EXHIBIT B

MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7, 2017

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7, 2017. Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad Readler; Virginia A. Seitz, Esq.; Judge Craig B. Shaffer (by telephone); Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter, and Professor Catherine T. Struve, Associate Reporter (by telephone), represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated (by telephone). The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the Administrative Office. Judge Jeremy D. Fogel and Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Dennis Cardman, Esq. (ABA); David Epps (ABA); Thomas Green, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Joseph Garrison, Esq. (NELA); Chris Kitchel, Esq.; Henry Kelston, Esq.; Robert Levy, Esq.; Ted Hirt, Esq.; John Vail, Esq.; Susan H. Steinman, Esq.; Brittany Schultz, Esq.; Janet Drobinkske, Esq.; Benjamin Gottesman, Esq.; Jerome Kalina, Esq.; Jerome Scanlan, Esq. (EEOC); Leah Nicholls, Esq.; and Andrew Pursley, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that two members have joined the Committee. Ariana Tadler has attended many past meetings and participated actively as an observer; she is well known. Professor Spencer, of the University of Virginia, has substantial rules experience and has written widely on rules subjects.

Judge Bates reported that in June the Standing Committee approved for adoption amendments of Rules 5, 23, 62, and 65.1, basically as they were published and recommended for adoption. In September these amendments were approved by the Judicial Conference without discussion as consent calendar items. They have been transmitted to the Supreme Court. If the Court prescribes them by

May 1, 2018, they will go to Congress and take effect on December 1, 2018, unless Congress acts to delay them.

April 2017 Minutes

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

Legislative Report

Julie Wilson presented the Legislative Report. She noted that while the Administrative Office tracks and often offers comments on many legislative proposals that affect court procedure, the agenda materials include only bills that would operate directly on court rules — for this Committee, the Civil Rules. There is little new since the April meeting. H.R. 985 includes provisions aimed at class actions and multidistrict litigation. It passed in the House in March, and remains pending in the Senate. The Lawsuit Abuse Reduction Act of 2017, H.R. 720, renews familiar proposals to amend Rule 11. It has passed in the House. A parallel bill has been introduced in the Senate, where it and the House bill are lodged with the Judiciary Committee. She also noted that AO staff will attend a hearing on the impact of frivolous lawsuits on small businesses that is not focused on any specific bill.

Rule 30(b)(6)

Judge Ericksen delivered the Report of the Rule 30(b)(6) Subcommittee. She began by describing the "high-quality input" from the bar that has informed Subcommittee deliberations. An invitation for comments was posted on the Administrative Office website on May 1. There were more than 100 responses. Subcommittee representatives attended live discussions with Lawyers for Civil Justice and the American Association for Justice. The many responses reflect deep and sometimes bitter experience. These comments helped to shape what has become a modest proposal. Three main sets of observations emerged:

First, there has not been enough time for the new discovery rules that took effect on December 1, 2015 to bear on practice under Rule 30(b)(6).

Second, there is a deep divide between those who represent plaintiffs and those who represent defendants. Examples of bad practice are presented by both sides. Plaintiffs encounter poorly prepared witnesses. Defendants encounter uncertainty, vague requests, and overly broad and burdensome requests. All agree that courts do not want to become involved with these problems. These divisions urge caution, invoking the first principle to do no harm.

cases. "It's all about consent; the Social Security Administration consents all the time." But "local rules are antithetical to national uniformity." If national rules save time for the Social Security Administration, that will yield benefits for claimants and for the courts. Another judge emphasized that local rules must be consistent with the national rules, but it can be difficult to police. At the same time, still another judge noted that the Federal Judicial Center can educate judges in new rules. And a fourth judge observed that local culture makes a difference, but "some kind of uniformity helps."

Judge Bates concluded the discussion by stating that the Committee should explore these questions. A start has been made. The Subcommittee will be formally structured, and will look for possible rule provisions. We know that the Southern District of Indiana is working on a rule for service in disability review cases.

Third-Party Litigation Financing

Judge Bates introduced the discussion of disclosing third-party litigation financing agreements by noting that additional submissions have been received since the agenda materials were compiled. One of the new items is a letter from Representative Bob Goodlatte, Chair of the House Committee on the Judiciary.

The impetus for this topic comes from a proposal first advanced and discussed in 2014, and discussed again in 2016. Each time the Committee thought the question important, but determined that it should be carried forward without immediate action. The Committee had a sense that the use of third-party financing is growing, perhaps at a rapid rate, and that it remains difficult to learn as much as must be learned about the relationships between third-party financers and litigants. It is difficult to develop comprehensive information about the actual terms of financing agreements. The questions have been renewed in a submission by the U.S. Chamber Institute for Legal Reform and 29 other organizations.

The specific proposal is to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

Detailed responses have been submitted by firms engaged in providing third-party financing, and by two law professors who focused on the ethical concerns raised by the proponents of disclosure.

The first point made about the proposal is that it does not seek to regulate the practice or terms of third-party financing. It seeks nothing more than disclosure of any third-party financing agreement.

Many arguments are made by the proponents of disclosure. They are summarized in the agenda materials: "third-party funding transfers control from a party's attorney to the funder, augments costs and delay, interferes with proportional discovery, impedes prompt and reasonable settlements, entails violations of confidentiality and work-product protection, creates incentives for unethical conduct by counsel, deprives judges of information needed for recusal, and is a particular threat to adequate representation of a plaintiff class."

These arguments are countered in simple terms by the financers: None of them is sound. They do not reflect the realities of carefully restrained agreements that leave full control with counsel for the party who has obtained financing. In addition, it is argued that disclosure is actually desired in the hope of gaining strategic advantage, and in a quest for isolated instances of overreaching that may be used to support a campaign for substantive reform.

The questions raised by the proposal were elaborated briefly in several dimensions.

The first question is the familiar drafting question. How would a rule define the arrangements that must be disclosed? Inevitably, a first draft proposal suggests possible difficulties. The language would reach full or partial assignment of a plaintiff's claim, a circumstance different from the general focus of the proposal. It also might reach subrogation interests, such as the rights of medical-care insurers to recover amounts paid as benefits to the plaintiff. It rather clearly reaches loans from family or friends. So too, it reaches both agreements made directly with a party and agreements that involve an attorney or law firm.

Parts of the submissions invoke traditional concepts of champerty, maintenance, and barratry. It remains unclear how far these concepts persist in state law, and whether there is any relevant federal law. There may be little guidance to be found in those concepts in deciding whether disclosure is an important shield against unlawful arrangements.

Proponents of disclosure make much of the analogy to Rule 26(a)(1)(A)(iv), which mandates initial disclosure of "any insurance agreement under which an insurance business may be liable" to satisfy or indemnify for a judgment. This disclosure began with a 1970 amendment that resolved disagreements about discovery. The amendment opted in favor of discovery, recognizing

that insurance coverage is seldom within the scope of discovery of matters relevant to any party's claims or defenses but finding discovery important to support realistic decisions about conducting a litigation and about settlement. It was transformed to initial disclosure in 1993. At bottom, it rests on a judgment that liability insurance has become an essential foundation for a large share of tort law and litigation, and that disclosure will lead to fairer outcomes by rebalancing the opportunities for strategic advantage. The question raised by the analogy is whether the same balancing of strategic advantage is appropriate for third-party financing, not only as to the fact that there is financing but also as to the precise terms of the financing agreement.

Much of the debate has focused on control of litigation in general, and on settlement in particular. The general concern is that third-party financing shifts control from the party's attorney to the financer. Financers and their supporters respond that they are careful to protect the lawyer's obligation to represent the client without any conflict of interest. Indeed, they urge, their expert knowledge leads many funding clients to seek advice about litigation strategy, and to seek funding to enjoy this advantage.

The concern with influence on settlement is a variation on the control theme. The fear is that litigation finance firms will influence settlements in various directions. At times the pressure may be to accept an early settlement offer that is unreasonably inadequate from the litigant's perspective, but that ensures a safe and satisfactory return for the lender. An alternative concern is that at other times a lender will exert pressure to reject an early and reasonable settlement offer in hopes that, under the terms of the agreement, it will win more from a higher settlement or at trial. Funders respond that it is in their interest to encourage plaintiffs to accept reasonable settlement offers. They avoid terms that encourage a plaintiff to take an unreasonable position.

Professional responsibility issues are raised in addition to those presented by the concerns over shifting control and impacts on settlement. Third-party financing is said to engender conflicts of interest for the attorney, and to impair the duty of vigorous representation. Special concern is expressed about the adequacy of representation provided by a class plaintiff who depends on third-party financing. Fee splitting also is advanced as an issue.

A different concern is that a judge who does not know about third-party funding is deprived of information that may be necessary for recusal. A response is that judges do not invest in litigation-funding firms, and that it reaches too far to be concerned that a family member or friend may be involved with an unknown firm that finances a case before the judge. In any event, this concern can be met, if need be, by requiring disclosure of the financer's identity without disclosing the terms of the agreement.

Yet another concern is that the exchanges of information required to arrange funding inevitably lead counsel to surrender the obligation of confidentiality and the protection of work product.

Disclosure also is challenged on the ground that it may interfere with application of the rules governing proportionality in discovery. Rule 26(b)(1) looks to the parties' resources as one factor in calculating proportionality. The concern is that a judge who knows of third-party financing may look to the financing as a resource that justifies more extensive and costly discovery, and even may be inclined to disregard the terms of the financing agreement by assuming there is a source of unlimited financing.

Finally, it is urged that third-party financing will encourage frivolous litigation. The financers respond that they have no interest in funding frivolous litigation — their success depends on financing strong claims.

All of these arguments look toward the potential baneful effects of third-party financing and the reasons for discounting the risks.

There is a more positive dimension to third-party funding. Litigation is expensive. It can be risky. Parties with viable claims often are deterred from litigation by the cost and risk. Important rights go without redress. Third-party financing serves both immediate private interests and more general public interests by enabling enforcement of the law. It should be welcomed and embraced, no matter that defendants would prefer that plaintiffs' rights not be enforced.

The abstract arguments have not yet come to focus, clearly or often, on the connection between disclosing third-party financing agreements and amelioration of the asserted ill effects that it would foster. One explicit argument has been made as to settlement — a court aware of the terms of a financing agreement can structure a settlement procedure that offsets the risks of undue influence. More generally, a recent submission has suggested that "if a party is being sued pursuant to an illegal (champertous) funding arrangement, it should be able to challenge such an agreement under the applicable state law — and certainly should have the right to obtain such information at the outset of the case." This argument relies on an assumption of illegality that may not be supported in many states (some states have undertaken direct regulation of third-party financing), and leaves uncertainty as to the consequences of any illegality on the conduct and fate of the litigation.

Professor Marcus suggested that it is important to recognize that proponents of disclosure may have "collateral motives." He

noted that third-party financing takes many forms, and that the forms probably will evolve. Financing may come to be available to defendants: how should a rule reach that? More specific points of focus should be considered. Rule 7.1 could be broadened to add third-party financers to the mandatory disclosure statement. Rule 23(g)(1)(A)(iv) already requires the court to consider the resources that counsel will commit to representing a proposed class; it could be broadened to require disclosure of third-party funding. Third-party financing also might bear on determining fees for a class attorney under Rule 23(h).

Professor Marcus continued by observing that there may be a need to protect communications between funder and counsel for the funded client. And he asked whether the jury is to know about the existence, or even terms, of a funding arrangement?

The local rule in the Northern District of California was noted. It provides only for disclosure of the fact of funding, not the agreement, and it applies only to antitrust cases. Including patent cases was considered but rejected.

A judge suggested that third-party funding seems to be an issue primarily in patent litigation and in MDL proceedings.

Professor Coquillette offered several thoughts.

First, he observed that the common-law proscriptions of maintenance, barratry, and champerty have essentially disappeared. "We keep tripping over the ghosts and their chains." State regulation has displaced the ghosts, in part because these are politically charged issues.

Second, he urged that even coming close to regulating attorney conduct raises sensitive issues for the Civil Rules. The rules do approach attorney conduct in places, such as Rule 11 and regulation of discovery disputes. The prospect of getting into trouble is reflected in the decision to abandon a substantial amount of work that was put into developing draft Federal Rules of Attorney Conduct. That effort inspired sufficient enthusiasm that Senator Leahy introduced a bill to amend the Enabling Act to quell any doubts whether the Act authorizes adoption of such rules. But there was strong resistance from the states and from state bar organizations.

Third, Professor Coquillette noted that third-party funders argue that the relationships are between a lay lender and a lay litigant-borrower. The lawyer, they say, is not involved. "I do not believe that lawyers are not involved." Lawyers are involved on both sides, dealing with each other. "There are major ethical issues." These issues are the focus of state regulation. Here, as before, the Committee should anticipate that proposals for federal

regulation will meet substantial resistance from the states.

A Committee member identified a different concern about conflicts of interest. Often she is confident that there is funding on the other side. The risk is that her firm has a conflict of interest because of some involvement with the lender. She also noted that she believes that some judges have standing orders on disclosure. A judge agreed that there are some. Patrick Tighe, the Rules Committee Law Clerk, stated that many courts have local rules that supplement Rule 7.1 by requiring identification of anyone who has a financial interest in an action. But it is not clear whether these rules are interpreted to include third-party financing.

A Committee member stated that he has worked with third-party financing in virtually every patent case he has had in the last five years. He is not confident, however, that his experiences and the agreements involved are representative of the general field.

His first observation was that disclosure of insurance is unlike the general scope of discovery in Rule 26(b)(1). There are reasons to question whether disclosure of third-party funding should be treated as a phenomenon so much like insurance as to require disclosure. "We need to know exactly what we're dealing with." Third-party funding creates risks, including ethical risks. The duty of loyalty may be affected. The lawyer still must let the client make the decision whether to settle, but third-party financing may generate pressures that make settlement advice more complex. Disclosure, of itself, will not bear on these problems. Many steps must be taken from the disclosure to make any difference.

"Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all. In present practice, defendants seek discovery about financing. Objections are made. The law will evolve, and may come to allow routine discovery. There are settings in which funding can become relevant, as in the class-action context noted earlier. There may be guidance in decisional law now, but "I'm not aware of it."

Another Committee member responded that case law is emerging. Financing agreements are listed on privilege logs. Motions are made for in camera review. State decisions deal with work-product protection for communications dealing with third-party financing. Something depends on how the agreement is structured. Some courts say third-party funding is not relevant. For that matter, how about disclosure of contingent-fee arrangements? The Committee has never looked at that. Disclosure of third-party funding is increasingly required in arbitration, because of concerns about conflicts of

interest, and also because of concerns that a party who depends on third-party financing may not have the resources required to satisfy an award of costs.

The Committee member who described experiences with third-party funding suggested that disclosure of the existence of funding may be less problematic than disclosing the terms of the agreement.

A Committee member suggested that ethics issues "are not our job." At the same time, it seems likely that there will be an increase in local rules.

A judge suggested that care should be taken in attempting to define the types of agreements that must be disclosed. A variety of forms of financing may be involved in civil rights litigation, in citizen group litigation, and the like. One example is litigation challenging election campaign contributions and activities. "We need to think about the impact." Another judge suggested that in state-court litigation it is common to encounter filing fees borrowed from family members, and many similar instances of friendly financing, with explicit or implicit understandings that repayment will depend on success.

A third judge suggested that it would be useful to know about financing in appointing lead counsel, and also in settlement. He can "ask and order" to get the information when it seems desirable.

These questions about defining the kinds of arrangements to be disclosed prompted a suggestion that some help might be found in the analogy to insurance disclosure, which covers only an insurance agreement with an insurance business. Other forms of indemnity agreements, and business or personal assets, are not included. Although further refinement would be needed, it might help to start by thinking about disclosure, more or less extensive, of financing agreements with enterprises that engage in the business of investing in litigation.

A judge said that he had encountered various forms of funding arrangements on the defense side. Others who are interested in the outcome, directly or precedentially, may help fund the defense. Joint defense agreements often address cost sharing, and contributions may be set by making rough calculations of likely proportional liability. The prospect of such arrangements, and perhaps investments by firms that now engage in funding plaintiffs, should be considered in shaping any disclosure proposal that might emerge.

The Committee member who has dealt with third-party funding in patent litigation responded to questions by noting that he has clients who can fund their own patent litigation. But patent cases have become increasingly costly. The cost increase is due in part

to an increasing number of hurdles a plaintiff must surmount to get to verdict and then through the Federal Circuit. The pendulum has shifted in patent law, making it more difficult to get to trial. In the old days, his firms and others could pay the expenses. But "as costs rose, and risks, we became less willing to cover the expenses." Third-party financing is replacing law firms as the source of financing.

Professor Coquillette observed that "we need to learn more." If work goes forward, it will be important to learn what states are doing about third-party financing. The states are better equipped than the federal courts are to deal with ethical issues such as conflicts of interest and control.

A judge suggested that it may not be useful to require disclosure of information when the courts are not equipped to do anything with the information. An example is suggested by litigation in which a defendant, after a number of unfavorable rulings, retained as additional counsel a law firm that included the judge's spouse. Rather than countenance this attempt at judge shopping, the chief judge ordered that the new firm could not play any role in the litigation. Something comparable might happen with third-party financing, without the opportunity for an analogous cancellation of the financing agreement. It does not seem likely that judges will invest in enterprises that engage in third-party financing, but there may be a risk, especially with networks of related interests. Judge Bates noted that similar concerns had emerged with filing amicus briefs on appeal.

Judge Bates summarized the discussion by suggesting that a sense of caution had been expressed. Further discussion might be resumed in the discussion of MDL proposals, one of which explicitly adopts the disclosure proposal that prompted this discussion.

Rules for MDL Proceedings

Judge Bates opened the discussion of the proposals for special Multidistrict Litigation Rules by suggesting that two of the proposals are essentially the same, while the third is distinctively different.

All three proposals agree that MDL proceedings present important issues. They account for a large percentage of all the individual cases on the federal court docket. The Civil Rules do not really address many of the issues encountered in managing an MDL proceeding. Proponents of new rules suggest that courts often simply ignore the Civil Rules in managing MDL proceedings. And Congress has shown an interest. H.R. 985, which has been passed in the House, includes several amendments of the MDL statute, 28 U.S.C. § 1407.

The major concerns focus on cases with large numbers of claimants. The perception is that many of the individual claimants have no claim at all, not even any connection with the events being litigated by the real claimants. The concern is that there is no effective means of screening out the fake claimants at an early stage in the litigation. Many alternative means of early screening are proposed. But it is not clear what differences may flow from early screening as compared to screening at the final stages of the litigation if the MDL leads to resolution on terms that dispose of the component actions. Apart from the several proposals for early screening, concerns also are expressed about pressures to participate in bellwether trials and about the need to expand the opportunities to appeal rulings by the MDL court.

Several different early screening proposals are advanced. Some of them interlock with others.

An initial proposal is that Rule 7 should be amended to expressly recognize master complaints and master answers in consolidated proceedings, and also to recognize individual complaints and individual answers. Subsequent proposals focus on requirements for individual complaints or supplements to them.

A direct pleading proposal is that some version of Rule 9(b) particular pleading requirements should be adopted for individual complaints in MDL proceedings. An alternative is to create a new Rule 12(b)(8) motion to dismiss for "failure to provide meaningful evidence of a valid claim in a consolidated proceeding." The court must rule on the motion within a prescribed period, perhaps 90 days; if dismissal is indicated, the plaintiff would be allowed an additional time, perhaps 30 days, to provide "meaningful evidence." If none is provided the dismissal will be made with prejudice.

A related proposal addresses joinder of several plaintiffs in a single complaint. The suggestion is that Rule 20 be amended by adding a provision for a defense motion to require a separate complaint for each plaintiff, accompanied by the filing fee.

The next proposal is for three distinct forms of disclosure. One would require each plaintiff in a consolidated action to file "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant's conduct or product." The second disclosure tracks the disclosure of third-party financing agreements as proposed in the submission already discussed. The third would require disclosure of "any third-party claim aggregator, lead generator, or related business * * * who assisted in any way in identifying any potential plaintiff(s) * * *." This proposal reflects concern that plaintiffs recruited by advertising are not screened by the recruiters, and often do not have any shade of a claim.

Turning to bellwether trials, the proposal is that a bellwether trial may be had only if all parties consent through a confidential procedure. In addition, it is proposed that a party should not be required to "waive jurisdiction in order to participate in" a bellwether trial. This proposal in part reflects concern with "Lexecon waivers" that waive remand to the court where the action was filed and also waive "jurisdiction." (Since subject-matter jurisdiction cannot be waived, the apparent concern seems to be personal jurisdiction in the MDL court.)

Finally, it is urged that there should be increased opportunities to appeal as a matter of right from many categories of pretrial rulings by the MDL court. The concern is both that review has inherent values and that rulings made unreviewable by the final-judgment rule result in "an unfair and unbalanced mispricing of settlement agreements."

A quite different proposal was submitted by John Rabiej, Director of the Center for Judicial Studies at the Duke University School of Law. This proposal aims only at the largest MDL aggregations, those consisting of 900 or more cases. At any given time, there tend to be about 20 of these proceedings. Combined, they average around 120,000 individual cases. There are real advantages in consolidated pretrial discovery proceedings. But when the time has come for bellwether trials, the proposal would split the aggregate proceeding into five groups, each to be managed by a separate judge. Separate steering committees would be appointed. The anticipated advantage is that dividing the work would increase the opportunities for individualized attention to individual cases, although the large numbers involved might dilute this advantage.

One concern that runs through these proposals is that MDL judges are "on their own." Judicial creativity creates a variety of approaches that are not cabined by the Civil Rules in the ways that apply in most litigation.

Addressing rules for MDL proceedings "would be a big undertaking. It is a complex and broad project to take on." And it is a project affected by Congressional interest, as exhibited in H.R. 985, which includes a number of proposals that parallel the proposals advanced in the submissions to the Committee.

Professor Marcus reported that Professor Andrew Bradt has worked through the history of § 1407. The history shows a tension in what the architects thought it would come to mean for mass torts. The reality today presents "hard calls. The stakes are enormous, the pressures great. Judges have provided a real service."

Judge Bates predicted that a rulemaking project would bring out "two clear camps. We will not find agreement."

The appeals proposals were the last topic approached in introducing these topics. The suggestions in the submissions to this Committee are no more than partially developed. It is clear that the proponents want opportunities to appeal from pretrial rulings on *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in bellwether trials, and "any ruling that the FRCP do not apply to the proceedings." It is not clear whether all such rulings could be appealed as a matter of right, or whether the idea is to invoke some measure of trial-court discretion in the manner of Civil Rule 54(b) partial final judgments. Nor is it clear what criteria might be provided to guide any discretion that might be recognized. One of the amendments of § 1407 embodied in H.R. 985 would direct that the circuit of the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the ultimate termination of one or more civil actions in the proceedings." The proviso clearly qualifies the "shall permit" direction, but the overall sense of direction is uncertain. The Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that define what are final judgments for purposes of § 1291 and to create new categories of interlocutory appeals. If the Committee comes to consider rules that expand appeal jurisdiction, it likely will be wise to coordinate with the Appellate Rules Committee.

The first suggestion when discussion was opened was that these questions are worth looking into. The Committee may, in the end, decide to do nothing. "Some of the ideas won't fly." But it is worth looking into.

Judge Bates noted that almost all of the input has been from the defense side. The Committee has yet to hear the perspectives of plaintiffs, the Judicial Panel on Multidistrict Litigation, and MDL judges.

A Committee member noted that his experience with MDL proceedings has mostly been in antitrust cases, "on both sides of the docket," and may not be representative. "The challenges for judges are enormous." Help can be found in the Manual for Complex Litigation; in appointing special masters; in seeking other consultants; and in adaptability. Still, judges' efforts to solve the problems may at times seem unfair. It is difficult to be sure about what new rules can contribute. If further information is to be sought before deciding whether to proceed, where should the Committee seek it?

Judge Bates suggested that it may be difficult to arrange a useful conference of multiple constituencies in the course of a few months or even a year. The Committee can reach out by soliciting written input. It can engage in discussions with the Judicial Panel. It can reach out to judges with extensive MDL experience. Judge Fogel noted that the FJC and the Judicial Panel have

scheduled an event in March. "The timing is very good." That could provide an excellent opportunity to learn more.

Another judge suggested that judges that have managed MDL proceedings with large numbers of cases might have useful ideas about what sort of rules would help. "We have nowhere near the information we would need to have" to work toward rules proposals. At least a year will be required to gather more information.

A Committee member echoed this thought. "We're far from being ready to think about this." She is not opposed to looking into these questions, "but we must hear from all sides."

Another judge noted that she has an MDL proceeding with more than 4,000 members. She has 17 *Daubert* hearings scheduled. "It's a lot of pressure" to get things right. We should think about working with the Appellate Rules Committee. Another judge described an MDL proceeding with 3,200 claimants and 20 *Daubert* hearings.

A Committee member asked whether the Judicial Panel has accumulated information about MDL practices.

Judge Campbell described resources available to MDL judges. The Judicial Panel has a web site with a lot of helpful information and forms. The Judicial Panel staff attorneys are very helpful about model orders. The Manual for Complex litigation is useful. There are annual conferences for MDL judges. And lawyers "bring a lot to the table." Experienced MDL lawyers reach agreement much more often than they disagree. But the question of appeal opportunities is important and should be explored. It would be very hard to manage an MDL if there are multiple opportunities to appeal. As an example, in one massive securities case a § 1292(b) appeal was accepted from an order entered in August, 2015. The appeal remains pending. The case has been essentially dead while the appeal is undecided. "Managing with appeals is a tough balance."

Judge Campbell continued by taking up the question of means for early procedures to weed out frivolous cases. In his 3,200-claimant MDL four new claims are filed every day. It is impossible in this setting to have evidential showings for each claimant. It would be all the more impossible in cases with 15,000 claimants and 20 new claimants every day. The lawyers seem to know there are frivolous cases, and bargain toward settlement with this in mind. They often establish a claims process that weeds out frivolous claims. What is the need to weed them out at an earlier stage? The flow of new cases has no effect on discovery, on the day-to-day life of the case. It will be useful to learn why early screening is important.

Another judge seconded these observations. "I don't think it

makes a difference to sort out the frivolous cases at the beginning. We know they're there. Weeding them out takes effort. Weeding them out before discovery is especially doubtful."

An observer from a litigation funder asked what is the overlap between MDL procedures and third-party financing? Judge Bates noted that one of the MDL submissions expressly incorporates the disclosure proposal advanced for third-party financing.

John Rabiej described his proposal. The Center for Judicial Studies has been holding conferences since 2011. Data bases show that a large share of all the federal-court case load is held by 20 judges. "This holds over time. There is a business model that will endure for the foreseeable future." They are planning a conference for April, asking lawyers to address problems in practice. The Center has prepared a set of best practices guidelines that are being updated. It is a mistake to underestimate the burden that frivolous claims impose on defendants. The problem is the frivolous cases, not the "gray-area" cases. Reliable sources suggest that in big MDLS of some types 20% or more of the claims are "zeroed out."

There is some momentum in practice for providing some minimum information about each claimant at the outset. In drug and medical products cases, for example, the information would show a prescription for the medicine, and a doctor's diagnosis.

MDL proceedings are a big part of the caseload. "The Civil Rules are not involved." Judges like the status quo because they like the discretion they have. "Plaintiffs are basically happy," although they recognize there is room for rules on some topics such as the number of lawyers on a steering committee. "The Civil Rules Committee should be involved in this."

Judge Bates agreed that the Committee needs to learn more about the basis for the positions taken than the simple facts of what plaintiffs say, what defendants say, what MDL judges say.

Responding to a question, John Rabiej said that he has not found anyone who wants to talk about third-party financing in the MDL setting. It would be difficult for the Center to devise best practices for third-party financing. "It does come up in MDL proceedings — funders even direct attorneys where to file their actions."

Susan Steinman noted that most American Association for Justice members work on contingent-fee arrangements. "They have no incentive to take cases that are not meritorious." Third-party financing is not an issue to be addressed in the Civil Rules. "It is a business option some members choose." There may be some areas of disagreement among plaintiffs, but they tend to have negative views of disclosure.

Alexander Dahl said that weeding out frivolous claims is an important part of the system. "Rules 12 and 56 are designed for this." In MDL proceedings, the weeding-out function is still more important. "It is numbers that make them complex." The numbers are inaccurate in ways that we do not know. "Numbers raise the stakes and pressures." "Some courts see MDL proceedings as a mechanism for settlement, not truth-seeking. Settlements require a realistic understanding of what the case is worth." And there is an important regulatory aspect. A publicly traded company has to disclose litigation risks. If it loses a bellwether trial, it has to disclose the 15,000 other cases, even though many of them are bogus, inflating the apparent exposure to risk of many losses.

Alexander Dahl also provided a reminder that the proposal to disclose litigation-financing agreements calls only for disclosure. There is no need to resolve all the mysteries that have been identified in discussing third-party financing.

A judge asked whether a "robust fact sheet" would satisfy the need for early screening? She requires them. A defendant can look at them. Alexander Dahl replied that there are a lot of cases where that does not happen. When it does happen, it can work well. What is important is uniformity of practice.

A Committee member observed that not all MDL proceedings involve drugs or medial devices.

Another Committee member asked what is the "simple disclosure" of litigation-funding that is proposed? Alexander Dahl replied that the proposal seeks the funding agreement, although "the existence of funding is the most important" thing.

Judge Campbell noted that he understands the argument for early screening. In his big MDL there is a master complaint. Each plaintiff files a fact sheet. The defendant carefully tracks the fact sheets and identifies suspect cases. "But I never see them." The defendants identify the suspect cases in bargaining. "How is it feasible for the judge to screen them"? Alexander Dahl responded that the use of fact sheets varies. Compliance varies. "Often defendants have to gather the information on their own." Defendants eventually bring motions to dismiss where that is important. Again, "uniformity in practice is important," including "uniform standards for dismissal." Further, we need to know what ineffectual judges are doing. The rulemaking process would be beneficial to all sides. Rules can allow sufficient flexibility while still providing guideposts for cases where guidance is needed.

John Rabiej described an opinion focusing on a proceeding with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used in many of these cases. That is why lawyers are devising procedures to get some kind of fact information. That is all they need.

A Committee member asked why is it necessary to consider particularized pleading, or motions to dismiss for want of meaningful evidence? Why is it not sufficient to apply the pleading standards established by the Twombly and Iqbal decisions?

Judge Bates summarized the discussion by stating that the Committee needs to gather more information. Valuable information has been provided, but it is mostly from one perspective. The Committee has learned a lot from the comments provided this day. But the Committee needs more, particularly from the Judicial Panel. The Committee should launch a six- to twelve-month project to gather information that will support a decision whether to embark on generating new rules. A Subcommittee will be appointed to develop this information. For the time being, third-party financing will be part of this, at least for the MDL framework.

Rule 16: Role of Judges in Settlement

A proposal to amend Rule 16 to address participation by judges in settlement discussions is made in Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St.L.J. 73 (2017). The proposal calls for a structural separation of two functions – the role of "settlement neutral" and the role of the judge in "management and adjudication." The judge assigned to manage the case and adjudicate would not be allowed to participate in the settlement process without the consent of all parties obtained by a confidential and anonymous process. The managing-adjudicating judge could, however, encourage the parties to discuss settlement and point them toward ADR opportunities. A different judge of the same court could serve as settlement neutral, providing the advantages of judicial experience and balance.

The proposal reflects three central concerns. The judge's participation may exert undue influence, at times perceived by the parties as coercion to settle. Effective participation by a settlement neutral usually requires information the parties would not provide to a case-managing and adjudicating judge. If the judge gains the information, it will be difficult to ignore it when acting as judge. In part for that reason, the parties may not reveal information that they would provide to a different settlement neutral, impairing the opportunities for a fair settlement.

The proposal recognizes contrary arguments. The judge assigned to the case may know more about it, and understand it better, than a different judge. The parties may feel that participation by the assigned judge gives them "a day in court" in ways not likely with a different judge or other settlement neutral. And the assigned judge may be better able to speak reason to unreasonably intransigent parties.