COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. David G. Campbell
Advisory Committee on Civil Rules

RE: Report of Advisory Committee on Civil Rules

DATE: December 2, 2014

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on October 30, 2014, concluding in one day an agenda that had been scheduled to carry over to October 31. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

The Committee has no action items to recommend.

Deliberations at the October meeting fell into four areas.

The consideration of e-rules amendments has been assigned to the all-committees subcommittee, and will be reflected in its report.

The second bundle of topics focused on a number of proposed rules amendments that have been submitted to the Committee over the last few years. These proposals and the Committee's deliberations on them are described extensively in the draft Minutes. They will be summarized in Part II, some rather fully and others briefly. The summaries follow the order of discussion in the draft Minutes, facilitating reference when curiosity prompts a search for greater detail.

The third kind of work involved ongoing subcommittee projects. Part III summarizes the Rule 23 Subcommittee report, and notes the projects pending before other subcommittees.

Finally, Part IV reports briefly on the hope that ways may be found to encourage the development of pilot projects to test innovations in civil litigation and provide empirical data regarding their effectiveness. It also reflects discussion of ways to advance early understanding and implementation of rules amendments when they have been prescribed and are to take effect.

I. E-RULES

The Committee has reported these tentative recommendations to the all-committees Subcommittee:

The Civil Rules should mandate e-filing. Exceptions should be allowed for good cause. Paper filing also may be permitted or required by local rule. Any provision for electronic signatures remains open for further consideration. Reactions to the rule published by the Bankruptcy Rules Committee in 2013 suggest that it would be unwise to go forward with a general provision for electronic signatures. But it might be useful to provide for electronic signing by the person who makes the filing. Filing by an authorized user could count automatically as the user's signature. This approach would not address the questions raised by other signatures, such as signatures on affidavits or declarations filed to support a summary-judgment motion. And, although present Rule 5(d)(3) authorizes local rules that cover electronic verification, it may be safer to leave verification out of the rule unless consideration by the subcommittee produces a persuasive provision.

The Civil Rules also should provide for e-service of the papers described in Rule 5(a), deleting the requirement in present Rule 5(b)(2)(E) that consent be obtained from the person served. Here too, exemptions could be made for good cause or by local rule.

Rule 5(d)(1) would be amended to provide that a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

The Committee considered the "template" rule that would equate electrons with paper for all purposes throughout the Civil Rules, "unless otherwise provided." The template comes in two parts. The first provides that any reference to information in written form includes electronically stored information. The second provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. It has been recognized from the beginning that these approaches may fit some sets of rules better than other sets. The Committee concluded that it is too early to attempt to adapt these approaches to the Civil Rules. Many different words in many different rules can be understood to imply paper. Great and at times risky effort will be required to sort through all of them to determine whether electronic modes are

equally suitable. Emerging problems in practice may come to justify the effort. But the Committee is not aware of any pressing needs to act now, and recognizes that the most satisfactory resolutions may well arise from practice in the continual migration to the electronic universe.

Short of a generic rule, several individual Civil Rules could be revised to equate electrons with paper. One simple example is Rule 72(b)(1), which directs that the clerk must promptly "mail" to each party a copy of a magistrate judge's recommended disposition. "No one mails." "Serve" could easily be substituted. And it may be substituted when a general package of e-rules proposals is ready for publication. But there is no need to act now.

II. ACCUMULATED DOCKET MATTERS

Signatures on Notice of Removal. Several removal statutes allow any one defendant to remove an action from state court. Some are ambiguous. 28 U.S.C. § 1441(a) provides for removal "by the defendant or the defendants." Section 1446(b)(1)(A) provides that if an action is "removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal * * *." The circuits have taken different approaches to a simple question: Can one defendant sign a notice of removal, representing that all other defendants authorize and join in the removal? A uniform answer to this question could be given by amending Civil Rule 81(c)(2). The answer might be that all defendants must sign separately. It might be that one can sign on behalf of all, expressly representing authority to sign for all. Or some combination could be found, with a joint notice for some and separate notices for all others. One reason to hesitate is that the circuits disagree on the question whether § 1452 authorizes a single defendant to remove a claim related to a bankruptcy case. A Rule 81 provision limited to removals under § 1441(a) might create uncertainty in the current circumstance, and might require revision if a uniform answer is given. A provision addressed to any removal that must be joined by all defendants might solve that problem. But deeper questions remain: Does the Committee have power under the Rules Enabling Act to resolve judicial disagreements on the meaning of a statute? And even if it has the power, is it wise to do so? A lawyer contemplating removal should take care to discover and comply with circuit practice. Most lawyers are careful to ensure that all parties join in removal when the underlying statute requires unanimity. Matters that bear on removal statutes should be approached only if there is a serious need, and even then should be approached with caution. The Committee concluded that this subject should be tabled.

Third-Party Litigation Financing. This proposal would amend Civil Rule 26(a)(1)(A) to require automatic initial disclosure of third-party litigation financing agreements. Contingent-fee agreements would not be included in the concept. An analogy is offered to the initial disclosure of liability insurance. The proponents suggest several advantages. Disclosure may promote settlement. It will protect against unknown conflicts of interest by ensuring judges have access to information, not provided by Rule 7.1 disclosures, identifying third-party financing entities in which the judge may have an interest. The defendant has an intrinsic interest in knowing who the true adversaries are. Knowing of third-party financing may affect rulings on motions to shift the

costs of discovery, or for sanctions.

Discussion reflected concerns that third-party financing is a relatively new and evolving phenomenon. It takes many forms that may present distinctive questions. A study paper for the ABA 20/20 Commission on Ethics expressed the hope that work will continue to study the impact of funding on counsel's independence, candor, confidentiality, and undivided loyalty.

The Committee agreed that the questions raised by third-party financing are important. But they have not been fully identified, and may change as practices develop further. In addition, the Committee agreed that judges currently have the power to obtain information about third-party funding when it is relevant in a particular case. An attempt to craft rules now would be premature. These questions will not be pursued now.

Nonparty Rule 30(b)(6) Depositions. This proposal describes a concern that notices of a Rule 30(b)(6) deposition of an entity that is not a party to the underlying action often set an unreasonably short time for deposing the persons designated to testify for the entity. Rule 30(b)(6) presents other possible problems; several years ago the Committee considered a lengthy proposal that addressed attempts to elicit testimony outside the matters described for the examination. The rule was the subject of an exacting review and evaluation that extended over several Committee meetings. Discussion noted that the Committee had recently devoted substantial work to considering Rule 45 subpoenas — the means used to compel a nonparty to appear for a deposition — without having encountered the "short notice" issue. Nor were Committee members aware of the problem as described. This proposal was set aside.

Attorney-Client Privilege Appeals. In *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), the Supreme Court ruled that the collateral-order appeal doctrine does not support appeal from orders that reject claims of attorney-client privilege. The opinion suggested that the Rules Enabling Act process is the best means of considering the question whether appellate review should be expanded beyond the infrequent opportunities provided by disobedience and contempt, certification under 28 U.S.C. § 1292(b), and extraordinary writ review. The Appellate Rules Committee has considered these questions and has decided not to propose any new rule. The Civil Rules Committee reached the same conclusion.

Rule 41. This submission came in the form of a law review article, Bradley Scott Shannon, "Dismissing Federal Rule of Civil Procedure 41," 52 U. of Louisville L. Rev. 265 (2014). The first part of the article describes several well-known shortcomings in the rule text, including these: (1) The unilateral right to dismiss without prejudice should be cut off by a motion to dismiss as well as by an answer or motion for summary judgment. (2) The reference to dismissing "an action" should be elaborated to reach dismissal of part of an action, whether a particular claim or a particular party. (3) Rule 41(c) should be expanded to address dismissal of all claims after the complaint, not only counterclaims, crossclaims, or third-party claims. (4) The events that cut off the right to unilaterally dismiss under Rule 41(c) should be expanded. The

second part of the article criticizes the reliance in Rule 41 on such concepts as "prejudice," "without prejudice," and "on the merits." The suggested remedy is to substitute more direct references to "preclusion." Although Professor Shannon has identified some shortcomings in the Rule 41 text, no member of the Committee has encountered problems in practice. The Committee also expressed concern about the potential complexity of writing precise preclusion rules into Rule 41, as well as the significant risk of unintended consequences. Revision will not be undertaken.

Rule 48: Non-Unanimous Verdicts in Diversity Cases. This proposal would amend Rule 48 to direct that state majority-verdict rules be applied in diversity cases. Several reasons were offered. Defendants often believe that majority-verdict rules favor plaintiffs, creating an incentive to remove to federal court cases that otherwise would remain in state court. State majority-verdict rules, further, may reflect substantive state values that should be respected by federal courts when enforcing state-law claims. And majority-verdict rules may be better than the antiquated unanimity requirement enshrined in Rule 48 and federal tradition. Adopting a majority-verdict rule for all cases, not diversity cases alone, would have a further advantage. If majority verdict rules were limited to state-law claims, there could be significant difficulties in asking a single jury to reach unanimity as to federal-question claims in the same case.

Discussion revealed cogent arguments on all sides of these considerations. It seems inevitable that those who oppose a shift to majority verdicts will invoke the Seventh Amendment, whether the shift is limited to diversity (and supplemental jurisdiction) cases or is adopted for all cases in federal court. At the end of this vigorous discussion, the Committee voted to remove the proposal from the docket.

Rule 56: Summary-judgment Standards. This submission is an article, Suja A. Thomas, "Summary Judgment and the Reasonable Jury Standard," 97 Judicature 222 (2014). Parts of the article intimate that judges are simply incapable of understanding what it may be reasonable for a jury to find. But the proposal at the end is not to abolish summary judgment, nor even to undertake a present restatement of the standard for summary judgment. Instead, study of the standard is proposed, likely invoking the aid of the Federal Judicial Center. The Federal Judicial Center has undertaken several studies of summary-judgment practice. But its researchers have not been able to design a study that would advance understanding of what the summary-judgment standard means in actual application. The Committee removed this proposal from the agenda.

Rule 68: Invigorate Offers of Judgment. The Committee published proposals to amend Rule 68 in 1983. Active responses led to publication of a substantially revised proposal in 1984. The project was then abandoned. Rule 68 was taken up again more than 20 years ago. Successive drafts became increasingly complicated in attempting to respond to discoveries of ever-increasing complications. That effort was abandoned in 1994 without publishing any proposals. Rule 68, however, remains a popular subject as measured by the regular appearance of proposals by bar groups and others that revisions should be made. The proposals vary, but the common theme is

that Rule 68 is not much used, that its use should be encouraged, and that encouragement should come by adding "teeth" in the form of stronger sanctions for failing to win a judgment better than a rejected offer. Most of the proposals would add a provision for offers by plaintiffs, not only defendants as in present Rule 68. These proposals commonly suggest that an award of attorney fees is the appropriate sanction when a defendant rejects an offer and then loses even more by judgment — the successful plaintiff ordinarily would recover statutory costs in any event, so the costs sanctions in present Rule 68 would have no meaning.

Reliance on attorney fees as sanctions stirs deep concerns about the "American Rule." It also invites an evaluation of the Supreme Court's reading of present Rule 68. Relying on "plain meaning," the Court ruled that a plaintiff loses the right to statutory attorney fees incurred after rejecting an offer that was better than a lower judgment the plaintiff actually wins. This consequence follows, however, only if the underlying statute provides a fee award as "costs," the word in Rule 68(d). If the statute simply provides a fee award, failure to win a judgment better than the offer does not cut off the statutory right.

Nor is the statutory fee issue the only Supreme Court interpretation that must be evaluated if a Rule 68 project is launched. Rule 68(d) provides for sanctions "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." So if a defendant offers $10,000 and the judgment is for $9,000 or $1, the defendant is entitled to costs incurred after the offer was made. But if judgment is for the defendant, Rule 68 sanctions disappear because the plaintiff did not "obtain" a judgment. So long as the only consequence is an award of costs, this makes little difference since the prevailing defendant ordinarily would be entitled to costs. But if more substantial sanctions are adopted, the distinction becomes important.

The Committee recognizes that the persistence of Rule 68 proposals warrants serious consideration of possible revisions, or even potential abrogation. The vigorous responses that met the proposals published in 1983 and 1984, and the challenging complexities encountered in attempting to draft a more elaborate rule 20 years ago, will have to be faced if any new project is undertaken. One avenue that can be explored without yet facing these challenges will be to study counterpart rules in the state courts. The Committee concluded that state rules should be studied before deciding what, if anything, should be done next. A review of state rules and any available empirical studies will be completed before the Committee's April meeting.

Rule 4(c)(1): "Copy" of the Complaint. This proposal comes from a federal judge who was faced with the cost of printing more than 9,000 pages to serve 30 defendants with 300 pages of a complaint and exhibits filed by a pro se prisoner plaintiff. The suggestion is that an electronic medium, such as a CD, should be counted as a "copy" of the complaint to be served with the summons. Discussion reflected the concern that not all defendants will be able to use whatever e-medium is used, and the belief that this subject should be addressed as part of the continuing effort to bring the rules into the era of e-communication. It also was noted that informal arrangements have been made in some courts with defendants who agree to accept e-form copies.

The conclusion was to take no action on this suggestion.

Rule 30(b)(2). Rule 30(b)(2) provides that a notice of a party's deposition may be accompanied by a request under Rule 34 to produce "documents and tangible things at the deposition." The suggestion is to add ESI: "documents, electronically stored information, and tangible things." The suggestion reflects a deliberate choice made in developing the 2006 amendments that brought ESI directly into rule text. The basic choice was to treat ESI separately in Rule 34(a)(1)(A), not as a subcategory of "documents." The secondary choice was to add "ESI" to the text of some of the other rules that refer to "documents," but not to add it to other rules that also refer to "documents." The Committee concluded that this deliberate choice has not produced any problems in practice, and that there is no point now in either making ESI a category of "documents" or adding ESI to every rule that now refers to documents.

Rule 4(e)(1). Rule 4(e)(1) provides for service on an individual by following state law. State law may provide for leaving the summons and complaint unattended at the individual's dwelling or usual place of abode. The suggestion is that the server should take and file a picture of the process affixed to the dwelling. As a practical matter, a person intent on depriving the defendant of actual notice could take the picture and then remove the process. More generally, this specific proposal does not address the problem of "sewer service" — the deliberate filing of false proofs of service after discarding the summons and complaint after minimal or no efforts to accomplish actual service. The Committee recognizes that problems persist with falsified proofs of service. But it does not believe that amending the rules will provide a satisfactory answer.

Rule 15(a)(3): "Any required response". Rule 15(a)(3) sets the time for "any required response" to an amended pleading. The suggestion is that this wording, adopted in the Style Project, has introduced an ambiguity. There is no doubt about amendment of a pleading that does not require a response — an answer that does not include a counterclaim, for example. But does every amendment of a pleading that does require a response require amendment of a responsive pleading that already has been filed? The Committee concluded that it is better to leave the rule as it stands. Court files might be neater if there is always an amended responsive pleading to correspond to an amended pleading, but trivial amendments that do not affect the responsive pleading may be addressed by less formal but equally effective measures.

Rule 55(b): Partial Default Judgment. This suggestion appears to rest on a misreading of present Rule 55(b). It will be removed from the agenda.

New Rule 33(e). This proposal would adopt a new Rule 33(e) that would provide a precisely worded interrogatory that would not count against the presumptive limit of 25 interrogatories. The interrogatory would ask for specific and detailed information about the grounds for failing to respond to a Rule 36 request to admit with an "unqualified admission." The Committee decided to remove the proposal from the agenda.

Rule 8: Format for Complaint. The Committee will not take up this proposal to amend Rule 8 to provide a general format for a complaint. The proposal would, in addition to other matters, direct inclusion of "alleged acts and omissions of the parties, with times and places"; "alleged law regarding the facts"; and "the civil remedy or criminal relief requested." The time may come when pleading issues should be restored to an active place on the agenda, but this proposal does not prompt present action.

Rule 15(a)(1) cut-off of amendments as a matter of course; Rule 12(f) expanded to strike material in a motion; Discovery times Each of these proposals was removed from the docket. Elaboration seems unnecessary.

e-discovery. A number of proposals addressing e-discovery were made while the recent work went on. They were all considered — many of them provided valuable help — in framing the proposals now before the Supreme Court. They too have been removed from the docket.

III. SUBCOMMITTEE ACTIVITY

Rule 23 Subcommittee. The Rule 23 Subcommittee continues to reach out to other groups for advice that will inform the decision whether to recommend that work begin on possible class-action amendments. This decision will depend on identifying current practices that seem troubling in ways that might be improved by amending Rule 23. All Subcommittee members appeared for a panel at the ABA National Class Action Institute to seek input. The Subcommittee will appear on the program for the afternoon before the formal opening of the American Law Institute Annual Meeting next May. Other organized events may be sought out, and less formal inquiries also are being pursued. The Subcommittee also hopes to arrange a miniconference at some time during 2015. The Subcommittee plans to present conceptual drafts of possible rules amendments at the April 2015 Advisory Committee meeting, on the understanding that the drafts are not a recommendation whether to recommend rules for publication and possible adoption.

A number of issues have been identified as subjects for further development. But it remains important to solicit suggestions for other subjects, recognizing that it will be difficult to expand the range of possible revisions once any project is well under way.

A cluster of issues persist with respect to settlement, the eventual outcome of almost all class actions.

The criteria for certifying a settlement class are important. It is understood that concerns of manageability are substantially changed when a class is certified for settlement, not for trial. But it is not clear what other differences there may be. Does the prospect of settlement, for example, reduce concerns about the variability of state law that might defeat a finding that common questions predominate for a Rule 23(b)(3) certification?

Criteria for reviewing whether a settlement is "fair, reasonable, and adequate" might be added to rule text. A lengthy list of criteria was considered for rule text in developing the proposals that led to the 2003 amendments. This list was then transferred to the Committee Note, and eventually abandoned. But it may remain useful to provide some guidance, perhaps by developing a list of a few rather broad factors rather than the dozen or more factors that have been identified in the cases.

Cy pres awards have drawn particular attention in recent years. Some courts have already adopted the approach recommended in the ALI Principles of Aggregate Litigation. But fair questions remain. One approach is to reduce the amount left over for cy pres distribution to the minimum that can be achieved after all feasible distributions to class members, including a second round of distributions after the rate of initial claiming fails to deplete a settlement fund. Another is to rely on cy pres distribution of whatever remains unclaimed after a first round of claims. Still another is to recognize that there may be circumstances in which the difficulty of identifying and compensating class members who were actually injured, or the cost of distributing relatively trivial sums, justify a cy pres or "fluid" recovery that will provide some public benefit and enforce the policies reflected in outlawing the activities challenged by the class.

One of the reasons for disquiet about cy pres awards is the perception that at times they are made to recipients that will use the award for purposes that have little or no relation to the interests of the class. Awards to educational institutions favored by counsel or the court are an example. Could cy pres provisions in Rule 23 effectively direct that the award go to an entity that has interests closely aligned with class members' interests?

Whatever may be made of cy pres awards, it will be important to consider possible Enabling Act limitations on the scope of any Rule 23 provisions that might be proposed.

Objectors to settlements present another set of longstanding issues. Once the class and its adversaries have worked out a settlement, they join in lauding its virtues. The independent advice of objectors may play a vital role in aiding the court's review. A variety of proposals to enhance the effectiveness of objectors were considered in the most recent round of Rule 23 studies, but were put aside. If potential objectors are not to be included in evaluating the conduct of the litigation up to the point where serious settlement negotiations begin, and are not to be included in the negotiations, the cost of providing them with information to evaluate the proposed settlement can be high. Beyond that, parties to a settlement commonly distrust an objector's motives. Some objectors are genuinely motivated by a desire to improve the settlement, both for the benefit of class members and to enhance enforcement of the underlying law. Some may not be so motivated. It remains an open question whether it is possible to identify rules provisions that would prove helpful. If these questions are pursued, it will be important to identify and learn from lawyers who frequently appear as objectors.

A special set of issues arise when an objector appeals and then settles pending appeal. The Appellate Rules Committee is considering approaches that might constrain the temptation to appeal in order to capitalize on the nuisance value of the appeal. The two committees will work together to develop these issues.

The role of "issues" classes under Rule 23(c)(4) has long seemed uncertain to many observers, including the relation to the "predominance" requirement in Rule 23(b)(3). Some observers contend that disagreements among the circuits on the interpretation of Rule 23(c)(4) may be on the way to a resolution that will forestall any role for rule amendments. But the point deserves further investigation.

Notice issues also remain. Most of the current discussion focuses on the wish for less expensive means of effecting notice. Individual mail is expensive. Publication in traditional newspapers is expensive. In some circumstances widespread notice can be effected at lower cost, and perhaps more effectively, by various electronic means such as e-mail and social media. There are sensitive concerns about due process and protecting a meaningful right to opt out of a (b)(3) class, but these issues deserve at least an inquiry to determine whether meaningful improvements can be made in the rule. A subset of notice questions might ask whether the present optional notice provisions for (b)(1) and (b)(2) classes might be tightened.

A number of other topics have been identified. It is important to gain advice on the value of adding them to an active agenda. The Supreme Court has spoken on the award of damages incident to a Rule 23(b)(2) class certified for injunctive or declaratory relief, but there may be room to clarify or modify the rule. Consideration of the "merits" at the certification stage has continued to grow: is there room for regulation or improvement? Recent cases have sharpened the focus on the "ascertainability" of class membership — again, is there both reason and opportunity to address this concern by new rule text? Rule 68 offers of judgment seem to be coming into increasing favor as attempts to moot individual class representatives before certification, hoping to moot the entire action. There is no reason to suppose that the mooting effect of an offer of complete relief should depend on the choice whether to clothe it in Rule 68 garb, but the question might be addressed in part through Rule 68 or more generally in Rule 23. There is a sensitive tie to Article III mootness doctrine, but this concern might be readily overcome.

A new issue emerged for the first time at the Committee meeting. The Department of Justice is concerned that the 14-day period allowed to seek permission to appeal an order granting or denying class-action certification is too short for the Department of Justice. The Department would favor an amendment that, like the provisions in Rule 12, would allow more time when the United States is a party.

Other possible issues have been identified but placed on hold. What is most important now is to encourage further suggestions, beginning with this meeting of the Standing Committee.

Other Subcommittees. The Discovery Subcommittee carries forward on its agenda the question whether additional "requester pays" provisions might be included in the discovery rules.

The Appellate Rules Committee has formed a joint subcommittee with this Committee to work on issues that involve both sets of rules. The current agenda includes two sets of issues. One is a long-pending effort to decide whether rules provisions should be adopted to address efforts to manufacture a final judgment by voluntarily dismissing what remains of an action after an unfavorable ruling. The other addresses discontinuities in the Civil Rule 62 provisions for stays and bonds pending appeal.

IV(A). PILOT PROJECTS

The Committee devoted substantial time to exploring the possibilities of enhancing rules reform by means of pilot projects that put possible new rules into actual practice. Rules revisions have often relied heavily on the lessons of practical experience as reported by lawyers and judges. Information of this sort can be invaluable, and may be the best available foundation for work. In recent years the committees have turned increasingly to empirical work, frequently asking the Federal Judicial Center to frame studies of the ways in which current rules work in real cases. These studies also have proved valuable, and often are evaluated both in their own terms and by drawing from subjective reports of experience to help understand the events that are measured by the empirical inquiry.

Beyond these efforts, much may be learned by controlled experiments in forms that may be called "pilot projects." A pilot project is designed to implement new rules in real cases. It should be designed carefully, beginning with an attempt to identify the kinds of questions that may be fruitfully tested. What reasons suggest that a new procedure might prove beneficial? What fact information will help prove or disprove those reasons? How can a project be structured so as to yield the fact information in measurable form? If structured from the beginning with the help of empirical experts who can encourage a design that will yield reliable information that addresses the intended questions without introducing confounding variables, pilot projects could become a particularly valuable means of improving the rules.

One general problem that must be faced is whether to make participation in a pilot project mandatory. If parties and lawyers are allowed to opt out of the project, the results may be skewed because the cases that remain are not representative of the population that must be studied. There even may be too few cases remaining to support evaluation, no matter how well the few may resemble the entire class. Mandatory participation, however, presents serious questions if the project modifies the national rules. A local rule must be consistent with the national rules. Finding other authority, such as adoption by order on an individual case-by-case basis, may encounter resistance.

A different limit appears when searching for empirical information about standards. Framing a pilot project to measure the effect of different pleading standards, for example, would be difficult. Outcomes could be measured, but evaluating any differences would be difficult at best. Evaluating the differences may be addressed by interviewing lawyers or judges; interviews can advance understanding, but are vulnerable to challenge as subjective, as not rigorous.

Three pilot projects in the Southern District of New York were described. One is adoption of the discovery protocols for individual employment cases that have been adopted by some 50 judges around the country. The second, for some commonly encountered types of actions brought under 42 U.S.C. § 1983, adopts mandatory disclosure of core discovery and requires that plaintiffs make a settlement demand. The case goes automatically to mediators. The third, now concluded, tested a set of best practices for complex cases. Although it may be difficult to evaluate the best practices after a mere 3 years, "there is a value in generating experiences to discuss even if their actual effect cannot be measured statistically."

The Seventh Circuit e-discovery project also was discussed. The project has helped to develop "great expertise in e-discovery," and has "changed the culture in our Circuit."

The nationwide 10-year pilot project for patent cases also was discussed.

The success of the discovery protocols for individual employment cases has encouraged suggestions that similar protocols should be developed for other types of cases. Suitable candidates might be employment class actions, or actions under the Individuals with Disabilities Education Act or the Fair Credit Reporting Act. The process of generating the protocols for individual employment cases was arduous. The participants were very good lawyers from both plaintiff and defense practices. Three judges engaged in the Enabling Act process provided support and encouragement. The Institute for the Advancement of the American Legal System promoted the work. But with all of those advantages, the work resembled a labor negotiation, with much hard bargaining and several moments that prompted legitimate fears of a breakdown. Still, the result is worth it. All sides seem satisfied with the product.

Less formal projects also were noted. The Northern District of California adopted an expedited trial process that has been abandoned for lack of takers. A Committee member reported an experiment with case-specific orders that offered a trial in 4 months with minimal or no discovery and no motions for summary judgment. After 1,100 cases the order was discontinued because almost no one had seized the opportunity.

IV(B). PROMOTING NEW RULES

A number of important proposed Civil Rules amendments are now before the Supreme Court. If the Court prescribes them and Congress acquiesces, they will take effect next December 1.

Lawyers and even judges may lag in coming to recognize and understand new rules provisions. Means to encourage understanding and thoughtful implementation are always useful. Finding effective means to bring these new rules into effective practice will be important.

The Federal Judicial Center takes the lead in creating educational programs for judges, and will be ready if the proposed changes are adopted.

There may be new ways in which the Committees can encourage the development of programs to educate the bar in the new rules. It might help to prepare descriptive materials that can be used by groups that offer continuing education, bar groups, Circuit conferences, Inns of Court, and others. The Committee is considering what it may be able to do.