Minutes
Civil Rules Advisory Committee
October 12, 2022

The Civil Rules Advisory Committee met at the Administrative Office on October 12, 2022. Two members participated by remote means. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer C. Boal; Hon. Brian M. Boynton; David J. Burman, Esq.; Judge David C. Godbey; Judge Kent A. Jordan; Judge M. Hannah Lauck; Judge R. David Proctor; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer (remotely); Ariana Tadler, Esq. (remotely); and Helen E. Witt, Esq. Professor Richard L. Marcus participated as Associate Reporter and Professor Edward H. Cooper participated as Reporter. Judge John D. Bates, Chair; Professor Catherine T. Struve, Reporter; and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. The Department of Justice was further represented by Joshua E. Gardner, Esq. H. Thomas Byron III, Esq.; Bridget M. Healy, Esq.; S. Scott Myers, Esq.; Allison A. Bruff, Esq; Christopher I. Pryby, Esq.; Brittany Bunting–Eminoglu; and Nicole Y. Teo represented the Administrative Office. Dr. Emery G. Lee and Tim Reagan, Esq. (remotely) represented the Federal Judicial Center.

Members of the public who joined the meeting in person or remotely are identified in the attached attendance list.

Judge Dow opened the meeting with greetings to all observers, both those attending in person and those attending remotely. He noted newcomers. Judge Hannah Lauck, of the Eastern District of Virginia, is a new Committee member. Judge D. Brooks Smith, of the Third Circuit, is the new liaison from the Standing Committee, but was unable to attend today's meeting. Allison Bruff has joined the Rules Committee Support Office as counsel for the Civil and Criminal Rules Committees, while Christopher Pryby is the new Rules Law Clerk and Nicole Teo is an intern from Smith College. Judge Dow added thanks to the observers, both for their present interest in the Committee's work and for the great help that many of them and their organizations have provided in the past and can be counted on to provide in the future.

Judge Bates announced further "comings and goings." Judge Dow is leaving the Committee to become Counselor to the Chief Justice. This position is very demanding and responsible. It involves administration not only in the Supreme Court but throughout the federal judiciary, working as a leader along with the Executive Committee of the Judicial Conference, the Director of the Administrative Office, and others. Judge Dow was present and participating in all the Committee meetings that Judge Bates attended, demonstrating tremendous inspiration for the rulemaking process. Congratulations are due to him, and well wishes for his new role.

Judge Bates also welcomed Judge Rosenberg as the new Committee Chair. She will be another great leader. She has done fantastic work as chair of the Multidistrict Litigation Subcommittee, and will be another creative and inspiring leader.

Judge Dow responded with thanks, noting that he became involved in the Rules Enabling Act process in 2010 with his appointment to the Appellate Rules Committee. Professor Struve was Reporter for that Committee; her reappearance as Reporter for the Standing Committee has been a delight. He gave heartfelt thanks to all Committee members and staff for the experiences of his seven years with this Committee.

Judge Dow then reported on the Standing Committee meeting last June. The other advisory committees generated a lot of work for the Standing Committee, while this Committee presented relatively less work. The CARES Act emergency rule, Civil Rule 87, was presented in tandem with the parallel proposals for emergency rules in the Appellate, Bankruptcy, and Criminal Rules. All were approved for adoption. Amendments to Civil Rules 15 and 72 also were approved for adoption.

The Judicial Conference approved for adoption new Rule 87; amendment to Rule 6 for adoption without publication to add Juneteenth National Independence Day to the list of national holidays; and amendments to Rules 15 and 72. Judge Dow noted that the CARES Act provisions for emergency practices in criminal prosecutions had been very helpful in managing cases during the pandemic, and that some judges are still using them.

Rules "in the pipeline" were noted. An amendment of Rule 7.1 requiring diversity disclosure and the new Supplemental Rules for reviewing individual claims for Social Security benefits are on track to take effect this December 1. The Social Security Rules were "a pretty heavy lift." Amendments of Rules 6, 15, 72, and new Rule 87, are moving toward taking effect on December 1, 2023. Rule 12 is the only rule now on track for taking effect on December 1, 2024.

Later in the meeting, Judge Roslynn R. Mauskopf (Director of the Administrative Office) appeared to offer a greeting and welcome. She thanked the committee for all of its hard work. "The work is so important for judges. It is instrumental to ensuring the promise of Rule 1, the search for civil justice." There are a lot of difficult issues on the agenda.

Legislative Update

The legislation update by Judge Dow and Christopher Pryby was brief. A good number of bills that would affect civil procedure have been introduced in this session of Congress. Some of them would mandate adoption of new rules, or directly affect current rules. None of them have yet passed in either house. In addition to Civil Rules, some bills would affect Bankruptcy, Criminal, and Evidence Rules.

March 2022 Minutes

The draft minutes for the March 29, 2022, Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Discovery Subcommittee

Judge Godbey delivered the report of the Discovery Subcommittee.

The Subcommittee recommends that amendments of Rules 16(b)(3) and 26(f)(3) be recommended for publication. The drafts are consistent with the drafts discussed at the most recent two Committee meetings. They advance a modest proposal.

The proposals address practices in preparing the descriptions required by Rule 26(b)(5)(A)(ii) when a party withholds information from discovery by invoking privilege or work-product protection. The rule text directs that the withholding party describe the nature of the things not produced "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." These words capture the intent of the rule without providing much guidance on how to accomplish the desired description. Efforts to craft rule text that provides better practical guidance, however, have proved fruitless.

Rather than attempt to revise Rule 26(b)(5) itself, then, the Subcommittee has focused on the advantages to be gained by encouraging the parties to confer about the timing — and the method to be used — for generating what are often called "privilege logs." Important advantages can be won by early discussions aimed at shaping case-specific methods for generating privilege logs, and at prompting early release of at least a partial privilege log to set the stage for any further discussions that may be needed.

To this end, the same new words are proposed for both Rule 26(f)(3)(D) and Rule 16(b)(3). The caption of Rule 16(b) also would be revised to include one new word to emphasize the role of case management in general: "(b) Scheduling <u>and Management</u>." The new language can be illustrated through Rule 26(f)(3)(D):

> A discovery plan must state the parties' views and proposals on: * * *
>
> (D) any issues about claims of privilege or of protection as trial-preparation materials, including <u>the timing for and method to be used to comply with Rule 26(b)(5)(A) and</u> — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

This language has been polished repeatedly by the Reporter, working with the Subcommittee, to achieve a successful synthesis of the many comments that emerged from discussions with lawyer groups.

The practicing bar has strong interests in this rule. The interests of producing parties often diverge from the interests of requesting parties. But the values of early discussion aimed at case-

specific protocols are widely recognized and shared. The values of producing at least a partial privilege log relatively early in the discovery period are also recognized and shared.

Judge Dow noted that the Subcommittee process worked very well. Great help was provided by the lawyer members. "We could not do it without them."

Judge Bates suggested that this "is a modest, but a great, proposal." The Committee Note provides background information, and offers suggestions for implementation. Generally a Note this extensive is prepared for "meaty" amendments, such as the 2015 discovery amendments or Evidence Rule 702. Is there a risk that this Note, prepared to illuminate a modest proposal, will stir the very divisiveness that the Subcommittee fears would be stirred by a more detailed amendment of rule text?

The general resistance to using committee notes as practice manuals was noted. But this amendment originated as a proposal to amend Rule 26(b)(5)(A) itself, "to put some meaty things there," such as describing withheld matters by category. A fulsome note provides what could be useful background. "We spent a lot of time on this." The bar and judiciary will not be shy about commenting on this Committee Note. "The Note may evolve, but for now it is useful to explain what is intended and why."

Professor Coquillette noted that "this is a historic concern of mine." If some committee notes include best-practices advice while others do not, questions will be raised about the different approaches.

The discussion concluded with the observation that "the bottom line is we will see what the public comments say." Privilege logs are contentious. The tendency in framing rules amendments is to move toward what can be achieved by consensus.

The Committee voted without dissent to recommend that these draft rules be approved for publication. Special thanks were expressed for the work of Judge Godbey and Professor Marcus.

Rule 42 Consolidation - Appeal Finality

Judge Rosenberg introduced the report of the Rule 42 Subcommittee, a joint subcommittee of Appellate and Civil Rules Committee members. The recommendation is to remove this topic from the Committee agenda.

The Supreme Court, in *Hall v. Hall*, 138 S. Ct. 1118 (2018), ruled that complete disposition of all claims among all parties in what began as an independent action is an appealable final judgment, even though further work remains to be done in another action that was consolidated with the now-concluded action. At the same time, the Court suggested that if problems emerge from this approach, improvements could be made through the Rules Enabling Act process.

The Subcommittee was formed largely because of fears that this wrinkle on final-judgment appeal doctrine might remain obscure to many lawyers, causing loss of any opportunity for

appellate review by failure to take a timely appeal. The Federal Judicial Center was enlisted to study the effects of the rule in actual practice.

The FJC study was led by Dr. Emery Lee. The first phase studied all district court filings from 2015 to 2017. The earlier cases provided an opportunity for comparison because the circuits had generated three different approaches to this question, with a modest variation on one of them. The approach adopted by the Court was followed only in a minority of circuits.

The first phase of the FJC study examined all actions on the dockets of all the districts, excluding MDL consolidations. After identifying all consolidated actions, a sample was studied for appeal experience. Appeals were taken in only a small fraction of all consolidated cases. And there was no indication that any party had forfeited the opportunity to appeal for ignorance of the newly uniform rule.

The second phase of the FJC study examined all appeals filed in 2019 or 2020, identifying appeals in consolidated actions. Once again, there was no evidence that opportunities to appeal had been lost for ignorance of the rule established by *Hall v. Hall*.

Dr. Lee observed succinctly that "problems do not arise."

Further discussion noted that the FJC study showed that nearly half of all district court consolidation orders did not identify the purposes of the consolidation. That habit might prove difficult to dislodge by amending Rule 42(a) in an attempt to encourage district courts to think ahead to the possible appeal complications that might arise upon the future complete disposition of one of the originally independent actions embraced by the consolidation. Consolidation is ordered to achieve more efficient and better management of parallel actions. That is the immediate focus. Predicting the twists and turns that may follow in the ensuing proceedings would be difficult. The FJC study shows that what were labeled "original action final judgments" were relatively rare.

The uncertainty about the character of many consolidations makes it difficult to consider the possibility that the parties, district court, and appellate court could gain by a rule that brings consolidated actions into the partial final judgment provisions of Rule 54(b). The possible gains are illustrated by a simple example. Two plaintiffs might join in an action against the same two defendants. Complete disposition of all claims between one plaintiff and one defendant is not a final judgment unless the court, considering the many factors that inform Rule 54(b) orders, directs entry of a partial final judgment. Rule 54(b) has worked well in this setting. Why should it be different if the same litigation begins with two separate actions that are then consolidated for all purposes?

The problem is that there is no apparent reason to invoke Rule 54(b) when cases are consolidated for fewer than all purposes. Rule 42(a)(1) permits joining cases for hearing or trial. Rule 42(a)(3) authorizes "any other orders to avoid unnecessary cost or delay" when actions before

the court involve a common question of law or fact. Combined discovery would be an obvious example.

An attempt to integrate Rule 54(b) with Rule 42(a), in short, would have to grapple with the need to address only orders that consolidate two or more cases for all purposes. A satisfactory resolution as a matter of rule text might be within reach, but it would depend on an explicit statement of the purposes of consolidation, either when consolidation is ordered or perhaps when the court comes to believe that complete disposition of an originally independent action is — or is not — a desirable occasion for immediate appeal. The risks of stirring undue complications and confusing appeal doctrine seem too great to be incurred.

The Committee concluded without dissent to recommend to the Standing Committee that the joint subcommittee be dissolved without further work.

Multidistrict Litigation Subcommittee

Judge Rosenberg introduced the report of the Multidistrict Litigation Subcommittee. She noted that, at the time of the meeting last March, the Subcommittee had been working on possible amendments that would address multidistrict litigation through Rule 26(f) party discussions and Rule 16(b) case management orders. After that meeting, however, the Subcommittee came to believe that it would be better to address the possibility of MDL-specific rule provisions in a new rule if there are to be any rule provisions. A draft framed as a new Rule 16.1 was presented to the Standing Committee last June, not for discussion but to illustrate the approach that would be considered with the help of interested groups over the summer. An incidental effect of this approach is that it avoids the need to consider coordination of any Rule 26(f) and 16(b) amendments with the proposals recommended this morning to address privilege log practice.

The core of the Rule 16.1 approach is to prompt a meet-and-confer of the parties before the initial MDL case management conference. Over the summer the Subcommittee had separate remote meetings with lawyers designated by the American Association for Justice and Lawyers for Civil Justice. The focus was on alternative versions of subdivision (c). Alternative 1 provides a lengthy list of matters the court might direct the parties to discuss as a basis for a report to the court. Alternative 2 provides a much condensed list, at points drawn in more general terms. Both groups preferred Alternative 2, and each provided a "redlined" version that would revise Alternative 2. As might be expected, the redlined versions differed from each other. The Subcommittee discussed the redlined versions, and Professor Marcus undertook to annotate the rule draft with explanations of the issues that have been identified by the Subcommittee and the redline suggestions. This expanded version appears at page 179 in the agenda materials.

Further review of the draft will be sought by presenting it to a group of MDL judges at the upcoming conference of MDL judges in early November. It will be quite different from the proposal considered in the same setting four years ago. The proposal then focused on issues, such as expanded opportunities for interlocutory appeals, that now are on the back burner.

Discussions of MDL procedure always are complicated by the proposition that not only do the cases consolidated in the many different proceedings comprise a large part of the federal docket; they range across a broad range of case numbers, from only a few to thousands or even tens of thousands. Many of them are readily managed under the general Civil Rules. But the small number of outsized consolidations, perhaps 20 or 25 of them at any one time, present enormous challenges.

The potential value of a rule specifically framed for the MDL proceedings that are too complicated for easy management under ordinary practices is enhanced by several factors. The Judicial Panel on Multidistrict Litigation is actively seeking to draw new judges into MDL assignments. New MDL judges need to be educated in MDL management. Education is often provided, and to good effect, by the experienced MDL lawyers who regularly appear in MDL proceedings. But less interested guidance also may be important. MDL judges, moreover, are actively engaged in efforts to draw new lawyers into the MDL world. The new lawyers also will benefit from guidance on the distinctive management needs of the more complex MDL aggregations.

One approach can be to resist the temptation to propose any new MDL-specific rule. Reliance might be placed on other sources of best practices, including the Manual for Complex Litigation. The Manual, however, although a great resource, is not keyed solely to MDL proceedings and is no longer up to date. A project to update the Manual has recently been launched, but several years will be required for completion. The Judicial Panel works hard to support MDL judges, including the annual conference at which the Rule 16.1 proposal will be presented in November.

The question is whether these alternative sources of support for MDL judges should be bolstered by new provisions in the Civil Rules. The Rule 16.1 proposal reflects the possibility that much can be gained by a rule that prompts lawyers and the court to consider the distinctive and often complex issues that arise in the more challenging MDL consolidations.

Rule 16.1(a) provides for an early management conference to develop a management plan for orderly pretrial activity.

Rule 16.1(b) provides for designating "coordinating counsel" to act on behalf of the parties — plaintiffs, and perhaps defendants — in the conference provided for by subdivision (c). It further provides that designation as coordinating counsel does not weigh in the future determination of appointments as leadership counsel.

Rule 16.1(c) is presented in alternative versions. As noted, Alternative 1 is more extensive and detailed. Alternative 2 is condensed, identifying such core subjects as early exchanges of information; whether to appoint leadership counsel, including the process for appointment and leadership responsibilities and common benefit funds to support leadership work; and schedules for sequencing discovery or deciding disputed legal issues.

At many points, the draft offers choices for the words of command. "Must" and "may" are the more common alternatives, but "should" also figures in some alternatives. The Subcommittee has shied away from "must" at many steps, recognizing that lawyers are creative and may develop better ways of doing things than can fit within a mandatory rule text. At the same time, the "must" command may be appropriate at some points.

Judge Dow noted that, in addition to the sessions with AAJ and LCJ lawyers, suggestions have been received from other observers. Professors Morrison and Transgrud joined in one, and another provided by John Rabiej offers detailed commentary. More will be learned from MDL judges at the upcoming conference. It seems that judges are more interested than lawyers in having a new rule. In part, that reflects the fact that "not everyone reads the Manual" or other sources of best practices advice. But "everyone reads the Civil Rules." A good rule could be an important guide that helps utilize the immense staffing required for a big MDL. The Rule 16.1 draft is dramatically different from the drafts considered four years ago. "There will be a lot of eyes on this." The Subcommittee deserves full compliments for its work.

Professor Marcus added two observations. Some participants are wary of using "may" in rule text as a discretionary word that may not seem adequately mandatory. Quite separately, the Rule 16.1(b) provision for coordinating counsel has seemed a "which should come first" conundrum to some observers. Organizing the proceedings will require leadership counsel with authority to engage with the court on behalf of others. How can there be lead counsel to advise on who should become lead counsel? Even if designated as "interim" leadership, how is the court to know whom to designate — does there have to be a coordinated presentation, or can the court solicit applications and perhaps entertain comments on the applicants as a way to sort out coordinating counsel?

A committee member provided a reminder of "how we got here." Many MDL judges and lawyers have said we do not need a rule. No one-size-fits-all procedure can be set for all MDLs. But we also hear that there is a need. We should look for a balance that does not constrain, but points to key topics that should be considered. A rule can be designed to focus attention and prompt discussion.

Another member observed that initial proposals for adopting an MDL rule came from groups, one or another, looking for advantage. The proposal to expand opportunities for interlocutory appeals is an example. Proponents looked for rules that would place a thumb on the scales. The discussion with MDL judges in 2018 was on these topics. With this new proposal, "we need to hear from these judges again." The question about interim coordinating counsel is an example of the competing fears: plaintiff-side counsel fear that however described, an initial designation of interim coordinating counsel will give an advantage that risks ripening into a full leadership designation, and also fear that a rule may give defendants a voice in designating plaintiff leadership. Defendants' counsel also have partisan views on these issues. "Organizations can be more vociferous." We need to hear from those on the ground in settings that are not filtered through their organizations.

This member continued by suggesting that "today I would favor (c) Alternative 1." It is a long and helpful list of the things that must be considered to successfully start an MDL. "If you start well, you're likely to finish successfully."

A different member said that the process of generating successive rules drafts has been informative. "I am not really persuaded there should be a rule." We need to hear from lawyers who engage in all types of MDLs. And we need to be careful about how many items we include in a rule. Many of the details might better be shifted to the Committee Note.

The same member continued to observe that in designating leadership it is important that the judge learn not only who wants to be a leader, but who the leaders really are. Early candidates may be useful members of the final team, but others must be considered as well. Gathering input from the MDL judges at their upcoming meeting will be useful.

A judge said that sometimes the initial process is useful because some lawyers shine, while others flop — perhaps because they do not play well with others. The authority conferred on lead counsel limits the role of the other lawyers, but virtual proceedings can enlarge the number of nonlead lawyers who can participate effectively.

Another judge expressed worries about "mission creep." Relying on an extended committee note to guide practice may be a mistake. The note may be too long. And these are rules, not Federal Suggestions for Civil Procedure. A note that suggests thinking about this, thinking about that, thinking about another thing might accomplish nothing more than a rule that advises judges and lawyers to consult the Manual for Complex Litigation. "This doesn't feel like a rule." Reliance on "may" provisions illustrates the lack of a need for such rule provisions. "No one doubts the authority to do what we might include in a list of things the court 'may' do." So the organizations that advised the Subcommittee over the summer prefer the shorter list in (c) alternative 2.

Another participant suggested a broader context for the concern about reliance on Committee Note discussion in place of more detailed guidance in rule text. The discussion earlier this morning about the Committee Note for the privilege log proposal was a beginning. Historically, the advisory committees have resisted extended checklists, often described as "laundry lists," in rule text. Earlier explorations of class-action questions included a draft that proceeded through more than a dozen paragraphs of factors to be considered in evaluating a proposed settlement. That approach was abandoned; the general formula that emerged, and that was polished in more recent Rule 23 amendments, seemed better. One of the grounds for resisting multifactor lists in rule text is the fear that lawyers will feel compelled to address every factor in every case, even though only a few — and perhaps none — may be useful or even relevant in a particular case. At the same time, detailed rule text can provide the intended guidance for judges and lawyers, especially those newly come to MDL practice. It will be important to make sure that either alternative of Rule 16.1(c) is drafted to make it clear that the lawyers are directed to consider only the elements that the court selects from the list that follows.

A judge noted that the Subcommittee has been hearing from "the high end of the MDL bar and judges." The choice between a manual and a rule troubles lawyers because a rule passes some control from the lawyers to the judge. That may be why lawyers have resisted the more detailed (c) alternative 1. The lawyers have long had a powerful role in educating new MDL judges in the practices that the concentrated MDL bar has developed across many years of experience in many MDLs, from small to the largest. They do not want to give up this advantage. "We want to give judges what they need."

Another judge noted that lawyers prefer (c) alternative 2 because it is more concise. They assert that it will better enable judges to manage the proceedings.

Professor Marcus provided a reminder that the first proposals for MDL rules were made by lawyers involved in defending the small number of very large MDLs. "They did not like the direction of the prevailing winds."

A third judge noted that at one of the conferences arranged for the Subcommittee, Judge Chhabria described his experience as a newcomer to a very large MDL. He and his clerks researched MDL practices extensively. But he believed that he had gone wrong in establishing provisions for a common-benefit fund. He could have done better "if I knew then what I know now." He has suggested that an explicit Civil Rule for MDL proceedings would help judges. So it will help if we get lawyers involved at the beginning in informing the judge about what needs to be considered in initially organizing the MDL. And "it seems better to make clear that the judge controls what is to be discussed."

A fourth judge observed that "we hear a lot about how different MDLs are" from one another. There is a wide variety. But the federal courts deal with a wide variety of cases, and the Civil Rules address an equally wide range. The Subcommittee process has been great. Subdivision (c) alternative 1 may be safer than alternative 2, because it addresses more elements that may be important in managing one or another variety of MDLs. And there is a visible danger in adopting an extensive Committee Note. There may be a temptation, encountered elsewhere in the rulemaking process, to use a note to address matters that seem too sensitive to address in rule text. An example is settlement. Could a note say simply that settlement plays a very important role in most MDLs? Could it go on to suggest what the judge may and may not do? If it says anything, the risks are saying too much or too little. Another example is the interplay between Rule 23 class actions and MDLs. "There are some real issues there." Framing the note "will not be an easy process."

Judge Dow echoed this observation. "Settlement has been a difficult question all along." Academics have proposed adopting for MDLs the settlement review procedures that Rule 23 adopts for class actions. But we have come to understand that judges cannot become involved in the merits of settlement proposals in MDLs that are not resolved as class actions. At the same time, judges may have an important role in managing the process of settlement. One example might be a case management order provision that any lawyer who has more than XY cases in the MDL must show up in court to explain the process that led to an impending settlement.

Judge Dow concluded the discussion by noting that the Rule 16.1 proposal "needs and will get more attention from all sides."

Rule 41 Subcommittee

Judge Bissoon delivered the report of the Rule 41 Subcommittee. The first questions presented to the Committee arise from the word "action" in Rule 41(a)(1)(A): "the plaintiff may dismiss an *action*" without court order and without prejudice. Most circuits that have considered one set of questions have ruled that a single plaintiff who dismisses all claims against one of plural defendants has dismissed the action. So if one of two plaintiffs dismisses all claims against all defendants, that dismisses the action. Some circuits, however, have taken different positions. And district courts remain divided on a parallel question: if one plaintiff wants to dismiss fewer than all claims against a single defendant, does that dismiss the action? A majority say it does not, relying on the "plain meaning" of "the action." That view seems to contradict the meaning attributed to "action" in the cases that address complete dismissal as to only one defendant or plaintiff. But other district courts have ruled that Rule 41 authorizes a plaintiff to dismiss without prejudice a single claim against a single defendant.

The Subcommittee has not yet worked its way through to a recommendation. It hopes to be guided by any lessons from experience that can be provided by Committee discussion. Should there be an amendment? Should it aim only to adopt the majority views announced in the cases, without attempting to search out underlying policies that have not been articulated in the opinions? Should it undertake to consider other aspects of Rule 41 that may deserve attention?

Professor Marcus suggested that there are too many Rule 41 balls in the air to count. Rule 41 remains largely unchanged since its adoption in 1938. It was intended to move away from the variety of state court practices incorporated through the Conformity Act; some states allowed unilateral dismissal without prejudice at an advanced stage of an action, even into trial. The purpose to require court approval after an early point in the proceedings has been accomplished. It would be possible to go further to require court approval for any voluntary dismissal without prejudice, but that has not been proposed.

These themes were expanded upon. Rule 41 could be amended by a simple process that does no more than achieve uniformity by adopting the majority views of what it means to dismiss the action. A somewhat more ambitious approach would look behind the tacitly conflicting views of plain meaning to ask what underlying policies might, for example, distinguish between dismissal of only some claims between a pair of adversary parties and dismissal of all claims between them. Still greater ambition might suggest that if Rule 41 is to be taken on, other nagging questions also might be considered. One prominent question is whether the provision that terminates the plaintiff's right to dismiss on an answer or a motion for summary judgment should be expanded to include motions under Rule 12(b), (e), or (f), in parallel with the provision in Rule 15(a)(1)(B) that uses those motions to trigger the time limit for amending a pleading once as a matter of course. The provisions in Rule 41(c) that address dismissal of claims by parties other than the plaintiff might also deserve some consideration.

Judge Bissoon noted that the materials in the agenda book illustrate a variety of possible alternative rule amendments. Voluntary dismissal questions may be particularly important in complex litigation that involves many parties and claims. She asked what might be learned from Committee group experience?

Discussion was opened by a participant who "does not see a problem." The simplest example is truly minor. Rule 41(a)(1)(B) refers to previous dismissal of an action that includes the same "claim" as the present action. Use of "claim" here is mandated by the context, and does not shed any light on the meaning of "action" in (a)(1)(A). It is simply a shorthand reference to "transaction or occurrence." So too the reference to dismissing a counterclaim or the like in Rule 41(c) provides no implications for interpreting "action" — a defendant cannot dismiss the action. The questions raised by partial dismissals in the context of multiple claims or parties are a problem for Rule 15(a) — the plaintiff need only amend the complaint to omit whatever claims or parties it wants to dismiss. There is no reason to amend Rule 41 to accomplish what can be done through Rule 15. Rule 41 should be reserved for "calling the whole thing off." So too, adding Rule 12 motions to the events that cut off the right of voluntary dismissal does not make sense; "some of them may be what gives the understanding of the need to dismiss." We should leave it to the courts to resolve interpretive disagreements.

A judge observed that the circuits "do approach it differently," and that the title of Rule 41 is "Dismissal of Actions." Further, "we do get motions to dismiss less than the full action, and tend to sign off on them." The inconsistent circuit decisions are a warning. Clear guidance could be useful for MDL proceedings.

In response to a question, Judge Bissoon said that she had never encountered a problem raised by the "without prejudice" element of Rule 41(a).

Another participant noted a local district rule that requires court approval for any dismissal without prejudice.

Another judge addressed the provision of Rule 41(a)(2) that requires court approval of a dismissal after the Rule 41(a)(1)(A) cutoff. The dismissal is without prejudice "unless the order states otherwise." "Sometimes I get an objection and approve dismissal only if it is to be with prejudice." Things become complicated "if you want to do more than the rule says."

The possibility of adding Rule 12 motions to the events that cut off the plaintiff's unilateral right to dismiss was brought back by an observation coupled with a question. The defendant expends money and effort to make the motion. Is it a fair outcome to allow the plaintiff to respond by dismissing without prejudice, holding open the opportunity to bring the same claims another time?

Discussion concluded with the reminder that the Subcommittee "is still at work."

Pro Se e-Filing

Professor Struve led discussion of the rules that govern electronic filing by unrepresented parties. Civil Rule 5(d)(3)(B)(i) was adopted in tandem with parallel provisions in the Appellate, Bankruptcy, and Criminal Rules. It provides that a person not represented by an attorney "may file electronically only if allowed by court order or by local rule." (Rule 5(d)(3)(B)(ii) provides that an unrepresented party "may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions." That provision is not being reviewed.)

A working group of reporters has devoted almost a year to opening study of the question whether the presumption against electronic filing by unrepresented parties should be replaced by a presumption that electronic filing is permitted unless prohibited by order or a local rule. The Federal Judicial Center has conducted an extensive study of practices across all federal courts, culminating in a formal report that is included in the agenda materials.

The FJC study shows wide divergence in practices across the country. Five circuits, for example, presumptively permit e-filing by unrepresented parties who are not incarcerated. Other circuits take different approaches. In the district courts, fewer than ten percent of all districts have local rules that presumptively permit e-filing. Others have local rules that unrepresented parties may not file electronically. Bankruptcy practice includes a bankruptcy-specific form of electronic submissions.

The difficulties of opening a new case in the CM/ECF system are among the concerns that impede willingness to allow electronic filing by unrepresented parties. Some courts do not allow even attorneys to open a new case. After a case is opened, however, successful electronic filing by unrepresented parties can gain all the advantages the system affords. Transmitting notice and serving registered users are high among them.

The meaning of "file electronically" in Rule 5(d)(3) and the parallel rules is not certain. Several courts accept filings that unrepresented parties deliver to the court by electronic means, including email or attachments to email messages. The clerk's office translates the message into the court's CM/ECF system. This task may be at least as convenient for the clerk's offices as the task of entering paper filings. But concerns remain about the risks of computer viruses and malware. Particular concerns arise in bankruptcy courts, which regularly encounter unrepresented parties who seek to upload excessive or inappropriate files, or to file documents under inappropriate names. But expanded access to CM/ECF systems is being considered for bankruptcy courts.

A bankruptcy judge observed that "I do a lot of social work with pro se litigants." Relatives and family members file documents with the wrong names, without a power of attorney, or simply inappropriate things — one person uploaded a picture of a dead body. There are really weird mortgage filings by debtors intended to fake payment in full and discharge. The dangers of electronic filing are more work and expense for creditors and court staff. But "I give sufficient

time to make their responses." On the other hand, "forms may be different." It might work to adopt a presumption for electronic filing of some forms.

Another observation was that the present provision allowing electronic filing by court order invites different practices by different judges on the same court. If the presumption is reversed, will the outcome be much different? Or will judges who now do not enter orders that permit electronic filing simply switch to entering orders that deny it?

A committee member asked "who should drive this process?" Is this subject suitable for the rules committees? Or is it better addressed by the Judicial Conference technology committee, or by the Court Administration and Case Management Committee? The FJC study shows substantial concerns in many quarters that electronic filing by unrepresented parties will not work. "Should we get into this at all?" A response observed that these questions affect the interests enshrined in Rule 1, affecting access to the courts. Rule 5 and its analogs do address electronic filing. "The momentum is there." And the reply expressed agreement, but asked whether now is the time to take these issues up again. "We can say whatever we want, but if it doesn't work it doesn't matter. We need better understanding of how things work." But we can at least begin by thinking about what we would like courts and unrepresented parties to be able to do.

Judge Bates observed that "we are gathering information so we can initiate this process with the other institutions that need to be brought in. A coordinated effort by the rules advisory committees to find out what we might aspire to is important." One factor to be kept in mind is that the CM/ECF system is subject to a process of continual change. One likely outcome is a report to other actors that asks whether we should amend the rules.

Another judge reported that the clerk of her court recommends that the rules not be amended. The advice is that most courts are not equipped for CM/ECF access by unrepresented litigants, nor for other means of electronic filing. "We do not have the ability." And unrepresented parties make more docketing errors. Particular problems arise with prisoners, who are often switched from one prison to another — there are five different facilities in her district. New procedures would have to be devised to deal with electronic filing by unrepresented parties.

Another problem was identified. Some troublesome litigants are subject to orders that impose special procedures for permission to file new actions. That would be an added complication. And there are risks that documents that should not be publicly available will be filed in the public record. But there also are real advantages to electronic filing, such as disseminating notice.

The advantage of electronic noticing led to a reminder of another current issue. Once a filing by an unrepresented party is added to the court's CM/ECF system, notice is sent to all registered users. Many courts interpret the present rules to require the party to send a separate paper notice to registered users who already have received notice from the court. That seems to impose an unnecessary and perhaps heavy burden on the unrepresented party. Some local rules address these issues. For that matter, even an approach that would require paper notice only to

parties that are not registered users would work better if the unrepresented party can rely on clear identification of which parties are not registered users.

Judge Dow expressed the Committee's thanks to Professor Struve for undertaking the heavy work to lead the working group's efforts and for leading the present discussion.

Rule 45(b)(1)

Professor Marcus led the discussion of a Rule 45(b)(1) question that has repeatedly reappeared on the agenda. Rule 45(b)(1) says that: "Serving a subpoena requires delivering a copy to the named person * * * ." Going back at least to 2005, various groups have pointed out that most courts interpret "delivering" to mean in-hand service. Some courts, however, accept mail as a means of delivery. The suggestions have ranged from recognizing mail — including, more recently, commercial carrier — to adopting the means of serving a summons and complaint under Rule 4.

This question was considered at some length during the long and careful process that revised Rule 45 to simplify subpoena practice by directing that all subpoenas issue from the court where the action is pending, and authorizing the court where compliance is required to transfer an enforcement proceeding to a different court that issued the subpoena. The question was put aside then, in part from concerns that in-hand service is important as an assured means of actual notice. In-hand service also impresses the importance of the duty to comply, particularly on a nonparty. The importance of understanding the duty is underscored by the severity of contempt, the sanction for noncompliance.

So the question is whether we should take up this question once again. Is the present somewhat-muddled practice acceptable, recognizing that delivery by mail is a common practice, particularly among the parties to an action? Or should this question be deferred while the Committee decides whether the time has come to undertake a broad review of the means of serving a summons and complaint under Rule 4?

A judge remarked that different judges on the same court may adopt different views. Rule 4 service presents many more issues. In bankruptcy practice, service can have serious consequences.

Discussion concluded inconclusively, with a judge's observation that judges generally are forgiving when faced with questions of improper service. There is yet no sense of actual experience with potential problems in serving subpoenas.

Rule 7.1

Two suggestions focus on expanding the Rule 7.1 provisions for disclosures designed to flag potential conflicts of interest that may require recusal of the judge assigned to the case.

One suggestion would expand disclosure beyond "parent" corporations to include what may be called "grandparent" corporations. A party may identify its parent corporation. But the parent corporation may itself have a parent. Some of these grandparent corporations have many children, and judges may not be aware of the tie between their holdings in the grandparent and the identified parent.

A second suggestion is that all parties should be required to review publicly available information about the financial interests of the judge assigned to a case.

Discussion began with the observation that "judges are feeling a lot of heat." Widespread publicity has been given to a study that found well over a hundred cases in which judges failed to recuse themselves, although almost certainly inadvertently, for conflicting interests that were not pointed out to them. Congress has recently enacted added reporting requirements.

The question whether parties should be required to review a judge's stock holdings is not easy. "How much help can we get from them?" Is it appropriate to require a party to make public all financial interests it may have in common with a judge?

Professor Marcus elaborated by noting that the Wall Street Journal investigation of judges' stock holdings included holdings by family members. It did find many cases without recusals that should have been made.

The grandparent problem was illustrated in the suggestion by pointing to Berkshire Hathaway as an entity that is parent to a great many other corporations that themselves are parents of still other corporations. Judges who made favorable investments in Berkshire Hathaway may be understandably reluctant to divest these assets. Nor, for that matter, is it suitable for a rule of procedure to explore such questions as what sorts of suitably dispersed or blind investments are better suited for judges. The challenges presented by capital gains taxes are even further from rulemaking.

The recent proposed addition of diversity disclosure provisions is supported in part by the absolute obligation to ensure the subject-matter jurisdiction of a federal court. It is much better to ensure that the judge has that information at the beginning of the action.

The proposal that would require all parties to check publicly available information about an assigned judge's financial information sets a 14-day deadline. As with diversity jurisdiction, it is better to have recusal information available at the beginning. But is this an undue burden on the parties? Or at least on parties not represented by counsel?

These questions "are not going to go away."

Judge Dow noted that this Committee has been nominated to take the lead for the other advisory committees. A first question will be whether we think a joint committee is needed. A related question is whether these issues are best suited for consideration in the Rules Enabling Act

process, or whether some other Judicial Conference committee might be a better resource. He also noted that the Seventh Circuit is developing a new plan for financial disclosures by judges. It is not clear what financial information about judges is available now, nor whether parties know where to look for it.

Another judge suggested that it would place an extraordinary burden on a party to require it to track down information that may not be readily available, and to reveal information that is not otherwise public.

A lawyer member said that with big clients, checks for conflicts of interests are worthwhile. "But for represented litigants in smaller stakes cases, it could be too much work." Checking for conflicting interests among clients must be done, and it is complex, including "who's on the other side." It is further complicated because it is important for SEC purposes to guard against learning insider information. So for the grandparent example used for expanded recusal disclosures, we do look upstream from the corporation that is a party's parent, but this example "is prominent in corporate databases." In other settings "it can be very hard."

A judge agreed that there are many corporations whose affiliations are harder to track than Berkshire-Hathaway. "A rule might not accomplish much."

A different lawyer member agreed that conflicts checks can be difficult. "We often represent unsophisticated clients," and clients with no assets. But the firm has the resources required to do conflicts checks, and has a "whole team" that does them. Information also is collected from the lawyers. Conflicts checks are expensive. Many firms may not have the resources to do that.

A judge agreed that resources are an important part of the ability to find the information that's required now. "Courts are under scrutiny," but it is difficult to know whether a rule will help.

Yet another lawyer confirmed that firm practice asks clients to make sure the firm has complete information.

A judge observed that shifting responsibility to the parties could help judges.

Discussion turned to the next steps to be taken in considering recusal disclosures. There are issues that need further attention and work. It may be that the Standing Committee should become responsible for directing work by all advisory committees. The proposals should be kept on the Civil Rules agenda.

A subcommittee might be appointed for further study. There have been several subcommittees recently, and they have had several meetings. "We can take stock of what resources are available." It may be useful to appoint a small subcommittee to continue gathering information.

A committee member observed that there are many moving parts. The proper approach is not clear.

The possibility of a small subcommittee was noted again, with a judge and a lawyer and perhaps only one more member. The committee chair can open discussions with the Financial Disclosures Committee. "I doubt this is something for a Rules answer."

Discussion concluded with an analogy to the questions raised by third-party litigation funding. The questions remain on the agenda, but in an inactive status. They will not go away, just as these recusal disclosure questions will not go away. And here, it will be useful to find time to coordinate with other committees.

Rule 55

Professor Marcus introduced the Rule 55 questions that have been carried forward on the agenda. Rule 55 says that court clerks "must," in described circumstances, enter defaults and then default judgments. But practice in many districts does not adhere to this directive. Work is underway to explore the reasons why many districts require that all default judgments be entered by a judge, and why a few seem to require that the initial default also be entered by a judge.

Dr. Lee stated that the FJC has begun work to explore actual practices across the districts and to find the concerns that have led some courts to shift to judges responsibilities that Rule 55 assigns to clerks. Initial work has shown that clerk's offices find some default questions to be routine, readily handled by the office, while others present real challenges.

Brief discussion provided an example of a court that has defaults entered by the clerk, but has judges enter default judgments. Another example noted a court that has judges enter both defaults and default judgments.

Rules 38, 39, 81

Judge Dow noted that questions surrounding the rules that govern demands for jury trial have lingered untended on the agenda for several years. There is a clear potential for further study, but the committee capacity for creating subcommittees has been fully devoted to other projects.

Professor Marcus focused on a proposal submitted to the Committee the day after the Standing Committee meeting in June 2016. The discussion in the Standing Committee focused on questions raised by the jury demand provisions for cases removed from state courts. Then-Judge Gorsuch and Judge Graber, Standing Committee members, proposed that the jury demand requirement be dropped. They pointed to Criminal Rule 23, which allows a bench trial only if the government, defendant, and judge agree to proceed without a jury. They were concerned that the demand procedure at times leads to inadvertent forfeiture of the right to a jury trial. They pointed to satisfactory experience in state courts that do not require demands. And they suggested that

making jury trials automatically available in all cases with a right to jury trial might increase the number of cases actually tried to juries.

The first question is whether the demand procedure actually reduces the number of jury trials. The FJC is conducting a study of jury trials that could inform the answer.

Dr. Lee said that the ongoing study of jury trials focuses on factors that may explain the different rates of jury trials in different districts. The study was undertaken in response to a direction from Congress. Good information can be developed from court dockets, because Rule 39(a) provides that an action must be designated on the docket as a jury action when a jury trial has been demanded under Rule 38. The information gathered so far is presented in the tables presented in the agenda materials. The rate of jury trials varies by case types, and is higher when the parties are represented by counsel. Surprisingly, jury trials occur in cases that do not have a jury demand noted in the docket — the rate of actual jury trials in such cases is 2.7%, double the rate in cases with jury demands noted in the docket. Perhaps the mystery can be explained as simple failure to make docket notes of actual demands. It also appears that some judges are eager to grant belated requests for jury trials, waiving the demand requirement, while others look for good reasons to justify waiving the requirement.

The agenda history was elaborated upon. Jury-trial-demand practice first came to the current agenda by a suggestion that focused on the 2007 Style Project's revision of one word in Rule 81(c)(3)(A). Before the revision, this provision established the procedure for demanding a jury trial in an action removed from a state court before a demand was made in the state court. It was framed to address the circumstance that arises if state law "does" not require an express demand. It was restyled to say "did" not require an express demand. The suggestion argued that the change created an ambiguity that led to a different meaning. The question arises in cases removed from state courts that do require a demand, but set a deadline at a point after the time of removal. The report to the Standing Committee was designed only as an information item about this question, including the information that this Committee was considering a possible amendment that would simplify the procedure in removed cases by requiring a jury demand under Rule 38 whenever a jury trial had not been demanded in the state court before removal.

These topics remain on the agenda for further consideration after completion of the FJC study.

End of the Day for e-Filing

The Time Project in 2009 amended Rule 6(a)(4)(A) to define the end of the last day for electronic filing as "midnight in the court's time zone." The same definition was adopted in the Appellate, Bankruptcy, and Criminal Rules.

A suggestion to reconsider this definition was made a few years ago. The concern was that enabling midnight filing was inhumane. Lawyers, often young associates, were required to work late, disrupting personal and family life. A large-scale FJC study was planned, and has been completed with a vast amount of information about actual filing practices. The study had also

contemplated searching interview efforts, but they were postponed because of pandemic disruptions and then abandoned because the pandemic encouraged broad changes in practice by remote means.

Judge Dow opened the discussion by observing that this inquiry has been going on for some time. The pandemic may have affected practices in important ways. An interesting datum is the recent remark of a big-firm lawyer that the firm has 600 lawyers without an office for them to work from. We have heard from various sources that family life may indeed be improved by the midnight deadline — family dinner and bedtime can be enjoyed before turning to the final polishing of a midnight filing. Work and filing practices may remain in disarray because of the pandemic's changes in the ways people work. There is a wide disparity in views. It may be time to abandon this question.

One example was offered of a phone call to the Rules staff from a lawyer in the New York area who opined that a 5:00 p.m. deadline would worsen his family life.

The Department of Justice prefers to leave the rule as it is.

It is not certain whether other advisory committees have different views. The Bankruptcy Rules Committee may have distinctive concerns.

A lawyer was pleased that the Committee recognizes that the world has changed for lawyers and their clients. "Flexibility in the times that work best for each is important." It will be good to drop this item from the agenda.

The Committee agreed without dissent that this proposal should be dropped from the agenda unless a problem of disuniformity arises from a suggestion by another advisory committee that the deadline should be redefined.

In Forma Pauperis Standards and Procedures

Judge Dow briefly summarized earlier discussions that reflect broad agreement that there are serious problems with addressing requests to proceed in forma pauperis. The standards to qualify vary widely, not only among districts, but also among different judges on the same court. And the practices for applying the standards vary as well, assigning primary responsibility to different actors in different courts. But there are grave reasons to doubt whether the need for improvements can be addressed effectively through the rulemaking process.

Another judge noted that "filing fees are handled differently, especially in prisoner cases." Orders to show cause are sometimes used. The Administrative Office has prepared a memorandum to court clerks on when to close prisoner cases. The Court Administration and Case Management Committee is involved with these questions. They even affect the allocation of pro se law clerks to the districts.

Judge Dow noted that the Administrative Office has a working group for i.f.p. cases, and that it remains at work. The Prison Litigation Reform Act requires filing fees; if fees are not waived, the fee becomes the minimum settlement value. "We have to charge a fee, and there is a huge number of these cases." There is a strong prospect that the Court Administration and Case Management Committee is better able than this Committee to address i.f.p. practice.

Class Representative Awards

A topic not on the agenda was introduced by Judge Proctor. A longstanding and widespread practice has recognized modest awards to class action representatives to compensate for the work they do on behalf of the class. A panel decision in the Eleventh Circuit, however, has recently relied on Supreme Court decisions from the 1880s to rule that such fees cannot be awarded. Rehearing en banc was denied by a 6–5 vote. The dissent offered persuasive reasons to rehear the case, and concluded that Congress or this Committee should restore the practice followed elsewhere. Since the decision, lawyers have observed that if they have a choice, they will file a class action in the Fifth Circuit, not the Eleventh. Denial of representative awards "will add to the feeling that class actions are lawyer-driven, not party-driven." And in fact class representatives are commonly called upon to do work on behalf of the class — they are consulted on the prosecution of the action, and are involved in responding to discovery. "We need them." "I move that this topic be added to the agenda."

Judge Dow agreed that a Committee member can recommend that the Committee consider an issue. The Seventh Circuit would have a different view than the Fifth Circuit. In a class action, "I know if a named plaintiff has done work." And he denies certification if he thinks the named plaintiff will not do work.

Professor Marcus suggested that the Committee should consider whether this question can be addressed by Rule 23. It may indeed have an effect on where class actions are filed.

A lawyer member noted that a petition for certiorari to the Eleventh Circuit has been filed. "This is an important question." The Second Circuit has already disagreed with the Eleventh, and approved service awards.

Another judge agreed that this is an interesting and important issue that warrants review of the history and where other circuits stand now. The Committee ordinarily does not jump in to correct a single aberrant decision. And it is appropriate to pause to see whether certiorari is granted.

A lawyer member suggested that even the terminology is important. The current description of representative fees is "service award."

This topic will be carried forward on the agenda.

Rule 17(a) and (c)

Professor Marcus introduced this proposal as one made by a nonlawyer who wishes to proceed to litigate as a duly appointed guardian on behalf of his ward. He complains that the district court has required that he be represented by an attorney, and urges that Rule 17 should be amended to make it clear that he can proceed without an attorney.

Rule 17(a)(1)(C) provides that a guardian is among those who "may sue in their own name without joining the person for whose benefit the action is brought." Rule 17(c)(1)(A) provides that a general guardian "may sue or defend on behalf of a minor or an incompetent person."

The rule ensures the capacity to sue. There is no reason to amend it simply because this litigant did not get what he wanted.

This proposal was removed from the agenda without dissent.

Rule 63

Rule 63 provides that when a judge conducting a hearing or trial is unable to proceed, another judge may proceed on determining that the case may be completed without prejudice to the parties. The second sentence further provides:

> In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden.

A proposal was submitted to suggest that it may be desirable to amend the second sentence to reflect the proposition that the availability of audio- or video-recorded testimony may affect the decision whether to recall a witness. The suggestion was prompted by a nonprecedential decision of the Federal Circuit interpreting the cognate provision in the Court of Federal Claims Rules. The case involved an audio recording, but the decision did not turn on that. Instead, the opinion first noted that the successor judge had erred in deciding not to recall two witnesses without explaining the decision by reference to the factors enumerated in the rule text. But the decision then went on to rule that this error was not prejudicial because the testimony of each of the two witnesses was irrelevant. There was no dispute as to the controlling facts.

Discussion of this proposal at the March 2022 meeting expressed some concern that Rule 63 may unduly limit a successor judge's ability to decide that a witness need not be recalled. Judge Dow recruited Allison O'Neill, a Seventh Circuit law clerk, to do volunteer research into Rule 63's application in practice. Her thorough and thoughtful memorandum is included in the agenda materials. It does not show any need to amend the rule. There is no apparent reason to amend the rule because of an opinion that says a successor judge should explain a determination not to recall a witness.

Committee members were asked whether there is any experience that suggests a need to examine Rule 63 further. No one offered any reason to go further.

This proposal was dropped from the agenda without dissent.

Mandatory Initial Discovery Pilot Programs

Dr. Lee noted that the FJC has been studying the mandatory initial discovery pilot programs in the District of Arizona and the Northern District of Illinois since 2016. "It's not over yet" for him or for his partner, Jason Cantone. But the report is almost done. The current draft runs to 130 pages. The plan for distributing the completed report will be developed in consultation with this Committee. Until it is completed, however, it is better not to attempt to summarize the findings.

Judge Dow noted that this was the only pilot project considered by the Committee that found willing participants, and only two districts took on this one. In the Northern District of Illinois, about two-thirds of the judges participated, offering an opportunity for comparisons within the same court that may support more robust findings.

The model for the pilot projects is described as discovery, but it is an "all cards on the table" version of initial disclosure. It was readily accepted by the judges and lawyers in Arizona, where state practice has adhered to a highly similar model for many years. It met resistance in Illinois from defense lawyers who protested that it requires a great deal of work that may be wasted if a motion to dismiss is later granted. The model was revised in midstream in Illinois to provide that an answer must state whether the defendant plans to make a motion to dismiss. That addition enables the judge to decide whether to suspend the mandatory initial discovery. "It's not for every case." Some lawyers resisted, and it seems likely that in some cases the lawyers for all parties tacitly agreed to act as if they had exchanged mandatory initial discovery without actually doing it.

Dr. Lee noted that "cases in the program do terminate earlier." But he could not yet say how much earlier.

Closed-case attorney surveys continue. The responses include many open-ended comments. "There is a lot of information there." These are big districts, with lots of cases. There is "a ton of data." The third part of the report provides a sampling of what the pilot cases looked like, including whether there was a lot of satellite litigation over discovery (there does not seem to have been a lot).

A member noted the three somewhat similar information-exchange protocols developed with IAALS support. Each was hammered out in intense discussions between plaintiff-side and defense-side lawyers. The first was for individual employment actions. The next two were for Fair Labor Standards Act cases and first-party property insurance disputes that arose from a hurricane. They have been adopted in several districts, and gained favorable reviews.

Experience with the first version of Rule 26(a)(1) mandatory initial disclosure also was noted. The effects in the first years were studied by the RAND Institute. Although the analysis fell a fraction of a point short of the 95% confidence level required to show statistical confidence, there were strong indications of favorable effects.

Added background was provided for new members. The pilot projects grew out of the subcommittees that proposed the 2015 discovery rules amendments in the wake of the 2010 conference at Duke Law School. The next step was to ask whether still more ambitious revisions should be considered. Pilot projects are attractive because they can provide a controlled environment that supports rigorous analysis of the results. It was good to enroll two districts; it would have been better yet if more volunteers could be found.

Dr. Lee noted that his FJC colleague, Tim Reagan, did great work in preparing training videos for the pilot projects. Judge Dow agreed, observing that the training was so good that only one judge dropped out of the pilot.

The next meeting is scheduled for March 28, 2023.

Judge Dow thanked all participants for their interest and hard work.

Judge Bates thanked Judge Dow for his many years of service on rules committees, inspiring a wave of applause.

Respectfully submitted,

Edward H. Cooper
Reporter