MINUTES
CIVIL RULES ADVISORY COMMITTEE
San Antonio, TX | April 2-3, 2019

The Civil Rules Advisory Committee met in San Antonio, Texas, on April 2 and 3, 2019. Participants included Judge John D. Bates, Committee Chair, and Committee members Judge Jennifer C. Boal; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; Ariana J. Tadler, Esq.; and Helen E. Witt, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair; Professor Catherine T. Struve, Reporter (by telephone); Professor Daniel R. Coquillette, Consultant (by telephone); and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Ahmad Al Dajani, Esq., represented the Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Jennie Lee Anderson, Esq.; John Beisner, Esq.; Amy Brogioli, Esq. (AAJ); Fred Buck, Esq. (American College of Trial Lawyers); Danielle Cutrona, Esq. (Burford Capital); Alexander Dahl, Esq.(Lawyers for Civil Justice); Joseph Garrison, Esq. (NELA); William T. Hangley, Esq. (ABA Litigation Section liaison); Brittany Kauffman, Esq. (IAALS); Robert Levy, Esq. (Exxon Mobil); Ellen Relkin, Esq.; Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer; Brittany Schultz, Esq. (Ford Motor Co.); and Susan H. Steinman, Esq. (AAJ).

Judge Bates welcomed all participants and reported that there was a good discussion of Multidistrict Litigation issues at the January meeting of the Standing Committee. There were no "Rules matters" discussed at the March meeting of the Judicial Conference.

Judge Bates further reported that amendments of Rules 5, 23, 62, and 65.1 took effect as scheduled on December 1, 2018. Some of these changes are significant, especially the changes in Rule 23. The Committee will monitor implementation of these rules as practice develops.

November 2018 Minutes

The draft Minutes for the November 1, 2018 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the legislative report. The agenda materials list three bills that would amend the Civil Rules, either directly or effectively. Some of the topics are familiar from earlier Congresses, including disclosure of third-party litigation funding agreements and prohibitions on "nationwide" injunctions. A third bill would amend Rule 23 to add a requirement for class certification that the class does not allege misclassification of employees as independent contractors.

In addition to these bills, a bill on minimum-diversity jurisdiction has been introduced. No action has yet been taken on it.

Rule 30(b)(6)

Judge Bates introduced the Rule 30(b)(6) Subcommittee Report by suggesting that it probably will prove to be the major item for discussion at this meeting. The proposal to require a conference of the noticing party and the deponent about a Rule 30(b)(6) deposition of an organization was published last August. Hearings were held this January and February, drawing some 80 witnesses. Reporter Marcus records a count of 1,780 written comments; many of the comments were repetitive — they did not reflect 1,780 different viewpoints.

The Subcommittee has recommended revisions of the published proposal in response to the testimony and comments. They recommend that the amended rule continue to require a conference about the matters for examination. But they also recommend deleting the proposed requirement to confer about the identity of the witnesses to appear for the organization, and to delete the requirement to confer about the number of matters for examination. Related changes also are recommended.

The Subcommittee also advances, without a recommendation either way, an alternative that would add a requirement that 30-days notice be given of a Rule 30(b)(6) deposition, and that some number of days before the deposition the organization name the witnesses who will appear.

Judge Ericksen delivered the Rule 30(b)(6) Subcommittee Report. She began by noting that "the hearings were very helpful." They, and the written comments, led the Subcommittee to recommend revisions of the published draft. The Subcommittee is unanimously behind the recommended revisions. They are solid. With these revisions, the Subcommittee recommends that the Committee recommend adoption of the proposal. It also presents two possible alternative additions for consideration, without recommendation.

The most "vociferous" comments addressed the published proposal's requirement that the conference include discussion of the identity of the persons who would appear as witnesses for the organization. Everyone agrees that the organization retains sole discretion to designate who its witnesses will be. What, then, is the point of conferring? There also was some concern that knowing the identity of the witnesses would lead to the misuse of social media research to turn the deposition into a personal deposition, not an organization deposition.

The testimony and comments also expressed concern about requiring discussion of the number of matters for examination. Many suggested that if the number of matters described for examination is reduced, the matters will be described with greater breadth. Broad descriptions, even if not vague, make it difficult to focus witness preparation and to conduct the deposition without disagreements. The Subcommittee long since abandoned any idea of prescribing a numerical limit on the number of matters for examination. Requiring discussion of the number could lead some lawyers to assert an implied right to limit the number.

Withdrawal of the requirement to confer about the identity of the witnesses led to a recommendation to withdraw the words that the parties confer, "continuing as necessary." Those words were inserted because it was recognized that an organization cannot determine who its witnesses will be until it knows what the matters for examination will be. They are no longer needed for this purpose, and could become an occasion for mischief. To be sure, conferring still may need to be continued in stages to satisfy the good-faith requirement, but a careful balance is needed when adding possible points for strategic posturing. The constant precept to do no harm supports deletion of "continuing as necessary."

Judge Ericksen went on to describe the two alternatives presented by the Subcommittee without recommendation. They grow out of deliberations about the withdrawn recommendation to require discussion of the identity of the witnesses to be designated by the organization. Rather than discuss identity, the organization could be required to name them at some interval before the time designated for the deposition. To make this work, it seems necessary to set a minimum notice period. The alternative draft therefore would add a requirement that the notice of a Rule 30(b)(6) deposition be given at least 30 days before the designated time. The time for the organization to name the designated witnesses could be 7, or 5, or 3 days before the deposition — those alternatives are offered as illustrations without suggesting a choice among them. One important reason for identifying the designated witnesses is that the organization may designate more than one, assigning them to different matters for examination. The party taking the deposition should know what matters will be addressed by each witness as it prepares to depose them. Alternative 2A reacts to the fears that advance notice of witness names will foster misuse by requiring that the organization specify, without naming them, which witness will address which matters for examination.

The Subcommittee believes that if either version of Alternative 2 comes to be recommended, it should be published for comment. Much testimony and many comments addressed the advantages and disadvantages of requiring that the organization's witnesses be named in advance, perhaps in such detail that the Committee would not likely learn anything more by republication. But there has been no opportunity to address the advance notice requirements.

Professor Marcus added the suggestion that it might be better to defer discussing the number of days set for the notice provisions until there is at least a tentative Committee position on Alternatives 2 and 2A.

Judge Bates expressed the Committee's thanks to Judge Ericksen, Professor Marcus, and the Subcommittee. He noted that some comments have been addressed to the Subcommittee Report as it appears in the agenda book for this meeting. Lawyers for Civil Justice supports adoption of the revised proposal, adding a 30-day notice requirement but not adding a requirement that witnesses be named before the deposition. They urge that republication would not be required. Several groups support Alternative 2, requiring the organization to name its designated witnesses before the deposition, and supporting the 7-day period.

Judge Bates also noted that the limited advance allocation of unnamed witnesses to different matters for examination set out in Alternative 2A might, by example, discourage organizations that now name witnesses in advance from continuing to do so. Several comments have said that the best practice of the best lawyers now provides names in advance. It would be unwise to discourage it. Resistance to advance naming of witnesses arises from distrust of the not-so-good lawyers who may misuse the names for social media research that supports efforts to convert the occasion from an organization deposition into a personal deposition of the witness.

Judge Bates also suggested that the prospect of republication should not deter consideration of the advance-naming proposal. The Committee should generate the best rule possible. The notice provisions might well require republication. If so, so be it. The fear of bad practices that seek to convert the deposition to a personal deposition are offset by the advantages of advance identification. Among the advantages are those that arise when the same witness has previously testified for the organization on the same matters — the transcript may be available to support better focus in taking the deposition, and it may be possible to select documents shown to be familiar to the witness.

Members of the Subcommittee then provided further views.

One Subcommittee member was "not a proponent of Alternative 2." Naming the witness might lead to gamesmanship. Questions may be prepared that seek the witness's personal information, not information the organization has had an opportunity to prepare the witness to understand and relate accurately. The questions may elicit "I don't know" responses, creating a false appearance of inadequate preparation.

Another Subcommittee member offered some support for requiring advance notice of witness names. Without this requirement, the direction to confer about the matters for examination "is pretty weak sauce." The fear that requiring advance notice will deter lawyers from continuing their present best practices — for example by shortening the period of advance notice down to the required minimum — seems overdrawn. The less we require, the more room there will remain for controversy about the desirable more.

Still another Subcommittee member said that Subcommittee discussions had been robust. "Concerns were expressed on both sides of the 'v.'" about requiring advance notice of witness names. The purpose of discovery is to provide information for the efficient and just resolution of litigation. Advance disclosure of witness identities can advance that goal. Yes, there is an opportunity to abuse social media information and bleeding over into making it an individual deposition. But good lawyers can handle these extreme situations when they occur. The alternative that would simply allocate unidentified witnesses to different subsets of the matters for examination is interesting, but it does not add enough — it does not advance preparation for inquiring into each matter.

A Committee member began the all-Committee discussion by suggesting that the rule should be guided by, and should reinforce, best practices. Testimony at the February hearing revealed that some lawyers are reluctant to reveal witness identity in advance. "That gave me pause." But identification — not conferring about it — is a good thing. "Social media are part of how we live today." Abusive questioning can be managed. And advance identification can be useful if the witness has testified for the organization on other occasions. "I support Alternative 2."

Another Committee member "inclined" toward the revised version of the published proposal. "Rule 30(b)(6) is a unique tool to get information from an organization." It is not designed to get individual knowledge. "The overlap between corporate and personal is a problem now," creating problems in sorting out what is "binding" on the organization. And forgoing a requirement of advance naming can lead to desirable trading — for example, an agreement to provide names in advance in return for identification of the documents that will be used in examining the witness. We should be careful to not get in the way of current best practices.

This initial discussion was punctuated by a reminder that if Alternative 2 is approved, it will be for republication. If views continue to be divided, republication will provide an opportunity to gather more information.

The 30-day notice provision won support as something that could be added to the original proposal. "You need it to prepare the witness." Judge Ericksen responded that this view had been expressed by many organizations. But the Subcommittee is not recommending it. The 30-day notice provision was inserted in Alternatives 2 and 2A — remember that the Subcommittee advanced them for discussion without making any recommendation — because it seemed a necessary support for a provision requiring disclosure of witness names at any interval before the time for the deposition.

Another Committee member offered support for Alternative 2. The downside that advance identification of the organization's witness will lead to social media searches for personal information does not seem much entrenched by advance notice. Millennial lawyers can undertake a comprehensive search even if the witness is identified only at the moment the deposition begins. Even for the Subcommittee's recommended revision of the published rule, the draft Committee Note, p. 105, lines 193-194 of the agenda materials, suggests that it may be productive to discuss at the conference the numbers of witnesses and the matters on which they will testify. Is this a tentative backdoor approach to embracing Alternative 2?

Judge Ericksen responded that "the mandated conference could include lots of things. We hear of many things that are discussed now." Professor Marcus added that there is a legitimate concern about "legislating by Committee Note," but this is a pretty soft sentence. It says only that "it may be productive" to discuss a few suggested topics. It does not support any argument that there is a right to confer about them. These responses were accepted as fair.

The Department of Justice does not favor identification of witnesses before the deposition. The organization is the deponent, not the individual. The deposition is not about the individual witness. Better practice is to have the parties frame the matters for examination, but not to name the witnesses.

A Committee member went to the Notes on the February 22 Subcommittee conference call, pointing to lines 692-694 at page 120 of the agenda materials. That sentence observed that it might be useful to add to the Committee Note for the recommended amendment a statement about the value of specifying which topics the various witnesses would address as part of the conference about the matters for examination. There are concerns about the need to change witnesses at the last minute before the deposition, and about misuse of the fruits of social media research, but why not at least suggest in the Committee Note that it may be helpful to discuss which matters which witness will address? The response was that this suggestion in fact appears in the draft note, p. 105 at line 194. But the rejoinder was that at this point the Note might refer to discussing the identity of the witnesses. Another Committee member agreed — if it is best practice to discuss the identity of witnesses, why not refer to it in the Note?

The characterization of best practice was questioned. The hearings and comments repeatedly emphasized that the best lawyers regard discussion of witness identity as the best practice "when they choose to do it." It is the best practice in the right circumstances. "We should not strip professional judgment out of what is best practice." It would not be the end of the world to adopt Alternative 2 and require advance notification of witness identity, but that is not the same as hinting that best practice, even if not rule text, requires discussion of witness identity. We should remember that the possibility of requiring advance naming of witnesses arose during the January hearing as Committee members raised it as one possible response to the difficulties of requiring that the conference include discussion of identity. Another Committee member noted that advance identification of witnesses was not included among the many proposed Rule 30(b)(6) amendments that the Subcommittee considered and rejected, as described beginning at line 738 of page 121 of the agenda materials. It is a new-found issue. Yet another Committee member agreed. Advance identification of witnesses arose as an alternative to the many protests about requiring discussion of witness identity.

Broader doubts were raised about recommending any Rule 30(b)(6) amendments at all. There is a good bit of anecdotal information about problems in some cases, but it is not clear that this is enough to support any amendments. The revised proposal recommended by the Subcommittee could lead to gamesmanship. The proposed rule text direction to confer about the matters for examination does not embrace all of the six things the Committee Note recommends for discussion. The rule does not require discussion of those things. They should be put into rule text, or removed from the Note.

These doubts expanded to consider the discussion of "good faith" in the draft Note. Even after deleting "continuing as necessary" from the proposed rule text, the Note says that a single conference may not suffice. It also says that agreement is not required. So what does good faith require — when can it be established without reaching agreement? The Note seems to suggest that if the parties fail to agree, they should ask the court for guidance. Why not rely on Rule 26(c) without revising Rule 30(b)(6)? A motion for a protective order must be preceded by conferring or attempting to confer in good faith, accomplishing the same purpose — a conference among those affected.

Judge Ericksen agreed that the Note does speak to matters not included in the rule text. But the Note provides insight into what can be accomplished in conferring about the matters for examination, and to encourage it. "It's hard to convey the breadth of what can be ironed out" by conferring. And requiring a conference is useful — witnesses have told us that they attempt to initiate discussion of the matters for examination and are rebuffed.

Professor Marcus noted that generalized discussions of what constitutes "good faith" are always possible. But good-faith conferring is already required in other discovery rules, see Rule 26(c) and 37(a)(1), and has worked. We can give examples of good practices in the Committee Note, even if some of them extend beyond the obligation to discuss in good faith the matters for examination. This is not legislating by Committee Note, but simply offering observations about what might happen during the conference. It is better to discuss things in advance than during a partially failed deposition.

Professor Coquillette agreed that a Committee Note cannot add to, or withdraw from, the rule text. But this draft Note does not run afoul of that precept.

This discussion led to the suggestion that perhaps the Committee Note should add to the second paragraph that appears on p. 105 the express statement that appears in the third paragraph, recognizing that the opportunity to discuss does not imply any obligation to agree.

Moving back to the recommended rule text, it was noted that the Federal Magistrate Judges' comment on the published proposal observed that Rule 30(b)(6) raises issues that are often litigated. They think that a rule will help — indeed they support the published proposal that requires conferring about the choice of witnesses.

A different perspective on the recommended rule text was offered. The MDL Subcommittee continually encounters the question whether any MDL-specific rules should be detailed or general. The need to preserve wide margins of discretion is often expressed. The recommended revision of the published proposal is more open-ended than the Alternative 2 requirement to name witnesses in advance of the deposition, and to give at least 30 days notice of the deposition. These concerns suggest that it is safer to stick with the less aggressive changes in Alternative 1.

More hesitating support was offered for Alternative 2. The argument that it will promote gamesmanship does not seem persuasive at first. But caution is warranted by the observation that naming the witnesses before the deposition date is the best practice only in the right circumstances. Still, there are obvious advantages in advance naming.

A counter concern was offered. It often happens that just before the deposition "you realize the first chosen witness won't work." If you change to a different witness, the noticing party will take that as a signal to take a personal deposition of the first-named witness. That is not harmless — the withdrawn witness may have no personal knowledge, but have been instructed in organization knowledge to some uncertain extent and with uncertain results. When subjected to an individual deposition, the witness may get it garbled, confusing a distorted version of organization information with personal knowledge. Beyond that, Rule 26(c) already includes an obligation to confer, or to attempt to confer. And the recommended proposal does not state any consequences for failing to agree.

The concern about the last-minute need to change witnesses was addressed by asking whether the risk would be reduced by adopting a brief period for providing the names. Perhaps the 3-day alternative in the draft, or even less — 2 days, or even 1.

The distinction between deposing the organization and a personal deposition of the same witness was noted again. The two should not be conflated, even when the witness is a fact witness as well as an organization's designated witness. The confusion can be aggravated when the witness is named in advance. The confusion can be dispelled in part by scheduling back-to-back depositions, one confined to deposing the organization through the individual and the other to deposing the individual, but the lines are not always observed.

A Committee member suggested that requiring that witnesses be named in advance would inevitably draw the parties into discussing who the witness should be. The noticing party will say that it is the wrong person, we need to discuss the choice. There is an argument that requiring advance naming is a step back toward requiring the parties to confer about the choice.

Another member agreed that requiring names can lead to talking about the choice, but Alternative 2 does not require the organization to confer. The organization has the prerogative to refuse to discuss its choice. Professor Marcus observed that the sequence of steps appears clear enough, but something still more explicit could be added to the Note: First, there must be at least 30 days notice. Then, before or promptly after the notice, the parties must confer about the matters for examination. Then, having settled the matters for examination however well the conference permits, the organization chooses its witness or witnesses and names them at the required interval before the deposition.

Discussion returned to the question whether Rule 30(b)(6) should be amended at all. A judge said that "this may be the most used, most valuable discovery tool. It is used in almost every case. We do not want to weaken it.” The Committee studied it intensely twelve years ago. The complaints, then as now, went to both sides. Organizations protested that there were too many possible matters for examination. Deposing parties complained that organization witnesses were not adequately prepared. The best lawyers confer before the deposition now, and the most we think we can do by amending the rule is to require them to confer. But requiring them to confer has a potential to solve a lot of the problems. “This will not cause the structure to fail.” Disputes happen at depositions now, and will continue to occur no matter what.

The same judge added that experience with 30(b)(6) depositions, although some years ago, suggests that it is not necessary to know the name of the organization’s witness. The inquiring party has a lot of information from documents. The questions can be asked no matter who the witness is. And there are potential downsides in requiring advance notice of witness names. But if the Committee finds substantial reasons to inquire further, it may be wise to go ahead and republish for comments on witness naming.

Another judge agreed with these thoughts. And yet another agreed. Advance naming may upset the balance of what good lawyers do now. Experience as a judge shows frequent encounters with disagreements about the number of matters for examination, but none about the identity of the organization’s witnesses.

A different Committee member thought these observations by three judges make sense. But the problem remains with the draft Committee Note for the revised proposal. It seems to expand on what good faith means for discussing issues beyond defining the matters for examination, and to encourage parties to ask the court for guidance.

Another Committee member suggested that a value of conferring about the matters for examination is often to reduce the number. A party can agree to provide the requested information in documents, suggesting that there will be no need for a witness if the inquiring party is satisfied by the documents. As to identifying the organization’s witnesses, there have been cases where my colleagues refuse to provide names as a bargaining tactic to seek tradeoffs. “Gamesmanship happens on both sides.” But we would like for more lawyers to follow best practices, and that can be encouraged by establishing them in rule text.

A different judge said that the rule should retain the meet-and-confer requirement. And it is desirable to provide a Committee Note that, in the very beginning, suggests discussion of other topics. The draft Note discussion of good faith, appearing at p. 106 of the agenda materials, “accomplishes a lot.” But what about the sentence that suggests the parties seek guidance from the court if they reach an impasse?

Professor Marcus responded that the suggestion about seeking guidance from the court is a suggestion, not a command. It responds to many comments that the rule does not provide any means to resolve disputes when the parties do not reach agreement. A related suggestion appears in the next-to-final paragraph of the draft note, noting that when the parties anticipate the need for Rule 30(b)(6) depositions they may be able to begin planning during the Rule 26(f) conference and in Rule 16 pretrial conferences. All of these suggestions are aimed at avoiding combative positions — "Give me what I want or I'll make a motion." The open-ended suggestion to seek guidance reflects the practice of many judges to entertain discovery disputes without requiring a formal motion. A judge noted that the note does not tell lawyers they have to go to the court, and, even without this sentence, they know they can seek the court's help. The same observation was extended to the suggestions in the preceding Note paragraph about other matters the parties may find appropriate for discussion.

Judge Ericksen added that many magistrate judges and district judges who do discovery disputes report that they like to be available by phone to facilitate discussions without the formality of a motion.

William Hangley reminded the Committee that the letter from active members of the ABA Litigation Section that launched the current Rule 30(b)(6) project noted that the Civil Rules do not provide for anything short of motion practice to resolve disputes. They asked for language like the Note draft, suggesting that the parties "confer" with the court. He further noted that some courts will rule against objections by a party that has not sought a protective order. Counsel often suggest that moving for a protective order is the only way to resolve disputes. "That's a wasteful way of doing it." He added that it is a mistake to think that organizations want to provide a witness whose response is "I do not know." That means another deposition. "We want to produce the most knowledgeable person."

An observer noted that the proposed rule applies to nonparty organizations as well as party organizations. It imposes obligations akin to Rule 45 obligations to produce documents, but it lacks the safety valve remedies in Rule 45(d)(1)(B). Protections are not provided even for nonparties that are not within the jurisdiction of the court where the action is pending. The misuse of social media research when a witness is named in advance is an issue, but so is the ability of the inquiring lawyer to go to the networks of lawyers to find out about the witness's testimony in other cases and use it to shape the deposition.

The drafting of this sentence in the proposed rule text was questioned: "A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party." It might be better if the provisions were flipped: "its duty to confer with the serving party and to designate each person who will testify." A different suggestion was to simplify it: "must advise a nonparty organization of these duties." This was resisted by suggesting that it is better to revise current rule text as little as possible, and that "these duties" may not be sufficiently specific. It was agreed that the rule text should spell out the duties, that this is not a point where brevity is a virtue.

Discussion returned to the question whether either alternative version calling for advance notice of witness names should go forward. Experience suggests that there are fewer disputes when people exchange more information. Perhaps further advice should be sought, as from the Federal Magistrate Judges rules committee?

Judge Bates suggested that the discussion had moved to a point to support a decision whether to approve the revised Rule 30(b)(6) recommended by the Subcommittee. The draft Committee Note need not be included in the vote. If the proposal is approved, voting can turn to the alternatives that would require advance notice of witness identity, or at least assignment of unnamed witnesses to particular matters for examination. All of the Subcommittee recommended amendment is included in the alternatives, so this path avoids the prospect of approving an alternative and then gutting it. But it does not make sense to approve a recommendation that the Subcommittee proposed amendment be adopted, and also to approve publication for comment of an alternative. Only one proposal for adoption should be made, whether now or after a year's delay for republication.

A motion to recommend adoption of the Subcommittee's proposed amended Rule 30(b)(6), with the style revision noted above, was approved, 12 votes for and 2 votes against.

Discussion of Alternatives 2 and 2A began with the suggestion that if republication is approved, the Committee need not choose between the bracketed alternatives that would require 7, or 5, or only 3 days' notice of witness names. Committee practice has included publication of proposals with bracketed alternatives, or even with complete alternative provisions, as a means of stimulating comments on issues that seem likely to benefit from further discussion. A Committee member added that absent any opportunity to address the time for naming or allocating witnesses in comments on the published proposal, it would be a mistake for the Committee to attempt to choose a single time period in a republished proposal. A suggestion to narrow the focus by publishing with only 7- or 3-day alternatives was met by a decision to set out all three alternative periods in brackets.

A motion to approve publication of Alternative 2, including 30-day notice of a Rule 30(b)(6) deposition, advance naming of organization witnesses, and alternative naming times of 7, 5, or 3 days failed, 6 votes for and 9 votes against.

A motion to approve publication of Alternative 2A, including notice periods similar to Alternative 2, but requiring only advance designation of which matters for examination would be addressed by which unnamed witnesses failed, 2 votes for and 13 votes against.

The first day's discussion of Rule 30(b)(6) concluded with these votes. The questions raised by discussion of the draft Committee Note were carried forward for consideration on the next day of such revisions as might be prepared by the Subcommittee in overnight deliberations.

Deliberations on the Committee Note resumed the next day. Judge Ericksen thanked Judge Goldgar for style suggestions. The revised draft retained the substance of the second paragraph, but with style improvements. The third paragraph was revised to make it clear that it does not suggest there is an obligation to confer about anything other than the matters for examination.

Further style changes were suggested and accepted: "and enable the ~~responding party~~ <u>organization</u> to ~~identify~~ <u>designate</u> and * * *.

The next suggestion was to recognize the value of discussing witness identity: "It may be productive also to discuss * * * the number <u>and identity</u> of witnesses * * *." This suggestion was resisted, in part by offering an analogy to the changes in rule text. The published rule required discussion of the identity of each person the organization will designate to testify, and also discussion of the number of matters for examination. Both of these requirements were deleted from the amendments recommended for adoption. The references to each in the published Committee Note have been deleted. It would be a mistake to bring back a suggestion to discuss witness identity, even though it is a suggestion, not a command. Strong agreement was offered — bringing this back to the Note would seem to retract the revision of the rule text.

The proponent responded that the suggestion is only precatory. And the comments showed that discussing the number of topics can be counterproductive. Efforts to reduce the number lead to increasingly broad and vague descriptions of the matters for examination. Many comments showed that witness identity is often discussed to good effect. A Note suggestion that it may be helpful to discuss witness identity is not likely to add much to the burden of conferring. Putting this in the Note does not imply a suggestion to discuss the number of matters for examination. Another participant agreed that there is no known tendency to interpret a Committee Note discussion of one topic to imply anything about a matter not discussed, much less to draw the implication from a decision to withdraw a provision that appeared in the rule text published for comment. The proponent added that courts do cite Committee deliberations in interpreting rules.

Adding "and identity" of the witnesses was resisted. It would move back toward the published rule and Note that drew 1,780 comments, mostly negative on the requirement to confer about witness identity. Some comments said that this should not be in the Note. Another member agreed with this view. The rule text proposed for adoption does not impose a duty to discuss witness identity. Adding it to the Note might generate disputes. Another participant added that Committee Notes should not, and do not, give advice on how to practice law.

Discussion continued with a question whether it would be wise to delete the entire sentence that enumerates issues that might be discussed. One member answered that it is useful to encourage the good practices identified in the public comments. Another suggested that "We're giving useful advice, based on the public comment process, not telling people how to practice law." Yet another member agreed generally, but opposed adding a suggestion to discuss witness identity. Discussing witness identity was removed from the published rule text for good reasons. A prompt in the Committee Note is not needed to enable discussion of witness identity by parties who wish to do so. The proponent rejoined that the discussion can be productive, and it is useful to remind the parties of its value.

A different part of the draft Committee Note was addressed by asking what it means to advise about seeking guidance from the court if the discussion reaches "an impasse." Professor Marcus replied that this sentence reflects a hope that the parties and the court will have used Rule 16 to establish a procedure for resolving discovery disputes. We could leave it to Rule 26(c) protective-order practice, "or to trying to iron it out as a deposition mess." A reminder in the Note can help. The many suggestions in the 2018 Committee Note for amended Rule 23 provide a useful illustration.

Judge Ericksen added that this Note sentence relates to the inability to agree about the matters for examination.

Another Committee member observed that lawyers know they can seek the court's guidance on discovery disputes. This sentence comes close to telling lawyers how to practice law.

The suggestion to strike the entire sentence illustrating issues that it might be productive to discuss was renewed, along with a suggestion to delete the sentence on seeking court guidance when an impasse is reached. Lawyers will react to these observations in the Note, arguing that the Note says they should discuss these things but they do not want to.

Another participant observed that "impasse" means "can't move forward." It is the organization that will want to take disputes to the court, not the noticing party.

Judge Ericksen noted that there had been a lot of pressure to add an express objection procedure to Rule 30(b)(6). Many judges will not hear a dispute about the matters for examination without a Rule 26(c) motion for a protective order. Another participant noted that the comments sought some uniform method for resolving disputes. Some courts refuse to entertain Rule 26(c) motions before the deposition, insisting that disputes be brought to the court only as problems arise during the course of the deposition. The Subcommittee considered adopting an objection procedure and decided not to. The duty to confer expedites the process by starting with the conference that would have to precede any Rule 26(c) motion.

Doubts about the "impasse" sentence were expressed in other terms. One question asked whether it adds anything of value. Another observation suggested that it may hint that there *is* an objection procedure, and will encourage arguments to the court that a party is not conferring in good faith.

This discussion led to a suggestion to delete the Note statement that the obligation to confer in good faith "does not require the parties to reach agreement."

The participant who first asked about the meaning of "impasse" said that the discussion showed that this sentence can be useful to suggest that difficulties can be brought to the court by means short of a formal motion. They might be raised in a status conference, or by other means.

Attention turned to this Note sentence: "The duty to confer continues if needed to fulfill the requirement of good faith." Professor Marcus noted that good-faith conferring requirements appear in Rule 26(c) and Rule 37(a)(1). "Walking out of the room does raise an issue of good faith." The purpose of requiring a conference could be defeated by an approach that automatically accepts "once is enough." But it was rejoined that an earlier sentence already says that the process of conferring may often be iterative. Judge Ericksen agreed to delete the "continues if needed" sentence.

Style suggestions were accepted, adding two words to the list of things it might be productive to discuss: "the number of witnesses and the matters on which each witness will testify * * *." Another accepted suggestion was "The process of discussion ~~will~~ may ~~often~~ be iterative."

The Committee moved to voting on the Committee Note.

The first paragraph was accepted without a formal vote.

Adding "the" before matters on which each witness will testify was approved by vote, 10 for and 3 against.

Adding a suggestion to discuss the identity of witnesses was rejected by vote, 2 for and 11 against.

The Note language suggesting that it might be productive to discuss "the documents the noticing party intends to use during the deposition," not earlier discussed, was challenged. Many comments opposed this practice as interfering with work-product protections. A motion to delete this suggestion was adopted by vote, 8 for and 5 against.

Another part of a sentence was challenged: "The process of conferring will often be iterative, *and a single conference may not suffice*." A motion to delete the "single conference" clause was adopted by vote, 12 for and 1 against.

The sentence stating that the amendment does not require the parties to reach agreement was examined next. A Committee member urged that it is important to say there is no obligation to agree. And a suggestion to combine this statement with the next sentence about seeking guidance from the court was resisted on the ground that a single sentence would discourage efforts to work things out in favor of running to the court. A motion was made to reorganize the sentence to read: "Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement." The motion was adopted, 10 for and 3 against.

A motion was made to revise the "impasse" sentence" to read: "In some circumstances, it may be desirable to seek guidance from the court." The motion was adopted, 8 for and 5 against.

A motion to strike the Note sentence stating that "The duty to confer continues if needed to fulfill the requirement of good faith" was adopted, 11 for and 1 against. (The Subcommittee Report recommendation to delete the preceding sentence from the Committee Note as published was accepted without discussion. This sentence read:"But the conference process must be completed a reasonable time before the deposition is scheduled to occur.")

A motion to adopt the final two paragraphs of the draft Committee Note was adopted, 13 for and 0 against.

MDL Subcommittee Report

Judge Bates introduced the MDL Subcommittee Report. The Subcommittee has been hard at work. It has gathered a lot of information, especially from the Judicial Panel on Multidistrict Litigation. It remains an open question whether it will be useful to propose any MDL-specific rules. The overall number of MDL proceedings may be declining. More importantly, the problems seem to be concentrated in the "mega-MDLs" that aggregate thousands and tens of thousands of cases. Drafting rules that distinguish the many smaller MDLs might prove difficult. And it seems clear that any rules must take care to preserve the creative flexibility that has generated sound procedures for the often unique circumstances of particular MDL proceedings.

Judge Dow delivered the Subcommittee Report. The Report provides an overview of the Subcommittee's work. Subcommittee members have attended many MDL-focused events, and will attend still more. Special appreciation is due to the Judicial Panel on Multidistrict Litigation, Judge Vance, and the JPML's Panel Executive Ms. Duncan for their help. Emery Lee and the FJC research division also have provided great help. Still, the November Committee meeting pointed to the need to gather more information. Is there a problem? Are there potential rule-based solutions?

In approaching these questions, it is important to remember that multidistrict proceedings are created under the aegis of a statute, 28 U.S.C. § 1407. And the statute is implemented by the Judicial Panel. The Panel has an active approach to educating MDL judges, and a vastly improved web site that provides guidance on many questions.

The Subcommittee is focusing on a small number of MDL proceedings, but they are the large proceedings that, taken together, include a large fraction of the total number of cases pending in federal courts at any moment.

The Subcommittee has framed a list of six topics for current attention. The list is not fixed. New topics may emerge as the work proceeds. And some may soon be dropped.

Four topics have come to the center of current work:

Early vetting of individual cases in an MDL to weed out those that have no shadow of merit has been sought by many defendants. A group of plaintiff and defense lawyers has been working with the Emory Law School Institute for Complex Litigation to frame a proposal on this issue. There seems to be some measure of agreement that there is a problem with unfounded individual cases, but not so much agreement on the prospect of finding a solution in a court rule.

Opportunities for interlocutory appellate review have been sought, again primarily by defendants. The earlier proposals sought to establish categories of appeals as a matter of right, with no input from the MDL court and directing speedy decision of the appeal. Each of those features has been challenged vigorously. But there still may be room for some expansion of appeal opportunities.

Settlement review has been urged on the ground that at least in the MDLs that include a great many cases settlement negotiations come to resemble class actions but without the protective features built into Rule 23. The fear is that plaintiffs represented by lawyers who do not participate in the centralized steering committee structure are not afforded a genuine opportunity for meaningful individual settlement negotiations. One approach might be to make the court responsible for some supervision of the plaintiffs steering committee. Another might seek review by some form of independent entity. As it is, some MDL judges become very much involved in settlement terms.

Third-party litigation funding has generated many proposals for disclosure. Comments have been coming in on a regular and continuing basis. The November 2 conference at George Washington Law School provided a lot of information. "It's complicated." Local rules are popping up. And there seem to be many MDL judges who are not even aware of the phenomenon of third-party funding or of its existence in their cases. The Subcommittee may undertake a survey of MDL judges this summer through the FJC. If a survey is made, pointed questions about third-party funding will be included.

Professor Marcus added that two other subjects round out the top-six list. Filing fees and "master complaints" have been the subjects of many comments. But this kind of thing can change, and so the list of topics changes. Perhaps these two should be put aside. More generally, it is important to continue to ask what are the significant problems in MDL practice, and what a rule solution might look like.

<u>Screening Claims</u>: Discussion turned first to the question whether a rule might be devised to encourage early screening of individual claims. Defendants urge a "field of dreams" problem: creating an MDL proceeding invites filing claims without any investigation of possible merit. Pejorative terms are used, speaking of "1-800-call-a-lawyer" operations and a "get a name, file a claim" approach. The perception is that in an MDL, "everyone gets paid." These concerns are reflected in H.R. 985, introduced in the last Congress. Its provisions required plaintiffs to disclose a great deal of information within 45 days after an action is transferred to the MDL court or directly filed there; required the judge to determine the sufficiency of each submission within 30 days, and to dismiss without prejudice if the submission is insufficient; and required the judge to dismiss with prejudice if a sufficient submission was not filed within 30 days after the dismissal without prejudice.

Courts have adopted various means of developing information about individual claims that go beyond fact-pleading minimums. One common device is the plaintiff fact sheet. Plaintiff profiles are similar. Defendant fact sheets may be required. Many questions arise: should plaintiff fact sheets, for example, be required in all MDL proceedings, or only some? Who drafts the PFS? How early in the proceeding should a PFS requirement be imposed? And what should be done with them?

Emery Lee reported that the FJC has studied the frequency of PFS orders, along with plaintiff profiles, DFS orders, and short-form complaints. Their report is included in the agenda materials at page 229. The study included 39 mega proceedings over its entire period, with about 25 pending at any one time. The FJC reviewed all case-management orders in them. The plaintiff fact sheets "tend to be pretty similar." They were ordered in many mega proceedings; the frequency of requiring fact sheets increased as the number of cases in the MDL increased. The study did not reveal whatever reasons may have led to not using PFSs in the proceedings that did not use them. Plaintiff profiles tend to be briefer than fact sheets. Both devices should be distinguished from "Lone Pine" orders. All include information about using the product and injury. But only Lone Pine orders require showing expert opinion evidence on causation. Some plaintiff fact sheets included questions about third-party funding.

It is not clear who starts the PFS process. Usually the form is negotiated by the parties and submitted to the judge for approval. The median time from centralization to entry of the PFS order was 6.2 months, the average 8 months.

A judge suggested that plaintiff fact sheets are not screening techniques that serve to knock out frivolous claims. They give the defendant basic information, to prepare an inventory of types of cases. Dismissals are entered for failing to comply with the order to file a PFS, not for failure to provide enough to support a claim. Another judge observed that there still may be a connection — failure to file a fact sheet may reflect an inability to provide the required information. A plaintiff who never used a challenged product may not be willing to provide details of when it was used.

Another participant thought that fact sheets have been used to weed out frivolous claims. In an era of television advertising for clients, the fact sheet helps to ensure the lawyer has some contact with the client, has taken a look at the case. Some of the clients do not have any connection to the events in suit. It is not a Lone Pine order, but it is screening of a sort.

Professor Marcus suggested that concern about screening individual claims should be modulated by asking whether it is important to undertake this screening at an early stage of the MDL proceeding. Screening "is early discovery-disclosure that helps move the case along." It may fold into other discovery. Fact sheets are used differently in different MDLs. They may reduce the over-supply of claims, but it is not clear that screening the fact sheets is the first thing that should occupy the MDL court's attention. As an alternative, a rule might encourage a process similar to the Rule 26(f) discovery conference, urging the parties to confer about questionable claims to sharpen the issues.

Defendant fact sheets also are frequently used. They often include information about the defendant. But they also often include information the defendant has about the plaintiff.

Judge Dow noted that it is important to preserve flexibility. An MDL judge may find it important to focus on things other than screening individual claims.

Another Committee member observed that the concerns with screening seem to be driven by a small number of mega-MDLs. MDL judges frequently argue against rules that might tie their hands. How can we fashion rules that do not affect cases where screening is not needed? Is it better to leave these questions to be handled by standing orders, the Manual for Complex Litigation, or guidance by the Judicial Panel? A different Committee member echoed these questions: Can one size fit all MDLs? Can mega-MDLs be distinguished? "How are MDL judges educated"?

A judge responded that the JPML web site provides great guidance. So does the annual conference of MDL judges. "New MDL judges are not left to their own."

Judge Dow emphasized that the critical point is that these concerns arise in a small fraction of all MDL proceedings. But there may be a need. The question is whether we can frame a rule that helps in the cases where help is needed without interfering with the more general run of MDL proceedings.

A Committee member suggested that the need is to ensure that an MDL is managed by responsible groups of attorneys on both sides. Rule-based solutions may be hard to find.

Another Committee member suggested that devising rules might, by being available to all, make it possible to expand the number of lawyers participating in MDL proceedings beyond the in-group of present practice.

Dr. Lee also noted that large mass-tort MDLs tend to resolve by aggregate settlements because they are not suitable for certification of a settlement class under Rule 23. Smaller MDLs with fewer cases tend to be resolved through Rule 23.

<u>Interlocutory Appeals</u>: Judge Dow observed that expanding opportunities for interlocutory appellate review of MDL court rulings cannot be accomplished by best practice guides, provisions in the Manual for Complex Litigation, or like endeavors. A court rule or legislation are the only available means.

Professor Marcus began by pointing to the appeal provision in H.R. 985. That provision directed that the court of appeals "shall permit" an appeal from any order in an MDL proceeding, "provided that an immediate appeal from the order may materially advance the ultimate termination of the proceeding." Wherever this provision may lie on a spectrum from complete discretion to a right to appeal, the Subcommittee has not thought to create opportunities for appeal as a matter of right.

It may be that appeals by permission of the district court under § 1292(b) suffice to the needs of MDL proceedings. But questions are raised about the MDL judge's absolute veto — the court of appeals cannot grant permission if the district court has not. Questions also are raised about the risk that each of the three criteria set out in § 1292(b) can raise undesirable obstacles. The district court must state that there is "a controlling question of law" "as to which there is substantial ground for difference of opinion" "and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." John Beisner undertook a comprehensive review of § 1292(b) appeals in MDL proceedings that shows quite infrequent use.

If an attempt is made to draft an appeal rule, it must address such questions as the role of the MDL court: is it necessary that the MDL court approve the appeal? If not, should the MDL court have a means to offer advice to the court of appeals about the potential costs and benefits of an immediate appeal? Should appeals be available only from defined categories of orders? Should the court of appeals have wide-open, certiorari-like discretion?

A judge posed the first question: Should any proposal for interlocutory appeals include a requirement that the court of appeals decide the appeal quickly? This judge ruled on a preemption question in an MDL. Immediate appellate review might have been helpful. But local circuit experience showed that the earliest a decision might be had would be two years. That much delay was too much to contemplate, so no § 1292(b) appeal was certified. It is difficult to craft a rule that requires prompt appellate decision, but some limit on the time for appellate decision should be linked to any new appeal opportunity.

The need to provide for prompt decision on appeal prompted the question whether the prospect of a 2-year or even longer delay may be peculiar to a single circuit? In another circuit, decision within three to nine months is routine. It was pointed out that the Ninth Circuit encounters 14,000 cases a year; decision in a few months would be hard to accomplish. And about one-third of all MDLs are in the Ninth Circuit.

Judge Sutton, former chair of the Standing Committee, has urged that lawyers should ask for expedited disposition of appeals in class actions or MDL proceedings. But discussion in the Standing Committee has shown reluctance about mandating prompt disposition.

Yet a rule might encourage consideration of the prospect of a speedy or delayed decision as a factor in deciding whether to permit an appeal. And lawyers themselves could cooperate in expediting the appeal briefing schedule. But in the Ninth Circuit, argument is likely to be had 18 months after briefing.

A judge suggested that § 1292(b) is not effective because of concern that the time taken to reach an appellate decision defeats the element that asks whether an appeal will materially advance the ultimate termination of the litigation. Rule 23(f) does not have any comparable factor, but leaves the decision whether to permit appeal to the discretion of the court of appeals. There is a natural inclination to grant permission "only when it looks good." But it would help to provide an opportunity for the district court to weigh in on the decision whether to permit an appeal. A rule mandate for expeditious decision, however, will run into serious problems. One concern is delaying the decision in other cases — for example an appeal by someone who will remain in prison until the appeal is decided.

The prospect of addressing delay on appeal was considered further. Would an appeal rule apply to all MDL proceedings? Only some? Only to some identified categories of orders?

Beyond these concerns, it was agreed that any consideration of a rule creating new appeal opportunities would have to be developed in cooperation with the Appellate Rules Committee.

Discussion turned to asking why § 1292(b) is not much used in MDL proceedings. The Beisner report does not clearly show whether the criteria that limit § 1292(b) appeals are an obstacle. Attempting to find out much more by an FJC study would likely be difficult — for example, how would you find whether lawyers considered asking for permission to appeal and why they decided not to? Is there perhaps some parallel in the use of § 1292(b) for appeals in class actions before Rule 23(f) was adopted? The one-time "death knell" version of final-judgment appeals from orders denying class certification, and even "reverse death-knell" appeals from orders granting certification was recalled; some courts of appeals liked this opportunity for appeals before the Supreme Court rejected the doctrine. Mandamus has always been available, but is used sparingly.

An observer identified herself as engaging in practice for plaintiffs in medical device cases. A year to appellate decision is the best that could be hoped for. Many plaintiffs are elderly. Some will die while the appeal is pending. Any provision for an automatic right of interlocutory appeal would be undesirable. New York state courts provide frequent interlocutory appeals, and cases there can drag out through eight to ten years of appeals.

A Committee member asked whether a permissive interlocutory rule could be entirely open-ended, providing certiorari-like discretion? Rule 23(f) is like that. So for the question whether an appeal would stay proceedings in the MDL court — like § 1292(b) and Rule 23(f), a new appeal provision could explicitly provide that an appeal does not stay proceedings in the MDL court unless the district judge or the court of appeals orders a stay.

<u>Settlement Review</u>: Professor Marcus suggested that the authors of § 1407 were not thinking about settlement in MDL proceedings. The statute is contemporary with the 1966 Rule 23 amendments; the 1966 Committee Note suggests a lack of serious concern with settlement because it simply echoes the 1966 rule text. Since then, "settlement has become a big deal." MDL practice has not developed in the way Rule 23(e) has. The conceptual reason is that settlement of some cases in an MDL proceeding does not bind other cases — every plaintiff remains free to settle, or not settle, on individual terms. Each plaintiff, moreover, has an individual lawyer. There are no rules for review by the MDL judge, unless class certification is chosen as the vehicle for settlement. But some MDL judges become involved in framing a global settlement. A rule might provide for review by way of building on rule provisions for appointing and reviewing the activities of a plaintiffs steering committee. Some judges refer to MDL proceedings as quasi-class actions; an MDL rule might build on the Rule 23(g) model for appointing class counsel.

Judge Dow noted that the MDL proceedings he has been assigned have involved 30 or fewer individual actions. But a recent conference of judges and special masters in mega-MDL proceedings reflected concern that the end-game settlement process may at times be unfair to groups of inventory plaintiffs. Some judges have been supervising settlements in ways that may not be supported by formal authority. If pressed, they may find authority in their obligation to police the ethical behavior of the lawyers that appear before them. They are concerned that settlements should be equitable as to similarly situated plaintiffs. There is a concern that individual plaintiffs may be only "sort of" represented by their individual lawyers.

Another judge with experience in a mega-MDL had the same sense of the situation. Mega-MDL judges agree that an MDL proceeding is not of itself a class action governed by Rule 23, "but it may feel like a class action to plaintiffs and lawyers not on the steering committee." The large number of client-attorney relationships is a thicket that may be difficult to penetrate. "We know that lawyers on the steering committee and lawyers not on the committee will not agree on distributing a common fund." Settlement review should be studied. But when there is a stipulation to dismiss an individual action in an MDL, "I do not inquire further."

Still another judge reported on a mega-MDL that is approaching the fourth and final bellwether trial. The parties have been told that after that last bellwether all cases that remain unsettled will be remanded for trial. That surprised the lawyers on the steering committee. They had expected the cases would linger on to settle. One immediate reaction was a flurry to add more cases to the MDL, some 2,000 of them. The defendants have retained a separate law firm to negotiate individual case settlements, not only with lawyers on the steering committee but with all other attorneys. The negotiations produce settlement terms sheets that set out the terms of settlement, with sliding scales of payment depending on which version of the product was used. Each plaintiff lawyer has six months in which to deal with each client to see about settling. The plaintiffs' lawyers are acting in good faith. They do not seem to be forcing settlements, nor to be giving some clients better deals than others. They tell their clients they are prepared to try the cases if they are remanded without settlement.

The question returned: The form of MDL proceedings that do not lead to class certification is that each constituent action remains an individual action. It is not clear how far that concept matches reality. "We need to know more." But a response suggested that it is not clear whether this is a matter for an Enabling Act rule. And a reminder was provided that as an MDL proceeding appears to be winding down toward the time for remand the parties may negotiate disposition by winning certification of a settlement class.

The same themes reappeared in further discussion. Some MDL judges take a much more active approach than others in promoting settlement. There may be a tension between an MDL judge asking to be included in the loop of settlement and the view that, absent class treatment, the judge cannot do more. But every judge asks to be informed — the judge is on the spot if the settlement does not seem fair. Still, it will be hard to frame a rule if there is uncertainty about the judge's authority.

The judge's role in appointing lead counsel or committees for plaintiffs, and perhaps also for defendants, was again pointed to as a source of authority. Responsibility for appointing leadership includes responsibility to supervise the leaders' discharge of their appointed authority.

Still, it was asked how a judge would enforce a negative review of a settlement proposed by a plaintiffs steering committee? The view of some MDL judges that they have an obligation to review the responsible performance of professional duties was repeated. But if unprofessional conduct is found, is the judge obliged to do something more than reject the settlement? Or is it enough that judges expect to be listened to? And heard?

A related question asked what is the authority for ordering bellwether trials as a device that may promote settlement? The answer is consent. One judge reported that in a mega-MDL the lawyers asked for bellwether trials. They provided written consents from plaintiffs and defendants. Following the announcement that unsettled cases would be remanded after the last bellwether trial, the lawyers asked for a six-month delay, but did not ask for review of individual settlements. Time will be given to delay remand of cases covered by settlement terms sheets presented to the court. Other cases will be remanded on a regular basis. This process is designed only to give time for individual settlements. And when an individual plaintiff and defendant appear and announce that they have settled their case, "how am I to review it"?

A similar view was expressed. MDL judges at the annual conference seemed to want not to be involved in non-class settlements. There are too many cases. But a judge can encourage settlement. And the judges at the conference seemed to pretty much agree that it would not be a good idea to adopt a rule that either encourages or limits involvement in settlement.

A Committee member asked whether a bellwether trial is more an arbitration than an exercise of jurisdiction, even though it yields a final and binding judgment? Discussion responded that there should be federal subject-matter jurisdiction for every case in the MDL; that cannot be waived. Although the MDL court cannot use § 1404 to transfer constituent actions to itself for trial, personal jurisdiction and venue objections can be waived. Pretrial proceedings authorized by § 1407 enable the MDL court to resolve the merits by ruling on motions to dismiss for failure to state a claim, or for summary judgment. Trial provides a more complete procedure for deciding the merits.

<u>Third-party Litigation Funding</u>: Professor Marcus opened this topic by noting that third-party litigation funding is a very interesting topic. It involves increasingly large amounts of money, and is growing rapidly. What might be counted as third-party funding, and where it may be going, remains unclear. It does not appear to play a distinctive role in MDL litigation as compared to other forms of litigation, although prominent examples have occurred in the NFL concussion MDL and in the national opioids MDL. In other forms, there seem to be real distinctions between a $5,000,000 nonrecourse funding for a patent action and an advance of living expenses to an individual personal injury plaintiff. There is great interest in this topic, but it is not clear whether this Committee should be interested in considering possible rules, whether for MDL proceedings or more generally.

Judge Bates seconded the observation that third-party funding is not unique to MDL proceedings. Indeed it may be more prevalent elsewhere.

A Committee member focused on the several submissions that urge disclosure of third-party funding. Rule 7.1 requires disclosure for the purpose of informing the court of issues that bear on recusal. Why should third-party funding be any different? The survey prepared for the Committee by Patrick Tighe suggested that 24 districts and six circuits have local rules that seem to point toward disclosure of third-party funding. And this is not an issue limited to MDL proceedings.

Professor Marcus agreed that support for recusal decisions is one reason for disclosure. But that purpose can be served by disclosing the fact of funding and the identity of the funder. Those who urge disclosure want more than that. They argue an analogy to the disclosure of liability insurance. But difficult distinctions need to be drawn. There is no proposal that law firms should be required to disclose a general line of credit extended to the firm on regular commercial terms. Nor has it been argued that disclosure need be made of an uncle’s undertaking to pay the rent until a plaintiff’s case has been resolved.

Judge Dow noted that the analogy to liability insurance is advanced by suggesting that the defendant (and perhaps the judge) needs to know who is controlling the litigation. And the research on local district and circuit rules will be updated.

Another judge reported hearing that it has become common practice to ask about third-party funding in discovery. Plaintiffs commonly respond by saying that they have funding, and will not say anything more. And defendants can respond by taking the question to the court. One task will be to determine whether a common-law of discovery is already being developed. That in itself may be a reason to leave the way open for practice to evolve through discovery and local rules.

<u>Individual Filing Fees</u>: The inquiry into individual filing fees was prompted by suggestions that individual fees were often shirked for multi-plaintiff proceedings, and that individual fees should be required for every plaintiff as a means of encouraging lawyers to be more careful in filing.

Emery Lee reported on an FJC study of filing fees. The study has been facilitated by an origin code that since 2016 identifies direct-filed cases that includes a line for fee status. The study is not complete because the new code is not uniformly used by all MDL courts. But in the proceedings that were studied, filing fees were paid in about 99% of the direct-filed cases.

Professor Marcus added that filing fees are governed by statute. Rule 20 allows multiple plaintiffs to join in a single action. Some suggestions look to Rule 21 as authority to sever plaintiffs into separate proceedings so as to increase the number of fees. But there is no information to suggest that a rule addressing filing fees would have much effect in reducing unfounded filings.

Further discussion found agreement that MDL judges overwhelmingly require individual filing fees for each action in the MDL. It was agreed that if anything, this is a matter to be addressed by a guide to best practices, not by an Enabling Act rule.

Master Complaints: Professor Marcus stated that master complaints have been used to manage large aggregations. A master complaint does not supersede the complaints in individual actions unless it is intended to do so. So long as the master complaint is used only as a convenient management tool, complete disposition of any single action in an MDL proceeding establishes a final judgment that must be appealed then or never. But if a master complaint supersedes individual complaints, dismissal of some claims set out in the master complaint may not of itself establish finality even if some plaintiffs have individually pleaded only the claims that were dismissed. The effect of acting on parts of a master complaint on appeal jurisdiction remains uncertain.

A master complaint may be adopted when the MDL court finds it would not be useful to focus on individual complaints. It can be a management tool to focus on some issues first. Preemption, for example, can be a common issue that transcends myriad issues that might be framed by individual complaints.

Emery Lee noted that short-form complaints built around a master complaint are often used, especially for direct-filed cases. They include forms to check which claims in the master complaint are asserted by an individual plaintiff, and call for some additional plaintiff-specific information.

Further discussion noted that a master complaint allows consolidated filings, and can be a huge time-saver for the clerk’s office. But multiple motions to dismiss may be entertained in smaller-scale MDLs.

A judge reported that in a mega-MDL the parties stipulated to a master complaint. Each direct-filing plaintiff pays a filing fee, checks the boxes, and adds some individual information. The short-form complaints are not subject to motions to dismiss.

A judge asked whether it would be useful to add a reference to master complaints to the Rule 7 list of pleadings that are allowed. Discussion suggested that it would not provide any appreciable benefit as a stand-alone rule for MDL proceedings. And it might be difficult to explain proper use of a master complaint. Courts are using them now, successfully. Why run the risk of undue complications?

The Committee agreed that the Subcommittee can remove master complaints from the list of subjects for active study. But this and all other subjects can be brought back if reason appears.

Judge Bates noted the Committee's thanks to Judge Dow, the MDL Subcommittee, and Professor Marcus for their fine work.

Rule 73(b)(1)

The agenda materials include draft amendments to the Rule 73(b)(1) procedure for obtaining the parties' consent to trial before a magistrate judge. The impetus for the proposal arose from a feature of the CM/ECF system that automatically sends individual consents to the judge as they are filed. That feature undermines the promise of anonymity that underlies Rule 73 and the statutory direction that rules of court for referring civil matters to a magistrate judge shall include procedures to protect the voluntariness of consents.

Initial reports were that there is no way to thwart this automatic feature of the CM/ECF system. But recent information suggests that it may, after all, prove possible to design a procedure that, without imposing undue burdens on the clerk's office, continues to allow separate filings of consent that do not come to the attention of either magistrate or district judges unless all parties file consents.

There is no apparent reason to revise Rule 73(b)(1) if it continues to be feasible to allow each party to separately file a consent to magistrate judge jurisdiction. And carrying the rule forward without amendment may avoid the need to consider other possible issues that have not been raised on any front but that arise when amendments are considered.

This topic will be deferred pending examination of the opportunities to adjust operation of the CM/ECF system.

Rule 7.1 Disclosure

Discussion began by noting four different proposals to expand the disclosures required by Rule 7.1.

Disclosure of third-party financing arrangements is being studied by the MDL Subcommittee. The questions are not unique to MDL proceedings. Indeed, as discussed with the MDL Subcommittee report, the questions arise in many different categories of litigation. The MDL Subcommittee will continue its work.

The MDL discussion at this meeting also touched on the original reason for adopting Rule 7.1. It is designed to elicit information relevant to recusal decisions. That topic is common to at least the Appellate, Bankruptcy, Civil, and Criminal Rules. The original initial disclosure rules were framed by a joint subcommittee of all the advisory committees. Any revisions aimed at informing recusal decisions should be considered by a like process. There have been occasional indications that it might be useful to initiate the inquiry. Discussion at the January Standing Committee meeting as part of the MDL rules discussion, however, suggested that the time has not yet come.

One of the two disclosure topics that remain is straight-forward. An amendment of Appellate Rule 26.1 is on track to take effect this December 1. A parallel amendment of Bankruptcy Rule 8012(a) was published last summer and seems to be on track for a recommendation to adopt. These amendments can be illustrated by the parallel amendment that would conform Rule 7.1 to them:

Rule 7.1. Disclosure Statement

(a) Who Must File. A nongovernmental corporate party and a nongovernmental corporation that seeks to intervene must file 2 copies of a disclosure statement that * * *."

It is desirable to have uniform provisions in all three rules. The Appellate and Bankruptcy rules amendments have been tested by the public comment process and there is little reason to believe that civil actions present different considerations that warrant distinctive treatment. The case for adopting this parallel amendment is so strong that it might be recommended for adoption without publication. But there is no apparent urgency about establishing uniformity, and it is possible that public comment might reveal reasons to reconsider. It seems better to recommend publication of the amendment for comment.

A separate question is whether the rule should continue to require 2 copies of the disclosure statement. Electronic docket practices were not uniformly established when Rule 7.1 was adopted. The copy was thought useful as a means of facilitating distribution to the judge assigned to the case. But there have been repeated indications that electronic docket practices have evolved to a point that makes the "2 copies" requirement superfluous. Does it mean that the party must send the same disclosure twice by the same electronic means?

Discussion noted that some judges like to have paper copies of many different sorts of filings. But the rules do not require that two copies of other filings be provided. And a judge can make arrangements to have printed copies of whatever electronic filings the judge wishes to have on paper. A judge's judicial assistant can also make sure that all disclosure statements are provided to the judge as soon as they are filed.

The Committee agreed that this proposed amendment should delete the 2-copies requirement.

The final disclosure question was raised by Judge Thomas Zilly. He suggests mandatory initial "disclosure of the names and citizenship of any member or owner of an LLC, trust, or similar entity.” His suggestion was inspired by experience with a case that went through a 10-day trial. On appeal the court of appeals remanded for a determination whether the citizenships of four LLC parties satisfied the complete diversity requirement for diversity jurisdiction.

The risk that diversity jurisdiction may not exist arises from the rule that an LLC is a citizen of every state of every owner’s citizenship. If an owner is itself an LLC, the owner’s citizenships are determined by the citizenships of its owners. The opportunities to defeat diversity by finding common citizenship between even one plaintiff and one defendant are manifest. The problem arises with respect both to plaintiff LLCs and defendant LLCs. And the problem is aggravated by the broad proliferation of LLCs and the secrecy that often shrouds information about LLC members. A plaintiff’s attempts to satisfy the Rule 8(a)(1) obligation to plead a short and plain statement of the grounds for the court’s jurisdiction may well fall short. It is easily possible that a plaintiff may not even be entirely sure of its own citizenship. Pleading the citizenship of a defendant LLC may be well beyond the plaintiff’s ability.

LLC parties are only one part of the problem. Many other entities or quasi-entities take on the citizenship of their participants for the determination of complete diversity. Partnerships, limited partnerships, at least some labor unions, trusts, “joint ventures” created in various ways, foreign-law entities, and still others provide examples. Any attempt to write an all-inclusive catalog into a court rule would fall short, and might inadvertently test the rule that Enabling Act rules cannot expand or limit subject-matter jurisdiction.

The difficulty of enumeration prompted preparation of a generic draft for the agenda materials. The draft would recast present Rule 7.1(a) into two paragraphs. The first paragraph would be present Rule 7.1(a), as it would be amended by the addition of the intervenor provision described above. The second paragraph would require a disclosure statement as follows:

> (2) A party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a disclosure statement that identifies the citizenship of every person whose citizenship is attributed to that party.

This incorporation of § 1332(a) includes the provisions of § 1332(c) that define the citizenship of an insurer sued in a direct action and the citizenship of the legal representative of an estate, an infant, or an incompetent. It should not create problems for diversity jurisdiction under the Class Action Fairness Act, § 1332(d), since that jurisdiction depends on minimal diversity, not the general complete diversity rule. It might be noted, however, that § 1332(d)(10) includes a distinctive definition of citizenship for an unincorporated association. And it seems likely that courts will bypass the potential complexities of determining the citizenship of class members for purposes of § 1332(d)(3) and (4) provisions when more than one-third but less than two-thirds of class members and the primary defendants are citizens of the state in which the action was filed, or greater than two-thirds of class members are citizens of the state where the action was originally filed, etc.

Judge Bates opened the discussion by noting that he had had an action to enforce a California diversity judgment. It became apparent that the California court in fact did not have diversity jurisdiction. That led to questions about the consequences for enforcing the judgment, an issue not addressed by the proposed amendment. The proposal seems fairly direct.

Another judge stated that "this is serious. It does come up." Like it or not, the rule for determining the citizenship of an LLC has been settled by the Supreme Court. Perhaps the rule should be reconsidered, but that is not a question for the Committee or lower courts. There are many LLCs. Many of the people involved with them hope for privacy. It is possible that a person wishing to discover the ownership of an LLC might file a purported diversity action simply for the purpose of disclosing the ownership. We should provide discretion for the court to protect anonymity of the information.

This observation suggested a question about the proposed rule draft. All the draft would require is a statement identifying citizenships; it does not require naming the persons whose citizenships are attributed to the party. But perhaps the text should be "a disclosure statement that names and identifies the citizenship of every person * * *." Or, if that is not done, the Committee Note could underscore the point that the rule text does not require identifying the persons by name.

The discussion continued by pointing out that an LLC might decide not to challenge jurisdiction because it prefers not to reveal its owners, or instead because it prefers to be in federal court although disclosing all of its citizenships would defeat diversity.

Another possibility would be to provide for disclosure in camera. That would put the court in a position to work with the issue, without always defeating privacy interests.

A rule, or the Committee Note, might point out that a plaintiff may plead citizenships for diversity jurisdiction "on information and belief" as to other parties.

A judge pointed out that for a long time she was the only judge on her court who refused to accept a simple pleading that "the defendant is an LLC whose principal place of business is in Wisconsin." She has a standard order for cases in which citizenship is pleaded on information and belief, and another order where the allegations are plainly incomplete. An opportunity to disclose in chambers is provided. These orders issue routinely in three or four cases every month. It is useful to have a disclosure provision in the rules.

Another judge agreed that these citizenship questions should be raised at the beginning of an action. "Privacy is important, however."

The question whether the rule should include an "unless otherwise ordered" provision was addressed by asking whether this qualification should be expressed in rule text or in the Committee Note.

Another judge agreed on the need for disclosure. Judges are engaged in this process now. And the problem arises not only from LLCs. The same problem can arise with partnerships, and can go down several levels.

A judge suggested an alternative approach. He has an order that directs the parties to discuss diversity citizenship in the Rule 26(f) conference. He often finds that lawyers do not know a party's citizenship or have not made the inquiry.

A judge observed that the draft Committee Note does not tell a plaintiff what to do in the complaint when it does not know the defendant's citizenship. A judge responded that the Committee Note might say that pleading on information and belief suffices.

The same two judges suggested that it would be enough to draft the rule to require only identification of a party's attributed citizenships, and to comment in the Committee Note that the disclosure requirement does not extend to the names of the persons whose citizenships are identified.

Two other judges asked what should be done when a defendant wants to challenge diversity jurisdiction. The draft rule text requires the plaintiff as well as other parties to disclose all of its citizenships, but a defendant may not trust the disclosure. Discovery should be available to probe behind the disclosure, just as it is available to explore other matters bearing on a determination of subject-matter jurisdiction that cannot rest on the pleadings alone. Another judge agreed. Courts manage discovery. But the Committee Note should reiterate that disclosures that identify citizenship need not also name the persons whose citizenship is attributed to the party.

In moving toward a vote on the Rule 7.1 proposals, it was agreed that a vote on rule text could be made on the basis of the ongoing discussion. If rule text is approved with a recommendation for publication, the draft Committee Note can be revised to reflect the discussion and submitted to the Committee for voting by e-mail messaging.

A question about rule text asked whether a requirement to "identify the citizenship of every person" might be read to imply a duty to disclose names as well as citizenship. One approach might be to change the language to "states the citizenship." A similar suggestion was that the rule text should require disclosure of the "states of citizenship."

A judge responded that "there are parent LLCs. I want them named."

A different judge suggested that it is appropriate to empower the judge to protect the identity of even first-tier participants in an LLC party. It might suffice to recognize this power in the Committee Note. If you need to know, you can get it in discovery. But it might be wise to anchor this authority in rule text by introducing paragraph (2) with "Unless otherwise ordered by the court." This was accepted as sufficient to the needs of the unusual case.

The question of naming the persons whose citizenship is disclosed returned. "An LLC is an amalgamation of people. Anonymity should be the exception."

This discussion led to proposals that the rule text should read:

(2) Unless otherwise ordered by the court, a party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a disclosure statement that names — and identifies the citizenship of — every person whose citizenship is attributed to that party.

The Committee Note can build on the "otherwise ordered" clause to say that the court can limit disclosure of names by a protective order.

A question was addressed to "person": does it include artificial entities, for example an LLC that is an owner of an LLC party? The answer was that rule style conventions use "person" to include any form of entity.

An observer suggested that there may be great difficulties in unraveling all of the citizenships that are attributed to a party. There are exotic forms of organization that may include many people holding interests in multiple and overlapping layers. He had an experience with such an organization, and after much discovery was able to show citizenships that defeated diversity jurisdiction. This lament was accepted by observing that the complications arise from the rules that measure diversity jurisdiction. The accepted rules are that the parties cannot waive or forfeit subject-matter jurisdiction questions. And the court has an obligation to ensure that it has subject-matter jurisdiction in every case. As complicated as the search for citizenships may become, the value of initial disclosure at the beginning of the action is important. So all that is needed is to search far enough to find one citizenship that defeats complete diversity. The obligation to search is imposed alike on parties who wish to invoke diversity jurisdiction and on those who wish to defeat it.

A Committee member observed that the rule text limits the obligation to disclose to the persons whose citizenship is attributed to the disclosing party.

A motion to recommend publication of the amendment of Rule 7.1(a)(1) set out at page 285, lines 1864-1865, striking the "2 copies of" provision and including disclosure by a nongovernmental corporation that seeks to intervene was approved, 13 yes and 0 no.

A motion was made to begin the addition of new Rule 7.1(a)(2) set out at lines 1869-1871 with "Unless otherwise ordered by the court." The motion included addition of "names" before "identifies." (This addition was styled to read: "statement that names — and identifies the citizenship of — every person * * *.") The motion was approved, 13 for and 0 against.

The Committee Note will be revised to reflect this discussion and the amended rule text. The revised Committee Note will be circulated to the Committee for an e-mail vote.

Social Security Review Subcommittee Report

Judge Lioi delivered the Report of the Social Security Review Subcommittee. The early drafts that divided the potential provisions among three rules have been revised to include all provisions in a single rule. The draft included in the agenda materials is tentatively framed as new Rule 71.2. Representatives of the Social Security Administration, the National Organization of Social Security Claimants Representatives, and the American Association for Justice attended the November 1 Committee meeting and provided helpful comments on the Committee discussion of the draft rules included in the November agenda materials.

The Subcommittee has met by a series of conference calls since the November Committee meeting. A small working group held a series of conference calls to deliberate detailed questions of drafting. Those calls were very successful, but many issues remain open for further consideration.

The next step, apart from at least one Subcommittee meeting by conference call, will be to hold a conference on June 20. The conference will bring together representatives of the organizations that have provided advice in the past. It also will ask for participation by the Department of Justice and a representative of the Federal Magistrate Judges rules committee. Professor David Marcus, one of the authors of the study prepared for the Administrative Conference of the United States, will be there. The first meeting with representatives of these groups before the November 2017 meeting provided a lively exchange of views. Bringing them together again, with augmented forces, is likely to provide the same benefits. It remains possible that separate meetings may be arranged with some of these groups, but nothing definite has been planned.

The draft rule in the agenda materials is likely to be revised further before it is distributed to participants in the June 20 conference.

The Subcommittee's first objective is to pursue development of an illustrative draft that will provide a foundation for deciding whether to recommend that the Committee work to develop a draft that can be published for comment. The recommendation may be that repeated exploration of the potential pitfalls shows that the potential advantages of adopting a good and uniform national rule are not sufficient to justify an excursion into a rule that is specific to a particular substantive topic.

Final Judgment Appeals in Consolidated Cases

The Committee decided at the November 2018 meeting that it should consider the possibility of developing Civil Rules to revise the ruling about final-judgment appeals after cases that began as separate actions are consolidated in the district court. In *Hall v. Hall*, 138 S.Ct. 1118 (2018), the Court ruled that each originally separate action remains separate for purposes of final-judgment appeals under 28 U.S.C. § 1291. Disposition of all claims among all parties in an initially separate action is a final judgment. At the same time, the Court suggested that the Enabling Act provides the appropriate process for revising the final-judgment rule.

Judge Bates announced that this question will be considered by a joint subcommittee drawn from the Civil Rules and Appellate Rules Committees. Subcommittee members will be Judges Bybee, Jordan, and Rosenberg, and Professor Spencer. Professors Cooper and Hartnett will serve as reporters.

Initial sketches illustrate possible approaches that would revise Rule 42 and Rule 54(b). The object is to achieve two goals. One goal is to take advantage of the district court's opportunity to act as "dispatcher," determining whether an immediate appeal is desirable after weighing the several competing interests that affect continuing proceedings in the district court, the parties' interests in achieving repose and executing the judgment, and the best use of appellate court resources. The other goal is to maintain a bright-line approach that protects against loss of the right to appeal by inadvertent failure to recognize that a final judgment has entered.

Judge Goldgar noted that Civil Rule 42 applies in bankruptcy, and that the Bankruptcy Rules Committee will be interested in this subject. Judge Bates said that the Bankruptcy Rules Committee can participate if it wishes.

Railroad Retirement Act

The General Counsel of the Railroad Retirement Board has suggested that Rule 5.2(c) should be amended to include actions for benefits under the Railroad Retirement Act in the categories of cases that allow only limited remote electronic access to court files. The records in these cases include the same kinds of personal information as the records in social security cases. But it is not clear whether Rule 5.2(c) is the appropriate rule to address this question. Actions for review are filed in a court of appeals. Appellate Rule 25(a)(5) could be amended to the same effect. The Appellate Rules Committee is considering this question. If they conclude that the best course is to amend Rule 25(a)(5) without a parallel amendment to Rule 5.2(c), their advice will be a great help to this Committee.

Rule 4(c)(3): Serving Process in Forma Pauperis Actions

Judge Furman, a member of the Standing Committee, has raised questions about Rule 4(c)(3).

28 U.S.C. § 1915(d) provides that when a plaintiff is authorized to proceed in forma pauperis, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases."

Rule 4(c)(3) comprises two sentences. The first says that "[a]t the plaintiff's request," the court may order service by a United States marshal. The second says "The court *must so order* if the plaintiff is authorized to proceed in forma pauperis * * * or as a seaman." Different interpretations of this rule by different courts show a potential ambiguity: does "must so order" refer back only to ordering service by a marshal, or does it also include the predicate requirement that the plaintiff request service by a marshal? This ambiguity appeared in rule text, although in different form, before Rule 4(c)(3) was restyled in 2007.

A related question is raised by the position taken by at least some marshal's offices that they cannot request waiver of service under Rule 4(d).

Additional questions surround these direct questions. Rule 4(b) provides that the plaintiff may present a summons to the clerk for signature and seal. Rule 4(c)(1) provides that "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m)." An immediate question is whether Rule 4(c)(1) bears on interpreting Rule 4(c)(3) — if the plaintiff is responsible for service, that could imply that the plaintiff is responsible for requesting service by the marshal. Beyond that, questions arise as to the plaintiff's responsibility to assist the marshal in making service: need the plaintiff, for example, provide an address where service can be made? And is it plausible to suppose that a marshal's failure to effect timely service within Rule 4(m) limits should be attributed to the plaintiff without an automatic extension of time under the "good cause" provision?

Brief discussion reflected that one court automatically orders the marshal to effect service when i.f.p. status is granted. And waivers of service are routinely accepted when service is to be made on any of the local governmental institutions that have agreed to blanket waivers of service.

The next step will be to work with the Marshals Service to discover whether they indeed have uniform practices around the country, what variations in practice may exist, what practical concerns they have, what reasons might prompt a refusal to take the seemingly easy step of requesting waivers — do they think Rule 4(d) does not authorize it?, and any additional information that may inform further consideration of the Rule 4(c) issues.

Rules 25, 35: 18-CV-Z

Judge Bates reported that the questions raised about Rules 25 and 35 in 18-CV-Z appear to rest on misreading these rules.

The Committee voted to remove this matter from the agenda.

IAALS Initial Discovery Protocols

Judge Bates noted that IAALS has adopted a third set of initial discovery protocols. This one covers First-Party Property Damage Cases Arising From Disasters. It follows in the wake of the earlier protocols for Employment Cases Alleging Adverse Action and Fair Labor Standards Act cases. It was developed by a similar careful process involving plaintiff and defense lawyers, federal government lawyers, and guided by an experienced federal judge and an experienced state judge. Some courts have high numbers of these cases. The protocols are very well done. They will be helpful to the judiciary. IAALS is to be commended.

Another judge observed that an arbitration association has adopted the employment protocols and finds them very helpful.

Initial Discovery Pilot Project

Judge Campbell reported that the mandatory initial discovery pilot project is approaching the end of its second year in the District of Arizona. It has been smooth. Emery Lee is sending out a survey for closed cases, and is generating data from the docket. The project will end in May 2020, and in June 2020 in the Northern District of Illinois. "We should have good data." Two years of implementation has yielded a number of cases that have reached the summary-judgment or trial stage. Those cases provide a test of success, and so far there have been few problems arising from motions to exclude evidence for failure to provide it by initial discovery.

Judge Dow said that experience in the Northern District of Illinois has been similar to the experience in Arizona. The court has come to recognize a judge's discretion to not require that discovery go forward pending a motion to dismiss. The project seems to be going smoothly.

Emery Lee reported that in a week or two the FJC expects to complete the fourth round of closed-case surveys. "It's going pretty well."

Judge Bates closed the meeting by thanking all Committee members for their great work.

The next meeting will be in Washington, D.C., on October 29.

Respectfully submitted,

Edward H. Cooper
Reporter