through the normal
1109 process. But if it proves wise to structure the civil review action
1110 as essentially an appeal process, it may help to involve the
1111 Appellate Rules Committee in the work.

1112 Let it be assumed that any rules should be developed either
1113 within the Civil Rules or as an independent body that still is
1114 integrated with the Civil Rules. What form might they take?

1115 The first step is likely to require a sound understanding of
1116 the structure and procedures that lead to the final decision of the
1117 Commissioner that is the subject of review. It does not seem likely
1118 that rules governing district-court review procedure can do much to
1119 affect the administrative structure and operation. The standard of
1120 review — "substantial evidence" — is set by statute. But knowing
1121 the origins of the cases that come to the courts may affect the
1122 choice between rules that are simple and limited or rules that are
1123 more complex and extensive.

1124 The second step will be to establish the basic character of
1125 the rules. The analogy to appeal procedures is obviously
1126 attractive. Guidance may even be sought in the Appellate Rules. But

1127 going in that direction does not automatically mean that review
1128 should be initiated by a paper that is as opaque as an Appellate
1129 Rule 3 notice of appeal. There is a real temptation to ask that the
1130 review be commenced by a paper that provides some indication of the
1131 claimant's arguments. On the other hand, little may be possible
1132 until the administrative record is filed with the answer as
1133 directed by § 405(g). If the "complaint" provides little
1134 information about the claimant's position, it may make sense to
1135 follow the Administrative Conference suggestion that the
1136 administrative record should be the "main component" of the answer.

1137 Once the review is launched, the reflex response will be to
1138 treat the claimant as a plaintiff or appellant, responsible for
1139 taking the lead in framing the arguments for reversal or remand. It
1140 may be that the ambiguous assignment of responsibilities to the
1141 administrative law judge might carry over to assign to the
1142 Commissioner the first responsibility for presenting arguments for
1143 affirmance. This alternative is likely to prove unattractive
1144 because it will be difficult, at least in some cases, to frame the
1145 argument that the final decision is supported by substantial
1146 evidence before the claimant has articulated the contrary
1147 arguments.

1148 Assuming that the claimant is to file the first brief on
1149 review, the analogy to appellate procedure suggests several
1150 correlative rules. A time must be set to file the brief. A later
1151 time must be set for the Commissioner's brief. Provision might well
1152 be made for a reply by the claimant. Whether to allow still further
1153 briefing would be considered in light of past experience with these
1154 review proceedings. Times must be set for each step. Page limits
1155 might be set, although some thought should be given to the
1156 possibility that leeway should be left for local rules that reflect
1157 local district circumstances. None of these provisions should be
1158 imported directly from the Appellate Rules without considering the
1159 ways in which a narrowly focused set of rules may justify specific
1160 practices better than those crafted for a wide variety of cases.

1161 The review rules might be expanded to address more detailed
1162 issues. The Administrative Conference recommends that there be no
1163 provisions for class actions, and that the rules should not apply
1164 to "cases outside the scope of the rationale." It suggests
1165 provisions governing attorney fees, communication by electronic
1166 means, and "judicial extension practice". Work on these and other
1167 issues that will be raised will again require learning about the
1168 details of social security administration. It will be important to
1169 understand the scope of § 405(g) in attempting to define the
1170 categories of cases covered by the rules — why, for example, is it
1171 assumed that § 405(g) authorizes review by way of a class action?
1172 And why, if indeed the statute would establish jurisdiction, is a
1173 class action inappropriate if the ordinary Rule 23 requirements are

1174 met? Or, on a less intimidating scale, what is different about
1175 these cases that justifies departure from the procedures for
1176 awarding attorney fees set out in Rule 54(d)(2)?

1177 It will be important to explore the limits of useful detail.
1178 It seems likely that much will be better left to the Civil Rules.
1179 And imagination should not carry too far. As compared to appellate
1180 courts, for example, district courts regularly take evidence and
1181 decide questions of fact. And there may be some special fact
1182 questions that are not committed to agency competence. Imagine, for
1183 example, questions of improper behavior not reflected in the
1184 administrative record: bribery, supervisor pressure on the
1185 administrative judge corps to produce an acceptable rate of awards
1186 and denials, or ex parte communications. As intriguing as it might
1187 be to craft rules for such claims, the task likely should not be
1188 taken up.

1189 This initial presentation concluded with two observations. The
1190 Administrative Conference has made an important recommendation that
1191 must be taken seriously. Careful thought must be given to deciding
1192 whether the project should be undertaken. A commitment to explore
1193 the suggestion carefully, however, does not imply a commitment to
1194 develop new rules.

1195 Judge Bates summarized this initial presentation by a reminder
1196 that the present task is to determine what priority should be
1197 assigned to social-security review rules on the Committee agenda.
1198 If the project is taken up by this Committee, an early choice will
1199 be whether to adopt one rule or several more detailed rules, and
1200 whether to place them directly in the Civil Rules or to adopt a
1201 separate set of rules that are nonetheless integrated with the
1202 Civil Rules in some fashion. Every year brings many of these cases
1203 to the district courts. Around the country, different districts
1204 adopt quite different procedures for them. And there are wide
1205 variations in remand rates.

1206 Discussion began by asking how many districts have local rules
1207 that govern review practices. This question led to a more pointed
1208 observation that in various settings there may be confusion whether
1209 proceedings that involve agencies should be initiated as a civil
1210 action by a Rule 3 complaint, or instead are some other sort of
1211 "proceeding" in the Rule 1 sense that is initiated by an
1212 application, petition, or motion. It will be important to explore
1213 other substantive areas that involve quasi-appellate review in the
1214 district courts.

1215 The next observation was that district courts may well follow
1216 different procedures for different areas of administrative review,
1217 or may instead have a single general review practice. There are
1218 variations among the districts. One variation is that in many

1219 districts, particularly for social security cases, magistrate
1220 judges are the first line of review.

1221 Judge Campbell encouraged the Committee to take up this
1222 project. This is a Civil Rules matter. The District of Arizona
1223 local rule for these cases is not long, showing that a good rule
1224 need not be long. He gets 20 to 30 of these cases every year. They
1225 always rely on a paper record. The records include many medical
1226 reports. One important element in the review is provided by
1227 specific rules, often rather detailed rules, that each circuit has
1228 developed to guide the administrative decision process. The Ninth
1229 Circuit has specific rules as to the standard of decision the
1230 administrative law judge must use when the treating expert's
1231 opinion is not contradicted, the standard when it is contradicted,
1232 and so on. These rules may require reversal for failure to
1233 articulate the reviewing circuit standard without considering
1234 whether substantial evidence supports the denial of benefits. If
1235 the administrative law judge does not say the right things in
1236 rejecting an expert opinion, "I have to treat the opinion as true."
1237 That leads to about a 50% reversal rate. But reversal rates vary
1238 across the Ninth Circuit, ranging from 28% in the District of
1239 Nevada to 69% in the Western District of Washington. There is
1240 reason to suspect that reversals often happen because
1241 administrative judges do not say what circuit rules require them to
1242 say.

1243 This observation led to the question whether the Rules
1244 Enabling Act process can address circuit decisions imposing rules
1245 that are closely bound up with the substance of social security law
1246 and the administrative procedures that implement that substance.
1247 This concern provides a specific illustration of the need to keep
1248 constantly in mind the challenges of creating procedural rules
1249 specific to a single substantive area.

1250 Another participant stated that the United States Attorney
1251 offices handle the vast majority of these cases. Two working groups
1252 in the Department of Justice have studied the variations among the
1253 circuits. A "model" rule might be useful, if it is adaptable to
1254 local circumstances. But there is no real sense that these are
1255 issues that must be addressed.

1256 A judge reviewed some of the statistics provided in the
1257 Gelbach and Marcus paper describing the workload of the
1258 administrative law judges and the amount of time they can devote to
1259 any single case. These statistics "point to the Social Security
1260 Administration looking to its own structures and procedures." It
1261 will be hard to do much by rulemaking. "We do need to respect the
1262 request, but we need to look at a lot more than this report." And
1263 it may be important to look at practices on administrative review
1264 in many different settings for insights that may be important in

1265 considering this particular setting. This suggestion was seconded
1266 — we must look to what is happening in other substantive fields.

1267 Another participant asked how much variation there is among
1268 the circuits, and whether the variations will make it difficult to
1269 craft a single rule that makes sense across the board? Another
1270 participant turned this question around by asking whether the
1271 principal problem lies in the work of the Social Security
1272 Administration, not in variations in circuit law.

1273 A judge suggested that we should look for more specific local
1274 rules. The District of Minnesota aims at timelines and procedures
1275 that will reduce delay in getting benefits to a person who is
1276 entitled to them. (It was later noted that social security cases
1277 are reported separately for delays in disposition.)

1278 The local-rule inquiry may tie to the number of review cases
1279 that are brought to a district. Some courts have more than others,
1280 often because of differences in the size of the local population.

1281 A judge asked whether there is any sense of what proportion of
1282 claimants appear pro se — a pro se litigant may encounter
1283 difficulty with a separate set of rules. Two judges responded that
1284 most claimants in their districts have lawyers; one explained that
1285 fee provisions mean that the lawyer appears with essentially no
1286 cost to the claimant.

1287 A judge noted that there are separate rules for habeas corpus
1288 cases and for § 2255 proceedings and asked whether the issues
1289 surrounding substance-specific rules are different for those rules
1290 than they would be for social-security review rules.

1291 A lawyer member said that "it is difficult to say to the
1292 Administrative Conference that we do not want to look at this." So
1293 where should we look? Should we look to administrative review more
1294 broadly? That would be more consistent with the "general rules"
1295 contemplated by the Enabling Act. But if there is no obstacle to
1296 prevent focusing on the specific setting of social-security review,
1297 it will be better to focus on that. "This seems to be a
1298 distinctive, even unique, set of issues." One obvious place to
1299 start will be with standards of review, or circuit rules that seem
1300 to combine approaches to review with dictates about practices that
1301 must be followed by administrative law judges to avoid reversal.
1302 How far do the circuits root their rules in statutory language? And
1303 we should determine whether the Administrative Conference is most
1304 concerned with establishing uniform rules, or whether it aims
1305 higher to get rules that are both uniform and good? Is the test of
1306 good defined only in terms of good dispositions in the district
1307 courts, or is it defined more broadly in hoping for procedures that
1308 will wash back to enhance administrative law judge dispositions?

1309 Several members joined in suggesting that it will be important
1310 to seek out associations of claimants' representatives if this
1311 project proceeds. The Committee will need expert advice from all
1312 perspectives. A number of organizations were quickly identified.

1313 Emery Lee reported that Gelbach and Marcus got some of their
1314 information from him. And they have a lot of data that might be
1315 shared for our study. And he has been involved with the
1316 Administrative Conference and the Social Security Administration.
1317 The Social Security Administration has a really impressive data
1318 processing system. There is a long-term effort to improve the
1319 entire Administration.

1320 Judge Bates concluded the discussion by suggesting that the
1321 Committee should look at these questions, beginning with efforts to
1322 gather more information. But decisions about priorities should be
1323 deferred until four more pending projects have been discussed.

1324 *Jury Trial Demands: Rules 38,39, and 81(c)(3)*

1325 Judge Bates introduced the questions raised by the rules that
1326 require an explicit demand by a party who wishes to enjoy the right
1327 to a jury trial.

1328 The question first came to the agenda in a narrow way. Until
1329 the Style Project changed a word in 2007, Rule 81(c)(3)(A) provided
1330 that a party need not demand a jury trial after a case is removed
1331 from state court if "state law *does* not" require a demand. "Does
1332 not" was understood to mean that a demand was excused only if state
1333 law does not require a demand at any time. Even then, the rule
1334 provided that a demand must be made if the court orders that a
1335 demand be made, and further provided that the court must so order
1336 at the request of a party. The Style project changed "does"
1337 to "did." That creates a seeming ambiguity: what does "did" mean if
1338 state law requires a demand at some point, but the case is removed
1339 to federal court before it reaches that point? Is a demand excused
1340 because state law did not require it to be made by the time of
1341 removal? Or is a demand required because, at the time of removal,
1342 current state law did require a demand, albeit at a later point in
1343 the case's progress toward trial?

1344 Early discussions of this question have been inconclusive.
1345 Discussion in the Standing Committee in June, 2016, also was
1346 inconclusive. But soon after the meeting, two members — then-Judge
1347 Gorsuch and Judge Graber — suggested that Rule 38 should be amended
1348 to delete the demand requirement. The new model would follow the
1349 lead of Criminal Rule 23(a), under which a jury trial is
1350 automatically provided in all cases that enjoy a constitutional or
1351 statutory right to jury trial. A jury trial would be bypassed only
1352 by express waiver by all parties; the Criminal Rule might be

1353 followed to require that the court approve the waiver. They wrote
1354 that this approach would produce more jury trials, create greater
1355 certainty, remove a trap for the unwary, and better honor the
1356 purposes of the Seventh Amendment.

1357 The Committee agreed last November that further research
1358 should be done. A starting point will be to attempt to dig deeper
1359 into the history of the 1938 decision to adopt a demand
1360 requirement, and to set the deadline early in the litigation. State
1361 practices also will be examined, recognizing that some states do
1362 not require a demand at any point and others put the time for a
1363 demand later, even much later, than the time set by Rule 38.

1364 Empirical questions also need to be researched. One is to
1365 determine how often a party who wants a jury trial fails to get one
1366 because it overlooked the need to make a timely demand and failed
1367 to persuade the court to accept an untimely demand under Rule
1368 39(b). That question may be difficult to answer. A separate
1369 question asks a different kind of practical-empirical question: Is
1370 it important to the court or the parties to know early in an action
1371 whether it is to be tried to a jury? Why?

1372 If the Criminal Rule model is to be followed, it will be
1373 useful to consider drafting issues that distinguish the Seventh
1374 Amendment from the Sixth Amendment. It is not always clear whether
1375 there is a Seventh Amendment (or statutory) right to jury trial, or
1376 on what issues. There should be some means to raise this question.
1377 Whether the means should be provided by express rule text is not
1378 yet clear. As part of that question, it may be useful to consider
1379 whether it is appropriate to hold a jury trial in a case that does
1380 not involve a jury-trial right. Present Rule 39(c)(2) authorizes a
1381 jury trial with the same effect as if there is a right to jury
1382 trial, but only with the parties' consent. Should a no-demand-
1383 required rule address this issue?

1384 The right to jury trial is important and sensitive. These
1385 questions must be approached with caution.

1386 Discussion began with the empirical question: How often *do*
1387 people lose the right to jury trial? "Can there be a general, quick
1388 fix"? This is an important issue — jury trial is an important part
1389 of democracy. And there are all sorts of ways to address the issue.

1390 A judge supported this view, saying that part of the first
1391 step will be to explore the issue of inadvertent waiver. Another
1392 judge agreed that these questions are important philosophically,
1393 but empirical information is also important.

1394 Another member agreed that these questions may deserve
1395 consideration. Some state courts do not require a demand: does that

1396 create any problems? Pro se cases may become an issue. But there
1397 are reasons to ask whether amending Rule 38 would change much in
1398 practice.

1399 The other side of the practical question was asked again:
1400 Criminal Rule 23 means that the parties know from the beginning
1401 that there will be a jury trial. If an amended Rule 38 does not go
1402 that far, how important is it to set the time for demand early in
1403 the case? Can the time be pushed back, reducing the risk of
1404 inadvertent waiver, until a point not long before trial?

1405 Another part of the empirical question will be to determine
1406 what standards are employed under Rule 39(b) to excuse a failure to
1407 make a timely demand. If tardy demands are generally allowed, the
1408 case for amending Rule 38 may be weakened.

1409 *Rule 47: Jury Voir Dire*

1410 Judge Bates introduced the Rule 47 proposal that came from the
1411 American Bar Association. The proposal adheres to the ABA
1412 Principles for Juries and Jury Trials 11(B)(2), which provides that
1413 each party should have the opportunity to question jurors directly.
1414 The ABA proposal is supported by submissions from the American
1415 Board of Trial Advocates and the American Association for Justice.

1416 The proposal observes that federal judges generally allow less
1417 party participation in voir dire than is allowed in state courts.
1418 Judge-directed questioning is challenged because judges know less
1419 about the case than the parties know, leaving them unable to think
1420 of questions that probe for potential biases relevant to that
1421 particular case. For the same reason, judges are unable to
1422 anticipate developments at trial that may trigger bias. The ABA
1423 also urges that when answering lawyers' questions jurors will be
1424 more forthcoming, more willing to acknowledge socially unacceptable
1425 things, than when answering a judge's questions. Possible
1426 difficulties are anticipated and refuted by arguing that lawyer
1427 participation will not cause significant delay, and that it should
1428 not be assumed that lawyers will abuse the opportunity.

1429 This question was considered by the Committee some time ago.
1430 In 1995 it published for comment a proposal very similar to the ABA
1431 proposal. The public comments divided along clear lines. Most
1432 lawyers supported the proposed rule. Judges were nearly unanimous
1433 in opposing it. Opposition was expressed by many judges who
1434 actually permit extensive lawyer participation — they believe that
1435 lawyer participation can be valuable, but that the judge must have
1436 an unlimited right to restrict or terminate lawyer participation as
1437 a means to protect against abuse. The Committee decided then to
1438 abandon the proposal. Rather than amend the rule, it concluded that
1439 judges should be better educated in the advantages of allowing

1440 lawyer participation subject to clear judicial control.

1441 The reactions seem to be the same today. It is not clear
1442 whether federal judges generally are more or less willing to permit
1443 lawyer participation in voir dire than they were in 1995. There is
1444 reason to suspect that more judges permit active lawyer
1445 participation today. But if indeed more judges do so, that could
1446 cut either way. It may show that there is little need to amend Rule
1447 47. Or it may show that Rule 47 should be amended to ensure that
1448 all judges permit practices that wide experience supports. It may
1449 be important to try to get better information on current practices.

1450 Discussion began with the observation that Criminal Rule 24(a)
1451 is closely similar to Rule 47.

1452 A lawyer member strongly favors the ABA proposal. His
1453 experience is that more federal judges have come to permit
1454 supplemental questioning by lawyers, but that not all do. Many
1455 trial lawyers believe that judge questions produce less useful
1456 information about how people think, about what prejudices they
1457 have. And some judges do not permit lawyer participation, or allow
1458 only a very short time for lawyer participation. Allowing
1459 supplemental questioning by the lawyers "would be a good start."

1460 Another lawyer asked what would be the standard of review
1461 under a new rule when the judge limits lawyer participation? A
1462 judge answered that judges are inclined to allow lawyer
1463 participation "when it seems helpful, otherwise not." If the rule
1464 expands lawyers' rights, appeals will be taken to review rulings on
1465 what are reasonable questions. Minnesota state courts generate many
1466 opinions on what are reasonable questions that must be allowed.

1467 Another judge observed that his district has 30 judges and
1468 perhaps 20 different ways of regulating lawyer participation in
1469 voir dire. He allows supplemental questions. "One size may not fit
1470 all judges. There is a risk in losing my discretion." But it is
1471 useful to think further about this proposal.

1472 Another judge observed that he respects lawyers, "especially
1473 the experienced, good lawyers. Not all are like that." We need to
1474 learn more before going for more lawyer participation. If we can
1475 get questions from the lawyers up front, a combined procedure in
1476 which the judge goes first, supplemented by the lawyers, should
1477 work.

1478 Another judge noted that he gives lawyers a limited time to
1479 ask questions after he has finished. "I worry about giving lawyers
1480 and parties a right to conduct voir dire, especially in pro se
1481 cases."

1482 A state-court judge said that his state has a large body of
1483 law on this topic. The 1995 Committee Note referred to clear abuse
1484 of discretion. In his state, "we get a lot of issues for appeal."

1485 Another judge said that he asks questions, then allows lawyers
1486 to ask questions. "They're not very good at it," perhaps because
1487 earlier judges on his court did not give them a chance to get
1488 experience with it.

1489 Further discussion was deferred to the overall discussion of
1490 assigning agenda priorities.

1491 *Rule 45: Serving Subpoenas*

1492 Rule 45 directs that "serving a subpoena requires *delivering*
1493 *a copy to the named person*." A majority of courts interpret this
1494 opaque language to mean that personal service is required. But a
1495 fair number of courts interpret it to allow delivery by mail, and
1496 some interpret it to allow delivery by mail if attempts at personal
1497 service fail. Occasionally a court has authorized other means of
1498 service.

1499 The proposal submitted to the Committee suggests that all of
1500 the means allowed by Rule 4 to serve the summons and complaint
1501 should be allowed for service of a subpoena. The argument is
1502 straightforward: the consequences of complying with a subpoena are
1503 less than the consequences of being brought into an action as a
1504 defendant who must participate in the full course of the litigation
1505 and is at risk of losing a judgment. The proposal would also
1506 authorize the court to direct service by means not contemplated by
1507 Rule 4.

1508 The reasons for expanding the modes of service are attractive.
1509 Personal service can be expensive. It can cause delay. And at times
1510 it may be physically dangerous. The analogy to Rule 4 has an
1511 initial appeal.

1512 In addition to the wish for less burdensome means of service,
1513 it is desirable to have a uniform national practice. If some courts
1514 permit service by mail, uniformity can be restored by permitting
1515 mail service generally or by prohibiting mail service generally.
1516 Whichever way, uniformity is attractive.

1517 There is much to be said for permitting service by mail; the
1518 rule might call for certified or registered mail, or might borrow
1519 from other rules a more general "any form of mail that requires a
1520 return receipt."

1521 Turning to the Rule 4 analogy, there also is much to be said
1522 for allowing "abode" service by leaving the subpoena with a person

1523 of suitable age and discretion who resides at the dwelling or usual
1524 place of abode of the person to be served.

1525 Allowing other means authorized by the court seems attractive,
1526 at least if there are reasons why personal service, mail, or abode
1527 service have failed.

1528 Still further expansions can be made. And it may prove
1529 attractive to distinguish between parties and nonparties. Serving
1530 a subpoena on a party by serving the party's attorney is
1531 attractive, particularly in an era that permits service by filing
1532 the subpoena with the court's electronic-filing system.

1533 Going all the way to incorporate all of Rule 4, on the other
1534 hand, raises potential problems. Careful thought would have to be
1535 given to serving a minor or incompetent person; serving a
1536 corporation, partnership, or association; serving the United States
1537 and its agencies, corporations, officers, or employees; or serving
1538 a state or local government. So too for service outside the United
1539 States.

1540 Discussion began with the observation that Criminal Rule 17(d)
1541 is similar to Rule 45: "The server must deliver a copy of the
1542 subpoena to the witness * * *." This Committee should consult with
1543 the Criminal Rules Committee to determine their views on the value
1544 of expanding the means of service, either generally or as to
1545 criminal prosecutions in particular. And it would be useful to
1546 learn how "deliver" is interpreted in the Criminal Rule.

1547 The Bankruptcy Rules Committee also should be consulted.

1548 A lawyer member noted that the Committee considered this very
1549 set of questions a few years ago during the work that led to
1550 extensive amendments of Rule 45. The Committee decided then that
1551 there was not sufficient reason to amend the rule. Personal service
1552 was thought useful because it dramatically underscores the
1553 importance of compliance. There does not seem to have been any
1554 change of circumstances since then — the state of the law described
1555 in the proposal is the same as the law described in extensive
1556 research for the Discovery Subcommittee then. "This does not seem
1557 the most important thing we can do."

1558 *Rule 68*

1559 Judge Bates introduced the Rule 68 offer-of-judgment topic by
1560 noting that it has been the subject of broad proposals for
1561 reconsideration and expansion and also the subject of proposals
1562 that focus on one or another specific problems that have appeared
1563 in practice.

The history of the Committee’s work with Rule 68 was used to set the framework for the current discussion. Some observers have long lamented that Rule 68 does not seem to be used very much. They believe that it should be given greater bite. The purpose is not so much to increase the rate of settlements — it would be difficult to diminish the rate of cases that actually go to trial — as to promote earlier settlements. A common parallel theme is that the rule should be expanded to include offers by plaintiffs. Since plaintiffs generally are awarded "costs" if they win a judgment, the cost sanction seems inadequate to the purpose of encouraging a defendant to accept a Rule 68 offer for fear the plaintiff will win still more at trial. So these suggestions commonly urge that post-offer attorney fees should be awarded to a plaintiff who wins more than an offer that the defendant failed to accept. That proposition leads in turn to the proposal that if a plaintiff can be awarded attorney fees, fee awards also should be provided for a defendant when the plaintiff fails to win a judgment more favorable than a rejected offer made by the defendant.

Alongside these proposals to expand Rule 68 lie occasional arguments that Rule 68 should be abrogated. It is seen as largely useless because it is not much used. But it may be used more frequently by defendants in cases that involve a plaintiff’s statutory right to attorney fees so long as the statute characterizes the fees as "costs." The Supreme Court decision establishing this reading of the Rule 68 provision that "the offeree must pay the costs incurred after the [more favorable] offer was made" is challenged as a "plain meaning" ruling that thwarts the plaintiff-favoring purpose of fee-shifting statutes. More generally, Rule 68 is challenged as a tool that enables defendants to take advantage of the risk aversion plaintiffs experience in the face of uncertain litigation outcomes.

The Committee published proposed amendments in 1983. The vigorous controversy stirred by those proposals led to publication of quite different proposals in 1984. No further action was taken. The Committee came to the subject again in the 1990s. The model developed then worked from a proposal advanced by Judge William W Schwarzer. Both plaintiffs and defendants could make offers and counteroffers. A party could make successive offers. Attorney fees were provided as sanctions independent of statutory authority. But account was taken of the view that post-offer fees should be offset by the "benefit of the judgment": the difference between the rejected offer and the actual judgment was subtracted from the fee award. As one illustration, the plaintiff might reject an offer of $50,000, and then win a judgment of $30,000. The defendant may have incurred $40,000 of attorney fees after the offer lapsed. The $20,000 benefit of the judgment — $30,000 subtracted from the $50,000 offer — was subtracted from the $40,000 post-offer fees to yield a fee award of $20,000. A further concern for fairness led to

1612 an additional limit: the fee award could not exceed the amount of
1613 the judgment. In this illustration, the defendant's post-offer fees
1614 might have been $80,000. Subtracting the $20,000 benefit of the
1615 judgment would leave a fee award of $60,000. Simply offsetting the
1616 $30,000 judgment would leave the plaintiff liable for $30,000 out-
1617 of-pocket. The rule prevented this result by denying any fee award
1618 greater than the judgment. And to afford equal treatment, the same
1619 cap applied for the benefit of a defendant who rejected a more
1620 favorable offer: the fee award was capped at the amount of the
1621 judgment for the plaintiff. Still further complications were added
1622 in accounting for contingent-fee arrangements, offers for specific
1623 relief, and other matters. The Committee eventually decided that
1624 the attempt to address so many foreseeable complications had
1625 generated a rule too complex for application. The project was
1626 abandoned without publishing any proposal.

1627 Many suggestions to revise Rule 68 have been made by bar
1628 organizations and others over the years. Extensive materials
1629 describing many of them were supplied in an appendix to the agenda
1630 book. Many of them aim at broad revision. Some are more focused.
1631 Ten years ago the Second Circuit suggested that the Rule should be
1632 amended to provide guidance on the approach to evaluating
1633 differences between an offer of specific relief — commonly an
1634 injunction — and a judgment that does not incorporate all of the
1635 proposed relief but adds more besides. More recently, Judge Furman
1636 has pointed to a specific problem: The voluntary dismissal
1637 provisions of Rule 41(a)(1)(A), incorporated in Rule 41(a)(2), are
1638 "subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable
1639 federal statute." When a settlement requires court approval,
1640 voluntary dismissal cannot be used to sidestep the approval
1641 requirement. The Second Circuit has ruled, for example, that a
1642 requirement of court approval of a settlement is read into the text
1643 of the Fair Labor Standards Act. This requirement cannot be
1644 defeated by stipulating to dismissal. Rule 68 does not have any
1645 list of exceptions. So a question has appeared: can the parties
1646 agree to a settlement that requires court approval, and then avoid
1647 court scrutiny by making a formal Rule 68 offer that is accepted by
1648 the plaintiff? Rule 68(a) directs that on filing a Rule 68 offer
1649 and notice of acceptance, "[t]he clerk must * * * enter judgment."
1650 Perhaps Rule 68 could be amended to address only this problem — the
1651 1983 proposal, for example, specifically excluded actions under
1652 Rules 23, 23.1, and 23.2 from Rule 68.

1653 The lessons to be learned from this history remain uncertain.
1654 Continually renewed interest in revising Rule 68 suggests there are
1655 strong reasons to take it up once again. Repeated failure to
1656 develop acceptable revisions, both in the carefully developed
1657 efforts and in brief reexaminations at sporadic intervals, suggests
1658 there are strong reasons to leave the rule where it lies. It causes
1659 some problems, but is not invoked so regularly as to cause much

1660 grief. Yet a third choice might be to recommend abrogation because
1661 Rule 68 has a real potential for untoward effects and because
1662 curing it seems beyond reach.

1663 The repeated suggestions for amendments caused the Committee
1664 to reopen Rule 68 in 2014, giving it an open space on the agenda.
1665 Further consideration will be scheduled when there is an
1666 opportunity for further research. There is a considerable
1667 literature about Rule 68. Many states have similar rules that
1668 nonetheless depart from Rule 68 in many directions. Careful review
1669 of the state rules may show models that can be successfully
1670 adopted.

1671 Discussion began with the observation that many states have
1672 offer provisions. The California provision is bilateral. Federal
1673 courts have ruled that when a state rule provides for plaintiff
1674 offers, the state practice applies to state-law claims in federal
1675 court because Rule 68 is silent on the subject. But Rule 68 governs
1676 to the exclusion of state law as to defendant offers, because Rule
1677 68 does speak to that subject. One consequence of abrogating Rule
1678 68 could be that state rules are adopted for state-law claims in
1679 federal court. State rules, further, may suggest effective
1680 sanctions other than awards of attorney fees. California practice
1681 allows award of expert-witness fees, a sanction that has proved
1682 effective.

1683 The next observation was that Georgia has a new offer statute
1684 enacted as part of tort reform. It recognizes bilateral offers, and
1685 bilateral awards of attorney fees. "The effect has been chaotic."
1686 Offers are made early in an action, before either party has any
1687 well-developed sense of what discovery may show about the merits of
1688 the case. Even with early offers, there is little evidence that the
1689 rule has advanced the time of settlement. There have been lots of
1690 problems, and no benefit. And "getting rid of it presents its own
1691 set of issues."

1692 A lawyer member asked "how fast can I run away from this?
1693 Trying to do everything everyone wants will be a real headache."
1694 And a judge remarked that Rule 68 seems to be falling away.

1695 *Ranking Priorities*

1696 Judge Bates suggested that the time had come to consider
1697 ranking the priority of these five items: Review of social-security
1698 claims; the demand procedure for jury trial, both in removed
1699 actions and generally; lawyer participation in jury voir dire;
1700 service of Rule 45 subpoenas; and Rule 68 offers of judgment.

1701 The first advice addressed all five. The Committee should
1702 press ahead with the social-security review topic. The jury demand

1703 questions should begin with an attempt to learn how often parties
1704 suffer an inadvertent loss of a desired jury-trial right. As to
1705 voir dire, Rule 47 could be written as the ABA proposes, but the
1706 amendment would not change judges' behavior. Exploring subpoena-
1707 service questions should be coordinated with the Criminal Rules
1708 Committee. There is not enough reason to reopen Rule 68 in general,
1709 but it would be interesting to see how other courts react to
1710 similar procedures. There is no need to act immediately.

1711 A lawyer member noted that courts divide on the availability
1712 of mail service for Rule 45 subpoenas. "There aren't that many
1713 cases." And some courts allow mail service only after attempting
1714 and failing to make personal service. The Committee should decide
1715 what it wants. Perhaps the jury-demand question could be explored
1716 by addressing removal cases separately from the general Rule 38
1717 demand question.

1718 A judge suggested that the Committee should take up the
1719 social-security review question. For Rule 38, it should attempt to
1720 determine how often parties forfeit the right to jury trial for
1721 failure to make timely demand. The remaining Rule 45, 47, and 68
1722 questions should be put on a back burner.

1723 Another lawyer member agreed with the first suggestion that
1724 not much is likely to be accomplished by revising Rule 47. It will
1725 be useful to explore inadvertent loss of the right to jury trial by
1726 failing to make a timely demand. And the Committee should look to
1727 the social-security review questions.

1728 Emery Lee and Tim Reagan addressed the difficulty of
1729 undertaking empirical research into the inadvertent loss of jury
1730 rights. "Jury trials are rare to begin with." There may not be a
1731 Rule 39(b) request to excuse an unintentional waiver — it may be
1732 difficult to find docket entries that reflect the problem. Getting
1733 useful information may not be impossible, but it will be difficult.
1734 It might work to look at reported cases and work backward from
1735 them. A judge observed that anecdotal information is available, but
1736 it will be difficult to distinguish between accident and choice —
1737 a party that knowingly failed to make a timely demand may come to
1738 wish for a jury trial and plead for relief from what is
1739 characterized as an inadvertent oversight. A judge observed that in
1740 cases challenging the effectiveness of a demand she rules that it
1741 makes no difference whether the demand was entirely proper. Another
1742 judge said that he has had two cases in which pro se litigants
1743 failed to make a timely demand; he ruled that they had not lost the
1744 right to jury trial.

1745 A lawyer agreed that it is almost impossible to figure out how
1746 often there is an inadvertent forfeiture of jury trial. But he
1747 asked "why should the right be lost by failing to meet a deadline?

1748 It may be deep in the case before you figure out whether you want
1749 a jury."

1750 A lawyer member reported that a quick on-line search of Rule
1751 39(b) cases suggests a general approach: a belated jury demand
1752 should be granted unless there is good reason to deny it. Examples
1753 of reasons to deny may be long delay, disrupting the court
1754 schedule, or burden on the opposing party.

1755 A further caution was noted. If we expand the right to jury
1756 trial without demand, the rule should deal with the fact that many
1757 contracts waive the right to demand a jury trial.

1758 Lauren Gailey reported that research has begun on these
1759 topics, including the history of the demand requirement, and Rule
1760 39(b). She noted that the Ninth circuit has a stringent test for
1761 granting relief under Rule 39(b). The research should be available
1762 soon.

1763 Judge Bates summarized the discussion of priorities. Social-
1764 security review issues lie at the top of the list. The work will
1765 move forward now. It may be that a way should be found to bring
1766 people familiar with these issues into the project.

1767 The jury demand questions will be pursued by finishing the
1768 research now under way in the Administrative Office. Empirical
1769 investigations also may be undertaken if a promising approach can
1770 be developed.

1771 The remaining three topics will be held aside for the time
1772 being. There is little enthusiasm for present renewal of the jury
1773 voir dire question. The Rule 45 subpoena question also will be on
1774 a back burner, recognizing that the question is manageable and that
1775 we likely will have to deal with it in the future as means of
1776 communication continue to develop. Short of more adventuresome
1777 approaches, a simple amendment to authorize service by mail may be
1778 considered. Rule 68 will not be reopened now, but developments in
1779 FLSA cases in the Second Circuit will be monitored.

IV
OTHER MATTERS

Pre-Motion Conference: 17-CV-A

Judge Furman has suggested consideration of Rule 16(b)(3)(B)(v). Rule 16(b)(3)(B) lists "permissive contents" for scheduling orders. The broadest potential amendment would change item (v) so that a scheduling order may:

> direct that before ~~moving for an order relating to discovery~~ making a motion,the movant must request a conference with the court;

This question was considered by the subcommittee that developed the package of case-management and discovery amendments that took effect on December 1, 2015. The subcommittee concluded that it would be better to encourage the pre-motion conference through Rule 16(b) in a modest way limited to discovery motions. Many judges require pre-motion conferences now, but many do not. The subcommittee was concerned that a more ambitious approach would meet substantial resistance.

More recently, the Committee has added to the agenda a suggestion that the encouragement of pre-motion conferences should be expanded to include summary-judgment motions. The purpose of the conference would not be to deny the right to make the motion, but to help focus the motion and perhaps illuminate the reasons why a motion would not succeed.

Judge Furman's suggestion would add to the list at least some motions to dismiss. A motion to dismiss for failure to state a claim is a leading candidate, along with similar motions for judgment on the pleadings or to strike. Motions going to subject-matter or personal jurisdiction could be added. Perhaps other categories could be included. But it does not seem likely that all motions should be included. Ex parte motions are an obvious example. So for many routine motions and some that are not so routine. What of a motion to amend a pleading? For leave to file a third-party complaint? To compel joinder of a new party?

Discussion began with a reminder that not long ago a deliberate decision was made to limit the new provision to discovery motions. "Judges do it in different ways." Some require a conference before filing a motion for summary judgment. Others require a letter informing the court that a party is considering filing a motion — judges use the letter in different ways. Judge Furman himself does not have a pre-motion requirement.

The Committee concluded that these questions should be left to

1822 percolate and mature in practice. It is too early to reopen more
1823 detailed consideration.

1824 *The Patient Safety Act: 17-CV-B*

1825 The Patient Safety Act creates patient safety organizations.
1826 Health-care providers gather and provide information to patient
1827 safety organizations about events that harm patients. The Act
1828 defines and protects "patient safety work product."

1829 The suggestion is that a Civil Rule should be adopted to
1830 repeat, almost verbatim, the statute that protects against
1831 compulsory disclosure of information collected by a patient safety
1832 organization unless the information is identified, is not patient
1833 safety work product, and is not reasonably available from another
1834 source. The purpose is to provide notice of a statute that
1835 otherwise might be ignored in practice.

1836 The chief reason to bypass this proposal is that the Civil
1837 Rules should not be used to duplicate statutes. A related but
1838 subsidiary reason is that a provision in the Civil Rules would be
1839 incomplete — the statute extends its protection to discovery in
1840 federal, state, or local proceedings, whether civil, criminal, or
1841 administrative.

1842 Beyond that, it seems likely that patient safety organizations
1843 themselves are well aware of the statute. They can bring it to the
1844 attention of anyone who demands protected information.

1845 The Committee agreed that this topic should be removed from
1846 the agenda.

1847 *Letter of Supplemental Authorities: 16-CV-H*

1848 This suggestion builds on Appellate Rule 28(j), which allows
1849 a party to submit a letter to provide "pertinent and significant
1850 authorities" that have come to the party's attention after its
1851 brief has been filed or after oral argument. The proposal is that
1852 a comparable procedure should be established for the district
1853 courts, backed by personal experience with wide differences in the
1854 practices now followed.

1855 The analogy to appellate practice is not perfect. Appellate
1856 practice has a clear structure for scheduling the parties' briefs.
1857 District-court practice includes a wide variety of events that must
1858 be addressed by the court, and the Civil Rules do not establish any
1859 particular system of briefing or time schedules for presenting a
1860 party's position. Immediate presentation and response are likely to
1861 be needed more frequently than in courts of appeals. Any attempt to
1862 establish a meaningful structure for submitting supplemental

1863 authorities might well depend on establishing a structure and time
1864 limits for presenting arguments in general.

1865 Discussion began with an appellate judge who, as the frequent
1866 recipient of Rule 28(j) letters, is skeptical about expanding the
1867 practice to the district courts. A district judge said that he has
1868 no "mechanism" for such submissions, and "I love them when they
1869 come in," but concluded that the time for a Civil Rule is not now.

1870 Another judge noted that the variety of motions confronting a
1871 district court, and the lack of a structure for briefing in the
1872 Civil Rules, weigh against exploring this suggestion further.

1873 The Committee agreed that this topic should be removed from
1874 the agenda.

1875 *Title VI, Puerto Rico Oversight Act: 16-CV-J*

1876 The Puerto Rico Oversight Act includes, as Title VI, a
1877 procedure for restructuring bond claims (including bank debt). An
1878 Oversight Board determines whether a "modification" qualifies. The
1879 issuer can apply to the District Court for Puerto Rico for an order
1880 approving a qualifying modification. The provisions for action by
1881 the district court are sketchy.

1882 The Act includes a Title III, with proceedings governed by the
1883 Bankruptcy Rules. The Bankruptcy Rules Committee has advised that
1884 the Bankruptcy Rules are not appropriate for Title VI proceedings.

1885 The suggestion is for adoption of a new Civil Rule 3.1. The
1886 suggestion arises from the provision in Title VI that the district
1887 court acts on an "application" by the issuer. Rule 3 directs that
1888 a civil action is commenced by filing a complaint. It is not clear
1889 what an "application" should include, but the proposal is that it
1890 is better to track the statute, so the new Rule 3.1 should direct
1891 that a civil action for relief under the Act "is commenced by
1892 filing an application for approval of a Qualifying Modification *
1893 * *."

1894 The puzzlement about Rule 3 reflects an issue that was
1895 addressed in the Style Project. At the time of the Project, Rule 1
1896 applied the Civil Rules to "all suits of a civil nature." It was
1897 amended to apply the Rules to "all civil actions and proceedings."
1898 Some proceedings are initiated by filing a petition or application,
1899 not a complaint. Whether a complaint is appropriate is a question
1900 governed by the substantive law. What should be required of an
1901 "application" embodied in a particular substantive statute also
1902 should be shaped by the substantive law.

1903 Strong arguments counsel against undertaking to draft a new

1904 Rule 3.1. Proceedings under the Act can be brought in only one
1905 district court, the District Court for Puerto Rico. Suitable
1906 procedures should be tailored to the overall practices of that
1907 court, and to the substantive provisions of the Oversight Act. That
1908 court knows its own practices, and will come to know the
1909 substantive provisions of the Act, better than any other court or
1910 this Committee can know them. In addition, it will soon confront
1911 applications under the Act and must respond to them. Procedures
1912 must be developed now. A new Civil Rule, at least in the ordinary
1913 course, could not take effect before December 1, 2019, and that
1914 schedule might be ambitious in light of the need to become familiar
1915 with local procedures and the substance of the modification
1916 process.

1917 The Committee agreed that this topic should be removed from
1918 the agenda.

1919 *Disclaimer of Fear or Intimidation: 16-CV-G*

1920 This suggestion would add a rule "requiring a judge disclaim
1921 fear or intimidation influence the judgment being written." It
1922 draws from concern that a judge may be influenced by forces not
1923 perceived, such as use of a horn antenna with a microwave oven
1924 Magnetron as a beam-forming wireless energy device.

1925 The Committee agreed that this topic should be removed from
1926 the agenda.

1927 *"Nationwide Injunctions": 17-CV-E*

1928 This suggestion urges adoption of a new Rule 65(d)(3):

1929 (3) *Scope.* Every order granting an injunction and every
1930 restraining order must accord with the historical
1931 practice in federal courts in acting only for the
1932 protection of parties to the litigation and not
1933 otherwise enjoining or restraining conduct by the
1934 persons bound with respect to nonparties.

1935 Although the proposed rule ranges far wider, the supporting
1936 arguments are presented primarily through the draft of a
1937 forthcoming law review article. The article focuses on injunctions
1938 issued by a single district judge, or by a single circuit court,
1939 that restrain enforcement of federal statutes, regulations, or
1940 official actions throughout the country.

1941 Examples are given of an injunction that restrained
1942 enforcement of an order by President Obama and another that
1943 restrained enforcement of an order by President Trump. The reasons
1944 advanced for prohibiting "nationwide" injunctions are partly

1945 conceptual and partly practical.

1946 On the practical side, it is urged that a single judge or
1947 circuit should not be able to bind the entire country by an order
1948 that may be wrong. The intrinsic risk of error is aggravated by the
1949 prospect of forum-shopping for favorable districts and circuits;
1950 the risk of conflicting injunctions; and "tension" with established
1951 doctrines that reject nonmutual issue preclusion against the
1952 government, establish important protective procedures when relief
1953 is sought on behalf of a nationwide class under Civil Rule
1954 23(b)(2), deny judgment-enforcement efforts by nonparties, and deny
1955 any stare decisis effect for district-court decisions.

1956 On the conceptual side, it is urged that the Judiciary Act of
1957 1789 limits federal equity remedies to traditional equity practice.
1958 Some adjustments must be made to reflect the fact that there was
1959 but a single Chancellor for all of England, while now there are
1960 many federal-judge chancellors. There also are extended arguments
1961 based on Article III justiciability concerns. Article III is seen
1962 to limit remedies as well as initial standing. It confers judicial
1963 power only to decide a case for a particular claimant. Once that
1964 controversy is decided, "there is no longer any case or controversy
1965 left for the court to resolve."

1966 This suggestion raises many questions. It is well argued. But
1967 the questions go beyond those that may properly be addressed by
1968 "general rules of practice and procedure" adopted under the Rules
1969 Enabling Act. Appropriate remedies are deeply embedded in the
1970 substantive law that justifies a remedy. If justiciability limits
1971 in Article III are involved, a rule on remedies would have to
1972 recognize, and perhaps attempt to define, those limits.

1973 Additional questions are posed by the broad generality of the
1974 proposed rule, which sweeps across all substantive areas.

1975 The Committee agreed that this topic should be removed from
1976 the agenda. It also agreed, however, that it will consider any
1977 suggestions that may be made by the Department of Justice to
1978 address concerns it may advance for possible rule provisions.

1979 *Rule 7.1: Supplemental Disclosure Statements*

1980 Rule 7.1(b)(2) directs that a disclosure statement filed by a
1981 nongovernmental corporate party must be supplemented "if any
1982 required information changes."

1983 The disclosure provisions of the several sets of rules were
1984 adopted through joint deliberations aimed at producing uniform
1985 rules. Criminal Rule 12.4(b)(2) now requires a supplemental
1986 statement "upon any change in the information that the statement

1987 requires." The slight differences in style are immaterial.
1988 "[C]hange" in the Criminal Rule and "changes" in the Civil Rule
1989 bear the same meaning.

1990 The Criminal Rules Committee is considering an amendment of
1991 disclosure requirements as to an organizational victim under
1992 Criminal Rule 12.4(a)(2). In the course of its deliberations it has
1993 proposed an amendment of Rule 12.4(b)(2) to address the situation
1994 in which facts that existed at the time of an initial disclosure
1995 statement were not included because they were overlooked or not
1996 known. The underlying concern is that the present rule does not
1997 require a party to file a supplemental statement when it learns of
1998 facts that existed at the time of the initial statement because
1999 there is no "change" in the information.

2000 The question for the Civil Rules Committee comes in three
2001 parts.

2002 The first question is whether a supplemental disclosure
2003 statement should be required when a party learns of pre-existing
2004 facts that were not disclosed. The answer is clearly yes.

2005 The second question is whether the present rule text requires
2006 a supplemental statement. There is a compelling argument that it
2007 does. Even if the facts have not changed, information about them
2008 changes when a party becomes aware of them. The purpose of
2009 disclosure requires supplementation.

2010 The third question is whether to amend Rule 7.1(b)(2) even if
2011 it now provides the proper answer. One reason to amend would be
2012 that it is ambiguous. It does not seem likely that a court would
2013 accept the argument that a supplemental statement is not required.
2014 It seems likely that a rule amendment would not be pursued if the
2015 question had come in through the mailbox. But another reason to
2016 amend is to maintain uniformity with the Criminal Rules if the
2017 proposed amendment is recommended for adoption. The Appellate Rules
2018 Committee will soon consider adoption of an amendment to maintain
2019 uniformity with the Criminal Rule. If both committees seek to
2020 amend, it likely is better to amend Civil Rule 7.1(b)(2) as well.
2021 And it likely is better to adopt the language of the Criminal Rule
2022 rather than engage in attempts to consider possibly better drafting
2023 for all three rules.

2024 The Committee agreed that uniformity is a sufficient reason to
2025 pursue amendment of Civil Rule 7.1(b)(2) if the other committees go
2026 ahead with proposed amendments. The amendment might be pursued in
2027 the ordinary course, with publication for comment this summer. But
2028 it seems appropriate to advise the Standing Committee that the
2029 amendment might be pursued without publication to keep it on track
2030 with the Criminal Rule. Publication and an opportunity to comment

2031 on the Criminal Rule may well suffice for the Civil Rule; there is
2032 little reason to suppose there are differences in the circumstances
2033 of criminal prosecutions and civil actions that justify different
2034 rules on this narrow question. That seems particularly so in light
2035 of the view that the amendment makes no change in meaning.

2036 If the Criminal and Appellate Rules Committees pursue
2037 amendment, the Rule 7.1(b)(2) question will be submitted to this
2038 Committee for consideration and voting by e-mail ballot.

2039 **NEXT MEETING**

2040 The next Committee meeting will be held in Washington, D.C.,
2041 on November 7, 2017.

2042 Respectfully submitted,

2043 Edward H. Cooper
Reporter