DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
March 28, 2023

The Civil Rules Advisory Committee met on March 28, 2023, in West Palm Beach, Florida. Participants included Judge Robin Rosenberg (Advisory Committee Chair) and Judge John Bates (Standing Committee Chair), Advisory Committee members Justice Jane Bland; Judge Cathy Bissoon; Judge Jennifer Boal; Brian Boynton; David Burman; Chief Judge David Godbey (remotely); Judge Kent Jordan; Judge M. Hannah Lauck; Judge R. David Proctor; Joseph Sellers; Judge Manish Shah; Dean Benjamin Spencer; Ariana Tadler; and Helen Witt. Professor Richard Marcus participated (remotely) as Reporter, Professor Andrew Bradt as Associate Reporter, and Professor Cooper as Consultant. Also representing the Standing Committee were Judge D. Brooks Smith, Liaison to this committee (remotely) Professor Catherine Struve, Reporter to the Standing Committee (remotely); and Professor Daniel Coquillette, Consultant to the Standing Committee (remotely). Representing the Bankruptcy Rules Committee was Judge Catherine McEwen, liaison to this committee. Carmelita Shinn, clerk liaison, also participated. The Department of Justice was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas Byron III; Allison Bruff; Christopher Pryby; and Scott Myers (remotely). The Federal Judicial Center was represented by Dr. Emery Lee; Jason Cantone (remotely); and Timothy Reagan (remotely); Darcie Thompson, law clerk to Judge Rosenberg, and Supreme Court Fellow Brad Baranowski also attended.

Susan Steinman of the American Association for Justice, Alex Dahl of Lawyers for Civil Justice, and Robert Levy of Exxon Corp. and Kyle Cutts and Gil Keteltas of Baker Hostetler attended in person. Members of the public also joined the meeting remotely. They are identified in the attached attendance list.

Judge Rosenberg opened the meeting by noting that this was her first meeting as Chair. She noted that she aspired to continue the great tradition set most recently by Judges Bates and Dow, the immediate past chairs of this Committee.

New Committee Members and Associate Reporter

Judge Rosenberg introduced two newly-appointed members of the Committee. First, Justice Jane Bland of the Texas Supreme Court has joined the Committee. She has been a Justice of that court since 2019 and was previously on the Texas Court of Appeals, and before that served as a district court judge in the Texas state courts. She has abundant rulemaking experience, having served for 21 years on the Texas Rules Committee.

Judge Manish Shah of the Northern District of Illinois graduated from Stanford and then the University of Chicago Law School. He then worked for a San Francisco law firm before serving as law clerk to Judge James Zagel of the Northern District of Illinois. After his law clerk service, he was an Assistant U.S. Attorney in the N.D. Ill. for 12 years, the last two years as Chief of the Criminal Division.

Judge Rosenberg then introduced Professor Andrew Bradt, the new Associate Reporter of the Committee. He is a Professor of Law at the University of California, Berkeley, where he has won law school and campus-wide teaching awards. He is also co-author of casebooks on Civil Procedure and Complex Litigation. And he is Faculty Director of the Berkeley Law Civil Justice Institute. Before entering full-time teaching, he served as law clerk to Judge Patti Saris (D.Mass.), practiced at Ropes & Gray and at Jones Day, and served as a Climenko Teaching Fellow at Harvard Law School.

Standing Committee January meeting

Judge Rosenberg then reported on the Standing Committee meeting in January 2023. Much of the meeting focused on work done by other advisory committees. For this Committee, there were

three areas of interest:

(1) The Rule 42 Consolidation Subcommittee, a joint subcommittee of the Civil and Appellate Rules Advisory Committees (sometimes call the Hall v. Hall Committee) was disbanded. This committee was formed after the Supreme Court's decision in Hall v. Hall, 138 S.Ct. 1118 (2018), holding that even after separate cases have been consolidated a final judgment in one of them is immediately appealable even though the other case or cases remain pending in the district court. The Court recognized in its decision that a rule change could alter the result it reached, which resolved a circuit conflict. A very substantial research effort by FJC Research, after overcoming considerable obstacles, showed that there had not been significant problems under the rule announced by the Court, and that there was no significant indication that a rule change was needed. Consequently, the subcommittee was disbanded.

(2) The proposed privilege log amendments to Rules 16(b)(3) and 26(f)(3) were presented to the Standing Committee. That committee did not have a problem with the small changes in the rules themselves, but had misgivings about the length of the draft Committee Notes in relation the minor changes in the rules. One concern was that these Notes were verging on being a practice manual rather than explaining how the amendments were to function. The decision was to return the privilege log package to the Advisory Committee to consider shortening the Note, and the Discovery Subcommittee had since January agreed on a shorter Note that is before the full Committee today.

(3) The third topic presented to the Standing Committee in January was the MDL package. That generated substantial discussion at the Standing Committee meeting, and is an important part of today's agenda. So detailed discussion can be deferred until that point in the agenda.

Judicial Conference Meeting, March 2023

Judge Rosenberg also noted that the agenda book contains a report submitted to the Judicial Conference for its March 2023 meeting. It is included for information purposes only. It notes the matters now under study by this Committee.

Minutes for October 2022 Meeting

The agenda book also contains the draft minutes for the Advisory Committee's October 2022 meeting. The draft was approved without dissent, subject to correction of typographical or similar errors.

Rule 12(a) -- Recommending adoption

A small amendment to Rule 12(a) was published for public comment in August 2022. It was introduced as correcting a seeming oversight in the rule that suggested the rule altered statutes that call for the government to respond in fewer than 60 days (the time specified for the government to file its answer under Rules 12(a)(2) and (3)). The prime example is the Freedom of Information Act, and the Committee was informed that the existing rule had caused problems in some FOIA cases. The amendment sought to cure this problem by amending the provision formerly limited to Rule 12(a)(1) so it applies to the entirety of Rule 12(a), including the times that apply to the government, and the Note made clear that this would invoke a statute that provided another time -- whether shorter or longer -- in place of the time provisions of the rule itself.

Only three comments were submitted. One (submitted by Anonymous) supported the amendment, and another objected that the rule had been "disregarded" in favor of the State of Indiana in a prior litigation. The Federal Magistrate Judges Association supported the amendment

but noted that there might be other rules that might specify a different time. The FMJA did not identify any such rules, but a comment during the meeting noted that Rule 15(a)(3) calls for responding to an amended pleading within 14 days, which might be affected. Rule 15(a) was not exempted by the current rule, however, and no problems under that rule had been identified (as with the FOIA cases). Moreover, this possible change could be said to go beyond the published draft amendment.

On motion, the amendment was approved for recommendation that the Standing Committee forward it to the Judicial Conference for adoption, with one dissent.

Privilege Logs
Rules 16(b)(3) and 26(f)(3)

As already noted, the Standing Committee returned the proposed amendments to the Advisory Committee with a request to consider shortening the Note. No questions were raised about the rule amendments themselves.

Chief Judge David Godbey, Chair of the Discovery Subcommittee, reported that the Subcommittee had met by email on a number of occasions to craft a punchier Note. After considerable wordsmithing, the Subcommittee agreed to a revised and shortened Note, which is included in the agenda book. It urges that the draft rule amendments, along with the shortened Notes, but published for public comment.

In addition, after the Standing Committee meeting, Judge Facciola and Mr. Redgrave submitted a proposal for an amendment to Rule 26(b)(5)(A), where the requirement to specify what has been withheld on grounds of privilege appears. The Subcommittee does not recommend making this additional rule change.

A Subcommittee member commented in support of the amendment, but expressed worries that the parties might often find it difficult to devise a specific method of complying with Rule 26(b)(5)(A) as early in the case as when the Rule 26(f) conference occurs. The idea is that this should be "the beginning of the process" in many instances.

A reaction was that one can "almost always" make later revisions to any early arrangements of this sort in light of developments. And it was repeatedly emphasized as the Subcommittee studied the problem that early attention was critical. Deferring serious consideration of the method of satisfying Rule 26(b)(5)(A) until the end of the discovery period could produce major problems.

A question was raised about the suggestion from Judge Facciola and Mr. Redgrave. Why not make that change? An answer was that the rule amendment calls for discussion during the Rule 26(f) meet-and-confer session, so the best place to put that is in Rule 26(f). Presumably that is where people would look to find out what they should do during the meet-and-confer session. Telling them the same thing in Rule 26(b)(5)(A) seems redundant.

The Committee voted unanimously to recommend that the revised amendment package be published for public comment.

MDL Subcommittee -- Rule 16.1

Judge Rosenberg introduced this matter by noting that this subcommittee may have set a record for longevity for Advisory Committee subcommittees. The task has lasted more than four years and has ranged through a multitude of issues. Much time was spent on whether to move

forward with special rules for interlocutory appellate review in MDL proceedings. Considerable additional time was devoted to study of third party litigation funding. Aggressive "vetting" proposals were also made, sometimes calling for plaintiffs to submit "evidentiary" materials at the outset of litigation to validate their claims.

For some time (up until when the Advisory Committee's agenda book for the March 2022 meeting was prepared), the focus was on Rules 26(f) and 16(b), the same rules addressed in the Discovery Subcommittee privilege log proposals. But eventually it became clear (a) that Rule 26(f) was not entirely suitable as a vehicle because it is addressed to individual actions, and (b) that a special feature -- appointment of "coordinating counsel" -- might be important to assist in the organization of the meet-and-confer session that could produce a report for the court to assist in the management of MDL proceedings.

After the Advisory Committee's March 2022 meeting, an initial sketch of a possible Rule 16.1 was prepared, using two alternatives. The first included a list of specifics very much like the one being presented to this committee. The second alternative was more general. This sketch was included in the Standing Committee agenda book for its June 2022 meeting as a purely informational item. It was later the focus of very useful meetings with members of the Lawyers for Civil Justice and the American Association for Justice attended by members of the Subcommittee.

In addition, as reported during the October 2022 meeting of this Committee, representatives of the Subcommittee would be attending the transferee judges conference hosted by the Judicial Panel on Multidistrict Litigation at the end of October 2022. The Panel was very helpful to the Subcommittee during that event. There was a session of the entire conference devoted to the Rule 16.1 ideas, and at the end of the conference also a special breakout session for in-depth discussion of the 16.1 ideas. During that session in particular, the transferee judges expressed a distinct preference for the Alternative 1 approach -- including more specifics. Such a rule could provide valuable guidance, particularly to judges new to the MDL process, and to lawyers without substantial prior experience. In addition, it could tee up a variety of topics that can beneficially be considered at the outset of MDL proceedings.

Judge Proctor continued the introduction of the Rule 16.1 proposal. He noted that he had been Chair of the Subcommittee only since last November -- the third Chair for this Subcommittee (perhaps also a record). He recalled an early presentation during the Judicial Panel's 2018 transferee judges conference about the possibility of amending the Civil Rules to address MDL proceedings. At that time he was a member of the Panel, and was personally skeptical about the rule amendment ideas, particularly given the topics then under discussion, including expanded interlocutory appeals and "vetting" requirements. Many other transferee judges were similarly resistant to these amendment ideas during the 2018 conference.

He also attended the sessions at the Panel's 2022 transferee judges conference and found the sessions very helpful in crystallizing what emerged as strong support among the judges for the Alternative 1 approach. Support even came from a number of judges who had been opposed to rule amendments during the 2018 conference. Indeed, one very experienced transferee judge remarked that he had become a "convert" to favoring this new approach to addressing MDL proceedings in the Civil Rules.

With this background, the Subcommittee set to work. The Subcommittee members were indefatigable. There may have been as many as ten meetings, and unless they were ill or out of the country all members showed up for and participated in these meetings. There was a collective effort to take account of the comments received from the sources mentioned above, and from other sources that the very experienced members of the Subcommittee have consulted.

The basic concept is to give the transferee judge a set of prompts that can provide a valuable starting point for successful management of an MDL proceeding. In a sense, the rule offers the judge a "cafeteria plan" to direct counsel to provide needed input up front without constricting the judge's flexibility in tailoring the management order to the needs of the specific proceeding.

As recognized in the rule and Note, there may be some MDL proceedings that do not need as much detail or management as the larger ones. But a consistent message through the long consideration of these issues is that almost all transferee judges convene an initial management conference to develop a plan.

Turning to the structure of the 16.1 draft, Judge Proctor noted that this is about the initial management conference, though it foresees that ordinarily there will be further conferences to monitor the proceedings and adapt to developments. Rule 16.1(b) authorizes appointment of "coordinating counsel" to assist in the preparation and organization of a meet-and-confer session under Rule 16.1(c) and in the preparation of the report to the court before the Rule 16.1(a) initial management conference. Such a designation might be likened to having to "herd cats," but it is something that may provide important value to the court.

A concern repeatedly raised during meetings with bar groups and in submissions to the Committee might be called a "chicken/egg" problem -- how can all the topics on which the meet-and-confer session is to focus be addressed meaningfully before leadership is appointed (assuming there is to be an appointment of leadership counsel -- one of the proposed topics of the meet-and-confer session). But the scheme is not to insist that all these matters be immediately set in concrete. Indeed, Rule 16.1(d) says the initial case management order governs only "until" it is modified. A key objective is to maintain flexibility while also providing guidance and identifying issues that might cause great difficulty later unless brought to the surface near the outset.

Rule 16.1(c) provides the "cafeteria" menu, and leaves it entirely to the judge to pick the topics that the parties must discuss and address in their report. The rule does not require that they agree on how to handle these matters, but the reporting function at least equips the judge to appreciate the various positions (sometimes, perhaps, involving disagreements among plaintiff counsel or defense counsel and not only between the two "sides").

Turning to some of the specifics, (c)(4) introduces the question of what was originally called "vetting." Some say the § 1407 process is not primarily designed to weed out groundless claims, but that is not so. The statute is indeed designed to deal with the "forest" more than individual trees, and in some instances there may be a cross-cutting issues that should be considered first. General causation, preemption, and *Daubert* issues might be examples of that sort of issue. It may often be that individual specifics are best deferred until remand to the transferor district. But in some MDL proceedings, early requirements for disclosure of information about specific claims can be important. Indeed, the frequent use of plaintiff fact sheets or the census methods introduced recently demonstrate that such methods are often important, particularly in MDL proceedings with hundreds or thousands of actions.

Another topic that has received much attention is settlement, and particularly the judicial role in connection with possible settlement of some of these individual cases. Settlement issues are different in MDL proceedings from class actions. Rule 23 authorizes the judge to appoint class counsel, and also authorizes the judge to approve a settlement presented by class counsel even over class member objections. In MDL proceedings, most plaintiffs have their own attorneys, and settlement is an individual decision made by individual parties. The Note makes that clear, and that is an important point.

Nevertheless, the court has a role to play in regard to settlement. For one thing (as recognized by proposed 16.1(c)(1)(C)), it is common for leadership (if appointed) to have prominent role in regard to settlement, at least when settlement involves resolution of multiple cases. Since the court appoints leadership (and may restrict the activities of nonleadership counsel -- see proposed 16.1(c)(1)(E)) there is a potential oversight role for the court.

Beyond that, whether or not leadership counsel are appointed, proposed 16.1(c)(9) draws attention to measures the court can take to facilitate settlement. Rule 16(a)(5) already recognizes that "facilitating settlement" is one purpose for pretrial conferences in general, and proposed 16.1 builds on that foundation.

Some have called attention to the Manual for Complex Litigation as a valuable source for guidance for transferee judges. And it certainly is a wonderful source of guidance, though by now nearly 20 years old. But it is also about 900 pages long and may not be easily digested by a judge (or lawyer) newly introduced into MDL proceedings. The Panel has been consciously reaching out to involve more judges in this process. And not all judges have an extensive background in complex civil litigation; for example, some may come to the bench with more experience in criminal cases. Transferee judges are also making efforts to involve attorneys in leadership who have not previously had extensive MDL experience. The draft Committee Note recognizes the importance of care in designation of leadership counsel, including a variety of experiences for potential appointees. For those new to the MDL process, the Manual may be daunting to contemplate up front. And the draft Note calls attention to the Manual as a source of guidance.

So 16.1 is not designed to supplant the Manual, but instead to provide a valuable starting point for the court and the attorneys. 16.1 is not even for every MDL, though it is probably quite rare for an MDL proceeding to be so simple that an initial management conference is unnecessary. The draft Note recognizes that, and that matters identified in 16.1(c) may be important also in actions concentrated before a single district judge without an MDL assignment, as by a related case provision in local rules.

In conclusion, many of the particulars included in proposed 16.1(c) are features of particular importance in MDL proceedings, and particularly in the larger ones that have assumed such prominence in recent years. The "cafeteria" process is designed to equip the judge to be able to manage the action successfully, something that often depends on getting a good start.

A Subcommittee member began the discussion by emphasizing that the proposal was the product of great effort and care -- ten meetings and many, many emails. The Subcommittee spent lots if time on many issues and was very careful about wording. Regarding the Manual for Complex Litigation, it might be that completion of a new edition and final adoption of a new Rule 16.1 could be seen as something of a race. The Enabling Act process takes several years, and the completion of a new edition of the Manual would also likely take several years.

Turning to the draft rule, this member noted that the goal was to be as flexible as possible. And the messages in the Committee Note are meant to be used to interpret and implement the rule's provisions. As with the 2015 amendments to the discovery rules, the rule and Note work hand in hand.

A judge raised several questions:

(1) The title is "Multidistrict Litigation Management," but the rule seems almost entirely addressed to the "initial" management conference. In the same vein, in line 291, the term "MDL" should be moved before "management" for consistency. It was agreed that this

change in line 291 is needed.

(2) It may be that draft 16.1(c)(4) is too strong, as it assumes that this information exchange should occur in every MDL even though the Note says that some MDLs don't call for this process. That seems to be in tension.

(3) In the Note to 16.1(b), in line 364, it seems that the reference should be to the 16.1(a) conference, for that is the conference on which the rule focuses, not the 16.1(c) meet-and-confer. The resolution might best be to make it clear in line 364 that the meet-and-confer session is what's meant.

(4) In regard to 16.1(c)(12), the Note seems to insist that any appointment of a master be done in strict compliance with Rule 53. Yet it seems that creative judges sometimes use masters in other ways in some MDL proceedings. Was it meant to disapprove that activity?

(5) The discussion of settlement in 16.1(c)(1)(C) and 16.1(c)(9) seems not entirely consistent. Moreover, the Note at lines 415-26 seems to authorize the court to pass on the "fairness" of any settlement. Is that suitable to MDL proceedings? In lines 501-05, the Note appears to direct the court to ensure that any proposed settlement process "has integrity." If that is a direction to the court, should it be in the rule? And does the court have that authority in MDL proceedings, where judicial approval of settlements is not required?

(6) In the Note to 16.1(c)(6), about a discovery plan, there is a reference to 16.1(c)(11), which is about related actions in other courts. What does that mean?

An immediate reaction was that these are very important questions. As to the last question, the point was that duplicative or overlapping discovery resulting from the pendency of overlapping proceedings was to be avoided, if possible. That could be a goal of the "coordination" that 16.1(c)(11) addresses.

An additional reaction was that the rule really looks beyond the initial management conference. For one thing, 16.1(c)(8) says that there probably should be a schedule for further such management conferences. And the Note (lines 490-91) says that "courts generally conduct management conferences throughout the duration of MDL proceedings." In addition, 16.1(c)(1)(A) directs attention to whether, if leadership counsel are appointed, "the appointment should be reviewed periodically during the MDL proceedings," again foreseeing recurrent oversight by the court. Though the basic point is to provide the court with the information needed during the initial management conference, that initial conference (and the resulting initial management order under 16.1(d)) would ordinarily be a foundation for further judicial management.

A Subcommittee member addressed the master question. There has been, and to some extent still is, substantial disagreement about the necessity of following the entire Rule 53 procedure every time there is a need for such an appointment. Some might even say such appointments lead to a "quasi master." The Subcommittee did not seek to resolve these divergent attitudes. The reality is that "you won't get far without party buy-in in MDLs" in situations in which special assignments are needed for a master. But the rule provision is directed more to enabling the parties to inform the court of their views before the 16.1(a) initial management conference. The goal was to leave some play in the joints.

Regarding settlement, this member emphasized that "we beat settlement half to death." The lawyer members of the Subcommittee were critical to the process. A starting point is in 16.1(c)(1)(C). If the court appoints leadership counsel it is highly likely that those lawyers will play

a prominent role in any considerable settlement process. It is appropriate to consider judicial directions regarding this recurrent possibility. Indeed, some say it makes sense on occasion to appoint liaison settlement counsel. That is what Judge Breyer did in the VW Diesel case. Proposed 16.1(c)(9) thus refers to existing Rule 16(c)(2)(I). The Note makes a critical point twice -- in MDL proceedings the decision whether to settle is an individual decision by a claimant and defendant. The variety of settlement arrangements is wide. There may be some "global" settlements. One or more defendants may approach some plaintiffs with settlement proposals for them. When bellwether trials are scheduled, that may also prompt attention to settlement of some cases.

The judge who raised the questions noted above responded that it is not clear whether the purpose is to make the judge responsible to ensure that the settlement is "fair," or that the settlement process has "integrity." In either event, if that is the purpose it is likely it should be in the rule, not just the Note.

Another Subcommittee member addressed the settlement topic, stressing that there is a broader perspective here than under Rule 23. On the one hand, if the court appoints leadership counsel, the rule is intended to give the court an opportunity to consider the appropriate role of those attorneys in the settlement context. Separately, whether or not the court appoints leadership counsel, the court in MDL proceedings, as in all cases, has some authority to address resolution. Regarding the Note at lines 425-26, the point is only to attend to procedural fairness, not to assess the fairness of the underlying settlement itself.

A judge commented that it may not be sufficient that the rule refers to the possibility of further management conferences; perhaps the title should be limited to the initial conference. On the question of "should" v. "must," that deserves discussion. It was clear from the introduction of the rule that the Subcommittee carefully considered which verb to use, but "should" seems to be nothing more than advice. Saying "may" makes it clear that the court has authority to do the things mentioned. It is not clear that there is a doubt about the court having authority under the current rules to do the things this rule proposal calls for the court to explore. Saying "must" is surely a rule, and this rule does use that verb for what the parties have to do if the judge tells them to discuss and report on a given topic. But "should" could be seen as existing in a sort of netherworld doing neither of these two things.

A Subcommittee member responded that this was a key discussion topic at the transferee judges' conference. Initially the judges favored "may," in part to ensure that the rule was clear about the breadth of the court's authority to address the matters listed in the rule. Another member recognized that one might regard "should" as precatory. But the rule is clear that judges have the authority to address the matters listed, and beyond that it provides guidance on how that authority ordinarily can be used.

A judge on the full Committee warned of "mission creep." This is not really a rule; there is only one "must" in it. This proposal seems almost entirely to be a best practices guidance document. And beyond that, it seems that the idea is that the Note is equally as important as the rule. That seems backward; the Note ought only provide commentary, and is not of equal dignity. Courts have to follow rules; they do not have to follow Notes.

Another Committee member agreed. This is really a "best practice" guide. It is not giving new authority or commanding judges to do anything. It is also not clear how this rule operates with current Rule 16. Rule 16(b) commands the judge to adopt a scheduling order limiting the time to do certain things in the case.

A Subcommittee member responded that this is not just a best practices guide. Instead, it

might best be regarded (as Professor Bradt has written in an article) as providing the judge with the tools to engage in what can be called "information forcing." And the first sort of information it forces out is guidance for the judge on how to organize and manage the MDL proceedings. This rule does not supplant Rule 16; it operates alongside it. The use of "should" in the rule proposal is intentional and meaningful.

A consultant noted that the proper role of the Note raises jurisprudential issues. For one thing, one must be careful about giving advice in a Note, in part because there is a risk of a negative pregnant. In this proposal, we have only one "must," and even it is contingent. It comes into play under 16.1(c) only if the judge directs the counsel to address certain topics in their report to the court.

A judge responded that Rule 16 itself has lots of "may" provisions. And the use of "should" reflects the "overwhelming" feedback the Subcommittee received about the need for flexibility. The starting point has been and should be whether this rule is useful.

On that point, the judge stressed that it is exceptionally rare for an MDL not to need at least an initial management conference. But that rare possibility is a reason not to command a useless conference; hence the "should" in 16.1(a) and 16.1(c). The "may" in 16.1(b) recognizes that there might be a question about appointing a "coordinating counsel" to organize for the initial management conference, and this rule puts that to rest. The basic bottom line the Subcommittee has heard, particularly from transferee judges, is that "this is needed." At least one judge at the recent transferee judges conference said: "This rule would give me authority that I need." Another example is presented by Judge Chhabria's 2021 opinion about his common benefit fund order, which may have been done too quickly.

Another judge on the Subcommittee emphasized that Judge Chhabria's experience was an important stimulus to favor adoption of this rule. For a period of time, this judge was adamant that no rule was needed. But Judge Chhabria's experience played a role in this judge's conversion. Absent a rule, there is a risk that judges new to the process (and perhaps some with MDL experience) will feel they should promptly sign early orders without an adequate appreciation of the implications of those early decisions. This rule is designed in part to protect the judge, and also to provide a method for non-leadership counsel to be heard on important issues.

Another judge emphasized that a high percentage of pending actions are subject to MDL transfer orders. This is not a situation that existed 20 years ago, and the Civil Rules presently say nothing about these very important proceedings. Moreover, the Panel is trying to expand the number of judges given MDL responsibilities, and many transferee judges are seeking to expand the circle of attorneys involved in leadership positions. Guidance is presently important, and likely to become more important.

A Committee member questioned these points. For example, the use of "should" in lines 287 and 295 regarding convening an initial management conference and directing the parties to meet and confer to address specified topics are not really rules. "It's not up to us to say this."

A Subcommittee member responded: "We think it is right to say 'should.'" It's more than "may." There almost always is an initial management conference.

A judge suggested that an alternative formulation might be "must, unless exceptional circumstances exist," which at least is in form a rule.

This suggestion drew a caution that inviting litigation about whether an exception applies

could invite distractions. To contrast, Rule 16(b) says the court "must" enter a scheduling order because, when it was adopted in 1983, judicial management was very new in most federal courts and a command seemed necessary. The use of an "exceptional circumstances" exception can breed litigation. An example is provided by the "exceptional circumstances" exception in Rule 26(b)(4)(D)(ii) for discovery of facts or opinions developed by a retained expert not testifying at trial. Inviting disputes about whether such an exception applies could distract the early organization of MDL proceedings.

Another Subcommittee member emphasized that "may" is not strong enough. But saying "must" with an exceptional circumstances exception would prove problematical. Using "may" has no teeth. There will be a lot of comments during the public comment period, and this question may deserve further discussion after that is completed.

The question whether "should" is used in other rules came up. Although a comprehensive review could not be done on the spot, at least some examples came immediately to the surface:

Rule 15(a)(2); "The court should freely give leave [to amend] when justice so requires."

Rule 16(d): "After any conference under this rule, the court should issue an order reciting the action taken."

Rule 25(a)(2): In the event of a party's death, "[t]he death should be noted in the record."

Rule 56(a): If it grants summary judgment, "t]he court should state on the record the reasons for granting or denying the motion."

A more comprehensive investigation of other rules might well turn up additional examples.

A judge observed that this proposed rule could be put out for comment, but continued to believe that was really just a best practices item. Perhaps "must, if appropriate" could be considered. The invitation to comment might include an invitation to comment on the choice of verbs and whether use of "should" will be useful. Perhaps the published proposal could include bracketed alternative versions.

The question was raised whether such bracketed alternatives have ever been offered in the past with regard to possible rule changes. Caution was expressed: such an invitation might provide a muddled result during and after the public comment period. The report to the Standing Committee would call attention to this topic, and ordinarily be included in the published invitation for public comment. So those offering comments could see that this topic deserved attention and comment accordingly. There was one time over recent decades when a footnote called attention to an alternative provision, but offering seemingly co-equal alternatives in a published preliminary draft might produce more confusion than light.

A judge on the Subcommittee recalled the series of questions Judge Dow used to ask about possible rule changes: (1) Is there actually a problem?; (2) If so, is there a rule solution to that problem?; and (3) Does the rule-based solution create a risk of harm? This is a unique set of circumstances in MDL proceedings, which are not otherwise addressed in the Civil Rules. So on question (1) there seems to be an actual need. On question (2), the Subcommittee has concluded that there is a rule-based solution -- proposed 16.1. And on question (3), it seems that using "must" or "may" would create problems, and that using "should" is the right choice.

A Committee member drew attention to proposed 16.1(c)(4), which seems to assume there

should be an exchange of information, perhaps before formal discovery. Shouldn't that instead say something like "Whether the parties must exchange information . . . ."?

A Subcommittee member responded that this is not about formal discovery. FJC research on the "vetting" issue extensively considered earlier in the Subcommittee's work showed that some such exchange occurs extremely often in large MDL proceedings. Another judge suggested that this is more like existing Rule 26(a)(1)(A) initial disclosure. Attention was drawn to lines 458-62 of the draft Note, which provide an explanation of the focus of 16.1(c)(4).

[During the lunch break, the Subcommittee met and considered whether or how to modify the proposed preliminary draft to respond to concerns voiced by Committee members.]

After the lunch break, the MDL Subcommittee presented revisions to its proposed preliminary draft that responded to certain concerns raised during the morning's discussion. By way of introduction, it was noted that some ideas for changing the proposed rule were not adopted. The title was not changed. 16.1(c)(4) was not changed. 16.1(c)(9) was not changed. Finally, the word "should" was retained.

But the Subcommittee proposed making the following revisions, which were displayed to the whole Committee for its review:

Rule 16.1(b) would be revised as follows:

(b) DESIGNATION OF COORDINATING COUNSEL FOR INITIAL MDL MANAGEMENT CONFERENCE. The transferee court may designate coordinating counsel to assist the court with the initial MDL management ~~MDL~~ conference under Rule 16.1(a) and to work with plaintiffs or defendants to prepare for any conference and to prepare any report ordered pursuant to Rule 16.1(c).

Rule 16.1(c) would be revised as follows:

(c) PREPARATION OF REPORT FOR INITIAL MDL MANAGEMENT CONFERENCE. The transferee court should order the parties to meet and confer to prepare and submit a report to the court prior to the initial MDL management conference. The report must address any matter designated by the court, which may include any matter listed below ~~addressed in Rule 16.1(c)(1)-(12)~~ or in Rule 16. The report may also address any other matter the parties desire to bring to the court's attention.

The Committee Note at lines 362-65 would be revised as follows:

Rule 16.1(b). Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side -- to ensure effective and coordinated discussion during the Rule 16.1(c) meet and confer ~~conference~~ and to provide an informative report for the court to use during the initial MDL management conference under Rule 16.1(a).

The Committee Note at lines 418-26 would be revised as follows:

Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose

to settle a claim is just that -- a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate ~~fair~~.

The Committee Note at lines 458-62 would be revised as follows:

Rule 16.1(c)(4). Experience has shown that in ~~certain~~ MDL proceedings early exchange of information about the factual bases for claims and defenses can facilitate ~~the~~ efficient management ~~of the MDL proceedings~~. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings.

The Committee Note at lines 482-84 would be revised as follows:

Rule 16.1(c)(6). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication~~, addressed in Rule 16.1(c)(11)~~.

The Committee Note at lines 494-505 would be revised as follows:

Rule 16.1(c)(9). Even if the court has not appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that -- a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement. ~~Should the court be called upon to approve a settlement, as in any class actions filed within the MDL, or when the court is asked to appoint a settlement administrator, the court should ensure that all parties have reasonable notice of the process that will be used to determine the division of the proceeds, that the process of allocation has integrity, and that monies be held safely and distributed appropriately.~~

After these changes were presented and explained to the Advisory Committee, it voted without dissent to recommend publication of the revised Rule 16.1 proposal for public comment.

Rule 41 Subcommittee

Judge Bissoon introduced the report of the Rule 41 Subcommittee. It had held three online meetings, but had not reached consensus or closure. Accordingly, one could say that it is still at a preliminary point. To take Judge Dow's approach to rule-change ideas, the first question -- whether there is a problem -- may depend on where you are or what kind of case you are talking about. On the "where you are" consideration, the divergence of the circuits on the rule means that judges in some circuits have less latitude than judges in other circuits. On the "kind of cases" consideration, one might focus on civil rights and pro se cases and conclude that there is indeed a problem.

Professor Bradt continued the introduction, noting that the core question is that we have a rule that seems straightforward and has remained essentially the same since originally adopted in 1938. One could, therefore, say that it only applies when the entire action is dismissed. But that is the minority view, suggesting the courts chafe at such a limited handling of the problem. Often the rule is found satisfied when a plaintiff dismisses as to one of two defendants. District courts may be more flexible yet. In the background lie possibly "unintended consequences," particularly relating to possible preclusion effects -- dismissal without prejudice may not affect preclusion if the remainder of the case is fully adjudicated on the merits.

A comment observed that the cases are presently inconsistent, but also that it is not clear what the result of a rule change would be. Instead, the outcome is not simple. To some extent, that is illustrated by a recent 11th Circuit case in which all the parties and the district court thought that when the plaintiff used Rue 41(a) to dismiss the remainder of its claims after the district court had dismissed some but not all of the claims, that would produce a final judgment subject to immediate review on appeal. But the court of appeals concluded that some claims in the very long complaint had not been effectively dismissed, with the result that it could not address the appeal on the merits.

Another comment noted that there might be said to be a slippery slope problem to begin sorting out all the inter-related rule provisions that could be affected. It might be likened to pulling one loose thread on a sweater, only to find that the unraveling goes much further than initially appreciated. And it is worth noting that it always seems open to the plaintiff to seek dismissal via court order under Rule 41(a)(2), which has a default setting of without prejudice. So the Rule 41(a)(1) problem only exists when the defendant (or a defendant) will not stipulate to dismissal without prejudice. That resistance to stipulating might result from uneasiness that the dismissed claim will come back in another forum, but it may well be that such a "boomerang" claim is quite rare. Nonetheless, a party unwilling to stipulate -- even before an answer is filed -- could make 41(a)(1) dismissal of less than the entire action unavailable.

A Committee member pointed out the preclusion complications that could result if the court dismissed without prejudice but the remaining claims reached judgment on the merits. Assuming the dismissed claim would be viewed as arising from the same transaction, that might well preclude the assertion of the dismissed claim in another action.

Another Committee member noted that this can be a pretty important set of issues, particularly for some unsophisticated litigants. "This is something that affects some people in important ways."

A Subcommittee member reiterated the view that Rule 41(a) is not designed to "shape and prune" multi-party or multi-claim actions. Other rules, most notably Rule 15 on amendments without leave of court, address these issues. At the same time, the 11th Circuit decision was wrong.

Another comment noted that there may be considerable reason for caution due to the Supreme Court's view in the Semtek case that preclusion is not within the Enabling Act authority. In addition, with regard to self-represented litigants, it might be useful to canvas pro se law clerks to see what their experience has been. A further suggestion was that the Administrative Office has a pro se working group that could be a resource.

Against that background, the Subcommittee's work will continue.

Discovery Subcommittee

In addition to its action item on privilege log issues, the Discovery Subcommittee reported

on three other items on which it is currently focusing. Chief Judge David Godbey, Chair of the Subcommittee, made the report.

"Delivery" of a subpoena; Rule 45(b)(1) says a subpoena should be served by "delivering a copy to the named person." There are divergent judicial decisions, even in the same district, on whether that requires delivery by hand or can be accomplished by other means. More than a decade ago, a Rule 45 Subcommittee comprehensively surveyed issues involving the rule and made fairly comprehensive changes to many features of the rule. One of the issues raised then was the question of clarifying what "delivering" means in the rule. But that was put aside, in part because it seemed important -- at least for some nonparty witnesses called upon to respond on short notice -- that in hand service occur.

A Committee member expressed concern about the possibility that some substituted method of service might be sanctioned under the rule, particularly when the subpoena called for very prompt action by the witness, often a nonparty. In hand service can be important in such situations.

A liaison member of the Committee suggested that overnight courier or email should suffice in most instances.

One suggestion going forward would be for research to be done, perhaps by the Rules Law Clerk, on whether state court systems have more flexible provisions for serving subpoenas. A first look at the California provisions suggested that they are nearly the same as in Rule 45.

Filing under seal: Several years ago, Prof. Volokh and the Reporters' Committee for Freedom of the Press urged a fairly elaborate new Rule 5.3. One feature of this proposal was that it recognize what the submission said was already recognized in the case law -- that the showing needed to support filing under seal is much more exacting than the standard to support a protective order under Rule 26(c). The Subcommittee developed a sketch of changes to Rule 26(c) and existing Rule 5 to make that clear in the rules.

But the submission went well beyond the standard to be used for filing under seal and proposed a variety of special procedures to attend motions to seal, seemingly including posting outside the case file for the given case and forbidding any decision sooner than seven days after such posting. Meanwhile, an inquiry to the Federal Magistrate Judges Association gave an indication the magistrate judges (who often handle such motions) did not think there was a problem with the standard for filing under seal, but did think that the diversity of procedures used for deciding motions to seal might be regularized.

Around this time, however, the Subcommittee also learned that the Administrative Office had formed a working group to study problems of filing under seal more generally, and the advice to the Subcommittee was to defer acting on the pending proposal until that A.O. project produced results. So, as reported to the full Committee, the Subcommittee put the project on the back burner.

Early this year, however, the Subcommittee was informed that it seemed unlikely the A.O. project would address standards for filing under seal. But the A.O. group seems focused on what might be called "inside the clerk's office" features of handling materials filed under seal, and it remains uncertain how that work will bear on the multiple other proposals made in the original submission or the FMJA idea that regularizing procedures would be desirable. So work will continue on these topics.

Rule 28 proposal: In March, Judge Baylson (E.D. Pa.), a former member of the Advisory Committee, proposed an amendment to Rule 28 to address discovery activity in relation to U.S.

litigation occurring outside this country. Because this submission was received so recently, the Subcommittee has not had time to examine it in any detail. It may be that Professor Gensler (another former member of the Advisory Committee mentioned in Judge Baylson's submission) can offer the Subcommittee background on the issues. Work will begin on this proposal in the future.

Rule 7.1

Professor Bradt introduced the issues presented. Two submissions have addressed conflict disclosure. Judge Erickson called attention to what might be called the "grandparent" problem, with the illustration being Berkshire Hathaway, which owns 100% of the stock of a number of corporations that in turn own 100% of the stock of other corporations. So if a judge owns Berkshire Hathaway stock and one of those "grandchild" corporations is a party to a case pending before the judge, the judge may not know of the problem even though under 28 U.S.C. § 455(b)(4) the judge should recuse. And Berkshire Hathaway is not the only corporation that might have such holdings; another example identified by Judge Erickson is CitiGroup.

Possibly pertinent to this kind of situation going forward might be the Anti-Corruption and Public Integrity Act of 2022 (S. 5315), introduced by Senator Warren. That bill would require judges to "maintain and submit to the Judicial Conference a list of each association or interest that would require the justice, judge, or magistrate to recuse under subsection (b)(4)." How exactly judges would identify all such interests in the case of very large conglomerates like Berkshire Hathaway is uncertain.

Meanwhile, the Courthouse Ethics and Transparency Act (Pub. L. 117-125, May 13, 2022), now requires the creation of a searchable internet database to enable public access to any report required to be filed with regard to securities or similar holdings. That database came online on Nov. 9, 2022.

Judge Erickson submits that an amendment to Rule 7.1 could facilitate determinations whether a judge has to recuse. Presently, Rule 7.1(a)(1) directs that a nongovernmental corporate party must disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock."

Magistrate Judge Barksdale proposes that Rule 7.1 be amended to require every party to certify that they have checked the assigned judge's database disclosures. Then, if there is a possible conflict, the party must file a motion to recuse or a notice of possible conflict within 14 days.

It seems clear that this is a difficult and delicate situation for judges. Congress may take further action that is pertinent, as mentioned above, but it is not presently possible to determine whether that will happen. Expanding the disclosure requirement beyond "parent corporations" could make definition of what additional corporations must be disclosed quite difficult. And it may be that other entities present similar difficulties. Recently, for example, Rule 7.1 was amended to call for disclosure of information about all members of LLCs, including all members of any LLC that is a member of an LLC that is a party before the court. That change was designed to reveal whether compete diversity exists, not to address recusal problems. But the stimulus was the proliferation of LLCs, and the intricacy of their organization. It seems that there is a very wide range of entities that engage in business nowadays.

Other rules committees have similar issues before them. But for the present it seems sensible that the Civil Rules Advisory Committee take the lead in addressing these challenges.

A judge mentioned getting a disclosure statement raising such a difficulty. Without that

disclosure, the judge could not have found out about the problem.

One suggestion was to look at local rules to see if they add such disclosure requirements. The D.C. Circuit, for example, has its local rule 26.1, which could be a model. Another possibility might be to investigate how the states approach these issues with regard to judges on their state courts. It seems reasonable to suppose that somewhat similar issues bear on recusal of state court judges, even though they obviously are not bound by the federal statute.

A Wall Street Journal article identified a significant number of instances in which federal judges decided cases involving parties in which they held interests. It seems that all, or almost all, of these examples were cases in which the judge did not know of the disqualification problem. A Committee member noted that these are important issues, and that passing them by is not the best way to go.

But another Committee member noted the thorny problem of identifying such conflicts. Ownership of business entities is changing "by the minute." The range of forms used to do business seems to grow by leaps and bounds. Finding a solution will be a major challenge.

Another point was brought up: There is a bill in Congress seeking to require the Federal Judicial Center to use its research capacity to unearth this sort of information. This sort of research effort might absorb a very large portion of the FJC's capacity, and could also create tensions between the Center and the judiciary. That would be very unfortunate.

Returning to the local rules possibility, it was noted that all or almost all of the clerks in district courts require some disclosures. There are local rules that have forms for disclosure; those could be investigated.

But a serious problem was noted: What are the updating requirements? Judges' holdings may change over time. And it seems clear that corporate and other business arrangements change over time. Not only do companies "go public," some that were public "go private."

A judge emphasized that it's essential that we operate within the bounds of what can be done. Could one have a rule that required disclosure of "all affiliated entities"? That would seem to raise questions about what "entity" is and what "affiliated" means.

Returning to local rules, it was noted that it is likely some go well beyond the corporate form -- LLCs, partnerships, limited partnerships, joint ventures, etc. And getting into the amount of stockholding could be complicated. Suppose a corporation that owns 50% of the stock of a corporation that owns 10% of a publicly held entity. Is that counted as a 5% holding for these purposes?

Another Committee member cautioned that it may not be so difficult. It is likely unwise to try to include "affiliates" in this effort. And moving beyond "parents" -- perhaps to "siblings" and "cousins," etc. -- would likely cause unnecessary problems.

A judge questioned whether the problem is really so great. At some point, it may seem that the rules cannot be a cure-all. One might say the central issue is the application of the recusal statute, which itself may be the subject of further change. Given the possibly exceptional difficulty of the task, one might conclude that at some point such directives must be honored but in the breach.

Another judge reacted that if the Berkshire Hathaway example is the correct guideline, judges need to know. This judge also mentioned the recurrent issue raised with third party litigation

funding that judges might unknowingly hold interests in funders supporting one of the parties in a case before the judge. In the past, it has seemed unlikely that judges would be holding interests in hedge funds allegedly involved in litigation funding, but some reports indicate that funding is going mainstream.

A more specific reaction was offered: The proposal that the rule require certification by parties that they checked the judge's holdings on the new database does not look promising. For one thing, it is not clear that the database is designed for that purpose. More significantly, it seems unreasonable to expect pro se litigants (the subject of another agenda item) to be able to make a reliable check. And if the proposed requirement that parties file a motion to recuse or a notice of potential conflict within a specified time is meant to foreclose later recusal, that seems to go against the statute, which simply requires recusal.

In conclusion, the Committee would continue to gather information and study this set of issues. It is likely that a subcommittee would be formed to develop information and consider solutions. It is not clear whether such a subcommittee should include members of other advisory committees. The work will continue.

Rule 38

In 2016, a question was raised before the Standing Committee about whether to consider an amendment to Rule 81(c)(3) to protect against waiver of jury trial in removed cases. [That submission -- 15-CV-A -- remains on the Advisory Committee's agenda.]

After that Standing Committee discussion of that question, two members of the Standing Committee -- then-Judge Gorsuch and Judge Graber -- proposed that Rule 38 be amended to "flip the default," as is true of the Criminal Rules, which direct that trial will be to a jury unless the government, the defendant and the judge all agree that it will be to the court.

Interestingly, it seems that the Criminal Rules Committee is considering whether to change the Criminal Rule on jury trial to provide that if the defendant requests a court trial and the judge thinks the request is meritorious the government not be permitted to veto that election. Whether that Criminal Rules amendment idea is pursued remains uncertain. In a sense, however, such a change would make jury less protected (with the judge's oversight) than under current Rule 38, which permits either party to make a binding request for a jury trial. In addition, under Rule 39(b), the court may order a jury trial even though a Rule 38 jury demand was not made.

During the Committee's October 2022 meeting the agenda book included an FJC study of jury demands that found little indication that failure to adhere to Rule 38's requirements had prevented parties who wanted jury trials from getting jury trials. So one possibility at that time would be to remove this matter from the agenda on the ground that it did not satisfy Judge Dow's first inquiry -- there seems not to be a problem. That decision was deferred, however, because the FJC was working on a massive project ordered by Congress about differences among districts in the frequency or number of jury trials. That project was not yet finished, and might shed light on the Rule 38 proposal.

The report to Congress has been completed and was included in the agenda book. It does not focus on jury demands in particular, but rather was addressed to the declining frequency of civil jury trials. Discussion as the work was being done frequently prompted judges to say that if a party failed to satisfy Rule 38 "we forgive." But some judges said the rule requires a waiver and we follow the rule.

In terms of what seems to have been the reason why Congress directed that the study be prepared, it does not shed much light on why different districts have different numbers of jury trials. From one perspective it does -- the largest district (C.D.Cal.) has the largest number of jury trials. But if one focuses on frequency of jury trials as a percentage of civil cases, the smallest district -- Wyoming -- has the highest percentage. That percentage is only 2.7%, however, so inter-district comparisons don't tell us much because the figure is very low all around. Sixty years ago, nationwide, it was about ten times as high.

It was suggested, however, that the Gorsuch/Graber proposal might be taken to raise a normative issue more than a question to be answered by empirical work. If the right to jury trial is important, it should not be difficult to enforce. How one assesses Judge Dow's first question -- is there a need -- in normative terms is not entirely certain.

In conclusion, it was decided that this proposal could be removed from the Committee's agenda. The pending Rule 81(c) issue will remain, however.

Pro se E-Filing

Professor Struve (Reporter of the Standing Committee) gave an update on the work of the inter-committee working group on whether to facilitate electronic filing by pro se litigants. The Committee has received several submissions urging the easing of the current rules, which leave the choice whether to permit pro se E-Filing largely up to individual district courts. The pandemic fortified momentum behind this initiative.

With great help from the Federal Judicial Center (particularly Tim Reagan), interviews have been done with 15 court personnel from 8 districts. A particular focus has been on the districts that exempt non-electronic filers from having also to mail hard copies of each filing to each other party even though the clerk's office will upload the documents and the parties will then get the document via CM/ECF. In all the districts that have made such accommodations, the report is that it works fine.

Special issues arise when a document is filed under seal. One solution then is to restrict online access to parties. But that is not an issue at the core of the basic concern.

The biggest pending question is to figure out how pro se litigants know which parties will receive service via CM/ECF and that paper service by mail is therefore not necessary.

Special problems can exist if pro se litigants are in prison.

A sketch of a possible amendment to Rule 5 appears on pp. 256-57 of the agenda book.

One concern that was raised seems not problematical -- the risk that pro se litigants who got credentials to use CM/ECF would then share those credentials with others. There is one instance in which a son used his mother's credentials to make filings on her behalf in a case to which she was a party, but this does not seem like a serious problem.

Another possibility is an alternative to CM/ECF -- some districts allow electronic noticing without formal credentials.

The conclusion was that the work will continue, and that more information is needed.

Rule 23

Purely as information items, this topic is on the agenda to alert Committee members to ongoing matters. No current action is before the Committee.

First, during the October 2022 meeting the 11th Circuit decision by a divided panel that two 19th century Supreme Court decisions preclude "incentive awards" to class representatives in class actions was raised as a concern. The 11th Circuit declined to grant a rehearing en banc, and a cert. petition is now pending before the Supreme Court. Meanwhile, at least some courts are explicitly not following the 11th Circuit's ruling; the agenda book contained a reference to a recent 1st Circuit case declining to follow that view. But it appears that a panel of the Second Circuit has taken a different view; this ruling may be the subject of a petition for rehearing en banc.

A Committee member observed that it is unrealistic to expect class representatives to invest substantial time and energy (and perhaps even money) into doing a good job in that role but deny them any compensation for that effort. Even class member objectors can receive awards if their objections result in improvements to the deal. In class action settlement situations, we want the class reps to take an active interest; why shouldn't they get equal treatment? As for the Second Circuit case, that may be an example of over-compensation; the class reps were awarded something like $900,000. Perhaps a rule could be devised to guide district courts in making such awards, but a total ban based on a 19th century precedent does not make sense.

Another member agreed. The 9th Circuit has articulated some factors for determining what amount to award, and there is guidance of that sort in other circuits though not all of them. If this issue goes forward, that would be a place to look; it is possible that case law suffices on this point. The first question, however, is whether the Supreme Court addresses the question on the merits; on that, it is necessary to watch and wait.

The other issue is a proposal by Lawyers for Civil Justice to amend Rule 23(b)(3) so that it does not limit the superiority prong to adjudicative alternatives. An example is a 7th Circuit case in which a product recall prompted more than 50% of purchasers of the product in question to obtain the refund offered but a lawyer nevertheless filed a class action seeking more on behalf of the other purchasers. The district court denied certification on the ground the recall program gave the class adequate relief, but the 7th Circuit held that this was not a consideration permitted under the current rule.

The agenda book report raises some concerns that might arise if this proposal moves forward -- whether companies would be less likely to make such recall offers if class actions could be defeated by after-the-fact offers, whether courts could, early in the litigation, make the sort of comparison that would need to be made if presented with a settlement embodying similar measures for the non-participating customers. LCJ recently submitted a further paper on the topic of this proposal (23-CV-J), which came in too late to be included in the agenda book.

A judge noted that Rule 23 is a perennial. For example, the question of ascertainability has remained uncertain for many years. For the present, on both these issues, it is better to let things percolate.

The matters will be carried on the Committee's agenda.

In forma pauperis applications

Professors Hammond and Clopton submitted a proposal that the Committee consider rulemaking regarding the handling of ifp status under 28 U.S.C. § 1915. Professor Hammond's Yale Law Journal article in 2019 showed that there were significant differences in the way such

applications were handled -- both in terms of the criteria for receiving a fee waiver and the procedures for requesting a fee waiver -- in districts across the country. Indeed, it seems there are difference between judges in a given court. One concern is reported inconsistency in selecting the A.O. form that should be used.

The topic was introduced as principally involving a statute. The Civil Rules do not include specific provisions about ifp applications, and -- at least as to the standards that should be used to decide such applications -- a national rule seems a dubious instrument. For example, it is likely that one could conclude that somebody in San Francisco (where the cost of living is very high) would be a pauper with income or assets that would be more than sufficient in some other parts of the country. And such things change much more rapidly than the Enabling Act process would permit changes to be made.

In addition, it may be that various districts diverge considerably in their personnel for making such determinations. Large metropolitan districts may have a considerable platoon of pro se law clerks who can do an initial review, while other districts may not have a similar setup.

But this is an important issue, and the A.O. has a pro se working group. It seems that an effort to make contact with that group should be made. It may well be that this topic is not suited to rulemaking, but the topic should remain on the agenda. For the present, the topic will be retained on the agenda pending Judge Rosenberg's discussion with the A.O. Pro Se Working Group.

Rule 53

In July 2022 Senators Tillis and Leahy wrote the Chief Justice relaying press reports that a single federal judge was overusing "technical advisors" to assist in addressing patent infringement cases. According to the article cited by the senators, using that assistance the judge is able to preside over as many as six or seven *Markman* hearings in a week. According to the story, at the time the story was written this judge had "about 25% of the nation's patent cases."

The senators observe that this judge's practices "appear to clearly exceed the boundaries of Rule 53," and that "[t]he rules governing the use of special masters seem clear to us." They asked for an investigation into whether the practices described in this article are authorized under Rule 53, and if so whether the rule should be amended.

The senators sent a copy of their letter to the Chief Judge of this district court, who may have taken action to change circumstances there by introducing district-wide assignment of patent cases on a random basis.

On the rulemaking front, as the senators note, the Rule seems appropriately designed and focused. It was comprehensively rewritten about 15 years ago to take account of recent developments. Further change to rule seems unnecessary. In terms of rule amendment, then, the appropriate measure seems to be to remove the topic from the Committee's agenda.

But it is also important to make certain the senators know of the response their inquiry produced -- that the rule seems correct, as they note, and therefore that this situation does not call for a rule amendment. The Rules Committee Staff will ensure that the Administrative Office has responded to the senators' letter.

Rule 11

Andrew Straw urges that Rule 11 be amended. The stimulus seems to be a longstanding

conflict between him and his former employer -- the Indiana Supreme Court. This conflict has included suits he filed in federal court against various entities. In some of those suits, Rule 11 sanctions were not imposed, but state bar authorities suspended him from practice partly as a result. Mr. Straw proposes that the rule be amended to forbid state bar authorities from taking such action unless a federal court has first imposed formal Rule 11 sanctions.

The interaction of Rule 11 sanctions and state bar discipline is occasionally an important matter. A number of state bars direct attorneys to notify the bar if they are subjected to sanctions by a court, including a federal court acting under Rule 11. The state bars may treat that circumstance as a basis for imposing bar discipline on the attorney. It seems this is what happened to Mr. Straw. (He also submitted a comment regarding the amendment to Rule 12(a) that the Committee approved for formal adoption, raising objections to the handling of some of his litigation with the Supreme Court of Indiana.)

The federal courts do not control state bar discipline. Yet Mr. Straw proposes adding a new Rule 11(e) entitled "Containment of Discipline and Prevention of State Court Abuse." Although the district courts can, and sometimes do, impose discipline including something akin to disbarment for conduct in federal court, they do not have authority under that rule to constrain state bar authorities. Attempting by rule to prevent state bar authorities from acting pursuant to their governing statutes would likely raise serious questions about rulemaking power.

The matter will be dropped from the agenda.

Mandatory Initial Discovery Project

Initial disclosure was a highly controversial addition to Rule 26 in 1993. Owing the controversy surrounding this addition to Rule 26, it was initially made optional; districts could opt out. There ensued a patchwork of regimes in different districts. The initial disclosure was extended nationwide in 2000, again prompting considerable controversy even though it removed the "heartburn" of having to disclose harmful evidence.

Nonetheless, stronger disclosure rules might make litigation less costly and produce faster resolutions. To evaluate such a possibility, a pilot project was approved by the Standing Committee and many judges in the District of Arizona and the Northern District of Illinois agreed to implement the pilot project. In brief, it restored the "heartburn" requirement.

A very intensive study of the results of this pilot in approximately 5,000 cases in Arizona (where the state courts have long had a similar disclosure requirement) and 12,000 cases in the N.D. Ill. revealed that cases handled were resolved more rapidly. That difference between these cases and cases not handled under the pilot was statistically significant. This was not a huge difference, but it was good news. In Dr. Lee's words, this was a "modest but real effect on duration." But it may be that some resolved quickly because otherwise the parties would have had to comply with the pilot's requirements.

The study also involved attorney surveys on closed cases, and the report (100 pages long) provides much detail about attorney responses. The responses did not show great enthusiasm among attorneys for the pilot. Interestingly, though the expectation was that younger attorneys would be more receptive, in actuality more experienced attorneys were satisfied more often.

One way of looking at the study's results is whether they support a "clarion call" for amending Rule 26(a) along these lines. It is difficult to find such a call in the data, despite the heartening finding about duration. It may be that the attitudes that contributed to the controversy in

1991-93 about adding initial disclosure to the rules, and again in 1998-2000 about removing the "opt out" for districts and imposing it nationwide persist today.

The Committee discussed the ways in which the study could nevertheless be employed to identify promising solutions to existing problems. It was agreed that the Discovery Subcommittee should carefully review the study and see whether it identified specific techniques that could be added to the rules even without the mandatory arrangement employed in the pilot.

Several points were made during the discussion of this study. One was that the project was initiated by the past and present chairs of the Standing Committee, rather than by the Advisory Committee. It was also noted that the E.D. Va. has a local process known as the "rocket docket," adopted by local rule, so that perhaps local rules might be a method of introducing practices found successful in the project. In addition, since courts are always looking for techniques to increase efficiency, it is worth considering whether there are lessons to be drawn from this study.

The Discovery Subcommittee will review the study with care and consider whether it shows that specific changes should be pursued.

Respectfully submitted,

Richard Marcus
Reporter