

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**MEMORANDUM**

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. John D. Bates, Chair  
Advisory Committee on Civil Rules

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** May 18, 2017

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*Introduction*

The Civil Rules Advisory Committee met in Austin, Texas, on April 25, 2017. Draft Minutes of this meeting are attached.

Action items are presented in Part I. Proposals to amend Civil Rules 5, 23, 62, and 65.1 were published for comment last August. The Rule 5 proposals coordinate with similar proposals published for comment on recommendations by the Appellate, Bankruptcy, and Criminal Rules Committees. The Rules 62 and 65.1 proposals work in tandem with coordinating proposals published for comment on recommendation of the Appellate Rules Committee. Written comments were submitted on all proposals, although Rule 23 received a majority of them. Three hearings were held, the first on November 3 in conjunction with the Civil Rules meeting, the second on January 4, and the third, by teleconference, on February 16. Almost all of the

testimony addressed Rule 23. Summaries of the comments and testimony are provided with each rule. The Committee recommends that these proposals be recommended for adoption with revisions suggested by the comments and testimony or developed from further joint work with the other advisory committees.

Part II recounts the Committee's tentative views on assigning relative priorities in allocating its resources to five topics. Two of them are new: A proposal to create rules to govern district-court review of individual Social Security disability claims, and a proposal to expand attorney rights to participate in jury voir dire questioning under Civil Rule 47. Three of the topics are familiar from discussion last January: demands for jury trial, both in original actions and in cases removed from state court; the means of serving Rule 45 subpoenas; and offers of judgment under Rule 68.

Part III describes the next steps to be taken by the Rule 30(b)(6) Subcommittee in considering whether to propose amendments that would address recurring issues that arise when an organization is named as a deponent and must provide testimony through persons who are knowledgeable about the information available to the organization.

Part IV provides a brief account of progress in implementing the Expedited Procedures and Mandatory Initial Discovery Pilot Projects.

Finally, Part V describes Committee action on a variety of proposals advanced in suggestions submitted to the Committee.

## **I. RECOMMENDATIONS TO APPROVE FOR ADOPTION**

### **A. RULE 5**

The proposed amendments of Rule 5 address service and filing of papers after the summons and complaint. The central purpose of the amendments is to recognize the changes that have developed in practice regarding filing and service through the court's electronic-filing system. The amendments also address recurring issues about incidental aspects of e-filing and service.

Turning first to service, proposed Rule 5(b)(2)(E) is recommended for adoption as published. Present Rule 5(b)(2)(E) requires consent of the person served if service is to be made by any electronic means. Present Rule 5(b)(3) provides that if authorized by local rule, a party may use the court's transmission facilities to make service. The proposal changes this system to allow service by sending a paper to a registered user by filing it with the court's electronic filing system. Consent of the registered user is not required. Adopting a uniform national provision entails the further proposal to abrogate Rule 5(b)(3). Rule 5(b)(2)(E) will continue to require written consent of the person to be served when service is made by electronic means outside the court's system.

Although the service provisions are recommended without change, a new paragraph is proposed for the Committee Note. This paragraph summarizes the service provisions and advises that: “[T]he rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.” The Note further observes that a filer who learns that the transmission failed is responsible for making effective service, an obligation imposed by the present rule and carried forward in the proposed rule.

Present Rule 5(d)(3) permits papers to be filed, signed, or verified by electronic means if permitted by local rule. A local rule may require electronic filing only if reasonable exceptions are allowed. Most courts have come to require registered users to file electronically. Proposed Rule 5(d)(3)(A) makes this practice uniform—a person represented by an attorney must file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. This amendment has not generated any controversy.

Electronic filing by a person not represented by an attorney is treated differently by proposed Rule 5(d)(3)(B). Electronic filing is permitted only if allowed by court order or by local rule, and may be required only by court order or by a local rule that includes reasonable exceptions. This proposal has generated some concerns. Comments and testimony made it clear that some pro se parties are fully capable of engaging in electronic filing and that permitting this practice can work to benefit the filer, the court, and all other parties. But the Committee—in line with the other advisory committees—concluded that for the present the risks of a general opportunity to file electronically outweigh the benefits. The prospect that a pro se party might be required to file electronically raised fears that access to the court would be effectively denied to persons not equipped to do so. Proposed Rule 5(d)(3)(B) was included in the rule to support programs in a few courts that have set up systems for pro se filing by prisoners. The programs seem to work and to provide real benefits. The Committee Note includes a reminder that access to court must be protected. The Committee concluded that this provision should be included in the recommendation.

Proposed Rule 5(d)(3)(C) is a signature provision to take the place of the provisions in local rules that govern signing an electronic filing. The published version provided that “[t]he user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.” Comments found ambiguity—this wording might be read to require that the name and password appear on the paper. The comments also expressed uncertainty about identifying an attorney of record on the party’s first filing. In consultation with the other advisory committees, the recommendation is to substitute this language:

An authorized filing made through a person’s electronic filing account, together with the person’s name on a signature block, constitutes the person’s signature.

Proposed Rule 5(d), finally, includes a provision for a certificate of service. Present Rule 5(d)(1) states this: “Any paper after the complaint that is required to be served—together

with a certificate of service—must be filed within a reasonable time after service.” The published proposal aimed to dispense with a separate certificate of service for papers served by filing with the court’s electronic-filing system under proposed Rule 5(b)(2)(E): “A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court’s electronic-filing system.” Further discussion found reasons to revise this approach. Treating the notice of electronic filing as a certificate of service has an element of fiction; the Civil Rule proposal then was modified, following the lead of the Appellate Rule proposal, to provide that no certificate of service is required when a paper is served by filing it with the court’s system. That change is carried forward in the revised language set out below.

Additional difficulties emerged from carrying forward the present rule’s provision that a paper must be filed within a reasonable time after service. The principal difficulty seems to be unique to the Civil Rules. Following the direction that a paper must be filed within a reasonable time after service, Rule 5(d)(1)’s second sentence directs that many disclosures and discovery papers “must not be filed until they are used in the proceeding or the court orders filing \* \* \*.” That raised the question whether a certificate of service should be required for a paper that may be filed a long time after it is served, and may well not be filed at all. Several attempts were made to draft a provision to address this situation. Different views were expressed on the value of filing the certificate. Some observers thought that filing certificates would do no more than add needless clutter to court files. But others thought that filing certificates would enable a judge to monitor the docket to ensure that the parties were diligently pursuing an action, and might also prove useful to parties not directly involved with the papers served. Weighing these concerns, the Committee recommends this language for adoption as Rule 5(d)(1)(B), recognizing that item (ii) will be unique to the Civil Rules:

- 1                   (B) *Certificate of Service*. No certificate of service is required when a paper is
- 2   served by filing it with the court’s electronic-filing system. When a paper
- 3   that is required to be served is served by other means:
- 4
- 5   (i) if the paper is filed, a certificate of service must be included with it or
- 6   filed within a reasonable time after service, and
- 7
- 8   (ii) if the paper is not filed, a certificate of service need not be filed unless
- 9   filing is required by local rule or court order.

The overstrike and underline version of Rule 5 set out here uses simple overstriking to show changes from present Rule 5, underlining to show new words included in the published proposal, overstriking and underlining to show words included in the published proposal but not in the final proposal, and double underlining to show new words added after publication by the final proposal. The simpler traditional system of overstriking and underlining is used in the Committee Note.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2  
3 \* \* \* \* \*

4 **(b) SERVICE: HOW MADE.**

5  
6 \* \* \* \* \*

7  
8 **(2) Service in General.** A paper is served under this rule by:

9  
10 **(A)** handing it to the person;

11  
12 \* \* \* \* \*

13  
14 **(E)** sending it to a registered user by filing it with the court's electronic-filing  
15 system or sending it by other electronic means if that the person consented  
16 to in writing—in either of which events service is complete upon  
17 ~~transmission~~ filing or sending, but is not effective if the serving party filer  
18 or sender learns that it did not reach the person to be served; or

19  
20 \* \* \* \* \*

21  
22 ~~**(3) Using Court Facilities.** If a local rule so authorizes, a party may use the court's~~  
23 ~~transmission facilities to make service under Rule 5(B)(2)(E).~~ [Abrogated  
24 (Apr. \_\_, 2018, eff. Dec. 1, 2018.)]

25  
26 \* \* \* \* \*

27  
28 **(d) FILING.**

29  
30 **(1) Required Filings; Certificate of Service.**

31  
32 **(A) Papers after the Complaint.** Any paper after the complaint that is required to  
33 be served—~~together with a certificate of service~~—must be filed within  
34 no later than a reasonable time after service. But disclosures under  
35 Rule 26(a)(1) or (2) and the following discovery requests and responses  
36 must not be filed until they are used in the proceeding or the court orders  
37 filing: depositions, interrogatories, requests for documents or tangible  
38 things or to permit entry onto land, and requests for admission.

39  
40 **(B) Certificate of Service.** ~~A certificate of service must be filed within a~~  
41 ~~reasonable time after service, but a notice of electronic filing constitutes a~~  
42 ~~certificate of service on any person served by the court's electronic filing~~  
43 ~~system.~~ No certificate of service is required when a paper is served by

44 filing it with the court’s electronic-filing system. When a paper that is  
45 required to be served is served by other means:

- 46  
47 (i) if the paper is filed, a certificate of service must be filed with it or  
48 within a reasonable time after service, and  
49 (ii) if the paper is not filed, a certificate of service need not be filed unless  
50 filing is required by local rule or court order.

51 \* \* \* \* \*

52  
53  
54 (2) Nonelectronic Filing ~~How Filing is Made in General~~. A paper not filed  
55 electronically is filed by delivering it:

56  
57 (A) to the clerk; or

58  
59 (B) to a judge who agrees to accept it for filing, and who must then note  
60 the filing date on the paper and promptly send it to the clerk.

61  
62 (3) ~~Electronic Filing, and Signing, or Verification~~. ~~A court may, by local rule, allow~~  
63 ~~papers to be filed, signed, or verified by electronic means that are consistent with~~  
64 ~~any technical standards established by the Judicial Conference of the United~~  
65 ~~States. A local rule may require electronic filing only if reasonable exceptions are~~  
66 ~~allowed.~~

67  
68 (A) By a Represented Person—Generally Required; Exceptions. A person represented by  
69 an attorney must file electronically, unless nonelectronic filing is allowed  
70 by the court for good cause or is allowed or required by local rule.

71  
72 (B) By an Unrepresented Person—When Allowed or Required. A person not  
73 represented by an attorney:

74 (i) may file electronically only if allowed by court order or by local rule;

75 and

76 (ii) may be required to file electronically only by court order, or by a local  
77 rule that includes reasonable exceptions.

78  
79 (C) Signing. ~~The user name and password of an attorney of record, together with~~  
80 ~~the attorney’s name on a signature block, serves as the attorney’s~~  
81 ~~signature~~. An authorized filing made through a person’s electronic filing  
82 account, together with the person’s name on a signature block, constitutes  
83 the person’s signature.

84  
85 (D) Same as a Written Paper. A paper filed electronically ~~in compliance with a~~  
86 ~~local rule~~ is a written paper for purposes of these rules.

87

88

\* \* \* \* \*

COMMITTEE NOTE

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**Subdivision (b).** Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

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10

The amended rule recognizes electronic service through the court’s transmission facilities as to any registered user. A court may choose to allow registration only with the court’s permission. But a party who registers will be subject to service through the court’s facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court’s facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

15

16

Service is complete when a person files the paper with the court’s electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic-filing system that an attempted transmission by the court’s system failed. But a filer who learns that the transmission failed is responsible for making effective service.

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25

Because Rule 5(b)(2)(E) now authorizes service through the court’s facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

28

29

**Subdivision (d).** Rule 5(d)(1) has provided that any paper after the complaint that is required to be served “must be filed within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

33

34

~~Amended Rule 5(d)(1) provides that a notice of electronic filing generated by the court’s electronic filing system is a certificate of service on any person served by the court’s electronic filing system. Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court’s electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of (nonexistent) service. When service is not made by filing with the court’s electronic filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the~~

42

43 proceeding or the court orders filing, the certificate need not be filed until the paper is filed,  
44 unless filing is required by local rule or court order.

45 Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts  
46 have adopted local rules that require electronic filing, and allow reasonable exceptions as  
47 required by the former rule. The time has come to seize the advantages of electronic filing by  
48 making it generally mandatory in all districts for a person represented by an attorney. But  
49 exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a  
50 local rule may allow or require nonelectronic filing for other reasons.

51  
52 Filings by a person proceeding without an attorney are treated separately. It is not yet  
53 possible to rely on an assumption that pro se litigants are generally able to seize the advantages  
54 of electronic filing. Encounters with the court's system may prove overwhelming to some.  
55 Attempts to work within the system may generate substantial burdens on a pro se party, on other  
56 parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for  
57 governing by local rules or court order. Efficiently handled electronic filing works to the  
58 advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants  
59 with the court's permission. Such approaches may expand with growing experience in the courts,  
60 along with the greater availability of the systems required for electronic filing and the increasing  
61 familiarity of most people with electronic communication. Room is also left for a court to require  
62 electronic filing by a pro se litigant by court order or by local rule. Care should be taken to  
63 ensure that an order to file electronically does not impede access to the court, and reasonable  
64 exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In  
65 the beginning, this authority is likely to be exercised only to support special programs, such as  
66 one requiring e-filing in collateral proceedings by state prisoners.

67  
68 ~~The user name and password of an attorney of record, together with the attorney's name~~  
69 ~~on a signature block, serves as the attorney's signature. An authorized filing through a person's~~  
70 ~~electronic filing account, together with the person's name on a signature block, constitutes the~~  
71 ~~person's signature.~~

#### 72 Gap Report

73  
74 Published Rule 5(d)(1)(B) carried forward the requirement in present Rule 5(d)(1) that  
75 any paper after the complaint that is required to be served "must be filed within a reasonable  
76 time after service." That language does not clearly allow a paper to be filed before it is served. It  
77 is changed to direct filing "no later than" a reasonable time after service.

78  
79 The certificate of service provisions in proposed Rule 5(d)(1)(B) are changed. First, the  
80 provision that a notice of electronic filing constitutes a certificate of service on any person served  
81 by the court's electronic-filing service is replaced by a provision that no certificate of service is  
82 required when a paper is served by filing it with the court's electronic-filing system. Next, the  
83 provision that when a paper is served by other means a certificate of service must be filed within  
84 a reasonable time after service is replaced by a two-part direction: If the paper is filed, a  
85 certificate of service must be filed with it or within a reasonable time after service, and if the

86 paper is not filed, a certificate of service need not be filed unless filing is required by local rule  
87 or court order. The provision recognizing that a paper that has been served may not be filed  
88 reflects the direction in proposed Rule 5(d)(1)(A), carried over from present Rule 5(d)(1), that  
89 many disclosures and discovery papers must not be filed until the court orders filing or they are  
90 used in the action.

91

92 The Committee Note has been changed to reflect these changes.

## **RULE 5: CLEAN TEXT**

### **Rule 5. Serving and Filing Pleadings and Other Papers**

\* \* \* \* \*

#### **(b) SERVICE: HOW MADE.**

\* \* \* \* \*

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

\* \* \* \* \*

(E) sending it to a registered user by filing it with the court’s electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

\* \* \* \* \*

(3) [Abrogated (Apr. \_\_, 2018, eff. Dec. 1, 2018.)]

\* \* \* \* \*

#### **(d) FILING.**

(1) *Required Filings; Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests

for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of Service*. No certificate of service is required when a paper is served by filing it with the court’s electronic-filing system. When a paper that is required to be served is served by other means:

- (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service, and
- (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by local rule or court order.

\* \* \* \* \*

(2) *Nonelectronic Filing*. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing*.

(A) *By a Represented Person — Generally Required; Exceptions*. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required*. A person not represented by an attorney:

- (i) may file electronically only if allowed by court order or by local rule; and
- (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing*. An authorized filing made through a person’s electronic filing account, together with the person’s name on a signature block, constitutes the person’s signature.

(D) *Same as a Written Paper*. A paper filed electronically is a written paper for purposes of these rules.

\* \* \* \* \*

#### COMMITTEE NOTE

**Subdivision (b).** Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

**Subdivision (d).** Rule 5(d)(1) has provided that any paper after the complaint that is required to be served "must be filed within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.

Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court's electronic-filing system. When service is not made by filing with the court's electronic filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by

making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

An authorized filing through a person's electronic filing account, together with the person's name on a signature block, constitutes the person's signature.

#### **SUMMARY OF COMMENTS: RULE 5**

##### *In General*

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

##### *Rule 5(b)*

Pennsylvania Bar Association, CV-0064: The rule should provide for service by electronic means of papers not filed at the time of service, notably disclosures and discovery materials. Service would be by email addressed to attorneys of record at the addresses on the court's electronic filing system. E-service is faster generally, and reduces problems and uncertainty about service.

*Rule 5(d)(1)*

Andrew D’Agostino, Esq., 0035: It should be made clear that the proof of service of the complaint or other case-initiating document can be filed electronically.

Sergey Vernyuk, Esq., 0049: (1) Lawyers regularly include certificates of service as part of the papers served, both in paper form and e-form. The rule should clarify the status of an anticipatory certificate—should the certificate always be a separate document, prepared after actual service? (2) The bar should be educated on the proposition that a certificate need not be included in a disclosure or discovery paper that is not to be filed. (3) Rule 5(d) will continue to direct that “discovery requests and responses,” including “depositions” and “requests for documents [etc.]” not be filed. Does this mean that a Rule 45 subpoena to produce must not be filed as a discovery request to produce documents? (4) The separation of the certificate requirement from its place in the present rule creates an ambiguity. Present Rule 5(d) directs that the certificate be filed when the paper is filed, a reasonable time after service. That means that the certificate is never filed if the paper is never filed, given the direction that disclosures and most discovery papers are to be filed only when the court orders filing or when used in the action. Proposed Rule 5(d)(1)(B) says that the certificate must be filed within a reasonable time after service; on its face it contemplates filing the certificate even though the paper has not been, and may never be, filed.

Michael Rosman, Esq., 0049: As written, Rule 5(d)(1)(B) is ambiguous: the Notice of Electronic Filing constitutes a certificate of service, but must the filer separately file the NEF? It would be better to follow the lead of Appellate Rule 25(d)(1)(B), dispensing with the proof-of-service requirement as to any person served through the court’s system.

Federal Magistrate Judges Association, 0094: With paper, the practice has been to file with the court after making service. With e-filing, filing effects service. If the language of the current rule is retained, something should be added to reflect e-filing: “Any paper after the complaint that is required to be served, **but is served by means other than filing on the court’s electronic filing system**, must be filed within a reasonable time after service.”

*Rule 5(d)(2)*

Sai, 0074: The core message, elaborated over many pages, is direct: The proposed rule impairs the right to appear pro se “by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants.” “This inequity in access and delays results in two procedurally different systems \* \* \*.” “Before the law sit many gatekeepers. Let this not be one of them.”

A pro se litigant who completes whatever training is required for an attorney to become a registered user should be allowed to be a registered user without seeking additional permission, beginning with the right to file a complaint, motion to intervene, or amicus brief. If given access the ability to file a case initiation should prove the filer’s capacity. Inappropriate burdens are

entailed by requiring a preliminary motion for permission, burdens that are particularly inappropriate if the filer is already a CM/ECF filer in the same court. Indeed the rule, as written, would prohibit e-filing even by a registered attorney user who appears pro se as a party. Still worse, a motion cannot be filed unless the case has already been initiated—a pro se plaintiff must always file a paper complaint. The problems that arise when a pro se litigant is not able to use the court’s system effectively can be solved by finding good cause to deny e-filing. But the inevitable small problems can be fixed: “docket clerks routinely screen incoming filings and will correct clear deficiencies or errors.”

At the same time, it should be presumed that a pro se litigant has good cause to file on paper, not in the electronic system. The presumption should be irrebuttable for a pro se prisoner, who should always have the option of paper filing.

The advantages of e-filing are detailed at length. It is virtually instantaneous, and makes the most of applicable time limits. A complaint can be perfected up to the very end of a limitations period. After-hours filing is simple. Only e-filing may be feasible for emergency matters, particularly a request for a TRO or a preliminary injunction—the harm may be done before a paper filing can be prepared and filed. A pro se defendant must wait to be served by non-electronic means.” For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks. This is just to *receive* filings; one must also respond.”

E-filing also is important for litigants with disabilities, particularly those with impaired vision. A document scanned into the court file from a paper original is more difficult to use, in some settings much more difficult. E-documents “are more readable on a screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.” “Being required to file on paper hinders *everyone’s* access to the litigant’s filings \* \* \*.”

E-filing also is less expensive, and much less expensive for long filings. Courts often “require multiple duplicates of case initiation documents for service, chambers, etc.” These costs are particularly burdensome for i.f.p. litigants.

A registered user of the CM/ECF system can receive the same notices of electronic filing as the parties to a case. That can support tracking for an eventual motion to intervene or an amicus brief. It can give access to arguments that can be cribbed or anticipated and opposed, evidence found by litigants to other cases, or information of “journalistic interest, where immediate notification of developments is critical to presenting timely news to one’s audience.” (There are other references to citizen journalists and observations that denying access of right to e-filing operates as a prior restraint. The prior restraint observations seem to extend beyond the citizen-journalist concern to the broader themes of burden.) A nonparty pro se can be allowed to file only an initiating document, such as a motion for leave to file; improper filings can be summarily denied or sanctioned.

Nov. 3 Hearing, Sai, pp. 112-124: The argument is clearly made: pro se litigants should be allowed to choose for themselves whether to e-file. There should be no need to ask either for permission or for exemption. This argument is supported by recounting the many advantages Sai has experienced as a pro se litigant when allowed to e-file, and the many disadvantages experienced when not allowed to e-file. (1) Even in courts that allow a pro se litigant to e-file, generally the litigant must first commence the action on paper and then seek leave to e-file. That adds to delay and expense. (2) e-filing is faster and less expensive. Last-minute extensions, for example, can be sought after the clerk’s office has closed. A request for a TRO can be filed instantly, as compared to the cost and delay of mail. And filings by other parties are communicated instantly by the Notice of Electronic Filing, as compared to the cost and delay of periodic access to the court file through PACER. Sai is an IFP litigant, and the costs of printing and mailing are inconsistent with the IFP policy. (3) When paper filings are scanned into the court’s e-files readability suffers, and it is not possible to include links to exhibits, court decisions, and like e-materials. “The structure of a PDF is harmed.” (4) The fears that underlie the “presumption” against pro se e-filing are exaggerated. It should not be presumed that pro se litigants are vexatious. Pro se litigants are not the only ones who occasionally make mistakes in docketing — clerks do it too. Many pro se litigants are fully capable of e-filing; Sai has done it successfully in several cases after going through the chore of getting permission.

*Rule 5(d)(3): Electronic Filing*

Michael Rosman, Esq., 0061: (1) The rule text does not define “user name” or “password.” It could be read to require that they be included in the paper that is filed. But the only way to file electronically is by entering the user name and password. It would be better to say: “For all papers filed electronically by attorneys who are registered users of the Court’s electronic filing system, the attorney’s name on a signature block serves as the attorney’s signature.” (2) What about papers that are not filed at the time of service—disclosures and discovery materials? Rule 26(g) requires that they be signed. They may be served by electronic means outside the court’s system. Some provision should be made. (3) An attorney who files a complaint is not yet an attorney of record, so the filing and name do not satisfy the draft rule text. Why not substitute “attorney registered with the Court’s electronic filing system” for “attorney of record”?

Pennsylvania Bar Association, CV-0064: The proposed text on signing should be clarified—the attorney’s name on a signature block serves as the attorney’s signature if a paper is filed in the court’s system. Beyond that, something should be said about the circumstance in which a paper is filed using an attorney’s name and password, but a different signature appears on the block.

Heather Dixon, Esq., 0067: The signature provision should be revised to make it clear that the attorney’s user name and password are not to be included in the signature block.

New York City Bar Association, 0070: Again, the rule text should be clear that the attorney’s user name and password are not to appear on the signature block.

Federal Magistrate Judges Association, 0094: The risk that the published proposal will be read to require supplying the filer's user name and password on the signature block can be addressed like this: "For documents filed utilizing the court's electronic filing system, inserting the attorney's name on the signature block and filing the document using the attorney's user name and password will constitute that attorney's signature."

## B. RULE 23

The great majority of the comments and testimony during the public comment period addressed the Rule 23 package. The summary of comments and testimony is included in this agenda book.

The published preliminary draft principally addressed issues related to settlement of class actions. After study, the Advisory Committee decided not to pursue several additional topics. Some of those topics were nonetheless urged during the public comment period. In addition, comments urged certain additional measures that had not been considered during the Advisory Committee's review of the rule. Comments about these topics are included at the end of the summary of comments.

Regarding the proposed amendments included in the preliminary draft, the Advisory Committee received much commentary about the modernization of notice methods and about the handling of class member objections to proposed class-action settlements. These matters are also presented in the summary of comments.

After the conclusion of the public comment period, the Rule 23 Subcommittee met by conference call to review and consider the comments received about the published preliminary draft. Very few changes were made in the rule language, and Committee Note language was clarified and shortened during this review.

Notes from the first of those conference calls are included in this agenda book. The second conference call revolved almost entirely around wording choices for the Committee Note, and the materials below reflect those wording choices.

1 **Rule 23. Class Actions**

2  
3 \* \* \* \* \*

4  
5 **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes;**  
6 **Subclasses**

7  
8 \* \* \* \* \*

9  
10 **(2) Notice.**

11  
12 \* \* \* \* \*

13  
14 **(B) For (b)(3) Classes.** For any class certified under Rule 23(b)(3)—or upon  
15 ordering notice under Rule 23(e)(1) to a class proposed to be certified for  
16 purposes of settlement under Rule 23(b)(3)—the court must direct to class  
17 members the best notice that is practicable under the circumstances,

18 including individual notice to all members who can be identified through  
19 reasonable effort. The notice may be by one or more of the following:  
20 United States mail, electronic means, or other appropriate means. The  
21 notice must clearly and concisely state in plain, easily understood  
22 language:

23 \* \* \* \* \*

24  
25  
26 (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a  
27 certified class—or a class proposed to be certified for purposes of settlement—may be  
28 settled, voluntarily dismissed, or compromised only with the court's approval. The  
29 following procedures apply to a proposed settlement, voluntary dismissal, or  
30 compromise:

31  
32 (1) Notice to the Class

33  
34 (A) Information That Parties Must Provide to the Court. The parties must  
35 provide the court with information sufficient to enable it to determine  
36 whether to give notice of the proposal to the class.

37  
38 (B) Grounds for a Decision to Give Notice. The court must direct notice in a  
39 reasonable manner to all class members who would be bound by the  
40 proposal if giving notice is justified by the parties' showing that the court  
41 will likely be able to:

42  
43 (i) approve the proposal under Rule 23(e)(2); and

44  
45 (ii) certify the class for purposes of judgment on the proposal.

46  
47 (2) Approval of the Proposal. If the proposal would bind class members under  
48 Rule 23(e)(3), the court may approve it only after a hearing and only on finding  
49 that it is fair, reasonable, and adequate after considering whether:-

50  
51 (A) the class representatives and class counsel have adequately represented the  
52 class;

53  
54 (B) the proposal was negotiated at arm's length;

55  
56 (C) the relief provided for the class is adequate, taking into account:

57 (i) the costs, risks, and delay of trial and appeal;  
58

- 59                    **(ii)**    the effectiveness of ~~any~~ the proposed method of distributing relief  
60                    to the class, including the method of processing class-member  
61                    claims, if required;  
62  
63                    **(iii)**    the terms of any proposed award of attorney's fees, including  
64                    timing of payment; and  
65  
66                    **(iv)**    any agreement required to be identified under Rule 23(e)(3); and  
67  
68                    **(D)**    the proposal treats class members ~~are treated~~ equitably relative to each  
69                    other.  
70  
71                    **(3)**    Identification of Side Agreements. The parties seeking approval must file a  
72                    statement identifying any agreement made in connection with the proposal.  
73  
74                    **(4)**    New Opportunity to Be Excluded. If the class action was previously certified  
75                    under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords  
76                    a new opportunity to request exclusion to individual class members who had an  
77                    earlier opportunity to request exclusion but did not do so.  
78  
79                    **(5)**    Class-Member Objections.  
80  
81                    **(A)**    In General. Any class member may object to the proposal if it requires  
82                    court approval under this subdivision (e); ~~the objection may be withdrawn~~  
83                    only with the court's approval. The objection must state whether it applies  
84                    only to the objector, to a specific subset of the class, or to the entire class,  
85                    and also state with specificity the grounds for the objection.  
86  
87                    **(B)**    Court Approval Required for Payment In Connection With an Objection ~~to~~  
88                    ~~an Objector or Objector's Counsel.~~ Unless approved by the court after a  
89                    hearing, no payment or other consideration may be provided ~~to an objector~~  
90                    ~~or objector's counsel~~ in connection with:  
91  
92                    **(i)**    forgoing or withdrawing an objection, or  
93  
94                    **(ii)**    forgoing, dismissing, or abandoning an appeal from a judgment  
95                    approving the proposal.  
96  
97                    **(C)**    Procedure for Approval After an Appeal. If approval under  
98                    Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the  
99                    court of appeals, the procedure of Rule 62.1 applies while the appeal  
100                    remains pending.  
101

102 (f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying  
103 class-action certification under this rule, ~~but not from an order under Rule 23(e)(1), if a~~  
104 ~~petition for to appeal is filed~~ A party must file a petition for permission to appeal with  
105 the circuit clerk within 14 days after the order is entered, or within 45 days after the order  
106 is entered if any party is the United States, a United States agency, or a United States  
107 officer or employee sued for an act or omission occurring in connection with duties  
108 performed on the United States' behalf. An appeal does not stay proceedings in the  
109 district court unless the district judge or the court of appeals so orders.

110 \* \* \* \* \*

111  
1 COMMITTEE NOTE

2  
3 Rule 23 is amended mainly to address issues related to settlement, and also to take  
4 account of issues that have emerged since the rule was last amended in 2003.

5  
6 **Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice  
7 to the class regarding a proposed class-action settlement only after determining that the prospect  
8 of class certification and approval of the proposed settlement justifies giving notice. This  
9 decision ~~has been is sometimes inaccurately~~ called “preliminary approval” of the proposed class  
10 certification in Rule 23(b)(3) actions, ~~and~~ it is common to send notice to the class  
11 simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class  
12 members to decide by a certain date whether to opt out. This amendment recognizes the  
13 propriety of this combined notice practice. ~~Requiring repeat notices to the class can be wasteful~~  
14 ~~and confusing to class members, and costly as well.~~

15  
16 Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice  
17 to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the  
18 individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have  
19 read the rule to require notice by first class mail in every case. But technological change since  
20 1974 has introduced ~~meant that~~ other means ~~forms~~ of communication that may sometimes  
21 provide a ~~be more~~ reliable additional or alternative method for giving notice and important to  
22 many. Although first class mail may often be the preferred primary method of giving notice,  
23 c~~ourts and counsel have begun to employ new technology to make notice more effective, and~~  
24 ~~sometimes less costly.~~ Because there is no reason to expect that technological change will cease  
25 ~~halt soon,~~ when selecting a method or methods of giving notice courts giving notice under this  
26 ~~rule~~ should consider the capacity and limits of current technology, including class members'  
27 likely access to such technology, ~~when selecting a method of giving notice.~~

28 Rule 23(c)(2)(B) is amended to take account of these changes, ~~and to call attention to~~  
29 ~~them.~~ The rule continues to call for giving class members “the best notice that is practicable.” It  
30 does not specify any particular means as preferred. Although it may sometimes ~~often~~ be true that  
31 electronic methods of notice, for example ~~by~~ email, are the most promising, it is important to

32 keep in mind that a significant portion of class members in certain cases may have limited or no  
33 access to email or the Internet.

34  
35 Instead of preferring any one means of notice, therefore, the amended rule relies on  
36 courts and counsel to should focus on the means or combination of means most likely to be  
37 effective in the case before the court. ~~The amended rule emphasizes that t~~The court should must  
38 exercise its discretion to select appropriate means of giving notice. ~~Courts should take account~~  
39 ~~not only of anticipated actual delivery rates, but also of the extent to which members of a~~  
40 ~~particular class are likely to pay attention to messages delivered by different means.~~ In providing  
41 the court with sufficient information to enable it to decide whether to give notice to the class of a  
42 proposed class-action settlement under Rule 23(e)(1), it would ordinarily may be important to  
43 include details a report about the proposed method of giving notice ~~to the class~~ and to provide  
44 the court with a copy of each notice the parties propose to use.

45  
46 In determining whether the proposed means of giving notice is appropriate, the court  
47 should also give careful attention to the content and format of the notice and, if notice is given  
48 under both Rule 23(e)(1) and as well as Rule 23(c)(2)(B), any claim form class members must  
49 submit to obtain relief. ~~Particularly if the notice is by electronic means, care is necessary~~  
50 ~~regarding access to online resources, the manner of presentation, and any response expected of~~  
51 ~~class members.~~

52  
53 Counsel should consider which method or methods of giving notice will be most  
54 effective; simply assuming that the “traditional” methods are best may disregard contemporary  
55 communication realities. ~~As the rule directs, the notice should be the “best \* \* \* that is~~  
56 ~~practicable” in the given case.~~ The ultimate goal of giving notice is to enable class members to  
57 make informed decisions about whether to opt out or, in instances where a proposed settlement is  
58 involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily  
59 understood language.” Means, format, and content that would be appropriate for class members  
60 likely to be sophisticated, for example in a securities fraud class action, might not be appropriate  
61 for a class having many made up in significant part of members likely to be less sophisticated.  
62 ~~As with the method of notice, the form of notice should be tailored to the class members’~~  
63 ~~anticipated understanding and capabilities.~~ The court and counsel may wish to consider the use  
64 of class notice experts or professional claims administrators.

65  
66 Attention should focus also on the method of opting out provided in the notice. The  
67 proposed method should be as convenient as possible, while protecting against unauthorized opt-  
68 out notices. ~~The process of opting out should not be unduly difficult or cumbersome. As with~~  
69 ~~other aspects of the notice process, there is no single method that is suitable for all cases.~~

70  
71 **Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit  
72 that its procedural requirements apply in instances in which the court has not certified a class at  
73 the time that a proposed settlement is presented to the court. The notice required under Rule  
74 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class  
75 to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion.

76 Information about the opt-out rate could then be available to the court when it considers final  
77 approval of the proposed settlement.

78  
79 **Subdivision (e)(1).** The decision to give notice of a proposed settlement to the class is an  
80 important event. It should be based on a solid record supporting the conclusion that the proposed  
81 settlement will likely earn final approval after notice and an opportunity to object. The ~~amended~~  
82 ~~rule makes clear that the~~ parties must provide the court with information sufficient to determine  
83 ~~enable it to decide~~ whether notice should be sent. At the time they seek notice to the class, the  
84 proponents of the settlement should ordinarily provide the court with all available materials they  
85 intend to submit ~~to in support of approval under Rule 23(e)(2) and that they intend to make~~  
86 available to class members. ~~That would give the court a full picture and make this information~~  
87 ~~available to the members of the class~~. The amended rule also specifies the standard the court  
88 should use in deciding whether to send notice -- that it likely will be able both to approve the  
89 settlement proposal under Rule 23(c)(2) and, if it has not previously certified a class, to certify  
90 the class for purposes of judgment on the proposal.

91  
92 ~~There are many types of class actions and class action settlements. As a consequence, no~~  
93 ~~single list of topics to be addressed in the submission to the court would apply to each case.~~  
94 ~~Instead, T~~he subjects to be addressed depend on the specifics of the particular class action and  
95 proposed settlement. But some general observations can be made.

96  
97 One key element is class certification. If the court has already certified a class, the only  
98 information ordinarily necessary ~~in regard to a proposed settlement~~ is whether the proposed  
99 settlement proposal calls for any change in the class certified, or of the claims, defenses, or  
100 issues regarding which certification was granted. But if a class has not been certified, the parties  
101 must ensure that the court has a basis for concluding that it likely will be able, after the final  
102 hearing, to certify the class. Although the standards for certification differ for settlement and  
103 litigation purposes, the court cannot make the decision regarding the prospects for certification  
104 without a suitable basis in the record. The ultimate decision to certify the class for purposes of  
105 settlement cannot be made until the hearing on final approval of the proposed settlement. If the  
106 settlement is not approved ~~and certification for purposes of litigation is later sought~~, the parties'  
107 earlier positions submissions in regarding to the proposed certification for settlement should not  
108 be considered if certification is later sought for purposes of litigation in deciding on certification.

109  
110 Regarding the proposed settlement, many a great variety of types of information might  
111 appropriately be provided included in the submission to the court. A basic focus is the extent  
112 and type of benefits that the settlement will confer on the members of the class. Depending on  
113 the nature of the proposed relief, that showing may include details of the contemplated claims  
114 process ~~that is contemplated~~ and the anticipated rate of claims by class members. ~~If the notice to~~  
115 ~~the class calls for submission of claims before the court decides whether to approve the proposal~~  
116 under Rule 23(e)(2), it may be important to provide that the parties will report back to the court  
117 on the actual claims experience. ~~And B~~ecause some funds are frequently left unclaimed, ~~it is~~  
118 often important for the settlement agreement ordinarily should to address the distribution use of

119 those funds. ~~Many courts have found guidance on this subject in § 3.07 of the American Law~~  
120 ~~Institute, Principles of Aggregate Litigation (2010).~~

121  
122 ~~It is important for t~~The parties should also ~~to~~ supply the court with information about the  
123 likely range of litigated outcomes, and about the risks that might attend full litigation. ~~In that~~  
124 ~~connection,~~ Information about the extent of discovery completed in the litigation or in parallel  
125 actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the parties should  
126 provide information about the existence of other pending or anticipated litigation on behalf of  
127 class members involving claims that would be released under the proposal ~~—including the~~  
128 ~~breadth of any such release—may be important.~~

129  
130 The proposed handling of an award of attorney's fees under Rule 23(h) ~~is another topic~~  
131 ~~that~~ ordinarily should be addressed in the parties' submission to the court. In some cases, it will  
132 be important to relate the amount of an award of attorney's fees to the expected benefits to the  
133 class, ~~and to take account of the likely claims rate.~~ One way to method of addressing this issue is  
134 to defer some or all of the award of attorney's fees until the court is advised of the actual claims  
135 rate and results.

136  
137 Another topic that normally should be considered is any agreement that must be  
138 identified under Rule 23(e)(3).

139  
140 The parties may supply information to the court on any other topic that they regard as  
141 pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court  
142 may direct the parties to supply further information about the topics they do address, or to supply  
143 information on topics they do not address. The court should ~~It must~~ not direct notice to the class  
144 until the parties' submissions show it is likely that the court will be able to approve the proposal  
145 after notice to the class and a final approval hearing.

146  
147 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement  
148 is that it be fair, reasonable, and adequate. ~~This standard emerged from case law implementing~~  
149 ~~Rule 23(e)'s requirement of court approval for class action settlements. It was formally~~  
150 ~~recognized in the rule through the 2003 amendments. By then, Ceourts have~~d generated lists of  
151 factors to shed light on this ~~central~~ concern. Overall, these factors focused on comparable  
152 considerations, but each circuit has developed its own vocabulary for expressing these concerns.  
153 In some circuits, these lists have remained essentially unchanged for thirty or forty years. The  
154 goal of this amendment is not to displace any ~~of these~~ factors, but rather to focus the court and  
155 the lawyers on the core concerns of procedure and substance that should guide the decision  
156 whether to approve the proposal.

157  
158 ~~One reason for this amendment is that~~ A lengthy list of factors can take on an  
159 independent life, potentially distracting attention from the central concerns that inform the  
160 settlement-review process. A circuit's list might include a dozen or more separately articulated  
161 factors. Some of those factors—perhaps many—may not be relevant to a particular case or  
162 settlement proposal. Those that are relevant may be more or less important to the particular case.

163 Yet counsel and courts may feel it necessary to address every ~~single~~ factor on a given circuit's  
164 list in every case. The sheer number of factors can distract both the court and the parties from  
165 the central concerns that bear on review under Rule 23(e)(2).  
166

167 This amendment therefore directs the parties to present the settlement to the court in  
168 terms of a shorter list of core concerns, by focusing on the primary procedural considerations and  
169 substantive qualities that should always matter to the decision whether to approve the proposal.  
170

171 Approval under Rule 23(e)(2) is required only when class members would be bound  
172 under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must  
173 determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes  
174 of judgment based on the proposal.  
175

176 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as  
177 “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up  
178 to the proposed settlement. Attention to these matters is an important foundation for scrutinizing  
179 the substance ~~specifies~~ of the proposed settlement. If the court has appointed class counsel or  
180 interim class counsel, it will have made an initial evaluation of counsel's capacities and  
181 experience. But the focus at this point is on the actual performance of counsel acting on behalf  
182 of the class.  
183

184 The information submitted under Rule 23(e)(1) may provide a useful starting point in  
185 assessing these topics. For example, the nature and amount of discovery in this or other cases, or  
186 the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the  
187 class had an adequate information base. The pendency of other litigation about the same general  
188 subject on behalf of class members may also be pertinent. The conduct of the negotiations may  
189 be important as well. For example, the involvement of a neutral or court-affiliated mediator or  
190 facilitator in those negotiations may bear on whether they were conducted in a manner that  
191 would protect and further the class interests. ~~In undertaking this analysis, the court may also~~  
192 ~~refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual~~  
193 ~~conduct of counsel has been consistent with what Rule 23(g) seeks to ensure.~~ Particular attention  
194 might focus on the treatment of any award of attorney's fees, with respect to both the manner of  
195 negotiating the fee award and its terms.

196 **Paragraphs (C) and (D).** These paragraphs focus on what might be called a  
197 “substantive” review of the terms of the proposed settlement. The relief that the settlement is  
198 expected to provide to class members is a central concern. Measuring the proposed relief may  
199 require evaluation of any ~~the~~ proposed claims process; directing that the parties report back to  
200 the court about ~~and a prediction of how many claims will be made; if the notice to the class calls~~  
201 ~~for pre-approval submission of claims;~~ actual claims experience may be important. The contents  
202 of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed  
203 relief, particularly regarding the equitable treatment of all members of the class.  
204

205 Another central concern will relate to the cost and risk involved in pursuing a litigated  
206 outcome. Often, courts may need to forecast ~~what~~ the likely range of possible classwide  
207 recoveries ~~might be~~ and the likelihood of success in obtaining such results. That forecast cannot  
208 be done with arithmetic accuracy, but it can provide a benchmark for comparison with the  
209 settlement figure.

210  
211 If the class has not yet been certified for trial, the court may consider whether  
212 certification for litigation would be granted were the settlement not approved.

213  
214 Examination of the attorney-fee provisions may also be valuable in ~~important to~~ assessing  
215 the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be  
216 evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief  
217 actually delivered to the class can be a significant ~~an important~~ factor in determining the  
218 appropriate fee award. ~~Provisions for reporting back to the court about actual claims experience,~~  
219 ~~and deferring a portion of the fee award until the claims experience is known, may bear on the~~  
220 ~~fairness of the overall proposed settlement.~~

221  
222 Often it will be important for the court to scrutinize the method of claims processing to  
223 ensure that it facilitates filing legitimate claims. A claims processing method should deter or  
224 defeat unjustified claims, but ~~unduly demanding claims procedures can impede legitimate~~  
225 ~~claims. Particularly if some or all of any funds remaining at the end of the claims process must~~  
226 ~~be returned to the defendant, the court should ~~must~~ be alert to whether the claims process is~~  
227 ~~unduly demanding.~~

228  
229 Paragraph (D) calls attention to a concern that may apply to some class action  
230 settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern  
231 could include whether the apportionment of relief among class members takes appropriate  
232 account of differences among their claims, and whether the scope of the release may affect class  
233 members in different ways that bear on ~~affect~~ the apportionment of relief.

234  
235 **Subdivisions (e)(3) and (e)(4).** ~~A Heading are is added to subdivisions (e)(3) and~~  
236 ~~(e)(4) in accord with style conventions. These is additions are is intended to be stylistic only.~~

237 ~~**Subdivision (e)(4).** A heading is added to subdivision (e)(4) in accord with style~~  
238 ~~conventions. This addition is intended to be stylistic only.~~

239  
240 **Subdivision (e)(5).** ~~Objecting class members can play a critical role in the settlement-~~  
241 ~~approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit~~  
242 ~~objections to the proposal. The submissions required by Rule 23(e)(1) may provide information~~  
243 ~~critical important to decisions whether to object or opt out. Objections by class members can~~  
244 ~~provide the court with important information bearing on its determination under Rule 23(e)(2)~~  
245 ~~whether to approve the proposal.~~

246

247           **Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval  
248 for every withdrawal of an objection. An objector should be free to withdraw on concluding that  
249 an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or  
250 other consideration in connection with withdrawing the objection.

251  
252           The rule is also amended to clarify that objections must provide sufficient specifics to  
253 enable the parties to respond to them and the court to evaluate them. One feature required of  
254 objections is specification whether the objection asserts interests of only the objector, or of some  
255 subset of the class, or of all class members. Beyond that, the rule directs that the objection state  
256 its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting  
257 an objection. Courts should take care, however, to avoid unduly burdening class members who  
258 wish to object, and to recognize that a class member who is not represented by counsel may  
259 present objections that do not adhere to technical legal standards.

260  
261           **Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a  
262 proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such  
263 assistance under Rule 23(h). ~~As recognized in the 2003 Committee Note to Rule 23(h): “In~~  
264 ~~some situations, there may be a basis for making an award to other counsel whose work~~  
265 ~~produced a beneficial result for the class, such as \* \* \* attorneys who represented objectors to a~~  
266 ~~proposed settlement under Rule 23(e).”~~

267  
268           But some objectors may be seeking only personal gain, and using objections to obtain  
269 benefits for themselves rather than assisting in the settlement-review process. At least in some  
270 instances, it seems that objectors—or their counsel—have sought to obtain consideration for  
271 extract tribute to withdrawing their objections or dismissing appeals from judgments approving  
272 class settlements. And class counsel sometimes may feel that avoiding the delay produced by an  
273 appeal justifies providing payment or other consideration to these objectors. Although the  
274 payment may advance class interests in a particular case, allowing payment perpetuates a system  
275 that can encourage objections advanced for improper purposes.

276  
277           The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.  
278 Because the concern only applies when consideration is given in connection with withdrawal of  
279 an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when  
280 consideration is involved. Although such payment is usually made to objectors or their counsel,  
281 the rule also requires court approval if a payment in connection with forgoing or withdrawing an  
282 objection or appeal is instead to another recipient. The term “consideration” should be broadly  
283 interpreted, particularly when the withdrawal includes some arrangements beneficial to objector  
284 counsel. If the consideration involves a payment to counsel for an objector, the proper procedure  
285 is by motion under Rule 23(h) for an award of fees; ~~the court may approve the fee if the~~  
286 ~~objection assisted the court in understanding and evaluating the settlement even though the~~  
287 ~~settlement was approved as proposed.~~

288  
289           Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or  
290 abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-

291 action objector may produce much longer delay than an objection before the district court, it is  
292 important to extend the court-approval requirement to apply in the appellate context. The district  
293 court is best positioned to determine whether to approve such arrangements; hence, the rule  
294 requires that the motion seeking approval be made to the district court.

295  
296 Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal  
297 on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter,  
298 the court of appeals has authority to decide whether to dismiss the appeal. This rule's  
299 requirement of district court approval of any consideration in connection with such dismissal by  
300 the court of appeals has no effect on the authority of the court of appeals to decide whether to  
301 dismiss ~~over~~ the appeal. It is, instead, a requirement that applies only to providing consideration  
302 in connection with forgoing, dismissing, or abandoning an appeal. ~~A party dissatisfied with the~~  
303 ~~district court's order under Rule 23(e)(5)(B) may appeal the order.~~

304  
305 **Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's  
306 appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1  
307 applies. That procedure does not apply after the court of appeals' mandate returns the case to the  
308 district court.

309  
310 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the court must ~~should~~ direct  
311 notice to the class regarding a proposed class-action settlement ~~in cases in which class~~  
312 ~~certification has not yet been granted~~ only after determining that the prospect of eventual class  
313 certification justifies giving notice. ~~This decision is sometimes inaccurately characterized as~~  
314 ~~"preliminary approval" of the proposed class certification.~~ But this decision does not grant or  
315 deny class certification, and review under Rule 23(f) would be premature. This amendment  
316 makes it clear that an appeal under this rule is not permitted until the district court decides  
317 whether to certify the class.

318  
319 The rule is also amended to extend the time to file a petition for review of a class-action  
320 certification order to 45 days whenever a party is the United States, one of its agencies, or a  
321 United States officer or employee sued for an act or omission occurring in connection with duties  
322 performed on the United States' behalf. In such a case, the extension applies to a petition for  
323 permission to appeal by any party. The extension of time recognizes—as under Rules 4(i) and  
324 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for  
325 additional time in regard to these matters. The extension applies whether the officer or employee  
326 is sued in an official capacity or an individual capacity; ~~the defense is usually conducted by the~~  
327 ~~United States even though the action asserts claims against the officer or employee in an~~  
328 ~~individual capacity.~~ An action against a former officer or employee of the United States is  
329 covered by this provision in the same way as an action against a present officer or employee.  
330 Termination of the relationship between the individual defendant and the United States does not  
331 reduce the need for additional time.

“Clean” Rule and Note

[In order to facilitate comprehension of the revised proposed Rule and Note language, below is what they would look like if adopted.]

**Rule 23. Class Actions**

\* \* \* \* \*

**(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses**

\* \* \* \* \*

**(2) Notice.**

\* \* \* \* \*

**(B) *For (b)(3) Classes.*** For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

\* \* \* \* \*

**(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

**(1) Notice to the Class**

**(A) *Information That Parties Must Provide to the Court.*** The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

**(B) *Grounds for a Decision to Give Notice.*** The court must direct notice in a reasonable manner to all class members who would be bound by the

proposal if giving notice is justified by the parties' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
  - (ii) certify the class for purposes of judgment on the proposal.
- (2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
  - (A) the class representatives and class counsel have adequately represented the class;
  - (B) the proposal was negotiated at arm's length;
  - (C) the relief provided for the class is adequate, taking into account:
    - (i) the costs, risks, and delay of trial and appeal;
    - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
    - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
    - (iv) any agreement required to be identified under Rule 23(e)(3); and
  - (D) the proposal treats class members equitably relative to each other.
- (3) *Identification of Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) *Class-Member Objections.*
  - (A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or

to the entire class, and also state with specificity the grounds for the objection.

**(B)** *Court Approval Required for Payment In Connection With an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

- (i)** forgoing or withdrawing an objection, or
- (ii)** forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

**(C)** *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

**(f)** **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

\* \* \* \* \*

#### COMMITTEE NOTE

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

**Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called “preliminary approval” of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the

individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members “the best notice that is practicable.” It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the “traditional” methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily understood language.” Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

**Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

**Subdivision (e)(1).** The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(c)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In

addition, as suggested by Rule 23(b)(3)(A), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

**Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must

determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

**Paragraphs (A) and (B).** These paragraphs identify matters that might be described as “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

**Paragraphs (C) and (D).** These paragraphs focus on what might be called a “substantive” review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or

defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

**Subdivisions (e)(3) and (e)(4).** Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

**Subdivision (e)(5).** The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

**Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

**Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term “consideration” should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

**Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

**Subdivision (f).** As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official

capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

### Gap Report

At several points, the rule language was revised to shorten it or to shift to active voice. In Rule 23(c)(2)(B), the amendment proposal was revised to state that individual notice in Rule 23(b)(3) class actions be sent by “one or more of the following” before inviting use of United States mail, electronic means, or other appropriate means. In Rule 23(e)(2), the phrase “under Rule 23(c)(3),” originally proposed to be added, was removed from the proposed amendment in light of concerns that it might prove misleading in practice. The language of Rule 23(e)(2)(C)(ii) was adjusted to better parallel that of the following subsections. Rule 23(e)(5)(B) was modified to require court approval of any payments or other consideration provided in connection with forgoing, withdrawing or abandoning an objection to a class-action settlement or an appeal from rejection of such an objection. The Committee Note was revised to take account of these modifications in the rule language, to respond to some concerns raised during the public comment period, and to shorten the Note.

SUMMARY OF COMMENTS  
Rule 23 Package  
2016-17

Commentary on the following issues is presented:

Overall assessment

Rule 23(c)

Rule 23(e)(1) -- "frontloading"

Rule 23(e)(1) -- grounds for decision to give notice

Rule 23(e)(2) -- standards for approval

Rule 23(e)(5)(A) -- objector disclosure and specificity

Rule 23(e)(5)(B) and (C) -- court approval of payment to  
objectors or objector counsel

Rule 23(f) -- forbidding appeal from notice of settlement  
proposal

Rule 23(f) -- additional time for appeal in government cases

Ascertainability

Pick off

Other issues raised

Overall assessment

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): The amendment package is, generally speaking, addressing areas of concern.

Mark Chalos (Tenn. Trial Lawyers Ass'n): Overall, the organization supports the proposed amendments. The "road show" was particularly helpful to the bar in developing an appreciation of these issues. Deferring consideration of ascertainability and pick-off is sensible.

John Beisner (Skadden Arps): The proposed amendments are "directionally correct." They find the right spot as a general matter. But some clarification or reorientation in the Committee Note would be desirable. He will submit written comments.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): His organization has put out three editions of Standards and Guidelines for Litigation and Settling Consumer Class Actions. The third edition was published at 299 F.R.D. 160 (2014). It may be a resource for the Committee's work.

Brent Johnson (Committee to Support Antitrust Laws) (with written testimony): COSAL generally supports the majority of the proposed amendments. They either codify or clarify existing case law.

Phoenix hearing

Jocelyn Larkin (The Impact Fund) (testimony and CV-2016-0004-0063): The Subcommittee's outreach efforts were very valuable, and enabled many to be involved in the process. We are extremely enthusiastic about this package of proposals.

Annika Martin: The Committee's "listening tour" provided a great opportunity to be heard. We are enthusiastic about these efforts.

Paul Bland (Public Justice); I echo the other comments about the process used. The outreach was desirable, and there is consensus in favor of most of the provisions in the amendment package.

Written comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Since the 2003 amendments to Rule 23 went into effect, we have found that the rule generally has worked well. Nonetheless, the changes proposed in this package will improve class action practice even though they are modest.

Public Citizen Litigation Group (CV-2016-0004-081): We are pleased that the amendments proposed take a moderate, consensus-based approach and generally avoid changes that would disrupt existing practices. In particular, we are pleased that the proposed approach to objectors is similar to the one we proposed in 2015.

Prof. Suzette Malveaux (CV-2016-0004-082): Prof. Malveaux attaches a copy of a draft of an article entitled "The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today." The draft article is mainly about Rule 23(b)(2), but makes some mention of pick-off.

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): The Committee's hearing, along with the meetings the Committee had with various stakeholders nationwide, fostered a shared sense of purpose and a feeling of participation that have led to a strong process. The decision to abstain from proposing changes that are yet unripe for implementation is particularly appreciated. Ascertainability and pick-off fit in that category.

Public Justice (CV-2016-0004-089): "Public Justice believes that class actions are one of the most powerful tools for victims of corporate and governmental misconduct to seek and achieve justice." It strongly supports the vast majority of the proposed amendments, subject to a few qualifications. We believe that the proposals are useful and appropriate and should be adopted subject to the changes we suggest.

Rule 23(c)

Washington D.C. hearing

John Beisner (Skadden Arps): The Committee Note on p. 219 should be strengthened about the settling parties advising the court about the planned method of giving notice. The last sentence in the full paragraph on p. 219 should be strengthened to make it mandatory that the parties provide the court with their plan. For one thing, that will ensure that there is a plan. It has happened in the past that the parties do not start thinking about that until later. It should be up front. Regarding the form of notice, the Committee Note has it about right. The problem is to get the parties and the court to focus on the particulars of the case and what will likely work with the class. This is somewhat like advertizing. The parties should dig into the issue up front, and the court should attend to it then also. For the court to do this analysis, it will often be necessary to submit an expert report. Marketing experts can look at the demographic makeup of the class and explain how to give notice and why a given method is calculated or likely to work. It is important to go beyond generalities.

Alan Morrison (George Washington Univ. Law School) (with written testimony CV-2026-0004-0042): The words "under Rule 23(b)(3)" should be deleted from line 12 on p. 211 of the draft. The "best notice practicable" should be sent to class members in (b)(1) and (b)(2) cases as well.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): Class actions are critical to effective relief for the clients represented by his groups. For many of these people -- those who are elderly or poor, for example -- the Internet access that may be commonplace for middle class Americans does not exist. The Census Bureau, the FTC, and other governmental agencies recognize that relying solely on electronic means to reach such people is not effective. So it is critical that the court focus closely on the manner in which notice will be given to ensure that it is suitable to the class sought to be represented. For consumer class actions, often a summary notice that is relatively brief is better than a detailed and full description. And it can show how to get more information. The disappointing reality is that the average American reads at about the fifth grade level. Beyond that, we are a multilingual society, so often giving notice in more than one language is critical.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The requirement of individualized notice in (b)(3) cases should be relaxed in cases involving small value claims. For example, if the claims are for less than \$100

individual notice should be unnecessary, or handled on a randomized rather than universal basis. I proposed this in a 2006 article in the NYU Law Review. But don't weaken the means of individual (or other) notice. Banner ads simply do not provide individualized notice. Indeed, it is hard to imagine a case in which electronic notice is best. Instead, it would be best to recognize that individualized notice is unwarranted in small-claim cases. Todd Hilsee is right that electronic means are less effective. But with claims of \$1000, in one case he handled, the payout went to 94% of class members. So the current rule can be made to work. The amendment is not needed, and could be read in a harmful way. The current rule does not say U.S. mail, and there is no empirical basis for saying that banner ads work. Perhaps some form of electronic notice would supplement other methods. For example, consider a product uniquely tied to the use of email, or the members of a professional organization that ordinarily communicates by email. Judges should not be given too much discretion in approving the means of notice.

Hassan Zavareei (testimony and prepared statement): I disagree with Wolfman. I have experienced the benefits of electronic notice. Most organizations communicate with their members this way. This change to the rule does no harm and some good.

#### Phoenix hearing

Jennie Lee Anderson: We support the allowance of mixed notice. This amendment is practical and provides needed flexibility. The right way to design a notice program is to focus on the demographics of the class. For example, if it's made up of young professionals the means for giving notice might be quite different than for elderly low income class members. It is true that U.S. mail may often be the best way, but not always. Social media can be very useful. Even banner ads may be a valuable way to augment notice in some cases. True, banner ads would not be sufficient alone. One way to support effective notice programs might be to link the attorney fee award to the claims rate. Particularly if there were a reversion provision, that could be important to provide an incentive. Technology can sometimes help in achieving that result. But no matter how good the program is, it won't reach 100% distribution; there will always be some checks that are not negotiated.

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): We favor the expansion of means for notice. The selection of a notice method must take account of demographics. We particularly endorse the language in the draft Note recognizing that many still do not have access to a computer or the Internet. We think that the Note should highlight the need to ensure that electronic class notices are digitally accessible.

And important work should be done on readability of notices. The Committee Note should be strengthened to stress readability, and stress it in terms that take account of the educational attainment of the class members. For example, graphics can be very helpful. But there is no reason to favor paper over electronic methods of giving notice. We think that the Note should be strengthened in four ways: (1) the judge should be presented with the various forms of notice formatted exactly as the notice will appear either in print or electronically; (2) counsel should be required to make an affirmative showing that the notice is in fact readable to the vast majority of class members; (3) the Note should encourage the use of good design and infographics and, for electronic methods, hyperlinks to definitions or other clarifying materia; (4) electronic notice should be carefully vetted to ensure compliance with the obligation to ensure digital accessibility for people with disabilities. We also think that the FJC should update its Model Class Action notices. They should be build from the bottom up using suggestions and feedback from ordinary people rather than "dumbing down" dense legalese.

Annika Martin: The amendment takes the right approach. There is a need for flexibility, and the court should focus on what is right for the particular case. But the draft does not go far enough. It is preoccupied with the means of notice. That is important, but more effort should be made to address the content of the notice. Regarding the form of notice, it may often be that banner ads are unreliable, but getting into the weeds at this level of detail in a rule would not be justified. It is better to draft broadly, emphasizing the goal -- best practicable notice -- and avoiding embracing or denouncing specific means.

Todd Hilsee: He is a class action notice expert. He has already submitted material to the Committee, and will provide more material later. The basic point, however, is that there is no need for this proposed amendment, and that it will send the wrong signal. There should continue to be a preference for notice by U.S. mail. Although no means of communicating is certain to get the attention of all recipients, mail is most likely. 78% of mail is received or scanned. Electronic communications are often screened out by a spam filter or similar device. Yet there is a race to the bottom in class action notice; unscrupulous plaintiff counsel will seek the cheapest provider who can supply an affidavit claiming to be effective, and defendants will embrace this because it will save them money by minimizing claims. "This rule will foster reverse auctions." The Remington case is an example. Deadly consequences could flow from failure to solve the problem with these rifles, but only a small number of class members responded to a notice program that offered significant relief and provided a basis for cutting off their rights to sue in the event that serious injury or death

resulted from malfunction of the product. In effect, this proposal will be read as urging that courts forgo regular mail in giving notice. There should be a categorical preference for mailed notice.

Paul Bland (Public Justice); We challenged the secrecy in the Remington case, but the problems there do not show that the proposal here is unwise. We support the proposed amendment. There will be settings where electronic notice is best. One example is a case involving a defective app on iPhones. Another involved a cable company; using electronic means got more responses than would have been true with U.S. mail. Communications methods are changing at great speed. Don't presume we can guess now what will be prevalent means of communication in five or ten years. The risk of a reverse auction is overstated. Reversion provisions are rare; judges are alert to their risks. And plaintiff counsel know that judges are also alert to making sure that the notice methods will really work. Cy pres provisions can sometimes mitigate. But the reality is that the plaintiff lawyers are trying to get the money to the class members, and the judges are scrutinizing their efforts.

Dallas/Fort Worth (telephonic) hearing

Ariana Tadler (Milberg): I support the proposed amendment. It helpfully clarifies that notice can be provided by various and multiple means. In today's world, mail and print are not the go-to media for communicating. In class actions, the pertinent question is what method will provide the best notice practicable. There is a "dizzying array" of options for doing so in this digital age. One thing is abundantly clear -- one size does not fit all for this purpose. Some assert that this proposed amendment somehow prefers electronic notice, but it really does not do that. The Committee was right to take something of a "minimalist" approach in its Note. Trying to foresee future developments in electronic communications and offer a hierarchy of what is preferred would be an impossible task. Other comments assume that the amendment would somehow endorse using "banner ads" as the only means of giving notice. But that attitude fails to take account of modern realities. Unlike U.S. mail, electronic means can facilitate multiple efforts at giving notice, and also provide specific feedback on how successful the notice effort has been. Any effective notice effort must now begin by considering the best ways to reach the target audience. My family illustrates the dramatic ways in which communications habits have changed and are changing. My grandmother, born in 1916, has never used a computer. My mother, born in 1943, got her first computer in 2008, but uses no social media. My husband, born in 1966, is mainly a Facebook user, and "does not open postal mail." My two sons, though they are only three years

apart in age, have dramatically different habits. The older one, born in 1997, relies primarily on Facebook and social media. He has "tens of thousands of unread emails," and checks his postal mail perhaps once a month. The younger son, born in 2000, has a Facebook account that is dormant, and presently relies mainly on Instagram and Snapchat, relying also on news feeds through these sources. He rarely and reluctantly uses email, and will use texts for his family. Therefore, for both the court and counsel, the task of designing an effective notice program must be tailored to the case. And multiple means may be the best choice. She therefore endorses the submission of AAJ on this topic. She also thinks that adding "one or more of the following" to the last sentence in the preliminary draft could be an improvement. She was thinking of recommending that the draft be revised to say "and/or" between U.S. mail and electronic means, but recognizes that trying to do so might be inconsistent with the style of the rules.

Steven Weisbrot (Angeion Group) (testimony and CV-2016-0004-0062): I am a partner and Executive Vice President of Notice & Strategy at Angeion, which is a national class action notice and claims administration company. I support the proposed amendment to the notice provision, for it is rooted in common sense and progressive logic that mirrors the current media landscape, and remains flexible enough to accommodate the changes in technology that are currently happening and will inevitably continue to occur for years into the future. Each settlement has its own unique media fingerprint, which is what should guide the preferred dissemination of notice, including individual notice. This individual tailoring of notice programs is critical, given the breakneck speed with which advertising is changing. A "one size fits all" solution that ignores modern communication realities will not work; it is essential to maintain the level of flexibility that the proposed amendment provides. But it is also critical to recognize that the amendment will be counter-productive without more rigorous judicial analysis of any proposed notice plan during the preliminary approval process. We think that no one factor (even "reach") should be given primacy in that assessment. I recently met with representatives of the FJC and suggested a comprehensive approach to fashioning a robust class notice program at the preliminary approval stage of class litigation. the media environment has changed vastly since *Mullane* was decided in 1950, and in class actions it is often true that defendants are in regular contact with class members via email. Indeed, "U.S. mail is becoming less customary in our society." For example, in a recent Telephone Consumer Protection Act settlement, we found a significantly higher claim filing rate amongst those noticed by email compared to those noticed by traditional U.S. mail. For those noticed by email, it was relatively simple to link to the claims filing webpage and finalize a claim, as compared with the extra steps required to

complete a claim via the U.S. mail notice program. But the key point is that notice programs should be evaluated one by one, using the following criteria: (1) how does the defendant typically communicate with class members; (2) what are the class member demographics; (3) what are the class members' psychographics; (4) what is the amount of the overall settlement in relation to the cost of the notice; and (5) what are the age and media habits of class members? In view of these current realities, adding the phrase "one or more of the following" to the rule-amendment proposal would be a good change. It reflects the value of repeated efforts to give notice, sometimes by multiple methods.

#### Written Comments

Todd Hilsee (16-CV-E & supplemented by CV-2016-0004-080):  
The Committee Note on p. 219 is wrong in stating that electronic means of giving notice can be "more reliable" There should be a presumption in favor of first class mail. The current rule allows all forms of individual notice, and does not need to be changed. The change wrongly equates electronic forms of notice with first class mail. In particular, banner ads are not effective. Various industry sources and governmental entities (e.g., the FTC) show that the rate of opening email ranges from a low of 7% to a high of less than 25%. The FTC study (attached) shows that physical mailings outstrip email, and far outstrip other forms of notice such as internet banners. According to a booklet published by another claims administrator (attached): "Email notices tend to generate a lower claims rate than direct-mail notice." According to Google, only 44% of banners typically included in "impression" statistics are actually viewable, and for more than half of banner impressions half of the banner is not on the screen for a human to see for more than one second. (Google report attached.) New revelations show that millions of internet banner "impressions" purchased for very low prices are seen not by human beings but by robots or are outright fakes. A Bloomberg report states:

The most startling finding: Only 20 percent of the campaign's "ad impressions" -- ads that appear on a computer or smartphone screen -- were even seen by actual people. . . . As an advertiser we were paying for eyeballs and thought that we were buying views. But in the digital world, you're just paying for the ad to be served, and there's no guarantee who will see it, or whether a human will see it at all. . . . Increasingly, digital ad viewers aren't human.

Some claims administrators have sworn to courts that extremely low claims rates are not normal. Hilsee concludes:

Numerous notice professionals tell me they have assessed

false promises that unscrupulous and untrained vendors have been pitching. But credible notice professionals may speak out only at their own peril. They have been told outright that major firms will not work with them if they publicly oppose notice plans. They face pressure to dial-back effective notice proposals to compete with falsely-effective inexpensive from affiants who are untrained in mass communications. Thus, despite the rule requiring "best practicable" notice, courts are too often presented with the least notice a vendor is willing to sign off on if awarded the contract to disseminate notice and administer the case. We should not compound the problems by making this unnecessary and counter-productive rule change.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We appreciate and applaud the efforts to update notice practices and to recognize that the ability to give individual notice by mail may not always be available, and that, even when it is, notice to certain class members may be better effectuated by email or other means. We also believe that the Note does an excellent job recognizing that different methods of individual notice may be better able to reach different audiences, and that the specific targeted audience must be considered in each case. We think, however, that a modest change could beneficially be made to Rule 23(c)(2)(B) as follows:

The notice may be by one or more of United States mail, electronic means, or other appropriate means . . .

This change would communicate more clearly that multiple methods of notice may be appropriate to better ensure reaching different subsets of the class. Using multiple methods of notice is commonly done today, and would enhance the likelihood of reaching the same constituents.

Katherine Kinsela (CV-2016-0004-0060): Based on my 24 years experience with class notice, I oppose the proposed changes regarding class notice. The changes are harmful because they (1) remove any clear standard for notice regardless of class injury; (2) equate all forms of media with individual notice; (3) evidence no understanding of the effectiveness of different forms of class communication; and (4) fail to address the most significant issue -- should all class actions be held to the same notice standard? Moreover, the changes are unnecessary, since courts have for years approved notice in hundreds of cases using media other than U.S. mail. The language of the proposal is vague and sweeps too broadly; "electronic means" can conflate email with electronic display advertising. Making this change "will likely open the floodgates to any and all notice methods."

There cannot be individual notice through mass media. Due to the amendment, the "best notice practicable" may evolve into "cheapest notice possible," and usher in banner ads rather than individual mailed notice even in cases involving substantial recoveries and easy methods of identifying class members. Already, settling parties often demand the cheapest notice possible, and they sometimes enshrine an arbitrary notice budget in the settlement agreement. So-called "experts" with little or no media training routinely submit affidavits stating that a notice program meets due process standards even though a review by trained and experienced experts indicates that it does not. There has been a sea change in what is considered satisfactory reach for a notice program. Where formerly 85% or 90% reach was an ordinary goal, more recently the goal has slipped to 70% and there is a "race to the bottom." Email can work as a notice method if the email list is based on a transactional relationship between the sender and the recipient, but that is not true of all email lists. Even with such a list, there is no reliable way to update the list and deliverability rates are low compared to U.S. mail. Moreover, the average American receives 88 emails a day but only about a dozen pieces of U.S. mail per week. The best solution would be to calibrate notice efforts with class injury. "A class action alleging false advertising regarding the organic content of a food product that settles for \$5 million is wholly different from cases alleging serious money damages." In cases involving serious money damages, the Note should make clear that in most cases with mailing data the preferred notice should be by U.S. mail. The new proposed sentence to Rule 23(c)(2)(B) should be replaced with the following:

When class members are partially or wholly unidentifiable, or the individual or aggregate class injuries are not significant, notice may include media or other appropriate means.

Moreover, the Note should specify that notice experts should be used in most cases. Although the Note now refers also to "professional claims administrators," that is not the same thing as a class notice expert. Judges should require that testifying notice experts possess the following traits: (1) recognition by courts of expert status; (2) credentials that meet the standards of *Daubert* and *Kumho*; (3) training or in-depth experience in media planning; (4) thorough knowledge of Rule 23; (4) the ability to translate complicated legal issues into accurate plain language; (5) the ability to create effective print, Internet, radio, and television notices consistent with best advertising practices; (6) an understanding of direct notice deliverability issues; and (7) the ability to combine direct notice reach, when known, with media reach to ascertain overall unduplicated reach to class members. These requirements should be included in written guidelines and disseminated by the FJC for judicial

education purposes. Otherwise the "watering down" of notice efforts will continue to occur. "In the 24 years I have designed and implemented notice programs, I have never heard a comment or seen a formal objection that a case had 'too much notice,' or that the notice was 'too expensive.' There is no ground swell of consumers clamoring for less access to their legal rights to keep costs down."

Pennsylvania Bar Association (CV-2016-0004-0064): The amendment is designed to adopt a more pragmatic approach to class notice in light of modern technological advances. By using the broad phrase "electronic means," the amendment would give the court discretion to use the best practicable notice in each case. There may, however, be a concern that recipients would be unwilling to open or click on a message from an unknown sender. In light of this concern, the Note should be revised to say that all emailed notices should provide an option for a class member who is unsure whether to click the link to go instead to the assigned court's webpage, or to call the district court clerk directly, for more information. Using class counsel's website or phone number seems more problematical because a government website would seem more secure.

American Association for Justice (CV-2016-0004-0066): AAJ supports this proposed amendment. It would continue the requirement that the court direct the best notice that is practicable under the circumstances, but remind courts that first-class mail is not the only option. The Committee properly recognizes that the vast technological changes in the past three decades mean that U.S. mail is not the best choice in all cases. AAJ recommends that the Note be revised to suggest that "mixed notice" or "a mix of different types of notice" be suggested. In some cases the use of multiple types of notice would be the most effective way of notifying class members. Nowadays a number of cases involve contact information that would make mixed notice not only feasible but also the most cost-effective method of notice. For instance, many companies collect email addresses as well as mailing addresses for their customers. AAJ also recommends acknowledging that electronic notice can take forms other than email. The statement that "email is the most promising" may not always be correct. Younger consumers, in particular, may interact with the marketplace through other electronic means. Referring to "email" implies a limited ability to keep up with the evolution of technology. There is no mention of other electronic platforms, such as Facebook Twitter, and Instagram, or other smart phone applications or notification options. For example, consider a case against a ride-share company such as Uber in which notifying class members using the application might be the best choice.

Joe Juenger & Donna-lyn Braun (Signal Interactive Media) (CV-2016-0004-078): We believe that amending the rule is not necessary. We advocate the use of digital media where suitable, but believe the current language of the rule adequately authorizes such efforts. Courts are already approving settlements that rely on electronic notice. Changing the rule might be urged to make electronic means the preferred or predominant means even though not justified. Existing Rule 23(c) is adequate and therefore should not be amended. Instead, the Note should be revised to say that electronic means are allowable where required to achieve the most effective notice.

Public Citizen Litigation Group (CV-2016-0004-081): In light of the concerns raised by Todd Hilsee and Katherine Kinsella, it seems prudent to proceed cautiously. We suggest that the Committee refrain from any suggestion that courts dispense with mailed notice in cases where it is practicable. At a minimum, the Note should emphasize that courts should generally continue to use mailed notice when it is feasible and that other means of notice should supplement rather than displace it. Whether there should be any change to the rule is a difficult question. The best practices in this area surely deserve further study. If the amendment goes forward, we urge that the Note say that the objective is not to encourage courts to rush to adopt electronic or other alternatives means of notice that are not demonstrated to be superior to mail.

Richard Simmons (Analytics) (CV-2016-0004-084): I have over 26 years of experience in designing and implementing class notification and claims programs. I can report that the use of digital notice, where appropriate, is common practice. Digital notice provides fundamentally different opportunities and challenges than traditional mailed notices. Existing practices, rules, and guidance that have been used to evaluate whether or not a notice program provides the "best practicable" notice are still necessary, but they are no longer sufficient to address the complexities of digital media. To address evolving methods of providing notice, the rules and Note should be modified to recommend that courts take account not only of the likelihood that members of the class will receive a message but also the extent to which they are likely to act in response to messages delivered by different means. The 2016 FTC orders to class action claims administrators about forms of notice is, to my knowledge, the first independent analysis of the effectiveness of alternative forms of class notice. When designing notice programs, a key question beyond initial "reach" is that the program actually prompt responses. It is possible to design a program that has great reach but actually minimizes the likelihood of claims being submitted. Digital notice is fundamentally different from traditional mailed notice because it can be targeted, calibrated, limited or expanded and because it

can provide data regarding how recipients interact with the notice materials. Unfortunately, some in this business do not fully exploit the information-gathering characteristics of digital notice by gathering and reporting data on how many of the notices were actually opened, how many links were clicked, etc. Another strategy is to exploit those digital capacities to design a notice program that is actually more effective. Unfortunately, market forces in class action practice often seem to favor the lowest cost provider, while overlooking the critical questions of real effectiveness of the notice. Active management of a notice campaign, for example, often generates additional costs. In light of these realities, my view is that the amendments and Note are necessary, but no longer sufficient to deal with the advent of digital notice campaigns.

Public Justice (CV-2016-0004-089): We endorse the proposed amendment because it wisely permits courts to adopt the best notice practices available for different types of cases. Methods of communication are evolving, and are very likely to continue to do so. In many instances, first class mail will remain the best practicable form of notice. But in a case in which the defendant communicates with class members by electronic means, as in privacy litigation relating to some apps or electronic product or service, first class mail may not be the best approach. We therefore applaud the Note at p. 219, which says that "courts giving notice under this rule should consider current technology, including class members' likely access to such technology, when selecting a method of giving notice." We believe the proposed amendment will help judges do their job.

Rule 23(e)(1)(A) -- "frontloading"

Washington D.C. hearing

Alan Morrison (George Washington Univ. Law School)  
(testimony & CV-2016-0004-0040): This provision will aid the court and aid unnamed class members. It is very important that the rule require full details to be submitted well in advance of the deadline for objecting or opting out. In the NFL concussion litigation, the proponents of the settlement filed about 1,000 pages of material after that deadline for action by class members (e.g., opting out or objecting) had passed. And the specifics about the attorney fee application should be included. That should be submitted at least 21 days before objections and opting out must be done. But it need not be filed with the settlement notice. The filing need not be in detail comparable to the final fee request, but at a minimum it should state the maximum amount of the proposed fee award. In addition, it is important to bring in others at the point the court is considering approving the giving of notice to get additional views on the quality of the settlement proposal. Later the parties' and court's views may harden if a massive notice effort has already occurred before objections are heard. At least in some cases it is not difficult to identify additional people to notify. If there is an MDL proceeding on the same general set of issues, that provides a ready list of those who could be notified rather easily -- the attorneys for the litigants involved in the MDL. Some potential problems can be eased at this point. For example, simplifying the claim form may produce substantial benefits but not be easy to do later.

Phoenix hearing

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): One concern might be about disclosure of the details of side agreements, particularly "blow up" provisions that permit the settling defendant to withdraw from the settlement if more than a certain number of class members have opted out. If that is not intended by the statement that the parties must submit all the things they intend to rely upon when seeking approval under Rule 23(e)(2), it should be clarified that "identifying" these agreements under Rule 23(e)(3) does not require such disclosures. One way to do that would be to revise the sentence in the Note on p. 221 of the pamphlet to read: "That would give the court a full picture and make non-confidential ~~this~~ information available to the members of the class." [It might be noted that the Note accompanying the 2003 amendment to Rule 23(e) said the following with regard to the requirement that other agreements be identified: "A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure."]

Written comments

Public Justice (CV-2016-0004-089): We believe that the frontloading requirement is a positive change that would assist both judges and class members. We particularly applaud the Note at 221: "The decision to give notice . . . should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object."

Rule 23(e)(1)(B) -- grounds for decision to give notice

Washington D.C. hearing

John Beisner (Skadden Arps): The Committee Note on p. 222 should be strengthened. At present it says that if the proposal to certify for purposes of settlement is not approved, "the parties' earlier submissions in regard to the proposed certification should not be considered in deciding on certification." The possibility of such use of submissions supporting the settlement will make defendants very nervous. A way should be found to avoid this deterrent to settlement.

Alan Morrison (George Washington Univ. Law School)  
(testimony & CV-2016-0004-0040): Even though the draft wisely avoids the term "preliminary approval" because that makes the task of objectors too difficult, it should be revised because the standards for approving notice sound too much like a decision that the settlement will be approved and the class certified. His preferred locution would be something like "a sufficient possibility the proposal will warrant approval." In addition, the inclusion of "under Rule 23(c)(3)" on p. 213 at line 45 is unnecessary and possibly confusing. Readers may think that the phrase applies only to classes under (b)(3), which is not correct. In addition, subparagraphs (i) and (ii) should be reversed if they are retained. They are not necessary, but the point of reversing them is to recognize that class certification logically precedes settlement approval.

Phoenix hearing

James Weatherholtz: He is concerned about Note language about the standard for directing notice to the class and for approving a proposed settlement after notice to the class. One concern focuses on p. 222 of the published draft, where the Note says "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." That seems too strong. Does that mean the court may not take any action based on the expectation that the settlement will be approved? How about enjoining collateral litigation by class members? The decision to send notice should be recognized as a final judgment for some purposes (such as supporting an injunction against collateral litigation by class members). But that could be seen as inconsistent with the proposed change to Rule 23(f) regarding immediate review of decisions under Rule 23(e)(1), and might foster efforts to obtain immediate review under Rule 23(f). Another concern is that, later in the Note on p. 222 it is said that the court should concern itself with the claims rate. That should not be made dispositive, for people may have many reasons for declining to submit claims. Some may simply oppose the idea of class actions.

That should not prevent approval of a settlement. Finally, the sentence citing § 3.07 of the ALI Principles on p. 223 should be removed because it seems tacitly to endorse the cy pres doctrine. The prior sentence of the draft ("And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.") is not problematic. But the parties should be free simply agree to disposition of those funds; the court should not be involved in reviewing or rejecting that agreement.

Dallas/Fort Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and written submission): The Committee Note, p. 222, contains the following statement "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." This "sweeping prohibition" is too broad. It might interfere with necessary actions like enjoining suit by class members who have not opted out. Moreover, it could be read to mean that class counsel is not really representing the class until the final approval of the settlement and certification for that purpose. It might also have implications for judicial restrictions on communications between class counsel and class members during the time the proposed settlement is under consideration. It is difficult to determine why certification for settlement purposes before the final settlement approval hearing can never be appropriate. DRI recommends softening the statement to take account of the possibility of settlement-only certification on proper evidence before the final hearing.

Timothy Pratt (Boston Scientific): Unlike all the other witnesses, he is a client. Boston Scientific is a party to a large amount and range of litigation. Pratt is Executive Vice President. Pratt is also involved with Lawyers for Civil Justice and the Federation of Corporate Counsel. He wishes to rebut the narrative put forward by others -- that defendants always want to draw things out. To the contrary, his experience is that he wants to get to the merits and get the matter resolved so his company can move on. We commend the changes in terms of general direction regarding settlement processing and review. But there is one change that should be made. In the Note, at p. 223, there is a reference to the ALI Principles of Aggregate Litigation § 3.07. That appears to endorse, or perhaps to create, a right to rely on cy pres in class actions in federal court. The Committee considered whether to adopt a rule provision addressing cy pres, and wisely decided to back away from that idea. But this comment in the Note "back into" the same problem. This should be left to party agreement, and not burdened with the restrictions that the ALI found desirable. Beyond that, the Note says that reversion of funds to the defendant should not be allowed, and mentions deterrence as a reason for that. That's

not proper, and those statements should be removed or modified.

Written comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Our concerns relate to two issues:

(1) Disapproval of the term "preliminary approval." We are troubled by statements in the Note seemingly disavowing the use of the term "preliminary approval." The amendment instead calls the decision under Rule 23(e)(1) a "decision to give notice." But "preliminary approval" is the existing term and practice for the juncture at which the court first reviews a proposal for settlement. The term "preliminary approval" means simply that the court has determined that the proposed settlement is deserving of the expense and effort of class notice. Most forms of order submitted to the court are called "Preliminary Approval Orders." Class action practitioners understand that when the court orders notice it is not substantively approving either class certification (assuming that has not already happened) or the terms of the settlement. We recommend that the title reflect existing practice by using the title "Preliminary Approval -- the Decision to Give Notice" or simply "Preliminary Approval." As an alternative, perhaps it could instead be labelled "Preliminary Review." If that were done, Rule 23(e)(2) could be renamed "Final Approval of the Proposal." We understand that the Committee is concerned about making it appear that the decision to give notice means that approval of the proposal is inevitable. But the explicit findings the amendment required before notice can be authorized may increase, rather than decrease, the risk of settled expectations that the court will approve the settlement. Requiring that the judge specifically *find* that (1) the court will "likely" approve the proposal, and (2) the court will "likely" certify the class for purposes of settlement may make approval seem even more likely than under the rule's current language. The proposed phrasing could deter objectors from objecting because they would assume under that standard that certification and settlement approval is a "done deal." Compare the experience we have had with litigating before a judge who has made findings about likelihood of success in regard to a preliminary injunction -- a very difficult task. Our proposed solution would be to make clear that the preliminary findings are of a "prima facie" nature, either by using that term or using words to the effect that the court has found preliminarily, based on the materials submitted, that the class may ultimately be certified for settlement purposes and that the

proposed settlement appears worthy of approval.

(2) Reference to attorney's fees arrangement as part of the preliminary approval decision. The draft says that the court should order notice unless the parties show that it will likely be able to "approve the proposal under Rule 23(e)(2)." That provision, in turn, includes (iii) -- "the terms of any proposed award of attorney's fees, including timing of payment." We understand that under existing law, and in common practice, the decision on attorney's fees is not made until final approval. The separation between the attorney's fees question and the approval of the settlement on the merits therefore should make it clear that the preliminary approval does not extend to the attorney's fees aspect. One solution would be to revise proposed 23(e)(1)(B)(i) as follows:

- (i) approve the proposal under Rule 23(e)(2) except (C)(iii); and

Relabelling this decision "preliminary approval" or "preliminary review" would assist in making this distinction.

Pennsylvania Bar Association (CV-2016-0004-0064): We support adoption of this provision. The information involved would be useful to avoid problems in the case later on.

Gary Mason & Hassan Zavareei (CV-2016-0004-0065): We believe that the Note on 23(e)(1) improperly over-emphasizes the importance of claims rates. This emphasis is not consistent with current law to the extent it pulls out the claims rate as the most important factor in determining fees. A myriad of other factors routinely are considered. Indeed, numerous courts have held that claims rates are *not* a determinative factor. We propose revising the Note as follows:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases it may be appropriate to consider ~~will be important to relate~~ the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. However, the settlement's fairness may also be judged by the opportunity created for class members. ~~One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.~~ (p. 223)

New York City Bar (CV-2016-0005-070): The Committee Note suggests twice that the court review claims rates in assessing settlements. We agree that such review is generally appropriate, but believe the Note should be edited to make it clear that such review is not always appropriate. We agree that is generally a good idea to assess the likely claims rates in class settlements, and to treat that information as a data point in determining whether a settlement delivers meaningful relief. Tying "actual claims experience" to fees incentivizes the parties to implement automatic distribution of settlement proceeds where possible, to implement a robust notice program to reach class members, if automatic distribution is not possible, and to create a simple, easy-to-understand claim form. But in some cases the claims rate is difficult to determine in part because the number of class members -- the denominator -- is difficult to determine with precision. We recommend modifying the note on p. 223 as follows:

It may in some cases, it will be important for the court to consider to relate the amount of an award of attorney's fees in relation to the expected benefits to the class, and, when it is feasible and cost-effective to measure the claims rate, to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Similarly, we recommend the following changes to the Note on p. 227:

Provisions for reporting back to the court about actual claims experience, where it is feasible and cost-effective to, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Defense Research Institute (CV-2016-0004-072): There are a number of references in the Note to the claims rate. Although some courts do take that into account in determining an appropriate attorney's fee award, we do not think it is an appropriate consideration in evaluating the fairness of the settlement itself. The Note should be revised to make it clear that this factor does not bear on the fairness of the settlement. To be sure, a claims process should be based on the need for information from class members to process claims. It should never be used simply to diminish payouts. But when a court determines that such a process is justified under a given settlement and finds that the notice proposed is satisfactory, the actual response should not have any bearing on the fairness of the settlement. What matters is the relief offered, not how often it is claimed. Class members may decide not to make claims for a variety of reasons. The object of such settlements is not

to deter defendants from certain conduct; they have not admitted any wrongdoing. A settlement can be fair, reasonable, and adequate, and class members may nonetheless decide, for some reason, not to pursue relief. In addition, on p. 222 the Note says that the court cannot certify the class for purposes of settlement until the final hearing. That sweeping prohibition could inhibit the court from taking needed actions, such as enjoining litigation about the same claims by class members. It might also weaken efforts to regulate communications with the class if it meant that class counsel are not yet the lawyers for the class. DRI recommends softening that statement. On p. 223, the Note also refers to the ALI Principles of Aggregate Litigation. That reference introduces a substantive matter that offers a windfall to a nonlitigant in place of relief for a litigant.

Nelson Mullins Riley & Scarborough LLP (CV-2016-0004-073): The citation to the ALI Principles of Aggregate Litigation on p. 223 of the Note should be removed. Contrary to the implication of the draft Note, judicial citation to § 3.07 of that publication does not evidence a broad approval of cy pres provisions in class action settlement agreements. Instead, it urges a broadening or redefinition of the law, and does not presume merely to restate the law as it stood at the time of publication in 2010. The Note's reference to cy pres is also unnecessary and premature. Private agreements regarding the disbursement of unclaimed funds to non-litigants who have suffered no harm are not necessary for the approval of proposed settlement agreements.

Aaron D. Van Oort (CV-2016-0004-075): Using the standard "likely to be able to" approve the settlement and (where needed) class certification is a sound addition to the rule because it will help prevent one of the most harmful scenarios in class action practice -- rejection of settlement only after notice is sent and class members have submitted claims. Guarding against this risk is important, and the rule change is a good step in that direction. The factors identified in the proposed rule are sound, but I am concerned that the rule does not address the concept of proportionality -- the question of how much review is enough in a given case. The Note likewise does not address this concept. Many class action settlements involve low value claims or defendants in financial distress, or both. Courts should be given flexibility to adapt the burden of review to match the complexity and value of the case. I propose adding the following to the paragraph at pp. 223-24 of the Note:

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply

further information about the topics they do address, or to supply information on topics they do not address. In determining the amount and detail of information it requires the parties to submit at the notice stage under Rule 23(e)(1) and the approval stage under Rule 23(e)(2), the court should consider whether the burden of generating and submitting the information is proportional to the value of the claims, the amount of the settlement, and other factors informing the scope of review. The court ~~It~~ must not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Public Citizen Litigation Group (CV-2016-0004-081): We strongly support the approach of replacing the prevailing non-rule-based concept of "preliminary settlement approval" and "conditional certification" of settlement classes with a rule requiring that the court give early consideration to whether the parties have made a sufficient showing to justify giving notice. We are worried, however, about the use of the word "if" in the amendment to (e)(1) because that might imply that sometimes courts can approve settlements without giving notice. Although this misunderstanding may seem unlikely, we urge the Committee to make the rule clear to avoid any risk of misinterpretation. In addition, the "likely to be approved" standard seems likely to revive the disfavored "preliminary approval" idea sometimes in vogue. We favor the use instead of "reasonable likelihood" of approval. Accordingly, we would replace the proposed new language in (e)(1)(B) with the following:

The court shall direct such notice if it finds that consideration of the proposal is justified by the parties' showing that there is a reasonable likelihood that the court will be able to (i) certify the class for purpose of judgment on the proposal, if the class has not previously eeg certified; and (ii) approve the proposal under Rule 23(e)(2).

This proposal is similar to the one submitted by Prof. Alan Morrison, and we would also support the proposal he made in his Oct. 10, 2016, comments at pp. 6-7.

Diane Webb (Legal Aid at Work) (CV-2016-0004-086): We are program that was founded more than 100 years ago to provide legal aid to low-wage workers. We rely on charitable gifts, foundation grants, money from the California State Bar Legal Services Trust Fund, and cy pres distributions. These sources of funding have been drying up. The State Bar trust fund, for example, has had reduced funds for a long time due to low interest rates. Currently, we rely on cy pres funds to support our Workers'

Rights Clinic activities, including expanded services in rural areas of California. To save money, we rely on "virtual clinics" using video-call technology. In 2016, our Workers' Rights Clinic served more than 1200 clients. We wish to emphasize that cy pres funding is essential to our organization's mission and its continued sustainability. We believe that including a reference to the availability and appropriateness of cy pres in the Notes to the Rule 23 amendments will provide valuable guidance to litigants and the courts alike.

Washington Legal Foundation (CV-2016-0004-087): WLF believes that any proposed reference to cy pres awards should be eliminated. Cy pres is a highly controversial mechanism used to justify class actions even though the remotely situated class members cannot feasibly be identified or when identifying them would be more expensive than any potential recovery would warrant. With increasing frequency, cy pres has been utilized in federal class actions to award unclaimed funds to one or another charities supposedly relevant in some way to the issues presented in the case. Although the Committee prudently withdrew the idea of a rule provision addressing use of cy pres, the Note at pp. 222-23 still contains a reference to cy pres and also cites the ALI Aggregate Litigation Principles on this subject. WLF believes there is no basis to enshrine cy pres in the rules. More often than not, the primary function of cy pres is to ensure that a settlement fund is large enough to guarantee substantial attorney's fees or to make the bringing of the class action economically feasible. And cy pres distributions can contribute to a significant potential conflict of interest between class counsel and class members, because class counsel has no incentive to work hard to get the recoveries to class members as a way to justify reference to the overall class "recovery" as a basis for a large attorney's fee. There are serious Article III implications of unrestrained use of cy pres, and these "awards" are akin to punitive damages, which generally are permitted only where the courts have legislative authorization for them. Instead of citing cy pres approvingly, the rule amendments should clarify that Rule 23 provides no basis whatsoever for cy pres awards.

Rule 23(e)(2) -- standards for approval

Washington D.C. hearing

John Beisner (Skadden Arps): The Note fails to address what the court should do if it concludes that the proposed settlement should not be approved. This could apply either at the stage of deciding whether to give notice or at the final settlement-approval stage. It would be very helpful to have a discussion of what to do at that point. There could be some tension with the line of cases saying that the court may not rewrite the parties' agreement "for" them. So the Note should warn against being too specific about what changes would be likely to earn the court's approval. But at the moment this is a void in the Note. In addition, regarding the Note on p. 227, it is critical that the reference to the "relief actually delivered" specify that payment of a significant part or all of the attorney fee award ordinarily should await a report to the court about the results of the payout effort. If the lawyers are paid in full and it turns out that only 5% of the settlement funds have actually been claimed, it may be too late to do anything about it.

Brent Johnson (Committee to Support Antitrust Laws) (with written testimony): COSAL is concerned that proposed 23(e)(2)(C)(ii) could be used to support something like an ascertainability obstacle to class certification. The use of the word "effectiveness" as a criterion there might prompt some courts to conclude that a class action is not proper unless a heightened ascertainability standard is met. Ascertainability has split the circuits, and should not be insinuated here. Instead, the rule should say that "best methods" for distribution are the court's focus at this point.

Phoenix hearing

Thomas Sobol: I represent plaintiffs in pharmaceutical pricing and other health cases. It is good that the amendment addresses the distribution of relief. Responsible class counsel make efforts to ensure that money actually gets to class members. Judges also take an active role in doing so. One example was a case in Boston where Judge William Young would not authorize payment of our counsel fees until we improved the effectiveness of our payout. The first effort drew only 10,000 claims, and we were able to develop a list of 250,000 class members and improve the claims rate. Nevertheless, Rule 23(e)(2)(C)(ii) is phrased in a way that creates ambiguity. One interpretation is that it sets an absolute standard of distribution effectiveness. There is a risk it would be interpreted to say that, for all cases, there is an absolute standard of distribution effectiveness, and that the court should reject the proposal if it does not satisfy that absolute standard. On the other hand, it might only call

for focusing on the comparative effectiveness of reasonably selected alternative methods of affording relief. The first interpretation would work mischief. That risk could be avoided by revising the factor:

- (ii) the effectiveness of the proposed method of distributing relief to the class as compared to other, reasonably available methods of distribution under the circumstances, including the method of processing class-member claims, if any.

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): Factor (D) is very important; I am frequently asked whether different segments of the class can be treated differently. But it would be better to phrase (iv) in active voice -- "the proposal treats class members equitably relative to the value of their claims." Also, it might be good to add something like "relative to the value of their claims."

Paul Bland (Public Justice); I agree with Sobol that there is a risk the proposed rule language could be misinterpreted. But the solution probably is to make changes in the Note, not the rule, to clarify what is meant.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and CV-2016-0004-088): There are a number of references in the Committee Note suggesting that the court should focus on the anticipated or actual claim rate as an appropriate measure of whether the settlement itself is reasonable. Claims rates will always be lower than 100%. And class members may have a variety of reasons for not making claims, including being philosophically opposed to class actions, not feeling that they have a claim against the defendant, or not thinking that the payoff is worth the effort. Although the court might properly take an interest in whether the claiming process was fair or, instead, too burdensome, that determination can be made well before the claims process is engaged. The approval of the settlement should not depend on how many class members choose to avail themselves of the benefits offered. Treating a low claims rate as a "red flag" of problems with the settlement is using 20/20 hindsight. The settlement should be judged in terms of its provisions, and that judgment is not dependent on the subsequent developments.

Prof. Judith Resnik (Yale Law School) (testimony & CV-2016-0004-092): The amendments make a desirable effort to improve the settlement process, but more needs to be done. The key improvement is more explicit recognition of the court's responsibility for assuring that relief is really delivered to class members. I believe these changes are consistent with the

proposals already made and could be added without the need for republication and a further public comment period. Already the Note to (e)(1) and (e)(2) addresses the importance of judicial scrutiny of the proposed means for giving notice and making claims. The preliminary draft also suggests that reporting back to the court on the actual claims experience is desirable, and that the amount or timing of attorney fee payments to class counsel depend in part on the success of the claims program in delivering relief to class members. At present, the lack of court involvement in the phase after the settlement has been approved has resulted in a paucity of information on the public record about the actual success of the class action in delivering relief to the class. The rules should recognize that courts have responsibilities as "fiduciaries" of the class to ensure that class members receive the intended relief. Courts have done that in the context of structural injunctions, but not other cases. Learning about the intended methods of inviting and processing class member claims (as the current draft suggests) is desirable, but it is not enough. The rule should create a presumption that the parties file a statement about actual claims experience. Presently the Note only says that it may be important to provide that the parties do that. Courts should be directed to require that settlement agreements provide for regular reporting back to the court about distribution decisions, and also that, if conflicts about distribution across sets of claimants emerge, there is a method to return to court. Periodic reports to the court should be required, with regard to both structural relief and dollars distributed. It would also be desirable to impose sliding-scale fee awards for class counsel keyed to the success of the settlement in delivering actual relief to class members. That would build in an incentive for class counsel to make distribution a priority.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These changes are not explicit enough to achieve the desired result of ensuring that attorney fee awards are proportional to the benefits actually delivered to class members. In the 2003 amendments, the Committee Note to Rule 23(h) clearly stated that the benefits to class members should be a major factor in determining the amount of the fee award. But the reality is that the courts have too often disregarded this idea. Even after the adoption of CAFA, with its focus on coupon settlements, counsel still manage to camouflage coupons behind some other title, such as "vouchers," and justify over-large attorney fee awards by invoking the alleged total value of the coupons available to class members. The courts of appeals have split on whether courts are required to pierce these showings and make certain that the attorney fee awards do not exceed the benefits actually delivered to the class. The Seventh Circuit has been a leader in insisting that district courts make certain of proportionality. But if this amendment is adopted,

that may not only fail to bring the other courts into line, but prompt the courts that heeded the Committee's advice in 2003 to back off their requirement of proportionality. Under these circumstances, the right course would be to revise the amendment and adopt the Seventh Circuit's view. To achieve this result, the Rule 23(e)(2)(C)(iii) proposal should be revised as follows:

- (iii) the terms of any proposed aware of attorney's fees, including timing of payments, and, if class members are being required to compromise their claims, the ratio of (a) attorney's fees to (b) the amount of relief actually delivered to class members; and

In addition, the settlement approval provisions should explicitly prohibit clear sailing and reversion provisions in class action settlements. Claims administrators can very accurately forecast the take-up rate, and defendants rest assured that they will not face large actual pay-outs. Indeed, they can even buy insurance against the risk of over-high pay-outs.

#### Written comments

Lawyers for Civil Justice (CV-2016-0004-0039): The Committee should abandon this provision because unifying the standards is unlikely to provide genuine uniformity and it may instead cause increased litigation. Because the amendment only allows courts to "consider" these criteria, it is not likely to produce genuine uniformity. One criterion that has been useful -- the number and strength of objections of class members -- is not on the Committee's list. Because there is no catch-all provision, it is possible that important factors will be overlooked. But any catch-all provision must be limited. The limit could be to make it clear that any additional factor must go to whether the settlement is "fair, reasonable, and adequate." The current reality is that courts need flexibility. "Although there is clearly variation among the circuits, there is no indication that differences in settlement approval criteria are responsible for the rejection of settlements that should have been approved or the approval of settlements that should have been rejected." Moreover, some criteria are not adequately explained. For example, the timing of the payment of attorney fee awards is mentioned but not explained. Counsel sometimes press for a "quick pay" provision to ward off objectors. Is that what is meant? Defendants are unlikely to consent to such a provision absent a guarantee of repayment in the event of appellate reversal. Similarly, the "method of processing class-member claims, if required" is vague and ambiguous. This is a new requirement. Does it mean that arrangements in which a third-party processes claims are inherently more fair? Also, the new header for Rule 23(e)(3) -- "identification of side agreements" -- is likely to raise questions due to the use of the word "side."

For example, if the parties agree to pursue settlement approval in a jurisdiction where the law is clear on how that is to be done, is that a "side" agreement subject to disclosure? The word "side" should be deleted.

Gregory Joseph (CV-2016-0004-0040): The phrase "proposed to be certified for purposes of settlement" raises a question -- proposed to be settled where? Currently, if the parties want to settle a case originally filed in federal court in a state court instead, they can dismiss the federal action because it is uncertified and refile in state court. Is this change intended to prevent that result? That seems unwarranted, and is not hinted at in the Committee Note. Does the amendment change that if the federal court decides for some reason not to approve the proposal for settlement? Again, it does not seem that the federal court has a reason to prevent the parties from seeking approval in another court.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Our comments focus on three matters:

(1) The adequacy of relief to the class: We believe the first factor in the rule text should be moved up to (C), rather than included in subpart (i). Although the likelihood of success is mentioned in the Note, we believe it is often a dominant consideration, and one that should be balanced against the costs, risks and delay of further proceedings. If the plaintiffs' claims are strong, the court should expect that fact to be reflected in the relief to the class. But sometimes plaintiffs' claims are weak, or the defenses are strong also, and sometimes the law is uncertain. The point should be that the likelihood of success factor will support a settlement that otherwise might not be viewed as adequate, but is reasonable in light of the circumstances. Moreover, the costs of trial and appeal are not the only matters to be taken into account; the prospect of motions to dismiss or for summary judgment, and discovery costs, should be considered also. Thus, we would favor revising (C) and (i) as follows:

- (C) the relief provided to the class is adequate, taking into account the likelihood of success and the following:
  - (i) the costs, risks, and delay of further proceedings, including trial and appeal;

(2) Timing of notice under (e)(1): Under (e)(2), the court

may approve the proposal only "after a hearing." Some practitioners believe there is an ambiguity regarding whether notice must be given under (e)(1) before a hearing to approve the settlement under (e)(2) is scheduled. To clarify this matter, we propose that (e)(2) be revised, perhaps in one of the following ways:

*Alternative 1*

If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after notice and a hearing . . .

*Alternative 2*

If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after directing notice as provided in Rule 23(e)(1), a hearing . . .

(3) Reference in Note to extent of discovery as a factor bearing on approval of the proposal: More than once, the Note speaks of informing the court about the nature and amount of discovery in this and other cases, suggested that it is an important consideration in approval of the proposal. Although the extent of discovery could be relevant, we believe the Note should balance this discussion with language suggesting that early settlements before discovery has commenced should not be discouraged. The 2015 amendments emphasized the importance of proportionality in discovery, but some lawyers nevertheless take the position that they cannot approach settlement until a requisite amount of discovery is taken. Others will negotiate an early settlement but insist upon "confirmatory discovery" after the terms of settlement have been reached. As currently written, the Note might be seen to encourage wasteful discovery. Particularly in cases involving mergers and acquisitions, this would be an undesirable thing.

Pennsylvania Bar Association (CV-2016-0004-0064): We support this amendment, but think it is important to state that the factors are not exclusive. Some of the factors seem redundant. For example, adequacy of representation has already been addressed under Rule 23(a)(4). Although the amendment reflects an effort to clarify the factors already used by courts, by focusing on some and not mentioning others it may be interpreted to confine courts' discretion. To avoid that result, it would be desirable to say in the rule that the list is not exclusive.

Gary Mason & Hassan Zavareei (CV-2016-0004-0065): We believe that the Note on 23(e)(2) improperly over-emphasizes the importance of claims rates. This emphasis is not consistent with current law to the extent it pulls out the claims rate as the most important factor in determining fees. A myriad of other factors routinely are considered. Indeed, numerous courts have held that claims rates are *not* a determinative factor. We propose revising the Note as follows:

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. The number of claims submitted may not be a significant factor in cases where the award of attorney's fees is based on lodestar or is determined based on the full benefits made available by the settlement. Nevertheless, the relief actually delivered to the class ~~may~~ can be an important factor in determining the appropriate fee award. ~~In some cases, the Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known,~~ may bear on the fairness of the overall proposed settlement. (p. 227)

American Association for Justice (CV-2016-0004-0066): AAJ applauds and supports the effort to streamline the information courts consider when determining whether to approve a proposed class-action settlement. The addition of the word "only" regarding the existing criteria (fair, reasonable, and adequate) is more emphatic. The rewrite of the rule focuses the courts and litigants properly on the core concerns regarding settlement and move away from focusing on other lists of circuit-specific factors, which may be irrelevant to particular cases and may have remained unchanged in certain circuits for over 30 years. AAJ is concerned, however, about the two references to attorney's fees (on pp. 223 and 227) may complicate the review process and confuse courts and litigants with regard to settlement review. The suggestion that the reference to "claims rate" and the suggestion of deferring fee awards could be misconstrued by courts to have broad application. We offer the following views:

(1) Although the proposed attorney's fee award is a factor that bears on sending notice to the class, the reference to this factor on p. 223 seems unduly to stress this issue. Emphasizing this one factor, and not others, could be interpreted in limiting the courts' flexibility. Deferral of some or all attorney's fees seems to us out of place in regard to giving notice (the focus on p. 223). Even in regard to application of the 23(e)(2) approval factors, the emphasis seems unwarranted to us because it likely matters

in a minority of settlements. Focusing on claims rates may overlook important deterrence and other benefits provided by the settlement. AAJ thinks that the paragraph on p. 223 so that only the first sentence remains:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court.

Alternatively, if a reference to "claims rate" remains in the Note, we think that the Note on p. 223 should be rewritten as follows:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties submission to the court. In a small number of some cases, it may will be appropriate important to evaluate the expected benefits to the class or to take into account the likely claims rate relate the amount of an award of attorney's fees when considering the settlement and the award of attorney's fees. In such cases, other consideration may predominant, such as the difficult of the work, the quality of the representation and the results obtained, deterrence of violations of the law, and appropriate use of unclaimed funds, such as cy pres awards. Further, it may be appropriate to allow for inclusion of fees for significant additional work class counsel performs after notice is disseminated. to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

(2) The topic of attorney's fees comes up again in the Note on p. 227. The first two sentences of the second full paragraph on that page are accurate. But AAJ is concerned about the further discussion of "the relief actually delivered to the class" and possible deferral of fees until the claim experience is reported. This seems to reinforce the minority of cases where the settlement is a "claims made" settlement as opposed to a common fund. By referring to this special consideration, without providing other equally important factors, the Note could be interpreted as making claims rate experience both a general and exclusive concern. But some cases have low claims rates are only one factor in assessing the overall value of the case. Even if there is a low claims rate, the case may have considerable deterrent value. Other factors come into play, including

whether the underlying statute has an attorney's fee provision that indicates that the legislature has determined that a fully compensatory fee should be paid somewhat without regard to compensation in the individual case. But AAJ recognizes also that listing all these factors might overburden the Note. If the Committee deems it necessary to retain reference to claims experience, it favors revising the paragraph on p. 227 as follows:

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, evaluation of the relief actually delivered to the class can be an important factor in determining the appropriate fee award. In these cases, Provisions for reporting back to the court about actual claims experience is not an exclusive factor and other relevant factors, including, but not limited to, deterrent effect, legislative intent, and alternative use of the unclaimed funds, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

(3) AAJ is also concerned about factor (D) regarding equitable treatment of class members relative to each other. If that provision remains, it is important that courts not interpret "equitable" to be the same as "equal." Careened law does not require that a class action settlement benefit all class members equally. For example, if there are statute of limitations problems that affect the claims of some class members but not others, that would justify different treatment. To avoid misunderstanding, AAJ strongly urges revision of the Note on pp. 227-28 as follows:

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis others. Equitable treatment does not mean that all class members benefit equally from the settlement, but rather that the settlement be objectively fair to all members. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief.

Yvonne McKenzie (Pepper Hamilton) (CV-2016-0004-0069): We have two comments that focus on Rule 23(e)(2):

(1) We agree with the following statement in the Note on p. 226: "The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made . . . ." But we are concerned that the rule does not address a related concern that courts may not take adequate measures to define the class or otherwise to ensure that uninjured class members do not recover. This concern is particularly significant in the growing number of consumer class actions that are being brought based on technical violations of state and federal statutes with no concrete injury common to all class members. In *Spokeo v. Robins*, 136 S.Ct. 1540 (2016), the Supreme Court has held that a bare procedural violation does not satisfy Article III. The rule should be clarified to state that the class representative must show that all class members have Article III standing. One way to do this would be to amend Rule 23(a)(3) to clarify that typicality means that all class members have an injury similar to the one alleged by the class representative. Chief Justice Roberts recognized the importance of this issue in his concurring opinion in *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1051 (2016): "I am not convinced that the District Court will be able to devise a means of distributing the award only to injured class members."

(2) The second comment is related to the first. Proposed Rule 23(e)(2)(C)(ii) addresses in part the concern with compensating uninjured parties by requiring the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." The Note adds that the "claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims." We believe that this concern is better addressed at the class-certification stage. To illustrate, consider the recent Ninth Circuit decision in *Briseno v. ConAgra Foods*, 844 F.3d 1121 (9th Cir. 2017), where the court affirmed class certification in a case involving an allegedly misleading label claim that cooking oil was "all natural," even though many class members would likely be unable to recall what brand of cooking oil they purchased, much less whether the label claimed to be all natural. But the Ninth Circuit decision simply kicked the issue whether these class members could satisfy Article III down the road, an impractical result that could be avoided by a rigorous analysis at the class-certification stage.

Since it is not resolved at the certification stage, things are kicked down the line until the settlement stage. But the proposed Note to (e)(1) and (e)(2) do little to address this problem. Instead, they only call for attention to the method of processing class member claims and concern about the "claims rate." This comes close to endorsing diversion of the defendant's money to uninjured cy pres recipients. That is a mistake. Cy pres simultaneously facilitates the flaws and in modern class actions and creates the illusion of class compensation.

New York City Bar (CV-2016-0005-070): We are generally in favor of this proposal and believe it is helpful to lay out a specific framework for evaluating whether to approve a class settlement. The articulation of these criteria should minimize distinctions among the circuits, which we support. We do propose some edits, however:

(1) On p. 224, the Note says that the purpose of the amendment is "not to displace any of [the circuits'] factors." We fear that this may cause confusion. Instead, we suggest that the Note read as follows:

The goal of this amendment is not to displace any of these factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal the case law developed by the circuits because that case law remains relevant to determining whether a settlement meets the criteria for approval detailed in Rule 23(e)(2) itself. Because those same central concerns are embodied in the factors listed in Rule 23(e)(2), the amendment directs the parties to principally address the fairness, reasonableness and adequacy of the settlement to the court in terms that encompass the shorter list of core concerns, when all of those factors are appropriate.

(2) We are concerned that the amendment may be taken to direct consideration of all the factors even in cases in which they are not apposite. We think that the rule language on p. 213 at line 47-48 should be revised as follows:

only after finding that it is fair, reasonable, and adequate after considering factors including, where appropriate, whether:

(3) We offer the following comments on two of the factors in 23(e)(2):

23(e)(2)(C)(ii) focuses on "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." This type of factor has not regularly been addressed by the courts of appeals, and we are concerned that the district courts could apply it inconsistently. The Note should say that this factor does not require a specific method or absolute standard for distribution. Moreover, with regard to non-monetary relief, we worry that this standard might restrict creativity in tailoring relief before the method has been used. At a minimum, the Note should indicate that this factor may be inapposite for non-monetary settlements.

23(e)(2)(D) calls for the court to focus on whether "class members are treated equitably relative to each other." The Note should make clear that "equitable" is not the same as "equal," and that subclassing may often lead to different relief for different subclasses.

(4) We believe that another factor should be added -- "the nature of the class members' and objectors' reaction." We think this factor is not included in the proposed list, and that it is important. We say the focus should be on "the nature" of the reaction because otherwise there may be a risk courts will simply engage in nose-counting. A qualitative analysis of the class members' reaction is more important than an quantitative one.

Aaron D. Van Oort (CV-2016-0004-075): The provision in Rule 23(e)(2)(D) regarding equitable treatment of class members vis-a-vis each other is an important instruction for courts and lawyers. My concern is that the Note does not explain this important concept, and recognize that settlements must smooth out differences between class members in order to achieve speed, simplicity, efficiency, and finality. In a way, this point focuses on the differences between common and individual questions, particularly pertinent in this day of increased use of Rule 23(c)(4). "Because of the limitations imposed by the Rules Enabling Act, nearly all litigation classes are issue classes under Rule 23(c)(4), whether they are designated such or not." This is not to open a debate on a topic the Committee has put aside, but designed to make the point that when they settle parties can compromise on some of those individual questions even though courts might be unable to resolve them via litigation. Courts should therefore recognize as common for purposes of settlement issues that -- if litigated fully -- would be individual. I would therefore add to the Note paragraph on pp. 227-28 as follows:

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief. In applying Rule 23(c)(2)(D), courts may give due regard to the parties' ability to compromise and simplify the treatment of claims to achieve speed, simplicity, efficiency, and finality.

Public Citizen Litigation Group (CV-2016-0004-081): We generally support these changes. But we also support the suggestions of COSAL and Thomas Sobol that the criterion concerning the distribution of relief should be clarified. Rather than suggesting that all settlements must meet some absolute standard of efficacy of distribution of the settlement's benefits, the rule should recognize that the question is one of available alternatives. We suggest that proposed (e)(2)(C)(ii) be revised as follows:

- (ii) ~~the effectiveness of the proposed method of~~ distributing relief to the class, including the method of processing class-member claims, if required, is reasonable in relation to other practicable methods of distribution under the circumstances;

Public Justice (CV-2016-0004-089): We have concerns about the focus of proposed Rule 23(e)(2)(C)(ii). In the first place, the rule seems to assume that class actions generally include claims systems. In our experience there are a great many class actions where every member of the class is sent a check, or receives a credit or otherwise automatically gets relief. That reality should not be overlooked. Second, particularly when the defendant has dragged out the case, the settling class representatives and class counsel may encounter great difficulty in locating many class members. When that happens, the right solution is a cy pres use of the remaining funds that addresses the grievance raised by the suit. We know that the Note to Rule 23(e)(1) makes a brief reference to this possibility at pp. 222-23. We urge the Committee to expand on this point. In cases we have handled involving illegal debt collection practices, residual funds were properly committed to support organizations that protect the rights of debtors in the same geographic area as the class members. The inclusion of that possibility is and should be a factor in support of approval of the settlement.

Rule 23(e)(5)(A) -- objector disclosure and specificity

Washington D.C. hearing

Mark Chalos (Tenn. Trial Lawyers Ass'n): District courts routinely allow discovery about prior objections by objectors before them. It would be desirable to include a requirement that all objectors disclose how many times in the past they have objected. This listing should include case name, the court in which the case was pending, the docket number of all other cases in which the objector has submitted objections.

Alan Morrison (George Washington Univ. Law School)  
(testimony & CV-2016-00004-0040): This provision is not objectionable. But it is worth noting that sometimes settlement proponents go too far in policing the objections process. For example, in the NFL concussion case the parties required that all objections be personally signed by all the objectors and not just their lawyers even though they had pending cases in the MDL proceeding. That violates 28 U.S.C. § 1654 and was burdensome to lawyers who had more than one or two clients. On occasion it resulted in lawyers being unable to file objections on behalf of all of their clients.

Phoenix hearing

Thomas Sobol: The amendment does not go far enough. Keep in mind what is required of the class representative and class counsel. The representative must demonstrate typicality and adequacy. Class counsel must satisfy Rule 23(g). These requirements are essential to ensure that the court does not improvidently authorize somebody inappropriate to take actions that impair the legal rights of others. Yet objectors can put at risk the rights of the other class members by simply objecting. If they are doing so only on their own behalf, that should be their right, but if they assert that their objections are submitted on behalf of others, or perhaps the entire class, the court should consider insisting that they satisfy the same requirements that the class representative and class counsel must satisfy. The court should not consider the objection until this scrutiny of the objector and objector counsel is completed. The court has inherent power to do this, but the power should be made explicit. The following could be added at the end of proposed (e)(5)(A):

If an objection applies to a specific subset of the class or to the entire class, the court may require the class member filing such an objection to make a factual showing sufficient to permit the court to find (i) that the class member is a member of the affected class or a subset of the class; (ii) that the class member will fairly and adequately

represent the interests of the class; and/or (iii) that the counsel for each class member is qualified to fairly and adequately represent the interests of the class. Absent such a finding, a court may overrule the objection without considering it further.

Annika Martin: The required disclosures for objectors are a good idea, but they should be augmented. In addition, objectors should be required to disclose whether they have previously objected to a proposed settlement and, if so, to provide specifics about when those prior objections were made and the outcome. This might facilitate additional discovery about the objector. This might also call for some information about objector counsel's prior objections.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and CV-2016-0004-088): Proposed (e)(5)(A) says that the objector should specify whether the objection is offered only on behalf of the objector, on behalf of a specific subset of the class, or on behalf of the entire class. This provision invites class members to assert objections on behalf of other people. But those objectors have not been appointed to represent the class (as the class representative has been so appointed -- at least conditionally -- in connection with the proposed settlement). Moreover, this provision may create confusion about how much real opposition there is to the settlement. We have seen instances in which objectors have purported to "opt out" an entire state's population from a class action. But they have not been authorized to take any such action. There is no empirical need to have objectors instruct a district court how to interpret their various objections, and adding this invitation would only complicate an already-complicated settlement review process.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These standards for objector submissions are going to produce harmful results. The change to the rule is unnecessary because district courts already effectively manage such submissions. Adopting more formal requirements will only encourage arguments that objections should be rejected for failure to adhere to the favored form. Presently, the courts of appeals direct district judges to provide a reasoned response to all non-frivolous objections. But suggesting that some such objections can be rejected out of hand for being in the wrong form invites district courts not to address the merits of the objections. I agree with Mr. Isaacson that -- though there may be some unjustified objections -- there is no significant problem of frivolous, bad-faith objectors. There is a much more important problem of class counsel collaborating in faux settlements that benefit them but not the class, and allow the

defendant off cheaply. The goal of the amendment is to give class counsel a stick to use against the rare bad-faith objector, but what will happen is that the stick will be used against good-faith objectors. But if the Committee insists on proceeding with this rule change, it should ensure that class notice includes advising class members of these requirements. At the end of proposed (e)(5)(A) the following should be added:

The notice to the class must notify class members of the requirements contained in this paragraph. An objector's failure to satisfy technical standards is not a basis for dismissal of an objection. An objector does not waive an objection nor any rights to proceed on appeal for failure to meet the requirements of this paragraph.

#### Written comments

Alex Owens (CV-2016-0004-0036): The changes regarding serial objectors are wise. Professional objectors are the vast majority of class action objectors, and they tend to behave unethically. These attorneys generally have retainer agreements that limit the client to receiving no more than \$5,000. There should be guidance concerning the disclosure of such retainer agreements in that they effectively provide a contingency fee that often approaches 95%. There should be clearer standards not just regarding the details of the objection but also the manner in which the objector came to object and the bona fides of the objection. An additional subsection setting out a standard for when objectors or their counsel engage in sanctionable behavior would also help ensure that the objectors that object are not engaged in extortionate activity. Judges may often be unaware of this sort of activity.

Defense Research Institute (CV-2016-0004-072): The rule invites class members to object on behalf of others. That is not justified and should be changed. DRI agrees that the grounds of the objection should be stated with specificity, but sees no reason affirmatively to invite class members to raise objections "on behalf" of others. The court certainly can determine whether the objection has ramifications with regard to other class members without this invitation to class members to volunteer objections for others. This invitation could lead to side disputes and needless litigation.

Public Citizen Litigation Group (CV-2016-0004-081): We agree with the requirement that objections be stated specifically. In our experience, courts routinely disregard objections that are not stated specifically. But we think that the language should be modified to add the word "reasonable" between "with" and "specificity." This addition would provide support in the rule for the comment in the Note that pro se

objectors should not be held to "technical legal standards." In addition, we find the rule requirement that the objection specify whether it is on behalf only of the individual class member confusing. What does it mean for an objection to "apply to" all or part of the class is unclear. Because the court can only approve the settlement as presented to it, any valid objection in some sense "applies to" the entire class because it will, if accepted, be a ground to refusal approval of the settlement. We would therefore delete that language. This would result in (e)(5)(A) reading:

Any class member may object to the proposal if it requires approval under this subdivision (e). The objection must state its grounds with reasonable specificity.

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We believe that Rule 23(e)(5)(A) regarding the objector's submission should be amplified with the following sentence:

Objector and Objector's counsel, if any, must list by case name, court, and docket number all other cases in which she or he filed an objection.

This information should be discoverable in any event, but getting to that point takes considerable motion practice. This addition would streamline that process.

Rule 23(e)(5)(B) and (C) -- court approval of payment to objectors or objector counsel

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): DRI completely agrees with the idea that bad faith objectors should be deterred. But it is not certain that this proposal will accomplish that objective. Courts seem presently to be able to tell the "good" from the "bad" objectors. But many objectors tend to blend some "good" and some "bad" features.

Mark Chalos (Tenn. Trial Lawyers Ass'n): The draft should be improved to cover a possible loophole. Sometimes these deals involve payment to a recipient other than the objector or objector counsel. For example, the payment may be to an organization with which the objector is associated. The rule should forbid any payment "directly or indirectly" to the objector. In addition, there is a risk of payments that escape the court-approval requirement. There should be a requirement that, whenever an objector withdraws and objection, the objector must file with the court a certification saying that there has been no payment made in connection with the withdrawal of the objection.

Alan Morrison (George Washington Univ. Law School) (testimony & CV-2016-00004-0040): He strongly supports adding the court-approval requirement. Indeed, he would apply the court-approval requirement of Rule 23(e) to all settlements in putative class actions whether or not the court has ruled on class certification, or whether the settlement purported to bind others in the class (as was the general rule before the 2003 amendments). Regarding the Note on p. 229 about the possibility class counsel will believe that paying off objectors to avoid delay is worth the price, it might be added that defendants may also succumb to this sort of pressure. In at least one case, he understands that a defendant paid off an objector after an appeal was filed. Defendants may, at least subconsciously, agree to a larger attorney fee for class counsel in anticipation that some of it will be used to pay off objectors.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): He strongly supports this effort to prevent bad faith objectors from profiting. But it is important also to ensure that if objectors are paid the payment should come either from the defendant or from class counsel. If the objection results in a substantial increase in the settlement amount, however, that increase should not become a bonus for class counsel, and it could produce funds that would cover the payment to the objector who produced the increase.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): I have represented objectors in about 30 national class-action settlements. I support this proposed rule. Indeed, in 1999, I proposed a very similar rule to this Committee. But the rule has a gap -- it says nothing about the standards for approving such a payment. I think that a court should approve a payment to an objector different from the payout via the settlement only in the rarest circumstances. In effect, proposed 23(e)(2)(D) -- regarding equitable treatment among class members -- essentially says that. The solution is an addition to proposed 23(e)(5)(B):

The court may not approve a payment or a transfer of other consideration to an objector or objector's counsel unless it finds that (1) the objector's circumstances relative to other class members clearly justify treatment different from the treatment accorded to other class members under the proposal; and (2) the objector lacked a realistic opportunity to prosecute a separate action.

In addition, the Committee Note at p. 229 says that class counsel may conclude that a payoff to an objector is justified in order to get relief to the class. That is true, but may be taken to be a justification a court could adopt to support approval of a payment to an objector. This should never be a justification for a payoff. I propose that the Note be augmented by adding: "That is not a proper reason for providing payment or other consideration to these objectors. Rule 23(e)(5)(B)(ii) seeks to eliminate any incentive for providing such payment or consideration in the first place."

#### Phoenix hearing

Jennie Lee Anderson: We applaud this proposal. The bad faith objector problem affects both sides of the "v." The right of class members to object is important and should be protected. But the activities of these people have no bearing on that. This amendment should improve the situation, although it may not, by itself, be a complete solution. It will be important to monitor what happens. There may later be a need to involve the appellate rules also.

Jocelyn Larkin (The Impact Fund): The draft might be improved by providing examples to illustrate the grounds for approving a payment to an objector.

Annika Martin: It is good to require court approval for payments to drop an objection, or desist from making one. But there is a risk that this proposal has a loophole. Counsel may simply create a nonprofit organization that can be the recipient of the payment, thereby sidestepping the rule as presently

written. Revising proposed (e)(5)(B) to add this possibility would be a good idea. Alternatively, it might be sufficient to achieve a similar result by removing words from the rule proposal:

Unless approved by the court after a hearing, no payment or other consideration may be provided ~~to an objector or objector's counsel~~ in connection with:

- (i) forgoing or withdrawing an objection or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal;

Dallas/Ft. Worth (telephonic) hearing

Eric Alan Isaacson (testimony and CV-2016-0004-0076): I have 26 years' experience with the plaintiff class action bar. I have never seen a payment offered to an objector for a groundless objection. To the contrary, when objectors are offered money that is a sign that their objections are justified. Class counsel use payoffs to avoid appellate review that would likely lead to reversal of the approval of the settlement. There simply is no groundless objector problem. But there is a problem with payoffs that curtail appellate review. Consider a school teacher who has at best a \$1,000 claim and objects to an inadequate settlement. Suppose she is offered \$25,000 to drop the objection or an appeal. It is very difficult for average people to turn down such a payment, particularly in a time when so many people have trouble making ends meet. The requirement of court approval is not a solution to this problem, particularly because the proposed amendment does not state a standard for whether to approve the payment. One judge might think that paying objectors for dropping frivolous objections is bad, while another might think it makes perfect sense as a way to expedite completion of the settlement claims process. A better idea would be to provide explicitly in the rule for paying objector counsel. As things now stand, what frequently happens is that objectors become the target of harassment from class counsel. Suddenly they are subpoenaed to provide testimony about their lives as part of an effort to discredit them. That will become a bigger problem due to the removal of the current requirement (added in 2003) for court approval of objections without payment to objectors.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): Proposed (B) and (C) should be deleted because they will only increase extortionate payments to bad-faith objectors. By requiring that payoffs be disclosed to the court and approved, it will encourage other entrepreneurial attorneys catch on. "Newcomers to the objector blackmail market will see that they too can file a boilerplate objection with

conclusory allegations and be paid to go away." Moreover, class counsel can use this process to protect their bad settlements from appellate review. What should be done is to build in the right incentives by stating explicitly in the rule that objectors can recover an attorney's fee award for providing a benefit to the class. (B) should be rewritten as follows:

The court may approve an objector's request for an award of reasonable attorney's fees and nontaxable costs after a hearing and on a finding that the objection realized a material benefit for the class. An objector may not receive payment or consideration in connection with ~~Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:~~

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

If the Committee proceeds with (B) and (C) as currently formulated, it should add an enforcement mechanism. The remedial concept of disgorgement should be invoked along the following lines in a new (D):

(D) Enforcement. Any party or class members may initiate an action to enforce paragraph (B) and (C) by filing a motion for disgorgement of any consideration received by an objector in connection with forgoing or dismissing an objection or appeal.

#### Written comments

Gregory Joseph (CV-2016-0004-0040): Is it possible that this court-approval requirement will merely make it more expensive to buy off the objector? In addition, it is not clear how the limitation on payment for "forgoing" an objection is to be enforced. How will the court become aware of this event that leaves no blemish in the court's docket?

Hassan Zavereei (CV-2016-0004-0048): I am concerned that this rule will not actually deter bad faith objectors, who are unethical and unlikely to abide by its provisions. Class counsel sometimes feel they must give in to objectors in order to get relief to the class. The court approval requirement would effectively remove the decision whether to do so from class counsel's toolbox, for they would be unwilling to subject themselves to the public embarrassment of being on the record as having paid a professional objector. I am also concerned that the narrowness of retained district-court jurisdiction after an

appeal has been docketed may mean that changes to the Appellate Rules are also needed. Requiring approval by the district court is contrary to traditional notions of appellate jurisdiction. To avoid these jurisdictional difficulties, a better approach would be to add something along the following lines to Rule 23(e):

*Request for Finding that Objection Was Filed in Bad Faith.*  
At the request of any party to consider whether an objection has been filed in bad faith, the court may consider all surrounding facts and circumstances -- including whether the objector complied with Rule 23(e)(5)(A), whether the objector complied with all noticed requirements for the submission of an objection, whether grounds for the objection have legal support, conduct by the objector or objector's counsel in the instant case, and previous findings that the objector or objector's counsel has pursued an objection in bad faith -- and, if it deems it appropriate, make a finding that an objection was brought in bad faith.

Pennsylvania Bar Association (CV-2016-0004-0064): This amendment is a good start in addressing frivolous or meritless objections, which can impact the settlement of a class action. We recommend adoption.

New York City Bar (CV-2016-0005-070): We agree with the decision to require court approval before payment to objectors or objector counsel. But we do not believe that it should always require a hearing to obtain that approval. Accordingly, we think that the rule language at lines 90-94 on p. 216 should be revised as follows:

Unless approved by the court after a hearing or, if the Court deems it appropriate, based solely on written submission on notice to all interested parties, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

Public Citizen Litigation Group (CV-2016-0004-081): The proposed amendment requiring court approval is along the lines we proposed in 2015. We do think two modifications would improve it. First, we think that the words "to an objector or objector's counsel" should be removed from the rule to deal with the risk that some might direct payment to third parties affiliated with the objector or lawyer. Second, we are concerned about the absence of any standard for approving payments. Courts may conclude that paying off objectors is justified to finalize the settlement without regard to the validity of their objections. We think that the Note should make it clear that this sort of reason does not justify approval. We think that the standard should be whether the payment would be approved as fair and

reasonable from the standpoint of the class as a whole, which would incorporate the standard in (D) about treating class members equitably relative to each other. We propose that the following be added to (e)(5)(B):

The court may approve such payment or consideration only upon finding that it is fair and reasonable from the standpoint of the class as a whole, taking into considerations the factors set forth in Rule 23(e)(2).

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We urge that the proposed rule be revised to close a potential loophole for clever objectors and lawyers to set up entities to receive the payment. We suggest that the phrase "directly or indirectly" be added before "to an objector or objector's counsel." We know of objectors who have demanded that payments be made to a non-profit or "think tank" by which the objector is employed. We think also that a sentence should be added to the rule requiring that any objector who withdraws an objection or appeal without compensation file a notice with the court so stating. An explicit certification requirement would give the courts a method to enforce the rule.

Public Justice (CV-2016-0004-089): We endorse the proposal to require court approval for payment to an objector or objector counsel. We believe this provision will help deter so-called "professional objectors" from holding up an otherwise valid class action settlement.

Richard Kerger (CV-2016-0004-090) (letter initially sent to Chief Judge Guy Cole of the Sixth Circuit): I understand that a rule proposal has been made to deal with the problem of professional objectors, and write to report on an experience I have encountered in an MDL proceedings in which I was involved. After four and a half years of hard-fought litigation, both the direct purchaser and the indirect purchaser classes in these cases reached settlements. The indirect purchaser settlement, on which I was working, was attacked by several objectors including a particular pro se objector. For a year or more, this objector ignored directives from the district judge and also repeatedly accused the judge and the Sixth Circuit of conspiring with counsel to approve the settlement. The settlement was for more than \$151 million, but the objector asserted (without an iota of evidence) that it was fraudulent and done solely to line the pockets of lawyers. Even though the district judge eventually imposed an appeal bond requirement, this objector appealed without paying the bond. Eventually the appeal was dismissed. The objector's conduct delayed the settlement and caused the class to lose money because one of the defendants was not obligated to make its \$43.5 million deposit into escrow until all appeals had been resolved and the settlement upheld. Finally,

the district judge imposed a financial sanction on the objector. We tried to take his deposition, but he objected to the timing and then failed to appear. At this point, the district judge found him in contempt and had him arrested in Michigan at a motel and transported to the courthouse in Ohio by two marshalls. This man has been found to be a professional and serial objector and a vexatious litigator. In the past, he has received at least \$67,000 in payments for his objections. "The concern is that the history of this case is an advertisement for him as to why class counsel should cave in to professional objectors and pay them the relatively nominal amount they want to just 'go away'." Besides the current amendment proposal, other ideas occur to me: (1) insist that there be some proportionality between the amount of the class members' claim and the overall settlement; (2) amending Rule 23 to shorten the time by which a notice of appeal from denial of an objection must be filed; (3) making appellate review of objections discretionary, as is true under Rule 23(f) for class-certification orders; and (4) some sort of deterrent to prevent frivolous objections and appeals. "No objector with a minuscule claims, such as what [this objector] has in this case or others in which he has filed objections, should be allowed to go undeterred to prevent hard-fought class action settlements to proceed to finality. Without some degree of risk imposed on serial objectors, they will continue to obstruct the judicial process and our orderly system will remain broken."

Rule 23(f) -- forbidding appeal from notice of settlement  
proposal

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This proposal makes sense. Indeed, it seems implicit, but it makes sense to make it explicit.

Written comments

Frederick Longer (CV-2016-0004-0038): This change is very welcome. Rule 23(f) appeals can be very disruptive, but appeals from the sending of notice exacerbate this potential disruption. That notice occurs when the court and the parties clearly contemplate further proceedings that may significantly affect what the appellate court may see if the proposal is approved. Codifying the result reached by the Third Circuit in the NFL case relieves other litigants and judges of the need to worry about this point.

Rule 23(f) -- additional time for appeal in government cases

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This proposal does not go far enough. The class certification decision is, by far, the most important in the case. There should be an appeal as of right. Although 23(f) was a good idea, the reality has been that the rate of taking appeals has fallen. Most circuits seem to think that appeals should be allowed only when there is an open legal question to be answered. The rule should take the view of the ALI Aggregate Litigation project, and ensure appellate review of right in all cases.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and written submission): We have no problem with extending the time for seeking review in cases in which the United States is a party. But we think it should be recognized that the 14-day time limit in the current rule is too short for many others. There is often no way to know when a class certification decision will be rendered. It happens on occasion that counsel simply cannot free up the time to focus on that issue when the court's decision is made. What if counsel is in trial, for example? Certainly counsel should put the matter on the front burner, but there are limits to being able to do that. We are not advocating an extension to 45 days for all cases, but extending to 21 or 28 days would relieve a serious pressure point without creating significant risks of delay. It could also provide courts of appeal with better fashioned presentations; as things now stand, the submissions they receive are of necessity often the product of rushed work.

Written comments

Benjamin Mizer (U.S. Dep't of Justice) (CV-2016-0004-0037 and 0041): The Department strongly supports the amendment to Rule 23(f), which it initially proposed, to extend the time for seeking appellate review of a class-certification decision in cases in which the U.S. is a party. Any appeal by the U.S. government must be authorized by the Solicitor General, which depends on a deliberative process that typically requires substantial time. Multiple agencies and offices within the government might have different interests implicated in a specific case. Those interests are sometimes in tension, particularly in cases involving class actions. The current 14-day period for seeking review is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether a district court might have the authority to extend the deadline. And unlike a notice of appeal, a petition under Rule 23(f) is not a mere

placeholder. Instead, it is a substantive filing that must set forth arguments for reversing the class certification decision. Like the decision to seek review, the petition must be drafted by DOJ attorneys and authorized by the Solicitor General. Allowing additional time for the government is consistent with various provisions of the Appellate Rules. For example, Appellate Rule 4(a)(1)(B) provides 60 days (rather than the usual 30) for filing a notice of appeal in a case in which the government is a party. Similarly, Appellate Rule 40(a)(1) provides that a petition for rehearing or rehearing *en banc* in a civil case may be filed within 45 days (instead of 14 days) when the government is a party. The extension to 45 days in Rule 23(f) is a reasonable resolution of the timing problem for the government. Though it extends the current 14-day period, it is short of the full 60 days permitted to file a notice of appeal.

Lawyers for Civil Justice (CV-2016-0004-0039): There should be a right to interlocutory review of every certification decision. Rule 23(f) has not achieved its goal of increased uniformity of district court practice regarding class certification. Actually, the number of grants of petitions for review is modest -- about 5.2 grants per Circuit per year. And even where there is a grant, there is an opinion in only a fraction of the cases, a total of 47 opinions during a seven-year period studied in a 2008 report. On average, that works out to less than one opinion per Circuit per year. The problem is that the rule now says that the decision whether to allow an appeal is in the "sole discretion of the court of appeals." And the courts of appeals have developed criteria that are so flexible that they provide little guidance beyond "unfettered" decision-making. There is a simple remedy -- providing appeal as of right from decisions whether to certify a class.

Cheryl Siler (Aderant CompuLaw Court Rules Department) (CV-2016-0004-0058): The extension of the period for filing a petition for review in cases in which the United States or its officer is a party is sensible. this amendment would bring Rule 23 in line with other rules setting deadlines for appeal.

Pennsylvania Bar Association (CV-2016-0004-0064): We support this amendment. It affords all parties the extended period to seek review in cases in which the U.S. government is a party.

Defense Research Institute (CV-2016-0004-072): DRI has no problem with the extension of time for cases in which the government is a party. But in other cases as well, 14 days is really not enough time. That deadline is so short that it hinders the best advocacy and thus impairs the presentation to the court of appeals. Both sides of the "v" would appreciate have a bit more time. Without that needed time, the lawyers best

situated to work on the petition may be unavailable due to other professional commitments (in trial, for example) when the ruling on class certification is made. A 28 day period would be much fairer, and more in keeping with what lawyers are accustomed to have for such complicated matters.

## Ascertainability

### Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This should be addressed in the rule. There is an open circuit split. DRI proposes that Rule 23(a)(1) be amended as follows:

(1) the class is so numerous that joinder of all members is impossible the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficiently numerous that joinder of all class members is impracticable;

This is an issue of fundamental fairness. The proposal may be a bit beyond what any court has required so far, but perhaps that's because it's more succinct. But doing this would require a separate amendment package or republication because it is not included in the current package.

### Dallas/Ft. Worth (telephonic) hearing

Peter Martin (State Farm Mutual Ins.): The Committee should amend the rule to ensure that class definitions provide an administratively feasible way to identify every class member. The Third Circuit has been in front of this issue, and its lead should be followed. This is a matter of fundamental fairness; the defendant is entitled to know who is on the other side.

### Written comments

Frederick Longer (CV-2016-0004-0038): As a lawyer who has directly confronted the Third Circuit's evolving doctrine of ascertainability, I believe that the restraint demonstrated by the Committee in refraining from putting out a proposed rule provision is wise. "I commend the Committee's decision to await further developments in the lower courts, rather than attempt to draft a cure that may create more problems than it solves."

Lawyers for Civil Justice (CV-2016-0004-0039): The Committee should add an explicit ascertainability requirement to the rule. Courts will almost certainly continue to find an implicit requirement, but it makes sense to add it explicitly to the rule. The way to do that is to add a Rule 23(a)(5) as follows:

(5) the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial

administrative burden.

Alternatively, Rule 23(b)(3) could be amended as follows:

(3) the court finds that questions of law or fact common to class members, including but not limited to the type and scope of injury, predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the Committee's decision to defer any action on ascertainability was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): In the wake of the Supreme Court's denial of certiorari in cases addressing ascertainability, it is disappointing that the Committee has declined to propose draft language to provide guidance on these issues. A distinct split now exists among the circuits. The First, Second, Third, Fourth, and Eleventh Circuits require courts to consider whether there is an administratively feasible way to distribute relief. But the Sixth, Seventh, and Eighth use a less rigorous standard. The unsettled state of the law leads to inconsistent results.

Defense Research Institute (CV-2016-0004-072): DRI urges the Committee to move forward on ascertainability. Recent decisions in the Sixth, Seventh, and Ninth Circuits have created a clear need for addressing this issue by rejecting the view of the Second, Third, Fourth, and Eleventh Circuits. It may be that the Supreme Court will one day resolve the dispute in terms of the present rule. DRI believes that the Committee should pretermitt the need for such a ruling by adopting a express and robust ascertainability. The need for such guidance in the rule is clear. Class actions that bog down in efforts to determine class membership are as inefficient as those that bog down in making individual determinations of liability. The Sixth and Seventh Circuits' views really result from the absence of language in the rule itself. One way would be to adopt the method DRI proposed to the Committee in September, 2015, by amending Rule 23(a)(1) as follows:

~~the class is so numerous that joinder of all members is impracticable~~ the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficient numerous that joinder of all class members is

impractical;

Among many benefits of this approach, it would indirectly reduce the need to resort to cy pres remedies.

Washington Legal Foundation (CV-2016-0004-087): Nothing in the rule now explicitly requires that class members be ascertainable. Such a requirement would not only protect defendants by ensuring that all people who will be bound by the judgment are clearly identifiable, but it would also safeguard the rights of absent class members to receive fair notice. WLF believes that an unascertainable class is no class at all. Adding the requirement to the rule would bring it into conformity with the widespread practice of many federal courts. Forcing defendants to guess how many people will claim, for example, to have purchased a product, cannot comport with due process or the purpose of Rule 23. Class certification surely cannot require a defendant to forfeit its right to litigate substantive defenses to the claims. As the ALI Aggregate Litigation project recognized, there is no point in aggregate litigation if the same issues will have to be revisited in other proceedings. See ALI § 2.02 comment (e).

Pick off

Washington D.C. hearing

Mark Chalos (Tenn. Trial Lawyers Ass'n): He is not aware of pick-off problems arising since the Supreme Court's Campbell-Ewald decision.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony, supplemented by CV-2016-0004-079): There have been a number of cases since the Supreme Court's Campbell-Ewald decision, but no major problems. The courts are handling this just fine by themselves. Even before the Supreme Court's decision, the courts were handling the matter without difficulty.

Written Comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the Committee's decision to defer any action on pick off was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Supreme Court's decision in Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663 (2016), left open the possibility that a defendant could moot a class action by consenting to the entry of judgment against it and depositing money in escrow with the court. This open question has generated confusion with the lower courts. Although the Ninth Circuit rejected a tender of payment in Chen v. Allstate, 819 F.3d 1136, 1145 (9th Cir. 2016), district courts have demonstrated a greater degree of uncertainty. This uncertainty poses a real risk of a continued split among the lower courts and, consequently, forum shopping. Should a consensus not emerge, the Committee should consider amending the rule.

Other issues raised

Washington D.C. hearing

John Parker Sweeney (DRI): He would focus his comments on no injury classes. The Supreme Court's decision in Spokeo confirmed the basic Article III principle that one must suffer a concrete harm to file a suit. But American businesses face class actions on behalf of large numbers of people who have not suffered any injury. Nonetheless, the lawyers who file these cases seek to recover the statutory minimum for every member of the class, leading to such enormous exposure that businesses have no choice but to settle. In effect, this results in punishing companies for technical violations that really did no harm to anyone. Prof. Joanna Shepard of Vanderbilt recently did a study showing that during the period 2005 through 2015 there were some 454 "no injury" class actions resulting in total settlement payments of \$4 billion. The sensible solution would be a rule requiring that classes be defined in a way that limits the class in (b)(3) cases to those who have suffered an actual injury. Surveys show that Americans broadly regard that sort of requirement as appropriate in class actions. But this idea is not in the current amendment package, and the current package should not be held up to add this idea.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): Another problem that has arisen in cases involving consumer issues is that on occasion courts will entertain defense motions to strike class action allegations based only on the complaint. It would be desirable for the rule to say somewhere that certification decisions should not be based solely on the complaint. But that issue is not one that should hold up this amendment package. The Supreme Court has made it clear that these decisions should not be based only on the pleadings. Sufficient time for needed discovery must be allowed. That is also consistent with the 2003 amendments to Rule 23(c), removing that prior provision that the decision be made "as soon as practicable after commencement of an action." In addition, his groups agree that citation in the Note to ALI § 3.07 is a good and productive way of dealing with the contentious cy pres issue.

Mary Massaron (President of Lawyers for Civil Justice): The reference to § 3.07 of the ALI Principles of Aggregate Litigation should be removed. LCJ has sought an outright ban in the rule on use of cy pres. But this citation to the ALI section essentially puts the rule's imprimatur on the practice. This is a substantive change that raises Rules Enabling Act issues. Courts do cite the ALI treatment, so there is no need to do so here in the Note. In addition, LCJ favors revising Rule 23(a)(3) so that typicality requires the court to focus on the "type and

scope" of injury sustained by class members and ensure that all within the class have the same type and scope of alleged injury as the named plaintiff. More generally, cy pres should be banned; although a residue after distribution to the class might justify a second distribution, if the class members who make claims have been fully compensated making other uses of the money is essentially punitive and beyond the authority of the procedure rules.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The reference in the Note to the ALI treatment of cy pres is not an endorsement and should be retained.

#### Phoenix hearing

Thomas Sobol: Some who have made proposals for amendment to Rule 23 are seeking to curtail the legitimate authority of federal judges. Rule 23 is a tool for increasing that power in appropriate cases. Attacks on that power should be rejected unless supported by a clear and convincing showing of need for change.

Michael Nelson (testimony & CV-2016-9994-077): The time has come to recognize that Rule 23(f) is not working. Some circuits almost never allow interlocutory review of district court orders granting class certification. Something stronger than the unbridled discretion built into the current rule should be adopted. For example, courts may insist that the petition show that failure to review at this point will be the "death knell" of the case. How does one do that for a defendant? Yet interlocutory review is very valuable. What would we do, for example, without the Third Circuit decision in Hydrogen Peroxide? So the rule should be revised to say that the court of appeals "should," or perhaps "must" grant the request for review. True, there are not any statistics about cases in which review was denied, and the court later reversed certification after entry of final judgment. But that's because there is always a settlement. If the verb is not as strong as "must," however, it is not certain what standard should be employed to guide the courts in making this decision.

Scott Smith: There should be an absolute right to appeal under Rule 23(f). Indeed, this should be classified as a final judgment, although there should not be a requirement to appeal immediately if the defendant does not want to do so. In addition, Rule 23 should be amended to solve the problem created by Shady Grove, and provide that a federal court may not certify a class if the state law on which the claims are based forbids class treatment of such claims. This is the point made by Justice Ginsburg in Shady Grove (in dissent). A number of states

have statutes like the New York statute involved in that case and the deserve respect.

Dallas/Ft. Worth (telephonic) hearing

Timothy Pratt (Boston Scientific): There should be an automatic right to appeal. Certification is a pivotal decision in a case. From the defendant's perspective, it "turns a snowstorm into an avalanche." Delaying review of that decision until final judgment on the merits builds in more delay than allowing immediate review at that point. It also provides plaintiffs with a powerful settlement weapon. And this could be added to the rule without the need for republication because it has been brought up throughout the process. Many speakers have endorsed this addition to the rule in public fora. There would be no need to re-publish.

Gerald Maatman (Seyfarth Shaw): The Committee Note to the 2003 amendments to Rule 23(c)(1)(A) recognized that a trial plan is a valuable item to consider in making a class certification decision. Experience since then has made this proposition indisputable because it sheds light on whether the case is manageable for purposes of class-wide adjudication. A simple change to Rule 23 requiring the presentation of a viable trial plan in connection with any motion for class certification would therefore be very beneficial. This is the approach adopted by the California Supreme Court in *Duran v. U.S. Bank Nat. Ass'n*, 59 Cal. 4th 1, 27 (2014), which dealt with statistical proof. This requirement should be applied to all class actions, not only those dealing with statistical proof. Deferring serious consideration of these issues until the eve of trial can produce a considerable waste of resources. In light of the central importance of certification decisions, Rule 23(f) should be amended to guarantee appellate review of all decisions certifying classes. In addition, Rule 23 should be amended to address the proper application of proportionality to pre-certification discovery. It is true that the certification decision looms as the most important one in many cases (for which reason I favor amending Rule 23(f) to enable an immediate appeal of class-certification orders), but that does not necessarily mean that expansive discovery is per se proportional. Finally, it would be desirable for a rule amendment to address the standards for certification for purposes of settlement. The Rule 23 Subcommittee initially considered that possibility, but did not proceed with a proposed amendment. Manageability should not matter to settlement certification, even in a case involving the laws of multiple states, and the rule should say so.

Prof. Judith Resnik (Yale Law School) (testimony and CV-2016-0004-092): Amending Rule 23(f) to guarantee immediate appellate review of all class-certification orders would not be

desirable. There are a lot of routes to appeal in addition to 23(f), such as mandamus. Opening more routes leads to delay for plaintiffs and burden for the courts.

Peter Martin (State Farm Mut. Ins. Co.): I favor amending Rule 23(f) to guarantee an immediate appeal. The rule has not fulfilled its promise. The rate of grants of review has fallen. In 2007, it was around 40%, but now it is about 20%. As the Fifth Circuit pointed out in *Castano*, class certification tends to draw claims to the action. Consistency in class-certification rulings is a paramount concern, and making appellate review available as a matter of course is a way to assure consistency. In addition, the Committee should amend the rule to eliminate the possibility of a no injury class action. That violates Article III. In addition, the rule should be amended to make it clear that certification under Rule 23(c)(4) is allowed only when common issues predominate in the case as a whole. That is the position that the Fifth Circuit took in *Castano*, but since then other courts have moved away from that.

Patrick Paul (Snell & Wilmer): Rule 23(f) should be amended to guarantee a right to appellate review of any order granting or denying class certification. If the class is certified, the settlement pressure becomes extreme. If certification is denied, similar pressures apply to the plaintiff, who almost certainly cannot support litigation on the merits in an individual action.

#### Written comments

Lawyers for Civil Justice (CV-2016-0004-0039): LCJ favors rule changes to deal with the problem of no injury class actions. Prof. Shepherd's study of such cases shows that some \$4 billion was paid to settle such cases during the period 2005-15, but that only about 9% of this huge amount went to class members. An average of 37.9% went to class counsel. A simple solution would be amend Rule 23(a)(3) as follows:

(3) the claims or defenses, and type and scope of injury of the representative parties are typical of the claims, or defenses, and type and scope of injury of the class . . .

The Committee should also remove the reference to § 3.07 of the ALI Aggregate Litigation Project from the Committee Note. This is an implicit endorsement of cy pres, which the Committee has chosen not to add to the rule. If the Committee is going to do anything about cy pres, it should be to clarify that Rule 23 provides no basis for such arrangements.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the

Committee's decision to defer any action on cy pres was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Committee should monitor the issue of the no-injury class action. Many hoped that the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), would clarify the issues, but the decision did not do so. Should the current confusion about what is a "concrete and particularized" injury continue or deepen, the Committee should consider an amendment to address the question. A bright-line rule is necessary to guide lower courts, particularly as data breach litigation has grown in importance. Those data breach cases tend to be filed so shortly after notice of a data breach that there will rarely be sufficient time for consumers to suffer actual harm. Allowing data breach plaintiffs to claim "concrete and particularized" damages before any real harm has occurred is inconsistent with much long-standing precedent, but the *Spokeo* decision provides little guidance for how to handle these cases.

Defense Research Institute (CV-2016-0004-072): Rule 23(f) should provide an automatic right to review of all class-certification decisions at the request of any party. The conundrum facing plaintiffs and defendants due to the absence of appeal of right was recognized by the Note to the 23(f) amendment that is now in force. The actual operation of the current rule shows that it is not up to the task. The circuits are uneven in their exercise of their discretion in deciding when to entertain appeals. In recent years, fewer than 25% of the petitions for review have been granted. Rule 23 should also prohibit class certification in federal court for claims that are based on statutes that expressly prohibit class treatment. The Supreme Court's *Shady Grove* decision created a paradoxical, unintended, and unjustifiable policy result. The problem results from the Court's reading of the rule as mandating class certification when ever the rule's provisions are satisfied, and without regard to the limitations of underlying law. A good solution would be to reword Rule 23 so that it clearly vests discretion in the district court to grant or deny certification. DRI recommends, however, that the following new Rule 23(a)(5) be added:

- (5) the action is not brought under a state statute that (i) confers a substantive right; and (ii) prohibits class action treatment or classwide recoveries.

DRI also urges the Committee to address "no injury" classes. Today plaintiffs who admit they have suffered no harm regularly sue businesses, and act on behalf of large classes made up of similarly uninjured people. DRI recommends that Rule 23(b)(3) be amended to solve this problem:

- (3) the court finds that each class representative and each proposed class member suffered actual injury of the same type; that the existence, type and extent of each class member's injury, as well as the amount of monetary relief due each class members, can be accurately determined for each class member on the basis of classwide proof, without depriving the defendant of the ability to prove any fact or defense that defendant would be entitled to prove as to any class member if that class member's claims were adjudicated in an individual trial; that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings of predominance and superiority include:

The Supreme Court's Spokeo decision has not reduced the need for this amendment.

Nelson Mullins Riley & Scarborough LLP (CV-2016-0004-073):  
We support amending Rule 23(f) to provide appellate review as of right. The certification decision is the tipping point in litigation. Given its centrality, immediate review should be available. Instead, the current rule has permitted divergent approaches across circuits on when or whether to allow review.

Washington Legal Foundation (CV-2016-0004-087): Rule 23 should be amended to prevent plaintiffs who are denied class certification from an end run around Rule 23(f) by dismissing the individual plaintiff's suit and appealing from that dismissal. The Supreme Court has granted certiorari on that issue in *Microsoft v. Baker*, but if it does not resolve the issue this inequitable possibility should be foreclosed by rule amendment.

Rule 23 Subcommittee  
Advisory Committee on Civil Rules  
Conference Call  
March 1, 2017

On March 1, 2017, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Lauren Gailey (Rules Law Clerk).

The purpose of the call was to review ideas emerging from the public comment period about modifying the preliminary draft published in August, 2016. Before the call, Prof. Marcus circulated a marked up version of the preliminary draft, including draft changes to parts of the rule and Note, and footnotes explaining some draft changes and raising issues about other things that might be changed. There were 33 footnotes in this document.

Based on a review of the redraft, Judge Dow circulated an email in advance of the call identifying a number of footnotes that seemed to present "consent" issues that could be adopted without the need for discussion by the Subcommittee. In addition, he identified six topical areas for discussion and a number of "miscellaneous" footnotes that seemed to warrant discussion but not to fit within the six topical categories.

At the beginning of the call, the question was posed whether any on the call wanted to discuss the "consent" items. There was no interest in discussing any of those, so they would be considered consented to.

Discussion then turned to Judge Dow's six categories:

(1) Notice methods

The proposed amendment do Rule 23(c)(2)(B) regarding individual notice in Rule 23(b)(3) class actions had received considerable attention during the public comment period. Concerns were expressed that it might be taken to authorize online methods of notice that would not really be effective. Others said that the amendment was not necessary because courts have already begun using methods of notice other than first class mail. But strong support for amending the rule had also been expressed, on the ground that it is necessary to recognize that methods of communication are changing and that it is important for the rule to take note of that major development.

The first proposed change was to the rule amendment itself - adding a phrase to the new sentence at the end of the rule provision:

The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

This addition was initially suggested by Judge Jesse Fuhrman (S.D.N.Y.) a new member of the Standing Committee who attended the hearing in Phoenix on the amendment package. Several others who commented supported this change, and supported the idea of "mixed notice" or using multiple methods. Using some electronic methods, for example, could be augmented by also using other electronic means.

The consensus was to add the above words to the rule-amendment proposal, and discussion shifted to modifications to the Note that addresses this rule change. One change is to soften the draft Note language saying that forms other than first class mail are "more reliable" ways of giving notice. Instead, the Note can say:

But technological change since 1974 has introduced ~~meant~~ ~~that~~ other forms of communication that may sometimes provide a ~~be more~~ reliable additional or alternative method for giving notice and important to many. Although it may often be that first class mail is the preferred primary method of giving notice, ~~c~~ourts and counsel have begun to employ new technology to make notice more effective, ~~and sometimes less costly.~~

This change was approved, except that the published phrase "and sometimes less costly" seemed unnecessary and might best be removed due to sensitivity about excessive concern with the cost of notice undermining its effectiveness. (That phrase is therefore overstricken in the quotation above.)

Attention shifted to the reference in the redraft of the Note to the "likely reading ability of the class" and "arcane" legal terminology. It was noted that Rule 23(c)(2)(B) already directs that notice "clearly and concisely state in plain, easily understood language" a variety of things listed in the rule. We are only clarifying the methods of giving notice that satisfies that rule provision. Restoring that language to the version of the rule included in the package may be helpful. It would also be useful to include in the Note a reminder of what the rule has said since 2003, adding attention to the likely capacities of the class in understanding and using the form of notice recommended to the court. This clarifications may improve practice. Prof. Marcus is to try to revise the Note language on this point.

Attention shifted to draft language concerning the need to attend more closely to the array of choices presented in the current environment than in the past, when first class mail was probably conceived as the default method. The draft language was:

This amendment recognizes that courts may need to attend more closely than in the past to the method or methods of giving notice; simply assuming that the "traditional" methods are best may disregard contemporary communication realities.

It was objected that this seemed to criticize courts for what they had done in the past, which should not be the goal. Indeed, as recognized elsewhere in the Note, the courts had already begun to use alternative means of notice without a change to the rule. The focus, instead, should be on the lawyers, and their obligation to advise the court about what is most effective for this class in today's media world. Perhaps a reference to the Comment on Rule 1.1 of the ABA Ethics Code regarding competence including familiarity with technological change would be in order. Again, Prof. Marcus is to try to devise superior substitute language, and perhaps to relocate some of the added language.

A caution was raised: This is a very long Note. We are mainly talking about adding more to it. We should be cautious about doing that unless really needed. A reaction was that, though it is generally worthwhile to say relevant things in the Note it is also important to be aware of how long the Note can get. Although there is a question about whether most lawyers attend to what's in the Note, it can be a "treasure trove."

There was some discussion of ways in which a longer Note may be helpful to the profession. There is also the temptation to say things in the Note about subjects related to the rule change but not precisely about it. For example, the content of the notice to the class is not really the focus of the rule change we have been discussing, which is the method of giving notice, but it is fairly closely related to that subject, and may actually be pertinent to the form of notice. So saying something about it can be useful.

In this instance, the goal is to link the method to the message. One need not go as far as Marshall McLuhan ("The medium is the message.") to say that there is a link between the medium and the message.

(2) Rule 23(e)(1) concerns

The second set of issues focused on comments submitted by the ABA about the way in which the decision to send notice to the class is handled. The ABA submission urged that the term "preliminary approval" should not be disapproved because it has been in use for a long time and is widely recognized. Others, however, urged that the standard for sending notice should be softened because it would result in a de facto signal of approval even though the term "preliminary approval" was not used.

The discussion focused on the terminology used in the beginning of the Note regarding the decision to send notice. As published, the Note said that the decision to send notice "is sometimes inaccurately called 'preliminary approval.'" Is it really necessary to say this is inaccurate? One view was that this seems needlessly tendentious. Another view was that it would be useful to foster what should be a learning process for the bar about what this decision is. Another idea was to cite the ALI Aggregate Litigation principles on this subject; they oppose use of the term "preliminary approval."

The consensus was that Professor Marcus should try to reword that portion of the Note to avoid calling the current practice "inaccurate" but also convey the idea that the decision is a tentative one, and does not signify that approval is a done deal.

Discussion shifted to what has been called the Prandini issue -- the idea that the negotiation of the substance of the proposed settlement and the negotiation of the attorney fees should be done separately. The ABA submission urged that proposed 23(e)(1)(B)(i) be amended to exclude attention at the 23(e)(1) stage to Rule 23(e)(2)(C)(iii) (the terms of any attorney fee award), in recognition of this practice.

The reaction to this idea was that the court should focus on attorney fees at the time it is deciding whether it is likely to approve the overall deal and that notice is therefore warranted. Whether or not that topic is the subject of combined or separate negotiation, it is an important part of the overall package that will be sent to the class if notice goes out. Objectors often focus on attorney's fees, so the court should too. Indeed, Rule 23(h) directs that the class receive notice of the attorney fee application, so that would ordinarily be included with the other notices required by Rules 23(c)(2) and (e)(1). The consensus was not to exclude that from (e)(1).

(3) Citing ALI § 3.07

Several comments raised questions about the sentence in the Note citing § 3.07 of the ALI Aggregate Litigation Principles. One possibility would be to cite cases that rely on that section rather than the section itself, but citing cases is generally not desirable in a Note because they may be superseded by other cases.

The question, then, was whether citing § 3.07 really added much. Courts seem to have found that section on their own; indeed, §3.07 may be the section of the Principles that is most frequently cited by courts. The consensus was to remove the sentence citing § 3.07.

Discussion shifted to the previous sentence. In the current Note, it is as follows:

And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.

For one thing, the word "use" seems unduly vague. In its place, "disposition" was suggested. Attention then focused on the word "often." Actually, this is a dynamic area but that qualifier seems not useful. There almost always are going to be funds left over, and we should not be saying this is only "often" a concern. It is virtually always a concern. If it is necessary to re-notice the class then regarding their disposition, that is hardly a positive. So that word should probably come out. But the idea is important, and it is important that this issue be included before notice is directed to the class.

(4) Claims rate  
(5) Relative success of distribution

These two topics were combined for discussion. The starting point was that proposed 23(e)(2)(C)(ii) tells the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required" when assessing the adequacy of the relief provided by the settlement. The concern was that this might become "an absolute." One suggestion was that the rule itself be revised to add the words "as compared to other, reasonably available methods of distribution under the circumstances" after "to the class."

The consensus was that adding this language to the rule itself was not justified. It should be clear that the rule does not require perfection. Indeed, that is why the Note emphasizes making provision for disposition of the residue. What the Note

says is that the parties should demonstrate to the court that they have employed a method of delivering relief to the class that is likely to deliver relief to the class. It does not say the method must result in 100% success on that score. But being attentive to being effective is worth emphasizing.

Instead of changing the rule, attention to the Note's treatment of the claims rate question seemed the right way to approach these concerns. The first point at which claims rate appears was in the Note about (e)(1):

If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience.

This passage drew the observation that this is not how things usually happen. To the contrary, given the contingencies involved, it would be very unusual for the claims process to be completed before the approval decision under Rule 23(e)(2) occurs. Defendants will not be willing to fund the settlement until final approval has occurred. Indeed, they usually are not willing to fund the settlement until all objections and appeals are completely resolved. That's one of the reasons bad faith objectors can exert such pressure.

The reality, then, is that distribution usually does not occur until final approval has happened and all appeals are over. Then the question is whether or when the court learns about the results of that distribution effort. One witness urged that the courts should have a "fiduciary" obligation to follow up and ensure full distribution of relief. That requirement is not in this package.

The contemporary reality was described as regularly involving "continuing jurisdiction" for the district court during the administration of the claims process, something that might take quite a period of time. And reporting back about its success would normally be a feature of that continuing supervision. But that all had to come considerably later, and the Note material quoted above is about the Rule 26(e)(1) decision to send notice to the class. That's a premature discussion and the consensus was to delete the discussion at that point. That shortens the Note a little bit.

Another point at which "claims rate" appears in the 23(e)(1) Note is in regard to the proposed attorney's fees. That also seems premature at the point the decision to give notice must be made, and can be removed from the Note:

In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, ~~and to take account of the likely claims rate.~~

The court can have some justified expectation about the benefits to the class when the 23(e)(1) decision to give notice must be made, and it should consider the effectiveness of the method selected to give notice and, if necessary, to make claims. But beyond that it cannot sensibly forecast a likely claims rate. We do not want to make it seem necessary that the parties present expert evidence making such a forecast to support giving notice to the class.

Attention shifted to the reference to claims rate in the Note on final approval under Rule 23(e)(2). As published, that said:

Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important.

An initial reaction was that this seems a balanced treatment of the situation. But the idea of focusing on "a prediction of how many claims will be made" might be troublesome. In a sense, that gets at the usual reality that the payout to the class happens only after final approval and exhaustion of all appeals. So a forecast might make sense. But asking for one in the Note is likely to do more harm than good. Trying to make such a forecast is extremely difficult, could cost a lot, and might readily be wrong instead of right.

As noted earlier, district courts usually retain jurisdiction over the administration of the settlement. That commonly involves reporting back to the court on the results of that distribution effort. It may lead to a revised distribution effort. That does not lead to a "retroactive disapproval" of the settlement because of a low claims rate. How could one undo the settlement -- by making all the class members who had received relief pay it back and resuming the litigation?

A different concern is that the claims process itself might be set up in a way that obviously will deter or defeat claims. That is illusory relief to the class. But the Note does admonish the court to evaluate the proposed claims process; that seems to cover the point in terms of what the court can do at that point.

Attention turned to a bracketed proposal to add language about distribution to the Note:

Because 100% success in distribution can very rarely be achieved, the court should not insist on a distribution method that promises such success; the court's focus should instead be on whether the method proposed is justified in light of other reasonably available methods.

This Note language might ensure that courts do not treat perfection in distribution as a requirement or an expected result. The reality is that "it never happens that everyone cashes the check." There is always some money left over. That's why some provision in the settlement agreement for disposition of the residue is important. But saying "100% success in distribution can very rarely be achieved" is not useful.

The question was raised whether this addition really would be useful. As published for comment, the Note says that the court should scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. This does not seem to add usefully to that admonition already in the Note. This addition should be dropped.

#### (6) Objector issues

An initial question was whether proposed (e)(1)(A) should direct that objectors state whether they were objecting about their own assertedly unique problems, on behalf of a subset of the class, or on behalf of all class members. Objections to this provision have been that it (a) invites objections on behalf of others, and (b) should require that the objector satisfy something like Rule 23(a)(4) (on adequacy of representation) to represent anyone else.

The consensus was that these arguments do not present persuasive reasons for changing the amendment package. The rule already says that class members may object. It does not cabin what objections they make, and courts must consider those objections. It may well be that courts would look askance at objections by a class member who really had nothing at stake in regard to the matter raised by the objection. But if the objection is a cogent one, the court should consider it whether or not the objector has a direct stake in the resolution of the objection.

A second objection was that the rule does not state a standard for approving payment to an objector or objector counsel. It was noted that the Subcommittee discussed how to articulate such a standard in a useful way and did not find a good way to do so. The resolution of this objection to the text

of the rule was that this is a place to "let judges be judges."

A related question arose, however, in regard to the comment in the Note that "class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors." As pointed out during the public comment period, that statement might make it seem that this is a satisfactory reason to approve a payoff for such objectors. The redraft sought to prevent that interpretation and offered two ways of doing so. The consensus was to add the following to the Note after the material quoted above:

Although the payment may advance class interests in a particular case, allowing payments perpetuates a system that can encourage objections advanced for improper purposes.

A third question that arose during the public comment period was whether there was a major loophole in the amendment proposal because bad faith objectors or objector counsel might arrange that payments be made to organization with which they are affiliated, and contend that court approval is not required when they do that.

In response to this third problem, a change to proposed 23(e)(5)(B) deleted the words "to an objector or objector's counsel," and that phrase was eliminated from the tag line as well and replaced with the phrase "in connection with an objection." That would make the approval requirement apply no matter who was to get the payment so long as it was in connection with an objection.

Attention shifted to the Note material and there was consensus approval for addition of the following to the Note:

Although such payment is often made to objectors or their counsel, the rule also requires court approval if the payment is instead to an organization or other recipient, so long as it is made in connection with forgoing or withdrawing an objection or appeal.

A question was raised, however, about additional material that was included in the Note published for comment. Specifically, the following seemed to suggest a standard for approving a payment:

If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees; the court may approve the fee if the objection assisted the court in understanding and evaluating the settlement even though the settlement was approved as proposed.

This comment is about a Rule 23(h) motion, and Rule 23(h) has a Committee Note that addresses criteria for payments to objectors. There is no reason to get into that issue here, so the consensus was to delete the material after "award of fees."

#### Other matters

The final subject for discussion was the added language about maintaining confidentiality of information about agreements in connection with the proposal. During the public comment period one witness expressed concern that the risk that saying the class would have access to everything that the court received could require revelation of sensitive materials including such things as the number of opt outs that would trigger a right for the defendant to withdraw from the agreement. That was addressed in the draft as follows:

That would give the court a full picture and make ~~this~~ appropriate information available to the members of the class[, while maintaining confidentiality of sensitive information such as agreements that defendant may withdraw if more than a certain number of class members opt out].

The consensus was that the bracketed material above was not useful. The question whether substituting "appropriate" for "this" is helpful remained open. It was noted that ordinarily these matters are handled by separate agreements and not part of the settlement agreement. On the other hand, they are to be "identified" to the court reviewing the proposal, and thus might be subject to review by class members if submitted pursuant to the frontloading provisions of proposed Rule 23(e)(1).

#### Next steps

Prof. Marcus will attempt to make the changes agreed upon during this conference call and circulate by March 3 the next generation of the revisions of the published preliminary draft. The Subcommittee will attempt to confer by phone during the week of March 13 to resolve remaining matters. Ideally, many remaining issues can be resolved by email without the need to discuss in the next conference call. Final agenda materials will need to be at the A.O. by the first week of April.

### C. RULES 62, 65.1: STAYS OF EXECUTION

The proposed amendments of Rule 62 aimed at three changes, described more fully in the Committee Note. The automatic-stay provision is changed to eliminate the “gap” in the current rule, which ends the automatic stay after 14 days but allows the court to order a stay “pending disposition of” post-judgment motions that may be made as late as 28 days after judgment. The changes also expressly authorize the court to dissolve or supersede the automatic stay. Express provision is made for security in a form other than a bond, and a single security can be provided to last through the disposition of all proceedings after judgment and until final disposition on appeal. The former provision for securing a stay on posting a supersedeas bond is retained, without the word “supersedeas.” The right to obtain a stay on providing a bond or other security is maintained without departing from interpretations of present Rule 62(d), but with changes that allow the security to be provided before an appeal is taken and that allow any party, not only an appellant, to obtain the stay. Subdivisions (a) through (d) are also rearranged, carrying forward with only a minor change the provisions for staying judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement.

The changes in Rule 65.1 are designed to reflect the expansion of Rule 62 to include forms of security other than a bond.

There was little comment, and no testimony, on Rule 62 or Rule 65.1. The summary of comments reflects only short and general statements approving the amendments. No one suggested the need for other changes.

The Committee recommends approval for adoption of amended Rules 62 and 65.1 substantially as published. One change is recommended to conform Rule 65.1 to proposed Appellate Rule 8(b), which is being amended to reflect the changes in Rules 62 and 65.1. These changes remove all references to “bond,” “undertaking,” and “surety” from Rule 65.1 (“bond” remains in Rule 62, in keeping with strong tradition). Focusing Rule 65.1 only on “security” and “security provider” is clean, and avoids any possible implication that a surety is not a security provider.

#### Rule 62 as Published

##### 1 **Rule 62. Stay of Proceedings to Enforce a Judgment**

- 2
- 3 (a) ~~AUTOMATIC STAY.;~~ ~~Exceptions for Injunctions, Receiverships, and Patent Accountings.~~  
4 Except as provided in Rule 62(c) and (d), stated in this rule, ~~no execution may issue on a~~  
5 ~~judgment, nor may and proceedings be taken to enforce it, are stayed for 30 days until 14~~  
6 ~~days have passed after its entry, unless the court orders otherwise. But unless the court~~  
7 ~~orders otherwise, the following are not stayed after being entered, even if an appeal is~~  
8 ~~taken:~~  
9 (1) ~~an interlocutory or final judgment in an action for an injunction or a receivership; or~~  
10 (2) ~~a judgment or order that directs an accounting in an action for patent infringement.~~

11  
12 ~~(b) Stay Pending the Disposition of a Motion.~~ On appropriate terms for the opposing party's  
13 security, the court may stay the execution of a judgment—or any proceedings to enforce  
14 it—pending disposition of any of the following motions:

- 15 (1) under Rule 50, for judgment as a matter of law;  
16 (2) under Rule 52(b), to amend the findings or for additional findings;  
17 (3) under Rule 59, for a new trial or to alter or amend a judgment; or  
18 (4) under Rule 60, for relief from a judgment or order.  
19

20 (b) STAY BY BOND OR OTHER SECURITY. At any time after judgment is entered, a party may  
21 obtain a stay by providing a bond or other security. The stay takes effect when the court  
22 approves the bond or other security and remains in effect for the time specified in the  
23 bond or security.  
24

25 (c) STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER. Unless the court  
26 orders otherwise, the following are not stayed after being entered, even if an appeal is  
27 taken:

- 28 (1) an interlocutory or final judgment in an action for an injunction or receivership; or  
29 (2) a judgment or order that directs an accounting in an action for patent infringement.  
30

31 (de) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an interlocutory order or  
32 final judgment that grants, continues, modifies, refuses, dissolves, or denies ~~refuses to~~  
33 ~~dissolve or modify~~ an injunction, the court may suspend, modify, restore, or grant an  
34 injunction on terms for bond or other terms that secure the opposing party's rights. If the  
35 judgment appealed from is rendered by a statutory three-judge district court, the order  
36 must be made either:

- 37 (1) by that court sitting in open session; or  
38 (2) by the assent of all its judges, as evidenced by their signatures.  
39

40 ~~(d) STAY WITH BOND ON APPEAL.~~ If an appeal is taken, the appellant may obtain a stay by  
41 supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be  
42 given upon or after filing the notice of appeal or after obtaining the order allowing the  
43 appeal. The stay takes effect when the court approves the bond.  
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45 \* \* \* \* \*

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court’s authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor’s assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule’s text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new subdivision (b), “a party” may obtain a stay. For example, a party may wish to

- 44 secure a stay pending disposition of post-judgment proceedings after expiration of the automatic  
45 stay, not yet knowing whether it will want to appeal.

## **RULE 62 CLEAN TEXT**

### **Rule 62. Stay of Proceedings to Enforce a Judgment**

- (a) **AUTOMATIC STAY.**; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.
- (b) **STAY BY BOND OR OTHER SECURITY.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.
- (c) **STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:
- (1) an interlocutory or final judgment in an action for an injunction or receivership; or
  - (2) a judgment or order that directs an accounting in an action for patent infringement.
- (d) **INJUNCTION PENDING AN APPEAL.** While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
- (1) by that court sitting in open session; or
  - (2) by the assent of all its judges, as evidenced by their signatures.

\* \* \* \* \*

### **Gap Report**

No changes have been made in the Rule and Committee Note as published.

### Rule 65.1 as Published

#### 1 **Rule 65.1. Proceedings Against a Surety or Other Security Provider**

2  
3 Whenever these rules (including the Supplemental Rules for Admiralty or Maritime  
4 Claims and Asset Forfeiture Actions) require or allow a party to give security, and  
5 security is given through a bond, other security, or other undertaking, with one or  
6 more sureties or other security providers, each surety provider submits to the  
7 court's jurisdiction and irrevocably appoints the court clerk as its agent for  
8 receiving service of any papers that affect its liability on the bond, ~~or~~ undertaking,  
9 or other security. The ~~surety's~~ security provider's liability may be enforced on  
10 motion without an independent action. The motion and any notice that the court  
11 orders may be served on the court clerk, who must promptly mail a copy of each  
12 to every surety security provider whose address is known.

#### 1 COMMITTEE NOTE

2  
3 Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to  
4 obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1  
5 enforcement procedures to sureties might exclude use of those procedures against a security  
6 provider that is not a surety. All security providers are brought into Rule 65.1 by these  
7 amendments.

#### *Revising Rule 65.1 as Published*

The Committee recommends Rule 65.1 for adoption with changes designed to establish  
uniformity with Appellate Rule 8(b). The changes remove all references to "bond,"  
"undertaking," and "surety." "Security" and "security provider" include these forms of security  
and sureties.

#### 1 **Rule 65.1. Proceedings Against a Surety ~~or Other Security Provider~~**

2  
3 Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and  
4 Asset Forfeiture Actions) require or allow a party to give security, and security is given  
5 ~~through a bond, other security, or other undertaking,~~ with one or more ~~sureties or other~~  
6 security providers, each surety provider submits to the court's jurisdiction and  
7 irrevocably appoints the court clerk as its agent for receiving service of any papers that  
8 affect its liability on the ~~bond, or undertaking, or other security~~. The ~~surety's~~ security  
9 provider's liability may be enforced on motion without an independent action. The  
10 motion and any notice that the court orders may be served on the court clerk, who must  
11 promptly mail a copy of each to every surety security provider whose address is known.

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COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

**RULE 65.1 CLEAN TEXT**

**Rule 65.1. Proceedings Against a Security Provider**

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court’s jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider’s liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every security provider whose address is known.

COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

Gap Report

The rule text was changed to eliminate references to “bond,” “undertaking,” and “surety.” An explanation was added to the Committee Note.

SUMMARY OF COMMENTS  
RULE 62

*In General*

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Pennsylvania Bar Association, CV-0064: Changing Rule 62(a) to provide a 30-day automatic stay “makes sense, since that would be the appeal period in most matters.” The stay power established by Rule 62(a) makes present Rule 62(b) redundant; it is properly deleted. Adoption of the Rule 62 amendments is recommended.

RULE 65.1

*In General*

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Pennsylvania Bar Association, CV-0064: The amendments conform to the changes in Rule 62. Adoption is recommended.

## II. SETTING PRIORITIES

Potential Civil Rules amendments come to the Committee from several sources. Some can be put aside, at least for the time being, without a great investment of Committee resources. Some deserve careful study but in the end are put aside because the opportunity to improve practice is outweighed by the risk of making practice worse. Others offer sufficient promise to justify substantial work, even acknowledging that in the end no amendment may prove satisfactory. Proposals worthy of substantial work may accumulate at a rate that requires the Committee to choose which to take on first. So it is now.

Five topics were discussed by the Committee to begin the process of setting priorities. Three of them are familiar from past reports: Whether the Rule 38 procedure for demanding a jury trial should be changed to eliminate or ease the demand procedure, both in cases initially filed in federal court and in removed cases; whether the means for serving Rule 45 subpoenas should be clarified and perhaps extended; and both broad and closely focused amendments of the Rule 68 offer-of-judgment procedure. Two others are new: Whether to adopt, in the Civil Rules or as a freestanding set of rules, provisions for district-court review of individual social security disability and like cases; and whether to amend Rule 47 to expand lawyers' rights to participate in voir dire examination of prospective jurors. No definite ranking has been set. The proposals are described here with a request for guidance on their relative importance and opportunities for successful amendments.

### **A. SOCIAL SECURITY DISABILITY REVIEW**

42 U.S.C. § 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security “by a civil action.” Every year brings 17,000 to 18,000 of these review cases to the district courts. They account for approximately 7% of all civil filings. The national average remand rate is about 45%, a figure that includes rates as low as 20% in some districts and as high as 70% in others. Different districts employ a wide range of disparate procedures in deciding these actions.

The Administrative Conference of the United States, supported by admirably detailed work by Professors Jonah Gelbach and David Marcus, has submitted this proposal:

The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court’s consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

The proposal seems to contemplate action through the Rules Enabling Act. The suggestion of “consultation with Congress as appropriate” need not detract from that conclusion. Acting through the Enabling Act should involve at least the Judicial Conference and the Standing Committee. On balance it likely should involve the Civil Rules Committee as well. Section 405(g) review proceedings are civil actions. They are lodged in the district courts. The Civil Rules Committee has initial responsibility to study and to advise about rules for civil actions in the district courts. That holds whether in the end it seems better to adopt an independent set of review rules that are linked to the Civil Rules, instead to place the review rules directly in the Civil Rules, or even to recommend no action. Looking to the Civil Rules Committee also is indicated by the need to integrate with at least some provisions of the Civil Rules and with the overall modes of managing district-court dockets. In the end, it may be that any new rules will bear a striking resemblance to the Appellate Rules. The Appellate and Civil Rules Committees often work together, and can be expected to do so as proves useful in this project.

Any proposal to adopt rules specific to a particular substantive area must overcome well-founded reluctance. Detailed substantive knowledge may be required. In the setting of Social Security claims it also may be necessary to develop comprehensive knowledge of the ways in which the Social Security Administration and its lawyers interact in review proceedings with other government lawyers and claimants. There also is a risk that even rules that manage to strike a sound balance between competing interests will be perceived to favor one set of interests over another. Yet respect for the Administrative Conference suggests that this proposal should not be rejected without further work. It may prove possible to develop a uniform national procedure that benefits claimants, the government, and the courts.

If this task is taken on, it will be important to think about the means of gathering information necessary to do it well. Powerful institutional concerns counsel against such extraordinary measures as adding specialist members to the Advisory Committee or to a subcommittee. Those concerns are deepened by the prospect that it would not be enough to rely on one, or two, or three specialists. Some other means are likely to prove more appropriate. A rather widespread request addressed to professional groups, and perhaps to identifiable individuals, might prove a useful beginning. Experience with such requests has worked for projects focused on more traditional Civil Rules subjects, and might work here. So too, “miniconferences,” although expensive, have proved quite helpful. The only caution is that more than one miniconference might be needed to test proposals as they advance through successive stages.

The Committee has concluded that work on this proposal should begin now. The outcome may be a decision to put the task aside. It may be to develop a separate set of rules, with cross-incorporations between the separate set and the Civil Rules. Or it may be to develop a relatively short rule, or a few rules, lodged in the Civil Rules. The task will not be easy. The further it is pursued, the greater the expenditure of Committee resources.

The draft April Minutes reflect the Committee discussion. One issue that will have to be assessed is whether rules of the type suggested by the Administrative Conference—either as a separate set of rules or as part of the Civil Rules—will address the concerns focused by the Administrative Conference, particularly the high or divergent remand rates. The part of the April agenda that stimulated this discussion is set out here to give some sense of the issues as they first appear:

Unique, subject-specific, and intricate questions are raised by 17-CV-D, a submission by the Administrative Conference of the United States “for the consideration of the Judicial Conference of the United States.” The Administrative Conference “recommends that the Judicial Conference ‘develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).’”

#### *Civil Rules or Something Else?*

Two threshold issues intertwine. One is a potential ambiguity about the choice between stand-alone “special procedural rules” and adopting new and specialized Federal Rules of Civil Procedure. The other is whether the initial burden of developing either sort of specialized rules should be borne by the Civil Rules Committee, by the Civil Rules Committee as enlarged for this purpose by members well versed in Social Security review issues, by a new advisory committee, or by the Standing Committee itself with some other means of seeking advice.

Some uncertainty as to the nature of the special procedural rules springs from the recommendation's repeated references to special rules. In addition, there is a clear statement that many of the Civil Rules have no useful role to play in fashioning the means of appellate review on the administrative record. In the end, the recommendation is that:

The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

Setting aside for now the suggestion of consultation with Congress in developing Enabling Act Rules, the recommendation is compatible with adoption of a separate set of rules, akin to such models as the Habeas Corpus rules, or with adoption of new Civil Rules. Nor should the choice be deemed foreclosed by the study on which the recommendation is based. Professors Jonah Gelbach and David Marcus prepared for the Administrative Conference "A Study of Social Security Litigation in the Federal Courts" (July 28, 2016). The Study explicitly recommends "enabling legislation to clarify the U.S. Supreme Court's authority to promulgate procedural rules for social security litigation," with appointment of a social security rules advisory committee. Study, p. 148. The Study recognizes that the Enabling Act likely authorizes specific rules for social security appeals now, but prefers stand-alone rules because many Civil Rules are not suited to review on an administrative record. Something as simple as originating review by filing a complaint, Rule 3, is thought inappropriate, as are the general rules for pleading, discovery, and summary judgment. The poor fit of these rules with administrative review in turn has meant a riot of wildly disparate practices across district courts, many of them poorly suited to the task. All that need be done with the Civil Rules is to add to Rule 81(a) a new paragraph excluding cases governed by the new social-security review rules. Study, pp. 148-152.

The Study approaches the recommendations for review rules by establishing a richly detailed foundation in the structure and operation of the administrative proceedings that precede review in a district court. The details will command close attention when it comes time to begin framing specific review rules. They present a compelling picture of a system that, both in size and character, is quite unlike other administrative adjudications that come on for review either in a district court or in a court of appeals. One challenge will be to determine whether the many unique characteristics of this system will, in the end, have a significant bearing on the best procedures for review. One example is provided by requests

for voluntary remand. Office of General Counsel staff “typically requests voluntary remand in about 15% of appeals annually” when they conclude that a case “cannot be defended.” Study p. 31. Given the workloads involved, it would be good to adopt a review procedure that facilitates this practice. But it may be that this purpose can be served by rules that look a lot like the Appellate Rules for circuit-court review on an administrative record.

The Study also provides information about the outcomes on review. Part III, pp. 44-80, explores the statistic that “federal courts ruled for disability claimants in 45% of the 18,193 appeals they decided in FY 2014 \* \* \*.” Part IV, pp. 81-126, explores variations in the remand rate across the district courts. The lowest rate of remand is 20.8% in one district; the highest is 70.6%. There is a significant clustering of remand rates among the district courts as aligned by circuit, and—perhaps surprisingly—a significant sameness among different judges in any single district. Without venturing any firm diagnosis, one hypothesis offered for further study is that there is a significant variation in the quality of the work done in different regions of the Social Security Administration. It does not seem likely that court rules for review can be framed with a purpose to address the remand rate directly. Section 405(g) establishes the familiar “substantial evidence” standard of review. But it may be that addressing the cacophony of local practices by establishing a uniform and good review procedure will have some impact on the quality of review decisions.

It is useful to begin work on these questions in the Civil Rules Committee, with advice from the Appellate Rules Committee as seems helpful. Although no firm answer can be given now, it seems likely that some provisions of the Civil Rules will remain useful. Explicit provisions for default, entry of judgment, motions to alter or amend, perhaps stays, reliance on magistrate judges, Rules 77 through 79 on conducting business, motions, and records, and yet others are examples. In addition, § 405(g) provides that an individual may obtain review of the Commissioner’s “final decision” “by a civil action” filed in a district court. If it is to be a civil action, and if it is right that some aspects of the civil action are usefully governed by the general Civil Rules, integration of the special review procedures with the Civil Rules may be accomplished better within the body of the Civil Rules as a whole rather than by making an exception—most likely in Rule 81(a)—that excludes application of the Civil Rules from matters governed by the potential RULES FOR REVIEW OF INDIVIDUAL BENEFIT DECISIONS UNDER 42 U.S.C. § 405(g).

Beginning initial consideration in the Civil Rules Committee need not imply a commitment to complete the task. A great deal must be learned, although the Gelbach and Marcus Study provides an outstanding point of departure. One way to begin the task is to wonder about the models that might be used to frame a new review procedure.

The model advanced by the Administrative Conference adopts the direct analogy to administrative review as an appeal procedure. Review would be initiated by a “complaint” that is “substantially equivalent to a notice of appeal.” (Remember that § 405(g) directs that review be sought by a “civil action” “commenced” within 60 days; Rule 3 directs that a civil action be commenced by filing a complaint.) The next step is modeled on the provision in § 405(g) that “[a]s part of the Commissioner’s answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.” This is translated as a direction that the Commissioner “file a certified copy of the administrative record as the main component of its answer.” The case would then be developed by the claimant’s opening brief, the agency’s response, and “appropriate subsequent proceedings and the filing of appropriate responses consistent with \* \* \* § 405(g) and the appellate nature of the proceedings.” Appropriate deadlines and page limits would be added. And there would be “other rules” that promote efficiency and uniformity, “without favoring one class of litigants over another or impacting substantive rights.”

The appeal model is the obvious starting point. What counts is framing the issues clearly through submissions that bring together each point of agreement and each point of argument. As compared to an ordinary civil action that launches a new dispute, social security review comes at the end of an elaborate and multi-stage administrative and then adjudicatory procedure. There is little lost by a procedure that does not, at the time of complaint and answer, afford any idea of what the issues will be. Channeling the parties into a process that enables (or forces) them into a record-focused framing of the dispute suffices. The deadlines, word-count, and any like formal constraints can be shaped for the peculiar needs of this setting.

One question could be whether the benefits of this model should be generalized by adopting rules for all proceedings for review on an agency record, not for individual Social Security disputes alone. There may be reason for caution. The sheer number of Social Security review cases dwarfs all other district-court administrative review cases—there are something on the order of 18,000 social security review cases a year. The special character of the underlying claims and the distinctive administrative structure and operations also may be reasons to confine new rules to social security cases, as recommended by the Administrative Conference. In addition, § 405(g) specifies part of the procedure for review. Review is obtained “by a civil action.” “As part of the Commissioner’s answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.” There is a specific provision limiting review of administrative decisions based on failure to submit proof in conformity with regulations. The court may affirm, modify, or reverse, with or without remand. It may remand for

taking new evidence. And there is a special procedure for remanding on motion by the Commissioner.

A second question might be whether it would be simpler to adopt a Civil Rule that concisely absorbs by reference the Appellate Rules for administrative review. The answer may be that it would be more complicated, not simpler. The Study suggests different timing for briefing that responds to the special character of social-security review, and different word counts for briefs. Other parts of the Appellate Rules might also benefit from adaptation. These problems could be met by adopting special social-security review rules into the Appellate Rules, to be incorporated into the Civil Rules by simple cross-reference, but it seems better to use the Civil Rules to govern district-court proceedings. No one enjoys the process of beginning with a Civil Rule that directs attention elsewhere.

A different possibility would be to create a new procedure specifically tailored for administrative review in a district court. Although there may be rare exceptions, in the overwhelming majority of cases review is confined to the administrative record. The court does not decide the facts, and does not decide whether there are genuine disputes as to the facts. The only question is whether, in the standard phrase, the administrative decision is supported by substantial evidence on the record considered as a whole. If there is substantial evidence, the administrative decision is affirmed. If not, the administrative decision is set aside; if further proceedings are appropriate, the case is remanded to the agency. Because taking evidence is not part of the review, and for want of any obvious alternative in the Civil Rules, Professors Gelbach and Marcus report that many districts adapt summary-judgment procedures to decide social-security review cases. But they also find that this model is ill-suited. Many of the incidents of summary-judgment procedure, designed to determine whether there is a genuine dispute as to any material fact, are inapposite.

As with a Civil Rule based on analogy to the Appellate Rules, a new Civil Rule for review on an administrative record could be limited to Social Security review cases or made more general. Although there is likely to be a common core of provisions, caution may suggest limiting any new rule to Social Security cases, at least for the time being. The “civil action” specified by the statute might as well be commenced by filing a “complaint.” The statute ensures that the administrative record is supplied as part of the answer. The rule could provide for a claimant’s motion to reverse and for a Commissioner’s motion to affirm. Or it might provide that the complaint itself operates as a motion to reverse, to be met by a request to affirm in the answer or a motion by the Commissioner to remand under the statutory provision for remand.

The obvious danger in adopting a rule for a specific statutory framework is that the statute may be amended. The time required to amend the rule might leave a substantial period of confusion.

Discussion should begin with the broad questions: Where should new rules be lodged, and who should have primary initial responsibility for developing them. Thoughtful answers, carefully deliberated, are required. A request from the Administrative Conference should stimulate immediate study. It will be good to begin with at least an initial sense of direction.

### *Next Steps*

The immediate question, then, is what direction to take in developing this complex set of questions for further work. It may be wise to defer the choice between stand-alone rules and new Civil Rules. That choice will be affected by the shape of any rules that may be proposed, and would be mooted if the decision is not to adopt any rules. The question cannot be deferred if it is found useful to create a new advisory committee within the Enabling Act structure, but that is not recommended. Instead, a subcommittee of the Civil Rules Committee will be formed to lead the work. It will be important to begin gathering information from people with as many perspectives as can be found, both within the Social Security Administration and beyond. Local rules for these cases will be consulted as potential models for national rules. Much work lies ahead.

Report to the Standing Committee on Rules of Practice and Procedure  
Advisory Committee on Civil Rules  
May 18, 2017

Supreme Court of the United States  
Washington, D. C. 20543

COUNSELOR TO  
THE CHIEF JUSTICE

\* Appropriate  
Handling

February 10, 2017

Matthew Lee Wiener  
Vice Chairman and Executive Director  
Administrative Conference  
of the United States  
1120 20th Street, N.W., Suite 706 South  
Washington, D.C. 20036

Dear Mr. Weiner:

I am writing in response to your letter of January 13, 2017, submitting the Administrative Conference's recommendation that the Judicial Conference "develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)."

By copy of this letter, I am forwarding the Administrative Conference's recommendation to James C. Duff, Director of the Administrative Office of the U.S. Courts and Judicial Conference Secretary, and to the Honorable David G. Campbell, U.S. District Judge and Chair of the Judicial Conference's Committee on Rules of Practice and Procedure.

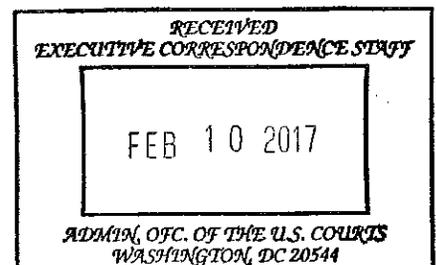
Thank you for your letter and for the analysis supplied on behalf of the Administrative Conference.

Sincerely,



Jeffrey P. Minear

Attachment



Report to the Standing Committee  
Advisory Committee on Civil Rules  
May 18, 2017

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cc: ✓ Director James C. Duff  
Hon. David G. Campbell  
Ms. Jill C. Sayenga  
Professor Ronald M. Levin  
Ms. Shawne McGibbon  
Mr. Reeve T. Bull  
Ms. Gisselle Bourns  
Mr. Daniel J. Sheffner



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

to the Standing Committee  
Advisory Committee on Civil Rules

May 18, 2017

January 13, 2017

Page 127

Mr. Jeffrey Minear  
Counselor to the Chief Justice  
Supreme Court of the United States  
1 First Street N.E.  
Washington, DC 20543

Dear Mr. Minear:

I respectfully submit for the consideration of the Judicial Conference of the United States Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*, 81 Fed. Reg. 94,312 (Dec. 23, 2016), of the Administrative Conference of the United States. It recommends that the Judicial Conference “develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).”

The Administrative Conference’s staff will be pleased to provide any assistance that the Judicial Conference may request in its consideration of the recommendation.

With my best.

Sincerely yours,

A handwritten signature in black ink that reads "Matthew Lee Wiener".

Matthew Lee Wiener  
Vice Chairman and Executive Director

cc: Ms. Jill C. Sayenga  
Professor Ronald M. Levin  
Ms. Shawne McGibbon  
Mr. Reeve T. Bull  
Ms. Gisselle Bourns  
Mr. Daniel J. Sheffner



## **Administrative Conference Recommendation 2016-3**

### **Special Procedural Rules for Social Security Litigation in District Court**

**Adopted December 13, 2016**

The Administrative Conference recommends that the Judicial Conference of the United States develop special procedural rules for cases under the Social Security Act<sup>1</sup> in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The Rules Enabling Act delegates authority to the United States Supreme Court (acting initially through the Judicial Conference) to prescribe procedural rules for the lower federal courts.<sup>2</sup> The Act does not require that procedural rules be trans-substantive (that is, be the same for all types of cases), although the Federal Rules of Civil Procedure (Federal Rules) have generally been so drafted. Rule 81 of the Federal Rules excepts certain specialized proceedings from the Rules' general procedural governing scheme.<sup>3</sup> In the case of social security litigation in the federal courts, several factors warrant an additional set of exceptions. These factors include the extraordinary volume of social security litigation, the Federal Rules' failure to account for numerous procedural issues that arise due to the appellate nature of the litigation, and the costs imposed on parties by the various local rules fashioned to fill those procedural gaps.<sup>4</sup>

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<sup>1</sup> 42 U.S.C. § 301 *et seq.* (2012).

<sup>2</sup> *See* 28 U.S.C. § 2072(a) (2012).

<sup>3</sup> FED. R. CIV. P. 81(a); *see also* FED. R. CIV. P. 71.1–73 (“Special Proceedings”).

<sup>4</sup> This recommendation is based on a portion of the extensive report prepared for the Administrative Conference by its independent consultants, Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the

The Social Security Administration (SSA) administers the Social Security Disability Insurance program and the Supplemental Security Income program, two of the largest disability programs in the United States. An individual who fails to obtain disability benefits under either of these programs, after proceeding through SSA's extensive administrative adjudication system, may appeal the agency's decision to a federal district court.<sup>5</sup> In reviewing SSA's decision, the district court's inquiry is typically based on the administrative record developed by the agency.

District courts face exceptional challenges in social security litigation. Although institutionally oriented towards resolving cases in which they serve as the initial adjudicators, the federal district courts act as appellate tribunals in their review of disability decisions. That fact alone does not make these cases unique; appeals of agency actions generally go to district courts unless a statute expressly provides for direct review of an agency's actions by a court of appeals.<sup>6</sup> However, social security appeals comprise approximately seven percent of district courts' dockets, generating substantially more litigation for district courts than any other type of appeal from a federal administrative agency. The high volume of social security cases in the federal courts is in no small part a result of the enormous magnitude of the social security disability program. The program, which is administered nationally, annually receives millions of applications for benefits. The magnitude of this judicial caseload suggests that a specialized approach in this area could bring about economies of scale that probably could not be achieved in other subject areas.

The Federal Rules were designed for cases litigated in the first instance, not for those reviewing, on an appellate basis, agency adjudicative decisions. Consequently, the Federal Rules fail to account for a variety of procedural issues that arise when a disability case is appealed to district court. For example, the Rules require the parties to file a complaint and an answer. Because a social security case is in substance an appellate proceeding, the case could more

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University of Arizona Rogers College of Law. *See* Jonah Gelbach & David Marcus, A Study of Social Security Litigation in the Federal Courts 127–42, 148–59 (July 28, 2016) (report to the Admin. Conf. of the U.S.).

<sup>5</sup> 42 U.S.C. § 405(g) (2012).

<sup>6</sup> *See* *Watts v. Sec. & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007).

sensibly be initiated through a simple document akin to a notice of appeal or a petition for review. Moreover, although 42 U.S.C. § 405(g) provides that the certified record should be filed as “part of” the government’s answer, there is no functional need at that stage for the government to file anything more than the record. In addition, the lack of congruence between the structure of the Rules and the nature of the proceeding has led to uncertainty about the type of motions that litigants should file in order to get their cases resolved on the merits. In some districts, for instance, the agency files the certified transcript of administrative proceedings instead of an answer, whereas other districts require the agency to file an answer. In still other districts, claimants must file motions for summary judgment to have their case adjudicated on the merits,<sup>7</sup> whereas such motions are considered “not appropriate” in others.<sup>8</sup>

Social security disability litigation is not the only type of specialized litigation district courts regularly review in an appellate capacity. District courts entertain an equivalent number of habeas corpus petitions,<sup>9</sup> as well as numerous appeals from bankruptcy courts. But habeas and bankruptcy appeals are governed by specially crafted, national rules that address those cases’ specific issues.<sup>10</sup> No particularized set of rules, however, accounts for the procedural gaps left by the Federal Rules in social security appeals.

When specialized litigation with unique procedural needs lacks a tailored set of national procedural rules for its governance, districts and even individual judges have to craft their own. This is precisely what has happened with social security litigation. The Federal Rules do exempt disability cases from the initial disclosure requirements of Rule 26, and limit electronic access of

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<sup>7</sup> See, e.g., E.D. Mo. L.R. 56-9.02; Order Setting Schedule, *Donvan-Terris v. Colvin*, Civ. No. 14-5125 (E.D. Wash. April 8, 2015); E.D. Mo. L.R. 56-9.02.

<sup>8</sup> See, e.g., S.D. Iowa Local R. 56(i).

<sup>9</sup> During the twelve months that ended on September 30, 2014, the district courts received 19,185 “general” habeas corpus petitions and 19,146 social security appeals. Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 3–4.

<sup>10</sup> See R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037.

nonparties to filings in social security cases,<sup>11</sup> but, otherwise, they include no specialized procedures. As a result, numerous local rules, district-wide orders, and individual case management orders, addressing a multitude of issues at every stage in a social security case, have proliferated. Whether the agency must answer a complaint, what sort of merits briefs the parties are required to file, whether oral arguments are held, and the answers to a host of other questions differ considerably from district to district and, sometimes, judge to judge. Such local variations have not burgeoned in other subject areas in which district courts serve as appellate tribunals; this fact reflects the district courts' own recognition that social security cases pose distinctive challenges.

Many of the local rules and orders fashioned to fill the procedural gaps left by the Federal Rules generate inefficiencies and impose costs on claimants and SSA. For example, simultaneous briefing—the practice in some districts that requires both parties to file cross motions for resolution of the merits and to respond to each other's briefs in simultaneously filed responses—effectively doubles the number of briefs the parties must file. Some judges employ a related practice whereby the *agency* is required to file the opening brief.<sup>12</sup> Because social security complaints are generally form complaints containing little specificity, courts that employ this practice (known as “affirmative briefing”) essentially reverse the positions of the parties, leaving to the agency the task of defining the issues on appeal. The questionable nature of some of these local variations may be attributable in part to the fact that they can be imposed without observance of procedures that would assure sufficient deliberation and opportunities for public feedback. Proposed amendments to the Federal Rules must go through several steps, each of which requires public input. So-called “general orders” and judge-specific orders, on the other hand, can be issued by a district or individual judge with very little process.

The disability program is a national program that is intended to be administered in a uniform fashion, yet procedural localism raises the possibility that like cases will not be treated

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<sup>11</sup> FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).

<sup>12</sup> See, e.g., Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Va. Jan. 1, 2005); Briefing Schedule, *Barnes v. Colvin*, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1–2.

alike. Burdensome procedures adopted by some districts or judges, such as simultaneous briefing schedules, can increase delays and litigation costs for some claimants, while leaving other similarly situated claimants free from bearing those costs. Further, many of the attorneys who litigate social security cases—agency lawyers and claimants’ representatives alike—maintain regional or even national practices. Localism, however, makes it difficult for those lawyers to economize their resources by, for instance, forcing them to refashion even successful arguments in order to fit several different courts’ unique page-limits or formatting requirements.

Procedural variation can thus impose a substantial burden on SSA as it attempts to administer a national program and can result in arbitrary delays and uneven costs for disability claimants appealing benefit denials. SSA and claimants would benefit from a set of uniform rules that recognize the appellate nature of disability cases. Indeed, several districts already treat disability cases as appeals.<sup>13</sup> Many of these districts provide, for example, for the use of merits briefs instead of motions or for the filing of the certified administrative record in lieu of an answer.

The Supreme Court has recognized that the exercise of rulemaking power to craft specialized procedural rules for particular areas of litigation can be appropriate under the Rules Enabling Act.<sup>14</sup> Yet, in recommending the creation of special procedural rules for social security disability and related litigation, the Administrative Conference is cognizant that the Judicial Conference has in the past been hesitant about amending the Federal Rules to incorporate provisions pertaining to particular substantive areas of the law. That hesitation has been driven, at least in part, by reluctance to recommend changes that would give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends, such as heightened pleading standards that would disfavor litigants in particular subject areas. The proposals offered

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<sup>13</sup> See, e.g., General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm’r of Soc. Sec.’s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order, *In re* Actions Seek. Rev. of the Comm’r of Soc. Sec.’s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.1.

<sup>14</sup> See *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) (inviting the Advisory Committee on Civil Rules to draft procedural rules for habeas corpus litigation).

herein have very different purposes. Indeed, the Administrative Conference believes that rules promulgated pursuant to this recommendation should not favor one class of litigants over another or otherwise bear on substantive rights. Instead, this recommendation endorses the adoption of rules that would promote efficiency and uniformity in the procedural management of social security disability and related litigation, to the benefit of both claimants and the agency.<sup>15</sup> Such a commitment to neutrality would also serve to dampen any apprehensions that the proposed rules would violate the Rules Enabling Act's proscription of rules that would "abridge, enlarge, or modify any substantive right."<sup>16</sup> Rules consistent with these criteria could potentially address a variety of topics, including setting appropriate deadlines for filing petitions for attorneys' fees, or establishing judicial extension practices, or perhaps authorizing the use of telephone, videoconference, or other telecommunication technologies. In developing such rules, the Judicial Conference may wish to consult existing appellate procedural schemes, such as the Federal Rules of Appellate Procedure and the Rules of Practice and Procedure of the United States Court of Appeals for Veterans Claims.

The Administrative Conference believes that a special set of procedural rules could bring much needed uniformity to social security disability and related litigation. In routine cases, page limits, deadlines, briefing schedules, and other procedural requirements should be uniform to ensure effective procedural management. At the same time, the new rules should be drafted to displace the Federal Rules *only* to the extent that the distinctive nature of social security litigation justifies such separate treatment.<sup>17</sup> In this way, the drafters can avoid the promulgation

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<sup>15</sup> This recommendation is the latest in a line of Conference recommendations focused on improving the procedures used in social security cases. *See, e.g.*, Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34,213 (June 8, 1990); Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 (June 26, 1978).

<sup>16</sup> 28 U.S.C. § 2072(b) (2012).

<sup>17</sup> *See* FED. R. CIV. P. 81(a)(6) ("[The Federal Rules], to the extent applicable, govern proceedings under [certain designated] laws, except as those laws provide other procedures.").

of a special procedural regime that sacrifices flexibility and efficiency for uniformity in certain cases.

The research that served as the foundation for this report focused on social security disability litigation commenced under 42 U.S.C. § 405(g). Section 405(g) also authorizes district court review of SSA old age and survivors benefits decisions, as well as other actions related to benefits. Because such non-disability appeals do not differ procedurally from disability cases in any meaningful way,<sup>18</sup> it is the Conference's belief that this recommendation should apply, subject to the exceptions discussed below, to all cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The Conference recognizes that some cases might be brought under § 405(g) that would fall outside the rationale for the proposed new rules. This could include class actions and other broad challenges to program administration, such as challenges to the constitutionality or validity of statutory and regulatory requirements, or similar broad challenges to agency policies and procedures. In these cases, the usual deadlines and page limits could be too confining. By citing these examples, the Conference does not intend to preclude other exclusions. The task of precisely defining the cases covered by any new rules would be worked out by the committee that drafts the rules, after additional research and more of an opportunity for public comment on the scope of the rules than has been possible for the Conference. It may also be necessary to include specific rules explaining the procedure for the exclusion of appropriate cases.

### RECOMMENDATION

1. The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final

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<sup>18</sup> Further, they only constitute about four percent of total social security cases appealed to district courts annually. See Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.



administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

2. Examples of rules that should be promulgated include:
  - a. A rule providing that a claimant's complaint filed under 42 U.S.C. § 405(g) be substantially equivalent to a notice of appeal;
  - b. A rule requiring the agency to file a certified copy of the administrative record as the main component of its answer;
  - c. A rule or rules requiring the claimant to file an opening merits brief to which the agency would respond, and providing for appropriate subsequent proceedings and the filing of appropriate responses consistent with 42 U.S.C. § 405(g) and the appellate nature of the proceedings;
  - d. A rule or rules setting deadlines and page limits as appropriate; and
  - e. Other rules that may promote efficiency and uniformity in social security disability and related litigation, without favoring one class of litigants over another or impacting substantive rights.

**42 U.S.C. § 405. Evidence, procedure, and certification for payments**

\* \* \* \* \*

**(g) Judicial review**

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

\* \* \* \* \*

## **B. RULES 38, 39, 81(c)(3)**

Consideration of the procedures that require an express demand by a party that wants to exercise a right to jury trial began with an ambiguity introduced by a style change in Rule 81(c)(3). It is not clear whether the demand requirement is excused after removal from a state court if state procedure requires a demand, but the requirement is set at a time after the case is removed. Initial discussions of this question with the Standing Committee led two members, then-Judge Gorsuch and Judge Graber, to suggest that the demand procedure should be reconsidered. The suggestion is that the Civil Rules should emulate Criminal Rule 23. Jury trial would be provided in every case with a statutory or constitutional right to jury trial unless all parties agree to waive jury trial—and even if all parties waive, it might be required that the judge approve the waiver. This approach would better protect the right to jury trial, would avoid a trap for the unwary, and might increase the number of cases that actually go to the gradually vanishing event of a jury trial.

The Committee has determined that some preliminary work should proceed on these questions. The initial step will be further research, with the help of the Administrative Office, on several questions. Some of the questions call for traditional research. Exploring the history of the 1938 decision to adopt a demand procedure, and to include a deadline early in the action, is one. A more sweeping task will be to explore state practices. Some states do not require a demand. Others set the time for demand much later than the time set in Rule 38. It will be useful to learn about the actual effects of these state rules in practice.

Other research may prove more elusive. The value of amending the rules is affected by two offsetting questions. The first is a purely empirical question: How often is the right to a jury trial forfeited by an inadvertent failure to make a timely demand, and by failing to seek or to win a jury trial by motion under Rule 39(b)? It may be difficult to get much solid information on this question. The other question is one of practical experience: What advantages may be gained by requiring an early demand? Early exploration of this question has been frustratingly inconclusive.

Once additional information is developed, the Committee will address whether to consider this subject further. Some concern has been expressed that a rule change in the jury trial demand procedure would not have much practical impact on jury practice and procedure.

### **C. SERVING RULE 45 SUBPOENAS**

Rule 45(b)(1) directs that a subpoena be served by “delivering a copy to the named person.” There is a clear split in district-court opinions on the proper modes of delivery. The majority rule requires personal service. A healthy minority rule allows delivery by mail, with the qualification in some courts that mail is allowed only after attempts at personal service have failed. Occasionally a court authorizes delivery by some other means. This topic was discussed by the Committee as it developed the Rule 45 amendments that took effect in 2013. The decision then was to make no changes, in part from a view that the dramatic act of personal delivery impresses the witness with the importance of compliance. The topic has been taken up again in response to a suggestion by the State Bar of Michigan Committee on United States Courts that all of the means of service allowed by Rule 4 for a summons and complaint should also be allowed for a Rule 45 subpoena. That suggestion has been discussed with the Standing Committee.

Taking these questions up again no more than a few years after they were last considered does not seem urgent. There have been no significant changes in the positions taken by the courts under Rule 45 as it stands. And there are good reasons to be wary of the seemingly attractive analogy to Rule 4. Still, a time may come when it proves wise to establish a uniform rule. And some changes would not be particularly adventuresome. Service by postal mail, now allowed by some courts, might provide useful efficiencies at low cost. “Abode” service by leaving the subpoena at the witness’s home might be useful. The possibility that relatively modest changes could prove beneficial justifies retaining these questions on the Committee agenda, but not as a high priority.

#### **D. RULE 47: LAWYER PARTICIPATION IN VOIR DIRE**

The American Bar Association has recommended that Rule 47 be amended to reflect ABA Principles for Juries and Jury Trials 11(B)(2). The core of Principle 11(B)(2) is that “each party should have the opportunity, under supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.”

This topic was last explored by the Committee through a proposal to amend Rule 47 that was published for comment in 1995. The proposal was that “the court shall also permit the parties to orally examine the prospective jurors to supplement the court’s examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause.”

The 1995 proposal drew extensive comments and testimony, both from judges and from lawyers. These responses showed a divide, clear and sharp, between bench and bar. A strong majority of the lawyers’ comments supported the proposal for an expanded right to participate. The judges were nearly unanimous in opposing the proposal. Many of these judges reported that they did allow active lawyer participation, but that the practice was successful only because Rule 47 allowed the judge to keep tight control. Without a clear right to exclude lawyer participation, they feared that voir dire examination would be turned to improper purposes. The Committee concluded then that it would be better to emphasize the values of controlled lawyer participation as a “best practice” than to pursue the proposed amendment further.

In 1995 the Committee believed that a majority of federal judges actually permitted substantial lawyer participation in voir dire. Today it believes that this practice remains, and may even have expanded to a still greater portion of judges. It could be useful to attempt an empirical inquiry to determine the range of contemporary practices.

This question is important. But there is little reason to believe that positions have changed since 1995. The Committee will retain this matter on its docket, but does not plan to develop it in the near future.

### **E. RULE 68 OFFERS OF JUDGMENT**

The Rule 68 offer-of-judgment procedure is seldom absent from the Committee agenda. A comparison might be drawn to discovery. Some aspect of discovery is almost always on the agenda. The discovery rules are amended regularly. Rule 68 wins its frequent place on the agenda by a continual flow of outside suggestions but has defied serious amendment attempts that go as far back as proposals published for comment in 1983. In October, 2014, the Committee decided to carry Rule 68 forward for further research, looking particularly to practices and results under a wide variety of analogous state procedures. The research continues, but has been interrupted intermittently as attention has been diverted to more urgent topics.

The focus of Rule 68 proposals can be broad or narrow.

The broad proposals look in two directions. One approach seeks to invigorate Rule 68 to become an instrument that yields, if not more settlements, then earlier settlements. These proposals commonly suggest an expansion that would provide for offers by claimants, and to enhance incentives by providing for an award of post-offer attorney fees against a party who fails to win a judgment better than a rejected offer. The other approach goes in the opposite direction, arguing that Rule 68 has provided few benefits in practice and should be abrogated because its occasional uses serve to take advantage of the uncertainty of litigation and the risk aversion of plaintiffs who often have urgent needs to recover something.

The narrower proposals look to a variety of particular problems. One, made by the Second Circuit more than a decade ago, was that guidance should be provided on the means of comparing the specific relief embodied in an offer with the somewhat different specific relief awarded by a judgment. Another, advanced more recently, points to the questions that arise when a statute or court rule requires that the court approve a settlement between the parties. The fear is that Rule 68 could be used to circumvent the approval requirement—the parties agree to settle, the defendant then offers the agreed settlement under Rule 68, the plaintiff accepts, and, as directed by Rule 68(a), the clerk must enter judgment. This tactic has been reported in Fair Labor Standards Act cases in the Second Circuit.

The long history of Committee consideration of Rule 68 persuaded the Committee that it should not reopen general amendments. But it will be useful to monitor the potential practice of resorting to Rule 68 as a means to bypass a requirement that a settlement be approved by the court. The Committee will keep that issue open on the Committee agenda as the law develops further.

### III. RULE 30(b)(6)

In January 2017, the Standing Committee discussed the Civil Rules Advisory Committee's initial work on possible changes to Rule 30(b)(6). The agenda book for that meeting included an analysis of some 16 different issues that might be pursued in relation to this rule.

The Advisory Committee undertook a review of the rule about a decade ago in response to expressed concerns from the bar about the functioning of the rule. After completing that study and considering the issues, the Committee decided not to recommend any changes to Rule 30(b)(6).

But since that decision, several bar groups have submitted suggestions that the Advisory Committee look at the rule again. In April, 2016, the Advisory Committee decided to appoint a Rule 30(b)(6) Subcommittee to do that, and this Subcommittee's initial work produced the multiple possible amendment ideas that were in the January agenda book. As of that time, the Subcommittee had not had time to discuss many of the amendment ideas in any detail. But it had identified a number of issues that seemed to warrant legal research.

Since January, the legal research has been done thanks to support from the Rules Committee Support Office. The resulting research memorandum from Lauren Gailey and Derek Webb is included in this agenda book. The memorandum reports that the rule “seems to have become a flash point for litigation, having been cited in nearly 8,300 decisions,” although it is not clear how many involved meaningful discussion of the rule. In addition, that research shows:

- (1) Literature on Rule 30(b)(6) generally speaks approvingly of the rule, and focuses not on criticizing its provisions but instead on “practice pointers” for using it.
- (2) Although many districts have local rules that apply generally to depositions (specifying a minimum notice period, for example), only two (D.S.C. & D. Wyo.) have local rules that focus specifically on 30(b)(6) depositions.
- (3) All states have provisions parallel to Rule 30(b)(6). Some state rules include a general time frame for the organization to designate its witnesses. New York introduced a more detailed provision for its Commercial Division in 2015, with time limits and designation requirements.
- (4) Regarding the question whether statements by Rule 30(b)(6) witnesses are “judicial admissions,” the strong majority rule is that they are not. But there is a minority view, and due to the importance of this question, the issue is “extensively litigated.”

Also since the January Standing Committee meeting, the Subcommittee has met by conference call and considered which possible amendments seem most promising. One way of framing this question is to consider whether adding explicit reference to the rule in Rule 26(f),

calling for the parties to develop a discovery plan, and Rule 16(b) or (c), regarding the court's scheduling order and supervision of discovery, would address the problems identified in comments to the Committee. Notes of this conference call are included in this agenda book.

There was strong support within the Subcommittee for the view that—although such case-management emphasis could be valuable—it would not be enough by itself. There was also some consensus for the view that it would be desirable to trim the long list of possible changes identified to date as the Subcommittee moves forward.

At the Advisory Committee's April 2017 meeting, therefore, much of the discussion focused on which possible amendment topics offered the most promise of producing benefits while avoiding difficulties. Before the meeting, the Reporter had attempted an initial “ranking” of issues to facilitate discussion within the Advisory Committee. This discussion is reflected in the minutes of the Advisory Committee's meeting, included in this agenda book.

After the Advisory Committee's meeting, the Subcommittee met to discuss ways to proceed in evaluating the issues in light of the full Committee's discussion. After further exchanges by email, the decision was to post an invitation for comment on Rule 30(b)(6) on the Administrative Office's website, asking that comments be submitted by Aug. 1, 2017. This invitation was posted on May 2, and the organizations that have previously communicated with the Committee have been alerted to the invitation. The invitation is set forth below, and lists six potential amendment areas on which this effort will focus initially.

In addition to this general invitation for comment, members of the Subcommittee continue to receive input from the bar. On May 5, 2017, representatives of the Subcommittee participated in a panel about Rule 30(b)(6) during the membership meeting of the Lawyers For Civil Justice in Washington, D.C. This event provided a forum for discussion of problems encountered in practice under the rule. Tentative plans have been made for representatives of the Subcommittee to participate in a roundtable discussion of the rule during the American Association for Justice's convention in Boston in July. There may be additional opportunities for such input.

Rule 30(b)(6) Subcommittee  
Advisory Committee on Civil Rules

Invitation for Comment on  
Possible Issues Regarding Rule 30(b)(6)  
May 1, 2017

The Advisory Committee on Civil Rules appointed a Rule 30(b)(6) Subcommittee in April, 2016, and it has begun work. The Advisory Committee spent considerable time looking at this rule about a decade ago, and eventually decided not to propose any amendments at that time. Since then, several bar groups have submitted thoughtful reports to the Committee about problems encountered by their members with the current operation of the rule. Other bar groups have provided submissions questioning the need or appropriateness of amending the rule. Material on these subjects can be found in the agenda book for the Advisory Committee's April 25-26, 2017, meeting at pp. 239-316. That agenda book is available at [www.uscourts.gov](http://www.uscourts.gov).

Initial legal research by the Rules Committee Support Office (reported at pp. 249-65 of the agenda book) has cast some light on the concerns that have been raised. The Subcommittee has given initial consideration to a wide range of possible concerns. During the Committee's April 2017 meeting there was considerable discussion of these issues.

As part of its ongoing work, the Rule 30(b)(6) Subcommittee invites input about experience under the rule. Reports received so far indicate both that the rule is an important vehicle for gathering information from organizations in a significant number of cases, and that without it the risk of “bandying” would increase. Other reports indicate, however, that some lawyers may be asking the rule to bear more weight than it was meant to bear, and that some who use the rule impose extremely heavy burdens on opposing parties (and perhaps sometimes on nonparties as well).

Because the Subcommittee's work on the rule is at a preliminary stage, it is not possible presently to determine whether any actual rule amendments would be helpful and therefore warrant the careful drafting effort that would be necessary before any amendment could be formally proposed. For the present, the goal is to determine whether rule changes should be seriously considered, and to identify the topics or areas that offer the most promise that amendments would improve Rule 30(b)(6) practice while preserving its utility.

Based on discussions to date, including the discussion during the Advisory Committee's April 2017 meeting, the following possibilities have been identified as potential rule-amendment ideas:

Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16: Rule 26(f) already directs the parties to confer and deliver to the court their discovery plan. It specifies some things that should be in that plan but does not refer specifically to 30(b)(6) depositions. Specific reference

to Rule 30(b)(6) might be added to both Rule 26(f) and Rule 16(b) or (c). Such a provision might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice under Rule 30(b)(6). There have been suggestions, however, that the Rule 26(f) conference comes too early in the case for the lawyers to speak with confidence about their Rule 30(b)(6) needs. But (in keeping with some local rules about cooperation in setting depositions) it could be that such early judicial involvement could forestall later disputes.

Judicial admissions: It appears that the clear majority rule is that statements during a 30(b)(6) deposition are not judicial admissions in the sense that the organization is forbidden to offer evidence inconsistent with the answers of the Rule 30(b)(6) witness. Yet there are repeated statements, including some in cases, that testimony by a Rule 30(b)(6) witness is “binding” on the organization. It may be that all these statements mean is that, under Fed. R. Evid. 801(b)(2)(C), this testimony is admissible over a hearsay objection. But it does appear that there is widespread concern that organizations will face arguments that the testimony offered is “binding” in the same way that an admission in a pleading or in response to a Rule 36 request for admissions forecloses admission of evidence about the subject matter. If so, that concern may fuel disputes about a variety of matters that would not generate disputes were the rule amended to make it clear that testimony at a Rule 30(b)(6) deposition is not a judicial admission. (At the same time, it might be affirmed that a finding that a party has failed to prepare its witness adequately could, under Rule 37(c)(1), justify foreclosing the use of evidence that should have been provided earlier.)

Requiring and permitting supplementation of Rule 30(b)(6) testimony: In general, Rule 26(e) does not require supplementation of deposition testimony. But Rule 26(e)(2) directs that the deposition of an expert witness who is required to provide a report (a specially retained expert) must be supplemented. A similar provision could be added for 30(b)(6) deponents, perhaps specifying that the supplementation must be done in writing and providing that it is a ground for re-opening the deposition to explore the supplemental information. Concerns in the past have included the risk that the right to supplement would weaken the duty to prepare the witness.

Forbidding contention questions in Rule 30(b)(6) depositions: Rule 33(a)(2) provides that “[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.” Interrogatory answers are usually composed by attorneys who have at least 30 days to prepare the answers, and Rule 33 nonetheless suggests that the answer date should sometimes be deferred. A spontaneous answer in a deposition seems quite different. It may be that questions of this sort are rarely if ever used in ordinary depositions, even with witnesses testifying from their personal knowledge. It might be that Rule 30(b)(6) should forbid asking such questions of the witness designated to testify about the organization's knowledge.

Adding a provision for objections to Rule 30(b)(6): An explicit provision authorizing pre-deposition objections by the organization could be added to the rule. One possibility would

be a requirement like the one now in Rule 34(b) that objections be specific. Objections might, on analogy to Rule 45(d)(2)(B), excuse performance absent a court order. But that Rule 45 provision ordinarily applies to nonparties who must be subpoenaed. Presently, it may be that the only remedy for an organizational party is a motion for a protective order, which may be difficult to present before the scheduled date for the deposition. If making an objection excused the duty to comply absent court order, a rule could (also like Rule 34(b)) direct that the objecting party specify what it will provide despite the objection.

Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions: Rule 30 has general limitations on number and duration of depositions, but they are not keyed to Rule 30(b)(6) depositions. Those depositions can complicate the application of the general rules because (a) multiple individuals may be designated by the organization, and (b) those individuals may also be subject to individual depositions in which they are not speaking for the organization. The Committee Notes accompanying those general limitations discuss the way such limitations should apply in the 30(b)(6) context (stating that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit on number of depositions no matter how many people are designated to testify) but those statements in Committee Notes are not rules and those prescriptions may not be right. Ideally, such issues should be worked out between counsel. Is the absence of such rule provisions at present a source of disputes? Would the addition of specifics to the rule reduce or increase the number of disputes? If specifics would be a desirable addition to the rule, what should the specifics be?

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The foregoing listing does not include many other matters that the Subcommittee has discussed, or that the Advisory Committee considered when it studied Rule 30(b)(6) a decade ago. As emphasized above, it is consciously tentative and provided only to suggest some ideas that have been discussed and on which the Subcommittee seeks further guidance. For the present, a key focus is to evaluate the desirability of beginning serious study of any of the issues identified above. Drafting actual amendment proposals will involve much further work and will identify further issues. At the same time, the Subcommittee is aware that there may be reason to give serious consideration to a variety of other Rule 30(b)(6) topics, and it therefore invites interested parties to submit suggestions for additional issues that might deserve serious consideration.

Because this is an ongoing project, there is no formal time limit on submission of commentary about Rule 30(b)(6). But for the Subcommittee to receive maximum benefit from any submission, it would be most helpful if it were received no later than Aug. 1, 2017. Any comments should be submitted to: Rules\_Comments@ao.uscourts.gov.

## MEMORANDUM

**TO:** Rule 30(b)(6) Subcommittee of the Civil Rules Advisory Committee

**FROM:** Lauren Gailey, Rules Law Clerk (with research and drafting assistance from Derek Webb, former Attorney Advisor, Rules Committee Support Office)

**DATE:** March 30, 2017

**RE:** Surveys of (I) attorney literature pertaining to Fed. R. Civ. P. 30(b)(6); (II) case law on the issue of whether corporate deponents' statements are "judicial admissions"; and (III) local and state procedural rules governing corporate depositions

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Federal Rule of Civil Procedure 30(b)(6) authorizes a party to depose "a public or private corporation, a partnership, an association, a governmental agency, or other entity." The notice served on that organization "must describe with reasonable particularity the matters for examination," and the organization must then designate a real person to testify on its behalf. FED. R. CIV. P. 30(b)(6). Originally, the discovering party bore the burden of identifying a deponent capable of addressing the noticed topics. *See* FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendments. This presented an opportunity for gamesmanship, in which deponent after deponent could disclaim knowledge of facts clearly known to *someone* in the organization. *See id*; *Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998). The 1970 amendments aimed to curb this "bandying" by requiring the organization to name a deponent capable of testifying "about information known or reasonably available to the organization." *See* FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendments.

Although "[n]ormally the process operates extrajudicially," *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 79 (D.D.C. 1999), *rev'd in part on other grounds*, 271 F.3d 1101 (D.C. Cir. 2001), Rule 30(b)(6) seems to have become a flash point for litigation, having been cited in nearly 8,300 decisions.<sup>1</sup> It has appeared on the Civil Rules Advisory Committee's agenda three times in eleven years at the request of various bar groups claiming either 30(b)(6) witnesses were

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<sup>1</sup> There is some anecdotal evidence to the contrary: several district judges have reported during various committee and subcommittee meetings that they are rarely called upon to resolve disputes over 30(b)(6) depositions. But the number of Rule 30(b)(6) decisions is undoubtedly large and continues to grow: a December 2016 Lexis "Shepard's" search yielded approximately 7,900 citing references, and another on February 9, 2017 returned 8,067. By March 30, the number had already climbed to 8,291. Nearly twenty years ago, Professor Kent Sinclair and litigator Roger Fendrich developed a theory to explain this apparent proliferation:

The burdens of depositions under [Rule 30(b)(6)] are so great and the potential for case-altering sanctions so near the surface of the proceedings, that authoritative rulings are avidly sought. This conjunction of factors may explain, in part, the frequency with which "clarifications" are sought of rulings bearing on compliance with Rule 30(b)(6) obligations.

Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 737-38 (1999) (footnotes omitted).

routinely unprepared, or the burden of preparing them was unreasonable. In 2006 and 2009, the advisory committee concluded that most of the problems complained of were attributable to behavior that could not be effectively addressed by rule. In January 2016, a group of attorneys from the American Bar Association Section of Litigation’s Federal Practice Task Force requested that the advisory committee again consider amending Rule 30(b)(6). *See* Jeffrey J. Greenbaum, et al., *Taking Rule 30(b)(6) Corporate Depositions: Should the 45-Year-Old Rule Be Changed?* 9–10 (A.B.A. SEC. OF LITIG., BUS. L. SEC. AND CTR. FOR PROF. DEV., presentation materials, May 10, 2016).<sup>2</sup>

This subcommittee was formed to consider whether a rule amendment addressing these problems might be feasible. In response to a request from the subcommittee, this memorandum provides surveys of:

- I. Attorney literature discussing Rule 30(b)(6);
- II. Case law on the issue of whether 30(b)(6) deponents’ statements are “judicial admissions”; and
- III. Local and state procedural rules governing corporate depositions.

## **I. Attorney Literature Review**

*Conclusions:* Most attorney literature provides “practice pointers” rather than calling for a change to Rule 30(b)(6). Both the plaintiffs’ and defense bars are generally content to operate within the existing framework.

### **A. Calls for a Rule Change Tend To Be Confined to the Academy.**

The topic of Rule 30(b)(6) corporate depositions has been explored frequently in attorney literature over the past several years. Overall, the practical literature over the past decade on the subject of Rule 30(b)(6) depositions speaks approvingly of the rule as currently written. Attorneys generally make a point of contrasting the rule with the pre-1970 “bad old days” of “bandying” between corporate representatives who may or may not have relevant information. *But see* James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYLOR L. REV. 938, 1032 (2013) (“Organization depositions under Federal Rule 30(b)(6) are largely all risk and no gain for the organization presenting the witness. Individual parties . . . are still free under the rules to ‘bandy about,’ denying personal knowledge and referring their opponents to discovery from others, their experts, etc., while corporations have been held obligated to seek out information even in the hands of third parties and present it to the interrogating party.”).

The general consensus seems to be that, on the whole, the burden-shifting framework of Rule 30(b)(6) has resulted in fairer notice to organizational defendants and better-prepared

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<sup>2</sup> In the interest of readability, links to internet sources have been omitted from all citations. Instead, the links are embedded in the full citations to those sources.

deponents. *See, e.g.*, Nathaniel S. Boyer, *Going Rogue in a 30(b)(6) Deposition: Whether It's Permissible, and How Defending Counsel Should Respond* 1 (A.B.A. SEC. OF LITIG. 2012 SEC. ANN. CONF., presentation materials, Apr. 18–20, 2012) (“All in all, it’s a success story for U.S. litigation efficiency.”). For example, an article in an ABA Section of Litigation publication argued that the burden-shifting regime under Rule 30(b)(6), in which both parties have certain obligations (i.e., describing with reasonable particularity in the notice, and designating and preparing a deponent), is superior to interrogatories and individual depositions because it prevents evasion and bandying among uninformed officers. Eric Kinder & Walt Auvil, *Rule 30(b)(6) at 45: Is It Still Your Friend?*, A.B.A. SEC. OF LITIG. – PRETRIAL PRAC. & DISCOVERY (Dec. 3, 2015). *But see* Joseph W. Hovermill & Jonathan A. Singer, *A Solution to Complex Problems in 30(b)(6) Depositions*, LAW 360 (July 18, 2012, 1:49 PM) (concluding that “[t]he better approach” is to require written discovery in lieu of corporate depositions “where there is simply too much information for a corporate representative to sufficiently learn”). For those reasons, “[f]orty-five years after its adoption, Rule 30(b)(6) continues to perform the role envisioned by the advisory committee in 1970. The rule remains a valuable aid in focusing discovery efforts more efficiently than would be possible in its absence.” Kinder & Auvil, *supra*; *see also* John J. Hickey, *Why the Corporate Representative May Be the Most Neglected Key Witness . . . and How They Can Make Your Case* (AM. ASS’N FOR JUST. ANN. CONV., presentation materials, July 2014).

At the same time, many attorneys concede that Rule 30(b)(6) has also created problems, such as “bickering and contentious behavior” and “[m]otions practice on discovery issues” like the scope of the notice and the relevance of the questions. *See* Collin J. Hite, *The Scope of Questioning for a 30(b)(6) Deposition*, LAW 360, (July 13, 2011, 1:20 PM); *see also* Winton, *supra*, at 941–42 (discussing hypothetical based on typical confrontation over plaintiff’s counsel’s questions); *see also* John Maley, *Federal Bar Update: Rule 30(b)(6) Depositions*, IND. L. (July 2, 2014) (“In practice, disputes sometimes arise regarding the sufficiency of the witness’s knowledge.”). Other attorneys—particularly defense counsel—have pointed out that the Rule contains “traps for the unwary.” *See* Howard Merten & Paul Kessimian, *Tough Issues in 30(b)(6) Depositions 2*, (FDCC CONNECT AND LEARN WEBINAR, presentation materials, Mar. 26, 2015); *accord* Carter E. Strang & Arun J. Kottha, *A Trap for the Unwary: Notice, Selection, Preparation, and Privilege Issues for Corporate Representative Depositions*, IN-HOUSE DEF. Q., Spring 2010, at 25–29, 60 [hereinafter Strang & Kottha, *Trap*].

However, calls for an actual change to or repeal of Rule 30(b)(6) in recent years have largely been confined to law reviews. *See, e.g.*, Kelly Tenille Crouse, *An Unreasonable Scope: The Need for Clarity in Federal Rule 30(b)(6) Depositions*, 49 U. LOUISVILLE L. REV. 133 (2010); Amy E. Hamilton & Peter E. Strand, *Corporate Depositions in Patent Infringement Cases: Rule 30(b)(6) Is Broken and Needs To Be Fixed*, 19 INTELL. PROP. & TECH. L.J. 5 (2007); Craig M. Roen & Catherine O’Connor, *Don’t Forget To Remember Everything: The Trouble with Rule 30(b)(6) Depositions*, 45 U. TOLEDO L. REV. 29 (2013); Sinclair & Fendrich, *supra* note 1. *But see* Bradley M. Elbein, *How Rule 30(b)(6) Became a Trojan Horse: A Proposal for a Change*, 46 FED’N INS. CORP. COUNS. Q. 365 (1996).

## B. Most Attorney Literature Concerns Practice Pointers.

Overwhelmingly, the focus of the practical literature from both the plaintiffs' and defense perspectives has been finding ways to make the current version of the rule serve their respective causes. Practice tips abound for attorneys drafting notices or preparing corporate deponents. Most articles and CLE presentations on the subject of 30(b)(6) depositions have been decidedly "partisan." See, e.g., Hickey, *supra* (plaintiff's side); Mark R. Kosieradzki, *Using 30(b)(6) To Win Your Case* (TRIAL GUIDES DVD, 1st ed., Oct. 2016) (same); David R. Singh & Isabella C. Lacayo, *A Practical Guide to the Successful Defense of a 30(b)(6) Deposition*, VERDICT, Spring 2009 (defense side); David J. Shuster, *Corporate Designee Depositions: A Primer for In-House Counsel*, KRAMON & GRAHAM (Oct. 2013) (same); Strang & Kottha, *Trap, supra* (same).

From the plaintiffs' perspective, a popular topic for articles and CLE presentations is practical advice for obtaining statements from corporate deponents that can be turned into "judicial admissions" at summary judgment or trial.<sup>3</sup> See, e.g., Charles H. Allen & Ronald D. Coleman, *Deposing Rule 30(b)(6) Corporate Witnesses: Preparing the Deposition Notice, Questioning the Corporate Representative, Raising and Defending Objections, and More* (STRAFFORD, webinar presentation materials, Dec. 8, 2015); Bailey King & Evan M. Sauda, *Using 30(b)(6) Depositions To Bind Corporations*, DRI'S FOR THE DEFENSE, Mar. 2012 ("The advantages of a 30(b)(6) deposition are that it allows a deposing party seeking discovery simply to provide a list of deposition topics shifting the burden to the corporation to designate one or more suitable spokespersons on those topics, and those spokespersons' testimony will bind the corporation."); Kosieradzki, *supra*; Ken Shigley, *7 Reasons Insurance Defense Lawyers Hate 30(b)(6) Depositions in Trucking Cases 1*, ATLANTA INJURY LAWYER (Apr. 2015) (dubbing the 30(b)(6) deposition the "Death Star deposition" because, "[i]f all the stars align," it "may strip away the filters that result from laziness, lack of motivation, dissembling and evasiveness, and . . . creat[e] . . . a series of sound bites of admissions and transparent evasions to play at trial").

Much of the relevant defense bar literature focuses on narrowing the scope of the deposition notice and limiting the number of topics addressed.<sup>4</sup> See, e.g., Chad Colton, *The Art of Narrowing Rule 30(b)(6) Deposition Notices*, MARKOWITZ HERBOLD; Michael S. Cryan, *The Scope of Rule 30(b)(6) in the Examination of Corporate Deponents*, L.A. LAW., Apr. 2010, at 15–16, 18; Neil Lloyd & Christina Fernandez, *Refining and Then Sticking to the Topic: Making Representative Party Depositions under Fed. R. Civ. P. 30(b)(6) Fairer and More Efficient*, 83 U.S.L.W. 1026 (2015); Merten & Kessimian, *supra*, at 15; Carter E. Strang and Arun J. Kottha, *Corporate Representative Depositions: Notice Provision of Rule 30(b)(6)*, INTER ALIA, Spring 2009, at 1, 14–15; Strang & Kottha, *Trap, supra*. The defense bar acknowledges, however, that this is an uphill battle, as courts have generally permitted questions that exceed the bounds of the notice as long as they remain

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<sup>3</sup> For a survey of recent case law on the "judicial admissions" issue, see *infra* Part II.

<sup>4</sup> Other defense topics include corporate-witness preparation. See, e.g., Martin D. Beier, *Organizational Avatars: Preparing CRCP 30(b)(6) Deposition Witnesses*, 43 COLO. L. 39 (Dec. 2014); Merten & Kessimian, *supra*, at 6–17 (discussing selection and preparation of witness and documents); Eric L. Probst, *How To Defend Rule 30(b)(6) Product Liability Depositions Successfully*, L.J.N.'S PROD. LIAB. L. & STRATEGY, Oct. 2015, at 1–4, 6; Singh & Lacayo, *supra*, at 2; Bailey Smith, *Preparing a Rule 30(b)(6) Representative for Deposition*, A.B.A. LITIG. NEWS, Summer 2010.

within the scope of discovery. *See, e.g., Hite, supra* (although defense counsel “often take pains to limit the scope of the testimony, . . . under the well-reasoned majority rule that effort is futile”); *see also Merten & Kessimian, supra*, at 17 (at best, “[f]ederal courts are split” as to whether the deponent can be questioned about matters beyond those listed in the notice). Universally, attorneys agree that instructing a witness not to answer questions outside the scope of the notice is improper in the absence of privilege. *See, e.g., Boyer, supra*, at 4; *Cryan, supra*, at 15; *Hite, supra*; *accord Kinder & Auvil, supra* (“While defense counsel have a number of options” when plaintiff’s counsel asks a question outside the scope of the deposition notice, “courts have been clear that merely instructing the witness not to answer is not one of those options.”).

Other articles are more neutral, and aim to expedite and streamline the corporate deposition process for *both* sides. *See, e.g., Michael R. Gordon & Claudia De Palma, Practice Tips and Developments in Handling 30(b)(6) Depositions* (A.B.A. SEC. OF LITIG., SEC. ANN. CONF., presentation materials, Apr. 9–11, 2014)<sup>5</sup>; *Kinder & Auvil, supra* (“Responsibilities under Rule 30(b)(6) are mutual.”). For example, an article by a Magistrate Judge Iain Johnston of the Northern District of Illinois suggested the parties work together *before* the 30(b)(6) deposition to clarify the scope of the notice and establish, in writing, what their respective concerns are and whether a protective order will be necessary. Iain D. Johnston, *A Modest Proposal for a Better Rule 30(b)(6) Deposition*, ILL. ST. B. ASS’N—FED. CIV. PRAC., June 2015, at 2; *accord Hite, supra* (“The better method is to work with opposing counsel to structure the deposition . . .”). This gives the court an opportunity to fashion a remedy early in the process and might obviate the need for judicial intervention entirely. *See Johnston, supra*.

## II. The “Judicial Admissions” Issue

*Conclusions:* Courts are not monolithic as to whether Rule 30(b)(6) deponents’ statements bind corporations in the sense of “judicial admissions.” The strong majority position is that they do not, and may be contradicted at trial like any other evidentiary admission. The courts holding otherwise have done so to effectively “sanction” organizations for failing to prepare their witnesses.

As the review of attorney literature makes clear, practitioners are keenly interested in whether a court will deem a corporate deponent’s testimony a “judicial admission.” The distinction between “judicial admissions” and “ordinary evidentiary admissions” is critical. *See* 6 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 801:26 (7th ed. 2014). “Evidentiary admissions” are statements “by a party-opponent [that] are excluded from the category of hearsay.” *See* FED. R.

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<sup>5</sup> There seems to be a difference of opinion within the ABA Section of Litigation as to whether Rule 30(b)(6) should be changed. Although some members are advocating for change, *see Greenbaum, et al., supra*, many others seem content to operate within the existing framework. *See, e.g., Boyer, supra*; *Gordon & De Palma, supra*, at 1–2 (although Rule 30(b)(6) “has evolved into something different than what its creators no doubt envisioned,” it nonetheless “embodies the ultimate aim of the Federal Rules of Civil Procedure . . . to ‘secure the just, speedy, and inexpensive determination of actions and proceedings’” (quoting FED. R. CIV. P. 1)); *Kinder & Auvil, supra*; *Singh & Lacayo, supra*; *Smith, supra* note 4.

EVID. 801(d)(2). Practically speaking, evidentiary admissions have been “made by a party” and therefore “can subsequently be used in a trial against that party.” Ediberto Roman, “*Your Honor What I Meant To State Was . . .*”: A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 PEPP. L. REV. 981, 983, 985 (1995). At trial, the party can “put himself on the stand and explain his former assertion.” 4 JOHN HENRY WIGMORE ET AL., WIGMORE ON EVIDENCE § 1048 (3d ed. 1972).

On the other hand, “[j]udicial admissions are not evidence at all.” 2 MCCORMICK ON EVIDENCE § 254 (Kenneth S. Broun et al. eds., 7th ed. 2006). They go further than evidentiary admissions toward establishing a fact, in that “[a] judicial admission *concedes* a fact, removing [it] from any further possible dispute.” Roman, *supra*, at 984 (emphasis added). The fundamental difference is this: an evidentiary admission “is subject to contradiction or explanation,” while a judicial admission is not. MCCORMICK ON EVIDENCE, *supra*, § 254.

Judicial admissions generally occur in the context of pleadings, summary judgment motions, responses to requests to admit served during discovery, stipulations of fact, and statements made in open court. HANDBOOK OF FEDERAL EVIDENCE, *supra*, § 801:26. Nevertheless, the argument persists that a corporate designee’s statements in the course of a Rule 30(b)(6) deposition should be included in this group. *See id.* (“Occasionally a party while testifying . . . during a deposition . . . admits a fact which is adverse to his claim or defense. A question then arises as to whether such a statement may be treated as a judicial admission binding the party . . .”). Because “binding a party” to a Rule 30(b)(6) deponent’s statement (or inability to formulate one) by precluding the introduction of contrary testimony at trial can have grave consequences for that party, the high degree of interest among practitioners is not surprising. *See generally* Roman, *supra*. Another natural consequence is that the “judicial admissions” issue has been extensively litigated.<sup>6</sup>

The courts that have considered the issue have split, although the overwhelming majority—including all of the courts of appeals to directly address it—has concluded that admissions made during 30(b)(6) depositions are evidentiary rather than judicial in nature. These courts have permitted the corporate party to introduce trial testimony that contradicts or supplements its designee’s deposition testimony.<sup>7</sup> Nevertheless, *Rainey v. American Forest & Paper Ass’n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), a seminal district court case reaching the opposite conclusion, remains influential. *See infra* Part II-B. However, a closer inspection of decisions barring parties from contradicting their 30(b)(6) deponents’ statements reveals that it is imprecise to characterize them as approving of the “judicial admissions” approach. In these cases, which tend to involve unusually evasive behavior or extreme lack of preparation on the part of the corporate party, barring contradictory evidence has been used as a sanction rather than a true judicial admission.

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<sup>6</sup>According to a March 22, 2017 Lexis search, the “judicial admissions” issue has been addressed more than a hundred times in federal court since 1991.

<sup>7</sup>The majority of courts’ refusal to treat a corporate deponent’s statements as judicial admissions is in accord with the prevailing view among legal scholars, who generally disfavor judicial admissions. *See, e.g.*, HANDBOOK OF FEDERAL EVIDENCE, *supra*, § 801:26 (“[T]reating a party’s testimony . . . as solely an evidentiary admission is preferable.”).

**A. Majority Position: 30(b)(6) Deponent’s Statements Are Not Judicial Admissions**

The majority of courts to decide the issue—including four courts of appeals—have concluded that a Rule 30(b)(6) deponent’s testimony should have the effect of an evidentiary admission rather than a judicial admission. In *A.I. Credit Corp. v. Legion Insurance Co.*, 265 F.3d 630 (7th Cir. 2001), the U.S. Court of Appeals for the Seventh Circuit became the first federal appellate court to weigh in on the “judicial admissions” issue. A.I. Credit, a finance company, sued a number of insurers and their representatives, claiming it had been fraudulently induced to agree to finance a struggling company that soon went bankrupt. *Id.* at 632–33. One of the representatives, William McPherson, argued in his motion for summary judgment that A.I. Credit’s evidence connecting him to the fraud was inadmissible. *Id.* at 632, 637. According to McPherson, Miles Holsworth, the bankrupt company’s controller, had testified that McPherson participated in the conference call that led to the financing agreement. *Id.* at 633, 637. However, the plaintiff’s 30(b)(6) witness, John Rago, testified that he, too, had been on the call, but also testified that he had never spoken to McPherson. *Id.*

In his summary judgment motion, McPherson argued that A.I. Credit should be precluded from introducing Holsworth’s testimony that McPherson was on the call because the testimony of its 30(b)(6) witness, Rago, suggested that he was not. *See id.* at 637. The Seventh Circuit rejected McPherson’s theory that Rule 30(b)(6) “absolutely bind[s] a corporate party to its designee’s recollection unless the corporation shows that contrary information was not known to it or was inaccessible.” *Id.* Following two influential district court cases, the court concluded that “[n]othing in the advisory committee notes indicates that the Rule goes so far.” *Id.* (citing *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) and *United States v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996)).

After *A.I. Credit*, the “judicial admissions” issue went somewhat dormant at the appellate level for more than a decade. It reemerged in 2013, when the U.S. Court of Appeals for the Eighth Circuit followed the Seventh Circuit in *Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013). The case involved a constitutional challenge to a state law imposing a residency requirement upon liquor wholesalers. *Id.* at 802. The State’s 30(b)(6) designee “did not mount the most vigorous defense” of the residency requirement when he “testified that he did not ‘think’ that the residency rule ‘impacts the distribution system,’” and “could not ‘think of any’ relationship between the residency requirement and the safety of Missouri citizens.” *Id.* at 811. Nevertheless, Judge Colloton, writing for a unanimous panel, concluded that the testimony was ultimately “not as devastating” to the State’s case as the challenger argued. *Id.* Judge Colloton cited *A.I. Credit* and a Third Circuit case, *AstenJohnson, Inc. v. Columbia Casualty Co.*, 562 F.3d 213 (3d Cir. 2009), for the respective propositions that “a designee’s testimony likely does not bind a State in the sense of a judicial admission,” and “[a] 30(b)(6) witness’s legal conclusions are not binding on the party who designated him.” *Id.* at 811–12; *see also infra* Part II-C (discussing *AstenJohnson*).

The U.S. Court of Appeals for the Second Circuit reached the same conclusion two years later in *Keepers, Inc. v. City of Milford*, 807 F.3d 24 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 277

(2016), where Rule 30(b)(6) was more squarely at issue. *Keepers* also involved a government deponent testifying in support of a challenged law (here, a municipal ordinance), but on this occasion the 30(b)(6) witness “was unable to answer various questions” rather than supplying contradictory testimony. *Id.* at 27, 32. Like the Eighth Circuit, the Second Circuit acknowledged that “the process by which [the city] ultimately answered [the challenger’s] questions was not a route that is to be preferred,” but permitted the city to supplement the deponent’s answers with an affidavit. *Id.* at 36–37. Although the challenger was correct “that an organization’s deposition testimony is ‘binding’ in the sense that whatever its deponent says can be used against the organization,” the court concluded that “Rule 30(b)(6) testimony is not ‘binding’ in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements.” *Id.* at 34. Again, the court relied on *AstenJohnson* and *A.I. Credit*, and it echoed the Seventh Circuit’s rationale for permitting an organization to offer additional evidence at trial to supplement its 30(b)(6) designee’s testimony:

Nothing in the text of the Rule or in the Advisory Committee notes indicates that the Rule is meant to bind a corporate party irrevocably to whatever its designee happens to recollect during her testimony. Of course, a party whose testimony “evolves” risks its credibility, but that does not mean it has violated the Federal Rules of Civil Procedure.

*Id.* at 34–35 (footnotes omitted). The court discounted the challenger’s policy arguments, reasoning that even though “some deponents will, of course, try to abuse Rule 30(b)(6) by intentionally offering misleading or incomplete responses, then seeking to ‘correct’ them by offering new evidence after discovery,” remedies such as sanctions and the “sham-affidavit rule” are already available. *Id.* at 35–36. The court “ha[d] no trouble concluding” that the district court did not abuse its discretion by admitting the affidavit. *Id.* at 37.

Most recently, the U.S. Court of Appeals for the Tenth Circuit “agree[d] with [its] sister circuits that the testimony of a Rule 30(b)(6) witness is merely an evidentiary admission, rather than a judicial admission.” *Vehicle Mkt. Research, Inc. v. Mitchell Int’l, Inc.*, 839 F.3d 1251, 1261 (10th Cir. 2016). The case arose in the context of a proposed jury instruction stating in part, “The corporation cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative.” *Id.* at 1259. The court rejected this statement of the law and held that the district court did not abuse its discretion by striking that sentence from the proposed instruction. *Id.* The court of appeals clarified that the instruction’s proponent had mischaracterized the cases and treatises it relied on, which, properly read, “make clear that [barring contradictory evidence] is limited to the context in which an affidavit conflicts with the Rule 30(b)(6) deposition *without good reason.*” *Id.* at 1260; *see also infra* Part II-B.

The leading federal civil procedure treatises are in accord. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS ET AL., FEDERAL PRACTICE AND PROCEDURE § 2103 (3d ed. 2010) (“Of course, the testimony of the representative designated to speak for the corporation are admissible against it. But as with any other party statement, they are not ‘binding’ in the sense that the corporate party is forbidden to call the same or another witness to offer different testimony at trial.” (footnotes omitted)); 7-30 JAMES WILLIAM MOORE ET AL., MOORE’S FEDERAL PRACTICE –

CIVIL § 30.25[3] (2016) (“[T]he testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not binding against the organization in the sense that the testimony can be corrected, explained and supplemented, and the entity is not ‘irrevocably’ bound to what the fairly prepared and candid designated deponent happens to remember during the testimony.” (footnotes omitted)).

**B. Minority Position: Under Some Circumstances, a Corporation May Not Be Permitted To Contradict Its Deponent’s Statements (or Silences)**

The leading case reaching the contrary conclusion is *Rainey v. American Forest & Paper Ass’n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), in which the U.S. District Court for the District of Columbia refused to consider at summary judgment an affidavit that contradicted statements the defendant employer’s designee made during a 30(b)(6) deposition. *Id.* at 93–96. The plaintiff claimed to have been denied overtime payments as a result of being misclassified as “exempt” under the Fair Labor Standards Act. *Id.* at 86–87. The employer’s 30(b)(6) witness was unable give “an informed answer” to many questions about the plaintiff’s specific job duties, and claimed that her job functions were “exempt in character” but could not provide details as to why; the functions he *was* able to describe supported the opposite conclusion. *Id.* at 92–93. At summary judgment, the employer tried to introduce as additional evidence of the plaintiff’s exempt status a more detailed, knowledgeable affidavit from the plaintiff’s former supervisor, whom the employer claimed it could not designate under Rule 30(b)(6) because she had since left the company. *Id.* at 93–94.

The district court held that Rule 30(b)(6) “precluded” the employer from introducing the affidavit at the “eleventh hour.” *Id.* at 94–95. The court reasoned that the employer had failed to adequately prepare its designee as the Rule requires, and interpreted the employer’s subsequent introduction of the affidavit as an attempt to “proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.” *Id.* at 94. The court viewed the employer’s later “revis[ion of] the positions taken at the 30(b)(6) depositions” by one employee with the affidavit of another as precisely the kind of “bandying” that Rule 30(b)(6) “aims to forestall.” *Id.* at 94–95. Instead, the Rule “binds the corporate party to the positions taken by its 30(b)(6) witnesses” to prevent “trial by ambush.” *Id.* at 95. The court declined to consider the affidavit for summary judgment purposes, concluding that “Rule 30(b)(6) requires such relief” because the employer failed to show “that the affidavit’s particular allegations were not ‘reasonably available’ at the time of the depositions.” *Id.* at 95–96.

Some courts have rejected *Rainey* outright. *See, e.g., A.I. Credit*, 265 F.3d at 637 (permitting 30(b)(6) witness’s testimony to be contradicted “is the sounder view”); *Whitesell Corp. v. Whirlpool Corp.*, No. 05-679, 2009 U.S. Dist. LEXIS 101106, at \*4 n.1 (W.D. Mich. Oct. 30, 2009) (concluding “the better approach” is that deeming a corporation “bound by the testimony of its designee does not also compel the conclusion that no contradictory evidence is permissible”).

Other courts declining to follow *Rainey* have noted that it does not categorically bar all evidence contradicting 30(b)(6) testimony, and its circumstances were somewhat extreme. *See, e.g.,*

*Beauperthuy v. 24 Hour Fitness U.S., Inc.*, No. 06-715, 2009 U.S. Dist. LEXIS 104906, at \*21 (N.D. Cal. Nov. 10, 2009) (“*Rainey* does not suggest that an inadequate Rule 30(b)(6) deposition may categorically preclude a party from bringing any evidence—indeed, the *Rainey* court found only that a single, specific affidavit was inappropriate, and discussed a variety of other types of evidence that Defendants offered to support their affirmative defense without suggesting that they were precluded by the inadequate deposition.”); *Mid-State Sur. Corp. v. Diversified Enter.*, No. 05-72, 2005 U.S. Dist. LEXIS 38687, at \*29–30 (S.D. W. Va. Dec. 12, 2005) (rejecting argument that *Rainey* “stand[s] for the proposition that the failure of a corporation to provide an educated witness is, in and of itself, grounds for summary judgment” and distinguishing on the grounds that “this is not the case, as it was in *Rainey*, where a corporation was trying to avoid summary judgment by introducing new evidence that was clearly contrary to the testimony of its 30(b)(6) representative”).

Another aspect of *Rainey* that limits its reach is that the court strongly suggested its true purpose in barring the affidavit was punitive. See 26 F. Supp. 2d at 95 (finding employer’s conduct in either designating the wrong person or failing to prepare its witness “clearly violated Rule 30(b)(6)”). *Wright, Miller & Marcus* has described the exclusion of evidence as a consequence of failing to prepare a 30(b)(6) witness as a “sanction.” See FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2103 (“A court might . . . sanction a party that has failed to satisfy its Rule 30(b)(6) duties by limiting the evidence it could present . . . by forbidding it from calling witnesses who would offer testimony inconsistent with that given by the one it designated . . .”). In this sense, then, the *Rainey* court’s decision to bar the affidavit was not a true “judicial admission” at all.

Another district court decision reaching the same result as *Rainey* supports this theory. During the 30(b)(6) deposition in *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992 (E.D. La. 2000), a products liability action, the defendant manufacturer’s designee “attested under no uncertain terms” that the defendant had manufactured the hammer at issue. *Id.* at 992. More than six months later, the manufacturer submitted an affidavit and report from one of its engineers concluding that it had *not* manufactured the hammer. *Id.* The court struck the affidavit and report, reasoning that the manufacturer “should not be allowed to defeat [the plaintiff’s] motion for summary judgment based upon its self-serving abuse of a Rule 30(b)(6) deposition.” *Id.* at 993. It allowed for the possibility of an exception for “contradictory or inconsistent affidavit[s]” that are “accompanied by a reasonable explanation,” but found that it did not apply. *Id.*

The *Hyde* court found the affidavit directly contradicting the 30(b)(6) testimony was “plainly” an example of the recurring (yet ineffective) sham-affidavit tactic at summary judgment: “where the non-movant . . . submits an affidavit which directly contradicts an earlier deposition and the movant has relied upon and based its motion on the prior deposition, courts may disregard the later affidavit.” *Id.*; *accord Keepers*, 807 F.3d at 35 (“[T]he ‘sham-affidavit rule’ prevents a party from manufacturing an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant’s previous deposition testimony.”). *Hyde* therefore fits neatly into the group of Rule 30(b)(6) cases standing for the unremarkable proposition that a non-movant organization cannot create a genuine issue of material fact sufficient to defeat summary judgment by introducing affidavits that contradict its own 30(b)(6) testimony. See *Vehicle Market Research*, 839 F.3d at 1259–60 (collecting cases excluding affidavits that

“conflict[] with the Rule 30(b)(6) deposition *without good reason*”); *see also* MOORE’S FEDERAL PRACTICE, *supra*, § 30.25[3] & n.15.2 (“[T]he entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know.”).

Although some have argued that *Hyde* effectively spread the *Rainey* “judicial admission” approach to the Fifth Circuit, *see, e.g.*, Greenbaum, *supra*, at 26, that conclusion is not airtight. Most obviously, *Hyde* did not cite *Rainey* at all; it primarily relied on *Taylor*, *see infra* Part II-C, and a District of Kansas sanctions case in which the 30(b)(6) “deposition reflect[ed] inadequate preparation and knowledge” as to two of the topics listed on the deposition notice. *See Hyde*, 107 F. Supp. 2d at 992–93 (citing *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999) (finding “sanctionable misconduct” where deponent “failed to make necessary inquiries about relevant topics” and “made no effort to review his own files”). In any case, even if *Hyde* could be interpreted so broadly as to suggest that it endorsed the rule read (fairly or not) into *Rainey* that a 30(b)(6) designee’s statements are judicial admissions, district courts in the Fifth Circuit do not seem to consider themselves bound by either precedent or comity to follow it. *See, e.g.*, *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 698 (S.D. Tex. 2009) (“A Rule 30(b)(6) deposition . . . is not ‘binding’ on the entity for which the witness testifies in the sense of preclusion or judicial admission.” (citing *Wright, Miller & Marcus* and *A.I. Credit*)).

### C. Other Courts Seem Reluctant To Expand the “Judicial Admissions” Approach

In the other circuits, there is either no binding appellate precedent, or the court of appeals has not given a straightforward answer to the broad question whether a 30(b)(6) deponent’s statements are “judicial admissions.” The holding in the leading Third Circuit case is more limited: the Court of Appeals in *AstenJohnson, Inc. v. Columbia Casualty Co.*, 562 F.3d 213 (3d Cir. 2009), declined to hold that a *legal conclusion* made by a designee during a 30(b)(6) deposition precluded the corporation from producing at trial evidence contradicting that position. *Id.* at 229 n.9. *AstenJohnson* found persuasive a pre-*Southern Wine* Eighth Circuit case that drew a distinction based on whether a 30(b)(6) witness’s “admissions” concerned “matters of fact [or] conclusions of law.” *See id.* (citing *R & B Appliance Parts, Inc., v. Amana Co.*, 258 F.3d 783, 787 (8th Cir. 2001)). It remains an open question whether the Third Circuit would bar evidence contradicting *facts* to which a 30(b)(6) witness had testified. *See id.*

Both before and after *AstenJohnson*, district courts in the Third Circuit have rejected the minority position that a 30(b)(6) deponent’s statements have the effect of judicial admissions. *See, e.g.*, *Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC*, 40 F. Supp. 3d 437, 451 (E.D. Pa. 2014) (“Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness.”); *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 212 (E.D. Pa. 2008) (“[T]he testimony of a Rule 30(b)(6) representative, although admissible against the party that designates the representative, is not a judicial admission absolutely binding on that party.” (quoting *Wright, Miller & Marcus*)); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 722 n.17 (M.D. Pa. 2006) (declining to bar evidence of damages at trial where 30(b)(6) designee “was unable to fully answer

questions about damages” during deposition). *But see Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 U.S. Dist. LEXIS 11320, at \*8 (E.D. Pa. Aug. 13, 1991) (holding that corporate defendant “will not be allowed effectively to change its answer by introducing evidence during trial” where designee “does not know the answer to plaintiffs’ questions”).

District courts in the Fourth Circuit have reached contrary—but reconcilable—conclusions. The influential case of *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996), adopted the position that “answers given at a Rule 30(b)(6) deposition are not judicial admissions.” *Id.* at 363. A more recent District of Maryland case used sanctions language to explain that, “depending on the ‘nature and extent of the obfuscation, the testimony given by [a] non-responsive deponent (e.g., ‘I don’t know’) may be deemed ‘binding on the corporation’ so as to prohibit it from offering contrary evidence at trial.” *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 685 (D. Md. 2012) (alteration in original) (quoting *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005)). *Wilson* in turn relied on both *Rainey* and *Taylor*. 228 F.R.D. at 530 (citing *Rainey*, 26 F. Supp. 2d at 94–95, and *Taylor*, 166 F.R.D. at 362). The takeaway from the District of Maryland cases appears to be this: a corporate deponent’s 30(b)(6) admissions will generally not preclude the introduction of contradictory evidence—unless the corporate party’s “obfuscation” demands punishment. A district court in the Eleventh Circuit is in accord. *Cont’l Cas. Co. v. First Fin. Emp. Leasing, Inc.*, 716 F. Supp. 2d 1176, 1190–91 (M.D. Fla. 2010) (“Although preclusion may be imposed as a sanction, it does not follow automatically from the nature of Rule 30(b)(6) testimony.”).

A district court in the Sixth Circuit acknowledged *Rainey*’s ambiguity and concluded that cases squarely rejecting the notion that “binding” a corporation with 30(b)(6) testimony means “no contradictory evidence is permissible” at trial “take the better approach.” *Whitesell*, 2009 U.S. Dist. LEXIS 101106, at \*3–4 & n.1. The court explained:

The Federal Rules of Civil Procedure not only permit but encourage parties to revise and update information throughout the discovery process. To the extent evidence . . . offered at trial contradicts the testimony and exhibits offered during the 30(b)(6) deposition, Defendant can use that deposition testimony for impeachment purposes, and in this sense Plaintiff is “bound” by it. To the extent evidence . . . offered at trial merely clarifies and updates the testimony and exhibits offered during the 30(b)(6) deposition, no rule of evidence or civil procedure requires its exclusion on that basis alone.

*Id.* at \*4–5 (citation omitted).

A district court in the First Circuit also declined to bar testimony from being introduced. In *Neponset Landing Corp. v. Northwestern Mutual Life Insurance Co.*, 279 F.R.D. 59 (D. Mass. 2011), the designee provided testimony on thirty of the thirty-six noticed topics and “prepared for the deposition by reviewing the documents and exhibits.” *Id.* at 61. Again, the court framed its decision in terms of the degree of punishment warranted: “This was not a situation where the defendant’s conduct was tantamount to a complete failure of the corporation to appear at its

deposition. Accordingly, there is no adequate basis for imposing the very severe sanction of precluding [the corporate party] from introducing evidence at trial.” *Id.* (citation omitted).

Although the U.S. Court of Appeals for the First Circuit has yet to address the subject, it foreshadowed in different context *Neponset Landing*’s emphasis on proportionality, i.e., whether the corporation violated its duty to prepare egregiously enough to deserve so harsh a sanction as preclusion of evidence:

Because of their binding consequences, judicial admissions generally arise only from deliberate voluntary waivers that expressly concede for the purposes of trial the truth of an alleged fact. Although there is a limited class of situations where, because of the highly formalized nature of the context in which the statement is made, a judicial admission can arise from an “involuntary” act of a party, considerations of fairness dictate that this class of “involuntary” admissions be narrow.

*United States v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975) (citation omitted).

The common themes that emerge from cases in the circuits that have yet to address the Rule 30(b)(6) “judicial admissions” issue are that these courts (1) have read *Rainey* narrowly, (2) have frequently declined to adopt or extend *Rainey*’s approach, and (3) view exclusion of evidence to supplement or contradict a 30(b)(6) witness’s incomplete or incorrect testimony as a sanction reserved for unusually obstructive conduct. It is clear that courts have not embraced a broad reading of *Rainey*.

Critically, no cases—even those barring supplemental, contradictory, or explanatory testimony, like *Rainey*—expressly hold that a Rule 30(b)(6) witness’s statements are judicial admissions.

### **III. Surveys of Local and State Rules**

For the purposes of this memorandum, systematic surveys were conducted of the procedural rules governing corporate depositions in the ninety-four federal judicial districts and all fifty states (and the District of Columbia). While, not surprisingly, more experimentation can be found at the state level than among the federal district courts’ local rules, these surveys yield few groundbreaking conclusions.

#### **A. Local Rules**

*Conclusions:* Local rules supplementing Rule 30 primarily address administrative details and only rarely prescribe additional requirements for organizational depositions. A recurring area of variance is the number of days constituting “reasonable notice.”

In addition to local analogs to Civil Rule 30, the survey of the federal jurisdictions examined *all* mentions of depositions in the district courts' local rules and standing, general, and administrative orders. Procedures specific to individual judges were beyond the scope of this particular survey.<sup>8</sup>

Only two districts have local rules or orders specifically addressing corporate depositions. A District of South Carolina rule provides that a 30(b)(6) deposition “shall be considered as one deposition regardless of the number of witnesses presented to address the matters set forth in the notice.” D.S.C. Civ. R. 30.01. This is consistent with case law indicating that multiple deponents may be needed to satisfy the organization’s obligations under Rule 30(b)(6). *See, e.g., Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) (“[C]orporations have an ‘affirmative duty’ to make available as many persons as necessary to give ‘complete, knowledgeable, and binding’ answers on the corporation’s behalf.” (quoting *Reilly v. NatWest Mkt. Grp. Inc.*, 181 F.3d 253, 268 (2d Cir.1999))); *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) (“The designating party has a duty to designate more than one deponent if necessary to respond to questions on all relevant areas of inquiry listed in the notice or subpoena.”).

The other local rule specific to corporate depositions is a provision of District of Wyoming Rule 30.1(b):

Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he has no knowledge, he or she shall submit, reasonably before the date noticed for the deposition, an affidavit so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action. The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness’s right to seek a protective order.

No other jurisdiction requires such an affidavit.

Although few local rules directly address 30(b)(6) depositions, many jurisdictions have local rules governing depositions generally; these apply to corporate depositions as well as depositions of other witnesses. *See, e.g.,* D. ME. R. 30 (technical specifications for video depositions); S.D. TEX. R. 30.1 (“stenographic recordation” of video depositions); E.D.N.Y. R. 30.3 (who may attend depositions); N.D. OHIO CIV. R. 30.1 (conduct of participants).

A significant percentage of these general rules define what constitutes “reasonable notice.” Six jurisdictions require at least fourteen days. *See* D. COLO. CIV. R. 30.1; M.D. FLA. R. 3.02; N.D. IND. R. 30-1(b); D. MD. App. A(9)(b); D.N.M. CIV. R. 30.1; D. WYO. CIV. R. 30.1(a). Four other

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<sup>8</sup> Judge James Donato’s standing order setting forth procedures and expectations for 30(b)(6) depositions is perhaps the most noteworthy. Standing Order for Discovery in Civil Cases before Judge Donato ¶ 16 (N.D. Cal. Apr. 25, 2014). Other judges have also adopted chambers rules regarding corporate depositions. *See, e.g.,* Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases before Judge William Alsup ¶ 23 (N.D. Cal. Mar. 17, 2016); Discovery Order ¶ 8 (D. Md. Apr. 9, 2013) (Grimm, J.) (limiting 30(b)(6) depositions to seven hours).

jurisdictions set a shorter time frame: the District of Kansas (seven days), D. KAN. R. 30.1, the Eastern District of Oklahoma (same), E.D. OKLA. CIV. R. 30.1(a)(2), the District of Delaware (ten days), D. DEL. R. 30.1, and the Eastern District of Virginia (generally eleven days), E.D. VA. R. 30(H). The longest notice period is twenty-one days, as required in the Western District of New York. *See* W.D.N.Y. CIV. R. 30(a). In other jurisdictions, the length of a “reasonable time” is a matter of geography. In the Southern District of Florida and the District of Columbia, the seven-day notice period is extended to fourteen days for out-of-state depositions and depositions taking place “more than 50 miles from the District,” respectively. S.D. FLA. R. 26.1(j); D.C. R. 30.1. The Eastern District of Virginia builds flexibility for geographical considerations into its eleven-day notice period, which “will vary according to the . . . urgency of taking the deposition . . . at a particular time and place.” E.D. VA. R. 30(H).

Local rules concerning “reasonable notice” frequently allow the parties, *see, e.g.*, N.D. IND. R. 30-1(b), the court, *see, e.g.*, D. KAN. R. 30.1, or both, *see, e.g.*, D.N.M. CIV. R. 30.1, to vary the time period. Others address counsel’s conduct in giving notice. *See, e.g.*, D. COLO. CIV. R. 30.1 (counsel “shall make a good faith effort to schedule [the deposition] in a convenient and cost effective manner” before noticing); D.N.M. CIV. R. 30.1 (“Counsel must confer in good faith regarding scheduling of depositions before serving notice of deposition.”).

There is no evidence of meaningful experimentation with Rule 30(b)(6) at the local level; even the two rules that do specifically apply to corporate depositions merely codify existing interpretations of the rule. However, there *is* some variance among local rules that define “reasonable notice” for the purpose of depositions generally (and, by extension, corporate depositions specifically).

## **B. State Rules**

*Conclusions:* Although state rules governing corporate depositions generally track Rule 30(b)(6) irrespective of whether a given state expressly follows the federal rules, “describ[ing] with reasonable particularity the matters for examination” is mandatory in only twenty percent of states.

Unlike the federal district courts, the states are not bound by Civil Rule 30(b)(6), and are thus less homogeneous and have more freedom to experiment. Nevertheless, a survey of the rules governing organizational depositions in all fifty states reveals many common threads—chief among which is a willingness to use Rule 30(b)(6) as a “base.” Every state has a version of Rule 30(b)(6), and thirty states track it almost exactly.

Even the twenty states that do not follow the federal rule’s organization and numbering scheme have adopted rules similar in substance to Rule 30(b)(6). For example, Iowa’s civil rule governing noticing of depositions provides, in relevant part:

A notice or subpoena may name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the witness will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

IOWA R. CIV. P. 1.707(5).

This Iowa rule also illustrates an important, and frequently-occurring, difference between Rule 30(b)(6) and many otherwise-similar state rules: whether “describ[ing] with reasonable particularity the matters for examination” in the deposition notice is mandatory or permissive. Rule 30(b)(6)’s notice provision uses mandatory language. FED. R. CIV. P. 30(b)(6) (“In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and *must* describe with reasonable particularity the matters for examination.” (emphasis added)). Only ten states, however, have adopted the federal notice requirement word for word. Forty states and the District of Columbia instead use permissive language, i.e., “may” rather than “must.” A typical formulation in these states is: “A party *may* in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.” MO. SUP. CT. R. 57.03(b)(4) (emphasis added); *see also, e.g.*, D.C. SUPER. CT. R. CIV. P. 30(b)(6) (“A party may in the party’s notice . . . describe with reasonable particularity the matters on which examination is requested.”); IOWA R. CIV. P. 1.707(5) (“A notice or subpoena may . . . describe with reasonable particularity the matters on which examination is requested.”); PA. R. CIV. P. 4007.1(e) (“A party may in the notice . . . describe with reasonable particularity the matters to be inquired into and the materials to be produced.”).

State rules differ from Rule 30(b)(6) in other noteworthy ways. For example, two states, Indiana and Ohio, place a different—and arguably heavier—burden on organizational witnesses than the federal rule does. Those rules both provide that the organization’s designee must be able to testify about information “*known or available* to the organization.” IND. R. TRIAL P. 30(B)(6) (emphasis added); OHIO R. CIV. P. 30(B)(5) (emphasis added). Rule 30(b)(6) defines the duty more flexibly; the deponent must testify about information “known or *reasonably* available to the organization.” FED. R. CIV. P. 30(b)(6) (emphasis added). Another difference involves the time frame within which the organization must designate its witnesses. Whereas Rule 30(b)(6) does not set one, some states, such as Texas, require that the organization named in the notice must designate its witnesses within “a reasonable time before the deposition.” *See* TEX. R. CIV. P. 199.2(b)(1).

A few states have departed further from Rule 30(b)(6). One is New York, which in 2015 revised Rule 11(f) of the Rules of the Commercial Division of the Supreme Court to permit

depositions of entities and require organizations to provide knowledgeable witnesses. Rule 11(f) is the most detailed and recently-revised state rule, and is reprinted in full below:

Rule 11-f. Depositions of Entities; Identification of Matters.

- (a) A notice or subpoena may name as a deponent a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
- (b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.
- (c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition
  - (1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;
  - (2) such designation must include the identity, description or title of such individual(s); and
  - (3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.
- (d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then:
  - (1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced;
  - (2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice or subpoena served upon such entity the identity, description or title of such individual; and
  - (3) if the named entity, pursuant to subsection (d)(1) of this Rule, cross-designates more than one individual, it must set out the matters on which each individual will testify.
- (e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this Rule.
- (f) The individual(s) designated must testify about information known or reasonably available to the entity.

- (g) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.
- (h) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.

Although rules like this show that some states have experimented with rules governing organizational depositions, the general approach at the state level seems to be significant overlap with Civil Rule 30(b)(6)—but with potentially meaningful deviations in certain areas, such as the “reasonable particularity” requirement and the scope of the deponent’s duty to prepare.

Notes of Conference Call  
Rule 30(b)(6) Subcommittee  
Feb. 13, 2017

On Feb. 13, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Brian Morris, Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter to the Advisory Committee), and Prof. Richard Marcus (Reporter to the Subcommittee), and Derek Webb of the Administrative Office.

The call was introduced with a report on the discussion at the Standing Committee meeting of Rule 30(b)(6) issues. The judges on that committee did not seem to think that this rule was a source of serious problems. One judge on the Standing Committee said he read through the entire packet of material in the agenda book (the agenda memo provided to the Advisory Committee for its November, 2016, meeting) and got a headache that only abated when he got to the case management ideas at the end of the agenda materials on the rule. That initially seemed to him a more sensible way to approaching these issues than a long, detailed addition to the rule.

So one way to resume the Subcommittee's work would be to shift focus to those case management ideas for revision to Rules 26(f) and 16. That sort of approach might be a "nudge" for lawyers and judges to make realistic provision for 30(b)(6) depositions early in the litigation, and the sort of case-specific tailoring such a nudge could produce might be superior to "one size fits all" default settings in a revised rule. That sort of revision to Rule 26(f) might insist on planning for some of the matters on which we have been discussing specific amendments to 30(b)(6). If that seemed promising, the question then might be whether there are specifics that nonetheless should be put into the rule. Perhaps all that is needed is a "nudge" on the case management track.

This idea prompted the reaction that focusing mainly on Rules 26(f) and 16 is not sufficient. That would only urge the parties to talk about various subjects, and could generate even more inconsistency than presently exists on some issues like the number or duration of these depositions. One problem with the case management approach is that its effectiveness depends a great deal on the energy level of the individual judge, and the judge's attitude toward this sort of activity. Some judges make intense use of Rule 16, but others are somewhat perfunctory in their attention to discovery planning at the inception of the case.

Having specifics in the rule on a number of the matters we have been discussing would be an important adjunct to invoking case management as well. A very large amount of time and energy and money is spent arguing about things that could be addressed in specific ways in a rule. That specific starting point would save time even if the parties agree to depart from the specifics, or urge the judge to do so by order. At the Rule 26(f) stage of the case, people are often not thinking as clearly about 30(b)(6) issues as would be needed to provide specifics then.

Given these circumstances, it was suggested, the LCJ starting point seems right -- the absence of motions does not show there is not a problem. The absence of motions may be the reason judicial members of the Standing Committee did not appreciate the level of difficulty caused by the rule. But the fact judges don't see motions shows that -- after a lot of bickering -- the parties make some sort of compromise rather than filing motions. Though one might endorse this situation as a sort of "cooperation," it is actually very time-consuming. Having specifics in the rule would actually save a lot of time.

A reaction to this view was that it was an eloquent argument for going beyond a general case-management admonition and providing specifics in the rule. Another reaction was to ask whether a Committee Note to such a case-management rule could itself provide the desired specifics. The response to that question was that "rulemaking by Note" is disfavored. Moreover, at least some of the issues that might be addressed in the rule are now addressed in Notes to prior amendments. For example, the 2000 amendments included a statement in a Note that a 30(b)(6) deposition should, for purposes of the duration limitation adopted that year, be regarded as permitting one day of seven hours for each person designated by the organization. And the Note to the 1993 amendments said that, for purposes of the ten-deposition limit introduced in 1993, the 30(b)(6) deposition should be regarded as one deposition no matter how many individuals are designated to testify. Standing alone, those Note comments seemingly have not avoided problems. That may show some of the hazards of "rulemaking by Note." Those Note comments could be elevated to rule provisions, but at least some seem to think they do not strike the right balance. So a rule provision could provide the desired force and also offer revised content.

Favoring adding specifics to the rule does not mean, it was added, that all the specifics we have identified should be added. Instead, our list could probably be considerably streamlined.

A question going forward, therefore, is whether action is needed on all these issues, and whether there are further issues that might be added. One possibility mentioned by the LCJ submission is that "duplication" by 30(b)(6) deposition should be

forbidden in the rule. But the ABA 2016 submission is pretty comprehensive; there probably are not a lot of additional issues beyond our original list of about 18 different issues.

Another reaction was that magistrate judges would likely be a more fruitful source of reports about 30(b)(6) issues than district or circuit judges. That drew the response that "it differs from jurisdiction to jurisdiction" because different districts use magistrate judges in very different ways. Moreover, there probably are differences among magistrate judges about active management of discovery; those who are active managers probably see fewer 30(b)(6) issues stimulating full-blown motions.

This drew a reaction from a lawyer member who had been surveying other lawyers about their 30(b)(6) experience. At least some 30(b)(6) notices include lists of matters for examination were very expansive. For example, in a patent case the matters listed were something like "(1) all your patents; (2) all affirmative defenses you have ever raised in patent infringement litigation; (3) all discovery you have ever done in patent infringement litigation; (4) your corporate structure." Probably some judges would insist that such a list be refined to a workable dimension. And it is not clear (as the ABA submission recognized) that a rule provision could improve much on the "reasonable particularity" specified in the current rule. Maybe the solution is to limit the number of matters that can be listed in a notice. But that might simply prompt parties to use even broader topic descriptions to avoid exceeding the numerical limit. Indeed, that seems to have occurred in the list of topics in the patent case described above.

Another concern might be that 30(b)(6) depositions sometimes seem to be employed as an end run around the limits on the number of interrogatories.

In terms of ways a rule amendment could improve practice, addressing judicial admissions could be helpful by reducing the risk that failure to prepare on something that the party doing discovery included in the list could have dire consequences. That drew agreement; the judicial admission issue is still a source of nervousness. There are constant objections that questions go beyond the scope of the notice because of a fear that there may be a judicial admission. This is a "key driver" of problems in these depositions.

This discussion drew the reaction that even if the case management approach is not a full solution all by itself it is still important to pare down this list. Remember how long it took the Subcommittee last September to complete its initial discussion of about half the issues. "We need to narrow this

down. "

It was suggested that at some point it would be desirable to get guidance from the bar. Most members of the Subcommittee intend to attend the LCJ discussion in early May. Perhaps other bar groups could offer similar opportunities for discussion of how a rule change would improve practice. Outreach to bar groups should emphasize involvement of a broad spectrum of lawyers; it is important to appreciate how practice experience and orientation affect views on this rule. It is likely that experience is not uniform throughout the bar.

Discussion turned to which categories seemed most important for provisions in Rule 30(b)(6). One list included the notice period, the number of matters on the notice, a procedure for objecting, supplementation and questions beyond the scope of the matters on the list. Another list included a timetable, supplementation, protecting against judicial admissions, and forbidding questions beyond the scope of the notice.

Regarding the judicial admissions issue, another idea suggested was to add a reference in Rule 37(d) about failure to properly prepare the 30(b)(6) witness, which could be treated as a "failure to appear" that permits Rule 37(b) sanctions without the prerequisite of a Rule 37(a) motion to compel. But it was noted that Rule 37(c)(1) might already produce similar results in terms of forbidding use of certain evidence to contradict or supplement what was said in a 30(b)(6) deposition.

That possibility prompted the observation that the very helpful research memorandum by the Rules Law Clerks shows that the "admissions" cases are really more like sanctions decisions than real judicial admissions. The focus seems to be on bad faith conduct by the party held to have made an admission.

A question was raised about whether it is wise to get too deeply into sanctions. There may be some risk that this would be regarded as a substantive rule. But some rules (e.g., Rule 8(b)(6) on the effect of failure to deny an allegation in a complaint) have consequences like a judicial admissions decision, and that qualifies as a procedural rule. In any event, however, raising sanctions too prominently as a part of any amendment package may have negative effects by inviting gamesmanship.

Another issue that might be raised is whether to limit 30(b)(6) depositions to parties. That drew the reaction that there is a qualitative difference with nonparties. With parties, one might say that interrogatories should be preferred or at least tried first. But with nonparties interrogatories are not available. And with nonparties the judicial admission issue seem nonexistent, or virtually nonexistent.

Another question is about whether to require/permit supplementation of testimony at a 30(b)(6) deposition. There have been concerns about the "I'll get back to you on that" reaction were supplementation added to the rule. But supplementation is a general feature of the discovery rules. It is connected to the obligation to properly prepare the witness for the 30(b)(6) deposition, and failure to do that is fraught with peril. There is a duty to supplement an interrogatory answer, and in a way 30(b)(6) depositions may serve as substitutes for interrogatories because lawyers "destroyed" the use of interrogatories for such purposes by avoidance behavior in crafting responses. Moreover, there are presently lots of cases involving asserted failure to prepare the witness adequately. Those seem to be the ones in which judicial admission treatment results. If those are really bad faith cases, does the addition of a supplementation requirement really make failure to prepare more likely? Even without it, some are not preparing adequately.

Another possible problem has been use of redundant 30(b)(6) depositions. First, the party takes the depositions of all those actively involved in the events in question, and then it notices the 30(b)(6) deposition of the organization to cover the same topics. That might be what the LCJ submission is getting at with its concern about "duplicative" 30(b)(6) discovery, although that idea seems to start with the 30(b)(6) deposition and then foresee limits on further discovery, such as depositions of the main actors in the events in question.

Yet another issue that might deserve attention is the contention question issue.

This discussion prompted the reaction "Nothing has been removed from our long list of issues." One goal of this "triage" discussion has been to shorten the list of topics that warrant mention in the rule (as opposed to a general "nudge" in the case management mode).

A reaction to this concern was that one approach would be to try to "fold 30(b)(6) into Rule 26(g)(1)." Then the court automatically has Rule 26(g)(3) sanctions available. That drew the reaction that this approach might be superior to trying to micro-manage via extensive specifics in 30(b)(6) itself. Instead, we should focus on specifics on which the rules are silent.

This approach drew support. The goal should be to identify a list of the specifics to focus upon in the rule. Indeed, we might start with our vision of what the rule is ideally designed to accomplish. Perhaps initial canvassing of the Subcommittee could be by email.

At the same time, it was noted, it is important to think about what exactly the Subcommittee wants to bring to the full Committee for its April meeting. One idea might be an A list and a B list. The A list might be illustrated with sketches. The B list might include only topics that have been considered but not included in the A list. On the other hand, the failure to include B list topics on the A list might be easier to appreciate if the difficulties of drafting were illustrated by rule sketches of those matters also.

It was noted that such an A list could co-exist with an expansion of the Rule 26(f) and Rule 16 issues to include reference to 30(b)(6) depositions as well. So section A1 might be specific rule language for the specifics that seem usefully added to 30(b)(6), and section A2 would be the case management package with a more general "nudge" to give thought to how to handle foreseeable 30(b)(6) depositions.

In addition to any sketches of specific provisions for section A1, it would be good to have a composite sketch that would show what the rule would look like overall with the additions.

Going forward, it might be desirable to see whether Subcommittee members could agree on which specific provisions should be put on the A list for the April meeting of the full Advisory Committee. Starting with the list that the Subcommittee presented at the November 2016 meeting, and adding ideas mentioned during this call, it might be useful to determine whether the Subcommittee could reach consensus on a relatively short A list -- perhaps five items or so. Then the remaining items could be placed on a B list so that the full Advisory Committee had them in the agenda book, but with a clear delineation of those the Subcommittee thought to have higher priority. A first effort at assembling such a list might be an email "ballot" that should be circulated no later than Monday, Feb. 20.

LIST OF SPECIFIC TOPICS  
FROM NOV. 2016 AGENDA BOOK

Below is a list of the various topics included as specific rule-amendment ideas in the materials presented to the Advisory Committee at last November's meeting [along with some specifics not included that might be added]. At least a few (e.g., no. (2)) replicate provisions now in the rule and presumably need not be on our A list because they are already in the rule.

Items (12) and (13) would presumably be included on the A list to provide a "nudge" to early consideration, and a portion of the specific ideas would also be A list recommendations. As

noted below, depending on how one counts those items, there may be as many as 28 on our November 2016 list, and four more raised (and listed as (14) through (17) during the call:

- (1) Minimum notice period
- (2) Matters for examination stated with "reasonable particularity" (presently in rule)
  - (A) Limitation to ten or some other maximum (not included last November)
  - (B) [Limiting to scope of discovery already specified in Rule 26(b)(1)]
- (3) Objections to notice
  - (A) Permitting party seeking discovery to move under Rule 37(a) for an order compelling a response [and perhaps stating that the parties must meet and confer]
  - (B) Relieving responding party of responding at all [or only with regard to objected-to matters] pending court order.
  - (C) [and directing the court to apply proportionality limits in its order]
- (4) Explicitly inviting party seeking discovery to provide copies of exhibits a specified period before the deposition
  - (A) Explicitly requiring the witness to be prepared to provide information about those exhibits during the deposition
- (5) Requiring the responding organization to identify the persons it would present a specified time before the deposition
  - (A) Providing that if the organization designates more than one person, it also specify which matters each person will address
  - (B) Providing that designating a person certifies under Rule 26(g)(1) that the person will be prepared to provide its information on those matters
  - (C) Providing that if the designated person is unable to provide the information the organization has on a given matter the organization will designate an another person
  - (D) Providing that if the organization cannot, after good faith efforts to do so, locate responsive information or a person with responsive information, it will notify the party seeking discovery.
  - (E) Providing that if the organization gives the notice in (D) the party seeking discovery may move the court for an order under Rule 37(a)
  - (F) Providing that unless an order issues under (E) above the party seeking discovery may not inquire

- about the matters on which the organization gave notice under (D) [or providing that inquiry is allowed into the efforts to obtain such information]
- (6) Forbidding questioning on matters beyond those for which the witness has been designated to testify
    - (A) Providing that if questioning goes beyond those matters, the testimony is not admissible against the organization as testimony of the organization
    - (B) Providing that if the questioning goes beyond those matters, the deposition will be considered a deposition of the witness as an individual and counted as a separate deposition against the ten-deposition limit
  - (7) Forbidding contention questions
  - (8) Providing that the organization is allowed to offer additional evidence not provided by the witness and that the testimony is not a "judicial admission"
    - (A) Providing that the court may order, under either Rule 37(c)(1) or Rule 37(d), that the response will be treated as a "judicial admission" if the organization failed adequately to prepare the witness
  - (9) Providing that the organization must supplement the witness's testimony under Rule 26(e)
    - (A) setting a specific time limit for such supplementation
  - (10) Providing durational (one day of seven hours) and numerical (only one of the ten permitted depositions) for 30(b)(6) depositions [or other specifics]
  - (11) Providing that another 30(b)(6) deposition of the organization may be taken, but that it would count as another of the ten depositions that can be taken without stipulation or court order.
  - (12) Adding Rule 30(b)(6) as another topic to address in the discovery plan under Rule 26(f)(3) [with reference to some of the items mentioned in (1) through (11) above]
  - (13) Adding Rule 30(b)(6) as a mandatory topic of a scheduling order under Rule 16(b)(3)(A) or as a permissive topic under Rule 16(b)(3)(B)

ADDITIONAL POSSIBLE TOPICS MENTIONED DURING CALL

- (14) Adding a specific reference to Rule 30(b)(6) in Rule 37(d)
- (15) Limiting 30(b)(6) depositions to parties
- (16) Adding a specific reference to Rule 30(b)(6) depositions in Rule 26(g)(1) (though that rule already refers to "every discovery request")
- (17) Forbidding discovery "duplication" by Rule 30(b)(6) deposition (though Rule 26(b)(2)(C)(i) already says the

court must limit discovery that is "unreasonably  
cumulative or duplicative")

#### IV. PILOT PROJECTS

The Pilot Projects Working Group has continued its work on two pilots: the Mandatory Initial Discovery Pilot (“MIDP”) and the Expedited Procedures Pilot (“EPP”).<sup>1</sup> While the goal of both pilots is to measure whether improvements in the pretrial management of civil cases will promote the just, speedy and inexpensive resolution of cases, they aim to do so in different ways. The Judicial Conference of the United States approved both pilot projects at its September 2016 meeting.

The MIDP seeks to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery will reduce the cost, burden, and delay in civil litigation. Under the MIDP, a party must produce specific items of information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case and including information that is both favorable and unfavorable to the responding party. In developing the MIDP, the Working Group drew on the positive experience of some state courts and the Canadian courts that have adopted mandatory disclosures of relevant information. If the MIDP results in a measurable reduction of cost, burden and delay, then this may provide empirical evidence supporting a recommendation that the Advisory Committee propose amendments to the civil rules to adopt mandatory initial discovery in civil cases.

The basic features of the MIDP are: the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1); the parties may not opt out; favorable as well as unfavorable information must be produced; responses must be filed with the court, so that it may monitor and enforce compliance; and the court will discuss the initial discovery with the parties at the Rule 16(b)(2) case management conference, and resolve any disputes regarding compliance. The initial discovery responses must address all claims and defenses that will be raised. Hence, answers, counterclaims, crossclaims and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to answer in order to consider certain motions based on lack of jurisdiction or immunity.

The Working Group has developed educational materials to assist participating judges. These include a Standing Order, User’s Manual, Checklist, instructions for ECF administrators and Clerk’s office staff, notices to the bar, and a host of model form orders. Scripts were written for two instructional videos for pilot project judges and lawyers providing an overview of the pilot and a group discussion of state judges and lawyers in Arizona talking about the positive experience there with mandatory initial disclosures. Emery Lee from the FJC participated to help insure that the forms facilitate his ex post analysis of the pilot districts’ court filings to obtain data to evaluate the effectiveness of the pilot. Paul Vamvas and Tim Reagan of the FJC provided substantial assistance in preparing the scripts for the educational videos (and recording

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<sup>1</sup>The Working Group includes members from the Standing Committee, the Advisory Committee on Civil Rules, and the Committee on Court Administration and Case Management. It is chaired by Judge Paul Grimm, a former member of the Civil Rules Committee.

them) and creating a web site for use by judges and lawyers to access the MIDP documents and related written materials.

With substantial assistance from Dave Campbell and members of his court's clerk's office, the District of Arizona became the first MIDP district, with all district and magistrate judges participating. The pilot began on May 1, 2017. All materials were customized to reflect D AZ practices and procedures, without altering their original substance.

Largely due to the excellent work of Amy St. Eve and Bob Dow, 16 active district judges, one senior district judge and all 11 magistrate judges in the ND Ill have agreed to participate in the MIDP beginning on June 1. As with the District of Arizona, some customization of the forms has been done, again without altering the substantive content.

Efforts to recruit additional courts for the MIDP have been disappointing. Although we developed leads for quite a few districts (Southern District of Ohio, Northern District of California, and the Districts of Oregon, Idaho, Montana, New Hampshire, and New Mexico), none has yet agreed to participate. Many reasons have been given, to include reluctance of the bar, reluctance of the judges, court vacancies and workload. The SD Texas (Houston Division) is still considering participation, but concerns among the judges and court vacancies mean that any decision on participation is not imminent, and if there is participation, it is likely to be by only some judges.

The EPP is designed to expand practices already employed successfully by some judges and thereby promote a change in judicial culture by confirming the benefits of active management of civil cases. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances. The aim is to have 90% of civil cases set for trial within 14 months, with the remaining 10% set within 18 months.

With the commencement of the MIDP, more detailed preparation for the EPP has started. Another small working group will be assembled to help. We will need to assess whether creating an educational video is necessary; because the EPP Pilot is more general in nature than the MIDP, there may be fewer materials that need to be prepared. A "user's manual" is being developed, and model forms and orders as well as other educational materials must be prepared before the EPP is ready for implementation. Mentor judges will be made available to support implementation in the pilot courts. The goal has been to have the project in place by the end of 2017, to run for a period of three years.

Unfortunately, to date only one district, the Eastern District of Kentucky, has agreed to participate in the EPP. The District of Kansas is still considering doing so, but more districts are needed. Unless we get a better cross-section of districts to participate, we will seek to add ED Ky to the MIDP effort and forego the EPP for now.

## V. OTHER INFORMATION ITEMS

The Committee considered and decided to take no further action on several additional matters that are described in the draft Minutes. A few of them are identified here to support the opportunity for advice that further consideration might be warranted.

The most ambitious proposal was that Rule 65 should be expanded to provide that an injunction must provide “only for the protection of parties to the litigation and not otherwise enjoin[] or restrain[] conduct by the persons bound with respect to nonparties.” The proposal was supported by a forthcoming article that focuses on the occasional issuance of “nationwide” injunctions by a single district judge or by a court of appeals. The injunctions used as illustrations commonly restrain federal officials from enforcing a federal statute, regulation, or order. Many reasons are advanced for ending this practice. A single judge or court should not have such great power, given the risk that the decision may be wrong. It is better to let such important topics “percolate” in the lower courts, generating consensus or disagreements that illuminate difficult questions. The practice encourages forum shopping and opens the risk of conflicting injunctions. It is inconsistent with other aspects of accepted doctrine, including the rule that a district court decision is not precedent even within that court and the rule that the government is not subject to nonmutual offensive issue preclusion. These concerns are supplemented by an argument that Article III permits a court to accord relief only to a person that has standing and has been made a party. Once judgment is entered as to the actual parties, no case or controversy remains and the court lacks judicial power to afford relief to nonparties.

This terse summary of an elaborately supported proposal reflects the Committee’s reasons for declining further work. The questions are fundamental. They tie closely to remedies that in turn are anchored in substantive law. But the prospect of Article III concerns is daunting. And in the end, these questions are not suitable for resolution under the Rules Enabling Act.

Two other suggestions relate to specific statutes. One would add a new Rule 3.1 to make it clear that an “application” is the proper way to commence a proceeding to approve a qualifying modification of bond claims under Title VI of the Puerto Rico Oversight Act. The Committee concluded that procedural questions unique to this Act are better addressed by the District Court for Puerto Rico, perhaps through a local rule. The other suggestion would add a rule that tracks, virtually verbatim, a provision in the Patient Safety Act that protects “patient safety work product.” The Committee concluded that the Civil Rules should not be used to provide notice of applicable statutory provisions.

General civil procedure issues were reflected in two other suggestions. One would add more motions to the provision in Rule 16(b)(3)(B)(v) that lists permissive contents for scheduling orders. The present rule, added in 2015, provides that a scheduling order may direct that before moving for an order relating to discovery, the movant must request a conference with the court. The Subcommittee that worked on this provision considered the question whether other types of motions should be added but, in a spirit of conservative beginnings, decided not to. More recently, the Committee has considered a suggestion that motions for summary judgment

be added. It seems likely that any expansion of the list would draw up short of adding all motions. Many routine motions seem ill-suited to so much procedure. Defining which motions might be added could prove difficult, although the spirit of conservatism might again support limited expansion. The Committee concluded that these questions should be left to percolate and mature in practice by many judges. The other suggestion was to adopt a provision similar to Appellate Rule 28(j), which provides for a letter of supplemental authorities. The Committee concluded that, as compared to post-briefing and post-argument submissions on appeal, district-court practice is too variable to capture in a uniform national rule. The Civil Rules do not now attempt to regulate briefing practices, and addressing submission of supplemental authorities in a vacuum could prove awkward.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 25, 2017

1 The Civil Rules Advisory Committee met at the Ella Hotel in  
2 Austin, Texas on April 25, 2017. (The meeting was scheduled to  
3 carry over to April 26, but all business was concluded by the end  
4 of the day on April 25.) Participants included Judge John D. Bates,  
5 Committee Chair, and Committee members John M. Barkett, Esq.;  
6 Elizabeth Cabraser, Esq. (by telephone); Judge Robert Michael Dow,  
7 Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Professor  
8 Robert H. Klonoff; Judge Sara Lioi; Judge Scott M. Matheson, Jr.;  
9 Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver,  
10 Jr.; Hon. Chad Readler; Virginia A. Seitz, Esq.; and Judge Craig B.  
11 Shaffer. Professor Edward H. Cooper participated as Reporter, and  
12 Professor Richard L. Marcus participated as Associate Reporter.  
13 Judge David G. Campbell, Chair; Peter D. Keisler, Esq.; and  
14 Professor Daniel R. Coquillette, Reporter (by telephone),  
15 represented the Standing Committee. Judge A. Benjamin Goldgar  
16 participated as liaison from the Bankruptcy Rules Committee. Laura  
17 A. Briggs, Esq., the court-clerk representative, also participated.  
18 The Department of Justice was further represented by Joshua  
19 Gardner, Esq.. Rebecca A. Womeldorf, Esq., Lauren Gailey, Esq., and  
20 Julie Wilson, Esq., represented the Administrative Office. Dr.  
21 Emery G. Lee, and Tim Reagan, Esq., attended for the Federal  
22 Judicial Center. Observers included Alex Dahl, Esq. (Lawyers for  
23 Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq.  
24 (IAALS); William T. Hangle, Esq. (ABA Litigation Section liaison);  
25 Frank Sylvestri (American College of Trial Lawyers); Robert Levy,  
26 Esq.; Henry Kelston, Esq.; Ariana Tadler, Esq.; John Vail, Esq.;  
27 Susan H. Steinman, Esq.; and Brittany Schultz, Esq.

28 Judge Bates welcomed the Committee and observers to the  
29 meeting. He noted that this is the last meeting for three members  
30 whose second terms have expired – Elizabeth Cabraser, Robert  
31 Klonoff, and Solomon Oliver. They have served the Committee well,  
32 in the tradition of exemplary service. They will be missed. Judge  
33 Bates also welcomed Acting Assistant Attorney General Readler to  
34 his first meeting with the Committee.

35 Judge Bates noted that the draft Minutes for the January  
36 Standing Committee meeting are included in the agenda materials.  
37 The Standing Committee discussed the means of coordinating the work  
38 of separate advisory committees when they address parallel issues.  
39 Coordination can work well. The rules proposals published last  
40 summer provide good examples. The Appellate Rules Committee worked  
41 informally with the Civil Rules Committee in crafting the  
42 provisions of proposed Civil Rule 23(e)(5) that address the roles  
43 of the district court and the court of appeals when a request for  
44 district-court approval to pay consideration to an objector is made  
45 while an appeal is pending. A Subcommittee formed by the Appellate  
46 and Civil Rules Committees and chaired by Judge Matheson worked to

47 coordinate revisions of Appellate Rule 8 in tandem with the  
48 proposals to amend Civil Rules 62 and 65.1. Four advisory  
49 committees have coordinated through their reporters, the Style  
50 Consultants, and the Administrative Office as they have worked on  
51 common issues on filing and service through the courts' CM/ECF  
52 systems. The e-filing and e-service proposals will require  
53 continued coordination as the advisory committees hold their spring  
54 meetings.

55 *November 2016 Minutes*

56 The draft Minutes of the November 2016 Committee meeting were  
57 approved without dissent, subject to correction of typographical  
58 and similar errors.

59 *Legislative Report*

60 Julie Wilson presented the Legislative Report. She began by  
61 directing attention to the summaries of pending bills that appear  
62 in the agenda materials. There has been a flurry of activity in  
63 February and March on several bills. Two, H.R. 985 and the Lawsuit  
64 Abuse Reduction Act, have passed the House and have been sent to  
65 the Senate.

66 H.R. 985 is the Fairness in Class Action Litigation and  
67 Furthering Asbestos Claim Transparency Act of 2017. The bill  
68 includes many provisions that affect class actions. Without  
69 directly amending Rule 23, it would change class-action practice in  
70 many ways, and the appeal provisions effectively amend Rule 23. It  
71 also speaks directly to practice in Multidistrict Litigation cases,  
72 and changes diversity jurisdiction requirements for cases removed  
73 from state courts. Judge Bates and Judge Campbell submitted a  
74 letter to leaders of the House and Senate Judiciary Committees  
75 describing the importance of relying on the Rules Enabling Act to  
76 address matters of procedure. The Administrative Office also  
77 submitted a letter. Other Judicial Conference Committees are  
78 interested in this legislation. The Federal-State Jurisdiction  
79 Committee is charged with preparing a possible Judicial Conference  
80 position on the legislation. It has not yet been decided whether  
81 any position should be taken. Nothing has happened in the Senate.

82 Judge Bates noted that H.R. 985 has substantive provisions. It  
83 also raises a "procedural" question about the role of the Rules  
84 Enabling Act process in considering questions of the sort addressed  
85 by the bill.

86 Judge Campbell stated that H.R. 985 went through the House  
87 quickly. It has been in the Senate since early February. There is

First draft

88 no word on when the Senate may address it. It would significantly  
89 alter class-action practices, even without directly amending Rule  
90 23. And some of the provisions that address Multidistrict  
91 Litigation would be unworkable in practice. These procedural issues  
92 should be addressed through the Rules Enabling Act process. He also  
93 noted the changes in diversity litigation that would direct courts  
94 in removal cases to sever diversity-destroying defendants and  
95 remand to state courts as to them, retaining each diverse pair of  
96 plaintiff and defendant.

97 The Lawsuit Abuse Reduction Act of 2017, H.R. 720 and S. 237,  
98 is a bill familiar from several past sessions of Congress. It  
99 passed the House in early March. It remains pending in the Senate.

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RULES PUBLISHED FOR COMMENT, AUGUST 2016

102 Judge Bates introduced the three action items on the agenda  
103 arising from rules proposals published last August. Rules 5, 23,  
104 62, and 65.1 would be amended. There were three hearings, including  
105 a February hearing held by telephone. There were many helpful  
106 written comments and useful testimony from some 30 witnesses. Most  
107 of the comments and testimony addressed Rule 23. Judge Dow, who  
108 chaired the Rule 23 Subcommittee, will present Rule 23 for action.

109

*Rule 23*

110 Judge Dow opened the Rule 23 discussion by describing the  
111 Committee process as smooth. The summary of the hearings and  
112 comments runs 62 pages long. The Subcommittee held two conference  
113 calls after the conclusion of the comment period. The first  
114 narrowed the issues; notes on that call are included in the agenda  
115 materials. The second call pinned down the final issues. A few  
116 changes were made in rule text words, and the Note was shortened a  
117 bit.

118 Professor Marcus led the detailed discussion of the proposed  
119 Rule 23 amendments. Very few changes have been made in the rule  
120 text as published. In Rule 23(c)(2)(B), the new description of the  
121 modes of service has been elaborated by adding a few words: "The  
122 notice may be by one or more of the following: United States mail,  
123 electronic means, or other appropriate means." The testimony and  
124 comments showed surprising levels of interest in the modes of  
125 notice. The added words reaffirm that the same modes of notice need  
126 not be used in all cases, nor need notice be limited to a single  
127 mode in a particular case. The idea is to encourage flexibility.  
128 The value of flexibility is described in the proposed Committee  
129 Note.

130 Proposed Rule 23(e)(2) addresses approval of a proposed  
131 settlement. The published proposal added a few words to the present  
132 rule: "If the proposal would bind class members under Rule 23(c)(3)  
133 \* \* \*." The Subcommittee recommends that these new words be  
134 deleted. They were added to address expressed concerns that Rule  
135 23(e)(2) might somehow be read to authorize certification of a  
136 class for settlement purposes even though the requirements of Rule  
137 23(a) and (b) are not met. The hearings, however, suggested that  
138 adding these words may cause confusion. The Committee Note says  
139 that any class certified for purposes of settlement must satisfy  
140 subdivisions (a) and (b). It is better to delete the added words  
141 from rule text.

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142 Various style changes are proposed. Subparagraph (e)(2)(D) is  
143 changed to the active voice: "the proposal treats class members  
144 equitably relative to each other." The tag line for paragraph  
145 (e)(3) is changed by deleting "side": "Identification of ~~Side~~  
146 Agreements." "Side" is a non-technical word commonly used, but not  
147 included in the rule text.

148 Subparagraph (e)(5)(B) also should be changed. As published,  
149 it addresses payment or other consideration "to an objector or  
150 objector's counsel." The hearings offered illustrations of payments  
151 made, not to objectors or their counsel, but to a nonprofit  
152 organization set up to receive payment. So the rule text is  
153 broadened by removing that limit: "no payment or other  
154 consideration may be provided ~~to an objector or objector's counsel~~  
155 in connection with: \* \* \*." A corresponding change is recommended  
156 for the tag line.

157 Turning to the Committee Note, Professor Marcus began by  
158 noting that the Note was revised to respond to the changes in the  
159 rule text. It also has been shortened a bit "to delete repetition  
160 that is not useful." In addition, parts that explore the genesis  
161 and purpose of the amendments are deleted as no longer useful.

162 Professor Marcus concluded this introduction by observing that  
163 it has been very useful to hear from the bar, but there was not  
164 much controversy over the proposed changes.

165 Discussion began with two words in the draft Committee Note  
166 for subdivision (e)(5)(B), appearing at line 376 on page 115 of the  
167 agenda materials: some objectors "have sought to *exact tribute* to  
168 withdraw their objections." "[E]xact tribute" seems harsh. The  
169 Committee agreed that the thought will be better expressed by words  
170 like this: "sought to obtain consideration for withdrawing their  
171 objections \* \* \*."

172 A separate question was raised about the use of "judgment" in  
173 proposed item (e)(1)(B)(ii), which says that notice of a proposed  
174 settlement must be directed if "justified by the parties' showing  
175 that the court will likely be able to \* \* \* (ii) certify the class  
176 for purposes of *judgment* on the proposal." The judge who raised the  
177 question said that he does not formally enter a judgment, but  
178 instead enters an order. The order may simply rule on the proposal.  
179 Discussion began by pointing to Rule 54(a), which states that a  
180 "judgment" "includes a decree and any order from which an appeal  
181 lies." A departure from the published proposal on this point should  
182 be approached with caution. One point that was made in the comments  
183 is that it is important to have a "judgment" as a support for an  
184 injunction against duplicating litigation in other courts. And

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185 "judgment" also appears in subdivision (e)(5)(B), dealing with  
186 payment for forgoing or undoing "an appeal from a *judgment*  
187 approving" a proposed class settlement.

188 Discussion of "judgment" went on to observe that Rule 58(a)  
189 requires entry of judgment on a separate document at the end of the  
190 case. The purpose of Rule 58(a) is to set a clear starting time for  
191 appeals. As "judgment" appears in the provision for notice of a  
192 proposed settlement, it is important as a reminder that the court  
193 should be confident that notice is justified by the prospect that  
194 the proposed settlement will provide a suitable basis for  
195 certifying a class and deciding the case after the notice provides  
196 the opportunity to object or to opt out of a (b)(3) class. The  
197 purpose is to focus attention on the need to justify the cost of  
198 notice by the prospect that the eventual outcome will be final  
199 disposition of the action by a judgment.

200 The discussion of "judgment" led to related questions about  
201 the relationship between items (i) and (ii) in proposed (e)(1).  
202 "[C]ertify the class" appears only in (ii), after (i) refers to  
203 approving the proposed settlement. But certification is necessary  
204 to approve the settlement. Why not put certification first? The  
205 response looked to the evolution of practice. When Rule 23 was  
206 dramatically revised in 1966, the drafters thought that the normal  
207 sequence would be early certification, followed by much work, and  
208 eventually a judgment. But the reality has come to be that most  
209 class actions are resolved by settlement, and that in most class-  
210 action settlements actual certification and approval of the  
211 settlement occur simultaneously. Subdivision (e)(1) frames the  
212 procedure for addressing this reality, in terms that depart from  
213 the common tendency to talk of "preliminary approval" of a proposed  
214 settlement.

215 Items (i) and (ii) reflect that the court certifies a class by  
216 an order. The ultimate purpose is entry of judgment. If a class has  
217 not already been certified when the parties approach the court with  
218 a proposed settlement, certification and settlement become part of  
219 a package. The settlement cannot be approved without certification,  
220 and both certification and settlement require notice – usually  
221 expensive notice – to the class. If the proposed settlement fails  
222 to win approval, class certification for purposes of the settlement  
223 also will fail. The Committee Note reflects this consequence by  
224 reminding readers that positions taken for purposes of certifying  
225 a class for a failed settlement should not be considered if class  
226 certification is later sought for purposes of litigation.

227 There was a brief suggestion that some other word might  
228 substitute for "judgment." Perhaps "order," or "decision"?

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229           The discussion of the relationship between items (i) and (ii)  
230 in proposed (e)(1)(B) then took another turn. They might be read to  
231 mean the same thing. (i) asks whether the court will likely be able  
232 to "approve the proposal under Rule 23(e)(2)." Approving the  
233 proposal includes certifying the proposed class. So what is  
234 accomplished by "(ii) certify the class for purposes of judgment on  
235 the proposal"? The first response was that approval of the  
236 settlement is covered by subdivision (e)(2). "All that's happening  
237 in (e)(1) is a forecast of what can be done later." Rule 58 "exists  
238 on the side." No one brought up this question during the comment  
239 period. All that (e)(1) does is to provide that notice is not  
240 appropriate until the parties show that, after notice, the court  
241 likely will be able to certify the class and approve the  
242 settlement.

243           An alternative might be to combine (i) and (ii), although that  
244 might reduce the emphasis: "showing that the court will likely be  
245 able to certify the class and approve the proposal under Rule  
246 23(e)(2)." This suggestion was echoed by a parallel suggestion to  
247 retain the structure of (i) and (ii), but strike "for purposes of  
248 judgment on the proposal" from (ii). "[F]or purposes of judgment on  
249 the proposal" does not do any harm, but it says something that is  
250 obvious without saying. Further discussion noted that perhaps it  
251 makes sense to refer first to "certify the class," as (i), before  
252 referring to approval of the proposed settlement. But care should  
253 be taken to avoid backing into a structure that might be read to  
254 create a separate settlement class-certification provision that the  
255 Committee has resisted. Adequate care is taken, however, in the  
256 Note discussion of subdivision (e)(1). The Note says specifically  
257 that the ultimate decision to certify a class cannot be made until  
258 the hearing on final approval of the settlement. The Note on  
259 subdivision (e)(2), further, expressly says that certification must  
260 be made under the standards of Rule 23(a) and (b).

261           One final question asked whether it would help to add one word  
262 in (ii): "certify the class for purposes of entering judgment on  
263 the proposal." Rule 58(a), however, seems to cover that.

264           This discussion concluded by unanimous agreement to retain (i)  
265 and (ii) as published.

266           Consideration of the Rule 23 proposal concluded by discussing  
267 the length of the Committee Note. It has been shortened during the  
268 work that led to the published proposal, and the version  
269 recommended for approval now is shorter still. But discussion of  
270 the separate subdivisions at times becomes repetitive because the  
271 interdependence of the subdivisions makes the same concerns  
272 relevant at successive points. Occasionally almost identical

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273 language is repeated. Committee practice allows continuing  
274 refinement of Committee Notes up to the time of submitting a  
275 recommendation for adoption to the Standing Committee.

276 The Committee voted unanimously to recommend for adoption the  
277 text of Rule 23 as revised, and also to approve the Committee Note  
278 subject to editing by the Subcommittee and the Committee Chair.

279 *Rule 5*

280 Provisions for electronic filing were added to Rule 5 in 1993  
281 and have gradually expanded as electronic communication systems  
282 have become widespread and increasingly reliable. Provisions for  
283 service by electronic means were added in 2001. The several  
284 advisory committees have taken care to make the respective rules on  
285 these matters as nearly identical as possible in light of  
286 occasional differences in the circumstances that confront different  
287 areas of procedure.

288 The proposal to amend Rule 5 published last August again  
289 reflects careful attempts to coordinate with the proposals advanced  
290 by the Appellate, Bankruptcy, and Criminal Rules Committees.  
291 Coordination has continued as public comments and testimony have  
292 shown opportunities to improve the published proposals.  
293 Coordination is not yet complete, because other advisory committees  
294 have yet to meet. The determinations made on Rule 5 will be subject  
295 to adjustment to maintain consistency with the other sets of rules.  
296 Matters of style can be adjusted without further Committee  
297 consideration. Matters of substantive meaning may require  
298 submission for Committee consideration and resolution by e-mail or  
299 a conference call.

300 No changes are suggested for the text of Rule 5(b)(2)(E) as  
301 published. The amended rule will provide for service by filing a  
302 paper with the court's electronic-filing system. The present  
303 provision in Rule 5(b)(3) that requires authorization by local rule  
304 is abrogated in favor of this uniform national authorization.  
305 Consent by the person served is not required. The amended rule  
306 will, however, carry forward the requirement of written consent to  
307 authorize service by other electronic means. It also carries  
308 forward the provision in present Rule 5(b)(2)(E) that service  
309 either by filing with the court, or by sending by other electronic  
310 means consented to, is not effective if the filer or sender learns  
311 that the paper did not reach the person to be served.

312 Concerns about the consequences of knowing that an attempted  
313 transmission failed, however, have prompted preparation of a  
314 proposed new paragraph for the Committee Note. The new paragraph

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315 describes the provision for learning that attempted service by  
316 electronic means did not reach the person to be served and then  
317 addresses the court's role. It says that the court is not  
318 responsible for notifying a person who filed the paper with the  
319 court's electronic-filing system that an attempted transmission by  
320 the court's system failed. And it concludes with a reminder that a  
321 filer who learns that the transmission failed is responsible for  
322 making effective service.

323 The core proposed provisions for electronic filing appear in  
324 Rule 5(d)(3)(A) and (B). No change is recommended in the published  
325 proposals. Subparagraph (A) states the general requirement that a  
326 person represented by an attorney must file electronically, unless  
327 nonelectronic filing is allowed by the court for good cause or is  
328 allowed or required by local rule. This provision reflects the  
329 reality that in most districts electronic filing has effectively  
330 been made mandatory. Subparagraph (B) states that a person not  
331 represented by an attorney may file electronically only if allowed  
332 by court order or by local rule, and may be required to file  
333 electronically only by court order or by a local rule that includes  
334 reasonable exceptions.

335 A witness who both submitted written comments and appeared at  
336 a hearing suggested that pro se litigants should have the right to  
337 choose to file electronically so long as they can meet the same  
338 training standards that attorneys must meet to become registered  
339 users. Important benefits would run both to the pro se party and to  
340 the court and the other parties. Although other advisory committees  
341 have not yet had their meetings, the consensus reflected in the  
342 materials prepared for each advisory committee is that it is still  
343 too early to move beyond case-specific permission or local rule  
344 provisions.

345 Certificates of service have become the occasion for some  
346 difficult drafting choices that remain to be resolved by uniform  
347 provisions suitable for each set of rules. Most, perhaps all, of  
348 the difficulty arises from the provision in Rule 5(d)(1) that  
349 specified disclosure and discovery materials "must not be filed"  
350 until they are used in the proceeding or the court directs filing.  
351 The question is whether a certificate of service must be filed, or  
352 even may be filed, before these materials are filed.

353 Present Rule 5(d)(1) says in the first sentence that any paper  
354 after the complaint that is required to be served " – together with  
355 a certificate of service – must be filed within a reasonable time  
356 after service." The second sentence sets out the "must not be  
357 filed" direction. Different readings are possible when confronting  
358 a certificate of service for a paper that must not (yet) be filed.

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359 It may be that the more persuasive reading is that the "together"  
360 tie of filing the certificate with the paper means that the  
361 certificate must be filed only when the paper is filed. The time  
362 for filing the certificate, set as a reasonable time after service,  
363 however, confuses the question: it could be argued that a  
364 reasonable time after service is measured by how long it takes to  
365 file after service, not by the lapse of time when filing does not  
366 occur until completion of a reasonable time after service.

367 Whatever the present rule means, it is important to write a  
368 good and clear provision into amended Rule 5. The published  
369 proposal addressed the question in a new Rule 5(d)(1)(A) that also  
370 addressed certificates for a paper filed with the court's  
371 electronic-service system: "A certificate of service must be filed  
372 within a reasonable time after service, but a notice of electronic  
373 filing constitutes a certificate of service on any person served by  
374 the court's electronic-filing system."

375 The transmutation of the Notice of Electronic Filing into a  
376 certificate of service has come to seem indirect. In line with the  
377 approach proposed by the Appellate Rules Committee, all advisory  
378 committees have agreed that it is better to provide, as suggested  
379 for a revised Rule 5(d)(1)(B), that "No certificate of service is  
380 required when a paper is served by filing it with the court's  
381 electronic-filing system."

382 The next step involves a paper served by means other than  
383 filing with the court's electronic-filing system. The time for  
384 filing a certificate of service can be set at a reasonable time  
385 after service for any paper that must be filed within a reasonable  
386 time after service. The problem of papers that must not be filed  
387 within a reasonable time after service remains. The revised  
388 provision prepared for the agenda materials addressed it in this  
389 way: "When a paper is served by other means, a certificate of  
390 service must be filed within a reasonable time after service or  
391 filing, whichever is later." The idea was that if filing occurs  
392 long enough after service as to be beyond a reasonable time to file  
393 a certificate as measured from the time of service, the certificate  
394 must be filed within a reasonable time after filing. It was  
395 expected that ordinary practice would file the certificate along  
396 with the paper. It also was intended that if a paper that must not  
397 be filed until it is used never is filed, there is no obligation to  
398 file a certificate of service. A reasonable time after filing is  
399 later than a reasonable time after service, and never starts to run  
400 when there is no filing.

401 The revised draft encountered stiff resistance. Much of the  
402 difficulty seems unique to the Civil Rule provision directing that

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403 most disclosure and discovery materials must not be filed. It seems  
404 likely that the other rules sets will be drafted to omit any  
405 provision that addresses certificates of service for papers that,  
406 at the outset, must not be filed. A new version worked out with the  
407 Style Consultants reads, adding words that emerged from continuing  
408 Committee discussion, like this:

409       **(d) (1) (B). Certificate of Service.** No certificate of  
410 service is required when a paper is served by filing it  
411 with the court's electronic-filing system. When a paper  
412 that is required to<sup>1</sup> be served is served by other means:  
413       (i) if the paper is filed, a certificate of service must be  
414       included with it or filed within a reasonable time after  
415       service; and  
416       (ii) if the paper is not filed, a certificate of service need  
417       not be filed unless filing is required by local rule or  
418       court order.

419       Under proposed (d)(1)(A), most papers must be filed within a  
420 reasonable time after service. (B)(i) then directs that the  
421 certificate of service be filed with the paper or within a  
422 reasonable time after service. If different parties are served at  
423 different times, the reasonable time for filing the certificate of  
424 service will be measured from the time of service for each. This  
425 provision should suffice for the other sets of rules.

426       (B)(ii) addresses the paper that is not filed because  
427 (d)(1)(A) says that it must not be filed. (ii) says that a  
428 certificate of service need not be filed. But under (i), a  
429 certificate of service must be filed when filing becomes authorized  
430 because the paper is used in the action, or because the court  
431 orders filing. The time for filing the certificate is, as directed  
432 by (i), either with the filing or within a reasonable time after  
433 service. (Here too, the proposed language encompasses a situation  
434 in which a party is served after the paper has been served on other  
435 parties and is filed upon order or use in the action.)

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<sup>1</sup> The Style Consultants used "must" here. Current Rule 5(d)(1) says "that is required to be served." The published proposal for 5(d)(1)(A) carries that forward. Unless we change to "must" in 5(d)(1)(A), parallelism dictates "is required" here.

Parallelism concerns are a bit confused. Rule 5(a)(1), which we have not addressed, begins "the following papers must be served." But when it comes to (C), it says "a discovery paper required to be served on a party."

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436 One more change is recommended for proposed Rule 5(d)(3)(C).  
437 Present Rule 5(d)(3) provides that a local rule may allow papers to  
438 be signed by electronic means. Displacing the local-rule provision  
439 means adding a direct provision to Rule 5. The published proposal  
440 was: "The user name and password of an attorney of record, together  
441 with the attorney's name on a signature block, serves as the  
442 attorney's signature." Comments on this proposal suggested some  
443 confusion. The intent was that the user name and password used to  
444 make the filing were not to appear on the paper, but the comments  
445 expressed fear that the rule text might be read to require that  
446 they appear. An additional concern was that evolving technology may  
447 develop better means of regulating access than user names and  
448 passwords – more general words should be used to accommodate this  
449 possibility. And  
450 an attorney may not become an attorney of record until the first  
451 filing – what then?

452 The reporters for the several advisory committees have reached  
453 consensus on the version recommended in the agenda materials for  
454 Rule 5(d)(3)(C):

455 (C) *Signing*. An authorized filing made through a person's  
456 electronic-filing account, together with the person's  
457 name on a signature block, constitutes the person's  
458 signature.

459 Discussion began with a question prompted by the new Committee  
460 Note language for Rule 5(b)(2)(E). How often does a court receive  
461 a message bounced back from the intended recipient? The answer was  
462 in two parts. Court systems come exquisitely close to 100% accuracy  
463 in transmitting messages to the addresses provided. The problems  
464 occur when a message bounces back because the address is not good.  
465 Almost all of those returned messages have been sent to addresses  
466 for secondary recipients – usually the address for the attorney of  
467 record remains good, and the bad address is for a paralegal or  
468 legal assistant.

469 Some puzzlement was expressed as to the original decision to  
470 address learning that attempted service failed only with respect to  
471 service by electronic means. Why should it be different if the  
472 party making service learns that mail did not go through, that a  
473 commercial carrier failed to deliver, that a paper left at a  
474 person's home was not in fact turned over to the person, that a  
475 misidentified person was served in place of the intended person?  
476 The history is clear enough – the decision in 2001 to address  
477 failed electronic service was prompted by the newness of this means  
478 of communication and lingering fears about its reliability.  
479 Failures of other means of service were left to the law as it was

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480 and as it might develop without attempting to provide any guidance  
481 in rule text.

482 The question of filing certificates of service for papers that  
483 must not be filed was addressed from a new perspective. Earlier  
484 reporter-level discussions asked whether there is any reason to  
485 file a certificate of service for a paper that is not filed. Some  
486 indications were found that filing the certificate would only add  
487 clutter to the file. But in Committee discussion a judge reported  
488 that he wants to have the certificates in the file because they  
489 provide a means of monitoring the progress of an action. District  
490 of Arizona Local Rule 5.2 provides that a notice of service of  
491 discovery materials must be within a reasonable time after service.  
492 That is useful. A practicing lawyer noted that it also is useful  
493 for all parties to know what is going on; Rule 5(a)(1)(C) directs  
494 that a discovery paper that is required to be served on a party  
495 must be served on all parties unless the court orders otherwise,  
496 but a certificate on the docket provides useful reassurance. Will  
497 the proposed rule language that a certificate of service "need not  
498 be filed" when the paper is not filed prevent filing voluntarily or  
499 as directed by court order or local rule? And it is important to  
500 know whether the answer, whatever it proves to be, will change the  
501 present rule.

502 Discussion reflected the ambiguity of the present rule that  
503 requires a certificate of service to be filed together with the  
504 paper, but directs that some papers must not be filed. It is  
505 difficult to be confident whether a clear new rule will change the  
506 present rule. So too, it is difficult to be confident about the  
507 implications that might be drawn from "need not be filed" standing  
508 alone. It might imply a right not to file. One response might be to  
509 redraft the rule to require that a certificate of service be filed  
510 within a reasonable time after service, whether or not the paper is  
511 filed. But it was concluded that the rule need not go so far; some  
512 courts may prefer that certificates not be filed for papers that  
513 are served but not filed. The conclusion was that words should be  
514 added to the Style Consultants' version as described above: "(ii)  
515 if the paper is not filed, a certificate of service need not be  
516 filed unless filing is required by local rule or court order.

517 A motion to recommend the proposed Rule 5 amendments for  
518 adoption, as revised in the agenda book and in the discussion, was  
519 approved by 13 votes, with one dissent.

520 *Rules 62, 65.1*

521 Judge Matheson, Chair of the joint Subcommittee formed with  
522 the Appellate Rules Committee, reported on the published proposals

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523 to amend Rules 62 and 65.1.

524 Rule 62 governs district-court stays of execution and  
525 proceedings to enforce a judgment. The published proposal revises  
526 the automatic stay by extending it from 14 days to 30 days, and by  
527 adding an express provision that the court may order otherwise. It  
528 recognizes security in a form other than a bond. It provides that  
529 security may be provided after judgment is entered, without waiting  
530 for an appeal to be filed, and that "any party," not only an  
531 appellant, may provide security. A single security can be provided  
532 to govern post-judgment proceedings in the district court and to  
533 continue throughout an appeal until issuance of the mandate on  
534 appeal. The rule also is reorganized to make it easier to follow  
535 the provisions directed to injunctions, receiverships, and  
536 accountings in an action for patent infringement.

537 Rule 65.1 provides for proceedings against a surety or other  
538 security provider. The proposed amendments were developed to  
539 dovetail with proposed amendments to Appellate Rule 8(b). The only  
540 issues that remain subject to further consideration are reconciling  
541 the style choices made for the Appellate and Civil Rules.

542 Public comments were sparse. All expressed approval of the  
543 proposals in general terms. No testimony addressed these rules  
544 during the three public hearings.

545 Discussion began with a question pointing to the wording of  
546 proposed Rule 62(b) stating that "a party *may* obtain a stay by  
547 providing a bond or other security." Must a judge allow the stay?  
548 This provision carries over from present Rule 62(d) – "the  
549 appellant may obtain a stay \* \* \*." The choice to carry it over was  
550 deliberate. Earlier Rule 62 drafts included provisions recognizing  
551 judicial discretion to deny a stay, to grant a stay without  
552 security, and take still other actions. They were gradually  
553 winnowed out in the face of continuing arguments that there should  
554 be a nearly absolute right to obtain a stay on posting adequate  
555 security. Carrying "may" forward will carry forward as well present  
556 judicial interpretations, which seem to recognize some residual  
557 authority to deny a stay in special circumstances even though full  
558 security is offered.

559 The Committee voted unanimously to recommend proposed Rules 62  
560 and 65.1 for adoption, subject to style reconciliation with the  
561 Appellate Rules proposal and to editorial revisions of the  
562 Committee Notes.

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563  
564 **II**  
**ONGOING WORK: RULE 30(B)(6) SUBCOMMITTEE**

565 Judge Bates introduced the Rule 30(b)(6) Subcommittee Report  
566 as work that remains in a preliminary stage. The question brought  
567 to the Committee by the Subcommittee is how to move forward.

568 Judge Ericksen introduced the Subcommittee Report by pointing  
569 to the Memorandum on Rule 30(b)(6) prepared by Rules Law Clerk  
570 Lauren Gailey, with assistance from Derek Webb. The Report shows  
571 that the rule "creates a lot of work," as measured by the number of  
572 cases that cite to it. "It is a focus of litigation."

573 The Report provides a ranking of possible new rule provisions,  
574 moving from A+ through A, A-, and simple B. Professor Marcus  
575 prepared the ranking after the last Subcommittee conference call.  
576 The Subcommittee has not reviewed it. But it provides a good point  
577 of departure in providing direction to the Subcommittee. What  
578 should the Subcommittee do first?

579 Rule 30(b)(6) can be seen as a hybrid of interrogatories and  
580 depositions. "It's a place where people release frustrations with  
581 numerical limits in Rules 30, 31, and 33." This shows in the  
582 continuing discussions of how to apply the Rule 30 limits of number  
583 and duration to multiple-witness depositions under Rule 30(b)(6).

584 Supplementation of a witness's deposition testimony has been  
585 a regular subject of discussion. The case law is pretty clear that  
586 an answer can be supplemented. But people worry about it because  
587 the Rule does not say it. "If we take away that worry, we may be  
588 able to focus better on discovery of where in the organization an  
589 inquiring party can find the desired information."

590 This first introduction prompted the observation that there is  
591 a tension in what the Committee is hearing. "We hear it is a focus  
592 of litigation." But in the Standing Committee, and here in this  
593 Committee, judges say they do not see these problems. We need to  
594 explore that. Judge Ericksen responded that "lawyers fight and  
595 scream with each other, but are reluctant to take it to the court."  
596 This observation led to an inquiry whether the many cases cited in  
597 the research memorandum reflected mere mentions of Rule 30(b)(6),  
598 or whether they involved actual disputes? Other Committee members  
599 reported different numbers of cases citing to Rule 30(b)(6), citing  
600 to the rule in conjunction with "dispute," or citing to the rule  
601 with "dispute" in the same paragraph. Still different on-the-spot  
602 e-search results were reported.

603 Professor Marcus described a new book that he has just read,

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604 Mark Kosieradzki, *30(b)(6): Deposing Corporations, Organizations*  
605 *& the Government* (2017). It runs more than 500 pages, including  
606 appendices. It reflects a point of view – "it's clear, and my side  
607 wins." Pages 242-245 of the agenda materials reflect "a lot of  
608 ideas that have been bouncing around."

609 The Subcommittee is still working on these ideas. It has not  
610 yet reached firm conclusions. Some, for example the American  
611 College of Trial Lawyers, tell us that reasonable lawyers can work  
612 out the things that might have a default in rule text. But why  
613 bother with new rule text when work-outs are common?

614 Looking to the most modest proposal, perhaps no one believes  
615 it would hurt to say that lawyers should talk about Rule 30(b)(6)  
616 depositions early in the litigation, although early discussions may  
617 not prove helpful when the 30(b)(6) depositions come at a late  
618 stage in discovery. So the only A+ ranking is awarded to the  
619 possibility of adding Rule 30(b)(6) depositions as subjects for  
620 possible provisions in a scheduling order and for discussion at the  
621 Rule 26(f) conference.

622 What else might be useful? Is there a risk that adding  
623 specific rule provisions will promote more disputes?

624 The A list begins with "judicial admissions," a topic that the  
625 Rule 30(b)(6) book covers in three chapters. These questions  
626 distinguish between giving a witness's deposition testimony the  
627 effect of a judicial admission that cannot be contradicted by other  
628 evidence and simply making it admissible in evidence against the  
629 entity that named the witness to represent it at the deposition.  
630 The next item on the A list is supplementation of the witness's  
631 testimony, either as an obligation or as an opportunity. Then come  
632 contention questions, attempts to use the witness to nail down the  
633 legal positions taken by the entity that designated the witness;  
634 objections to the "matters for examination" "specified with  
635 reasonable particularity" in the notice, a matter now open only by  
636 a motion for a protective order, and one that is made prominent in  
637 the Rule 30(b)(6) book; and the durational limit questions noted  
638 above.

639 The A- list begins with the practice of providing the witness  
640 advance copies of exhibits that will be used as a subject of  
641 examination; the Subcommittee has been reluctant to make this a  
642 mandatory practice for fear of stimulating massive sets of  
643 documents with a correspondingly massive obligation to prepare the  
644 witness. Second is the possibility of requiring that notice of a  
645 30(b)(6) deposition be provided a minimum period before the time  
646 set for the deposition. The underlying concern is that, as compared

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647 to other depositions, these depositions require the entity to  
648 gather information and train the witness to testify to it. Some  
649 local rules have general provisions setting notice periods, but  
650 there is little focused specifically on Rule 30(b)(6). The third A-  
651 topic asks whether questioning should be limited to the matters  
652 specified in the deposition notice. The witness designated by the  
653 entity named as deponent may have independent knowledge of the  
654 topic, and it is efficient to explore that knowledge in a single  
655 "deposition." But there are risks that the individual knowledge may  
656 be incomplete or simply wrong. Finding an all-purpose approach is  
657 difficult. The final two questions are whether a means should be  
658 found to channel into Rule 33 interrogatories inquiries into the  
659 sources of information, both witnesses and documents, and whether  
660 Rule 31 depositions on written questions might be developed as a  
661 similar alternative.

662 The B list includes nine subjects: Advance notice of the  
663 identity of the witnesses designated by the entity-deponent; second  
664 depositions of the entity; limiting Rule 30(b)(6) to parties, even  
665 though it may be useful as to nonparty entities; requiring  
666 identification of documents used in preparing a witness to testify  
667 for the entity; expanding initial disclosures to reduce the need  
668 for 30(b)(6) depositions that seek to identify witnesses and  
669 documents, a possibility being explored by the Initial Mandatory  
670 Discovery pilot project; forbidding other discovery to duplicate  
671 matters subject to a 30(b)(6) subpoena; making more stringent the  
672 "reasonable particularity" designation of matters for examination,  
673 or limiting the number of matters that can be listed; adding a  
674 specific reference to Rule 30(b)(6) to Rule 37(d), although the  
675 Rule 30(b)(6) book says that courts find it there now; and adding  
676 a specific reference to Rule 30(b)(6) to the provisions of Rule  
677 37(c)(1) that impose consequences – most notably exclusion of  
678 evidence not disclosed – for inadequate witness testimony.

679 Summing up the A, A-, and B lists, Professor Marcus suggested  
680 that attempting to address this many topics, many of them in a  
681 single rule, will indeed induce the "headaches" suggested by a  
682 member of the Standing Committee when a similar list was discussed  
683 last January.

684 Judge Bates suggested that these summaries of the list and  
685 grading of potential topics set the stage for discussing which  
686 subjects deserve further exploration.

687 A Subcommittee member identified himself as an advocate for  
688 doing more than prompting discussion of Rule 30(b)(6) depositions  
689 in scheduling conferences and Rule 26(f) conferences. "Unless you  
690 have a very active judge, in a complex case people will not yet be

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691 able to anticipate what problems will arise" as discovery proceeds.  
692 Subcommittee work has shown that there are problems that recur in  
693 some types of civil litigation. And judges do not often see them.  
694 This rule "is a time-consuming source of controversy in certain  
695 kinds of litigation." Lawyers argue about the same issues in case  
696 after case. Yes, they are worked out most of the time. "We can save  
697 a lot of time and expense if we do it right." But we must do it  
698 right. "We do not want a rule that will simply promote further  
699 disputes." The conflicting pressures suggest a "less is more"  
700 approach.

701 What issues most deserve close attention? "Judicial  
702 admissions" is one. The case law may pretty much have it right. But  
703 it is a lingering worry for many lawyers. It affects witness  
704 preparation and objections.

705 Another issue is contention questions. At the deposition you  
706 are not supposed to instruct the witness not to answer.

707 Yet another issue is questions that go beyond the scope of the  
708 matters designated in the notice: this ties to the "binding" effect  
709 of the answers. A distinction might be drawn by providing that a  
710 witness's answers to questions beyond the scope of the notice are  
711 not even admissible against the entity. A different line might be  
712 drawn to questions that are within the scope of the notice when the  
713 witness has not been adequately prepared to answer them.

714 Supplementation also might be usefully addressed. Allowing or  
715 requiring supplementation creates a risk that witnesses will not be  
716 prepared, and returning to the old "bandying" practice in which  
717 each successive witness says that someone else knows the answer.

718 It may not be useful to adopt rule text to say whether  
719 examination of each witness designated by an entity counts as a  
720 separate deposition, or whether the one-day-of-7-hours limit  
721 applies to each witness or to all of the designated witnesses  
722 together.

723 For a while it seemed attractive to require a minimum advance  
724 notice of the deposition, to be followed by a defined period for  
725 objections, to be followed by a meet-and-confer. All of that  
726 happens now in practice. People work it out. There is no real need  
727 to address it in rule text.

728 Finally, it would be better to put aside all of the topics in  
729 the "B" list.

730 Another member agreed that "judicial admissions is an

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731 interesting topic." It lies alongside the explicit Rule 36  
732 provisions for obtaining binding admissions. The question is  
733 different in addressing the effects of testimony by an entity's  
734 designated witness at deposition. Any rule should be framed  
735 carefully to guard against trespassing over the line that divides  
736 substance from procedure.

737 A practicing lawyer reported a comment by the legal department  
738 for a big company that seven hours is not enough time to complete  
739 a Rule 30(b)(6) deposition when the entity designates a number of  
740 witnesses. More generally, "we should continue our work." It may be  
741 that the problems may be solved by case management in some cases.  
742 But there also may be room for rule changes. In response to the  
743 question asked by the American College of Trial Lawyers, rulemaking  
744 can help. Adding explicit reminders of Rule 30(b)(6) to Rules 16(b)  
745 and 26(f) will help. A recent case from the Northern District of  
746 California is a worthy example. The notice listed 30 matters for  
747 examination. The judge found that Rule 1, as amended, "favors  
748 focus." Case management can help to cut out duplicative topics.  
749 "There may be room for nudges that will prevent the infighting that  
750 judges never see, or see only at times." Work should continue on  
751 the A list topics.

752 A judge said that he had seen some Rule 30(b)(6) problems, but  
753 in more than a decade and a half he could count the number on one  
754 hand. He agreed that case management can get the lawyers to work on  
755 the issues.

756 Another judge observed that he had never *ruled* on a Rule  
757 30(b)(6) dispute – "we work through them on calls." Creating a  
758 formal objection process might prove counterproductive by  
759 entrenching a more formal dispute process requiring more formal  
760 resolution.

761 A practicing lawyer noted that "we get objections now." The  
762 available procedure is a motion for a protective order, which must  
763 be preceded by a conference of the attorneys. Creating a formal  
764 objection procedure could allow the deposition to go forward on  
765 matters not embraced by the objections. Formalizing it will get  
766 people talking, and will crystalize the dispute. But it must be  
767 asked how much a formal process will slow things down, and what the  
768 value will be. It is not clear whether a formal objection process  
769 will slow things down as compared to current practice.

770 Judge Bates noted that the discussion had mostly involved  
771 Subcommittee members, and urged other Committee members to address  
772 the question whether the Subcommittee should move forward, and with  
773 what focus.

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774 A judge said that, like the other judges, "I don't get many  
775 issues," although that may be because he refers discovery disputes  
776 to magistrate judges. Still, his colleagues do not see many Rule  
777 30(b)(6) disputes. "It's a lawyer problem." And lawyers seem to  
778 work out the problems. "But there may be clear guidance that will  
779 help lawyers at the margin. The trick is to not write provisions  
780 that increase disputes." To this end, it may be useful to seek  
781 advice from lawyer groups that we have not yet heard from.

782 Another judge reported that he too does not see many 30(b)(6)  
783 disputes. It is hard to figure out what the core problems are. Are  
784 they not providing the right witnesses? Failing to prepare  
785 witnesses properly? It would help to get lawyers to identify the  
786 three or four worst problems, and to help think whether anything  
787 can be done to improve the means of addressing them. Adding  
788 30(b)(6) to the lists of topics that may be addressed in a  
789 scheduling order, and to the subjects of a Rule 26(f) conference,  
790 may help to get lawyers thinking about the issues. But it may be  
791 that the most useful approach will be to foster best practices  
792 rather than add to the rules.

793 Yet another judge stated that in 14 years on the bankruptcy  
794 court he has never encountered a 30(b)(6) problem, nor has he heard  
795 of them.

796 A fourth judge also has had very limited experience with the  
797 possible problems. He suspects it will be best to focus on a couple  
798 of broad issues.

799 Speaking as a practitioner, another Committee member suggested  
800 that disputes arise during the deposition, presenting questions  
801 that are hard for the lawyers to address in advance. Other issues  
802 may emerge as the case goes on, before the deposition itself, but  
803 again the scheduling conference and Rule 26(f) conference may come  
804 too early to enable useful discussion. This thought was echoed by  
805 another lawyer, who suggested that moving the discussion to the  
806 beginning of an action could increase the number of disputes. You  
807 do not know what the actual problems will be until you see and hear  
808 them.

809 The immediate response was that Rule 30(b)(6) depositions may  
810 come at the very beginning of an action. Lawyers who represent  
811 individual employment discrimination plaintiffs use them as an  
812 initial discovery tool. "It depends on the kind of case."

813 A judge said that these topics deserve further development in  
814 the Subcommittee. It will be useful to "kill" the idea of binding  
815 judicial admissions – it makes no sense to bind a party to things

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816 said by imperfect witnesses with imperfect memories. A rule can  
817 properly provide that an answer is not an admission that cannot be  
818 contradicted by other evidence. But in addressing other issues, it  
819 will be important to avoid adding detailed rules that will provoke  
820 disputes. And the last two items on the A- list – "substituting  
821 interrogatories" and "Rule 31 alternative" – should be dropped.

822 Judge Ericksen reported that the Subcommittee will be helped  
823 by knowing that the Committee supports continuing work. The  
824 question of judicial admissions will be considered. The list of  
825 topics will be studied to determine which should be dropped. Should  
826 "contention" questions be kept on for more work? There is a  
827 possibility of directing them to Rule 33 and Rule 36, perhaps by  
828 new rule text that forbids a question allowed by Rule 33(a)(2) as  
829 one that "asks for an opinion or contention that relates to fact or  
830 the application of law to fact."

831 A judge followed up on this question by noting that lawyers  
832 use contention questions as a catch-all, and usually work out the  
833 disputes. They are concerned that answers to interrogatories may  
834 not be as forthcoming as should be.

835 Judge Bates invited comments from observers.

836 An observer based her observations on many years in practice  
837 and now as an in-house lawyer. "Rule 30(b)(6) is very expensive."  
838 Often it takes days, even weeks, to prepare for a deposition that  
839 takes one or two hours. It is not possible to overstate the time  
840 required to prepare the witness. "The absence of case law does not  
841 mean there is no problem." The notices often set out very broad  
842 topics, going far back in time, and spread across all products, not  
843 just the one in suit. "We object, file for protective orders, but  
844 often are not successful." We work hard to address it in Rule 16  
845 conferences, but that can be too early – the other side says that  
846 they do not yet have our information, and cannot yet know what they  
847 will have to seek through Rule 30(b)(6). Objections and attempts to  
848 work through the objections often are met by a simple response: "We  
849 want what we want." "Court rulings are not always satisfactory." As  
850 to contention questions, they are often inappropriate. A witness  
851 might be asked to state the basis for a limitations defense, a  
852 question of law. Or the question might ask about vehicle  
853 performance, a matter for an expert witness. And "we are getting  
854 discovery on discovery" – questions about what documents were used  
855 to prepare the witness, what documents were sought.

856 Another observer began with this: "There are people who abuse  
857 it, but that does not mean the rule is broken." A scheduling  
858 conference often is premature with respect to potential 30(b)(6)

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859 issues. If 30(b)(6) is added to list of topics in Rule 16(b), the  
860 parties will focus on it more, but it may be irrelevant to actual  
861 discovery. Rule 30(b)(6) "is one tool among many. It should be used  
862 wisely." The parties should, under Rule 1, cooperate by giving  
863 notice of the subjects they want to explore before discovery  
864 actually begins. Rule 30(b)(6) should be used only to get  
865 information that has not come forth by other means. An effective  
866 means of addressing the issues that do arise as discovery proceeds  
867 may be a meet-and-confer process triggered by a potential motion.

868 Yet another observer expressed concern that nothing be done to  
869 vitiate the utility of Rule 30(b)(6). From a plaintiff's  
870 perspective, it provides an opportunity to get by deposing one or  
871 two witnesses information that otherwise would require seven or  
872 eight depositions. Supplementation is appropriate when a witness  
873 says something that is absolutely wrong. It is not clear whether  
874 supplementation is otherwise useful.

875 Judge Bates concluded the discussion by noting that the  
876 Subcommittee has learned that it should continue its work. The  
877 Committee discussion will be helpful in focusing the work. There is  
878 a clear caution that care should be taken to avoid unintended  
879 consequences that generate more disputes than are avoided. Care  
880 must be taken to avoid changes that move lawyers away from working  
881 out their differences to taking them all to the court.

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882

*Pilot Projects*

883 Judge Bates described progress with the Expedited Procedures  
884 Pilot Project and the Mandatory Initial Discovery Pilot Project.  
885 The people working hard to complete supporting materials and to  
886 promote the projects include Judge Grimm, a past member of this  
887 Committee, Judge Campbell, Judge Shaffer, Laura Briggs, and Emery  
888 Lee, as well as others. The supporting materials will include video  
889 presentations available online to all those participating in a  
890 project. The work that lies ahead is to recruit a sufficient number  
891 of courts to provide a basis for strong empirical evaluation of the  
892 projects. Even some Committee members have found it difficult to  
893 persuade other judges on their courts that they should participate  
894 in one of the projects.

895 Judge Campbell said that the Mandatory Initial Discovery  
896 project has come further along than the Expedited Procedures  
897 project. It will be launched in the District of Arizona on May 1.  
898 The general order implementing it is very close to the pilot-  
899 projects draft. A check list for lawyers has been prepared; Briggs,  
900 Lee, and others have prepared model documents. Two introductory  
901 videos are available on the district web site. One is prepared by  
902 Judge Grimm. The other features Arizona state-court judges and  
903 lawyers who explain how comparable disclosure requirements work in  
904 Arizona courts and what does – and does not – work. The video shows  
905 that they believe in the system. It seems likely that Arizona  
906 disclosure practice explains why 73% of lawyers who litigate in  
907 both Arizona state courts and Arizona federal courts prefer the  
908 state courts; across the country, only 45% of lawyers who litigate  
909 in both state and federal courts prefer state courts. The District  
910 of Arizona is a good place to start the project because Arizona  
911 lawyers have 25 years of experience with sweeping initial  
912 disclosure requirements. The first months of the program will be  
913 studied in September to determine whether adjustments should be  
914 made. One price has been paid for starting the project – the  
915 successful protocol for discovery in individual employment cases  
916 had to be stopped because it is inconsistent with the project.

917 The Northern District of Illinois will start the Mandatory  
918 Initial Discovery project for many judges on June 1. Both the  
919 Eastern District of Pennsylvania and at least the Houston Division  
920 of the Southern District of Texas are "in the works."

921 The Expedited Procedures project still needs some work. The  
922 Eastern District of Kentucky is going to participate. Other courts  
923 need to be found. It may not be launched before the end of the  
924 year.

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925           The amendments that took effect in 2015 renewed the lesson  
926 that many rules changes will be accepted only if they are supported  
927 by hard facts. The hope is that the pilot projects will provide  
928 support for rules that lead to greater initial disclosures and  
929 still more widespread case management.

930           Emery Lee said that some time will be needed before we can  
931 begin to measure the effects of either pilot project. Cases that  
932 terminate early in the project period will not reflect the effects  
933 of the project. Many cases that are affected by the project will  
934 not conclude until some time after the formal project period  
935 closes.

936           Strategies to attract participation were discussed briefly.  
937 The standing order that establishes a project has been sent to  
938 every court that has been approached. The videos that explain the  
939 projects have not been; perhaps they should be used as part of the  
940 recruiting effort. More courts are needed.

941           Judge Campbell noted that United States Attorneys Offices have  
942 not been approached as such. The Department of Justice has  
943 identified a couple of concerns with the Arizona Mandatory Initial  
944 Disclosure project that can be addressed.

945           The final observations were that progress is being made, and  
946 that the Committee on Court Administration and Case Management has  
947 been helpful in promoting further progress.

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948 **III**  
949 **SETTING AGENDA PRIORITIES**

950 Judge Bates introduced five sets of issues that vie for  
951 priority on the Committee agenda. Each will demand a significant  
952 amount of Committee time when it comes up, and some will require a  
953 great deal of time. The question for discussion today is which of  
954 these projects should be taken up first, recognizing that any  
955 present assignment of priorities will remain vulnerable to new  
956 topics that emerge while these projects are considered.

957 The five current projects involve two that are new, at least  
958 on the current agenda, and three that have been on the agenda. The  
959 two new projects are a request from the Administrative Conference  
960 of the United States that new rules be developed for district-court  
961 review of Social Security Disability Claims and a suggestion from  
962 the American Bar Association that Rule 47 should be amended to  
963 ensure greater opportunities for lawyer participation in the voir  
964 dire examination of prospective jurors. The three projects already  
965 on the agenda involve several aspects of the procedure for  
966 demanding jury trial, the means of serving Rule 45 subpoenas, and  
967 the offer-of-judgment provisions of Rule 68.

968 It is possible that one or another of these projects will be  
969 withdrawn from the agenda as a result of the discussion. But it  
970 seems likely that most will survive in some form, although perhaps  
971 reduced and perhaps deferred indefinitely.

972 Each project will be explored separately. Discussion aimed at  
973 assigning priorities will follow.

974 *Review of Social Security Disability Claims*

975 The Administrative Conference of the United States has made  
976 this request:

977 The Judicial Conference, in consultation with Congress as  
978 appropriate, should develop for the Supreme Court's  
979 consideration a uniform set of procedural rules for cases  
980 under the Social Security Act in which an individual  
981 seeks district court review of a final decision of the  
982 Commissioner of Social Security pursuant to 42 U.S.C. §  
983 405(g). These rules would not apply to class actions or  
984 to other cases that are outside the scope of the  
985 rationale for the proposal.

986 Apart from a general suggestion that new rules should promote  
987 efficiency and uniformity, four specific suggestions are made. The

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988 complaint should be "substantially equivalent to a notice of  
989 appeal." A certified copy of the administrative record should be  
990 the main component of the agency's answer. The claimant should be  
991 required to file an opening merits brief, with a response by the  
992 agency and appropriate subsequent proceedings should be provided.  
993 The rules should set deadlines and page limits.

994 It seems clear that the request is to adopt the new rules  
995 under the authority of the Rules Enabling Act, 28 U.S.C. § 2072.  
996 Although less clear, and perhaps not an important element, it seems  
997 to be a request to adopt the rules outside the Federal Rules of  
998 Civil Procedure – there is an explicit suggestion that "the new  
999 rules should be drafted to displace the Federal Rules *only* to the  
1000 extent that the distinctive nature of social security litigation  
1001 justifies such separate treatment." This suggestion is illustrated  
1002 by a footnote suggesting that the new rules could be embraced by  
1003 adding to Civil rule 81(a)(6) a provision that the Civil Rules  
1004 govern proceedings under the new rules except to the extent that  
1005 the new rules provide otherwise.

1006 Presentation of this proposal began with recognition that it  
1007 must be treated with great respect because its source is the  
1008 Administrative Conference. Respect is further entrenched by the  
1009 support provided by a research paper authored by Jonah Gelbach and  
1010 David Marcus. Important questions remain as to the process best  
1011 fitted to developing any new rules that may prove appropriate, but  
1012 those questions may be discussed after sketching the underlying  
1013 administrative framework and the judicial review statute.

1014 Social Security disability claims, and claims under similar  
1015 provisions for individual awards outside old-age benefits, begin  
1016 with an administrative filing. If benefits are denied at the first  
1017 administrative stage, review is provided at a second stage. If  
1018 benefits are denied at that stage, review goes to an administrative  
1019 law judge. The Social Security Administration has 1,300  
1020 administrative law judges. The case load is enormous, looking for  
1021 dispositions on the merits and after hearings in 500 to more than  
1022 600 cases a year. The administrative law judge has responsibilities  
1023 that extend beyond the neutral umpire role familiar in our  
1024 adversary system; the judge must somehow see to it that the record  
1025 is developed to support an accurate determination. Once the  
1026 administrative law judge makes an initial determination of how the  
1027 claim should be decided, the case is assigned to a staff member to  
1028 write an opinion. The administrative law judge then reviews the  
1029 draft and makes any changes that are found appropriate. A  
1030 disappointed claimant can then take an appeal within the  
1031 administrative system.

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1032 Section 405(g) provides for district-court review of a final  
1033 determination of the Commissioner of Social Security "by a civil  
1034 action." It further directs that a certified copy of the record be  
1035 filed "[a]s part of the Commissioner's answer." Characterizing  
1036 review as a civil action brings the review proceeding squarely into  
1037 the Civil Rules, but of itself does not preclude adoption of a  
1038 separate set of review rules, particularly if they are integrated  
1039 with the Civil Rules in some fashion.

1040 The purpose of establishing special Social Security review  
1041 rules lies in experience with appeals. About 17,000 to 18,000  
1042 actions for review are filed annually. By case count, they account  
1043 for about 7% of the federal civil docket. In 15% of them, the  
1044 Office of General Counsel determines that the final decision cannot  
1045 be defended and voluntarily asks for remand for further  
1046 administrative proceedings. Of the cases that remain, the national  
1047 average is that about 45% are remanded. Remand rates, however, vary  
1048 widely across the country. The lowest remand rates hover around  
1049 20%, while the highest reach 70%. It is a fair question whether the  
1050 procedures that bring the review to the point of decision are  
1051 likely to have much effect on the remand rate, either in the  
1052 overall national rate or in bringing the rates for different courts  
1053 closer together. Other factors may account for the variability in  
1054 outcomes, including speculation that there are differences in the  
1055 quality of the dispositions reached in different regions of the  
1056 Social Security Administration.

1057 Another source of different outcomes may lie in differences in  
1058 the procedures adopted by district courts to provide review. Some  
1059 treat the proceedings as appeals. Some invoke summary judgment  
1060 procedures, reasoning that both summary judgment and administrative  
1061 review involve judicial action on a paper record. The analogy to  
1062 summary judgment is imperfect, however. On summary judgment, the  
1063 court invokes directed verdict standards to determine whether a  
1064 reasonable jury could come out either way, assuming that most  
1065 credibility issues are resolved in favor of the nonmovant and  
1066 further assuming all reasonable inferences in favor of the  
1067 nonmovant. On administrative review the question is whether, using  
1068 a "substantial evidence" test that is subtly different from the  
1069 directed-verdict test, the actual administrative decision can be  
1070 upheld. Beyond that point lie a large number of other procedural  
1071 differences. Both lawyers representing the government and private  
1072 practitioners that have regional or national practices may  
1073 experience difficulties in adjusting to these differences.

1074 Against this background, the initial questions tie together.  
1075 Is it suitable to invoke the Rules Enabling Act to address  
1076 questions as substance-specific as these? The Committees have

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1077 traditionally been reluctant to invoke the authority to adopt  
1078 "general rules of practice and procedure" to craft rules that apply  
1079 only to specific substantive areas. One concern lies in the need to  
1080 develop the detailed knowledge of the substantive law required to  
1081 develop specific rules. General rules that rely on case-specific  
1082 adaptation informed by the particular needs of a particular  
1083 question as illuminated by the parties may work better. Another  
1084 concern is that however neutral a rule is intended to be, it may be  
1085 perceived as favoring one set of parties over other parties, and in  
1086 turn may be thought to reflect a deliberate intent to "tilt the  
1087 playing field." At the same time, there are separate rules for  
1088 habeas corpus and § 2255 proceedings, and the Civil Rules have a  
1089 set of Supplemental Rules for admiralty and civil forfeiture  
1090 proceedings. And the nature of social security cases accounts for  
1091 special limitations on remote access to electronic records in Rule  
1092 5.2(c).

1093 One response to the concerns about substance-specific rules  
1094 could be to adopt more general rules for review on an  
1095 administrative record. The difficulty of taking this approach is  
1096 underscored by the specific character of individual social security  
1097 disability benefits cases described in the initial discussion. A  
1098 great deal must be known to determine whether a generic set of  
1099 rules for review on an administrative record can work well across  
1100 the vast array of executive and other administrative agencies that  
1101 may become involved in district-court review.

1102 If the Enabling Act process is employed, should it rely on the  
1103 Civil Rules Committee as it is, drawing on experts in social  
1104 security law and litigation as essential sources of advice, or  
1105 should some means be found to bring one or more experts into a  
1106 formal role in the process? Given the statutory direction that  
1107 review is sought by way of a civil action, the Civil Rules  
1108 Committee is the natural source of initial work, then to be  
1109 considered by the Standing Committee and on through the normal  
1110 process. But if it proves wise to structure the civil review action  
1111 as essentially an appeal process, it may help to involve the  
1112 Appellate Rules Committee in the process.

1113 Let it be assumed that any rules should be developed either  
1114 within the Civil Rules or as an independent body that still is  
1115 integrated with the Civil Rules. What form might they take?

1116 The first step is likely to require a sound understanding of  
1117 the structure and procedures that lead to the final decision of the  
1118 Commissioner that is the subject of review. It does not seem likely  
1119 that rules governing district-court review procedure can do much to  
1120 affect the administrative structure and operation. The standard of

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1121 review – "substantial evidence" – is set by statute. But knowing  
1122 the origins of the cases that come to the courts may affect the  
1123 choice between rules that are simple and limited or rules that are  
1124 more complex and extensive.

1125 The second step will be to establish the basic character of  
1126 the rules. The analogy to appeal procedures is obviously  
1127 attractive. Guidance may even be sought in the Appellate Rules. But  
1128 going in that direction does not automatically mean that review  
1129 should be initiated by a paper that is as opaque as an Appellate  
1130 Rule 3 notice of appeal. There is a real temptation to ask that the  
1131 review be commenced by a paper that provides some indication of the  
1132 claimant's arguments. On the other hand, little may be possible  
1133 until the administrative record is filed with the answer as  
1134 directed by § 405(g). If the "complaint" provides little  
1135 information about the claimant's position, it may make sense to  
1136 follow the Administrative Conference suggestion that the  
1137 administrative record should be the "main component" of the answer.

1138 Once the review is launched, the reflex response will be to  
1139 treat the claimant as a plaintiff or appellant, responsible for  
1140 taking the lead in framing the arguments for reversal or remand. It  
1141 may be that the ambiguous assignment of responsibilities to the  
1142 administrative law judge might carry over to assign to the  
1143 Commissioner the first responsibility for presenting arguments for  
1144 affirmance. This alternative is likely to prove unattractive  
1145 because it will be difficult, at least in some cases, to frame the  
1146 argument that the final decision is supported by substantial  
1147 evidence before the claimant has articulated the contrary  
1148 arguments.

1149 Assuming that the claimant is to file the first brief on  
1150 review, the analogy to appellate procedure suggests several  
1151 correlative rules. A time must be set to file the brief. A later  
1152 time must be set for the Commissioner's brief. Provision might well  
1153 be made for a reply by the claimant. Whether to allow still further  
1154 briefing would be considered in light of past experience with these  
1155 review proceedings. Times must be set for each step. Page limits  
1156 might be set, although some thought should be given to the  
1157 possibility that leeway should be left for local rules that reflect  
1158 local district circumstances. None of these provisions should be  
1159 imported directly from the Appellate Rules without considering the  
1160 ways in which a narrowly focused set of rules may justify specific  
1161 practices better than those crafted for a wide variety of cases.

1162 The review rules might be expanded to address more detailed  
1163 issues. The Administrative Conference recommends that there be no  
1164 provisions for class actions, and that the rules should not apply

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1165 to "cases outside the scope of the rationale." It suggests  
1166 provisions governing attorney fees, communication by electronic  
1167 means, and "judicial extension practice". Work on these and other  
1168 issues that will be raised will again require learning about the  
1169 details of social security administration. It will be important to  
1170 understand the scope of § 405(g) in attempting to define the  
1171 categories of cases covered by the rules – why, for example, is it  
1172 assumed that § 405(g) authorizes review by way of a class action?  
1173 And why, if indeed the statute would establish jurisdiction, is a  
1174 class action inappropriate if the ordinary Rule 23 requirements are  
1175 met? Or, on a less intimidating scale, what is different about  
1176 these cases that justifies departure from the procedures for  
1177 awarding attorney fees set out in Rule 54(d)(2)?

1178 It will be important to explore limits of useful detail. It  
1179 seems likely that much will be better left to the Civil Rules. And  
1180 imagination should not carry too far. As compared to appellate  
1181 courts, for example, district courts regularly take evidence and  
1182 decide questions of fact. And there may be some special fact  
1183 questions that are not committed to agency competence. Imagine, for  
1184 example, questions of improper behavior not reflected in the  
1185 administrative record: bribery, supervisor pressure on the  
1186 administrative judge corps to produce an acceptable rate of awards  
1187 and denials, or ex parte communications. As intriguing as it might  
1188 be to craft rules for such claims, the task likely should not be  
1189 taken up.

1190 This initial presentation concluded with two observations. The  
1191 Administrative Conference has made an important recommendation that  
1192 must be taken seriously. Careful thought must be given to deciding  
1193 whether the project should be undertaken. A commitment to explore  
1194 the suggestion carefully, however, does not imply a commitment to  
1195 develop new rules.

1196 Judge Bates summarized this initial presentation by a reminder  
1197 that the present task is to determine what priority should be  
1198 assigned to social-security review rules on the Committee agenda.  
1199 If the project is taken up by this Committee, an early choice will  
1200 be whether to adopt one rule or several more detailed rules, and  
1201 whether to place them directly in the Civil Rules or to adopt a  
1202 separate set of rules that are nonetheless integrated with the  
1203 Civil Rules in some fashion. Every year brings many of these cases  
1204 to the district courts. Around the country, different districts  
1205 adopt quite different procedures for them. And there are wide  
1206 variations in remand rates.

1207 Discussion began by asking how many districts have local rules  
1208 that govern review practices. This question led to a more pointed

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1209 observation that in various settings there may be confusion whether  
1210 proceedings that involve agencies should be initiated as a civil  
1211 action by a Rule 3 complaint, or instead are some other sort of  
1212 "proceeding" in the Rule 1 sense that is initiated by an  
1213 application, petition, or motion. It will be important to explore  
1214 other substantive areas that involve quasi-appellate review in the  
1215 district courts.

1216 The next observation was that district courts may well follow  
1217 different procedures for different areas of administrative review,  
1218 or may instead have a single general review practice. There are  
1219 variations among the districts. One variation is that in many  
1220 districts, particularly for social security cases, magistrate  
1221 judges are the first line of review.

1222 Judge Campbell encouraged the Committee to take up this  
1223 project. This is a Civil Rules matter. The District of Arizona  
1224 local rule for these cases is not long, showing that a good rule  
1225 need not be long. He gets 20 to 30 of these cases every year. They  
1226 always rely on a paper record. The records include many medical  
1227 reports. One important element in the review is provided by  
1228 specific rules, often rather detailed rules, that each circuit has  
1229 developed to guide the administrative decision process. The Ninth  
1230 Circuit has specific rules as to the standard of decision the  
1231 administrative law judge must use when the treating expert's  
1232 opinion is not contradicted, the standard when it is contradicted,  
1233 and so on. These rules may require reversal for failure to  
1234 articulate the reviewing circuit standard without considering  
1235 whether substantial evidence supports the denial of benefits. If  
1236 the administrative law judge does not say the right things in  
1237 rejecting an expert opinion, "I have to treat the opinion as true."  
1238 That leads to about a 50% reversal rate. But reversal rates vary  
1239 across the Ninth Circuit, ranging from 28% in the District of  
1240 Nevada to 69% in the Western District of Washington. There is  
1241 reason to suspect that reversals often happen because  
1242 administrative judges do not say what circuit rules require them to  
1243 say.

1244 This observation led to the question whether the Rules  
1245 Enabling Act process can address circuit decisions imposing rules  
1246 that are closely bound up with the substance of social security law  
1247 and the administrative procedures that implement that substance.  
1248 This concern provides a specific illustration of the need to keep  
1249 constantly in mind the challenges of creating procedural rules  
1250 specific to a single substantive area.

1251 Another participant stated that the United States Attorney  
1252 offices handle the vast majority of these cases. Two working groups

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1253 in the Department of Justice have studied the variations among the  
1254 circuits. A "model" rule might be useful, if it is adaptable to  
1255 local circumstances. But there is no real sense that these are  
1256 issues that must be addressed.

1257 A judge reviewed some of the statistics provided in the  
1258 Gelbach and Marcus paper describing the workload of the  
1259 administrative law judges and the amount of time they can devote to  
1260 any single case. These statistics "point to the Social Security  
1261 Administration looking to its own structures and procedures." It  
1262 will be hard to do much by rulemaking. "We do need to respect the  
1263 request, but we need to look at a lot more than this report." And  
1264 it may be important to look at practices on administrative review  
1265 in many different settings for insights that may be important in  
1266 considering this particular setting. This suggestion was seconded  
1267 – we must look to what is happening in other substantive fields.

1268 Another participant asked how much variation there is among  
1269 the circuits, and whether the variations will make it difficult to  
1270 craft a single rule that makes sense across the board? Another  
1271 participant turned this question around by asking whether the  
1272 principal problem lies in the work of the Social Security  
1273 Administration, not in variations in circuit law.

1274 A judge suggested that we should look for more specific local  
1275 rules. The District of Minnesota aims at timelines and procedures  
1276 that will reduce delay in getting benefits to a person who is  
1277 entitled to them. (It was later noted that social security cases  
1278 are reported separately for delays in disposition.)

1279 The local-rule inquiry may tie to the number of review cases  
1280 that are brought to a district. Some courts have more than others,  
1281 often because of differences in the size of the local population.

1282 A judge asked whether there is any sense of what proportion of  
1283 claimants appear pro se – a pro se litigant may encounter  
1284 difficulty with a separate set of rules. Two judges responded that  
1285 most claimants in their districts have lawyers; one explained that  
1286 fee provisions mean that the lawyer appears with essentially no  
1287 cost to the claimant.

1288 A judge noted that there are separate rules for habeas corpus  
1289 cases and for § 2255 proceedings and asked whether the issues  
1290 surrounding substance-specific rules are different for those rules  
1291 than they would be for social-security review rules.

1292 A lawyer member said that "it is difficult to say to the  
1293 Administrative Conference that we do not want to look at this." So

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1294 where should we look? Should we look to administrative review more  
1295 broadly? That would be more consistent with the "general rules"  
1296 contemplated by the Enabling Act. But if there is no obstacle to  
1297 prevent focusing on the specific setting of social-security review,  
1298 it will be better to focus on that. "This seems to be a  
1299 distinctive, even unique, set of issues." One obvious place to  
1300 start will be with standards of review, or circuit rules that seem  
1301 to combine approaches to review with dictates about practices that  
1302 must be followed by administrative law judges to avoid reversal.  
1303 How far do the circuits root their rules in statutory language? And  
1304 we should determine whether the Administrative Conference is most  
1305 concerned with establishing uniform rules, or whether it aims  
1306 higher to get rules that are both uniform and good? Is the test of  
1307 good defined only in terms of good dispositions in the district  
1308 courts, or is it defined more broadly in hoping for procedures that  
1309 will wash back to enhance administrative law judge dispositions?

1310 Several members joined in suggesting that it will be important  
1311 to seek out associations of claimants' representatives if this  
1312 project proceeds. The Committee will need expert advice from all  
1313 perspectives. A number of organizations were quickly identified.

1314 Emery Lee reported that Gelbach and Marcus got some of their  
1315 information from him. And they have a lot of data that might be  
1316 shared for our study. And he has been involved with the  
1317 Administrative Conference and the Social Security Administration.  
1318 The Social Security Administration has a really impressive data  
1319 processing system. There is a long-term effort to improve the  
1320 entire Administration.

1321 Judge Bates concluded the discussion by suggesting that the  
1322 Committee should look at these questions, beginning with efforts to  
1323 gather more information. But decisions about priorities should be  
1324 deferred until four more pending projects have been discussed.

1325 *Jury Trial Demands: Rules 38,39, and 81(c)(3)*

1326 Judge Bates introduced the questions raised by the rules that  
1327 require an explicit demand by a party who wishes to enjoy the right  
1328 to a jury trial.

1329 The question first came to the agenda in a narrow way. Until  
1330 the Style Project changed a word in 2007, Rule 81(c)(3)(A) provided  
1331 that a party need not demand a jury trial after a case is removed  
1332 from state court if "state law *does not*" require a demand. "Does  
1333 not" was understood to mean that a demand was excused only if state  
1334 law does not require a demand at any time. Even then, the rule  
1335 provided that a demand must be made if the court orders that a

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1336 demand may be made, and further provided that the court must so  
1337 order at the request of a party. The Style project changed "does"  
1338 to "did." That creates a seeming ambiguity: what does "did" mean if  
1339 state law requires a demand at some point, but the case is removed  
1340 to federal court before it reaches that point? Is a demand excused  
1341 because state law did not require it to be made by the time of  
1342 removal? Or is a demand required because, at the time of removal,  
1343 current state law did require a demand, albeit at a later point in  
1344 the case's progress toward trial?

1345 Early discussions of this question have been inconclusive.  
1346 Discussion in the Standing Committee in June, 2016, also was  
1347 inconclusive. But soon after the meeting, two members – then-Judge  
1348 Gorsuch and Judge Graber – suggested that Rule 38 should be amended  
1349 to delete the demand requirement. The new model would follow the  
1350 lead of Criminal Rule 23(a), under which a jury trial is  
1351 automatically provided in all cases that enjoy a constitutional or  
1352 statutory right to jury trial. A jury trial would be bypassed only  
1353 by express waiver by all parties; the Criminal Rule might be  
1354 followed to require that the court approve the waiver. They wrote  
1355 that this approach would produce more jury trials, create greater  
1356 certainty, remove a trap for the unwary, and better honor the  
1357 purposes of the Seventh Amendment.

1358 The Committee agreed last November that further research  
1359 should be done. A starting point will be to attempt to dig deeper  
1360 into the history of the 1938 decision to adopt a demand  
1361 requirement, and to set the deadline early in the litigation. State  
1362 practices also will be examined, recognizing that some states do  
1363 not require a demand at any point and others put the time for a  
1364 demand later, even much later, than the time set by Rule 38.

1365 Empirical questions also need to be researched. One is to  
1366 determine how often a party who wants a jury trial fails to get one  
1367 because it overlooked the need to make a timely demand and failed  
1368 to persuade the court to accept an untimely demand under Rule  
1369 39(b). That question may be difficult to answer. A separate  
1370 question asks a different kind of practical-empirical question: Is  
1371 it important to the court or the parties to know early in an action  
1372 whether it is to be tried to a jury? Why?

1373 If the Criminal Rule model is to be followed, it will be  
1374 useful to consider drafting issues that distinguish the Seventh  
1375 Amendment from the Sixth Amendment. It is not always clear whether  
1376 there is a Seventh Amendment (or statutory) right to jury trial, or  
1377 on what issues. There should be some means to raise this question.  
1378 Whether the means should be provided by express rule text is not  
1379 yet clear. As part of that question, it may be useful to consider

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1380 whether it is appropriate to hold a jury trial in a case that does  
1381 not involve a jury-trial right. Present Rule 37(c)(2) authorizes a  
1382 jury trial with the same effect as if there is a right to jury  
1383 trial, but only with the parties' consent. Should a no-demand-  
1384 required rule address this issue?

1385 The right to jury trial is important and sensitive. These  
1386 questions must be approached with caution.

1387 Discussion began with the empirical question: How often *do*  
1388 people lose the right to jury trial? "Can there be a general, quick  
1389 fix"? This is an important issue – jury trial is an important part  
1390 of democracy. And there are all sorts of ways to address the issue.

1391 A judge supported this view, saying that part of the first  
1392 step will be to explore the issue of inadvertent waiver. Another  
1393 judge agreed that these questions are important philosophically,  
1394 but empirical information is also important.

1395 Another member agreed that these questions may deserve  
1396 consideration. Some state courts do not require a demand: does that  
1397 create any problems? Pro se cases may become an issue. But there  
1398 are reasons to ask whether amending Rule 38 would change much in  
1399 practice.

1400 The other side of the practical question was asked again:  
1401 Criminal Rule 23 means that the parties know from the beginning  
1402 that there will be a jury trial. If an amended Rule 38 does not go  
1403 that far, how important is it to set the time for demand early in  
1404 the case? Can the time be pushed back, reducing the risk of  
1405 inadvertent waiver, until a point not long before trial?

1406 Another part of the empirical question will be to determine  
1407 what standards are employed under Rule 39(b) to excuse a failure to  
1408 make a timely demand. If tardy demands are generally allowed, the  
1409 case for amending Rule 38 may be weakened.

1410 *Rule 47: Jury Voir Dire*

1411 Judge Bates introduced the Rule 47 proposal that came from the  
1412 American Bar Association. The proposal adheres to the ABA  
1413 Principles for Juries and Jury Trials 11(B)(2), which provides that  
1414 each party should have the opportunity to question jurors directly.  
1415 The ABA proposal is supported by submissions from the American  
1416 Board of Trial Advocates and the American Association for Justice.

1417 The proposal observes that federal judges generally allow less  
1418 party participation in voir dire than is allowed in state courts.

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1419 Judge-directed questioning is challenged because judges know less  
1420 about the case than the parties know, leaving them unable to think  
1421 of questions that probe for potential biases relevant to that  
1422 particular case. For the same reason, judges are unable to  
1423 anticipate developments at trial that may trigger bias. The ABA  
1424 also urges that jurors will be more forthcoming in answering  
1425 lawyers' questions, more willing to acknowledge socially  
1426 unacceptable things, than in answering a judge's questions.  
1427 Possible difficulties are anticipated and refuted by arguing that  
1428 lawyer participation will not cause significant delay, and that it  
1429 should not be assumed that lawyers will abuse the opportunity.

1430 This question was considered by the Committee some time ago.  
1431 In 1995 it published for comment a proposal very similar to the ABA  
1432 proposal. The public comments divided along clear lines. Most  
1433 lawyers supported the proposed rule. Judges were nearly unanimous  
1434 in opposing it. Opposition was expressed by many judges who  
1435 actually permit extensive lawyer participation – they believe that  
1436 lawyer participation can be valuable, but that the judge must have  
1437 an unlimited right to restrict or terminate lawyer participation as  
1438 a means to protect against abuse. The Committee decided then to  
1439 abandon the proposal. Rather than amend the rule, it concluded that  
1440 judges should be better educated in the advantages of allowing  
1441 lawyer participation subject to clear judicial control.

1442 The reactions seem to be the same today. It is not clear  
1443 whether federal judges generally are more or less willing to permit  
1444 lawyer participation in voir dire than they were in 1995. There is  
1445 reason to suspect that more judges permit active lawyer  
1446 participation today. But if indeed more judges do so, that could  
1447 cut either way. It may show that there is little need to amend Rule  
1448 47. Or it may show that Rule 47 should be amended to ensure that  
1449 all judges permit practices that wide experience supports. It may  
1450 be important to try to get better information on current practices.

1451 Discussion began with the observation that Criminal Rule 24(a)  
1452 is closely similar to Rule 47.

1453 A lawyer member strongly favors the ABA proposal. His  
1454 experience is that more federal judges have come to permit  
1455 supplemental questioning by lawyers, but that not all do. Many  
1456 trial lawyers believe that judge questions produce less useful  
1457 information about how people think, about what prejudices they  
1458 have. And some judges do not permit lawyer participation, or allow  
1459 only a very short time for lawyer participation. Allowing  
1460 supplemental questioning by the lawyers "would be a good start."

1461 Another lawyer asked what would be the standard of review

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1462 under a new rule when the judge limits lawyer participation? A  
1463 judge answered that judges are inclined to allow lawyer  
1464 participation "when it seems helpful, otherwise not." If the rule  
1465 expands lawyers' rights, appeals will be taken to review rulings on  
1466 what are reasonable questions. Minnesota state courts generate many  
1467 opinions on what are reasonable questions that must be allowed.

1468 Another judge observed that his district has 30 judges and  
1469 perhaps 20 different ways of regulating lawyer participation in  
1470 voir dire. He allows supplemental questions. "One size may not fit  
1471 all judges. There is a risk in losing my discretion." But it is  
1472 useful to think further about this proposal.

1473 Another judge observed that he respects lawyers, "especially  
1474 the experienced, good lawyers. Not all are like that." We need to  
1475 learn more before going for more lawyer participation. If we can  
1476 get questions from the lawyers up front, a combined procedure in  
1477 which the judge goes first, supplemented by the lawyers, should  
1478 work.

1479 Another judge noted that he gives lawyers a limited time to  
1480 ask questions after he has finished. "I worry about giving lawyers  
1481 and parties a right to conduct voir dire, especially in pro se  
1482 cases."

1483 A state-court judge said that his state has a large body of  
1484 law on this topic. The 1995 Committee Note referred to clear abuse  
1485 of discretion. In his state, "we get a lot of issues for appeal."

1486 Another judge said that he asks questions, then allows lawyers  
1487 to ask questions. "They're not very good at it," perhaps because  
1488 earlier judges on his court did not give them a chance to get  
1489 experience with it.

1490 Further discussion was deferred to the overall discussion of  
1491 assigning agenda priorities.

1492 *Rule 45: Serving Subpoenas*

1493 Rule 45 directs that "serving a subpoena requires *delivering*  
1494 *a copy to the named person.*" A majority of courts interpret this  
1495 opaque language to mean that personal service is required. But a  
1496 fair number of courts interpret it to allow delivery by mail, and  
1497 some interpret it to allow delivery by mail if attempts at personal  
1498 service fail. Occasionally a court has authorized other means of  
1499 service.

1500 The proposal submitted to the Committee suggests that all of

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1501 the means allowed by Rule 4 to serve the summons and complaint  
1502 should be allowed for service of a subpoena. The argument is  
1503 straightforward: the consequences of complying with a subpoena are  
1504 less than the consequences of being brought into an action as  
1505 defendant who must participate in the full course of the litigation  
1506 and is at risk of losing a judgment. The proposal would also  
1507 authorize the court to direct service by means not contemplated by  
1508 Rule 4.

1509 The reasons for expanding the modes of service are attractive.  
1510 Personal service can be expensive. It can cause delay. And at times  
1511 it may be physically dangerous. The analogy to Rule 4 has an  
1512 initial appeal.

1513 In addition to the wish for less burdensome means of service,  
1514 it is desirable to have a uniform national practice. If some courts  
1515 permit service by mail, uniformity can be restored by permitting  
1516 mail service generally or by prohibiting mail service generally.  
1517 Whichever way, uniformity is attractive.

1518 There is much to be said for permitting service by mail; the  
1519 rule might call for certified or registered mail, or might borrow  
1520 from other rules a more general "any form of mail that requires a  
1521 return receipt."

1522 Turning to the Rule 4 analogy, there also is much to be said  
1523 for allowing "abode" service by leaving the subpoena with a person  
1524 of suitable age and discretion who resides at the dwelling or usual  
1525 place of abode of the person to be served.

1526 Allowing other means authorized by the court seems attractive,  
1527 at least if there are reasons why personal service, mail, or abode  
1528 service have failed.

1529 Still further expansions can be made. And it may prove  
1530 attractive to distinguish between parties and nonparties. Serving  
1531 a subpoena on a party by serving the party's attorney is  
1532 attractive, particularly in an era that permits service by filing  
1533 the subpoena with the court's electronic-filing system.

1534 Going all the way to incorporate all of Rule 4, on the other  
1535 hand, raises potential problems. Careful thought would have to be  
1536 given to serving a minor or incompetent person; serving a  
1537 corporation, partnership, or association; serving the United States  
1538 and its agencies, corporations, officers, or employees; or serving  
1539 a state or local government. So too for service outside the United  
1540 States.

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1541 Discussion began with the observation that Criminal Rule 17(d)  
1542 is similar to Rule 45: "The server must deliver a copy of the  
1543 subpoena to the witness \* \* \*." This Committee should consult with  
1544 the Criminal Rules Committee to determine their views on the value  
1545 of expanding the means of service, either generally or as to  
1546 criminal prosecutions in particular. And it would be useful to  
1547 learn how "deliver" is interpreted in the Criminal Rule.

1548 The Bankruptcy Rules Committee also should be consulted.

1549 A lawyer member noted that the Committee considered this very  
1550 set of questions a few years ago during the work that led to  
1551 extensive amendments of Rule 45. The Committee decided then that  
1552 there was not sufficient reason to amend the rule. Personal service  
1553 was thought useful because it dramatically underscores the  
1554 importance of compliance. There does not seem to have been any  
1555 change of circumstances since then – the state of the law described  
1556 in the proposal is the same as the law described in extensive  
1557 research for the Discovery Subcommittee then. "This does not seem  
1558 the most important thing we can do."

1559 *Rule 68*

1560 Judge Bates introduced the Rule 68 offer-of-judgment topic by  
1561 noting that it has been the subject of broad proposals for  
1562 reconsideration and expansion and also the subject of proposals  
1563 that focus on one or another specific problems that have appeared  
1564 in practice.

1565 The history of the Committee's work with Rule 68 was used to  
1566 set the framework for the current discussion. Some observers have  
1567 long lamented that Rule 68 does not seem to be used very much. They  
1568 believe that it should be given greater bite. The purpose is not so  
1569 much to increase the rate of settlements – it would be difficult to  
1570 diminish the rate of cases that actually go to trial – as to  
1571 promote earlier settlements. A common parallel theme is that the  
1572 rule should be expanded to include offers by plaintiffs. Since  
1573 plaintiffs generally are awarded "costs" if they win a judgment,  
1574 the cost sanction seems inadequate to the purpose of encouraging a  
1575 defendant to accept a Rule 68 offer for fear the plaintiff will win  
1576 still more at trial. So these suggestions commonly urge that post-  
1577 offer attorney fees should be awarded to a plaintiff who wins more  
1578 than an offer that the defendant failed to accept. That proposition  
1579 leads in turn to the proposal that if a plaintiff can be awarded  
1580 attorney fees, fee awards also should be provided for a defendant  
1581 when the plaintiff fails to win a judgment more favorable than a  
1582 rejected offer made by the defendant.

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1583 Alongside these proposals to expand Rule 68 lie occasional  
1584 arguments that Rule 68 should be abrogated. It is seen as largely  
1585 useless because it is not much used. But it may be used more  
1586 frequently by defendants in cases that involve a plaintiff's  
1587 statutory right to attorney fees so long as the statute  
1588 characterizes the fees as "costs." The Supreme Court decision  
1589 establishing this reading of the Rule 68 provision that "the  
1590 offeree must pay the costs incurred after the [more favorable]  
1591 offer was made" is challenged as a "plain meaning" ruling that  
1592 thwarts the plaintiff-favoring purpose of fee-shifting statutes.  
1593 More generally, Rule 68 is challenged as a tool that enables  
1594 defendants to take advantage of the risk aversion plaintiffs  
1595 experience in the face of uncertain litigation outcomes.

1596 The Committee published proposed amendments in 1983. The  
1597 vigorous controversy stirred by those proposals led to publication  
1598 of quite different proposals in 1984. No further action was taken.  
1599 The Committee came to the subject again in the 1990s. The model  
1600 developed then worked from a proposal advanced by Judge William W  
1601 Schwarzer. Both plaintiffs and defendants could make offers and  
1602 counteroffers. A party could make successive offers. Attorney fees  
1603 were provided as sanctions independent of statutory authority. But  
1604 account was taken of the view that post-offer fees should be offset  
1605 by the "benefit of the judgment": the difference between the  
1606 rejected offer and the actual judgment was subtracted from the fee  
1607 award. As one illustration, the plaintiff might reject an offer of  
1608 \$50,000, and then win a judgment of \$30,000. The defendant may have  
1609 incurred \$40,000 of attorney fees after the offer lapsed. The  
1610 \$20,000 benefit of the judgment – \$30,000 subtracted from the  
1611 \$50,000 offer – was subtracted from the \$40,000 post-offer fees to  
1612 yield a fee award of \$20,000. A further concern for fairness led to  
1613 an additional limit: the fee award could not exceed the amount of  
1614 the judgment. In this illustration, the defendant's post-offer fees  
1615 might have been \$80,000. Subtracting the \$20,000 benefit of the  
1616 judgment would leave a fee award of \$60,000. Simply offsetting the  
1617 \$30,000 judgment would leave the plaintiff liable for \$30,000 out-  
1618 of-pocket. The rule prevented this result by denying any fee award  
1619 greater than the judgment. And to afford equal treatment, the same  
1620 cap applied for the benefit of a defendant who rejected a more  
1621 favorable offer: the fee award was capped at the amount of the  
1622 judgment for the plaintiff. Still further complications were added  
1623 in accounting for contingent-fee arrangements, offers for specific  
1624 relief, and other matters. The Committee eventually decided that  
1625 the attempt to address so many foreseeable complications had  
1626 generated a rule too complex for application. The project was  
1627 abandoned without publishing any proposal.

1628 Many suggestions to revise Rule 68 have been made by bar

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1629 organizations and others over the years. Extensive materials  
1630 describing many of them were supplied in an appendix to the agenda  
1631 book. Many of them aim at broad revision. Some are more focused.  
1632 Ten years ago the Second Circuit suggested that the Rule should be  
1633 amended to provide guidance on the approach to evaluating  
1634 differences between an offer of specific relief – commonly an  
1635 injunction – and a judgment that does not incorporate all of the  
1636 proposed relief but adds more besides. More recently, Judge Furman  
1637 has pointed to a specific problem: The voluntary dismissal  
1638 provisions of Rule 41(a)(1)(A), incorporated in Rule 41(a)(2), are  
1639 "subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable  
1640 federal statute." When a settlement requires court approval,  
1641 voluntary dismissal cannot be used to sidestep the approval  
1642 requirement. The Second Circuit has ruled, for example, that a  
1643 requirement of court approval of a settlement is read into the text  
1644 of the Fair Labor Standards Act. This requirement cannot be  
1645 defeated by stipulating to dismissal. Rule 68 does not have any  
1646 list of exceptions. So a question has appeared: can the parties  
1647 agree to a settlement that requires court approval, and then avoid  
1648 court scrutiny by making a formal Rule 68 offer that is accepted by  
1649 the plaintiff? Rule 68(a) directs that on filing a rule 68 offer  
1650 and notice of acceptance, "[t]he clerk must \* \* \* enter judgment."  
1651 Perhaps Rule 68 could be amended to address only this problem – the  
1652 1983 proposal, for example, specifically excluded actions under  
1653 Rules 23, 23.1, and 23.2 from Rule 68.

1654 The lessons to be learned from this history remain uncertain.  
1655 Continually renewed interest in revising Rule 68 suggests there are  
1656 strong reasons to take it up once again. Repeated failure to  
1657 develop acceptable revisions, both in the carefully developed  
1658 efforts and in brief reexaminations at sporadic intervals, suggests  
1659 there are strong reasons to leave the rule where it lies. It causes  
1660 some problems, but is not invoked so regularly as to cause much  
1661 grief. Yet a third choice might be to recommend abrogation because  
1662 Rule 68 has a real potential for untoward effects and because  
1663 curing it seems beyond reach.

1664 The repeated suggestions for amendments caused the Committee  
1665 to reopen Rule 68 in 2014, giving it an open space on the agenda.  
1666 Further consideration will be scheduled when there is an  
1667 opportunity for further research. There is a considerable  
1668 literature about Rule 68. Many states have similar rules that  
1669 nonetheless depart from Rule 68 in many directions. Careful review  
1670 of the state rules may show models that can be successfully  
1671 adopted.

1672 Discussion began with the observation that many states have  
1673 offer provisions. The California provision is bilateral. Federal

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1674 courts have ruled that when a state rule provides for plaintiff  
1675 offers, the state practice applies to state-law claims in federal  
1676 court because Rule 68 is silent on the subject. But Rule 68 governs  
1677 to the exclusion of state law as to defendant offers, because Rule  
1678 68 does speak to that subject. One consequence of abrogating Rule  
1679 68 could be that state rules are adopted for state-law claims in  
1680 federal court. State rules, further, may suggest effective  
1681 sanctions other than awards of attorney fees. California practice  
1682 allows award of expert-witness fees, a sanction that has proved  
1683 effective.

1684 The next observation was that Georgia has a new offer statute  
1685 enacted as part of tort reform. It recognizes bilateral offers, and  
1686 bilateral awards of attorney fees. "The effect has been chaotic."  
1687 Offers are made early in an action, before either party has any  
1688 well-developed sense of what discovery may show about the merits of  
1689 the case. Even with early offers, there is little evidence that the  
1690 rule has advanced the time of settlement. There have been lots of  
1691 problems, and no benefit. And "getting rid of it presents its own  
1692 set of issues."

1693 A lawyer member asked "how fast can I run away from this?  
1694 Trying to do everything everyone wants will be a real headache."  
1695 And a judge remarked that Rule 68 seems to be falling away.

1696 *Ranking Priorities*

1697 Judge Bates suggested that the time had come to consider  
1698 ranking the priority of these five items: Review of social-security  
1699 claims; the demand procedure for jury trial, both in removed  
1700 actions and generally; lawyer participation in jury voir dire;  
1701 service of Rule 45 subpoenas; and Rule 68 offers of judgment.

1702 The first advice addressed all five. The Committee should  
1703 press ahead with the social-security review topic. The jury demand  
1704 questions should begin with an attempt to learn how often parties  
1705 suffer an inadvertent loss of a desired jury-trial right. As to  
1706 voir dire, Rule 47 could be written as the ABA proposes, but the  
1707 amendment would not change judges' behavior. Exploring subpoena-  
1708 service questions should be coordinated with the Criminal rules  
1709 Committee. There is not enough reason to reopen Rule 68 in general,  
1710 but it would be interesting to see how other courts react to  
1711 similar procedures. There is no need to act immediately.

1712 A lawyer member noted that courts divide on the availability  
1713 of mail service for Rule 45 subpoenas. "There aren't that many  
1714 cases." And some courts allow mail service only after attempting  
1715 and failing to make personal service. The Committee should decide

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1716 what it wants. Perhaps the jury-demand question could be explored  
1717 by addressing removal cases separately from the general Rule 38  
1718 demand question.

1719 A judge suggested that the Committee should take up the  
1720 social-security review question. For Rule 38, it should attempt to  
1721 determine how often parties forfeit the right to jury trial for  
1722 failure to make timely demand. The remaining Rule 45, 47, and 68  
1723 questions should be put on a back burner.

1724 Another lawyer member agreed with the first suggestion that  
1725 not much is likely to be accomplished by revising Rule 47. It will  
1726 be useful to explore inadvertent loss of the right to jury trial by  
1727 failing to make a timely demand. And the Committee should look to  
1728 the social-security review questions.

1729 Emery Lee and Tim Reagan addressed the difficulty of  
1730 undertaking empirical research into the inadvertent loss of jury  
1731 rights. "Jury trials are rare to begin with." There may not be a  
1732 Rule 39(b) request to excuse an unintentional waiver – it may be  
1733 difficult to find docket entries that reflect the problem. Getting  
1734 useful information may not be impossible, but it will be difficult.  
1735 It might work to look at reported cases and work backward from  
1736 them. A judge observed that anecdotal information is available, but  
1737 it will be difficult to distinguish between accident and choice –  
1738 a party that knowingly failed to make a timely demand may come to  
1739 wish for a jury trial and plead for relief from what is  
1740 characterized as an inadvertent oversight. A judge observed that in  
1741 cases challenging the effectiveness of a demand she rules that it  
1742 makes no difference whether the demand was entirely proper. Another  
1743 judge said that he has had two cases in which pro se litigants  
1744 failed to make a timely demand; he ruled that they had not lost the  
1745 right to jury trial.

1746 A lawyer agreed that it is almost impossible to figure out how  
1747 often there is an inadvertent forfeiture of jury trial. But he  
1748 asked "why should the right be lost by failing to meet a deadline?  
1749 It may be deep in the case before you figure out whether you want  
1750 a jury."

1751 A lawyer member reported that a quick on-line search of Rule  
1752 39(b) cases suggests a general approach: a belated jury demand  
1753 should be granted unless there is good reason to deny it. Examples  
1754 of reasons to deny may be long delay, disrupting the court  
1755 schedule, or burden on the opposing party.

1756 A further caution was noted. If we expand the right to jury  
1757 trial without demand, the rule should deal with the fact that many

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1758 contracts waive the right to demand a jury trial.

1759 Lauren Gailey reported that research has begun on these  
1760 topics, including the history of the demand requirement, and Rule  
1761 39(b). She noted that the Ninth circuit has a stringent test for  
1762 granting relief under Rule 39(b). The research should be available  
1763 soon.

1764 Judge Bates summarized the discussion of priorities. Social-  
1765 security review issues lie at the top of the list. The work will  
1766 move forward now. It may be that a way should be found to bring  
1767 people familiar with these issues into the project.

1768 The jury demand questions will be pursued by finishing the  
1769 research now under way in the Administrative Office. Empirical  
1770 investigations also may be undertaken if a promising approach can  
1771 be developed.

1772 The remaining three topics will be held aside for the time  
1773 being. There is little enthusiasm for present renewal of the jury  
1774 voir dire question. The Rule 45 subpoena question also will be on  
1775 a back burner, recognizing that the question is manageable and that  
1776 we likely will have to deal with it in the future as means of  
1777 communication continue to develop. Short of more adventuresome  
1778 approaches, a simple amendment to authorize service by mail may be  
1779 considered. Rule 68 will not be reopened now, but developments in  
1780 FLSA cases in the Second Circuit will be monitored.

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1783

**IV**  
**OTHER MATTERS**

1784                    *Pre-Motion Conference: 17-CV-A*

1785                    Judge Furman has suggested consideration of Rule  
1786 16(b)(3)(B)(v). Rule 16(b)(3)(B) lists "permissive contents" for  
1787 scheduling orders. The broadest potential amendment would change  
item (v) so that a scheduling order may:

1788                    direct that before ~~moving for an order relating to~~  
1789 ~~discovery~~ making a motion, the movant must request a  
1790 conference with the court;

1791                    This question was considered by the subcommittee that  
1792 developed the package of case-management and discovery amendments  
1793 that took effect on December 1, 2015. The subcommittee concluded  
1794 that it would be better to encourage the pre-motion conference  
1795 through Rule 16(b) in a modest way limited to discovery motions.  
1796 Many judges require pre-motion conferences now, but many do not.  
1797 The subcommittee was concerned that a more ambitious approach would  
1798 meet substantial resistance.

1799                    More recently, the Committee has added to the agenda a  
1800 suggestion that the encouragement of pre-motion conferences should  
1801 be expanded to include summary-judgment motions. The purpose of the  
1802 conference would not be to deny the right to make the motion, but  
1803 to help focus the motion and perhaps illuminate the reasons why a  
1804 motion would not succeed.

1805                    Judge Furman's suggestion would add to the list at least some  
1806 motions to dismiss. A motion to dismiss for failure to state a  
1807 claim is a leading candidate, along with similar motions for  
1808 judgment on the pleadings or to strike. Motions going to subject-  
1809 matter or personal jurisdiction could be added. Perhaps other  
1810 categories could be included. But it does not seem likely that all  
1811 motions should be included. Ex parte motions are an obvious  
1812 example. So for many routine motions and some that are not so  
1813 routine. What of a motion to amend a pleading? For leave to file a  
1814 third-party complaint? To compel joinder of a new party?

1815                    Discussion began with a reminder that not long ago a  
1816 deliberate decision was made to limit the new provision to  
1817 discovery motions. "Judges do it in different ways." Some require  
1818 a conference before filing a motion for summary judgment. Others  
1819 require a letter informing the court that a party is considering  
1820 filing a motion – judges use the letter in different ways. Judge  
1821 Furman himself does not have a pre-motion requirement.

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1822           The Committee concluded that these questions should be left to  
1823 percolate and mature in practice. It is too early to reopen more  
1824 detailed consideration.

1825                           *The Patient Safety Act: 17-CV-B*

1826           The Patient Safety Act creates patient safety organizations.  
1827 Health-care providers gather and provide information to patient  
1828 safety organizations about events that harm patients. The Act  
1829 defines and protects "patient safety work product."

1830           The suggestion is that a Civil Rule should be adopted to  
1831 repeat, almost verbatim, the statute that protects against  
1832 compulsory disclosure of information collected by a patient safety  
1833 organization unless the information is identified, is not patient  
1834 safety work product, and is not reasonably available from another  
1835 source. The purpose is to provide notice of a statute that  
1836 otherwise might be ignored in practice.

1837           The chief reason to bypass this proposal is that the Civil  
1838 Rules should not be used to duplicate statutes. A related but  
1839 subsidiary reason is that a provision in the Civil Rules would be  
1840 incomplete – the statute extends its protection to discovery in  
1841 federal, state, or local proceedings, whether civil, criminal, or  
1842 administrative.

1843           Beyond that, it seems likely that patient safety organizations  
1844 themselves are well aware of the statute. They can bring it to the  
1845 attention of anyone who demands protected information.

1846           The Committee agreed that this topic should be removed from  
1847 the agenda.

1848                           *Letter of Supplemental Authorities: 16-CV-H*

1849           This suggestion builds on Appellate Rule 28(j), which allows  
1850 a party to submit a letter to provide "pertinent and significant  
1851 authorities" that have come to the party's attention after its  
1852 brief has been filed or after oral argument. The proposal is that  
1853 a comparable procedure should be established for the district  
1854 courts, backed by personal experience with wide differences in the  
1855 practices now followed.

1856           The analogy to appellate practice is not perfect. Appellate  
1857 practice has a clear structure for scheduling the parties' briefs.  
1858 District-court practice includes a wide variety of events that must  
1859 be addressed by the court, and the Civil Rules do not establish any  
1860 particular system of briefing or time schedules for presenting a

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1861 party's position. Immediate presentation and response are likely to  
1862 be needed more frequently than in courts of appeals. Any attempt to  
1863 establish a meaningful structure for submitting supplemental  
1864 authorities might well depend on establishing a structure and time  
1865 limits for presenting arguments in general.

1866 Discussion began with an appellate judge who, as the frequent  
1867 recipient of Rule 28(j) letters, is skeptical about expanding the  
1868 practice to the district courts. A district judge said that he has  
1869 no "mechanism" for such submissions, and "I love them when they  
1870 come in," but concluded that the time for a Civil Rule is not now.

1871 Another judge noted that the variety of motions confronting a  
1872 district court, and the lack of a structure for briefing in the  
1873 Civil Rules, weigh against exploring this suggestion further.

1874 The Committee agreed that this topic should be removed from  
1875 the agenda.

1876 *Title VI, Puerto Rico Oversight Act: 16-CV-J*

1877 The Puerto Rico Oversight Act includes, as Title VI, a  
1878 procedure for restructuring bond claims (including bank debt). An  
1879 Oversight Board determines whether a "modification" qualifies. The  
1880 issuer can apply to the District Court for Puerto Rico for an order  
1881 approving a qualifying modification. The provisions for action by  
1882 the district court are sketchy.

1883 The Act includes a Title III, with proceedings governed by the  
1884 Bankruptcy Rules. The Bankruptcy Rules Committee has advised that  
1885 the Bankruptcy Rules are not appropriate for Title VI proceedings.

1886 The suggestion is for adoption of a new Civil Rule 3.1. The  
1887 suggestion arises from the provision in Title VI that the district  
1888 court acts on an "application" by the issuer. Rule 3 directs that  
1889 a civil action is commenced by filing a complaint. It is not clear  
1890 what an "application" should include, but the proposal is that it  
1891 is better to track the statute, so the new Rule 3.1 should direct  
1892 that a civil action for relief under the Act "is commenced by  
1893 filing an application for approval of a Qualifying Modification \*  
1894 \* \*."

1895 The puzzlement about Rule 3 reflects an issue that was  
1896 addressed in the Style Project. At the time of the Project, Rule 1  
1897 applied the Civil Rules to "all suits of a civil nature." It was  
1898 amended to apply the Rules to "all civil actions and proceedings."  
1899 Some proceedings are initiated by filing a petition or application,  
1900 not a complaint. Whether a complaint is appropriate is a question

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1901 governed by the substantive law. What should be required of an  
1902 "application" embodied in a particular substantive statute also  
1903 should be shaped by the substantive law.

1904 Strong arguments counsel against undertaking to draft a new  
1905 Rule 3.1. Proceedings under the Act can be brought in only one  
1906 district court, the District Court for Puerto Rico. Suitable  
1907 procedures should be tailored to the overall practices of that  
1908 court, and to the substantive provisions of the Oversight Act. That  
1909 court knows its own practices, and will come to know the  
1910 substantive provisions of the Act, better than any other court or  
1911 this Committee can know them. In addition, it will soon confront  
1912 applications under the Act and must respond to them. Procedures  
1913 must be developed now. A new Civil Rule, at least in the ordinary  
1914 course, could not take effect before December 1, 2019, and that  
1915 schedule might be ambitious in light of the need to become familiar  
1916 with local procedures and the substance of the modification  
1917 process.

1918 The Committee agreed that this topic should be removed from  
1919 the agenda.

1920 *Disclaimer of Fear or Intimidation: 16-CV-G*

1921 This suggestion would add a rule "requiring a judge disclaim  
1922 fear or intimidation influence the judgment being written." It  
1923 draws from concern that a judge may be influenced by forces not  
1924 perceived, such as use of a horn antenna with a microwave oven  
1925 Magnetron as a beam-forming wireless energy device.

1926 The Committee agreed that this topic should be removed from  
1927 the agenda.

1928 *"Nationwide Injunctions": 17-CV-E*

1929 This suggestion urges adoption of a new Rule 65(d)(3):

1930 (3) *Scope.* Every order granting an injunction and every  
1931 restraining order must accord with the historical  
1932 practice in federal courts in acting only for the  
1933 protection of parties to the litigation and not  
1934 otherwise enjoining or restraining conduct by the  
1935 persons bound with respect to nonparties.

1936 Although the proposed rule ranges far wider, the supporting  
1937 arguments are presented primarily through the draft of a  
1938 forthcoming law review article. The article focuses on injunctions  
1939 issued by a single district judge, or by a single circuit court,

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1940 that restrain enforcement of federal statutes, regulations, or  
1941 official actions throughout the country.

1942 Examples are given of an injunction that restrained  
1943 enforcement of an order by President Obama and another that  
1944 restrained enforcement of an order by President Trump. The reasons  
1945 advanced for prohibiting "nationwide" injunctions are partly  
1946 conceptual and partly practical.

1947 On the practical side, it is urged that a single judge or  
1948 circuit should not be able to bind the entire country by an order  
1949 that may be wrong. The intrinsic risk of error is aggravated by the  
1950 prospect of forum-shopping for favorable districts and circuits;  
1951 the risk of conflicting injunctions; and "tension" with established  
1952 doctrines that reject nonmutual issue preclusion against the  
1953 government, establish important protective procedures when relief  
1954 is sought on behalf of a nationwide class under Civil Rule  
1955 23(b)(2), deny judgment-enforcement efforts by nonparties, and deny  
1956 any stare decisis effect for district-court decisions.

1957 On the conceptual side, it is urged that the Judiciary Act of  
1958 1789 limits federal equity remedies to traditional equity practice.  
1959 Some adjustments must be made to reflect the fact that there was  
1960 but a single Chancellor for all of England, while now there are  
1961 many federal-judge chancellors. There also are extended arguments  
1962 based on Article III justiciability concerns. Article III is seen  
1963 to limit remedies as well as initial standing. It confers judicial  
1964 power only to decide a case for a particular claimant. Once that  
1965 controversy is decided, "there is no longer any case or controversy  
1966 left for the court to resolve."

1967 This suggestion raises many questions. It is well argued. But  
1968 the questions go beyond those that may properly be addressed by  
1969 "general rules of practice and procedure" adopted under the Rules  
1970 Enabling Act. Appropriate remedies are deeply embedded in the  
1971 substantive law that justifies a remedy. If justiciability limits  
1972 in Article III are involved, a rule on remedies would have to  
1973 recognize, and perhaps attempt to define, those limits.

1974 Additional questions are posed by the broad generality of the  
1975 proposed rule, which sweeps across all substantive areas.

1976 The Committee agreed that this topic should be removed from  
1977 the agenda. It also agreed, however, that it will consider any  
1978 suggestions that may be made by the Department of Justice to  
1979 address concerns it may advance for possible rule provisions.

1980 *Rule 7.1: Supplemental Disclosure Statements*

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1981 Rule 7.1(b)(2) directs that a disclosure statement filed by a  
1982 nongovernmental corporate party must be supplemented "if any  
1983 required information changes."

1984 The disclosure provisions of the several sets of rules were  
1985 adopted through joint deliberations aimed at producing uniform  
1986 rules. Criminal Rule 12.4(b)(2) now requires a supplemental  
1987 statement "upon any change in the information that the statement  
1988 requires." The slight differences in style are immaterial.  
1989 "[C]hange" in the Criminal Rule and "changes" in the Civil Rule  
1990 bear the same meaning.

1991 The Criminal Rules Committee is considering an amendment of  
1992 disclosure requirements as to an organizational victim under  
1993 Criminal Rule 12.4(a)(2). In the course of its deliberations it has  
1994 proposed an amendment of Rule 12.4(b)(2) to address the situation  
1995 in which facts that existed at the time of an initial disclosure  
1996 statement were not included because they were overlooked or not  
1997 known. The underlying concern is that the present rule does not  
1998 require a party to file a supplemental statement when it learns of  
1999 facts that existed at the time of the initial statement because  
2000 there is no "change" in the information.

2001 The question for the Civil Rules Committee comes in three  
2002 parts.

2003 The first question is whether a supplemental disclosure  
2004 statement should be required when a party learns of pre-existing  
2005 facts that were not disclosed. The answer is clearly yes.

2006 The second question is whether the present rule text requires  
2007 a supplemental statement. There is a compelling argument that it  
2008 does. Even if the facts have not changed, information about them  
2009 changes when a party becomes aware of them. The purpose of  
2010 disclosure requires supplementation.

2011 The third question is whether to amend Rule 7.1(b)(2) even if  
2012 it now provides the proper answer. One reason to amend would be  
2013 that it is ambiguous. It does not seem likely that a court would  
2014 accept the argument that a supplemental statement is not required.  
2015 It seems likely that a rule amendment would not be pursued if the  
2016 question had come in through the mailbox. But another reason to  
2017 amend is to maintain uniformity with the Criminal Rules if the  
2018 proposed amendment is recommended for adoption. The Appellate Rules  
2019 Committee will soon consider adoption of an amendment to maintain  
2020 uniformity with the Criminal Rule. If both committees seek to  
2021 amend, it likely is better to amend Civil Rule 7.1(b)(2) as well.  
2022 And it likely is better to adopt the language of the Criminal Rule

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2023 rather than engage in attempts to consider possibly better drafting  
2024 for all three rules.

2025 The Committee agreed that uniformity is a sufficient reason to  
2026 pursue amendment of Civil Rule 7.1(b)(2) if the other committees go  
2027 ahead with proposed amendments. The amendment might be pursued in  
2028 the ordinary course, with publication for comment this summer. But  
2029 it seems appropriate to advise the Standing Committee that the  
2030 amendment might be pursued without publication to keep it on track  
2031 with the Criminal Rule. Publication and an opportunity to comment  
2032 on the Criminal Rule may well suffice for the Civil Rule; there is  
2033 little reason to suppose there are differences in the circumstances  
2034 of criminal prosecutions and civil actions that justify different  
2035 rules on this narrow question. That seems particularly so in light  
2036 of the view that the amendment makes no change in meaning.

2037 If the Criminal and Appellate Rules Committees pursue  
2038 amendment, the Rule 7.1(b)(2) question will be submitted to this  
2039 Committee for consideration and voting by e-mail ballot.

2040 **NEXT MEETING**

2041 The next Committee meeting will be held in Washington, D.C.,  
2042 on November 7, 2017.

2043 Respectfully submitted,

2044 Edward H. Cooper  
Reporter

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