MINUTES
CIVIL RULES ADVISORY COMMITTEE
April 1, 2020

The Civil Rules Advisory Committee met by Zoom teleconference on April 1, 2020. The meeting was originally noticed for an in-person meeting in West Palm Beach, Florida, but was renoticed in the Federal Register for a remote meeting by Zoom, with the opportunity for public access by audio feed. 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; 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; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., Allison A. Bruff, Esq., S. Scott Myers, Esq., and Bridget M. Healy, Esq., represented the Administrative Office. Zachary Prorianda, Esq., staff of the Committee on Court Administration and Case Management, also attended. Dr. Emery G. Lee, and Tim Reagan, Esq., represented the Federal Judicial Center. Seth Fortenberry, Supreme Court fellow, also attended.

Observers are identified in the attached Zoom attendance list.

Judge Bates noted that more than fifty participants and observers had joined the new adventure of meeting by Zoom, "a platform made popular in these trying times." He expressed thanks to the Administrative Office staff for the untiring efforts that had set up the meeting and provided practice sessions to facilitate easy participation by Committee members. He noted that Brittany Bunting, a new member of the Administrative Office staff, had lead responsibility for planning this meeting, and will be planning future meetings.

Judge Bates also extended a welcome to Susan Y. Soong, Clerk for the Northern District of California, Laura Briggs's successor as clerk representative. She was unable to participate in this meeting because of emergency demands at her court.

Judge Bates also noted the conclusion of rules committee terms for several veterans. Judge Campbell served for many years as a member and then Chair of the Civil Rules Committee, and this year will conclude four years as Chair of the Standing Committee. "No individual has had a greater impact on the Rules Enabling Act process in the last 15 to 20 years." Judge Dow is completing his second term. His work as chair of the class-action and then MDL subcommittees has made him perhaps the second most influential member in this year's graduating class. Virginia Seitz, who has served on several subcommittees and worked with the pilot projects has been an essential member. Judge Goldgar, who is completing his

second term as a member of the Bankruptcy Rules Committee, has helped with many aspects of the Civil Rules work, including e-filing.

Finally, Judge Bates said that his term as Committee Chair is concluding this year. He has greatly enjoyed working with all members of the Committee and support staff, and will miss the work and engaging company.

Judge Bates also noted that draft minutes for the Standing Committee's January meeting are in the agenda materials, and reflect a generally positive reaction to the prospect that this Committee may advance a recommendation to publish for comment a set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The Judicial Conference held its March meeting by remote means of communication, with no Civil Rules business on the agenda.

Looking forward to new Civil Rules, amendments of Rule 30(b)(6) have been advanced from the Judicial Conference to the Supreme Court. If the Court prescribes them and Congress does not act, they will go into effect on December 1, 2020. Amendments of Rule 7.1 are on today's agenda. If the Committee recommends them for adoption and the Standing Committee approves, they will be on track to take effect no earlier than December 1, 2021.

October 2019 Minutes

The draft Minutes for the October 29, 2019 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Judge Bates said that there is not much present action in Congress on bills that would affect the Civil Rules. The CARES Act includes some small funding for the judiciary. It also includes provisions for video teleconferencing for some proceedings that were much improved with the help of Judge Campbell and the Criminal Rules Committee and its Reporters.

Judge Campbell prefaced his report on the CARES Act by saying that he will miss participating in the Civil Rules work, recalling the observation made by Peter Keisler that although there are term limits on committee membership, there are no limits on friendship. He feels pride for all Committee members.

Involvement with the CARES Act began two weeks ago when the Southern District of New York, and particularly Judge Furman — a member of the Standing Committee — became concerned about how the court could function in a time of pandemic. The CARES Act in its original form would have inserted direct amendments of the Criminal Rules that had no sunset provisions. The Criminal Rules Committee

worked with Judge Campbell, Judge Furman, and Judge Bates to formulate statutory provisions, not Rules amendments, for video and teleconferencing in twelve categories of criminal proceedings. These provisions include "sunset" clauses. The provisions take effect upon findings made by the Judicial Conference, and then take effect in a particular district for ten categories of proceedings on authorization of the chief judge. They take effect for felony pleas and sentencing only if the chief judge finds a threat to public health and safety, and the presiding judge finds that sentencing cannot be deferred without injustice. An example of injustice would be the prospect of a sentence to time served that would result in immediate release. Consent of the defendant is required for all twelve categories. Initial reports are that defense counsel around the country are consenting. The Act also directs the Judicial Conference and the Supreme Court to consider rules provisions that would enable similar emergency measures in the future.

Judge Bates said that the Civil Rules Committees and others will be considering rules that would authorize emergency measures. He will appoint a subcommittee, looking for progress that is expedited by extending over a period of months, not years. Volunteers are welcome. There will be technology issues, including public access and the presence of a detained defendant.

Social Security Disability Review Subcommittee

Judge Bates introduced the report of the Social Security Disability Review Subcommittee, noting that it had been working for nearly three years with Judge Lioi as chair. They have produced a modest but thoughtful draft of Supplemental Rules. The question at this meeting is whether to recommend publication of these rules for comment. The risks and problems tend to collect around issues that are characterized as transsubstantivity. "This is not an easy question. The views of the players are not uniform." But encouragement may be found in the reactions of several Standing Committee members that favored publication, at least as a means of gathering more information.

Judge Lioi introduced the Subcommittee Report. The subcommittee has received extensive input from the Social Security Administration, representatives of the Administrative Conference, the National Organization of Social Security Claimants Representatives, the American Association for Justice, magistrate judges and a few district judges, and academics. The Style Consultants have reviewed the current draft.

The subcommittee proceeded cautiously, working to develop neutral rules that will be easy to understand and follow. Rule 1 defines the scope of the rules. Rule 2 establishes simplified pleading standards for the complaint. Rule 3 adopts a procedure that replaces Civil Rule 4 service of the summons and complaint with electronic notice from the court. Rule 4 authorizes an answer

limited to the administrative record and any affirmative defenses, and describes motion practice. Rule 5 is in many ways the central feature, providing for an appeal-like procedure that presents the action for decision on the briefs. Rules 6 through 8 address the sequence of the briefs. The subcommittee deliberately chose to omit any page limits for the briefs.

The Committee decided at the meeting last October to ask for Standing Committee discussion about the transsubstantivity question. Several members suggested that it would be useful to publish proposed rules as a means of gathering additional information.

The subcommittee decided that the transsubstantivity question cannot be avoided by developing a set of rules for all administrative review actions in the district courts. There is too much variety of agencies and substantive law, and too many different mixtures of reliance on an administrative record with independent court proceedings. But the committee note for the proposed rules observes that, apart from the Rule 3 provision for electronic notice to SSA, a court might find it useful to adapt the social security review practice to other administrative review proceedings.

The Rules draft is nearly ready for publication. A few minor drafting issues remain, and will be addressed by the subcommittee.

The reasons for moving forward to publication should be considered alongside the reasons for abandoning the work.

Good, nationally uniform rules for social security review cases are intrinsically desirable. The project began with a request addressed by the Administrative Conference of the United States to the Judicial Conference, supported by an extensive empirical study and analysis by Professors Jonah Gelbach and David Marcus. The Social Security Administration continues to offer strong support, even after its proposed draft rules were ruthlessly revised and trimmed back by the subcommittee. SSA litigates these actions in all district courts, and encounters difficulties both with attempts to process them through the general Civil Rules and with some of the local practices and local rules that have been adopted to modify or displace the Civil Rules. The draft is neutral as between claimants and SSA. The Department of Justice has developed a model local rule that closely reflects earlier subcommittee drafts and recommends it for adoption by district courts. These review actions are just that — proceedings for review on an administrative record that should be recognized and treated as appeals, not original trial proceedings. Judges who have reviewed successive subcommittee drafts have been receptive; some of them already adopt practices closely similar to the draft rules, while others express frustration with the effort to provide review within the framework of the general Civil Rules. The sheer volume of these cases makes it appropriate to adopt substance-specific rules; the common

figures are that they number between 17,000 and 18,00 actions a year, accounting for 7% to 8% of the federal civil docket. Finally, publishing the proposals does not commit the rules committees to recommending adoption; it would provide additional information to support the decision whether to recommend adoption.

The arguments against advancing to publication begin with the tradition that the Civil Rules should be transsubstantive, designed to apply equally to all actions. One of the concerns that underlie this tradition is that substance-specific rules may favor one identifiable set of interests over competing interests, or at least be perceived in that light. These rules may be perceived in that way, in part because one SSA hope is that the uniform and efficient procedure they embody will provide some measure of relief to an inadequately funded and overworked legal staff. Claimants' representatives express a fear that district and magistrate judges like the particular procedures they have worked out, and will be unhappy and thus less efficient if forced into a uniform national procedure. The affection for local practices, moreover, may present an insurmountable obstacle in some districts that persist in their established habits, ignoring new national rules. And the Department of Justice fears that adopting this set of substance-specific rules will prompt requests by special interest groups for their own favorable sets of rules.

One way of framing these competing arguments is to recognize a presumption against substance-specific rules. We have some substance-specific rules now. There is no absolute prohibition. But it is wise to adhere to something of a presumption that can be overcome only by strong reasons for adopting a new set of substance-specific rules. On this approach, the question is whether the reasons that support a set of supplemental rules for § 405(g) review actions are strong enough to overcome the general presumption as well as the specific negative arguments.

This initial presentation was followed by a reminder that the subcommittee is proposing publication. A potential recommendation to adopt is not yet an issue. Publication will yield additional information on the wisdom of adoption. It is reasonable to be concerned that adding yet another and significant set of substance-specific rules will be seen as a precedent supporting adoption of still other sets under pressure from interest groups. But that concern is offset by the fact that there are other specialized rules, both broad and narrow. In a different direction, it is also wise to remember the prospect that new national rules may not be fully successful in driving out eccentric local practices. At a minimum, local practices are likely to continue to regulate such matters as the length of briefs. And some critics may believe that the rules "were pushed by one side of the 'v,' and were pushed to make life easier for SSA lawyers."

General discussion began with a reiteration of the Department of Justice concerns that adoption of these rules would perhaps

influence others to seek specialized rules. A close parallel might be found in arguing for rules for all Administrative Procedure Act cases. That could be a real problem. And local rules will persist; concerns about diverse practices will not be fully addressed. Publication, moreover, "implies imprimatur," a thumb pushing the scales toward eventual adoption.

Professor Coquillette said that the subcommittee has done a great job. "I'm an apostle of transsubstantive rules." There have been a number of efforts to get specialized rules. Fighting them off at times is hard work — pressure in Congress for rules to address perceived problems with "patent troll" litigation provides a recent example. But the subcommittee draft is really good work, particularly in the choice to frame the rules as a new set of Supplemental Rules, not as rules inserted into the body of general Civil Rules. They are worthy of publication.

A committee member expressed continuing concern about departing from transsubstantivity, but suggested that a further articulation of the reasons why the general Civil Rules are not well suited to § 405(g) actions would help. Might the subcommittee help?

Judge Lioi responded that it is significant that the proposal originated in the Administrative Conference, an independent body that has no self-interest in these questions, as well as winning support from SSA.

But it was observed that it may be better not to plead the case in the committee note. There is often a temptation to draft a note as in part a work of advocacy during the publication process, adding provisions that go beyond explaining the purpose and working of new rules provisions. But that temptation is better resisted. Carrying forward words of advocacy may generate a risk of over-eager implementation as litigants and courts adjust to new provisions.

It also was observed that many courts process § 405(g) review actions through summary-judgment procedures. That can work well if it means presentation through briefs that, in the manner of point-counterpoint motions for summary judgment, present the positions of the claimant and SSA through competing but specific references to the administrative record. But Rule 56 itself does not fit. It could generate confusion if a party is misdirected by an attempt to follow the inapposite Rule 56(c) procedures for presenting materials for decision. Far worse, it would be flat wrong to invoke the standard for summary judgment, that there is no genuine dispute of material fact. A genuine dispute defeats summary judgment, but mandates affirmance of an SSA decision as supported by substantial evidence on the record. Apart from Rule 56, SSA counts nine districts that insist that the claimant and SSA provide a joint statement of facts to provide a basis for decision. Claimants and SSA alike agree that this procedure is at best a great deal of

unnecessary work, and at worst provides an unsatisfactory basis for decision.

Another committee member provided a reminder that the summary-judgment procedures of Rule 56 do not work well. And rather than joint statements of fact, some courts demand individual statements of fact in forms that also do not work well.

The committee member who asked for further advice found these remarks helpful, but then asked how are § 405(g) review actions different from other administrative proceedings that come to the district courts? The fact that SSA supports the proposal is not of itself sufficient to distinguish § 405(g) actions from other administrative review actions.

A committee member responded that it is not only SSA that supports the proposal. The project was initiated by the Administrative Conference, a disinterested and neutral body. More importantly, half of his court's docket is comprised of administrative review actions. There is a great variety among those cases, often involving specific substantive statutes. There are big cases and small cases. There are cases that require something more for decision than the administrative record. The Freedom of Information Act is a source of many cases that are largely standardized in some dimensions, but that require processing before they are ready for decision. A general rule for all administrative review actions in the district courts "would be a big undertaking."

A different committee member recalled the volume of these cases, rising to 17,000 or 18,000 a year and accounting for 7% to 8% of the federal civil docket. Can the fear of stimulating other proposals for substance-specific rules be reduced by the lack of any other category of administrative decisions that mount to like numbers?

The first response was that the Department of Justice concern is not limited to special rules for specific categories of administrative review. It extends to all types of civil actions. More narrowly, the subcommittee considered this question but was unable to identify any category of administrative review actions with anything like comparable numbers. And reviewing the Administrative Office annual accounting of the types of cases that fill district-court dockets suggests that there is no room left for anything like comparable numbers of any particular category of administrative review actions.

Concerns returned about the reactions of some claimants' attorneys who fear that the rules favor SSA. What basis is there for these concerns? Judge Lioi responded that there is no basis. The reaction seems to be based on no more than suspicions based on the long and very detailed draft rules that SSA proposed at the beginning of the project. Some provisions drew particular ire, such as one that limited a claimant's brief to fifteen pages. Another

example was a proposed rule for determining awards of attorney fees for services in the district court. The rule was long and complex, addressing many details in ways that suggested an attempt to resolve disputed matters by rule provisions that could be adopted, if at all, only after deep inquiries into matters specific to social security review actions. The subcommittee has pared away all of the complexities, leaving a compact set of rules that establish efficient procedures for the core of an appellate review process. All sides, claimants, SSA, and the courts will benefit from the efficiencies.

Similar observations followed. There is not much more to explain such suspicions as persist. The fact that SSA is pushing the project makes some claimants reluctant, fearing that somehow the rules will confer unintended benefits on SSA. These fears may draw in part from the fact that one of SSA's hopes is that SSA will achieve some efficiencies in the staff attorney resources devoted to complying with the wide variety of local procedures.

Another committee member agreed that increased efficiency should not disadvantage claimants. It will work to the advantage of all sides.

Discussion turned to more specific questions.

Rule 1(a) defines the scope of the supplemental rules. They apply to a § 405(g) action "that presents only an individual claim." An action that extends beyond this bare model falls outside the supplemental rules and is governed in all matters by the ordinary Civil Rules. But are there cases that present only an individual claim where this is not the right model for the procedure? A plaintiff is allowed to plead more than the bare bones elements that identify the claimant and SSA proceeding. But may there be a need for discovery? Rule 1(b) is intended to invoke all of the Civil Rules, including discovery. Discovery is not inconsistent with the provisions for pleading, motions, notice of the action to the Commissioner, or presentation on the briefs. It was suggested that the committee note should be expanded to explain that discovery is available if needed, perhaps as an addition to the paragraph that notes that the Civil Rules continue to apply.

Rule 1(b) says that the Civil Rules "also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules." Why does it say "also," and why does the committee note say that the Civil Rules "continue" to apply? Why not just say that they apply? The wording of Rule 1(b) was taken directly from Supplemental Admiralty Rule A(2), one of the Supplemental Rules that has benefited from the style process when it was amended. It has seemed appropriate to borrow this language for a new set of supplemental rules; the different formula in Civil Rule 71.1 — "except as this rule provides otherwise" — might have been chosen if the social security rules were instead framed as new Civil Rules. "also" will carry forward.

The question was renewed whether the provision of proposed Rule 1(b) that the Civil Rules also apply except to the extent that they are inconsistent with the Supplemental Rules permits resort to the discovery rules? The answer was that discovery is almost never used in § 405(g) actions. If the record is insufficient, the cure is remand to SSA for further administrative proceedings, not adding to the record in the district court. Remands, indeed, are quite common. The Gelbach & Marcus study found wide variations in the remand rate from one district to another, ranging from a low of around 20% in some districts to a high of around 70% in some. But discovery may be appropriate in some situations, and is permitted under the general Civil Rules when not inconsistent with administrative review practices. Examples that have been noted in subcommittee discussions include ex parte communications with an administrative law judge, and one shocking example of routine bribery of an administrative law judge on a vast scale. Another concern is that the record filed by the SSA at times is not complete — an example often offered is failure to include materials excluded from evidence by the administrative law judge. Discovery may be necessary to compile a complete record. It was agreed that the subcommittee should consider adding to the committee note a brief observation about the availability of discovery.

A second question asked why Rule 2.2(b) permits a plaintiff to add to the required elements of the complaint "a short and plain statement of the grounds for *review*." This formula tracks the familiar language of Rule 8(a)(2), but substitutes "review" for "relief." "[R]eview" was chosen because it emphasizes the appellate character of a § 405(g) action, as compared to an action that seeks independent adjudication on the merits including a remedy that at times may be determined by a specific formula but often is more open-ended than a determination of social security benefits. But the reference to "review" might lead some readers to mistake this as a provision for more elaborate pleading of jurisdiction. The Committee agreed to change "review" to "relief."

A related question addressed the structure of Rule 2(b)(1). It is divided as first (A), a statement that the action is brought under § 405(g). That corresponds to a Rule 8(a)(1) statement of the grounds for the court's jurisdiction. Then come (B)(i) and (ii), identifying the person for whom benefits are claimed and the person on whose wage record benefits are claimed. That corresponds to a Rule 8(a)(2) statement of the grounds for relief. (C) comes last, stating the type of benefits claimed, corresponding to a Rule 8(a)(3) demand for the relief sought. The correspondence of this three subparagraph structure with the three-paragraph structure of Rule 8(a) seemed an attractive contrast to remind the plaintiff of both the familiar structure and the simplified requirements of Rule 2. But a few words could be saved by eliminating the items and establishing a four-subparagraph structure, a change approved by the Committee:

(1) The complaint must <u>state</u>:

(A) ~~state~~ that the action is brought under § 405(g) and identify the final decision to be reviewed;
(B) ~~state (i)~~ the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed~~, and~~;
(C) ~~(ii)~~ the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and
(~~C~~D) ~~state~~ the type of benefits claimed.

Rule 3 provides that the court must send electronic notice of the action to the Commissioner "and to the United States Attorney for the district [in which the action is filed]." The final words are set off by brackets to indicate that they are unnecessary — no one would expect that the court would send notice to the United States Attorney for a different district. But they were included to see whether some observers would think them necessary. They will be carried forward in brackets.

Brackets also were suggested to set off a new sentence that the subcommittee recently added to Rule 3: "If the complaint was not filed electronically, the court must notify the plaintiff of the transmission." This sentence was added in response to a fear that a pro se plaintiff who is not allowed to file electronically might not get notice that the required transmission actually occurred. Adding this provision to rule text is designed to provoke comment on the practical questions: Will CM/ECF systems automatically generate a prompt for paper notice when the complaint was filed on paper? If not, will clerks' offices develop protocols to make that happen? It was agreed to add brackets as a means of prompting public comment.

Another drafting question asked whether Rules 6, 7, and 8 should say only that plaintiff or Commissioner must serve a brief? The Appellate Rules call for filing. Although Civil Rule 5(d)(1)(A) directs filing within a reasonable time of any paper after the complaint that must be served, it would be useful to provide a reminder of the filing obligation. One drafting goal for the Supplemental Rules has been to make them accessible to pro se claimants. "File and serve" would help. The Committee adopted this change.

Changes in the committee note also were explored.

The addition of a sentence stating that discovery is available when appropriate is noted above.

Rule 5 provides that the action is presented for decision by the parties' briefs. The committee note states that reliance on Rule 56 summary-judgment procedures and directing submission of a joint statement of facts are inconsistent with Rule 5. The problem, however, is more general than these two specific and common examples. The problem is that some districts love their own

district practices, and may persist in practices that thwart the efficient appeal procedure embodied in Rule 5. The Committee agreed that the note should be expanded to include a statement that other practices that thwart this appeal procedure also are inconsistent with Rule 5.

The Committee voted 11 yes, one no, to recommend to the Standing Committee that the draft Supplemental Rules, as revised by the Committee, and the committee note, also as revised, be published for comment.

Judge Bates thanked all participants for a thorough and helpful discussion.

MDL Subcommittee Report

Judge Bates introduced the report of the MDL Subcommittee chaired by Judge Dow. He noted that the subcommittee had returned the topic of third party litigation financing to the full Committee as a matter for ongoing study, without any immediate plan to develop possible rules. Committee members who come across interesting information should send it to Professor Marcus, who will act as a clearing house and send the information on to the Administrative Office.

Of the many items that the subcommittee has considered, three have become the focus of current deliberations.

Early Vetting. One ongoing topic is "early vetting." A recent development has been characterized as an "initial census," a concept that is evolving in practice. Plaintiffs and defendants may hold different views of the purposes of an initial census, but they are cooperating to develop this approach in big MDLs. It might be seen as a device for plaintiffs to get a hand on efficient conduct of the litigation; or as a device for defendants to weed out unsupported claims; or as a means for the court to establish a basis for managing the proceedings, including support for designating leadership. The subcommittee is exploring how judges use the initial census, how lawyers use it, and whether the initial favorable views endure. Professor Marcus noted that it is not clear how long it will take to find out how this practice works as it evolves.

Judge Rosenberg described her early experience with an initial census in the Zantac MDL. Measures taken to combat the current pandemic have forced some delay in organizing the proceedings as communications switch from live hearings to remote means. A 2-page initial census form has been put together that meets with agreement by plaintiffs and a 4-lawyer initial defense firm. Professor Jaime Dodge reports that the lawyers have worked well together. By April 30 the vendor will report on everything in the system. The initial census form must be filled out for every case that has been filed. All lawyers who apply for leadership positions must also fill out

census forms for cases not yet filed. That will help in managing the proceedings, will provide a jump-start for discovery, and will remove some cases. There also is a 5-page initial census "plus" form that may at least delay the need to follow up with a plaintiff fact sheet process. This form will be due 60 days after appointment of lead counsel, an event that is scheduled for April 30. On this schedule, the time from the census order to receiving the census-plus forms will be 90 days. The information will include how many cases there are and who are prospective defendants, and perhaps supply records. Tolling provisions also are included. The census-plus form will include the case name and number; identify counsel; provide plaintiff's personal information, including Zantac usage information, where the drug was purchased, and the reasons that prompted usage; and what type of cancer is alleged. The form must be certified for truth and accuracy. A place is provided to attach medical documents, or to explain why they are not attached. The order provides that a plaintiff who attaches the documents need not file a plaintiff fact sheet "at this time." The plaintiff must attest to usage and to the injuries suffered.

The line between a plaintiff fact sheet and an initial census form with this much detail may be wavering. Plaintiff fact sheets have been tailored to the needs of individual MDLs, and are not uniform. The purpose of the initial census has been quicker development and responses because they seek less information than many plaintiff fact sheets demand.

Professor Marcus reflected that this discussion shows how difficult it would be to draft a rule that describes what an initial census should look like. The subcommittee has learned from many sources, including rigorous research by the Federal Judicial Center, that plaintiff fact sheets commonly are developed through months of negotiation specific to a particular MDL, and seek a lot of information, even though generally they do not include "Lone Pine" orders to produce evidence to support the answers.

Judge Dow noted that the impetus is to get a consensus of plaintiffs and defendants on a census form. "Not even plaintiffs want bad cases" — it is not only MDL lead counsel that shun them. Judge Fallon has observed that the first two pages of plaintiff fact sheets are all that are needed to know how to organize an MDL. It remains a question whether the census form should be designed to winnow out unfounded cases as well as to support organization of the proceeding. Further experience may show that initial census practices are indeed desirable. If desirable, it will remain a question whether to attempt to capture the practice in a Civil Rule, or whether to leave it instead to the categories of best practices that are fostered by the JPML, Federal Judicial Center programs for judges, the Manual for Complex Litigation, and like means. Judge Dow and Professor Marcus expressed favorable impressions of what has been heard about initial census developments and surprise at how fast the concept has evolved in practice.

Interlocutory Appeals. Judge Dow began discussion of the subcommittee's work on interlocutory appeals by expressing thanks to the JPML and the FJC for providing useful data. It is difficult to get full data on experience with interlocutory appeals and attempted interlocutory appeals in MDL proceedings. And it is likely impossible to develop reliable data on the phenomenon described by lawyers who report that they do not even attempt to win certification for what would be useful interlocutory appeals because they fear antagonizing the MDL judge.

The inquiry has been narrowed. At the beginning, defendants argued that appeals should be made available as a matter of right from specified categories of orders. The questions that remain are whether the MDL judge should have a "veto" by refusing to certify an interlocutory appeal, or whether the judge should be either permitted or required to offer advice to the court of appeals but not to veto an attempted appeal; whether any new appeal rule should be available in all MDLs, or only in a specified subset; whether there is an advantage in developing new criteria for MDL appeals that supplant the three criteria specified in 28 U.S.C. § 1292(b); and whether there should be some direction that the court of appeals must promptly decide any accepted appeal to address the risk that substantial delay on appeal will disrupt ongoing progress in the MDL court.

The subcommittee has heard about appeal opportunities from lawyers involved in "mega-MDLs." They remain divided. Defendants insist there is a great need for immediate appeal on questions that may resolve central issues that either simplify or even conclude the proceedings. Plaintiffs respond that § 1292(b) appeals are available, and that MDL judges recognize the need to apply the § 1292(b) criteria in light of the needs of complex MDL proceedings. Experience shows that most orders reviewed on interlocutory appeal are affirmed, as in other § 1292(b) appeals, and that § 1292(b) appeals generally inflict long delays on the proceedings.

These questions were reviewed by suggesting that a central question is whether to adopt the model of Civil Rule 23(f), which provides for interlocutory appeal in the sole discretion of the court of appeals. Rule 23(f) is focused on a narrowly defined category of orders that grant or deny class certification. It would be difficult, and probably counterproductive, to attempt to identify categories of orders that alone are eligible for a new MDL appeal rule. Still, placing sole discretion in the court of appeals might reduce the reluctance of lawyers to offend the MDL judge by asking for permission to appeal. If the MDL judge retains power to veto an appeal, it remains possible that some help would be provided by establishing a new MDL-specific criterion for certifying an appeal. Some judges may be deterred from certifying an appeal by generally narrow circuit interpretations of the criteria that ask for a controlling question of law as to which there is substantial ground for difference of opinion and whose resolution may materially advance ultimate disposition of the

litigation. A frequent example has been a Daubert ruling on the admissibility of expert testimony that, if reversed, could terminate the proceedings. Daubert rulings involve application of settled law in the district court's discretion: how is there a controlling question of law with substantial grounds for a difference of opinion? A criterion that asks whether an immediate appeal would advance the purposes of the MDL consolidation might prove liberating. But that is an uncertain prospect. Eliminating the MDL judge veto would at least create a possibility of more frequent appeals. Even then, it will remain important to provide for advice from the MDL judge on the desirability of an immediate appeal, in light of the importance and uncertainty of the issues underlying the challenged order and the impact that an appeal would have on continuing MDL proceedings. The advice could include an observation that an appeal might advance the proceedings if it is promptly decided, but would disrupt the proceedings if much delayed. The burden of providing advice ordinarily should not be great, at least if permission to appeal is sought soon after the ruling is made. And advice that an appeal would thwart orderly progress is likely to defeat permission by the court of appeals in most cases.

Judge Bates added that as with other MDL rules questions, the scope of an appeal rule must be decided. An attempt could be made to provide for appeals in some, but not all, MDLs. But it seems likely that any rule would apply to all MDLs, relying on common-sense application. "Changing § 1292(b) is a big step. We have authority under § 1292(e), but we should be cautious." Expansion seems attractive on its face, but careful examination is needed.

Judge Bates added that exploration of the appeal question will require an expansion of the subcommittee's work in gathering information. So far we have heard only from lawyers and judges involved in mass-tort MDLs.

A committee member said that delay is a major concern. Plaintiffs are especially worried about delay, and suspect that defendants may appeal for the purpose of winning delay. Some help may be found in the MDL judge's advice about the desirability of an immediate appeal, including the delay factor. "We should look for other creative input."

Judge Dow agreed that the subcommittee hopes for more input. Professor Dodge has agreed to arrange a conference that will bring together lawyers and judges from MDL proceedings that do not involve mass torts, and will add appellate judges. The conference was scheduled for April 14, but has been postponed. The tentative plan is to hold it in mid-June if travel and general distancing protocols are relaxed soon enough to make final planning possible. A committee member expressed approval of the plan to bring in the perspective of appellate judges.

Settlement. Judge Dow began the discussion of settlement by noting that a rule addressing MDL judges' involvement with settlement may well be framed by addressing other issues as well. The origins of this work lie in the protests of many academics that MDL proceedings frequently evolve toward settlement through a process that has the same effect as settlement of a class action but lacks the safeguards that protect class members. In an MDL virtually all plaintiffs are represented by a lawyer, but settlement terms often are negotiated by a subset of plaintiffs' lawyers. The focus is on negotiations by lawyers who have been formally appointed to leadership positions, acting very much as class counsel appointed under Rule 23. Defendants negotiate for terms and practices that will bring "global peace" by winning settlement with at least a very large swath of plaintiffs. Lawyers outside the leadership structure may not fully understand what settlement alternatives may be possible, and may encounter terms that make it difficult to accept the settlement for some or many clients while rejecting it for others.

One possibility would be to focus a rule solely on encouraging MDL judges to be involved in settlements. Judicial involvement happens now. Some judges justify their involvement by invoking inherent authority, or by relying on authority implied by the structure and purpose of § 1407 transfer and consolidation. But a Civil Rule could provide a stronger foundation, and could encourage greater involvement.

The first question is whether this is a solution in search of a problem. It may be asked why there is any need for judicial involvement when every plaintiff has a lawyer. And if there is a need, it can be addressed, as it often is addressed, by detailed provisions in the order appointing lead counsel. The order may specify which lawyers can negotiate, and on whose behalf they negotiate. But again, an explicit Civil Rule might encourage more frequent use of detailed appointment orders, and perhaps greater detail.

The subcommittee explored these questions in some detail in its March 10 conference call. The gist of the call is set out in the original agenda materials, and detailed notes were circulated before today's meeting.

Judge Bates observed that both the plaintiffs' bar and the defense bar have reported that they do not need help on settlements. They assert that they can work out fair settlements without the supposed help of any rule. MDL judges also report that they do not need the support of any rule. They say they know what to do. A rule would contribute nothing, and might interfere with flexible and creative response to the needs of a particular MDL. Only one or two of them — albeit an especially experienced one or two — think a rule would provide useful guidance and support. But the universe of MDL lawyers has been pretty much a closed club. Deliberate efforts have been made by MDL judges in recent years to

increase the diversity of the MDL plaintiffs bar, with some success and the prospect of increasing success. The world of MDL judges also has been something of a closed club, but here too efforts have been made to open the doors, even in the large-scale MDLs. The academics continue to be the primary voices calling for constraining the role of lead counsel by increased judicial involvement.

Professor Marcus noted that Professor Burch has been prominent in the ranks of those who protest the closed and cozy social network of insiders who are content with the status quo, both in a recent book and in law review writing.

Professor Marcus went on to recall that when the basic form of current Rule 23 was adopted in 1966 there was no considerable discussion of settlement. The rule required judicial approval for settlement of a class action, but said nothing more. In 2003 Rule 23(e) expanded the provisions for settlement and Rules 23(g) and (h) were added to address appointment of class counsel and attorney fees. Rule 23(e) was further elaborated by amendments in 2018.

Nothing similar to the evolution of Rule 23 has occurred for multidistrict proceedings. The lack of any formal rules most likely stems from the conceptual difference between class actions and MDL consolidations that are resolved without certifying a class. A class-action settlement binds all members who remain in the class at the time the settlement is approved. Settlement terms negotiated by MDL leadership do not bind anyone — even clients of lead counsel must consent to individual settlements. But informal pressures may remain quite direct and powerful. Individually retained plaintiffs' attorneys who are not part of the MDL leadership may feel powerless to resist. And academics fear that leaders are feathering their own nests, perhaps even by negotiating terms more favorable for their own clients than the terms offered to others. Conceptual distinctions may dissolve in the cold bath of reality.

All of that leaves the question whether to attempt to embody in a rule the creative things some judges are doing. How far should judicial authority and responsibility extend? Is a rule helpful?

The direct question of settlement leads to other questions. Many practices have grown up over the years since § 1407 was enacted. Appointment of lead counsel and leadership teams has become common, and indeed has roots extending far back before § 1407. These orders frequently restrict what individually retained plaintiffs' attorneys (IRPAs) can do in the consolidated proceedings. Appointment orders commonly establish common benefit funds, seeking to compensate leadership for the time and money devoted to conducting the litigation on behalf of all. Common benefit funds usually are fed by "taxes" on the fees nonlead counsel win under contracts with their individual clients. And a court that fears that contract fees are unreasonable in light of the limited effort and risk borne by nonlead counsel, even as

reduced by contributions to the common benefit fund, may cap individual attorney fees. These are strong measures. Perhaps it is useful, even important, to provide a secure foundation for these practices in a civil rule.

The interdependence of these phenomena suggests that a rule that addresses judicial involvement with settlement might best begin by focusing on the court's role in appointing and supervising lead counsel. The order can establish the roles of lawyers who are in the leadership team and the roles of lawyers who are not. That can include the establishment and terms of common benefit funds. It can include regulation of fees for leadership lawyers and for all other lawyers with cases in the MDL. And it can define roles in negotiating for settlement terms to be extended to any plaintiff that is not a client of a member of the negotiating team.

There are many pressure points for the lawyers involved in an MDL. Lead lawyers put up a lot of cash and time. IRPAs want to represent their clients, and may resist both paying a common-benefit tax and having their fees further reduced in an effort to protect against amounts that the court thinks unreasonable in light of the court's perception of the risk and effort involved. As roles become more complicated, and in some measures uncertain, questions of professional responsibility arise that cannot be addressed through the relatively less ambiguous questions that arise from the role of class counsel who represent not only representative class members but the entire class as well. There may be an increased risk of professional liability claims against lead counsel or IRPAs.

The March 10 subcommittee meeting identified six questions that will be a focus of its further work:

(1) Is there a need for rules that formalize well established practices?

(2) Do MDL judges refrain from taking steps they think would advance the purposes of the proceeding because of uncertainty about their authority?

(3) Is it important that any formal rulemaking would be vigorously opposed by plaintiffs' and defense lawyers, and likely would meet resistance among MDL judges?

(4) Can effective rules be crafted that do not improperly interfere with attorney-client relationships?

(5) Would a rule that formalizes common benefit funds and perhaps authorizes limitations on attorney fees for individual representation modify substantive rights in ways that § 2072 prohibits? The fact that courts do this now, relying on inherent authority and authority implied by § 1407 does not provide a complete answer.

(6) Can we be confident that a rule for designating MDL lead counsel would not impede the progress that is being made in diversifying the ranks of lawyers who take on leadership roles? This concern may relate to third-party funding: newcomers to leadership positions may need to rely on outside funding to be able to bear the investment required to support what often are years-long commitments of money and time.

This set of questions prompted the observation that a rule could be designed in ways that do not inhibit MDL-specific flexibility and creativity in developing new practices. A rule that firmly establishes the basic authority to do things that now rest on uncertain concepts of inherent and § 1407-implied authority could be authorizing and liberating, not confining. All details would be avoided. Authority to appoint leadership entails authority to define their roles in relation to counsel for other plaintiffs, including their role in negotiating settlement terms to be offered to plaintiffs not directly represented by leadership lawyers; to establish a process for determining lead counsel fees and for funding the fees; and to consider the often complicated ways in which what may be quite limited roles left open for nonlead counsel may bear on the reasonableness of fees charged to individual plaintiffs.

A committee member found it striking that all the players, lawyers on all sides and MDL judges, resist the idea of a formal MDL rule. "That should make us very cautious." The idea deserves continuing study, but we should respect the repeated pleas that formal rules should not interfere with the process by which things are worked out by means that are exported by many practices that keep both lawyers and judges at the leading edge of new and successful practices.

A subcommittee member observed that the subcommittee recognizes that it has heard only from lawyers and judges in mass-tort MDLs. "We want to hear from all the MDL bar." So far, Judge Fallon is the only judge we have heard to say that a rule would be welcome. It will help to hear more from him and from other MDL judges.

Another subcommittee member expressed agreement with the MDL judges who believe we do not need formal rules. This question was explored with a number of MDL judges at the annual JPML conference. They agreed unanimously that rules are not needed. The academic concern about representation of plaintiffs whose lawyers are not leaders can be addressed by care in establishing the structure of the leadership. To the extent that the concern is that some plaintiffs are represented by lawyers who are not competent, the concern is common to all litigation, and is not something to be addressed by rules of procedure. The JPML is good at advising MDL judges on how to get non-lead counsel involved. Courts of appeals have blessed what's going on. Oversight of settlement is blessed by § 1407. Some statutes establish additional specific support. And we

should be reluctant to have judges step on attorney-client relationships, even in the special structure of MDLs.

These views were echoed by another judge. Many of these issues are magnified in MDL proceedings, but are not unique to them. Across all litigation, judges confront questions of how far to become involved in settlement — indeed one of the agenda items for this meeting goes straight to those questions. In a large-scale MDL in his court, his judicial assistant gets calls from plaintiffs whose lawyers have forgotten about them, but clients of those firms probably have the same problems in non-MDL actions. In this MDL he gave notice to the parties of the point at which he would begin remanding cases to the courts where they were filed. The defendants reacted by retaining separate counsel to negotiate individual settlements, a process that has worked well. "Settlements are being reached."

Judge Bates agreed that these are difficult issues. And we should remember that many MDLs include actions that were filed as class actions. Settlement negotiations may produce agreement on terms for a class-action settlement that are approved by the court after certifying a class. The protections of Rule 23 are frequently available.

Judge Dow underscored the desire to expand subcommittee inquiries beyond mass-tort MDLs. His MDL proceedings have involved at most 40 actions, not the thousands or more that are brought together in some mega-MDLs.

Judge Dow went on to suggest that the subcommittee's work has already had an impact on MDL practices without even developing rules proposals. Early vetting practices have evolved, including the recent development of initial census orders. There is more explicit recognition that the MDL context should be taken into account in determining whether an interlocutory order is so important to the further progress of proceedings that it should be certified for appeal under § 1292(b). And the subcommittee has seen examples of lead-counsel appointment orders that provide excellent models for other proceedings. These can be used to educate other MDL judges. And "of course the in groups do not want to have rules that may disrupt their good thing." The subcommittee may, in the end, conclude that there is no need to recommend a new Civil Rule. But it will continue to work hard.

Judge Bates thanked the subcommittee for its work, and also thanked the JPML and FJC for contributing to the subcommittee's work.

Appeals after Rule 42 Consolidation

Judge Bates introduced the report of the joint Appellate-Civil Rules Subcommittee that has been established to study the effects of the decision in *Hall v. Hall*, 138 S.Ct. 1118 (2018). The Court

ruled that complete disposition of all claims among all parties in what began life as an independent action is a final judgment that can and must be appealed then even though the action was consolidated under Rule 42 with another action that has not reached final judgment. The Court also suggested that the rules committees could suggest a different rule if this approach causes problems.

Judge Rosenberg chairs the subcommittee. She explained that the subcommittee or smaller groups have held several calls to get the work started. Dr. Emery Lee is leading a detailed study by the FJC. He has established a data base of all 843,996 civil actions filed in the 94 United States District Courts in the years 2015, 2016, and 2017. That count includes actions that have been consolidated in MDL proceedings, but those actions will not be included in counting Rule 42 consolidations. Among the non-MDL proceedings, a total of 20,730 cases have been involved in Rule 42 consolidations. The total includes 5,953 "lead" cases; the rest are "membership" cases. They account for 2.5% of the civil-action total, and a greater share of the non-MDL cases. The data show that ten nature-of-suit codes account for 58% of all Rule 42 consolidations. Patent actions alone count for 13%, tracking on down through consumer-credit cases at 3%.

The ways in which courts have disposed of the consolidated actions have been counted. Eighty-four percent of the lead cases have terminated in the district court. Thirty-two percent were coded as settled. Another 22% were "other dismissal"; ten percent were "voluntary dismissals," likely for the most part reflecting settlements. Thirteen percent were dismissed on motion. Only 2% were disposed of at trial.

The next step will be to determine how to sample this large number of cases for detailed analysis. Some case types might be deliberately under-sampled because they seem less likely to lead to potential *Hall v. Hall* problems. Bankruptcy appeals, for example, accounted for 6% of the cases, but they often involve proceedings distinct from most civil actions and invoke special and more expansive concepts of interlocutory and final-order appeals. The means of disposing of the cases also may be distinguished. Settlements, for example, are less likely to involve final-judgment appeal problems than other dispositions.

Once the sample is established, the next steps will be to identify dispositions that may lead to problems in applying the *Hall v. Hall* rule. One problem may be confusion about the time to appeal. Additional problems may be appeals taken at times that disrupt trial-court proceedings or threaten to lead to multiple appeals presenting similar or identical questions to the court of appeals. How often is there a complete disposition of all of one of the original actions in the consolidation without disposing of all the others? How often is an appeal taken at that point? How often is an untimely appeal taken at a later point? If an untimely appeal is attempted, how often is untimeliness noticed and followed by

dismissal? And how often is untimeliness disregarded and followed by decision of the appeal?

So many cases are involved in the years selected for study that it will not be practicable to extend the study to include actions first filed after the decision in *Hall v. Hall*. But looking to cases filed before then has an advantage because it will include cases filed in every circuit, and thus cases that were governed by the *Hall v. Hall* rule for appeals decided before *Hall v. Hall* in the few circuits that had already established that approach but, in other circuits, were governed by one of the three other approaches that had been adopted by different circuits.

The FJC work will proceed apace. The subcommittee will resume its deliberations when the work has reached a suitable point.

e-Filing Deadline

Judge Bates reminded the Committee that Rule 6(a)(4) defines the end of the last day for computing a time period for electronic filing as midnight in the court's time zone. Identical provisions appear in all but the Evidence Rules. A joint subcommittee has been established to study the question whether the end of the day might be shortened to the time when the clerk's office closes. The FJC is gathering a great deal of empirical information that bears on this question, including actual filing practices under the current rule; variations in filing times among types of firms, types of litigation, courts, and other dimensions; the hours clerk's offices are open, and the use of drop boxes for after-hours filings; the experience of pro se litigants that are permitted to use e-filing; problems confronting lawyers who file across multiple time zones; and still other questions. "This is a big data project." The subcommittee will resume active work when the accumulation of data supports further consideration.

Rule 7.1: Intervenor Disclosure and Diversity Jurisdiction Disclosure

Judge Bates described two proposed amendments to Rule 7.1 that were published for comment in 2019. The questions now are whether they should be recommended for adoption.

Intervenor Disclosure: The first amendment would expand present Rule 7.1(a) to require disclosure by any nongovernmental corporation that seeks to intervene on the same terms as the rule requires for a nongovernmental corporate party. This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Publication of the intervenor amendment drew three comments. Two expressed approval. The third suggested several expansions of the present disclosure requirement for parties and intervenors

alike. These changes would require study and then publication for comment. The question whether disclosure statements should be expanded to include other information that may bear on recusal has been explored recently. The MDL Subcommittee has considered proposals by lawyer groups for disclosure of third-party litigation financing. Other committees have considered other expansions of disclosure. These explorations have not led to any recommendations for amendments.

The Committee unanimously approved a recommendation that the Standing Committee approve the intervenor disclosure amendment for adoption.

Diversity Jurisdiction Disclosure: The second proposed amendment would add an entirely new provision that applies only in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a). This provision requires a party to file a disclosure statement "that names — and identifies the citizenship of — every individual or entity whose citizenship is attributed to that party at the time the action is filed."

Diversity disclosure was proposed to meet problems that arise in satisfying the complete diversity requirement. The problems have been multiplied by the emergence of limited liability companies as a common means of organizing business enterprise. The established rule attributes the citizenship of each owner to the LLC. If an owner is itself an LLC, the citizenship of all of its members is likewise attributed to it and through it to the LLC that is a party to the action. The chain of attribution can reach even higher. There is a real risk that a diversity-destroying citizenship exists somewhere. Prompt recognition that there is no diversity jurisdiction is important. If the case goes through to final judgment without recognizing the problem, the damage may seem conceptual, but remains a disruption of the allocation of authority for adjudicating state-law disputes with the attendant risk of a non-authoritative interpretation and application of state law. If the lack of diversity jurisdiction emerges while the action is still pending, perhaps after heavy investment by the parties and trial court or even for the first time on appeal, the required dismissal can impose heavy costs. Many federal judges respond to this problem now by requiring initial disclosure.

The proposed rule extends beyond LLCs to require disclosure as to any other "entity" whose citizenship is attributed to a party. Some of these entities have played familiar roles in determining diversity for many years, including partnerships, limited partnerships, some forms of trusts, and the like. Others are more exotic, and include such vague concepts as "joint ventures" that may not have existence as an "entity" for any other purpose. What counts as an "entity" for disclosure is any thing that is not an individual but that must be examined in determining a party's citizenship.

Public comments on this proposal were generally favorable. A substantial share of them observed that actions are often removed from state courts without adequate inquiry into the full details required to determine diversity jurisdiction. Some comments offered anecdotes about the misery created by belated discovery that diversity does not exist. Many offered an optimistic view that disclosure will impose only a small burden, a view that may well be true for most LLCs.

Other public comments opposed the proposal. Two of these comments came from groups that have participated frequently and helpfully in the Committee's work, the American College of Trial Lawyers and the New York City Bar. Both comments said, in different ways, that the better solution for LLC diversity problems would be for the Supreme Court or Congress to treat an LLC in the same way as a corporation.

Beyond resisting the current attribution rule for LLCs, the negative comments suggested that expansive disclosure of ownership interests might prove overwhelming, distracting attention from the particular parts of the disclosure that should bear on judicial recusal. Rule 7.1 should continue to be confined to disclosure of information that bears on recusal. The comments also said that disclosure can impose heavy burdens of inquiry that should not be routinely imposed in all cases. The information can be obtained by targeted discovery in the subset of actions in which a party challenges diversity or seeks to establish a firm jurisdictional foundation at the outset. Disclosure also threatens interests in privacy that often account for establishing an LLC. A variation on the privacy concern addressed the privacy of "non-citizens."

An added problem was noted. There may be circumstances in which a party is not able to identify and determine the citizenship of everyone whose citizenship may be attributed to it. Interests in some forms of entity may be traded in a market or pass through other channels that are difficult to trace.

The comments also suggested a problem that may prove more difficult to resolve than it seems. The published proposal calls for disclosure of citizenship "at the time the action is filed." Those words were added to reflect that in most circumstances the citizenships that establish or defeat diversity jurisdiction are those set at the time the action is filed. The time of filing corresponds to that purpose, looking to the time the action is filed in federal court. If the action is removed from state court, citizenship is determined at the time the notice of removal is filed in the district court. These comments suggested this point should be made clear by adding "at the time the action is filed in, or removed to, the federal court." The difficulty with adding these words is that they may distract attention from the need to assess diversity jurisdiction anew if the parties are changed after the action is first filed or removed.

Judge Bates followed this introduction by noting that many federal judges are requiring disclosure now, either on their own or under local rules. There is no burden in cases that do not involve attributed citizenships. When there is a burden, it is often encountered now. Establishing a uniform practice by a national rule may not add much burden. And the difficulties that may arise in rare situations that make it impossible to determine all attributable citizenships seem likely to be rare enough that they should not stand in the way of a general rule.

Initial discussion provided support for adding "filed in, or removed to, the federal court." A complication was noted. 28 U.S.C. § 1447(e) provides that if after removal a plaintiff seeks to join a party that would destroy diversity jurisdiction, the court may deny joinder or may permit joinder and remand to state court. But requiring disclosure of attributed citizenships at the time of removal does not stand in the way of this statute. If anything, implementing the statute is supported by providing better information to determine whether joinder would destroy diversity. A related observation suggested that complexities are added by the need to work through arguments about fraudulent joinder designed to defeat diversity removal.

One suggestion was to add "at the time the court's jurisdiction is invoked." Concerns were expressed that litigants might not understand this. An alternative might be "at the time the disclosure is made," but that could be a time different from the controlling date for determining diversity. There are two separate concepts. One is the date that controls the determination of diversity, recognizing that some events may change the date — joining or dropping parties after the day the action is originally filed or is removed is a clear example. The other is the time for making the disclosure of citizenships as of the date that controls the existence or nonexistence of diversity jurisdiction. The time when the disclosure must be made is governed by Rule 7.1(b). A party that seeks to add another party has the usual burden of pleading jurisdiction, but the new party is responsible for making the diversity disclosure at the time directed by Rule 7.1(b).

Another suggestion was "at the time [or times] relevant to the determination of the court's jurisdiction." A further variation was suggested: "at the time the action is filed in or removed to federal court, or at such other time as may be relevant to determine the court's jurisdiction." This gives better guidance. The time of filing in or removing to federal court will control the vast majority of diversity determinations. In removed cases the plaintiff who filed in state court will, after removal, become obliged to disclose attributed citizenships. A disclosure that defeats diversity may disappoint the removing defendant, and it may disappoint a plaintiff who would rather have concealed an attributed citizenship that destroys diversity, but disclosure serves the need to enforce complete diversity. But another time may become relevant. It was pointed out that a state-court defendant

who is a co-citizen of a plaintiff at the time the action is filed in state court cannot manufacture diversity by establishing a diverse citizenship and then removing. The lack of diversity is then established by the time of filing in state court, not the time of removing to the federal court. The expanded language also conforms to another rule that permits a federal court to retain an action that was removed at a time when diversity was defeated by the citizenship of a party that is dropped from the action after removal. And, although "such other" often seems vague or indeterminate, it refers back to an antecedent time in this use and does not defeat the primacy of the time of original filing or the time of removal.

The Committee voted to approve the longer version, subject to a final style determination whether to refer to a "federal" or the "district" court. The Rules regularly refer to a district court, but refer to a "federal" court in contexts that embrace both state and federal courts. Rules 32(a)(8) and 41(a)(1)(B) are examples. Because Rule 7.1(a)(2) involves a similar emphasis on both state and federal courts, "federal" seems the appropriate word. The rule will go forward with "in or removed to federal court, or at such other time as may be relevant to determine the court's jurisdiction."

Attention turned to the problem of a party who finds it difficult or impossible to determine all attributed citizenships. An initial suggestion was that language should be added to the text of Rule 7.1(a)(2) to limit the disclosure to information that can be gathered without undue effort. An alternative suggestion was that the paragraph in the committee note describing the court's authority to "order otherwise" might be expanded to recognize that the court can order that a party that has exercised due diligence to uncover attributed citizenships need do no more. Tangential support was found in Rule 11(b), which sets a standard of an inquiry reasonable under the circumstances to support legal contentions and factual contentions in any paper submitted to the court. But the standard for avoiding sanctions does not carry directly over to the obligation that may be placed on a party to determine its own citizenship. Disclosure may be closer to discovery of jurisdictional facts, and to invoke the proportionality standard in Rule 26(b)(1). But that does not answer what discovery burden is proportional to the need to determine subject-matter jurisdiction. A judge opposed these suggestions as inconsistent with the command to insist on complete diversity. "People ask me all the time to assume jurisdiction because establishing the actual controlling facts is too difficult." We should not do anything in the rule that will encourage that approach. Neither the language of Rule 7.1(a)(2) nor the committee note will be changed on this account.

Other changes in the rule text were discussed. A motion to intervene should be brought within diversity disclosure, remembering the § 1367(b) limits on supplemental jurisdiction for

claims by or against intervenors. So the text will read "a party or intervenor * * * must file * * * whose citizenship is attributed to that party or intervenor * * *." The tag line will be changed to conform: "Parties or Intervenors in a Diversity Case."

The discussion of supplemental jurisdiction raised a question about Rule 7.1(b), which sets the time for making Rule 7.1(a) disclosures. Paragraph (b) requires that a disclosure be supplemented "if any required information changes." A concern was expressed that it may be important to require a supplemental diversity disclosure of facts that may defeat supplemental jurisdiction. Meaningful illustrations proved hard to come by, however, and this topic was dropped.

Discussion of Rule 7.1(b) did lead to recognition that bringing intervenors into the text of Rule 7.1(a)(1) requires a parallel addition at the beginning of Rule 7.1(b): "A party or intervenor must: (1) file the disclosure statement * * *." The Committee agreed that this is a technical amendment that can be recommended for adoption without publication. It is consistent with what was published and ensures implementation without a technical gap in Rule 7.1(b).

The committee note was discussed. The Federal Magistrate Judges Association Rules Committee suggested two additions. First, words would be added to this sentence: "The rule recognizes that the court may limit the disclosure upon motion of a party * * *." The purpose is to avoid any implication that the court has an independent duty to limit disclosure. But a nonparty may wish to limit disclosure, usually a nonparty whose citizenship is attributed to a party. And there is no apparent reason to limit the court's authority to act on its own. An obvious circumstance would be disclosure by one party of a diversity-destroying citizenship; the court could readily suspend further disclosures, pending a determination whether to dismiss the action or instead to allow a change of parties that might make further disclosures necessary. The Committee decided not to add these words.

The second suggestion by the magistrate judges was to add words to ensure that the court may seal the disclosure: "the names * * * might be protected against disclosure to the public or to other parties * * *." On balance, this suggestion also was rejected. It is difficult to imagine circumstances in which a court might wish to permit disclosure to the public, or even a particular nonparty member of the public, and at the same time arrange measures that would prevent the disclosure from leaking back to a party. In any event, the general authority to "order otherwise" does not require this degree of elaboration in the note.

The committee note will be changed to reflect the changes in the rule text. For Rule 7.1(a)(2) the note will add "or intervenor" where appropriate after references to a party's duty to disclose.

The final paragraph of the committee note on Rule 7.1(a)(2) will be expanded to describe the revised rule text that ties what must be disclosed both to the usual circumstances that determine diversity at the time of filing in, or removal to, the federal court and also to the unusual circumstances that may call for determining diversity at a different time.

And one further paragraph will be added to the committee note to reflect expansion of Rule 7.1(b) to include intervenors as well as parties in the provisions governing the time to disclose.

The Committee voted to recommend that the Standing Committee propose adoption of the Rule 7.1 text with the revisions adopted in this meeting, 10 yes and 1 no. It further agreed to consider the revisions that will be made in the committee note by electronic exchanges.

Rule 12(a)(1), (2), and (3): Statutory Times

Judge Bates described the question whether to recommend publication for comment of an amendment that would clarify the relationship between the times to respond set by Rules 12(a)(1), (2), and (3) and other times that may be set by statute.

The question arises from what may be seen as an ambiguity in the text of Rule 12(a)(1):

(a) TIME TO SERVE A RESPONSIVE PLEADING.
(1) *In General.* Unless a different time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows * * *.

The exception for times specified by this rule or a federal statute is not repeated in paragraphs (2) or (3). Paragraph (2) sets the time to respond at 60 days in an action against the United States, a United States agency, or a United States officer or employee sued only in an official capacity. Paragraph (3) sets the time at 60 days for a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

The problem called to the Committee's attention by a frustrated lawyer is that at least two federal statutes, the Freedom of Information Act and the Sunshine Act, set a 30-day time to respond. Paragraph (2) does not seem to recognize the possibility that a different time is set by these, and perhaps other, statutes.

It is possible to read the present rule to extend the "different time" provision from paragraph (1) to paragraphs (2) and (3). That is not an obvious reading. The Style Consultants agree that if it had been intended to recognize statutes that set a different time than paragraphs (2) and (3), the rule would have

been structured differently as presented in the agenda materials:

> Unless another time is specified by a federal statute, the time for serving a responsive pleading is as follows:
> (1) * * *.
> (2) * * *.
> (3) * * *.

The proposed amendment is surely free from ambiguity. It does present a question whether clarity is appropriate when the Committee does not yet know of any statute that sets a different time than the 60 days of paragraph (3) for an action against a United States employee sued in an individual capacity. But little harm is done if there is no such statute. At worst, it may sidetrack some parties into a futile quest for a statute that does not exist. Most lawyers for an employee sued in an individual capacity, however, are likely to rest content with any statute that may bear immediately on the particular claims. And at best, a form that includes paragraph (3) in the different time provision will include any statutory time period now on the books or that may be enacted in the future. There is no reason to wish to supersede either a present or a future statute.

Discussion began with a report that the Department of Justice views the proposed amendment as "well intended," but there is no problem that needs to be addressed. The Department is capable of meeting deadlines, and of seeking extensions to align the times to respond when a single case advances claims that are governed by different times. Amending the rule might imply that the court should be reluctant to grant an extension even when warranted.

The next comment suggested that the second paragraph of the draft committee note is confusing to anyone who does not understand the background. It attempts to explain the reason for including paragraph (3) even though there may not be any statutes that set a different time to respond when an official is sued in an individual capacity. But a reader pretty much has to know the answer to comprehend the explanation. Apart from that, Rule 12(a)(3) applies both when the officer or employee is sued only in an individual capacity and also when sued in both an official and individual capacity. "only" should be deleted. A response was that this paragraph could be deleted entirely. The rule text gives a clear answer if there is a statute setting a different time to respond, and will not be invoked if there is no such statute.

Two comments suggested that there is no indication that even paragraph (2) presents a real problem. The question was brought to the committee by a lawyer who was frustrated by the need to persuade a court clerk to issue a summons setting out the 30-day period to respond in the Freedom of Information Act. The problem was in fact resolved. There is no indication that this problem is widespread, nor that it cannot be resolved by pointing the clerk to the statute when it does arise. This is not reason enough to crank

up the Enabling Act process.

The absence of evidence of a practical problem was met by the reply that the rule is incorrect on its face, at least if it is given the more obvious reading supported by the Style Consultants. This reply rekindled the argument that the present rule can and should be read to recognize different times set by statute for all of (a)(1), (2), and (3).

A distinct question was raised as to the relationship between all of Rule 12(a)(1), (2), and (3) and Rule 81(c)(2). The times for a defendant to answer after an action is removed from state court are independent of the times set in Rule 12. Rule 81(c)(2) does not on its face recognize any exceptions for different times set by statute or, for that matter, Rule 12. This possible tension between Rule 81 and Rule 12 will persist no matter whether Rule 12 is amended to provide a clear exception for different statutory response times in paragraphs (2) and (3). There seems little reason to add this complication to the project.

The discussion concluded with a decision to carry these questions forward. Some committee members are attracted to the value of correcting rule text that at best is ambiguous and at worst is incorrect. There is no urgent need for action. Time for further consideration will be welcome.

Rule 12(a)(4)

Judge Bates introduced a suggestion by the Department of Justice that Rule 12(a)(4) should be revised to add time to respond when a United States officer or employee is sued in an individual capacity:

> (4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
> (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or * * *

This proposal rests in part on the same considerations that persuaded the Committee to adopt the 2000 amendment that established the Rule 12(a)(3) time to respond in such actions at 60 days. These considerations persuaded the Appellate Rules Committee to adopt the 2011 amendment of Appellate Rule 4(a)(1)(B)(iv) that establishes the time to file a notice of appeal in such actions at 60 days. The United States may or may not have been involved with defending its officer or employee at the time the Rule 12 motion

was made, and may need the 60 days to respond just as much as it needs 60 days to frame an answer after the later of service on the officer or employee or service under Rule 4(*i*)(3) on the United States Attorney.

The ordinary need for 60 days to respond is enhanced by the complications that arise when the officer or employee moves to dismiss on the ground of official immunity. Denial of the motion often provides a basis for an interlocutory appeal under the collateral-order doctrine. The determination whether to appeal must be made by the Solicitor General. Serious confusions and inconveniences can arise if the officer or employee is required to file an answer within 14 days after the motion is denied or postponed. The burden of filing an answer, moreover, is one of the burdens of litigation that official immunity and the opportunity for collateral-order appeal are meant to alleviate.

The style consultants have reviewed the proposed rule text.

It was pointed out that Rule 12(a)(4) allows a court to set a different time. If there is an urgent need to proceed, the court could set the time to respond at less than 60 days. Account also can be taken of the provisions in Appellate Rule 4(a)(4) that defer the moment when appeal time starts.

The Committee voted, 11 yes and zero no, to recommend that the Standing Committee approve the proposed amendment of Rule 12(a)(4) for publication.

Rule 4(c)(3)

Judge Bates pointed out that the perceived ambiguity in the Rule 4(c)(3) provision for service by the United States Marshal in cases brought in forma pauperis or by a seaman was first on the agenda a year ago.

The question is whether the rule means that the plaintiff must request that the court "must so order," or whether the court must enter the order automatically in every i.f.p. or seaman case. The Style Consultants believe there is no ambiguity — the court must make the order even without a request by the plaintiff. But not every court has found the rule so clear.

It is easy to eliminate any possible ambiguity. But it would remain necessary to decide what the clear provision should say. At least three choices are apparent: The plaintiff must request the order; the court must enter the order without a request; or the marshal is obliged to make service in every case without bothering with the formality of an automatically entered order, a formality that might accidentally be omitted in some cases. More adventuresome possibilities could be added, such as an experiment with electronic service in cases where the marshal believes that would be effective.

The choice among these alternatives will depend on practical information. The Marshals Service has been consulted, but as yet has provided no clear guidance. It is clear that the marshals would prefer to avoid the burden of making service, particularly in sparsely populated districts that may require distant travel. But the forma pauperis statute imposes the duty. It also is clear that at least in cases where an i.f.p. plaintiff has counsel the plaintiff may prefer to make service without relying on the marshal. Service by the plaintiff seems fully consistent with Rule 4(c)(3) as it stands, but if it is to be amended that point might be added.

Discussion led to the conclusion that this subject should be carried forward to the October meeting, with the expectation that a decision will be made then. Efforts will be made to get additional advice from the Marshals Service.

Rule 17(d): Naming Public Official Sued in Official Capacity

Rule 17(d) has long provided that a public officer who sues or is sued in an official capacity may be designated by official title rather than name. Sai has proposed that permission should be changed to mandate: the officer must be designated by the relevant official title (or titles if the same officer holds two or more relevant offices) if the title is unique and capable of succession.

A major purpose of the proposal is to avoid the annoyance of remembering to substitute a successor official, even though Rule 25(d) provides automatic substitution when the original officer ceases to hold office. A secondary purpose is to ease the task of following events in the action; Sai cites an action that has migrated through nineteen names for the United States Attorney General and remains active.

Designating the party by title rather than the name of the incumbent office-holder has obvious advantages. That is why Rule 17(d) authorizes this practice. But it is not clear that the rule should prevent a plaintiff officer from proceeding under a personal name, or prevent a plaintiff from naming an officer defendant by individual name.

As a general problem, there may be cases in which it is not clear whether substantive law authorizes an action by or against a "title," or, more realistically, against the office that is designated by the title. That can easily hold true for countless numbers of federal employees, beginning with the question whether a particular employee is an "officer" within the meaning of Rule 17(d), and then progressing to the question whether every "officer" occupies an office that is capable of being sued as an office. Titles proliferate, perhaps without pausing to consider whether the title is attached to an office.

The difficulty of determining whether suit can be brought by

or against a title or office is enhanced when the public officer is a state officer. It may be unwise to force litigants — and at times the courts — to wrestle with what may be obscure and uncertain questions of state law.

State officials pose a still greater caution when they are sued as defendants. The fiction that permits actions against state officials as a way to circumvent the Eleventh Amendment is vital, but still a fiction. It may be better to avoid entangling Rule 17(d) with disputes whether the official is a defendant in an individual capacity or an official capacity.

The value of amending Rule 17(d) may turn in part on pragmatic considerations. How great are the burdens it imposes? How can the Committee gather useful information?

Discussion began with a judge's observation that "the annoyance factor is a minor, but not a major, issue." Substitution is done routinely by law clerks or court clerks.

The Department of Justice observed that substitution "works seamlessly," and often is accomplished by the court acting on its own. Still, there is no harm in studying this proposal further.

The Committee decided to carry this subject forward.

Consent Agenda

Judge Bates reported that the reporters for the several rules committees have launched a still incomplete discussion of the question whether the advisory committees might establish a practice of placing some business on a consent corner of the agenda.

An analogy could be found in the consent calendar of the Judicial Conference. The Judicial Conference handles many matters, including many Enabling Act rules topics. The calendar is established by the Executive Committee, with advice from the Director and staff of the Administrative Office. But the work of the Judicial Conference comes from committees that have thoroughly prepared their recommendations. The rules advisory committees are the first line in Enabling Act work.

Obvious questions go to defining the way in which a consent calendar would work. What would be the criteria for selecting consent-calendar subjects? Who would make the selection — most likely some combination of the advisory committee chair and the reporters? What would be required to move a subject from the consent calendar for plenary discussion? Most likely any single committee member could effect the transfer. What provision should be made to ensure adequate notice to facilitate thorough preparation of the subject by committee members?

The agenda for this meeting includes three rules proposals

that are offered to illustrate the variety of considerations that might point toward placing an item on a consent agenda. Discussion of the merits of these proposals may illuminate the general question.

The first member to comment suggested that it would be better not to have a consent agenda. The items most likely to be placed on it would be some of those that come in from public suggestions. The need for committee consideration may begin with the prospect that some of these suggestions include useful kernels of information that may not be apparent when reviewed by only two or three persons responsible for constituting the agenda. And "we don't want to create an impression that some proposals receive 'short shrift' treatment."

Another judge agreed that public perception is an important consideration. But the reporters and chair would look for items "on which no one would want discussion." If even a single member wants discussion, full Committee treatment will be provided.

Another judge observed that the Bankruptcy Rules Committee has maintained a consent agenda for a few years now. "It has worked well for us." Occasionally a committee member asks to take up an item from the consent calendar. The criteria for selecting consent agenda topics remain unclear, but revolve around a determination that the topic is unlikely to raise any interest.

The possible advantages of a consent agenda were noted. It could reduce the amount of time committee members devote to some agenda topics, freeing time for topics that seem to demand greater attention. Advance notice that an item will be moved to the discussion agenda will ensure an opportunity to prepare for full deliberation. "Some proposals require a lot of digging. Some seem off the wall. We do not want to dilute consideration of the serious matters." Full consideration of all items could be too much work. Providing one week of advance notice that a topic has been moved to the discussion agenda reduces the value of the practice that seeks to provide agenda materials to committee members three weekends before the committee meeting, but it is not likely that more than one, at most a few, items would need to be studied a second time.

A committee member suggested that "matters come up with twists and turns that are not foreseen" when preparing an agenda. It is better to keep all items on a single agenda, "hoping for discipline on matters that do not require a lot of time."

Judge Bates suggested that this discussion provided a useful beginning, but that the question should be carried forward for further discussion at the October meeting. The three proposals offered to illustrate the general question remain for discussion.

Rule 16: Settlement Conferences

This topic suggests three changes with respect to settlement conferences, two in Rule 16 and a third evidently aimed at local rules or the Evidence Rules.

The first suggestion is that trial judges should be excluded from participating in settlement conferences. The fears include the possibility that the parties will feel coerced, that parties will engage in strategic behavior by presenting incomplete and misleading information, and that the judge may imbibe wrong views of the case. The Committee considered these problems in depth in November, 2017, and concluded that judges are well aware of them. Federal Judicial Center programs regularly explore the problems. And different approaches may be appropriate for different judges and different cases.

The second suggestion is that objective standards should be established to protect against undue sanctions under Rule 16(f)(1)(B), which authorizes sanctions "if a party or its attorney * * * is substantially unprepared to participate — or does not participate in good faith — in the conference." Examples are cited of sanctions imposed for "failing to bargain sufficiently, failing to make a reasonable offer, and failing to have a representative present at the settlement conference with 'sufficient settlement authority.'" Brief discussion suggested that although these examples sound extreme, it does not seem likely that there are widespread abuses of discretion, nor does it seem likely that amended rule language would be effective in constraining such abuses as are likely to occur.

The third set of suggestions seek to add "substantive and procedural safeguards" to be included in district court local ADR rules, or in the Evidence Rules. Two of them address the topics suggested in the sanctions section.

The Committee determined to remove these topics from the agenda.

Time Limits in Subpoena Enforcement Actions

This suggestion relies on impatience with the time courts take to decide actions brought by Congress to enforce subpoenas directed to executive officials. But the suggestion appears to be framed in general terms that would address all proceedings to enforce subpoenas of every type, including discovery subpoenas, trial subpoenas, and subpoenas or similar commands issued by administrative agencies.

Brief discussion focused on congressional subpoenas. Consideration of this topic was thought ill-advised. There was some discussion of the uncertain status of present law on enforceability. There was no thought that the specific and very tight time limits proposed for action by district courts, the courts of appeals, and the Supreme Court were sensible.

Discovery subpoenas also were noted. Not long ago the Committee devoted years of work to revising Rule 45. No problems were identified with respect to the time taken to reach decision on motions to enforce. At least as to discovery subpoenas, the proposal is a "nonstarter."

The Committee determined to remove this topic from the agenda.

Rules 7(b)(2), 10

This proposal suggests that Rules 7(b)(2) and 10 be amended to correct several "paradoxes" in their present relationship.

The paradox is said to begin with Rule 7(b)(2)'s direction: "The rules governing captions and other matters of form in pleadings apply to motions and other papers." Rule 7(a) lists the only "pleadings" that may be allowed. Motions are not pleadings.

Rule 10(a) directs that "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation."

How, the suggestion asks, can a motion bear a Rule 7(a) designation? It cannot be called a complaint, an answer to a third-party complaint, or by the name of any other pleading.

And how, the suggestion asks, can it have any other name, since the "title" referred to in Rule 10(a) manifestly refers to the title of the action, not the name to be fixed to a motion?

The examples proliferate. The submission recognizes that the problems are quite technical, and that "In practice, litigants and counsel simply ignore the problematic language, if they notice it at all."

Brief discussion suggested that the relationship between Rules 7(b)(2) and 10 "is a process of analogy, not literal reading." There is no practical problem, as the submission recognizes. There is no reason to undertake a revision project.

Judge Bates closed the meeting by stating that his term as Committee Chair has been a good time, expressing thanks to all Committee members and the others who worked in the common enterprise.

Respectfully submitted,

Edward H. Cooper
Reporter