it may appear that it is not something appropriately included in a
rule, but instead a management technique that could be included in
the Manual for Complex Litigation, or disseminated by the Judicial
Panel. So this first topic remains under study.

(2) Interlocutory Appellate Review —
Recommendation Not to Pursue at This Time

The original proposal for a rule providing an additional route
to interlocutory review in MDL proceedings, perhaps limited to mass
tort proceedings, called for a right to immediate review without
the “veto” that 28 U.S.C. § 1292(b) provides the district court by
permitting review only when the district judge certifies that the
three criteria specified in the statute are met. Under § 1292(b),
the court of appeals has discretion whether to accept the appeal.
But the original proposal was to remove that discretion with regard
to interlocutory appeals in MDL proceedings, and require the court
of appeals to accept the appeal.

From that beginning, the discussion evolved. The notion of
mandatory review was dropped relatively early on, and proponents of
a rule instead urged something like Rule 23(f), giving the court of
appeals sole discretion whether to accept the appeal, and including
no provision for input from the transferee district judge on
whether an immediate appeal would be desirable. In addition,
proponents of a new rule made considerable efforts to provide
guidance on distinguishing among MDL proceedings (limiting the new
appellate opportunity to only certain MDLs), and on distinguishing
among orders, to focus the additional opportunity for interlocutory
review on the situations in which it was supposedly needed.

The proponents of expanded interlocutory review came mainly
from the defense side, and principally from those involved in
defense of pharmaceutical or medical device litigation. The basic
thrust of those favoring an additional route for interlocutory
review was that interlocutory orders can sometimes have much
greater importance in MDL proceedings, which may involve thousands
of claims, than in individual litigation. So there might be greater
urgency to get key issues resolved, particularly if they were
“cross-cutting” issues that might dispose of many or most of the
pending cases. One example of such issues was the possibility of
preemption of state law tort claims.

Another concern was that some transferee judges might resist
§ 1292(b) certification when it was justified in order to promote
settlement. On the other hand, some suggested that permitting
expanded interlocutory review might actually further settlement;
defendants unwilling to make a substantial (sometime very
substantial) settlement based on one district judge’s resolution of
an issue like preemption might have an entirely different attitude
if a court of appeals affirmed the adverse ruling.

In addition, it was urged that the final judgment rule leads
to inequality of treatment. Should defendants prevail on an issue
such as preemption, or succeed in excluding critical expert
testimony under Daubert, plaintiffs often could appeal immediately
because that would lead to entry of a final judgment in defendants’
favor. But when they failed to obtain complete dismissal of
plaintiffs’ claims, defendants urged, they would not get a similar
immediate route to appellate review.

There was strong opposition from plaintiff-side lawyers. One
argument was that the existing routes to interlocutory review
suffice in MDL proceedings. There are already multiple routes to
appeal review, particularly under 28 U.S.C. § 1292(b), via
mandamus and, sometimes, pursuant to Rule 54(b). For recent
elements of interlocutory review sought or obtained in MDL
proceedings, see In re National Opiate Litig., 2020 WL 1875174 (6th
Cir., Apr. 15, 2020) (granting writ of mandamus on defendants’
petition); In re General Motors LLC Ignition Switch Litig., 427 F.
Supp. 3d 374 (S.D.N.Y. 2019) (certifying issue for appeal under
§ 1292(b) on plaintiffs’ motion); In re Blue Cross Blue Shield
Antitrust Litig., 2018 WL 3326850 (N.D. Ala., June 12, 2018)
certifying issue for appeal under § 1292(b) on defendants’
motion). Expanding review would lead to a broad increase in appeals
and produce major delays without any significant benefit,
particularly when the order is ultimately affirmed after extended
proceedings in the court of appeals. And, of course, the
“inequality” of treatment complained of is a feature of our system
for all civil cases, not just MDLs.

Both sides provided the subcommittee with extensive
submissions, including considerable research on actual experience
with interlocutory review in MDL proceedings. There was very
serious concern, including among judges, about the delay
consequences of such review.

In addition, the Rules Law Clerk provided the subcommittee
with a memorandum. Some conclusions seem to follow from these
materials:

1. There are not many § 1292(b) certifications in MDL
proceedings.

2. The reversal rate when review is granted is relatively
low (about the same as in civil cases generally).

3. A substantial time (nearly two years) on average passes
before the court of appeals rules.

4. The courts of appeals (and district courts) appear to
acknowledge that there may be stronger reasons for
allowing interlocutory review because MDL proceedings are
involved.

The subcommittee has received a great deal of input and help
in evaluating these issues. Representatives of the subcommittee
have attended (and often spoken at) at least fifteen conferences
around the country (and one in Israel) dealing with issues the
subcommittee was considering. Two of them were full-day events
organized by Emory Law School to focus entirely on the
interlocutory review issues.

The most recent conference — on June 19, 2020 — involved
lawyers and judges with extensive experience in MDL proceedings
more generally, not only “mass tort” litigation. In particular, it
included ten district judges and four court of appeals judges. Both
the current Chair of the Judicial Panel and the previous Chair
participated. Two former Chairs of the Standing Committee
participated, as well as a number of other judges with experience
on rules committees. There were also two judicial officers from the
California state courts — a Superior Court judge who is in the
Complex Litigation Department of Los Angeles Superior Court (and is
presently a member of the Standing Committee) and a Justice of the
California Court of Appeal who provided the Subcommittee with a
memorandum on a 2002 statute adopted in California that provided
for interlocutory review on grounds very similar to those in § 1292(b).

On August 18, the subcommittee met by conference call to
discuss its recommendation to the full Committee on whether to
pursue a rule for expanded interlocutory review. The discussions
are reflected in the extensive notes on that conference call, which
are included in this agenda book, with an Appendix listing the
participants in the June 19 online conference on these issues.

The many events attended by members of the subcommittee,
entirely or largely addressed to the appellate review question,
have provided a thorough examination of the subject. And the
starting point for the subject was that the existing routes to
interlocutory review provide meaningful review in at least some
cases, as illustrated recently by the Sixth Circuit’s mandamus
ruling in the opioids MDL and Judge Furman’s certification in the
GM Ignition Switch litigation (at plaintiffs’ request) which was
accepted by the Second Circuit. Particularly in light of the low
rate of reversal when review is granted, it is difficult to
conclude that there is evidence of a serious problem to be solved
by expanding interlocutory review.

Against this background, all subcommittee members concluded
that proceeding further with this idea was not warranted in light
of the many difficulties with doing so (some of which are mentioned
below, as they would remain important were the subcommittee to
continue down this path). The various reasons articulated by
different members of the subcommittee are reflected in the notes of
the August 18 call. Some of the reasons mentioned by subcommittee
members can be summarized as follows:

Delay: There is clearly a significant issue with delay, and in
some circuits it may be more substantial than in others. Though
allowing expanded avenues for review need not be linked to a stay
of proceedings in the district court, the more that one focuses
review on “cross-cutting” issues, the greater the impulse to pause proceedings until that issue is resolved.

Broad judicial opposition: Though there are some judges who have participated in events attended by members of the subcommittee who expressed willingness to consider expanded interlocutory review, by and large judges were opposed. Court of appeals judges often resisted any idea of “expedited” treatment on appeal of MDL matters (suggested as an antidote to the delay problem), and many regarded existing avenues for interlocutory review as sufficient to deal with real needs for review.

Undercutting the federal court’s potential “leadership” role when there is parallel litigation in state courts: When there is federal MDL proceedings, particularly “mass tort” litigation, it often happens that there is also parallel state court litigation, and the federal MDL court can provide something of a “leadership” role and coordinate with the state court judges. But if the progress of the federal MDL were stalled by an interlocutory appeal, at least some of the state courts likely would not be willing to wait for the resolution of a potentially lengthy period of appellate review. Resulting fragmentation of the overall litigation would be undesirable and inconsistent with the overall objective of § 1407, which seeks consistent management and judicial efficiency. That would be an unintended consequence, but still could be serious; indeed, a judge who participated in the June 19 event called it the “Achilles heel of MDL.”

Difficulties defining the kinds of MDL proceedings in which the new avenue for appeal would apply: Originally, the proposal for expanding interlocutory review focused on “mass tort” MDLs. That category does seem to include most of the MDLs with very large claimant populations. But it’s not clear that it would include all of them. The VW Diesel litigation, for example, involved tens of thousands of claimants, but was mainly claiming economic rather than personal injury damages. And data breach MDLs may become more common, raising potentially difficult issues about what is a “personal injury” claim.

An additional difficulty is to determine whether there should be a numerical cutoff to trigger the opportunity for review. Whatever number were chosen to trigger the right to expanded review (e.g., 500 claimants, 1,000 claimants), there could be difficulties determining when that milestone was passed. Some research suggests that some MDL proceedings receive huge numbers of new entrants long after the centralized proceedings were begun. Triggering a new interlocutory review opportunity then would not seem productive. Moreover, there could sometimes be a question about whether one should “count” the unfiled claims on a registry, as in the Zantac litigation.

Finally, if the new appellate route were available in all MDLs (perhaps because no sensible line of demarcation among MDL proceedings could be articulated in a rule), rather than only some
of them, there might be questions about why an MDL centralization
order would expand the opportunity for interlocutory review when
individual cases, consolidated actions or class actions in a given
district might involve many more claimants (perhaps hundreds or
thousands) but not be eligible for expanded interlocutory review.

Difficulties defining the kind of rulings that could be
reviewed, and burdening the court of appeals: Another narrowing
idea that was proposed was to limit the new route to review to
rulings on certain legal issues — e.g., preemption motions or
Daubert decisions or jurisdictional rulings — but none of those
limitations appeared easy to administer, and these rulings did not
seem so distinctive as to support a special route to immediate
review.

Another idea was to focus on “cross-cutting” rulings, those
that are “central” to a “significant” proportion of the cases
pending in the district court. That determination could be
particularly challenging for a court of appeals, as it might mean
that the appellate court would need to become sufficiently familiar
with all the litigation before the district court to determine
whether the rule’s criteria were satisfied. A Rule 23(f) petition
for review, by way of contrast, would not require consideration of
such varied issues dependent on the overall and individual
characteristics of what is often sprawling litigation.

Undercutting the district court: As noted below, the
subcommittee has concluded that if it is to proceed further along
this path, it is important to ensure a central role for the
district court, if not a “veto” as provided in § 1292(b). Only the
district court will be sufficiently familiar with the overall
litigation to advise the court of appeals on the role of the ruling
under challenge in the overall progress of the litigation. Though
one might rewrite § 1292(b) to change the “materially advance the
ultimate termination of the litigation” standard in the statute to
take account of the limits of § 1407 to “pretrial” proceedings, the
existing standard does not seem to have deterred transferee judges
from certifying issues for interlocutory review. Any new rule would
have to ensure that the district court’s perspective was included,
not only to assist the court of appeals but also to recognize the
need to avoid unnecessary disruption of proceedings in the district
court.

In sum, for these reasons and others, the entire subcommittee
recommends to the Advisory Committee that further efforts on
expanding interlocutory review not be pursued at this time.

Subcommittee Views on Other Issues

that Would Have to be Faced Moving Forward

In case the full Advisory Committee concludes that further
efforts are justified regarding interlocutory review, the
subcommittee explored the extent to which it has reached consensus
on a number of points that would need to be considered going
forward. Here is a summary of those points, provided here for the full Advisory Committee’s information:

**Appeal as of right:** The original proposal was for a right to appeal from any ruling falling within a defined category in any MDL proceedings involving “personal injury” claims. The subcommittee has reached consensus that no rule should command that the court of appeals entertain such an appeal. Any rule would have to provide the court of appeals discretion to decide whether to accept a petition for review.

**Expedited treatment of an appeal in the court of appeals:** Another suggestion was that a Civil Rule direct that the court of appeals “expedite” the resolution of appeals it has decided to accept under the hypothetical new rule. It is not clear how a Civil Rule could require such action by a court of appeals. Putting that issue aside, the subcommittee has reached consensus that there is no persuasive reason for requiring that the court of appeals alter the sequence of decisionmaking it would otherwise adopt and advance these appeals ahead of other matters, such as criminal cases, broad-based (even national) injunctions regarding governmental activity, cases accepted for review under existing § 1292(b) or Rule 23(f), or ordinary appeals after final judgment.

**Ensuring a role for district court:** As noted above, the subcommittee is committed to ensuring a role for the district court in advising the court of appeals on whether to grant review. Not only is that advice likely critical to provide the court of appeals with sufficient information to permit it to make a sensible determination whether to grant review, but it is also critical to safeguarding against disrupting the district court’s handling of the centralized litigation. The goal of § 1407 transfer is to provide a method for coordinated and disciplined supervision of multiple cases (perhaps inclining state courts to follow federal “leadership” with regard to cases pending in state courts) and, as noted above, the delays that can attend interlocutory review could disrupt that coordinated supervision.

**Devising a method for the district court’s input to be provided:** The best method for providing a district court role likely would present drafting challenges, however. Numerous models already exist, including § 1292(b) (district court certification required); Appellate Rule 21(b)(4) (the court of appeals may invite or order the district judge to address a petition for mandamus); Cal. Code Civ. Pro. §166.1 (permitting any party to request, or the trial court judge to provide without a request, an indication whether the trial court judge believes immediate review would materially advance the conclusion of the litigation). Alternatively, a rule could give the district court a period of time (say 30 days) to express its views on the value of immediate review, perhaps including specifically the question whether immediate review would be useful only if the appeal were resolved within a specified period of time. The subcommittee has not reached consensus on which method would be best to ensure a role for the