MINUTES
CIVIL RULES ADVISORY COMMITTEE
NOVEMBER 1, 2018

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

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

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

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

April Minutes

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

Legislative Report

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

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

Rules Amendments in Congress

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

Judge Bates also noted that as published in August, the proposal to amend Rule 30(b)(6) directs the parties, or a nonparty subjected to a deposition subpoena, to confer about the number and description of the matters for examination, and also to discuss the identity of the persons the organization named as deponent will designate to testify for it. Few comments have come in so far, but there are likely to be a fair number. The direction to discuss the identity of the witnesses has encountered substantial resistance. "We look forward to comments from all parts of the public."

Report of the MDL Subcommittee

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

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

The judges at the JPML meeting were perhaps more interested than the Subcommittee has been in some of the familiar topics that have been on the Subcommittee's short list for particular

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

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

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

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

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

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

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

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

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

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

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

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

Another judge reported that one MDL judge said he did not want to go through hundreds of fact sheets. And there was a sense that the time frame for fact sheets could be a problem — a plaintiff's attorney may not be able to gather the information requested by a fact sheet within, for example, 60 days after filing. Still, there was agreement that fact sheets work well.

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

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

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

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

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

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

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

Some proposals made to the Committee, or reflected in pending legislation, would require the judge to deal with each plaintiff on the basis of the fact sheet. In proceedings with large numbers of plaintiffs, that is a real problem for the judge. In the same vein, a Committee member asked whether it is clear that plaintiffs have an adequate opportunity to find the facts they are required to provide in fact sheets? If we do a survey, we should ask whether MDL judges are satisfied that plaintiffs have a fair chance, including through discovery.

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

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

A Committee member asked about the views of MDL judges about § 1292(b) — should we find out more by including this as a question in any survey that may be made? A judge said that most MDL judges think that § 1292(b) is adequate to the appeal needs of MDL proceedings. Another judge suggested that if MDL judges are surveyed, it would be good to learn how many requests are made for § 1292(b) appeal certification, and how many are granted by the district court and then the court of appeals. An example of a recent district-court certification was noted. Another question could ask about the effects of an accepted appeal on delay. In a class action, not an MDL, a § 1292(b) appeal was certified from an order that, choosing among conflicting circuit precedents, denied summary judgment. The appeal was accepted. The decision was made 27 months later. Delay of that magnitude "gives pause." In an MDL, the same judge denied a motion to dismiss that asserted state-law claims were preempted, and denied certification for appeal because the answer seemed clear and the first bellwether trial was almost ready to begin.

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

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

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

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

Defendants also urge that delay can be reduced if appeals are expedited. But the committees have been reluctant to adopt rules that require expedition on appeal. There are too many competing demands on the time of appellate courts. When, for example, would an interlocutory appeal in an MDL proceeding deserve priority over criminal appeals? A Committee member noted that rule 23(f) appeals are attempted in almost every class action, and that the impact is delay. We might try to find out more about the frequency of § 1292(b) appeals in MDL proceedings. It is important to remember that the cost of delay is not simply money. In medical product cases delay may mean that some plaintiffs die before the case resolves. "If we're looking at a very thin slice of cases, why not be transsubstantive"?

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

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

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

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

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

A Committee member asked whether there is an interaction between unsupported claims and the composition of the Plaintiffs' Steering Committee. Judge Dow responded that the Subcommittee has often heard that having a large number of clients is a ticket to a role on the steering committee.

"Some lawyers may seek to pump it up by advertising." But judges do not think we need a rule.

This view was expanded by another judge. Very experienced judges think they are handling the appointment of steering committees quite well. They look to the credentials of the lawyers who vie for appointment. Some make one-year appointments, a practice that can easily lead to flushing out lawyers who have garbage lists of clients. And a lot of attention is being paid to the repeat-player problem, both by MDL judges and the JPML. Still another judge pointed out that MDL judges are making active efforts to expand the ranks of steering committee participants, looking to expand the MDL bar to more lawyers and more diverse lawyers. A website is available and the JPML provides resources.

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

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

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

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

A judge noted one response to the risk that cases set for bellwether trials will be dismissed or settled to skew what was intended to be a representative sample: he told the parties that once a list of bellwether cases had been set, he would end the bellwether process if the cases started to dismiss or settle, and would remand them all for trial. Another approach would be to allow defendants to substitute a case for one dismissed by the plaintiff, and to allow plaintiffs to substitute a case for one settled by the defendants.

V. Settlement: Judge Dow began the discussion of settlement by noting that many MDLs include class actions, so that settlement brings compliance with Rule 23(e). Many non-class settlements reflect involvement of the judge, but without the Rule 23 process: is this a problem? The Subcommittee members at the October 31 conference made the possibility of a rule regulating

settlement a major focus. There was a lot of discussion. But the Subcommittee has not yet given much thought to these questions, nor developed them as well as might be.

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

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

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

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

VI. Third-Party Litigation Funding: Judge Dow opened the topic of third-party funding by noting that the Subcommittee has benefited from several meetings that included representatives of litigation funding firms. There is a broad diversity among funding arrangements. Often a sharp distinction is drawn between two settings. One involves small loans made directly to individuals in ordinary litigation. The other involves large loans made to litigants or law firms in complex or high-stakes actions. Many models of disclosure have been advanced. Judge Pollster's order in the Opioids MDL directing disclosure of funding agreements for in camera inspection, supplemented by affidavits about actual practice under the agreements, is one model. Another is disclosure to all parties — perhaps of the agreements themselves, or perhaps only of the fact of funding and the identity of the funder. Yet another is to supplement disclosure with some discovery. The purposes of disclosure also may vary. One purpose is to support recusal decisions by the judge. Another is to decide whether a funder should be involved in settlement conferences. Yet another is to determine whether a funder has influence or even a veto power over settlement.

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

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

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

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

Professor Marcus suggested that it is useful to consider actual current practice in framing a rule. The Rule 5 limits on filing discovery materials with the court, for example, were adopted after about half of the districts had adopted rules that limited or prohibited filing. "You've got to put the sidewalks where people are walking." But it would be a mistake to approach disclosure of third-party funding only for MDL proceedings. A broader approach should be considered. Judge Bates followed up this advice by reminding the Committee that third-party funding has been lodged with the MDL Subcommittee because disclosure had been proposed as part of package proposals for MDL proceedings, and because this tie avoided the need to form a third major subcommittee. The Subcommittee recognizes that the inquiry is not limited to MDL proceedings, and that funding occurs in many forms.

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

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

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

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

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

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

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

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

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

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

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

Social Security Disability Review

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

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

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

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

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

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

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

The draft does not include several provisions requested by the Social security Administration. It does not set page limits for briefs. It does not prohibit the practice in some courts that require the parties to file a joint statement of facts, although that practice should be found inconsistent with the pleading and briefing rules. Nor does it take up the proposal to address requests for attorney fees based on services on judicial review under § 406(b).

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

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

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

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

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

sense to permit them to join in a single action for review.

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

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

It is important to remember that much of the delay in processing social security disability claims occurs in the administrative process. New rules for district-court review will not affect that, and are not likely to affect the high rate of remands. It is important to provide as efficient and prompt review as possible, but the Committee should take care to remember that new rules will not do much to cure problems that primarily arise from an understaffed administrative structure.

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

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

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

the Commissioner to answer by filing the administrative record and stating any affirmative defenses, making it optional whether to respond to the allegations in the complaint.

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

The first information that the complaint must include is the plaintiff's name and address, along with the last four digits of the plaintiff's social security number. It also must identify "the person on whose behalf — or on whose wage record — the plaintiff brings the action." Serious questions have been raised about requiring the address and the last four digits of the social security number. Plaintiffs in other actions are not required to provide these details about themselves, and there is an inevitable risk in providing them. The Social Security Administration insists that it needs these details to make sure that it has identified the proper administrative proceeding and can file the correct record. With more than a million administrative proceedings each year, there often are many claimants with the same name. This insistence apparently reflects the absence of any other means to identify the administrative docket, but it might be asked whether the Administration should protect itself by developing a separate system to identify individual proceedings.

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

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

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

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

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

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

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

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

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

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

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

A Committee member observed that a bare bones complaint seems to work: why require more? The proceeding is really an appeal. It should work to frame the complaint as a notice of appeal. The draft rule creates unnecessary complexity. We can call it a complaint, to conform to the statutory direction that review is initiated by commencing a civil action and to Rule 3. So what is the need to plead more? Do local rules now require more? This ties to the answer. The Social Security Administration believes that the administrative record is a sufficient answer. In practice, complaints typically are one page, or at most two. They say "I am me. I am appealing."

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

A judge noted that the local rule in his court has five paragraphs detailing what must be in the opening brief. If the brief asks for a remand to take additional evidence, it must describe what the evidence is. Local rules like this are likely to persist so long as they are not inconsistent with a

set of simple national rules. A short national rule may not save any time for the Social Security Administration.

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

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

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

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

The next suggestion was that these questions might be put aside by adopting a practice analogous to a notice of appeal, addressed by filing the administrative record. "Why bother to plead more"? But is there a problem with affirmative defenses? — if they are not pleaded, the plaintiff will file the opening brief without addressing them. It does not seem likely that many cases will involve affirmative defenses. Res judicata is one possible example. Still further, is there a risk that the Administration will not yet have identified possible affirmative defenses when it files the answer? Is it likely that a bare bones complaint will give the Administration notice of what affirmative defenses might be available? Res judicata, for example, may not be apparent on the face of a complaint that does not note that review of the same administrative decision was sought in a separate action. Other issues may arise from filing in the wrong district, something that likely would be apparent if the complaint must include the plaintiff's address, but not otherwise, especially as plaintiffs may move after the date of the address provided in the administrative proceeding. Exhaustion of administrative remedies also might be an issue, although in this context it might be treated as a matter of jurisdiction by analogy to the requirement that there be a final administrative decision. This part of the discussion concluded by noting that the risk is that affirmative defenses will be waived if not timely pleaded, and by asking whether anyone present had seen a review action

that included an affirmative defense. No one had. But it was suggested that in some districts it may be routine to advance half a dozen affirmative defenses.

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

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

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

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

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

The plaintiff's brief is followed by the Commissioner's brief, due 30 days after service of the plaintiff's motion and brief. This brief too must support arguments of fact by citations to the record.

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

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

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

The time periods suggested by the draft were questioned. One court has a local rule that provides 60 days from answer to opening brief, and the court frequently gets requests for an additional 30 days. The same holds for the Administration's answer. The Subcommittee actually began with 60-day periods, but thought it unwise to allow so much time. It is important to expedite

district-court proceedings for the benefit of plaintiffs. The importance of helping plaintiffs toward speedy resolution is reflected in the six-month reporting period for motions that remain undecided.

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

Judge Bates thanked the Subcommittee for its work.

Rule 73: Consent to Magistrate Judge Trial

Judge Bates introduced the question that has been raised about Rule 73(b)(1). The Rule applies when a magistrate judge has been designated to conduct civil actions or proceedings. It implements the requirement of 28 U.S.C. § 636(c)(2) that when an action is filed the clerk shall notify the parties of the availability of a magistrate judge to exercise trial jurisdiction. "The decision of the parties shall be communicated to the clerk of court. * * * Rules of Court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." Rule 73(b)(1) seeks to protect voluntariness by providing that "the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral."

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

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

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

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

Discussion began with a suggestion that the part in brackets should be retained in the rule. There is a risk that some party may seek an advantage by filing a separate consent. Another judge observed that there are a lot of pro se complaints, and pro se plaintiffs do not understand the difference between a reference for trial and a reference for discovery. The prohibition on consents filed by fewer than all parties should remain in the rule. Yet another judge observed that in the District of Massachusetts pro se plaintiffs get separate notices. They are instructed to send consents to the magistrate judge's clerk, who gathers consents from all sides.

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

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

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

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

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

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

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

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

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

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

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

Finally, the question of consent by late-added parties might be addressed. The agenda materials sketch two possible approaches. One would require the new party to give consent within 30 days of joining the action. That approach might disrupt referrals more frequently than the alternative of requiring that a refusal be filed within 30 days. Neither approach would protect anonymity. Anonymity could be protected by requiring all parties, old and new, to file a joint consent after a new party is joined. That would open the way for second thoughts by a party dissatisfied with the direction of proceedings before the magistrate judge.

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

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

Rule 7.1 Disclosure Statements

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

Intervenors: The first questions arise from proposals before other advisory committees. A proposal has been made to amend Appellate Rule 26.1 to require a disclosure statement from a nongovernmental corporation that seeks to intervene. This proposal has been published, approved for adoption, and received by the Supreme Court. It is on track to take effect on December 1, 2019. A proposal to adopt a parallel amendment to Bankruptcy Rule 8012(b) was published this summer.

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

reason to make a parallel change in Rule 7.1(a):

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

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

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

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

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

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

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

The proposal is inspired by experience with the difficulty of determining the citizenship of some forms of entities for the purpose of establishing diversity jurisdiction. Judge Zilly describes

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

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

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

The proposal extends beyond LLCs to a trust or a similar entity. Here too the questions extend beyond diversity jurisdiction to information useful in knowing possible grounds for recusal. A wide variety of entities may be involved. Some local court rules list many of them. Others speak generally of disclosing anyone with a financial interest in the outcome. Discussion of financial interests ties back to the MDL Subcommittee's exploration of proposals to require disclosure of third-party litigation funding arrangements. It may be time to ask whether these broader issues should be considered by an all-committees group.

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

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

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

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

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

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

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

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

Several sketches of possible rule amendments were provided to illustrate the approaches that might be taken if *Hall v. Hall* is to take a place on the agenda. In short, it may be best to amend both Rule 42(a) and Rule 54(b). One approach would be to revise Rule 42(a)(2) to provide that the court may "consolidate the actions for all purposes." Anything less than melding the actions into a single action would be covered by (a)(1) and (3): "(1) join for hearing or trial any or all matters at issue

in the actions; * * * (3) issue any other orders to avoid unnecessary cost or delay." Rule 54(b) would be amended in parallel: "When an action — including one that consolidates [formerly separate] actions under Rule 42(a)(2) — presents more than one claim for relief * * * or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines * * *."

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

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

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

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

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

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

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

Naming Parties in Social Security Review Opinions

Judge Bates reported a recommendation by the Committee on Court Administration and Case Management that opinions in social security review cases should identify the claimant only by first name and last initial. The recommendation is initially addressed to courts, but includes, 18-CV-L, a suggestion that Rule 5.2(c) might be amended. Rule 5.2(c) limits remote electronic access by nonparties to the court file, but subdivision (c)(2)(B) expressly allows remote electronic access to

the court's opinion. Opinions often include substantial amounts of personal and medical information. The recommendation is being made to all courts without awaiting development of a national court rule. There are good reasons to hesitate about writing into Rule 5.2 provisions that dictate opinion-writing practices. It may be wise to wait to see how courts respond. The agenda materials include as an example a proposal by the Second Circuit Local Rules Committee that would respond to the CACM suggestion.

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

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

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

Time to Decide Motions

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

This item will be removed from the docket.

Pilot Projects

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

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

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

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

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

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

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

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

Next Meeting

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

Closing

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

Respectfully submitted,

Edward H. Cooper
Reporter