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# MINUTES

## CIVIL RULES ADVISORY COMMITTEE

## APRIL 10, 2018

The Civil Rules Advisory Committee met in Philadelphia, Pennsylvania,, on April 10, 2018. Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad Readler; Virginia A. Seitz, Esq. (by telephone); Judge Craig B. Shaffer; Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter (by telephone), Professor Catherine T. Struve, Associate Reporter, and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Fred B. Buck, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); Joseph Garrison, Esq. (NELA); Susan H. Steinman, Esq. (AAJ); Amy Brogioli (AAJ); Melissa Whitney, Esq., (FJC); Naomi Mendelsohn, Esq. (Social Security Admn.); Francis Massaro, Esq. (Admn. Conf. of U.S.); Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer; Leah Nicholls, Esq.; Robert Levy, Esq.; Brittany Schultz, Esq.; David Kerstein; Julia Sutherland; Bob Chlopak; Kristina Sesek; John Beisner, Esq.; Robert Owen, Esq.; Malini Moorthy, Esq.; Andrew Cohen, Esq.; and Andrew Strickler, Esq..

Judge Bates welcomed the Committee and observers to the meeting. He noted that four members -- Barkett, Folse, Matheson, and Nahmias -- were finishing six years of service, the maximum two terms in standard practice. Judge Shaffer is retiring from federal service, and a replacement must be found. And no successor has yet been appointed for former member Judge Oliver. As many as six new members may have been appointed by the time of the next meeting in November. This will be more change than usual in the Committee's membership.

Judge Bates reported that the Standing Committee meeting in January provided valuable input on the Rule 30(b)(6), MDL, and social security review projects. The subcommittees have taken this

input into account in the ongoing work that they report today. Nothing in the work of the Judicial Conference last March bears on the Committee's ongoing work. Finally, he noted that the Supreme Court continues to deliberate the Civil Rules proposals that were transmitted by the Judicial Conference last fall.

*November 2017 Minutes*

The draft Minutes of the November 7, 2017 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

*Legislative Report*

Julie Wilson presented the Legislative Report. She noted that in November the Senate Judiciary Committee held a hearing on the impact of lawsuit abuse on American small businesses and job creators. The subject is connected to the Lawsuit Abuse Reduction Act of 2017, which passed the House in March 2017 and remains pending in the Senate. Another House Bill addresses nationwide injunctions, a topic that was recently on the Committee agenda. It has a provision that would limit an injunction so that it reaches only parties to the case, and a provision that would limit injunctions to the district where issued.

*Rule 30(b)(6)*

Judge Bates introduced the three primary items on the agenda as the Reports of the Subcommittees on Rule 30(b)(6), MDL practices, and Social Security review. Skeptics have questioned the need for rules amendments in each of these areas. Each will provoke significant discussion, particularly Rule 30(b)(6) if it leads to a recommendation to publish a proposal for comment.

Judge Ericksen introduced the Report of the Rule 30(b)(6) Subcommittee. The November Committee meeting provided useful discussion of ways to improve the November draft. The Subcommittee conferred and made improvements following that meeting. The Subcommittee conferred again after learning of the January discussion in the Standing Committee.

The Rule 30(b)(6) amendment proposed by the Subcommittee appears at pp. 116-117 of the agenda materials. Several features deserve notice. It directs the person serving the notice or subpoena and the entity named as deponent to confer before or promptly after the notice or subpoena. "or promptly after" has been confirmed following earlier discussion. The question whether to say the parties "should" or "must" confer has been resolved in favor of "must," as a more appropriate direction for rule text. On the other

hand, the possibility of adding "or attempt to confer" has been rejected. Those words make sense in Rule 37, where they ensure that a recalcitrant party cannot thwart an attempt to compel proper discovery behavior by refusing to confer. They do not fit in Rule 30(b)(6), which should not be satisfied by a perfunctory attempt.

The Subcommittee discussed the proposed Committee Note at length. It chose a "less is more" approach. The Note does not prescribe topics to be discussed, for fear of prompting litigation about the adequacy of the conferring.

The Subcommittee also presents for consideration a possible amendment of Rule 26(f), which appears at p. 119 of the agenda materials. This proposal would add a suggestion that the parties "may consider issues regarding [contemplated] depositions under Rule 30(b)(6)" in the Rule 26(f) conference. The Subcommittee believes the Committee should consider this topic, but recommends that the amendment not be advanced for publication. Although the parties may be in a position to think about Rule 30(b)(6) depositions at the Rule 26(f) conference in some cases, in most cases the need to depose an entity and the matters to be covered will develop only as discovery progresses through other means. The possible Rule 26(f) proposal is described in a bracketed sentence in the Committee Note, p. 118 lines 237-239. The sentence that follows, also in brackets, observes that in some cases discussion at a Rule 26(f) conference may satisfy the Rule 30(b)(6) obligation to confer. This sentence makes sense whether or not the Rule 26(f) amendment is proposed, but it is not clear that it should be retained. It may be that it will simply invite disputes about the sufficiency of preliminary discussion in a Rule 26(f) conference to satisfy the Rule 30(b)(6) requirement.

Judge Bates thanked the Subcommittee for this report, and suggested that it be reviewed from the perspective of experience. From the outset, the Committee has been advised that most Rule 30(b)(6) problems are handled by the parties. If that fails, the court can resolve them without much ado. Judges, especially magistrate judges, say they seldom encounter Rule 30(b)(6) problems. So it is argued there is no need for any amendment. What is the Subcommittee view on this?

Judge Ericksen responded that anxiety about amending Rule 30(b)(6) has been substantially reduced when lawyers see the conservative amendment actually proposed. The question whether to go ahead with the proposal was the subject of back-and-forth discussion in November. The Subcommittee concluded that the proposal will bring into rule text the good practices in some courts and spread them to courts where the rule is not working so

well. The need is real. "There is a disconnect between what lawyers see -- frustration, and a wish to do something -- and what judges see."

Professor Marcus observed that about 12 years ago, the Committee went through Rule 30(b)(6) very carefully. Since then the Committee has repeatedly heard of problems with it. A lot can be learned from public comment, just as the Subcommittee learned a lot from the hundred or so comments offered in response to the Subcommittee's invitation.

A Subcommittee member added that the Subcommittee also recognizes that the 2015 amendments are working their way through the system. And reading all the Rule 1 cases shows that judges are invoking Rule 1 "to tell lawyers to behave better." Help also will be found in the new Rule 26(b)(1) definition of the scope of discovery. Not that progress is as uniform as might be hoped. References to the stricken phrase "reasonably calculated to lead to the discovery of admissible evidence," for example, have appeared in 99 cases in the weeks since this February 1, either in describing arguments of counsel or in the court's own statements. "Rule 30(b)(6) is a lightning rod." It generates disputes about the number and lack of clarity of matters for examination, what documents to prepare for, and lack of preparation. These seem to be case-management problems. If the proposed amendment encourages judges to become more involved, it will do good work.

Another Subcommittee member noted that he had been a fairly strong advocate for amending Rule 30(b)(6) based on his own experience. "Over the years, the process keeps getting reinvented case-by-case." But some proposals to solve problems directly would spawn their own problems. The Subcommittee proposal looks fairly modest. "It is what happens when good lawyers work together." Yet not all lawyers do that. Putting it into the rule can make it happen more often. And the Committee Note highlights added issues the lawyers should talk about. Some proponents of change will be upset that the proposal does not go far enough. But it is so modest that it is hard to imagine being upset with what it does.

Still another Subcommittee member echoed these thoughts. "Putting in more detailed commands will lead to more fights." Limiting the amendment to a requirement to confer is a sound approach. It is better at this point in the rule's evolution.

A different Subcommittee member observed that "The grandiose ideas gave way to a 'little nudge.'" The proposal is a good first step to prod the parties to confer and work it out.

Three Committee members turned to the draft Rule 26(f)

amendment, agreeing that they would not recommend it for publication. It is likely to stir fights in the Rule 26(f) conference.

That issue prompted a suggestion that if the Rule 26(f) draft does not go forward, thought should be given to deleting the final sentence from the proposed Committee Note, p. 118, lines 242-245: "In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16." Discussion suggested that if the Rule 26(f) proposal does not go forward, the bracketed sentence referring to it at lines 237 to 239 will be deleted. The next bracketed sentence, suggesting that discussion at a Rule 26(f) conference might at times satisfy the Rule 30(b)(6) mandate to confer, might also be deleted for fear of generating new disputes. But why not keep the suggestion that the parties might, without prompting by new rule text, find it helpful in some cases to include provisions for Rule 30(b)(6) in their discovery plan and perhaps seek to work out Rule 30(b)(6) issues at a scheduling conference? These questions will be framed more directly once the fate of the Rule 26(f) draft is decided, but the suggestion at lines 242-245 seems useful. "Let's not tinker too much with the Note."

It was noted that the Department of Justice would oppose going forward with the Rule 26(f) draft. As to Rule 30(b)(6), experience has been that it is not a concern. Still, it can be a difficult area for litigants given the breadth of the matters that may be described for examination. On the other hand, why does it matter who will be the persons designated by an entity deponent to provide testimony? Requiring discussion of who might be a witness may be difficult when the entity is not in a position to commit, and there is a risk that it will be difficult to change witnesses later. The entity may not yet know who can best testify, or how many.

The first response was that "there is a bit of reciprocity." The deposing party has to discuss the number and description of matters for examination. The deposed entity can think about the designation of witnesses only when the descriptions of the matters for examination are worked out. The party taking the deposition, on the other hand, needs to know whether the designated witness is also a fact witness. That can support discussion of ways to avoid duplicating depositions. The entity "is not required to put its feet in concrete. This is discussion, not a binding commitment."

A counterpoint was that over the last 25 years of reviewing discovery decisions, the most litigated issue arises from arguments that Rule 30(b)(6) designated witnesses are not adequately

prepared.

The first response found a parallel. The proposal only requires that the parties confer in good faith. "They need not resolve every problem, but they can reduce the number of problems."

The doubt about discussing the identity of witnesses was repeated. It will help to confer about the matters for examination to learn whether they are needed, and how clearly they are defined. But why does the deposing party care whether the witness is John Smith or Joan Smith?

The next response was that the entity can say that the witness will be John Smith or Mary Jones. Then they can confer about whether one of them also will be a fact witness, and perhaps should be designated as the entity's witness for that reason.

A Subcommittee member said that in his cases, the deposing party always asks who the witness will be. And, at some point, the entity always says who it will be. A similar comment was that the entity can, in conferring, say that "I can't tell you now. I will tell you later."

The doubter agreed that "parties do tend to share names." But requiring discussion may lead to problems. One response was that the entity can say that it is too early to be sure who will be designated, even that the choice may depend on who can be made available on the day the deposing party wants to take the deposition.

Another response agreed that witnesses are named in advance. "There are cases where the witness is obvious." On the other hand, there are cases where it may take weeks or even months to prepare the witness to testify. If the witness is not obvious because of his role in the underlying events, what value is there in conferring about identity?

Judge Ericksen noted that the direction to confer about the identity of the witnesses could be stripped from the proposal, leaving the rest to go ahead.

Professor Marcus pointed out that the Committee Note, reflecting the present rule text that will remain unchanged, says that the entity has the right to designate its witnesses. The proposal does not compel it to identify them before the deposition. But getting the topic on the table at the conference seems like a good idea. If conferring about witness identity remains in the proposal for publication, we will get comments and learn from them.

Another Committee member suggested that discussion of witness identity should be left in the proposal to elicit comments. Perhaps some way might be found to stimulate comments, such as placing this part in brackets, adding a question in a footnote, or specifically inviting comments in the message transmitting the proposal for publication. It was agreed that any of those tactics can be used. But even without them, there is enough interest to guarantee comments.

Judge Ericksen asked whether it would help to place brackets around "[and the identity of each person who will testify]." The Subcommittee got a lot of comments in response to its invitation. But it continues to be important to get comments about all aspects of the proposal. Emphasizing one part might be a distraction.

The opportunity to begin to confer "promptly after" the notice or subpoena was pointed out as a feature that should reduce the problem with discussing witness identity. That may justify leaving this subject in the published proposal. But it would be better to take it out. It will stir claims by deposing parties that they are entitled to know the identity of the witnesses before the deposition is taken.

This concern was echoed. Focusing on "the identity of each person who will testify" "seems definitive." A different Committee member suggested that the text might be revised to require discussion of who "might be" testifying as witnesses.

The duty to confer "in good faith" came back into the discussion. The duty is not satisfied by one phone call. There will be a continuing exchange. Perhaps the Committee Note can identify the iterative nature of the process. Agreement was expressed. One phone call is not good-faith conferring. The first step must be to identify with some clarity the matters for examination. Then the conference can move on to discuss who might be witnesses. Later discussion added further support for the view that it is important to emphasize the iterative nature of the process.

This view of the continuing duty to confer was questioned under the rule text. It might be argued that a duty to confer "before or promptly after" the notice or subpoena is satisfied by a single, one-off conference. One way to address this concern may be by elaboration in the Committee Note without changing the rule text. The Note could say that beginning no later than "promptly after" does not mean that prompt beginning should always be a prompt conclusion. In some — perhaps many — cases the discussion will have to continue through successive exchanges.

Judge Ericksen said that the proposal should carry forward

with the duty to confer about the identity of the witnesses. But it could be useful to expand the Committee Note to say that although the conference must be initiated promptly, it will often be an iterative process that requires more than one direct discussion.

Another participant observed that the problem is that the entity may not know the identity of its witnesses when the notice or subpoena is served. Perhaps the rule should instead direct discussion of "the manner in which the organization will respond," or "the steps the organization will take to respond." A Committee member suggested that perhaps one of these phrases, with or without some revision, might be published as a bracketed alternative. Professor Marcus expressed concern that publishing several bracketed alternatives might make the product seem less finished, less carefully considered. It is more forceful to include discussion of witness identity in rule text, without leaving it to Committee Note elaboration on "steps to respond." Another participant expressed a different concern: "manner" or "steps to" respond seem to impose a very broad obligation to discuss such things as the manner of searching electronic files, steps to learn from internal sources who may be good witnesses because of personal knowledge, the ability to learn added information, and the skill to communicate information accurately under deposition questioning.

Discussion returned to a renewed observation that a lot of people have said that it is a problem to begin a deposition without knowing before that moment who the witness will be. This was met with a question: would it be enough to resolve the problems for both sides by directing discussion of not who "will," but who "may" testify? One response was that "in good faith" properly identifies the process of conferring, but "may" seems to reduce the quality of the process.

A different suggestion was to add a few words to the rule text: "must confer in good faith about the number and description of the matters for examination, and in due course the identity of each person who will testify." Or: "the matters for examination. This discussion must include the identity of each person * * *."

Another possibility was suggested: "and begin to confer about * * *."

A still different possibility was proposed: within a reasonable time after determining the matters for examination, the entity could be required to identify the persons "who likely will testify." This met a widespread response: "likely" is not enough. It also elicited a response that it would create problems to require actual identification in rule text, but the issue could be discussed in the Committee Note.

Committee discussion of Rule 30(b)(6) was suspended at this point to enable the Subcommittee to confer over the lunch break. The way was left open for recommendation of alternative rule texts.

After lunch, the Subcommittee returned with a proposal to revise the Rule 30(b)(6) amendment by adding two words: "Before or promptly after the notice or subpoena is served, the serving party and the organization must begin to confer about * * *." These words would give a meaningful time to work out the steps that will make the deposition as useful as possible. They will support Committee Note language elaborating the iterative nature of the process and the interdependence of defining the matters for examination with designating the witnesses.

Professor Marcus noted that adopting this change would require revising the Committee Note in ways that cannot be accomplished by drafting on the Committee floor. It will be better to draft after the meeting, and to circulate the Subcommittee's recommendation for electronic review and voting by the Committee. Enough time remains for that to be done before the Report to the Standing Committee must be submitted.

A Subcommittee member said that the Note will emphasize that the conference is an ongoing process. It should emphasize the connection between defining the matters for examination and identifying the witnesses. The time for identifying witnesses depends on this. The Note also should continue to make it clear that the entity determines who the witnesses will be, and is responsible for making sure that they are prepared.

The "begin to" words raised a new concern. Are they too soft? Can a recalcitrant party say that it has no duty beyond beginning to confer, and can quit once it has begun? One response was that the Note can emphasize that "a voice-mail message is not good faith." But another Committee member "would rather not change rule text. 'Begin to' may soften the command." The Note can discuss the iterative nature of the conferring process without adding these words.

Judge Ericksen asked about a slight variation: "Beginning before or promptly after * * *." It was agreed that this change would not soften the command as much as "begin to confer." A further change was suggested to make it firmer still: "Beginning before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer * * *." That suggestion met the continuing fear that any added rule language will provoke new fights, this time about what is "necessary." But it was responded that "necessary" is clear, and rejoined that "I can't tell you what I don't know"-- it

should not be necessary to go on conferring forever to force a designation at some indeterminate time before the deposition begins. Still, three other members expressed support for the "continuing as necessary" language.

These suggestions led to a renewed suggestion that the Subcommittee's original proposal should be recommended for publication without changing the rule text. The Committee Note can explain the ongoing, iterative nature of the conferring process. All agreed that the "begin to confer" alternative should be dropped.

An observer suggested that all of this effort could be spared by simply omitting "and the identity of each person who will testify." There is no obligation to identify the person, so why require discussion of identity? The organization needs to know the matters for examination so it can prepare its witnesses, but the conference should not go further. This view was supported by a Committee member who did not want to encounter objections to the organization's choice of witnesses, nor to require discussion of who they will be. Professor Marcus replied that ultimately the organization must choose someone to testify. The witness's identity will be made known no later than the day of the deposition.

These questions were brought to a vote. The suggestion to add "and continuing as necessary" was adopted by voice vote. The Committee recommended publication of the proposal originally advanced by the Subcommittee with this addition, adding these words to Rule 30(b)(6):

> * * * Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. * * *

The Committee Note will be revised to discuss the iterative nature of the obligation to confer. The new Note language will be circulated for review and a vote by the Committee.

A vote was called on the question whether to pursue further the draft that would amend Rule 26(f) to include a reminder that the Rule 26(f) conference may consider issues regarding contemplated depositions under Rule 30(b)(6). No Committee member voted to publish. All opposed publication. The draft was dropped from further consideration.

*MDL Practice*

Judge Bates introduced the Report of the MDL Subcommittee by noting that at present the main questions go to the scope of any project that might be undertaken.

Judge Dow, the Subcommittee Chair, began by stating that "this is the alpha, not the omega" of the work. The Subcommittee has entered what will be an extensive information-gathering phase to see whether to propose any rules for conducting centralized proceedings in an MDL court.

Judge Dow also expressed thanks to Rules Committee Support Office staff Womeldorf, Wilson, and Tighe for the work they have done to gather background information on many topics. The Judicial Panel on Multidistrict Litigation also has been a treasure trove of information.

Third-party litigation funding is another big topic that has been committed to the Subcommittee, in part because it may be related to MDL practice. But the Subcommittee is not yet prepared to suggest discussion in the Committee.

The Subcommittee has launched a "road show" that will involve meetings with several groups. It has planned engagements with at least five outside groups.

Work so far has identified many topics for study. The result of the work is many things for the MDL world to think about. The current agenda includes ten topics for study.

Professor Marcus led discussion of the ten current agenda topics.

(1) Scope. The scope of inquiry might extend beyond proceedings actually centralized in an MDL court. One possibility would be to aim at all proceedings that involve a large number of claimants -- one proposal has been to establish special procedures for bellwether trials in MDL proceedings that involve more than 900 claimants. That number, or some other, might be adopted as a threshold for aggregations outside MDL consolidation and class actions. Or it might be adopted as a threshold to separate MDL proceedings to be governed by special MDL rules from smaller MDL proceedings left outside the special rules. A different possibility, closer to MDL proceedings, would be to take on actions that seem ripe for MDL consolidation before the Judicial Panel orders transfer, addressing such matters as timing. Something might also be said about whether the MDL rules lose all force when an individual action is remanded to the court where it was filed.

(2) Master Complaints and Answers. The use of master complaints and answers seems to be increasing. Do they supersede the original individual-case pleadings? Should they? Should they be the focus of Rule 12(b) motions, motions for summary judgment, and discovery rulings? If a case is remanded to the court where it was filed, do rulings on a master pleading unravel? If master complaints tend to be generated only after the consolidated proceeding is pretty much organized, will this be a fit subject for rules?

Discussion of this topic began with a judge noting that he took on an MDL proceeding when there were 200 cases. The question was what do defendants do to answer new complaints? The parties set out a master complaint to be incorporated by individual plaintiffs by directly filing a short-form complaint in the MDL proceeding. The defendants do not even answer the short-form complaint, but can move to dismiss it.

Further discussion asked whether there is much opportunity for a rule to improve a practice that seems to be pretty well developed already.

The next question was how the master pleading practice relates to initial disclosures. In this MDL, each plaintiff files an individual fact sheet 30 days after the short-form complaint. The defendant files a fact sheet for that plaintiff thirty days after the plaintiff files, stating that the product affecting that plaintiff is Lot X, sold by Y. This is case management, not a pleading rule.

A Committee member observed that there are big differences between different case types. Antitrust cases, data breach cases, personal injury, and still others do not present the same kinds of problems. "We need to think about this." One response was that these issues involve the scope of whatever rules might one day be designed.

(3) Particularized Pleading/Fact Sheets. One proposal, focused on personal-injury tort cases, has been to require particularized fact pleading in a model similar to Rule 9(b). Fact sheets, not pleadings, may be considered instead. Attention also can be directed to "Lone Pine" orders. These and still other practices can resemble initial disclosure of what will be claimed, of how it will be supported, or even of some of the supporting evidence itself.

A Committee member suggested that "this is moderately standardized." The fact sheet "does the particularizing." There is no need to make it a Rule 9(b) pleading rule, especially if there also is a master complaint.

Another participant suggested that it would be easy for the Subcommittee to gather a couple of dozen fact sheet forms from different MDL proceedings to gain an idea of what is asked for. They are not pleadings. They are sworn to. Defendants can use them to identify who is a real plaintiff.

The question whether fact sheets have been used in anything other than personal-injury MDL proceedings found only one answer -- that may have happened in a "fax" case that settled too early for the fact-sheet approach to be tested.

(4) Rule 20 Joinder and Filing Fees. The direct joinder question is raised by those who fear a "Field of Dreams" effect: building an MDL proceeding works as an invitation to joinder by would-be claimants who in fact have no connection to the events in suit. Various forms of this proposal emphasize the value of requiring payment of an individual filing fee for each plaintiff in a multi-plaintiff complaint as a means of ensuring at least close enough attention by counsel to the question whether there is any support for the claim. One difficulty with this approach might be that it could be difficult for the clerk's office to trace through a very long pleading to determine just how many plaintiffs and fees are involved. But it could be easy to require a filing fee for each plaintiff who directly files in the MDL court. This could serve as another screening device.

Individual filing fees in the largest MDL proceedings could generate millions of dollars.

A judge with a pending MDL proceeding noted that each direct-filing plaintiff provides a short-form complaint and pays a filing fee. The parties agreed that new plaintiffs would file directly in the MDL proceeding, and identify the district the plaintiff is from and to which the case will be remanded if it is not resolved in the MDL proceeding. There have been more than 3,000 direct filings.

Others noted that direct filing has become "very prevalent." It depends on the arrangements agreed to by the parties. Another Committee member agreed that direct filing is not unusual, but that it also is not unusual to have tag-along cases filed elsewhere before they are transferred to the MDL.

This discussion concluded with the question whether anyone had experience with a case with multiple plaintiffs and only one filing fee. No one identified any such case.

(5) Sequencing Discovery. Sequencing discovery to address common core issues first is a familiar case-management tool. Would a rule specifically addressing this practice be a positive

development? What of the need for case-specific discovery addressing "bystander" or "outlier" claimants? Is it a problem to delay case-specific discovery until completion of discovery on the common core issues?

A Committee member observed that class-action lawyers see sequencing of discovery as bifurcation, and do not like it.

A judge observed that Rule 16 authorizes sequencing. What more might be accomplished by another rule? Should a rule tell a judge to do it when it seems more a case-specific issue?

Another judge agreed that the authority is already there. But perhaps there is a place for a best-practices rule, something akin to the front-loading built into Rule 23 in the proposed amendments now pending in the Supreme Court. This could be part of a broader rule, or perhaps sufficiently relevant to another new rule to warrant discussion in a Committee Note.

The first judge reported that in his MDL, the parties proposed sequencing. "It was pretty obvious what needed to be done. It's case management."

Another judge agreed. It is important to encourage the parties to be creative.

(6) Third-party Litigation Financing and "Lead Generators." Although joined in the list of agenda items, these two topics are not necessarily linked to each other. There is considerable interest in third-party financing. It is not clear whether third-party financing has special ties to mass personal-injury tort MDLs, or whether it is tied to MDLs of other sorts. The concern in the mass tort cases is that lead generators account for the large numbers of claims from "people who did not use the product."

Are there problems with third-party financing serious enough to justify a rules response? What would the rule be, and where would it fit?

A judge, seconded by Professor Coquillette, noted that the Committee should be cautious in approaching the issues of professional responsibility raised by some who view third-party financing with alarm.

Additional discussion noted that third-party financing has become involved with bankruptcy practice in New York, but it is unclear just how. This prompted the further question whether, if third-party financing is to be approached at all, any new rules should address only the MDL context.

(7) Bellwether Trials. The broad questions about bellwether trials can be framed by asking whether they should be encouraged? Discouraged? Addressed in rules? No rule now addresses them. Indeed there may be some ambiguity about the concept -- in any mass tort context, any trial provides useful information for the parties in all other actions. If indeed a rule might be useful, it will remain to decide where it should be lodged in the rules structure and what it might provide.

A judge reported finishing a bellwether trial a week earlier. It was a regular trial of an individual case. There was nothing different about it. Although tried in Arizona, it involved a Georgia plaintiff, application of Georgia law, and the same witnesses as would have testified at trial in Georgia. This is a case management technique. The parties wanted it. A total of six cases were set for trial, with the parties' consent. Case selection can be an issue. In this proceeding, each side proposed 24 cases for the process. More extensive disclosures were required for these 48 cases. Twelve of them went to full discovery: doctors were deposed, and the plaintiffs were deposed. The parties then were able to agree on one case to be a bellwether. The judge picked the remaining five, looking to get a representative mix of cases. The purpose of these trials is to facilitate settlement. "I'm drawing the line at six. If they don't settle, the cases go home."

(8) Facilitating Appellate Review. The basic concern about appeals is that interlocutory rulings that for good reason are not appealable in ordinary litigation become so important in MDL proceedings as to warrant appeal before final judgment. 28 U.S.C. § 1292(b) interlocutory appeals by permission may not suffice to meet the need. The recent study of Rule 23 showed that many people wanted to amend Rule 23(f) to establish mandatory jurisdiction of appeals from orders granting or denying class certification. That wish was not granted. But some rulings in MDL proceedings are "really, really important." Is there a way to define when appeal should be available?

Judge Bates noted that if appeal jurisdiction is taken up, it will be necessary and helpful to coordinate with the Appellate Rules Committee.

Another judge found the desire to appeal understandable. But there is a practical problem, at least in a busy circuit. In a pending class action, he had to confront two lines of conflicting circuit authority. He chose one to decide a summary-judgment motion and certified the question for appeal. The panel decision was rendered 27 months later, and the mandate has not yet issued. What would happen in a case that afforded two or three opportunities for interlocutory appeal on complicated issues? A suggestion that a

rule could require expedited appellate procedure was rewarded with doubting laughter.

(9) Coordinating between "parallel" federal- and state-court actions: Parallel actions may be centralized both in a federal court MDL proceeding and in similar state-court consolidations. Some observers suggest that the federal MDL should become the leader, even suggesting enactment of legislation to remove related state actions to the federal MDL. Is there a serious problem? What is it? Can a rule reduce any problem? Informal coordination actions do happen, at least at times.

A judge noted that she recently sat on the bench for three days with a state-court judge at a Daubert hearing. The state judge, applying state law, dismissed all the state cases. She, applying federal law, cleared the path for the federal cases to go to trial. She also observed that coordination could delay settlement, for example if a strong state case is used as an obstacle. So, perhaps, a strong individual case in a federal MDL could become an obstacle to settlement.

A Committee member suggested there is no need for a rule. "I often see some level of coordination to achieve efficiency by avoiding redundant discovery." Defense counsel can join with plaintiffs' counsel in arranging to do a deposition once, and in adjusting for the phenomenon that state rules do not have the same time limit for depositions as the federal rules. "Often we work it out." Another problem, however, is presented by a race to settle and take credit for it.

(10) PSC Formation and common-fund directives. Questions have been raised about the formation of plaintiffs' steering committees, executive committees, coordinating counsel, and similar arrangements. Common-benefit funds to compensate lead counsel for their efforts also raise many questions. And some observers suggest that "insiders" are too often appointed to leadership positions.

Related concerns are raised by court-imposed caps on fees for individual representation of individual plaintiffs, combined with the "tax" for the common benefit fund.

Some courts borrow the Rule 23(g) and (h) criteria for designation of lead counsel and their compensation. The Manual for Complex Litigation advises judges to take an active interest in these matters. Here too, the questions are whether there are problems? Do any problems have rules solutions?

A judge suggested that these questions overlap third-party financing questions. In his MDL the estimate was that plaintiffs'

counsel would have to invest $20 million to pursue the case. Third-party financing can be part of the answer to the need for heavy investment. It can enable non-insider lawyers to take the lead. A court must consider the resources the lawyers can commit to the litigation. This observation was seconded by a fervent "amen."

Another judge reported learning that expenditures on a first bellwether trial usually are astronomical, mounting into the millions. "We want more diversity, new faces. But those on the steering committee must be able to bear the cost."

Discussion of these ten agenda items concluded by asking whether there are other matters the Subcommittee should investigate, and with agreement that after learning more the Subcommittee would likely profit from arranging a miniconference. An outline of the format suggested gathering 6 MDL judges, 6 plaintiffs' lawyers, and six defense lawyers.

Judge Bates then opened an opportunity for comments by observers.

John Beisner said that this process of inquiry is important. The bar becomes accustomed to regular practices. For some time, it was accepted that cases could be transferred for trial in the MDL court by supplementing § 1407 transfer with § 1404 transfer. Then the Supreme Court said that could not be done. The bar responded by developing the "Lexecon waiver." Workarounds like this may rest on foundations that appellate courts will not accept. Developing an understanding of common practices may support new rules that incorporate and advance them. He suggested further that data should be compiled to inform MDL courts about what other MDL courts are doing. The MDL process generally works well, but not all MDLs do. When an MDL goes awry, it can come to grief after investing many years and millions of dollars. Problems include orders that cannot be reviewed until long after they are issued, and orders that are not issued until there has been a long delay. It is important to come up with best practices or common rules.

Another observer who practices on the plaintiff side asked "What is broken to need fixing"? None of the agenda items address anything that is broken. Flexibility is necessary. Courts have express or inherent authority to address most of these issues. And as for appellate review, there is always mandamus. Expanding the opportunities for appeal will not do much. "The issues can be addressed as they arise."

Susan Steinman said that a lot of the agenda ideas do not work well for AAJ members. Flexibility is needed to address the different needs of different kinds of cases. Mass disaster cases

are different from environmental disasters. The AAJ has a working group to consider these problems. The issues that raise concerns include master complaints and answers, particularized pleading-fact sheets, and sequencing discovery. She also suggested that MDL cases that "aren't quite ready to go" could be put in an inactive file for later development. Professor Marcus added that the inactive-file approach was used in Massachusetts for pleural thickening asbestos cases.

Alex Dahl noted that Lawyers for Civil Justice has filed written comments on the Subcommittee Report. He offered several specific points. (1) "The Rules are not applied in all MDL cases." Practice has evolved beyond the Rules. As a practical matter, the Rules do not work when there are too many parties. Discovery does not work to reveal false plaintiffs. (2) There must be a rule that enables the parties to find out whether each MDL plaintiff has a claim. (3) In response to a question whether new rules should address all MDL proceedings, he said the need is for rules that work. Distinctions can be drawn. For example, Rule 7 could be amended to recognize the use of a master complaint, but to apply only to cases in which a master complaint is in fact used. (4) Devising rules that expand the opportunities to appeal is worth the complication because appeals are important to the judicial system as a whole and also to the parties. (5) The repeat-player phenomenon is a real problem. Outsiders cannot learn about "real" MDL procedure. If means can be found to educate outsiders in the practices that have been honed by the repeat players, the problem can be reduced. (6) The need for disclosure of third-party financing is demonstrated by the 24 district rules and 6 circuit rules that require disclosure. There should be a uniform national rule that requires disclosure of nonparties that have a financial interest in the outcome. Protection of the opportunity for judicial recusal is a compelling reason for disclosure, but there are additional reasons as well. The present local rules were not designed to address the other reasons for disclosure, and vary one from another. (7) In conclusion, MDLs are a complicated subject. The Committee should act to make sure that the Civil Rules apply in all cases. It should begin with a handful of topics including discovery, trial, and appeals.

Judge Bates thanked the Subcommittee, Judge Dow, and Professor Marcus for their excellent work.

*§ 405(g) Social Security Review*

Judge Bates introduced the work of the Social Security Review Subcommittee by noting that the project has been recommended by the Administrative Conference of the United States with the enthusiastic endorsement of the Social Security Administration. It

raises interesting and somewhat novel issues about rulemaking for a specific substantive area.

Judge Lioi delivered the Subcommittee Report. The Subcommittee is in the early stages of exploring whether uniform review rules should be developed. Working from a rough and "bare bones" draft that illustrated one possible approach, it sought reactions from the groups that provided initial advice in a meeting with the Subcommittee last November 6. The draft covers such topics as initiating an action for review, electronic service of the complaint, the Commissioner's response, and briefing on the merits. Reactions were provided by the Social Security Administration, the Department of Justice, the National Organization of Social Security Claimants' Representatives, and the American Association for Justice. The initial draft was revised to reflect their reactions. That draft was discussed in a Subcommittee conference call on March 9. The draft was then revised again; that revised draft is the one included in the agenda materials.

The question for today is whether it will be useful to use this revised draft, as it might be revised still further, as a basis for eliciting further comments. The draft is not yet ready to serve as the basis for refining into a foundation for work toward actual rules.

The questions were explained further. The Subcommittee has not decided whether it will recommend that any rules be adopted. It will continue to gather information from as many as possible of the people and groups with experience in social security review actions. The outcome may be a recommendation that no rules be developed. It may be that the wide variations now found in local district practice reflect different conditions in the districts, and that little would be accomplished by forcing all into a uniform national template. Or it may be that although the variations do exact substantial costs, it will be difficult to develop national rules that effect substantial improvements. And there is some remaining uncertainty whether it is appropriate to develop rules for one specific substantive area.

If rules are to be developed, choices remain as to form. One possibility would be to amend several of the present Civil Rules -- for example, a special pleading provision could be added to Rule 8. Another possibility would be to create new rules within the body of the Civil Rules. Abrogation of Rules 74, 75, and 76 has left a hole that might be filled, in whole or in part, by social security review rules. The draft in the agenda materials takes a different approach, creating a new set of supplemental rules along the lines of the supplemental rules for admiralty or maritime claims and civil asset forfeiture. No choice has been made among these

possibilities.

The draft rules begin with a scope provision that may be refined further as the work progresses. One possibility is to limit the new rules to actions that are pure § 405(g) actions: One claimant seeks nothing more than review of fact and law questions on the administrative record, joining only the Commissioner as defendant. That category would include a large majority -- likely nearly all -- of § 405(g) actions. Any action presenting any additional claims or including any additional parties would, as at present, be governed only by the general Civil Rules. The alternative possibility is to apply the § 405(g) rules to the part of a broader action that seeks review on the administrative record, leaving all other parts to the regular Civil Rules. Whichever approach is taken, it will remain necessary to include a provision invoking the full body of the Civil Rules except to the extent that they are inconsistent with the supplemental rules.

The next step is a rule for initiating the review proceeding. Discussions of this topic often begin by noting that review on an administrative record is essentially an appeal, and can be initiated by a document that is in effect a notice of appeal. The draft rule characterizes the initial filing as a complaint, reflecting the § 405(g) provision calling for review by filing a civil action. The elements of the complaint are simple, covering identification of the parties, jurisdiction, a general statement that the Commissioner's decision is not supported by substantial evidence or rests on an error of law, and a request for relief. Successive drafts also have included an opportunity to "state any other ground for relief," reflecting the possibility that a claimant may raise issues outside the administrative record.

The next provision has met widespread approval among those who have seen it. It provides that instead of Rule 4 service of a summons and the complaint, the court makes service of process by electronic notice to the Commissioner. The current draft places the responsibility for designating the "address" for electronic service on the Commissioner. Some districts have begun to use electronic service by agreement of the Commissioner and local United States Attorney. Their experience has been satisfactory. It may be that this provision should direct service on the local United States Attorney as well as the Commissioner, but still rely on the Commissioner to determine whether service should be made directly on the Commissioner, on the social security district where the district court is located, on both, or on yet some other office.

The next step is the Commissioner's answer. Earlier drafts, picking up a suggestion by the Social Security Administration, provided that the answer would include only the complete record of

administrative proceedings. Discussion in the Subcommittee, however, broadened this provision to say only that an answer must be served and must include the record. This approach was taken from concern that closing off the answer might lead to forfeiture of affirmative defenses. Res judicata, for example, is an affirmative defense that must be pleaded under Rule 8(c) or lost. Estoppel may be another example.

Dispositive motions also are covered. Earlier drafts limited dilatory motions to exhaustion and finality, timeliness, and jurisdiction in the proper court. Summary-judgment motions were excluded on the theory that they contribute no advantage when all of the facts for decision are already in the administrative record, and may be an occasion for delay or confusion. Some districts now seize on summary-judgment procedure to frame the review, a sound practice to the extent that it calls for identifying the issues and tying them to the record. But many parts of Rule 56 are inapposite and may cause confusion. All of the advantages of Rule 56 might be gained directly by the review rules themselves. Be that as it may for cases that involve nothing more than review on the record, however, summary judgment has a role to play when other claims or issues are introduced. The present draft says nothing of Rule 56, and recognizes the full sweep of Rule 12 motions. The time to answer is governed by Rule 12(a)(4). And the special role of motions to remand is recognized by providing that a motion to remand can be made at any time.

The procedure for bringing the case on for decision relies primarily on the briefs. The current draft directs the plaintiff to file a motion for the relief requested in the complaint and a supporting brief. The Commissioner as defendant must file a response brief, again with references to the record. The draft includes bracketed provisions that the briefs must support the arguments by references to the record.

The draft rules do not include other provisions that are included in the draft rules prepared by the Social Security Administration. Little other support has been found for provisions that would specify the length of the briefs. Nor has there been much other support for adding detailed provisions for seeking attorney fees. The general feeling has been that district courts should remain free to set rules for the format and lengths of briefs that fit their local circumstances and general practices. So too it has been felt that the general procedures for seeking attorney fees are adequate. Still, there may be room to inquire whether special provision should be made for seeking fees under the Social Security Act as compared to fees under the Equal Access to Justice Act.

Judge Lioi reminded the Committee that the question the Subcommittee presents for discussion is whether the Subcommittee should use the present draft of supplemental rules, as it might be revised in light of ongoing discussions, to prompt further responses from those who have experience on all sides of social security review cases.

Discussion began with agreement that "it seems logical to seek input from the people who do it." Another Committee member agreed -- there seems to be a strongly felt need. The draft will draw attention. Responding to a question, Judge Lioi reiterated that this is not a proposal for publication. The Subcommittee seeks only to go forward in gathering more information. The first rounds have been valuable, but the focus may have been diffused by the strong reactions to proposals to specify stingy page limits for briefs. Providing a clear target in the form of draft rules will also stimulate clearly focused responses. Efforts will be made to find and engage as many stakeholders as possible.

Judge Bates suggested that the stakeholders are not likely to address the question whether it is appropriate to develop rules that address a specific substantive subject. The Committee must continue to deliberate this question. One alternative would be to broaden any new rules to apply generally to all district-court actions for review on an administrative record.

A Committee member responded by suggesting that it is improper to have special rules for special parts of the docket, at least unless special needs are shown to justify the specific focus. Another Committee member shared this concern, but added that we can continue to explore the need for any rules. Judge Lioi pointed out that the Subcommittee Report touches on these questions, beginning at line 47 on page 243. The Report in turn points to the discussion at the November Committee meeting, as reported in the November Minutes.

Judge Bates agreed that the need for uniform national rules is part of the calculation. But he pointed out that the problem of delay in winning benefits arises in the administrative proceedings; Civil Rules will not address that, and district courts act quickly enough that there does not seem to be much room to reduce delay there. Nor can Civil Rules do anything about differences among the circuits on substantive law.

Another judge thought the draft was a great starting point, but asked why it contemplates Rule 12 motions -- he has never seen one in the many social-security review actions he has had. It was noted that earlier draft rules had limited motions to issues of exhaustion and finality, jurisdiction, and timeliness. But the

Subcommittee thought the full sweep of Rule 12 should be made available. There may not be much risk of dilatory motions to dismiss for failure to state a claim. It would be difficult for a lawyer to frame a complaint that does not meet the proposed standards; pro se litigants might actually benefit from the education provided by a Rule 12(b)(6) motion. An additional consideration is that much of the impetus for uniform national rules seems to arise from the powerful time constraints that confront the lawyers who represent the Commissioner. There is little incentive to multiply proceedings by preliminary motions that can do little more than anticipate the ways in which the merits arguments will explore the administrative record. A different judge sharpened the question: the draft rule sets out seven matters to be included in the complaint. Is there a risk of "Supplemental Rule 2(b)" motions challenging perceived inadequacies in complying with the rule?

Discussion concluded with Judge Bates's thanks to the Subcommittee for its work.

*Rule 71.1(d)(3)(B)(i): Newspaper Publication*

A specific question about Rule 71.1(d)(3)(B)(i) was raised by an outside observer. The question is whether the rule should continue to make "a newspaper published in the county where the property is located" the first choice for publication of notice of a condemnation proceeding. Discussion at the November meeting concluded by asking the Committee Chair, Judge Bates, and the Reporters to make a recommendation about further action.

The recommendation is to remove this item from the agenda.

The context of Rule 71.1(d) helps to explain the question. Property owners are served with a notice of condemnation proceedings. If an owner resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice must be made "in accordance with Rule 4." Rule 71.1(d)(3)(A).

Rule 71.1(d)(3)(B)(i) addresses service by publication when personal service cannot be made under subparagraph (A). Publication must be supplemented by mailing notice if the defendant's address is known. Whether or not mailed notice is possible, publication must be made "in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located."

The suggestion is to eliminate the preference for publication in a newspaper published in the county where the property is

located. Publication in any newspaper of general circulation where the property is located would suffice.

In this setting, the main concern centers on the efficacy of publication that cannot be supplemented by mail addressed to a defendant. Which publication is more likely to effect actual notice? A locally published newspaper, even one that does not enjoy general circulation, or any of what may be more than one newspapers of general circulation? Empirical information is required to address that concern usefully, or, if empirical information is as difficult to generate as seems likely, empirical intuition. Where will a property owner who anticipates possible condemnation proceedings more likely look for notice?

Several considerations prompt the recommendation to withdraw this question from further study. The present rule has been used without known questions for many years. The Department of Justice, the most common litigant in condemnation proceedings, is neutral about the proposal. The proposal itself rests on uncertain assumptions about the possible effects of state practice on publication under Rule 71.1(d)(3)(B)(i). Rule 4 service under subparagraph (A) apparently includes service under state law as incorporated in Rule 4(e)(1) and (h)(1), which may include service by publication on terms that do not give priority to a newspaper published in a particular county. But subparagraph (B)(i) seems an independent and self-contained provision that does not make any reference to state law. It governs by its own terms.

One element of the empirical question goes to the prospect that there may be two, three, or even more newspapers of general circulation in the place where the property is located. Giving priority to a newspaper published in the county narrows the search, perhaps to one unique newspaper. Free choice among competing newspapers means that a careful property owner must attempt to identify and regularly read them all.

Additional questions arise from issues that have been made familiar, but not easy, by repeated encounters. What counts as a newspaper in an era of physical publication, electronic publication, and mixed physical and electronic publication? Where is an electronic edition published? The Committee has not yet found these issues ripe for study as a general matter, and it would be awkward either to take them on or to ignore them in proposing amendment of Rule 71.1(d)(3)(B)(i).

The Committee voted without opposition to remove this item from the agenda.

*Rule 4(k)*

Two proposals have been made to expand personal jurisdiction under Rule 4(k). They are presented to the Committee without any recommendation as to future action. The purpose is to identify the many complex and difficult challenges that will be faced if one or both is taken up, and to open a discussion of the practical benefits that might be gained by further extensions of personal jurisdiction. The nature and importance of the benefits should figure importantly in deciding whether to take on the challenges.

One central challenge will be whether rules defining personal jurisdiction fall within the "general rules of practice and procedure" that may be prescribed under the Rules Enabling Act. Competing views on this question will be outlined in the present discussion. A second set of challenges arises from the common element that underlies both proposals. The proposals rest on the view that the constitutional constraint on personal jurisdiction in federal courts arises from the Fifth Amendment, not the Fourteenth Amendment. What Fifth Amendment due process requires is sufficient contacts with the United States as a whole, not sufficient contacts with any specific place within the territorial limits of one or another state.

Moving beyond the challenges, the proposals rest on the belief that much good can be accomplished by extending the reach of federal court personal jurisdiction to Fifth Amendment due process limits. The need to select appropriate places to exercise the nationwide power can be satisfied by venue statutes, as they are now or as they might be amended to reflect the new jurisdiction.

The background begins with present Rule 4(k). Both paragraphs (1) and (2) explicitly establish personal jurisdiction. Rule 4(k)(1)(A) provides that serving a summons establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located. This provision turns the jurisdiction of a district court on the longarm statutes of the state where it sits, and incorporates the 14th Amendment due process limits that constrain the longarm statute when it is applied by a state court. Rule 4(k)(1)(B) extends personal jurisdiction, independent of state lines or practice, through a "100-mile bulge" to join a party under Rule 14 or Rule 19.

Rule 4(k)(2) is more adventuresome. It provides that "for a claim that arises under federal law," serving a summons establishes personal jurisdiction if "(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States

Constitution and laws."

The first proposal, advanced by Professor Borchers, is more modest. It would simply expand Rule 4(k)(2) to include not only claims that arise under federal law but also cases in which jurisdiction is based on 28 U.S.C. § 1332 diversity and alienage jurisdiction. It would retain the requirement that the defendant not be subject to jurisdiction in any state's courts of general jurisdiction. The central purpose is to reach internationally foreign defendants that have sufficient contacts with the United States as a whole to support jurisdiction but lack sufficient contacts with any individual state. The purpose is illustrated by the circumstances of the Supreme Court's decision in *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873 (2011). Nicastro, the plaintiff, was injured in New Jersey while operating a large machine that the defendant made in England. Although the machine made its way to the United States, and although the defendant clearly and deliberately sought to make as many sales as it could in the United States, the Court ruled that New Jersey could not exercise personal jurisdiction. The defendant neither sold the machine to the plaintiff's employer nor shipped it directly to the employer. The sale was made by an independent distributor in another state. At most only four, and perhaps just this one of the defendant's machines had come into New Jersey. The proposal is that the broader reach of the national sovereign authorized by the Fifth Amendment supports personal jurisdiction.

Additional goals are offered by Professor Spencer to support the measure of personal jurisdiction that he believes proper, although he has come to believe that the limits of the Enabling Act mean that only Congress can adopt his proposal. This proposal would abandon Rule 4(k)(1) and expand Rule 4(k) to provide that serving a summons establishes personal jurisdiction when exercising jurisdiction is consistent with the United States Constitution. "[A]nd laws" might be added as a further constraint, drawing from present 4(k)(2)(B). This proposal would establish uniform personal jurisdiction rules for the federal courts, freeing them from dependence on the vagaries of such state statutes as do not extend to the limits of Fourteenth Amendment due process and likewise freeing them from Fourteenth Amendment limits that derive from the territorial definitions of state sovereignty. Federal courts would be freed to locate litigation in the most desirable court, as defined by federal venue statutes. Federal courts also would be freed from much of the preliminary wrangling that now arises over personal jurisdiction, since in most cases it will be clear that the defendant has sufficient contacts with the United States to satisfy Fifth Amendment due process. For diversity cases, expanded personal jurisdiction would help to advance the purposes of providing convenient federal courts for enforcing state-created

rights. And in some ways, defendants also would be helped by expanding the narrow limits of present Rule 4(k)(1)(B) to allow broader joinder of defendants both by the plaintiff initially and by the defendant under Rules 13, 14, 19, and 20.

These potential gains from expanded personal jurisdiction should be considered carefully. They may be real and important. Or they may be largely theoretical, particularly if experience shows that in most cases there is a convenient court that can assert personal jurisdiction over all parties that should reasonably be joined. The benefits, large or small, must then be weighed against the potential costs and uncertainties.

One major uncertainty arises from Professor Spencer's conclusion that the Rules Enabling Act does not authorize the Supreme Court to prescribe rules defining personal jurisdiction. He will elaborate this view later in the meeting. The core conclusion is that personal jurisdiction lies outside the initial authority to prescribe "general rules of practice and procedure." On this view, procedure encompasses what the parties and court do once the court acquires personal jurisdiction. Jurisdiction is a distinct and separate concept. In a pinch, it also might be argued that rules that expand or limit personal jurisdiction abridge, enlarge, or modify a substantive right. A still more ambitious argument can be made that Article III judicial power necessarily entails authority to exercise personal jurisdiction to the limits permitted by Fifth Amendment due process. On this view, Rule 4(k)(1) is invalid not because it establishes personal jurisdiction but because it curtails the personal jurisdiction that inheres in any case that falls under a statute establishing subject-matter jurisdiction under Article III.

A contrary view of the Enabling Act is also possible. One approach is to resist the temptation to rely on abstract definitions of "practice and procedure" and of "jurisdiction." On this approach, what is "practice and procedure" for Enabling Act purposes may be different from what is practice and procedure for other purposes. The question should be approached more directly by asking whether the Enabling Act should be interpreted to include rules that define personal jurisdiction. That approach does not lead to an automatic answer. Defining personal jurisdiction is a matter of important and sensitive concerns. It may be particularly sensitive to rely on courts to define the extent of their own power. In many ways, particularly with respect to internationally foreign defendants, personal jurisdiction is a more fundamental component of judicial power than the lines that limit federal subject-matter jurisdiction. A defendant from Maine or France may care more that he not be subject to suit in any court in California than that the court in California be a federal court or a state

court.

The approach that attempts a purposive interpretation of the Enabling Act can be bolstered by looking to tradition. The original version of Rule 4 expanded authority to serve summons from the district to anywhere in the state embracing the district. The Supreme Court upheld this rule as one relating to the manner and means of enforcing rights. In 1963 Rule 4 was amended to confirm and expand decisions interpreting an earlier version to enable federal courts to assert jurisdiction under state longarm statutes. Then Rule 4(k)(2) was added in 1993, reacting to a Supreme Court decision that although a foreign defendant might well be subject to personal jurisdiction because of sufficient contacts with the United States, jurisdiction could not be perfected for want of a rule authorizing service. The Court hinted that this lack could be corrected by Congress or by court rule. *Omni Capital Int'l. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987). The 1993 Committee Note says that the amendment responds to the Court's "suggestion." The Committee Note also begins with a "SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved," the Committee recommends adoption of the balance of the rule.

The Committee, in short, seems to have acted, and to have acted repeatedly, on the view that the Enabling Act authorizes adoption of rules that define personal jurisdiction. This view seems to be supported by Supreme Court decisions. The tradition and opinions may be wrong. In any event a conclusion that authority exists does not define wise exercise of the authority.

Expanding personal jurisdiction for cases governed by state law will add to the occasions for arguing choice-of-law issues. As the law now stands, a federal court must choose among competing state laws by adopting the choice-of-law rules of the state where it sits. This rule has been applied even in an interpleader action that could not have been entertained by the local state courts for want of personal jurisdiction over all claimants. Expanding personal jurisdiction could expand a plaintiff's opportunity to choose governing law by picking among the courts that have venue. It is possible to think about adding choice-of-law provisions to a rule that expands personal jurisdiction, but the task would be uncertain and contentious. And on some philosophies of choice-of-law it would abridge, enlarge, or modify substantive rights.

Reliance on present venue statutes to establish suitable constraints on the exercise of nationwide personal jurisdiction also presents problems. A simple example is provided by 28 U.S.C. § 1391(c)(3): "a defendant not resident in the United States may be

sued in any judicial district." For those defendants, there is no venue limit. A more complex example is provided by § 1391(c)(2), which provides that a defendant that is an entity with the capacity to sue and be sued "shall be deemed to reside * * * in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." This provision interacts with § 1391(b), which establishes venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." If there is only one defendant, venue again does not limit personal jurisdiction. If there are multiple defendants, venue again is no limit if all are entities subject to personal jurisdiction. Other examples may be found, but these suffice to suggest that present venue statutes are not adequate to the task. Carefully crafted legislation would be needed to establish satisfactory venue rules to locate litigation within a system of federal courts exercising general nationwide jurisdiction.

A number of other questions would be raised as well. It is enough to sketch them. Congress has enacted a number of statutes that assert some form of "nationwide" personal jurisdiction. It is not clear whether all of them would be interpreted to reach as far as a new court rule might. If the rule goes farther than the statute, there might be a supersession question. The Enabling Act authorizes rules that supersede statutes, but this power is exercised only for compelling reasons. A different approach would be to cut the rule short if the statute does not go so far -- that might be accomplished by retaining the requirement in present Rule 4(k)(2)(B) that exercising jurisdiction be consistent with the United States "laws."

Establishing personal jurisdiction for some claims and parties might also prompt further developments in the concept of pendent personal jurisdiction. The occasion would be much reduced by a general national-contacts rule, but might arise for related claims or even parties that share a common nucleus of operative fact but standing alone do not seem to have sufficient independent national contacts.

A further complication relates to the venue statutes. There is a strong strain of thought that Fifth Amendment due process is not always satisfied by contacts with the nation as a whole. There may be some inherent requirements of fairness that protect against the transactional inconveniences of litigating in a distant forum. Working through these questions would take time, imagination, and sound judgment.

Finally, it may be wondered what to make of the increasingly sharp distinctions between specific and general jurisdiction that

are emerging in Fourteenth Amendment decisions, and of the elusive tests for asserting specific jurisdiction. If a defendant is engaged in a business that pervasively involves all the states, does any real distinction remain?

Professor Spencer outlined his views as explained in two articles. The earlier article is included in the agenda materials. The more recent article remains in draft and is being revised for publication in 2019. The nubbin is that as desirable as it would be to expand federal personal jurisdiction by freeing it from ties to the lines of territorial sovereignty that confine state courts, jurisdiction is not a matter of practice or procedure. Enabling Act rules can only address the manner of adjudicating claims. Both Rule 4(k) and the property jurisdiction provisions in Rule 4(n) go too far. Even Rule 4(k)(1), invoking the bases for personal jurisdiction in state courts, needs to be enacted by Congress.

Rules of evidence are not procedure, but they are authorized by separate language in § 2072(a). It cannot be said that anything that is not substantive is procedural.

The better line begins with recognizing that it is the Fifth Amendment that limits the territorial reach of federal courts. A federal court should be able to exercise personal jurisdiction whenever that is consistent with due process and the venue statutes. "Rule 4(k)(1) is an artificial constraint." With "some tweaking," the venue statutes can do the job of localizing litigation within the federal court system, along with a more fully developed Fifth Amendment fairness test. The federal courts have not yet had occasion to develop such fairness tests, but expanding a national-contacts foundation will provide the occasion.

Present venue statutes reflect a background of Fourteenth Amendment due process thought. They will need to be revised to fit expanded personal jurisdiction.

This expansion would not change the result in the Goodyear case -- the Turkish manufacturer of a tire that failed in Paris would not become subject to federal-court jurisdiction. It is not clear whether national-contacts jurisdiction would support the claims of nonresident plaintiffs in a federal court in California against the defendant in the Bristol-Meyers case.

Choice of law is not a problem. Expanding personal jurisdiction might give plaintiffs a greater choice of federal courts and thus expand the bodies of state choice rules they could shop for, but any state rule is limited to choosing a law that has a constitutionally adequate connection to the litigation. If Congress enacts expanded jurisdiction, it can give attention to

this.

Professor Spencer concluded by stating that it is worthwhile to continue Committee discussion, but that the aim should be to develop proposals for action by Congress.

A Committee member asked whether the Committee has acted on matters outside the Enabling Act by making proposals to Congress. Professor Marcus noted that Evidence Rule 502 is a recent example of the special provision in 28 U.S.C. § 2074(b): "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." But it went through the full Enabling Act process. The only difference is that other Enabling Act rules take effect after submission to Congress "unless otherwise provided by law," § 2074(a).

Apart from that, the Committee has not engaged in recommending legislation, either by developing a proposed statute or by a more open-ended suggestion that Congress should address a problem. The closest approaches have come when fully developed proposals have adopted Enabling Act rules in the ordinary course, but the rules can become effective only if existing statutes are revised. The Appellate Rules Committee has successfully won statutory revisions to support Appellate Rules amendments, and statutory revisions were also sought and won to support some of the rules changes adopted in the Time Computation Project that swept across multiple sets of rules. The Federal-State Jurisdiction Committee regularly comments on proposed legislation, and Enabling Act Committee Chairs occasionally send formal letters to Congress commenting on pending bills. But there is no known precedent for something like developing a package of proposed personal jurisdiction and venue statutes.

A judge asked about the 1963 amendments of the personal jurisdiction provisions in Rule 4. Were they seen as expanding or as limiting personal jurisdiction? The answer is that they were seen to confirm existing interpretations of earlier Rule 4 provisions, and to ensure that federal courts could reach as far as their neighboring state courts. There is no indication that they were seen as limiting inherent personal jurisdiction that otherwise would be exercised without Rule 4 provisions for service. Instead they were intended to enable a federal court to do what a state court could do, no more.

This question came back in a different form: If Rule 4(k)(1) were rewritten to free federal courts from the limits on state-court jurisdiction, and for the purpose of expanding federal-court jurisdiction, what would be the practical effect? Will most cases have venue only where a substantial part of the events or omissions

giving rise to the claims occurred, see § 1391(b)(2)? Professor Spencer answered that it would remain necessary to redefine "resides." But the outcome would not be complete chaos. The earlier discussion of the effects of the present definitions of "resides" was renewed, with an added twist. The discussion of multidistrict centralization pointed to the limits that prevent transfer for trial in an MDL court that cannot independently establish personal jurisdiction. Adopting national-contacts personal jurisdiction could dramatically change practice in this respect.

Discussion returned to the benefits of expanding federal-court jurisdiction. It would reduce wrangling about personal jurisdiction in many cases. But it is difficult to predict just how far, and when, the actual result would be to bring actions to a federal court that could not entertain them now.

The question was repeated: Is there some value in going to Congress first? A Committee remember responded that normally the Committee does not do that.

Another Committee member asked whether, if indeed the Enabling Act process cannot prescribe rules of personal jurisdiction, parts of present Rule 4 are invalid? It would be better to avoid acting in a way that would suggest that current rules are invalid. And the discussion shows that indeed these are complicated questions.

Judge Bates suggested the Committee vote on three possible approaches: (1) Close out this agenda item. (2) Undertake full exploration of rules amendments now. This will be a major undertaking, with added complexity arising from interdependence with the venue statutes. or (3) Carry this topic forward on the agenda, but not pursue it actively now. No votes were cast for closing it out. Two votes were cast for present active pursuit. Eight votes were cast for pausing work, carrying the subject forward for future consideration.

*Rule 73(b): Consent to Magistrate Judge*

Judge Bates guided discussion of this agenda item. Rule 73(b)(1) provides that to signify consent to conduct proceedings before a magistrate judge "the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response * * * only if all parties have consented to the referral."

This provision for anonymity implements the direction of 28 U.S.C. § 636(c)(2), which directs that rules of court for reference to a magistrate judge "shall include procedures to protect the voluntariness of the parties' consent."

The problem arises from a collision between the provision for anonymity and the CM/ECF system. As soon as a single party files a consent form, the system automatically forwards the consent to the district judge assigned to the case. Apparently there is no way to circumvent this feature. An alternative might be to direct the parties to deliver their separate consents to the clerk without filing them. That approach, however, would impose significant burdens on the clerk's office and would lead to occasional lapses in one direction or another.

The suggestion to amend Rule 73(b)(1) made by the clerk for the Southern District of New York is for a simple change, deleting the reference to separate statements: "the parties must jointly ~~or separately~~ file a statement consenting * * *." It may be that somewhat greater revisions should be made to facilitate the process of generating a joint statement. Guidance might be found in the joint consent form used in the Southern District of Indiana.

Discussion began by suggesting that it is worthwhile to at least attempt to sort through this question.

A judge observed that the problem is that one party consents, and others do not, and the judge finds out about it. Or it may be that all but one consent, and start to behave as if all consented, forcing a nonconsenting party to protest.

Another judge observed that the rule functioned well in pre-ECF days. Now it is incumbent on the Committee to look at it. Yet another judge and a practicing Committee member agreed.

A different judge observed that in some districts magistrate judges are automatically assigned to civil actions, leaving it to the parties to consent or withhold consent. Any amended rule must be compatible with this practice.

Judge Bates concluded the discussion by stating that the question will be pursued further. Laura Briggs and a Committee member will be asked to help.

*Other Agenda Items*

17-CV-EEEEEE: Judge Bates described this proposal that return receipts be required for service by mail under Rule 5(b). He noted that the Committee has recently devoted close attention to Rule 5(b), focusing on electronic service and accepting service by ordinary mail without further ado. The Committee voted to remove this item from the agenda without further discussion.

18-CV-A: Rule 55(a) directs that "When a party against whom a

judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." The proposal complains that one district court refuses to let its clerk enter default, permitting action only by a judge. The solution is to add a sentence embellishing the "must enter" already in the rule. Judge Bates suggested that there may be some reason to preserve an element of judicial discretion about entering the default, in part because Rule 55(c) allows the court to set aside a default for good cause. Nor should the Committee be charged with policing potential misapplications of a Civil Rule by continually adding new language to emphasize what the rule already says. The Committee voted without further discussion to remove this item from the agenda.

18-CV-G: This proposal urges that complaints have become too long: "New Age complaints are completely out of control." It recommends a rule that would considerably shorten complaints. Judge Bates observed that most judges likely would agree that many complaints are too long. The Committee, however, has repeatedly considered Rule 8, often in depth, over the course of the last 25 years. There is little reason to again take up the subject now. The Committee voted to remove this item from the agenda without further discussion.

*Pilot Projects*

Judge Bates noted that the mandatory initial discovery pilot project is actively going forward in the District of Arizona and the Northern District of Illinois. Work continues to find districts to participate in the expedited procedures pilot project.

Judge Campbell said that the mandatory initial discovery pilot took effect in the District of Arizona on May 1, 2017. So far 1,800 cases are in the pilot. "It has been very smooth." The Arizona bar is used to extensive initial disclosures in state-court practice. The test will come when the cases come to summary judgment or trial and arguments are made to exclude evidence that was not disclosed. "We likely can deal with that," in part by drawing guidance from state-court practice.

Judge Dow reported that the Northern District of Illinois launched the mandatory initial discovery pilot on June 1, 2017. Great help was provided by draft standing orders and related guidance from the District of Arizona. "Our lawyers aren't used to it," unlike lawyers in Arizona. Rumors have been heard that e-discovery vendors are advising firms not to file cases with massive e-discovery in the Northern District because of the project. But the court has been reasonable about the deadlines set in the pilot rules. Parties are not required to file terabytes of information in 30 days. Emery Lee is collecting data for the Federal Judicial

Center's evaluation of the project. About 75% of the cases in the Northern District are in the project. All but one of the active judges participate. Only one senior judge participates. The project is going well.

Emery Lee described the FJC study of the mandatory initial discovery projects. He is approaching the second round of lawyer surveys of cases closed within the last six months. "We have data on 5,000-plus cases in the two districts together." A Committee member reported hearing that one effect of the project is that people settle when they find documents they do not want to disclose. Lee responded that the study is tracking that.

The FJC also is studying data on the longstanding differentiated procedure practice in the Northern District of Ohio, with help from Judge Zouhary. Experience there suggests that it is easy to assign cases to tracks.

Discussion of the mandatory initial discovery project turned to the Employment case protocol that was created in November, 2011. The FJC has collected data on cases resolved in 2016-2017. In all it has data on hundreds of cases. The more recent data include mature cases. There is a plan to collect data on a sample of comparison cases. The hope is to be able to report in November.

Some courts already have adopted the parallel protocol for individual actions under the Fair Labor Standards Act.

*Next Meeting*

Judge Bates confirmed that the next scheduled meeting will be on November 2 in Washington, D.C.

The meeting adjourned.

Respectfully submitted,

Edward H. Cooper
Reporter