COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Phoenix, AZ
January 7-8, 2016

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JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 7-8, 2016

AGENDA

I. Opening Business

A. Welcome and opening remarks by Judge Jeffrey S. Sutton

B. Report on rules effective December 1, 2015
- Bankruptcy Rule 1007
- Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84 and the Appendix of Forms

C. Report on September 2015 Judicial Conference Session and proposed amendments transmitted to the Supreme Court
1. Proposals transmitted on October 9, 2015:
   - Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7
   - Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012;
   - Civil Rules 4, 6, and 82
   - Criminal Rules 4, 41, and 45
2. Supplemental proposals transmitted on October 29, 2015:
   - Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 (known as the "*Stern* Amendments")

II. ACTION – Approve Minutes of the May 28, 2015 Committee Meeting

III. Inter-Committee Work

A. Electronic Filing, Service, and Notice
Discussion of the effort undertaken by each Advisory Committee to amend the Federal Rules to require e-filing and service, subject to appropriate exceptions, with a focus on the work of the Advisory Committee on Criminal Rules to develop a proposed amendment to Criminal Rule 49 [*Serving and Filing Papers*]

B. Privacy Issues
JOE S. CECIL, ET AL., FED. JUDICIAL CTR., UNREDACTED SOCIAL SECURITY NUMBERS IN FEDERAL COURT PACER DOCUMENTS (2015).

IV. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy

Information items:

1. Possible amendment to Rule 12.4(a)(2) [*Disclosure Statement–Who Must File–Organizational Victim*] in light of changes to the Code of Judicial Conduct
2. Possible amendment to Rule 15(d) [*Depositions–Expenses*] to address an inconsistency between the text of the rule and the committee note
3. Possible amendment to Rule 32.1 [*Revoking or Modifying Probation or Supervised Release*] to include certain procedural rules

V. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

ACTION – Approve publishing for public comment:

1. Proposed amendments to Rule 41 [*Mandate: Contents; Issuance and Effective Date; Stay*] that would (a) clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (b) address the standard for stays of the mandate; and (c) restructure the Rule to eliminate redundancy
2. Proposed amendments to Rule 29(a) [*Brief of an Amicus Curiae–When Permitted*] that would allow local rules to afford an appellate court the option to refuse an amicus brief, despite party consent, if the brief would cause disqualification
3. Proposed amendments to Rules 31(a)(1) [*Serving and Filing Briefs–Time to Serve and File a Brief*] and 28.1(f)(4) [*Cross-Appeals–Time to Serve and File a Brief*] that would change the time for filing a reply brief to 21 days

VI. Report of the Advisory Committee on Evidence Rules – Judge William K. Sessions III

Information items:

1. Report on the symposium on hearsay reform held in April 2015
2. Report on proposed amendments published for public comment in August 2015
   - Rule 803(16) [*Hearsay Exception for Statements in Ancient Documents*]
   - Rule 902 [*Evidence that is Self-Authenticating*]
3. Possible amendments to the notice provisions in the Evidence Rules
4. Best practices manual for authenticating electronic evidence

VII. Report of the Advisory Committee on Civil Rules – Judge John D. Bates

Information items:

1. Report on the work of the Rule 23 Subcommittee [*Class Actions*]
2. Report on the work of the Appellate-Civil Subcommittee
   - Civil Rule 62 [*Stay of Proceedings to Enforce a Judgment*]
3. Report on the work of the Pilot Project Subcommittee

4. Education efforts regarding the Civil Rules Package effective December 1, 2015

VIII. Report of the Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta

A. **ACTION –** Approve and transmit to the Judicial Conference:

1. Amendment to Rule 1015(b) [*Cases Involving Two or More Related Debtors*] in response to *Obergefell v. Hodges*
2. Renumbering of and minor amendment to Official Form 20A (to become Official Form 420A) [*Notice of Motion or Objection*] and Official Form 20B (to become Official Form 420B) [*Notice of Objection to Claim*]
3. Amendment to Official Form 410S2 [*Notice of Postpetition Mortgage Fees, Expenses, and Charges*]
4. Request that the Judicial Conference be asked to allow the Advisory Committee to make non-substantive, technical, or conforming changes to Official Forms effective immediately, with subsequent report to the Committee and the Judicial Conference for their retroactive approval

B. **ACTION –** Approve publishing for public comment a proposed amendment to Rule 3002.1(b) [*Notice of Payment Changes*]

C. Information items:

1. Update on the chapter 13 plan form and op-out proposal
2. Possible amendments under consideration
   - Rule 4003(c) [*Exemptions–Burden of Proof*]
   - Rule 9037 [*Privacy Protection for Filings Made with the Court*]

IX. Report of the Administrative Office

A. Report on the Committee on Court Administration and Case Management's consideration of protection of cooperator information

B. Request for suggestions regarding aspects of the *Strategic Plan for the Federal Judiciary* that should receive priority attention over the next two years

C. Legislative report

X. Next meeting: June 6-7, 2016 in Washington, D.C.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	**Honorable Jeffrey S. Sutton** United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215
Reporter, Standing Committee	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members, Standing Committee	**Honorable Brent E. Dickson** Indiana Supreme Court 306 Indiana State House 200 West Washington Street Indianapolis, IN 46204 **Roy T. Englert, Jr., Esq.** Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, N.W. - Suite 411-L Washington, DC 20006 **Gregory G. Garre, Esq.** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Daniel C. Girard, Esq.** Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, CA 94108 **Honorable Neil M. Gorsuch** United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823

Members, Standing Committee (*cont'd*)	**Honorable Susan P. Graber** United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204 **Professor William K. Kelley** Notre Dame Law School P. O. Box 780 Notre Dame, IN 46556 **Honorable Patrick J. Schiltz** United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415 **Honorable Amy J. St. Eve** United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1260 Chicago, IL 60604 **Professor Larry D. Thompson** University of Georgia School of Law 212 Hirsch Hall Athens, GA 30602 **Honorable Richard C. Wesley** United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043 **Honorable Sally Yates** Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530 **Honorable Jack Zouhary** United States District Court James M. Ashley and Thomas W.L. Ashley United States Courthouse 1716 Spielbusch Avenue, Room 203 Toledo, OH 43604

Advisors and Consultants, Standing Committee	**Professor Geoffrey C. Hazard, Jr.** Hastings College of the Law 200 McAllister Street San Francisco, CA 94102 **Professor R. Joseph Kimble** Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933 **Joseph F. Spaniol, Jr., Esq.** 5602 Ontario Circle Bethesda, MD 20816-2461
Secretary, Standing Committee and Rules Committee Officer	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2016
Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Daniel C. Girad	ESQ	California	2015	2018
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
William K. Kelley	ACAD	Indiana	2015	2018
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Sally Quillian Yates*	DOJ	Washington, DC	----	Open
Jack Zouhary	D	Ohio (Northern)	2012	2018
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Secretary and Principal Staff: Rebecca Womeldorf 202-502-1820

* Ex-officio

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Honorable Jeffrey S. Sutton** United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215
Reporter, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459

Chair, Advisory Committee on Appellate Rules	**Honorable Steven M. Colloton** United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044
Reporter, Advisory Committee on Appellate Rules	**Professor Gregory E. Maggs** The George Washington University Law School 2000 H Street, N.W. Washington, DC 20052

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Sandra Segal Ikuta** United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621
Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	**Professor Michelle M. Harner** University of Maryland Francis King Carey School of Law 500 West Baltimore Street Baltimore, MD 21201

Chair, Advisory Committee on Civil Rules	**Honorable John D. Bates** United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
Reporter, Advisory Committee on Civil Rules	**Professor Edward H. Cooper** University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Associate Reporter, Advisory Committee on Civil Rules	**Professor Richard L. Marcus** University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	**Honorable Donald W. Molloy** United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
Reporter, Advisory Committee on Criminal Rules	**Professor Sara Sun Beale** Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
Associate Reporter, Advisory Committee on Criminal Rules	**Professor Nancy J. King** Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Solomon Oliver, Jr.**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Rebecca_Womeldorf@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3678
Fax 202-502-1755
Julie_Wilson@ao.uscourts.gov

Scott Myers
Attorney Advisor (Bankruptcy)
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1913
Fax 202-502-1755
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1313
Fax 202-502-1755
Bridget_Healy@ao.uscourts.gov

Shelly Cox
Administrative Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-4487
Fax 202-502-1755
Shelly_Cox@ao.uscourts.gov

Frances F. Skillman
Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945
Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Tim Reagan *(Rules of Practice & Procedure)* Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Timothy T. Lau** *(Evidence Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov

TAB 1

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Item 1 will be an oral report.

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TAB 2

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DRAFT MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 28, 2015 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting in Washington, D.C. on May 28, 2015. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber (by teleconference)
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Yates, Deputy Attorney General, represented the Department of Justice, along with Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., and Thomas Byron, Esq.

DRAFT

Other meeting attendees included: Professor R. Joseph Kimble, the Committee's style consultant; Judge Jeremy D. Fogel, Director of the Federal Judicial Center; Judge Michael A. Chagares, member of the Appellate Rules Advisory Committee and prior Chair of the CM/ECF Subcommittee; Judge John D. Bates, incoming Chair of the Advisory Committee on Civil Rules; Professor Troy A. McKenzie, former Associate Reporter for the Advisory Committee on Bankruptcy Rules.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney, Rules Committee Support Staff
Scott Myers	Attorney, Rules Committee Support Staff
Bridget Healy	Attorney, Rules Committee Support Staff
Frances Skillman	Paralegal Specialist, Rules Committee Support Staff
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order, reviewed the agenda, and thanked those involved in providing logistical support.

Judge Sutton welcomed Deputy Attorney General Sally Yates to her first Standing Committee meeting and thanked Elizabeth Shapiro for arranging a meeting for Judge Sutton, Dan Coquillette and Rebecca Womeldorf with DAG Yates at the Department of Justice on May 27, 2015. DAG Yates spoke on the importance of the good working relationship between DOJ and the Rules Committees and her plans to participate in the rules process along with her colleagues.

Judge Sutton introduced Judge John Bates, immediate past-Director of the Administrative Office, and incoming Chair of the Civil Rules Advisory Committee, and shared the sad news of Dan Meltzer's passing. Members shared remembrances and observed a moment of silence.

Judge Sutton reported on the March 2015 Judicial Conference Session and on the proposed amendments adopted by the Supreme Court and transmitted to Congress on April 29, 2015. These amendments will become effective on December 1, 2015, absent contrary congressional action. The proposed amendments include: Bankruptcy Rule 1007; Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55; and abrogation of Rule 84 and the Appendix of Forms.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Committee approved its January 8-9, 2015 meeting minutes, with minor technical amendments as well as insertion of an additional paragraph on page 12 concerning the discussion of Multi-District Litigation cases.**

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented three action items. The first two items have been under consideration by the Advisory Committee since 2012, and were previously authorized for publication: Rule 4, which deals with service of criminal process, and Rule 41, which deals with the judicial district where search warrants can be sought. After consideration of public comments, the Advisory Committee now seeks final approval of Rules 4 and 41.

Amendments for Final Approval

FOREIGN SERVICE: FED. R. CRIM. P. 4 – Judge Raggi reported that the proposed rule contains two prongs regarding how foreign service may be accomplished:

(i) under 4(c)(3)(D)(i), by effecting service in a manner authorized by the foreign jurisdiction's law, or

(ii) under 4(c)(3)(D)(ii), by any other means that give notice, including one stipulated to by the parties, letters rogatory or a similar request submitted under an international agreement, or as otherwise permitted under an applicable international agreement.

Judge Raggi reported that comments received were generally favorable, and discussed one adverse comment filed by a U.S.-based law firm. Judge Raggi noted that the Advisory Committee considered, but declined to require, prior judicial approval before service of a criminal summons could be made in a foreign country by "other means" pursuant to 4(c)(3)(D)(ii). Judge Raggi offered the unanimous recommendation of the Advisory Committee to approve the proposed amendment as published.

The Committee discussed the proposal. One member commented on the strong need for the proposed amendment, citing the experience of having foreign corporations sending counsel to monitor proceedings in the United States who were not authorized to accept service.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 4 as published for submission to the Judicial Conference for final approval.**

VENUE: FED. R. CRIM. P. 41 – Judge Raggi next reported on the proposed amendment to Rule 41's territorial venue provisions. Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create difficulties for the government when it investigates crimes where the location of the victim computer is known, but the source of the offending conduct is not known. Judge Raggi acknowledged the expectation that the government will investigate such crimes, and the Advisory Committee believed it better to give the government a venue to seek a warrant, rather than leaving the government to rely on allegations of exigent circumstances or harmless error after-the-fact.

Based on comments received, the Advisory Committee tailored its proposed amendment to address the two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The first scenario occurs when the

government seeks to search a particular computer with an unknown location, a situation increasingly common due to sophisticated anonymizing technologies that hide a perpetrator's true IP address, thus preventing agents from identifying the physical location and judicial district of the originating computer. Second, the government increasingly faces criminal schemes involving multiple computers located in multiple districts, such as the surreptitious infection of multiple computers with malicious software creating a "botnet" of compromised computers that operate under the remote control of an individual or group. Rather than going to every affected district, if the harm extends to five or more districts, the proposal would permit the government to apply for a warrant in any affected district.

The proposed rule generated many responses during the public comment period, including forty-four written comments from individuals and organizations, and the testimony of eight witnesses at the Advisory Committee's hearing in November 2014. Those opposing the amendment feared that the proposed rule relaxed the protections for personal privacy guaranteed by the Fourth Amendment. Multiple comments questioned whether remote searches could meet the Fourth Amendment's particularity requirement. Although the Advisory Committee believed that the proposed venue provision does not impact the duty to state with particularity the subject of a search, to address concerns the Advisory Committee added language to the Committee Note to emphasize that the amendment does not alter the government's Fourth Amendment obligations. The Advisory Committee also made plans to work with the Federal Judicial Center on judicial education. Judge Raggi explained that the revision to the caption of Rule 41, replacing "Authority to Issue a Warrant" with the new caption of "Venue for a Warrant Application" was intended to emphasize that the rule change was directed to venue only and did not substantively enlarge the "authority" to obtain a warrant, a misreading the old caption invited.

Judge Raggi explained that the amendment aims to mimic notice physical search requirements. The proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Advisory Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises, but reasonable efforts must nonetheless be made to provide notice to the person whose information was seized or whose property was searched.

After publication, the Advisory Committee added language to the Committee Note to explain the changes to the notice provisions and to respond to comments that criticized the proposed notice provisions as insufficiently protective. The addition draws attention to the other provisions of Rule 41 that preclude notice except when authorized by statute and provides a citation to the relevant statute.

The Advisory Committee voted to recommend the revisions to Rule 41 to the Committee, with one dissent. The dissenting member viewed the amendment as having important substantive effects, allowing judges to make ex parte determinations about core privacy concerns.

Discussion followed. One member pointed out that these searches are already being done. Although the amendment looks substantive, it simply articulates venue. The member commended Judge Raggi for taking a broad proposal from the government and narrowing it substantially to address the concerns

and comments raised. Another member spoke in support of the proposal, stating that the choice for the Committee was whether to establish a process rule or to leave the situation to Congress or to magistrates all over the country.

Another member spoke in favor of the amendment, but questioned the potential for forum shopping under the proposed rule. The Committee discussed the potential for forum shopping under any rule. DAG Yates talked about the availability of venue in more than one district under the current rules, and the benefit of the proposed amendment in allowing prosecution in the same district issuing the warrant.

Another member questioned the source of the proposal to allow a warrant to be sought in any affected district if five or more districts were impacted; why five? Judge Raggi acknowledged that the number was a compromise, and after the rule goes into effect experience with it may suggest that a different threshold would work better.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 41 as amended after publication, for submission to the Judicial Conference for final approval.**

Information Items

Electronic Filing – Judge Raggi noted that the Advisory Committee continues its work trying to make sure criminal rules for electronic filing parallel civil rules to the extent appropriate, while accounting for significant differences in criminal practice. A proposed amendment to the Civil Rules would mandate electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The proposed Civil amendment was of particular concern to the Advisory Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. The Reporters for the various committees continue to examine these issues and coordinate on behalf of all the rules committees in search of common language that would work in various contexts. The Advisory Committee will benefit from the opportunity to study the provisions now under consideration by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committees), so that it can determine how best to revise the Criminal Rules.

Rule 35 – Judge Raggi briefed the Committee on a request to amend Rule 35 to bar appeal waivers before sentencing. The Advisory Committee declined to proceed with the proposal.

Judge Sutton acknowledged this meeting as the last for Judge Raggi as Chair of the Advisory Committee. Judge Sutton noted Judge Raggi's many years of excellent service on the rules committees, and particularly her work with the Rule 12 amendments, which spanned seven years, and which she guided to a consensus vote. Judge Sutton also praised Judge Raggi's sense of care about the important line of when to amend a rule, and when not to. Members voiced appreciation for Judge Raggi's service.

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REPORT ON MULTI-COMMITTEE PROPOSAL TO AMEND "3-DAY RULE"

Amendments for Final Approval

COMPUTING AND EXTENDING TIME: FED. R. APP. P. 26(C), BANKRUPTCY RULE 9006(F), FED. R. CIV. P. 6(D), FED. R. CRIM. P. 45(C) – Judge Chagares provided background for the conclusion by the CM/ECF Subcommittee that the original basis for the "3-Day Rule" across various rules no longer applies in the computer age. The proposed parallel amendments to the civil, criminal, bankruptcy and appellate rules published for comment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. Eliminating the extra three days would simplify time computation.

Professor Beale discussed Criminal Rule 45(c), and concerns specific to criminal practice about shortening the time for service. Members were concerned that the three added days were particularly important for criminal practitioners because speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. Post publication, working from language proposed by DOJ, the Criminal Rules Advisory Committee endorsed an addition to the Committee Note that addresses the potential need to grant an extension of the time allowed for responding after electronic service. That new language has been added to the published Committee Note in each Committee's parallel proposal, as confirmed by Professor Cooper. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

The Advisory Committee also agreed to amend the caption of Rule 45(c) published for comment to eliminate the additional words "Time for Motion Papers," and to revise Rule 45 as published so that the text is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*."

The Chair noted that although the Advisory Committees other than the Criminal Rules Advisory Committee initially voted against the added Committee Note language, the concerns specific to the criminal context, as well as the desire for uniformity, outweighed the general preference against adding such language to committee notes.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, as amended, for transmission to the Judicial Conference.**

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Sessions referenced the Advisory Committee's report, set out in the memorandum dated May 7, 2015, with attachments. Judge Sessions relayed the unanimous request of the Advisory Committee to

publish two proposed rules for comment, both of which received a positive reception at the last Committee meeting.

Amendments for Publication

ANCIENT DOCUMENTS: FED. R. EVIDENCE 803(16) – Rule 803(16)'s hearsay exception for "ancient documents" provides that a document 20 or more years old that appears authentic is admissible for the truth of its contents. Judge Sessions explained that the rule has always confused authentication and reliability, and has been used infrequently. The Advisory Committee considered whether Rule 803(16) should be abrogated or amended in light of the development of electronically stored information. Because electronically stored information can be retained for more than 20 years, we could very well see a flood of unreliable documents coming in under this rule.

The Advisory Committee considered four proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. The Advisory Committee unanimously concluded that Rule 803(16) should be abrogated, because it allows for the introduction of unreliable evidence. Evidence in ancient documents that is reliable can be admitted under other hearsay exceptions.

One member noted that the amendment might seem to some to be a substantial change, but it is not. While the rule at common law may have had a legitimate basis, no need for the exception now exists and authentication of documents traditionally thought of as ancient is still available under the rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed abrogation of Rule 803(16), together with the Committee Note to explain the abrogation.**

AUTHENTICATION REQUIREMENTS: FED. R. EVIDENCE 902 – Judge Sessions next reviewed the proposed amendment to Rule 902 regarding authentication of electronic evidence. The Advisory Committee's ongoing study of the admissibility of electronic evidence has produced proposals to improve efficiency, including allowing certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial. The Advisory Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901, but only by calling a witness to testify to authenticity. The Advisory Committee concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness,

incurring expense and inconvenience – and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The proposed change should bring cost savings to the process.

Professor Capra noted that the proposals should be viewed under the low level of proof required to show authenticity. The proposals reduce costs associated with requiring a live witness. One member noted that many proposals reflect an ongoing effort to grapple with electronic evidence. More than one member asked for clarification of the "process that produces an accurate result" language in the proposed amendment. One member noted the distinction between a declaration that says "this is what it purports to be" versus "this is an accurate result."

Professor Capra noted that the proposed language reflects language already in the rules. The proposal does not change the standard or the method of authentication under the rules; it simply allows the proponent to make the necessary showing by declaration as opposed to live testimony. One member suggested that examples in the Committee Note would help to avoid confusion.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 902 to add subsections 902(13) and 902(14).**

At a later point in the meeting, Judge Sessions and Professor Capra offered an additional paragraph of language for the Committee Note accompanying the proposed amendment to Rule 902. The proposed paragraph provides two examples of what the rule covers, and what it does not. As Professor Capra explained, the examples to be added to the Committee Notes illustrate and emphasize the limited reach of the proposal; the certificate can be used only to show that the proffered item is authentic. Questions of reliability, hearsay, and probative value remain for the court and the factfinder. Subject to further comment from the Advisory Committee, Judge Sessions asked the Committee to approve the Committee Note as revised for publication. Several members voiced support for the revised Committee Note and stated the explanation would be helpful during the comment period.

Upon motion that the new language will be included in the Committee Note absent any further contrary input from the Advisory Committee, with a second, and on voice vote: **The Committee unanimously approved for publication for public comment the proposed revised Committee Note to accompany the proposed amendments to Rule 902.**

Information Items

Symposium on the Hearsay Rule and Its Exceptions – Judge Sessions reported that in conjunction with its Fall meeting on October 9, 2015, the Advisory Committee will hold a symposium on the hearsay rule at the John Marshall School of Law. The symposium will explore recent broad proposals to loosen the strictures of the federal rule against hearsay. Judge Posner has proposed to substitute most of the hearsay exceptions with an expanded version of Rule 807 (the residual exception) which render the admissibility of a hearsay statement dependent on a judicial finding of reliability under the particular circumstances presented. The symposium will include presentation of information and ideas by invited judges, lawyers and professors, and may provide a foundation for future recommendations regarding the hearsay rule and its exceptions.

Notice Provisions in the Federal Rules of Evidence – Judge Sessions noted that the Advisory Committee is thinking about addressing inconsistencies in the notice provisions of the Federal Rules of Evidence. Some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Two such provisions may be problematic, independently of any interest in uniformity. First, Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. The Advisory Committee is inclined to abrogate that unnecessary requirement that serves as a trap for the unwary, particularly given that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. Second, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not.

Best Practices Manual on Authentication of Electronic Evidence – To provide assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, the Advisory Committee has begun work with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported on six sets of proposed amendments offered by the Advisory Committee on Appellate Rules for consideration by the Standing Committee for final approval.

Amendments for Final Approval

INMATE FILINGS: RULES 4(C)(1) AND 25(A)(2)(C), FORMS 1 AND 5, AND NEW FORM 7 – Judge Colloton first introduced the proposed amendments designed to clarify and improve the inmate-filing rules. After studying the matter since 2007, the Advisory Committee believes the rules should be clarified in light of concerns expressed about conflicts in case law and ambiguity in the current text. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence – a declaration, notarized statement, or other evidence such as a postmark and date stamp – showing that the document was deposited on or before the due date and that the postage was prepaid. New Form 7 suggests a form of declaration that would satisfy Rules 4(c)(1) and 25(a)(2)(C). Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, the court of appeals retains discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

Judge Colloton called the Committee's attention to several changes after publication. After publication, the Advisory Committee decided to abandon its prior proposal to delete the legal mail system requirement from Rules 4(c)(1) and 25(a)(2)(C). Research by Professor Struve and comments received convinced the Advisory Committee that retaining the requirement to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped, thus avoiding unnecessary litigation over the timing of deposits. In addition, the Advisory Committee

revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to reflect comments received in an effort to make all three forms more user-friendly and to make the new form more accurate.

One member suggested clarifying Forms 1 and 5 by referring to "this" notice of appeal rather than "the" notice of appeal in the new notes to inmate filers; Judge Colloton accepted the suggestion as a friendly amendment. Another member questioned the procedure of relying upon convicted felons to swear under penalty of perjury as to the truth of their declarations as to timeliness. The Chair noted the tremendous variation among jurisdictions as to requirements. Judge Colloton observed that the Advisory Committee did not consider whether to require more by way of verification than the current federal rule, but that a litigant could challenge a suspicious verification.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to the inmate filing rules and related forms – Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7 – for submission to the Judicial Conference for final approval.**

TOLLING MOTIONS: RULE 4(a)(4) – Judge Colloton next reviewed the proposed amendment to Appellate Rule 4(a)(4) concerning tolling motions filed in the district court. Appellate Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The question is whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a district court mistakenly ordered an "extension" of the deadline for filing the motion, or if the opposing party did not object to the untimely filing. A majority of the circuits that have considered this question have ruled that such a motion is not "timely" for purposes of Rule 4(a)(4). The minority view holding otherwise stands in some tension with the Supreme Court's decision in *Bowles v. Russell*, which held that courts have no authority to create equitable exceptions to jurisdictional requirements.

The Advisory Committee feels that it is important to clarify the meaning of "timely" in Rule 4(a)(4) and that uniformity in this area is important. The proposed amendment adopts the majority view – *i.e.*, that post-judgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law.

After publication, one commenter argued that the proposed amended Rule, like the current version, sets a trap for unwary litigants, a concern discussed at length by the Advisory Committee in its deliberations. The Advisory Committee ultimately adhered to its judgment that the Rule should be amended to adopt the majority view. The Advisory Committee observed that the Committee Note includes examples to promote understanding of the Rule.

One member asked about the range of other options considered given the high percentage of cases litigated by pro se litigants and the reality that in a rare case a litigant's appeal could be dismissed as untimely even though the district court had allowed additional time for a motion. Judge Colloton discussed the policy choices faced by the Advisory Committee. Discussion followed concerning the factual scenario underlying the Supreme Court's decision in *Bowles*, where a district court told a litigant that the litigant had more time to appeal than the rule and statute actually permitted, and the

Supreme Court upheld the judgment of the Sixth Circuit finding the litigant's appeal untimely. The Advisory Committee's proposed rule would not change that result, and simply defines "timely." Discussion followed concerning possible ways to change the result in a *Bowles* scenario by rule.

Members discussed whether this is the rare instance where congressional amendment to the jurisdictional statute might be properly sought. One member noted in support of that possibility the growing number of pro se litigants and the change away from a system where most parties have lawyers. In light of the discussion, and at the request of a member of the Standing Committee, Judge Colloton agreed to put on the Advisory Committee's agenda further consideration of exceptions to appeal deadlines, whether by rulemaking or proposed legislation.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 4(a)(4) for submission to the Judicial Conference for final approval.**

LENGTH LIMITS: RULES 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6 – Judge Colloton next reviewed the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – approved unanimously by the Advisory Committee after post-publication changes – that would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page.

The genesis of this project was the suggestion that length limits set in terms of pages are subject to undesirable manipulation and in any event have been superseded by advances in technology. Given that briefs are already subject to type-volume limits, and that the Supreme Court employs type-volume limits, the Advisory Committee determined the suggestion was a sensible one, and embarked on selecting a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit – that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee considered information that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules in fact contained fewer than 280 words per page.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page – that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule. The published proposals add a new Rule 32(f) setting forth a list of items to be excluded when computing length.

Many appellate lawyers and certain judges opposed a reduction in the length limits for briefs, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on

the Advisory Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In reviewing the suggestion of commentators to withdraw the proposal, therefore, the Advisory Committee considered whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

As noted, the Advisory Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the current proposal now before the Standing Committee. The amendments would reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

The Standing Committee Liaison to the Appellate Rules Advisory Committee spoke in support of the compromise position, which was the result of a thorough, deliberative process, robust debate, and careful review of a considerable number of comments received. The process resulted in a compromise informed by voluminous comments received and many differing viewpoints.

One member expressed concern that the proposed changes attempt to solve a "non-problem" given the case-specific nature of whether a brief is too long, and this member also expressed reservations that the proposal builds lack of uniformity into the rules and invites motions for leave to file over-length briefs. This member agreed that the process was well-done and for that reason that member would not vote against the compromise but would likely abstain. Another member seconded concerns about uniformity and the difficulty of discouraging lengthy briefs by rule, but expressed support for the proposal because of strong belief that most briefs are too long.

Another member supported the proposal even though the member's circuit may opt out to avoid anticipated motions to file over-length briefs. As to concerns about lack of uniformity, lawyers can (and do) manage differences now. Circuits should not have to continue accepting briefs of a length that they think they do not need.

One member asked about the reaction of the appellate bar to the compromise proposal. Another member questioned how many circuits might opt out, and expressed concern about approving a rule when circuits might opt out. Judge Colloton declined to predict the reaction of the bar or what circuits would do. He noted that the proposal would go to the Judicial Conference, and the Chief Judges would be there and could react and express their views. Judge Colloton commented that the concerns voiced by members were considered carefully by the Advisory Committee, as they mirrored many comments received. On the uniformity point, Judge Colloton noted the absence of uniform length limits in the district courts.

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Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments related to length limits – Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – for submission to the Judicial Conference for final approval, with one abstention.**

One member of the Advisory Committee commended Judge Colloton for his handling of a difficult issue and brokering of compromise. Judge Sutton echoed praise for Judge Colloton and Professor Struve and for the process that produced the compromise. Professor Kimble noted his appreciation of the chart collecting length limits and encouraged similar efforts where appropriate. Judge Sutton endorsed the effort as one that improves access to justice, particularly for unrepresented litigants.

AMICUS FILINGS IN CONNECTION WITH REHEARING: RULE 29 – Judge Colloton next introduced the proposed amendment to Rule 29. The problem identified for the Advisory Committee was the absence of a national rule on timing and length of amicus briefs in support of a petition for rehearing. While some local rules do exist, given the uncertainty for practitioners, the Advisory Committee proposes amendments to establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. The amendments would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case. Either way, the new default federal rule would ensure that some rule governs the filings in every circuit. The published proposal would have set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). Amicus opposing the petition would have the same due date as that set by the court for the response.

In response to the public comments, the Advisory Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Advisory Committee also deleted the alternative line limit from the length limit as unnecessary.

One member spoke in favor of the proposal, noting his view that the selection of a particular length limit or filing deadline was not as important as providing practitioners definitive guidance. This member was one of the original proponents of addressing the issue through rulemaking.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 29 for submission to the Judicial Conference for final approval.**

RULE 26(C) – AMENDING THE "THREE-DAY RULE": RULE 26(C) – The Chair noted the approval of the proposed amendment to Rule 26(c) as part of the Committee's prior vote on the three-day rule package.

UPDATING A CROSS-REFERENCE IN RULE 26(a)(4)(C) – Judge Colloton next explained the proposal to amend Rule 26(a)(4)(C) to correct an outdated cross-reference. In 2013, Rule 13 – governing appeals as of right from the Tax Court – was revised and became Rule 13(a). A new Rule 13(b) – providing that Rule 5 governs permissive appeals from the Tax Court – was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to

"filing by mail under Rule 13(a)(2)." The Advisory Committee asks to amend Rule 26(a)(4)(C) to update this cross-reference with the understanding that the change is a technical amendment that can proceed to the Judicial Conference without publication upon approval from the Standing Committee.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 26(a)(4)(C) for submission to the Judicial Conference for final approval.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell addressed the intention to undertake an educational campaign concerning the Duke Rules Package approved by the Supreme Court, assuming that Congress allows the amendments to become effective December 1, 2015. These rules impact case management, discovery, electronically-stored information, and they encourage greater cooperation. The lesson of rulemaking is that rule changes alone do not change behavior. Judge Paul Grimm, Discovery Subcommittee Chair, will lead the effort, which will include articles to be read by bench and bar, presentations at judicial conferences, preparation of materials for presentation at other conferences, videos, and more. The FJC will help to educate judges and publicize the benefits that can come with aggressive case management consistent with the anticipated rule changes. Judge Fogel explained that the FJC's primary focus will be on three areas: training of new judges, national conferences scheduled for district judges next year, and video educational opportunities. Judge Campbell solicited input, during the meeting and after, on these efforts and noted that the plans for the educational effort will be formed over the next six months or so, and that educational efforts will continue into 2016.

The Chair reported that DAG Yates offered DOJ as a resource for educational efforts. Members discussed options for undertaking educational efforts, including using the local and federal bar associations and taking advantage of trainings for new lawyers for admission to the federal bar.

Judge Campbell next turned to two minor rule changes as to which the Advisory Committee seeks final approval.

Amendments for Final Approval

RULE 4(m) – Judge Campbell introduced the proposed revision to Rule 4(m) referenced in the meeting materials. The Committee approved the August 2014 publication of a proposed amendment of Rule 4(m), adding service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. The amendment corrects a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time period specified in Rule 4(m). This problem is recognized by the two clear exceptions: for service on an individual in a foreign country under Rule 4(f), and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit exception for service on a foreign corporation, partnership, or other unincorporated association, which the proposed amendment makes explicit.

RULE 6(d) – Judge Campbell noted the Advisory Committee's proposal regarding Rule 6(d) had been approved by the Committee.

RULE 82 – Judge Campbell referenced the Advisory Committee's last action item dealing with an amendment to Rule 82 to reflect the reality that one referenced statute no longer exists, and the venue statutes governing admiralty actions have been amended.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to Rules 4(m), 6(d), and 82 for submission to the Judicial Conference for final approval.**

Information Items

e-Rules – The Advisory Committee has been working toward publication of proposed rules on electronic filing, electronic service, and electronic certificates of service. There are dozens of provisions in the rules that would be affected, but there is a strong feeling that change is needed. Because continuing expansion of electronic communication binds these issues together, these drafts are presented as one package. There are issues that overlap the jurisdiction of other Advisory Committees, including whether and how to mandate electronic filing and service and how to treat pro se litigants. Detailed information on these topics is included in the meeting materials.

The discussion that followed surfaced the need for more detailed understanding of local court rules and standing orders regarding pro se electronic filing, both of which may vary substantially by jurisdiction. Other areas for exploration include the specifics of PACER use by pro se litigants, and potential issues of allowing access to those who are not officers of the court.

Rule 68 – The Advisory Committee continues to look at possible changes to Rule 68 – whether it should be revised to become more effective, left alone, or studied for abrogation. The Advisory Committee is examining state practices to see whether actual experience shows good results achieved under a different approach to offers of judgment.

Rule 23 Subcommittee – Judge Campbell reported that the Rule 23 Subcommittee chaired by Judge Dow has been very active and has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. The Subcommittee has participated in 15 events over the past six months and more are scheduled. The last look at Rule 23 was a seven-year project. The Advisory Committee hopes to suggest concrete proposals for publication at the Spring 2016 Standing Committee meeting.

Judge Campbell briefly reviewed the issues under consideration by the Subcommittee and invited suggestions about additional topics. Issues under consideration include: (1) settlement approval criteria; (2) settlement class certification and the wisdom of a new Rule 23(b)(4) permitting certification for purposes of settlement; (3) very challenging issue surrounding *cy pres* in class action settlements; (4) the role available to objectors in the class action settlement process, and the tricky task of writing a rule that allows "good" objectors while deterring "bad" objectors; (5) Rule 68 offers of judgment used to moot proposed class actions; (6) how issue classes should be managed; (7) a range of

notice issues, including possible substitution of e-notice for first-class mail, whether some form of notice should be required in (b)(1) or (b)(2) class actions, and other possible steps to make notice more effective and perhaps less expensive; (8) the concept of "frontloading," meaning the procedure to follow when the parties propose settlement before a class has been certified, so that the court has full information about the litigation and the proposed settlement to support a decision whether to give notice to the class of the proposed settlement and certification; and (9) the question of ascertainability.

The Chair noted the importance of identifying circuit splits that exist on the application and interpretation of Rule 23 and considering the potential for rulemaking in those areas, even if the Subcommittee declines to recommend pursuing certain issues through rulemaking.

The Subcommittee will host a Mini-conference on September 11, 2015 in Dallas, Texas, to explore potential amendments to Rule 23. The Subcommittee will invite 25 participants from diverse perspectives.

Requester Pays – As reflected in the Advisory Committee report, the Discovery Subcommittee continues to consider possible implementation of a "requester pays" system. Members of Congress asked the rules committees to continue to study this question. Information is being gathered to aid the Discovery Subcommittee chaired by Judge Grimm. The recent amendment package is important to the committee's consideration because like a "requester pays" regime, the proposed rule amendments aim to reduce the costs of civil litigation.

Manufactured Finality – These two projects of the Appellate-Civil Subcommittee began in the Appellate Rules Committee. In the end, the Civil Rules Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as "manufactured finality." The Advisory Committee concluded there is no need for national uniformity in this area, and each circuit is satisfied with its own rules.

Judge Colloton, speaking for the Appellate Rules Committee, said that although a member expressed concern about uniformity, the Committee had elected to table the matter for the time being, believing that any Rule amendment should originate in the Civil Rules Committee. Judge Sutton noted that having listened to discussion in both Advisory Committee meetings, there was not a consensus on a substantive direction to take if the rules committees were resolved to address the issue. If uniformity is a driver, perhaps the Supreme Court will resolve the issue.

Stays Pending Appeal – Subcommittee consideration of these questions is in mid-stream. One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay – 14 days – and the time allowed to make the motions that support a stay under Rule 62(b) – which is 28 days. Lawyers are not reporting a problem; lawyers apparently are working this out among themselves. One question is what problems would result from extending the automatic stay to 28 or 30 days, and whether those problems would be alleviated if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay. The central point made in Advisory Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money

judgments pending appeal. Ordinarily the parties work out a reasonable solution. Judge Campbell solicited views from the Committee. One member questioned whether stating more explicitly the availability of a work around to obtaining a supersedeas bond would have the effect of discouraging use of those bonds.

Pilot Projects – The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure. Judge Sutton addressed the desire to coordinate pilot project discussions with the CACM Committee and its current Chair Judge Hodges, and noted Judge St. Eve would be a great resource in a liaison role between the Rules Committees and CACM given her history of service on both.

Judge Sutton acknowledged the last meeting of Judge Campbell as Chair of the Civil Rules Advisory Committee and praised his decade of service to the rules committees, and his last four years as Chair of the Civil Rules Advisory Committee. He noted that Judge Campbell dealt effectively with all of the various cross currents of the Civil Rules Package, and, quite impressively, achieved unanimous consensus. The entire Civil Rules Package effort dignified the Rules Enabling Act process. Judge Campbell noted that the Civil Rules Package was a team effort.

LEGISLATIVE REPORT

Rebecca Womeldorf reported on legislation that may intersect with the work of the Committee, particularly the Advisory Committee on Civil Rules. Covered legislation included: patent legislation, the Lawsuit Abuse Reduction Act of 2015 ("LARA"), and the Fairness in Class Action Act of 2015. Discussion followed, particularly as to one aspect of potential patent legislation that would require designation of core versus non-core discovery, a topic that intersects with mandatory early disclosures and some of the issues discussed in connection with pilot projects under consideration. The ability of the rules committees to react in the case of legislative mandates was also discussed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta recognized the tremendous service of Troy McKenzie as Associate Reporter to the Advisory Committee and wished him well in his new position with the Office of Legal Counsel at the Department of Justice.

Judge Ikuta summarized the action items from the Advisory Committee as seeking the Committee's final approval of one proposed new rule, four rule amendments, and the last major group of forms that were revised as part of the Forms Modernization Project ("FMP"). The Advisory Committee also seeks approval of one proposal for publication. Judge Ikuta noted that none of the committee's action items was controversial, and referred to the Advisory Committee report and appendices for additional detail on the proposals and the forms.

DRAFT

Amendments for Final Approval

RULES 1010, 1011, AND 2002, AND PROPOSED NEW RULE 1012 (GOVERNING RESPONSES TO, AND NOTICES OF HEARINGS ON, CHAPTER 15 PETITIONS FOR RECOGNITION, ALONG WITH NEW OFFICIAL FORM 401) – The Advisory Committee asks for final approval as published of these amendments and additions to the Bankruptcy Rules, which are part of a project to improve procedures for international bankruptcy cases and to give those rules their own "home" in the Bankruptcy Rules. The Bankruptcy Rules were amended in response to the 2005 amendments to the Bankruptcy Code to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15 related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in international bankruptcy cases. The proposed Official Form 401 is a new petition form for commencing chapter 15 international cases. None of these changes generated any opposition.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rules 1010, 1011, and 2002, and proposed new Rule 1012, along with new official Form 401, for submission to the Judicial Conference for final approval.**

RULE 3002.1 (ALONG WITH OFFICIAL FORM 410A) – The Advisory Committee proposes a change to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) to ensure that debtors who attempt to maintain their home mortgage payments while they are in bankruptcy will have the information they need to do so. Rule 3002.1, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's home to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. The proposed change clarifies how the rule applies in various scenarios on which courts have disagreed. An accompanying change to Form 410A requires a creditor to provide loan payment history information to the debtor in a format that is both more beneficial to the debtor and easier for the creditor to prepare.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 3002.1, along with official Form 410A, for submission to the Judicial Conference for final approval.**

RULE 9006(f) (ELIMINATING THE 3-DAY RULE FOR ELECTRONIC FILING) – Judge Ikuta noted prior approval by the Committee, along with similar amendments to other rules.

FORMS MODERNIZATION PROJECT – Judge Ikuta announced the final set of forms from the Advisory Committee's Forms Modernization Project (FMP) was ready for consideration, along with minor revisions to modernized forms previously approved by the Committee.

Judge Ikuta explained one issue regarding the effective date of the modernized forms. When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time

as bankruptcy courts began using the redesigned case management system, known as the Next Generation of CM/ECF (NextGen). A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the roll-out of NextGen is proceeding more slowly than expected. Under the current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016, NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors using the modernized forms (about 70 percent of bankruptcy cases). By December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors using the modernized forms.

Notwithstanding the delays in the implementation of NextGen, the Advisory Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations support that decision. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even without the extra capability with the NextGen system. Second, if the modernized forms take effect on December 1, 2015, the AO will be able to build a backend database that will store the information from the modernized forms, rather than the old forms. This approach will not prevent the AO from capturing the 80 data points required by the 2005 bankruptcy legislation.

Judge Ikuta noted one wrinkle to implementing the modernized forms in 2015, and sought the guidance of the Committee. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project. The eSR program is linked to the current chapter 7 case opening forms. The eSR data-entry screens and database will not work with modernized forms. The AO estimates that by 2017 eSR will work with the new forms.

Because the Advisory Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asked the Standing Committee to seek approval of the following from the Judicial Conference:

a. To make the forms effective December 1, 2015.
b. To allow the Advisory Committee to continue to make minor typo-type changes to these forms even after Committee approval.
c. To recommend to the Judicial Conference that it allow specified chapter 7 case-opening forms to continue to be official forms for the eSR program in the Central District of California, New Jersey, and New Mexico bankruptcy courts until 2017.

One member observed this proposal was consistent with the implementation of NextGen and was the right recommendation under the circumstances.

One member noted the fortuity of having the clerk of the New Jersey bankruptcy court on the committee, and thanked the clerk for his valuable input.

Another member questioned the wisdom of specifying an effective date as opposed to leaving the provision open ended; after discussion, the member who raised the question moved the proposal as written to keep the hard target date.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the Advisory Committee's request to ask the Judicial Conference: to authorize the modernized forms as effective December 1, 2015; to allow the Advisory Committee to make minor, non-substantive revisions to the official forms before submitting them to the Judicial Conference; and to allow specified case-opening forms in effect on November 30, 2015 to remain official forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by pro se debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation system.**

Amendment for Publication

RULE 1006(6)(1) – The provision provides for the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing an amendment to Rule 1006(b)(1). The amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006(b)(1).**

Information Items

Stern Amendments in Light of *Wellness v. Sharif* – Judge Ikuta reported on the Supreme Court's decision in *Wellness v. Sharif*, which held that if parties consent, bankruptcy judges can resolve claims otherwise reserved to Article III judges. The Court held that implied consent may satisfy the consent requirement, but that an express-consent approach may be easier to implement. Judge Ikuta reported that the Advisory Committee would reconsider at its Fall 2015 meeting its pending *Stern* amendments – which required express consent and had been held in abeyance pending the Court's decision in *Wellness*. Discussion followed concerning the timing of submissions to the Court.

Chapter 13 Plan Form – Judge Ikuta next reported on the status of the committee's multi-year project to create an official chapter 13 plan form. The proposal was initially published in August 2013, and re-

published in August 2014 after revision in response to substantial comments received. Again, the Advisory Committee received many comments, most in opposition, and with one opposition signed by 40% of the bankruptcy bench. After reviewing the comments on the proposed chapter 13 plan form, the Committee determined that there is still significant opposition to this new form, and it voted not to seek final approval of the form and related rule amendments at this time. Instead, the Advisory Committee intends to give further consideration to a compromise proposal, suggested by a group of commenters, that would allow a district to opt out of the mandatory national form if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements.

Discussion followed concerning the decision to develop a compromise proposal to allow a district to opt out of using a national chapter 13 plan form if the district adopted a single local plan form that met certain criteria, which will be considered at the Advisory Committee's October 2015 meeting. The Advisory Committee is considering whether such a revised approach would require republication, given that variations on the proposed form had gone through two rounds of publication already. While the Advisory Committee has discussed this issue, it decided to defer making the decision about republication until the October 2015 meeting pending more feedback from the bankruptcy community.

Discussion of the merits of republication followed, including the implications of republication on the Rules Enabling Act process.

CONCLUDING REMARKS

Judge Sutton expressed gratitude and farewell to outgoing members Dean Colson and Judge Levi. Judge Sutton also recognized the 30th anniversary of service to the Committee by Professor Coquillette.

Judge Sutton concluded the meeting and announced that the Committee will next convene on January 7-8, 2016 in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary

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Unredacted Social Security Numbers in Federal Court PACER Documents

Joe S. Cecil, George Cort, Ashley Springer,
and Vashty Gobinpersad

Federal Judicial Center
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This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, the report does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Summary

This study found 16,811 instances of unredacted Social Security numbers of 5,031 individuals appearing in 5,437 documents filed in federal district and bankruptcy courts in November 2013 and available through the Public Access to Court Electronic Records (PACER) service. The presence of Social Security numbers for approximately 75% (4,021) of these individuals appears to violate rules adopted by the Judicial Conference. Moreover, 314 of the unredacted Social Security numbers included one or more failed attempts at redaction in which the Social Security number appeared on the document to be obscured but the Social Security number itself remained accessible in the metadata of the document. Another 123 unredacted Social Security numbers appeared in Bankruptcy Form 21, which should not be filed with the court record.

This replication of a preliminary study in 2010 used more powerful search tools to examine the text of almost 4 million PACER documents filed in federal district and bankruptcy courts and found more instances of unredacted Social Security numbers than found in the previous study. These more powerful search techniques account for the apparent increase in incidence of unredacted Social Security numbers. In fact, after taking into account differences in the search techniques, it appears that the incidence of unredacted Social Security numbers in documents filed in bankruptcy courts has decreased by almost half since 2009.

Background

In response to The E-Government Act of 2002,[1] the Judicial Conference of the United States adopted rules effective on December 1, 2007, intended to protect private individual information in publically accessible electronic federal court records.[2] These rules require that certain personal information that fails to meet specific exemptions be redacted from documents filed with the federal courts. Such information includes Social Security and taxpayer identification numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses.[3] The rules make clear that the responsibility for redaction of personal information rests with those who file documents with the courts and not the court clerks who accept the filings. The federal court electronic document filing system also was modified to display an enhanced message at login to remind attorneys of their obligation to redact private information from the documents that they file and to require attorneys to acknowledge this responsibility.[4]

In 2009, the Executive Committee of the Judicial Conference directed the Committee on Rules of Practice and Procedure to report on the operation of the privacy rules. The Committee's Privacy Subcommittee considered the findings of a preliminary 2010 empirical study by the Federal Judicial Center, conducted a miniconference at the Fordham School of Law, and reviewed surveys of judges, clerks of court, and assistant U.S. attorneys regarding their experiences with the operation of the privacy rules. While the Privacy Subcommittee found no general problems in the operation of the privacy rules, it recommended that "[t]o ensure

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[1] Pub. L. 107-347, § 205(c) (3) (requiring the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents").

[2] More specifically, the Judicial Conference adopted amendments to Appellate Rule 25 and adopted new Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1, each setting forth the requirements that those filing records with the federal court redact private information unless that information is exempt under the rules.

[3] This study and the preliminary 2010 study focused only on the presence of unredacted Social Security numbers in federal court records. In the course of this study we also found, but did not record, instances of other protected information that remained unredacted.

[4] The initial notice on electronic case filing reminding attorneys of their responsibility to redact personal information was developed in response to a recommendation of the Administrative Office Privacy Task Force in April 2009. The Judicial Conference, through its Privacy Subcommittee of the Rules Committee, further modified the message to provide links to the Federal Rules and to require the filing attorney to acknowledge this responsibility. Memorandum from Noel J. Augustyn, Assistant Director, Office of Court Administration, Administrative Office of the United States Courts, to Clerks of the United States Courts, Re: Enhanced Notice of Attorney Redaction Responsibility, July 23, 2009.

continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information." This report offers an overdue reassessment of implementation of those privacy protections.

The initial 2010 empirical study[5] found 2,899 federal court PACER documents with one or more unredacted Social Security numbers among the almost 10 million PACER documents filed in federal district and bankruptcy courts in a two-month period during 2009. Seventeen percent (491) of those documents appeared to qualify for an exemption from the redaction requirement under the relevant privacy rules, leaving 2,408 documents containing one or more unredacted Social Security numbers with no apparent basis for exemption under the rules. That initial report also noted that the search methodology employed was unable to detect Social Security numbers that might reside within nontext documents such as PDF documents stored as static images, and that the results likely underestimated the extent to which Social Security numbers and other private information appear in federal court documents.

This replication study differs from the initial 2010 study in three important ways. First, this study examined documents[6] filed in a one-month (November 2013) rather than two-month (November and December 2009) period. We believe that the filing practices were similar for those two months and do not attribute any differences in the findings of the two studies to reliance in this study on filings in a single month.

Second, this replication study identifies both the number of individuals whose unredacted Social Security numbers appeared, as well as the number of court documents containing such numbers. The 2010 study identified only the number of documents that included one or more unredacted Social Security numbers.

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[5] Memorandum from George Cort and Joe Cecil, Research Division, Federal Judicial Center, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010).

[6] We use the term "document" to refer to a single electronic document as identified in the federal courts' PACER system. Such a document is often composed of several individual submissions to the court, such as a motion and attached exhibits. Especially large filings may be broken into two or more PACER documents for easier access. This is especially common in bankruptcy filings.

Third, and most importantly, this study also identified unredacted Social Security numbers appearing in documents initially filed as scanned images. Such documents were reprocessed by an optical character reader to transform the scanned images into searchable texts. The initial 2010 study identified only Social Security numbers in PACER documents that were originally filed in a text-searchable Social Security number format (i.e., 123-45-6789) without such reprocessing, thereby failing to detect Social Security numbers in documents that were filed as scanned images.[7] The specific research methods relied on in this study are set forth in Appendix A.

Although the Judicial Conference rules seek to protect a wide range of personal information in court records, we examined only the occurrence of unredacted Social Security numbers, as well as those financial account numbers that follow a Social Security number format. We did not attempt to identify the occurrence of unredacted names of minor children, financial account numbers in other formats, dates of birth, and home addresses in criminal cases, all of which are protected under the rules. However, we did notice instances of each of these types of unredacted protected information during our review of the documents.

[7] As noted in the original study, "The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to detect Social Security numbers that might reside within such documents." (Page 2).

Findings

Tables 1 and 2 below present the findings of our effort to identify unredacted Social Security numbers in PACER documents filed in federal district and bankruptcy courts. As indicated in Table 1, we found 16,811 separate instances of unredacted Social Security numbers among the 3,900,841 PACER documents filed in November 2013. Closer examination revealed that these instances involved Social Security numbers for just over 5,000 different individuals, with some individual Social Security numbers appearing multiple times in one or more court documents. Individual Social Security numbers appear in district court documents (including both civil and criminal case documents) and in bankruptcy court documents in approximately equal numbers, 2,498 and 2,533, respectively. However, far more documents are filed in bankruptcy courts.[8] When we examined the first occurrence of an unredacted Social Security number in those documents where they were found, approximately 20 percent overall appeared to qualify for an exemption from the redaction requirement, with a somewhat higher rate of exemptions in documents filed in district courts.

Table 1: Unredacted Social Security Numbers (SSNs) in PACER Documents

	Total	District Courts	Bankruptcy Courts
Instances of SSNs	16,811	7,093	9,718
Unique Unredacted SSNs	5,031	2,498	2,533
• *First Occurrence Exempt from Redaction*	1,010	602	408
• *First Occurrence Not Exempt from Redaction*	4,021	1,896	2,125

[8] We began our task by conducting electronic searches of all 2,725,788 bankruptcy court and 1,175,053 district court PACER documents filed in November 2013.

As indicated in Table 2, these 16,811 instances are scattered across 5,437 PACER documents. Some of these documents contained numerous instances of unredacted Social Security numbers. Such instances were more common in bankruptcy court documents, which differ from district court documents in that the forms, exhibits, and attachments often include financial account numbers and other personal information for the bankruptcy filers, and occasionally for the creditors as well. A particular problem arises when the bankruptcy involves failure of a business enterprise and former employees are listed as individual creditors, sometimes with individual Social Security numbers appended along with other payroll information. In one such case we found over 2,000 instances of unredacted Social Security numbers of former employees (with some numbers appearing repeatedly) in a single bankruptcy court document. In another case hundreds of unredacted Social Security numbers appeared in a single document, comprising almost all of the unredacted Social Security numbers found in that bankruptcy court.

Table 2: PACER Documents Containing One or More Unredacted Social Security Numbers*

	Total	District Courts	Bankruptcy Courts
Including One or More Unredacted SSN(s)	5,437	2,345	3,092
Including One or More Likely Nonexempt Unredacted SSN(s)	2,974	1,634	1,340

* This measure counts individual PACER documents, which may comprise parts of a single large filing that is divided into several PACER documents to ease user access.

Unredacted Social Security numbers in district court civil and criminal documents tend to show up in exhibits, depositions, and interrogatories. In criminal cases, Social Security numbers often appear in judgment and sentencing orders. Social Security numbers in district court documents appear somewhat more likely to qualify for an exemption from the redaction requirement under the rules. In the end, approximately the same number of documents with

nonexempt unredacted Social Security numbers appeared in both district court cases and bankruptcy cases (1,634 and 1,340 cases, respectively).

We noticed several odd patterns in court documents with unredacted Social Security numbers. At least 314 of the unredacted Social Security numbers represent a failed effort by the document filer to redact the number from the court document (52 SSNs in district court documents and 262 SSNs in bankruptcy court documents). Such failed efforts included strikeovers, scratch-outs, blackouts, and use of word processing applications that remove sections of text. Despite these redaction efforts, our electronic text search program detected the full Social Security number. Of particular concern is the apparent use of word processing redaction techniques that retain the Social Security number in the metadata when the document is converted to PDF for filing in court. The full Social Security number reappears when the apparently redacted text is cut and pasted into a word processing document. As noted, such failed efforts to redact individual Social Security numbers can be especially harmful in bankruptcy records, where a single document may contain a lengthy list of individual creditors, such as the employees of a failed business enterprise. For example, we found 221 individual Social Security numbers in a single bankruptcy court document in which the Social Security number appears in the metadata of the document despite the filing party's effort to block out those numbers.

The 123 instances of unredacted Social Security numbers appearing on *Bankruptcy Form 21: Statement of Social Security Number or Individual Tax Identification Number* are a specific source of concern. This form requires the debtor to enter the unredacted Social Security number, but the form itself is not supposed to be filed as part of the court record. Yet, forms with unredacted Social Security numbers often are combined with numerous other documents into a single bankruptcy document filing.

We also made a preliminary assessment of the basis for an exemption from the redaction requirement based on information in the specific PACER document containing the Social Security number. Often we were not able to interpret the role of such a document in the larger context of the litigation, and may not have recognized the basis for an exemption when it was not apparent on the face of the document. For example, often we were unable to identify the party filing the document based on the document alone and were, therefore, sometimes unable

to identify documents filed by some *pro se* litigants who might have waived the redaction requirement.

As indicated in Table 1 and presented in greater detail in Table 3 below, just over 1,000 of the unredacted unique Social Security numbers found in this study appear to qualify for an exemption from the redaction requirement under the privacy rules adopted by the Judicial Conference. The remaining 4,000 unredacted Social Security numbers, appearing in approximately 3,000 court documents (see Table 2), are in apparent violation of the privacy rules adopted by the Judicial Conference.

Table 3: Individual Social Security Numbers Likely Exempt from Redaction Requirement

Source	Total	District Court	Bankruptcy Court
All	1,010	602	408
Non-attorney Bankruptcy Preparer	357	1	356
Record of a State Court Proceeding	193	168	25
Criminal Investigation	118	118	0
Charging Document/Affidavit	86	86	0
Apparently Pro se	82	74	8
Arrest/Search Warrant	65	64	1
Administrative or Agency Proceeding	58	48	10
Court record filed before Dec. 2007	26	24	2
Order Regarding SS Benefits	20	18	2
Filing Attorney SSN	3	0	3
Forfeiture Property Account Number	1	1	0

The pattern of exemptions from the redaction requirement differs greatly between district court and bankruptcy documents. The most common exemption, accounting for more than a third of all exemptions, was the including of a Social Security number for a non-attorney

bankruptcy petition preparer. This number is required by statute to appear on the bankruptcy document in unredacted form.[9]

The second most common exemption to the redaction requirement involved Social Security numbers appearing as part of a record of a state court proceeding. Such records often involved an earlier state court decision in a criminal case or a family law matter. We found numerous exempt unredacted Social Security numbers in criminal cases appearing in criminal investigation reports, arrest and search warrants, charging documents, and affidavits. We also found individual Social Security numbers in 82 documents that appear by the nature of the filing to be documents filed by *pro se* litigants. Such instances may be more accurately regarded as a waiver of the privacy protection by the *pro se* filer.

[9] 11 U.S.C. § 110.

Comparison with 2010 Study Findings

The previous 2010 study used different metrics and a different search methodology, making a comparison between the two studies somewhat difficult. Nevertheless, the greater incidence of unredacted Social Security numbers found in this study requires additional explanation.

The 2010 study searched almost 10 million PACER documents filed during a two-month period (November and December 2009) and found 2,899 individual PACER documents with one or more unredacted Social Security numbers. This study searched almost 4 million PACER documents filed during a one-month period (November 2013) and found 5,431 individual PACER documents with one or more unredacted Social Security numbers. While it may appear that the number of federal court PACER documents with unredacted Social Security numbers has increased since the 2010 study, in fact the greater number found in this study is due to the more thorough search methodology used. When the search methodology used in 2010 is used to examine 2013 PACER documents, the incidence of documents with one or more unredacted Social Security numbers appears to have decreased over time, especially in bankruptcy courts.

As noted earlier, the current search methodology, unlike that of the previous study, allows detection of Social Security numbers in PACER documents initially filed as scanned images. This study reprocessed scanned documents through an optical character reader, thereby transforming those scanned images into searchable text and allowing identification of unredacted Social Security numbers that had previously escaped detection. The previous study detected only those Social Security numbers that appeared in searchable text documents and overlooked numbers in documents filed as scanned images. The ability of this study to search the text of image files allowed identification of Social Security numbers appearing as an unbroken series of nine numbers as well as those following the typical format with embedded dashes. These differences allowed a more thorough examination and thus a more accurate understanding of the extent of unredaction.

When we examine the recently filed court records using the older search methodology that did not include reprocessing with the optical character reader, it becomes apparent that the increase in incidence of unredacted Social Security numbers found in this study is due to the improved search methodology and not a change in filling practices in the courts. As indicated in

Table 4, after reprocessing the imaged documents, this study found a total of 5,437 PACER documents with one or more unredacted Social Security numbers. Examining the same PACER documents using the older methodology found only 757 PACER documents with unredacted Social Security numbers.

Table 4: Identification of Social Security Numbers Using Old and New Search Methodologies

	2013 Documents Using New Search Methodology	2013 Documents Using Old Search Methodology	2009 Documents Using Old Search Methodology
Total Court Documents	3,900,841	3,900,841	9,830,721
Total Docs with 1+ SSNs	5,437*	757	2,899
Ratio	1:717	1:5,153	1:3,391
Bankruptcy Court Documents	2,725,788	2,725,788	7,738,541
Bankruptcy Docs with 1+ SSNs	2,345*	419	2,244
Ratio	1:1,162	1:6,505	1:3,448
District Court Documents	1,175,053	1,175,053	2,092,080
District Docs with 1+ SSNs	3,092*	338	655
Ratio	1:380	1:3,476	1:3,194

*These counts of PACER documents filed in November 2013 with one or more unredacted Social Security numbers include those instances of unrelated Social Security numbers that appeared in documents filed as scanned images, and unredacted Social Security numbers that appeared without dashes separating the segments of the Social Security number. Such numbers were not detected using the older search methodology used in the previous study.

Of particular interest is the apparent drop in the likelihood of finding unredacted Social Security numbers in bankruptcy court documents. As indicated in Table 4, when we use the

older search methodology to allow a meaningful comparison, the likelihood of a bankruptcy court document having one or more unredacted Social Security numbers has decreased by almost half (from 1 in 3,448 documents in the 2010 study to 1 in 6,505 documents in the current study). District court documents show only a modest decrease in the likelihood of a document including one or more unredacted Social Security numbers.

Of course, these findings also mean that the incidence of unredacted Social Security numbers in PACER documents scanned as images was far greater in 2009 than suggested by that earlier report. While the presence in court documents of any private information that should be redacted under the rules is cause for concern, this study also suggests that the federal courts have made progress in recent years in reducing the incidence of unredacted Social Security numbers in federal court documents, especially in bankruptcy court documents.

Appendix A: Methodology

We sought to identify recently filed federal court documents containing one or more unredacted Social Security numbers. The Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure (see Appendix B) require redaction of Social Security numbers, taxpayer-identification numbers, birth dates, the names of minors, financial account numbers, and, in criminal cases, home addresses. Our study sought to identify only documents containing Social Security numbers, including Social Security numbers designated in the document as taxpayer identification numbers and financial account numbers. This study did not examine documents filed in appellate cases or filed in paper form.

We identified and downloaded a total of 3,900,841 individual PACER documents using a computer scripting language to query federal court electronic case management data in the district and bankruptcy courts' CM/ECF databases. The Structure Query Language (SQL) program identified all documents filed in the district and bankruptcy courts in November 2013. We excluded all sealed court records and other documents that were designated as unavailable on the Public Access to Court Electronic Records (PACER) service.

After downloading the documents we used Adobe Acrobat software to perform optical character recognition (OCR) on the individual documents to convert any static PDF characters into machine-readable text. A total of 3,063,235 PACER documents were modified as a result of the OCR. All documents from one bankruptcy district were excluded from the analysis because the documents were not maintained in a format that allowed use of the OCR program. An additional 27,424 PACER documents (less than 1% of the total number of documents) were excluded because of a variety of problems that arose while trying to use the OCR program. We found a few files in almost every district that could not be read by the Acrobat OCR or search program. After searching the files in a district we would receive a message such as "Search has skipped 137 files because either the files are corrupt or you don't have permission to open them." In addition to indicating that some of these files had restricted access or were corrupt and unable to be opened, we believe this message also indicated that some of these files may have

been saved in an older version of Acrobat or had embedded graphics defeating the search program.

Using functionality built into Adobe Acrobat we were able to detect Social Security number patterns (i.e., 123-45-6789) that might reside within such documents. We also detected unbroken nine-digit strings of numbers near text that included the words "Social Security" or "SSN."

We then examined the search output files and visually reviewed over 17, 205 court documents to determine if the string of characters appeared to be a valid Social Security number. Where multiple numbers appeared in a single document, we examined each number looking for information indicating that it was in fact a Social Security number. For example, multiple Social Security numbers may appear in a bankruptcy filing for a business in which the former employees are listed as individual creditors.

Numerous such instances were not Social Security numbers. For example, we found such a pattern of digits in misspecified telephone numbers and extended zip codes. We found such patterns in numbers that were specifically designated as nonfinancial account numbers, claim numbers, model numbers, grievance numbers, real estate parcel numbers, bar membership numbers, and student ID numbers. In some instances such numbers may have been derived from an individual's Social Security number, but unless the context made clear that the number was a Social Security account number or a financial account number, we did not code the value as falling within the privacy protection of the rules. Nine-digit numbers following the typical Social Security number pattern were often found after the name of an individual, and that alone with no contrary designation was coded as a Social Security number. For example, such numbers following a name on a pay stub in a bankruptcy proceeding were regarded as Social Security numbers. We also coded such numbers designated "tax identification numbers" in income tax filings as Social Security numbers.

Social Security numbers were then reviewed in the context of the document to determine whether the entry qualified for an exemption to the privacy protection under the rules. While there was broad agreement among the coders regarding whether an entry qualified as a Social Security number, there was less agreement regarding whether such an entry qualified for one or more exemptions. Such a determination often required an assessment of the context of the

document in which the Social Security number appeared. This assessment became difficult when a single large court document was broken into two or more parts to ease the public through the PACER system. For that reason, we construed the exemptions liberally, coding an entry as exempt whenever there was a reasonable likelihood that such a document might qualify for exemption.

The exemptions under the various rules were transformed into the following coding categories and assigned to the unredacted Social Security numbers:

0 = Valid SSN with no apparent exemption
1= Not a SSN

Apparent Exemptions:
2 = Record of a state court proceeding
3 = Non-attorney bankruptcy preparer
4 = Apparently pro se filing (suggesting waiver)
5 = Record of administrative agency proceeding
6 = SSN of attorney filing document
7 = Criminal charging document/affidavit
8 = Court record filed before December 2007
9 = Criminal arrest/search warrant
10 = Criminal investigation
11 = Order regarding SS benefits
12 = Forfeiture property account number

Appendix B: Federal Procedural Rules Protecting Individual Privacy

Federal Rule of Civil Procedure Rule 5.2—Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rule of Criminal Procedure Rule 49.1—Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record is not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases. A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rules of Bankruptcy Procedure Rule 9037—Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule; and

(6) a filing that is subject to § 110 of the Code.

(c) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) Protective Orders. For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) Option for Additional Unredacted Filing Under Seal. An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) Waiver of Protection of Identifiers. An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

TAB 4

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

DATE: December 14, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on September 28, 2015, in Seattle, Washington. This report discusses briefly the following information items:

(1) the Committee's continuing consideration of Rule 49, governing filing and service, including electronic filing;

(2) the Committee's decision to study further suggested amendments to several rules:

- Rule 12.4(a)(2) (government disclosure of organizational victims);
- Rule 15(d) (deposition expenses); and
- Rule 32.1 (procedural rules for revocation and supervised release);

(3) the Committee's decision not to pursue suggested amendments to Rules 6 and 23 of the Federal Rules of Criminal Procedure.

II. Rule 49: Electronic Filing, Service, and Notice

The Committee's attention to Rule 49 is part of an inter-committee project to develop rules mandating electronic filing, service, and notice, with appropriate exceptions. Coordination between the Civil and Criminal Rules Committees has been especially critical because Criminal Rule 49 (b) and (d) now provide that service and filing are to be made the "manner provided for [in] a civil action."[1] Thus changes in the Civil Rules will govern filing and service in criminal cases as well. Additionally, the Rules Governing Section 2254 and 2255 Cases provide that filing and service in these actions are governed by the Rules of Civil Procedure. The Criminal Rules Committee has traditionally had the responsibility for the Rules Governing Section 2254 and 2255 Cases.

It became clear last spring that the Civil and Criminal Rules Committees were not in agreement regarding the optimal default rule regarding electronic filing by pro se parties. The Civil Rules Committee favored a rule requiring all parties to file and serve electronically unless exempted for good cause or by local rule. The Criminal Rules Committee disagreed, concluding unanimously that the default rule for pro se defendants in criminal cases and pro se prisoners filing actions under §§ 2254 and 2255 should be filing and service outside the CM/ECF system. Members noted that the local rules in most districts do not now allow pro se defendants and prisoners to file electronically, and they identified many serious problems that would occur if pro se defendants and prisoners were expected to file, serve, and be served electronically in criminal cases and actions under §§ 2254 and 2255. These problems were described in the Committee's May report to the Standing Committee. I will not repeat that discussion here, but the pertinent portion of the May report is included, *infra,* as an appendix to this report. The Criminal Rules Committee recognized that districts could opt out of a national rule by adopting local rules exempting pro se criminal defendants from electronic filing, but the Committee opposed a national rule that almost all districts would need to modify by local rule.

The Civil Rules Committee displayed admirable flexibility, accommodating the concerns of the Criminal Rules Committee by altering its working draft in April to limit the default rule requiring electronic service and filing to represented parties. But the discussion of these issues and the process of inter-committee negotiation led the Criminal Rules Committee to consider a foundational question: whether the same rules should continue to govern filing and service in civil and criminal cases.

Discussions in the Civil and Criminal Rules Committees revealed that the optimal default rules for electronic filing and service in civil proceedings might be different from the optimal rules for filing and service in criminal prosecutions and actions brought by prisoners under §§ 2254 and 2255. There are critical differences between these proceedings that bear directly on

[1] Rule 49(b) refers to "the manner provided for a civil action," and (d) refers to "a manner provided for in a civil action."

the rules governing filing and service. Accordingly, the Committee recognized that there would be advantages to severing the linkage between the Civil and Criminal Rules, and providing stand-alone rules for filing, service, and notice in the Rules of Criminal Procedure and the Rules Governing Actions Under Sections 2254 and 2255. Severing the automatic linkage would allow the rules governing criminal prosecutions and habeas actions to be tailored to the distinctive nature of those proceedings. It would also free the Civil Rules from the constraints imposed by the need to accommodate concerns specific to criminal proceedings. Finally, a stand-alone Criminal Rule would allow federal prosecutors and defenders to consult the Rules of Criminal Procedure to determine the requirements for filing, service, and notice, rather than requiring them to consult two sets of rules. Accordingly, the Rule 49 Subcommittee was given the task of exploring the feasibility of drafting a stand-alone version of Rule 49.

At the Committee's September meeting, the Rule 49 Subcommittee reported its tentative conclusion in favor of severing the link to the Civil Rules governing filing and service and revising Rule 49 to serve as a stand-alone rule governing filing, service, and notice. The Subcommittee provided a discussion draft and solicited comments on various drafting issues that would need to be resolved in a stand-alone rule. The Committee agreed that the Subcommittee should draft a stand-alone version of Rule 49 and provided input on various drafting issues. Following the September meeting, the Rule 49 Subcommittee held two teleconferences.

Although the Rule 49 Subcommittee is considering a long list of technical issues, one illustrates how differences between civil and criminal litigation may warrant different rules for filing and service. Only the government and the defendant(s) are parties to a criminal case, but the reporters developed a list of nonparties that may be permitted or required to file certain motions or other pleadings in a criminal prosecution.[2] The Subcommittee is considering whether Rule 49 should address such nonparties,[3] and, if so, what the default rule should be for filing and service. The Subcommittee anticipated that the default rule might treat nonparties like parties in criminal cases, requiring electronic filing by those who are represented, absent a showing of good cause or local rule permitting paper filing. However, as our clerk of court liaison has explained, the architecture of CM/ECF system treats civil and criminal cases–and third parties in such cases–very differently. The CM/ECF system is hardwired to allow only two parties in a criminal case: the United States and the defendant(s). Anyone with a CM/ECF login and password can, in theory, file in any civil or criminal case. But the architecture of the system

[2] This includes, for example, victims who may present victim impact statements or assert other rights, material witnesses who seek to be deposed and released, third parties claiming an interest in property the government is seeking to forfeit, and news media seeking access to documents or proceedings.

[3] The current Rule 49(a) addresses only parties. During restyling, the effort to convert Rule 49(a) from a passive construction to the active voice deleted language that previously required all parties to be served with any motions or similar pleadings. A revision of Rule 49 to address electronic filing will also allow the Committee to reverse this unintended substantive change.

allows options in civil cases that are not available in criminal cases. In a civil case, a registered user can add a party (e.g., an intervener) to the case. A criminal case does not provide a registered user the ability to add a party. So even a registered user (such as a lawyer representing a victim or a news media organization) with a CM/ECF login cannot file in a criminal case unless he lists himself as an attorney for either the government or the defendant(s).

If Rule 49 is amended to delete the provisions incorporating the civil rules on filing and service, the new stand-alone Criminal Rule will likely diverge in several respects from Civil Rule 5. The Committee is keenly aware that inter-committee consultation is essential throughout the drafting process. Professor Ed Cooper (the reporter for the Civil Rules Committee) and members of that Committee have been participating in the Rule 49 Subcommittee Conference calls; they have also provided extensive feedback and advice to the reporters. This close consultation, followed by the publication process and the receipt of public comments, should help to identify any unanticipated problems that might arise from new language or changes in the organization of the Criminal Rule. The Subcommittee's intensive focus on Rule 49 has also had an unanticipated benefit, highlighting possible improvements in language that Professor Cooper thinks may be incorporated in the parallel drafts of the filing and service rules under consideration by the other advisory committees.

Although this issue cannot be fully debated and decided until the Rule 49 Subcommittee concludes its work and presents a final proposal, the Committee may wish to request the Standing Committee's approval to publish two alternatives: a stand-alone version of Rule 49, amended to omit references to the Civil Rules, and a revision of Rule 49 that would continue to require that filing and service comply with the Civil Rules, specifying exceptions as needed.

III. Suggested Amendments Under Consideration

The Committee had an initial discussion of several suggested amendments that were referred to Subcommittees for further discussion or placed on the Committee's study agenda to await further developments.

A. Rule 12.4(a)(2)

Rule 12.4(a)(2), which governs the prosecution's disclosure obligations to the court, provides:

> **(2)** ***Organizational Victim***. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

The Department of Justice presented two reasons for reconsideration of the notice requirement regarding organizational victims. First, the Code of Judicial Conduct was significantly amended in 2009, and it no longer treats all victims entitled to restitution as parties. Since the purpose of the rules was to require the disclosure of information necessary to assist judges in making recusal decisions, a change in the recusal requirements may warrant a parallel change in Rule 12.4. Second, there are some cases in which it is difficult or impossible for the government to provide the notification required by the current rule. For example, in some antitrust cases there may be hundreds or thousands of corporate victims. Providing the notification required for each of them, even if possible, would be extremely burdensome.

After initial discussion, there was agreement that a subcommittee should be appointed to study a possible amendment to address these problems. Because the Appellate Rules Committee has discussed whether it should amend its own rules to adopt a provision parallel to Rule 12.4(b)(2), consideration of this proposal should be done in consultation with the Appellate Rules Committee.

B. Rule 15(d)

Rule 15(d) designates the party responsible for deposition expenses. The Department of Justice brought to the Committee's attention an inconsistency between the text of the rule and the committee note. This inconsistency, the Committee learned, had been noted in the minutes of Committee meeting on at least one previous occasion, but no action taken at that time. Action may be warranted at this time, however because defendants in recent cases have urged courts to follow the committee note rather than the text. The Department is concerned that the inconsistency may now be affecting the outcome of cases.

Discussion focused on several points. First, the Committee was reminded that committee notes cannot be amended unless the text of a rule is amended. Second, there is some interplay with statutory provisions, including the Criminal Justice Act and 18 U.S.C. § 4285. There are also financial implications for different branches of government.

A subcommittee was appointed to study the issues and make a recommendation to the Committee at its April meeting.

C. Rule 32.1

Judge Susan Graber wrote to the Committee suggesting that it consider an amendment to Rule 32.1, which governs the procedures for revoking or modifying probation or supervised

release. Her letter brought to the Committee's attention two cases[4] from the Ninth Circuit in which the court imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. She suggested that the Committee consider whether it would be desirable to address these issues in the text of Rule 32.1.

Rule 32.1 reflects the development of a body of law regarding the procedural rights of parolees, probationers, and prisoners on supervised release. The Rule was created in 1979 to implement several decisions of the Supreme Court holding that due process required a hearing, and it was amended in 2002 and 2005 to include additional procedural rights in response to decisions in the lower courts. However, Rule 32.1 does not address all of the issues that are covered in Rule 32, which specifies the procedures for sentencing and judgment. In some cases in which the defendant was being sentenced for violating the terms of his supervised release the Ninth Circuit has drew upon Rule 32 to address these gaps.

In *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), the court of appeals vacated the consecutive sentence the district court had imposed and remanded the case because the district court had not allowed the government an opportunity to address the court on the sentence to be imposed upon revocation. The court began by comparing Rules 32 and 32.1. In contrast to Rule 32(i)(4)(A)(iii), which provides that "[b]efore imposing sentence, the court must . . . provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney," Rule 32.1 grants a defendant the right to make a statement but is silent as to whether the government must also be given an opportunity to do so. Id. at 1112. The court concluded that "[w]hen Rule 32.1 is silent with respect to the matters that must be considered by a district court in imposing a sentence for violating the terms of supervised release, Rule 32 may be used to 'fill in the gap' in Rule 32.1." *Id.* at 1113.

The *Urrutia-Contreras* court then considered whether the rationale for allowing the government to make a statement at sentencing was applicable in proceedings under Rule 32.1. It concluded that "like the defendant's right to allocute and the probation officer's recommendation, the government's position with respect to the sentence to be imposed for violating the conditions of supervised release is an important factor for the sentencing court to consider and include in its reasoning." *United States v. Booker*, 543 U.S. 220 (2005), requires the district court to consider and discuss the sentencing factors contained in the Sentencing Guidelines and 18 U.S.C. § 3553(a) when imposing a sentence, and this requirement "cannot be

[4] Judge Graber wrote about *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), and *United States v. Whitlock*, 639 F.3d 935, 940 (9th Cir. 2011). This report (and the Committee's discussion) focuses on *Urrutia-Contreras*, which appears to present the more significant issue. The issue in *Whitlock* was whether the district court erred when it prohibited the probation officer from disclosing that officer's sentencing recommendation to the defendant. The court held that the district court could prohibit disclosure, adapting the rule of Rule 32(e)(3). If the Committee refers Rule 32.1 to a subcommittee, this issue can be addressed as well.

met if the district court fails to solicit the government's position, whether at a post-conviction sentencing or at a revocation proceeding." *Urrutia-Contreras*. 782 F.2d at 1113.

Members expressed interest in the issue raised in *Urrutia-Contreras*, but concluded that it might be premature to take up the issue now. The decision was quite recent and is the only case to address the issue. Members thought there might be further developments in the Ninth Circuit or elsewhere that would be relevant. Additionally, they noted that the procedural posture of *Urrutia-Contreras* was somewhat unusual: the defendant, not the government, raised the issue of the court's failure to allow the government to speak to the proper sentence. The government did not appeal this issue. To the contrary, it argued that Rule 32.1 did not require the court to allow the government to speak.[5]

Accordingly, the Committee decided to place the specific issue in *Urrutia-Contreras*–and the more general issue whether the procedures in Rule 32.1 should be further specified–on its study agenda, requesting that the reporters stay abreast of further developments.

IV. Final Actions on Other Suggestions

The Committee also discussed and decided not to pursue at this time two other suggested amendments.

A. Rule 23

Rule 23(a) now states that the trial must be by jury unless the defendant "waives a jury trial in writing," and Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors. Judge Susan Graber wrote suggesting that the Committee consider revising the rule in light of cases holding that an oral waiver is sufficient if it is made knowingly and intelligently. She noted that several cases have held that the failure to make the waiver in writing was harmless error.

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[5] The court did not discuss the argument made in the government's appellate brief "that Rules 32.1 and 32 serve different purposes":

> When a defendant is sentenced at a sentencing hearing, he or she is sentenced for a crime against the United States. In that situation, it is clear why Congress would require that the court hear from the government. As the representative of the people, the government should be heard by the court in regards to a sentence being issued to a defendant who has violated the laws of the United States. When a defendant is sentenced at a revocation hearing, however, he or she is sentenced for a breach of the district court's trust. *See United States v. Reyes-Solosa*, 761 F.3d 972, 975 (9th Cir. 2014). Supervised release is about the district court's supervision of a convicted defendant, not a violation of the laws of the United States. This distinction explains why Congress intentionally left out the district court's requirement to allow the government an opportunity to make a statement regarding the violator's sentence in a revocation hearing in Rule 32.1.

The Committee considered this suggestion in the context of other waiver requirements in the Rules of Criminal Procedure. At least twelve Criminal Rules require a party (usually the defendant) who waives a right or consents to a certain procedure must do so in writing, and other rules require that approvals, stipulations and the like be in writing.[6] These rules draw the party's attention to the importance of the decision being made, help avoid misunderstanding or ambiguity, and by providing a record of the waiver, consent, or other action, also assist in the adjudication of later claims challenging the existence, validity, scope, or nature of the waiver.

Allowing an oral, on-the-record waiver of the right to trial by jury, so long as it is knowing and intelligent, would provide for greater procedural flexibility. On the other hand, there are several reasons to hesitate to amend Rule 23's writing requirement. Rule 23's requirement of a written waiver now provides a clear, bright line rule that emphasizes to the defendant the importance of the decision and provides a reliable record should the existence or validity of the waiver be challenged. Moreover, among the many procedural rights for which the Rules now require a written waiver, the Sixth Amendment right to trial by jury is arguably the most important.[7]

The Committee concluded that, at least for the present, no change is warranted in the requirement of a written waiver. The effort required to obtain a written waiver is not particularly burdensome for trial courts, and the Committee has received no expressions of concern about this requirement from defendants, prosecutors, or trial judges. The Committee recognized that there have been occasional cases in which a written waiver was not obtained. Judge Graber identified several cases in which appellate courts used the harmless error rule to uphold a criminal judgment despite the absence of a valid written waiver, when other evidence indicated

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[6] In addition to Rule 23, the following Federal Rules of Criminal Procedure require a written waiver or consent: Rule 10(b) (defendant's written waiver of appearance); Rule 11(a) (allowing entry of conditional guilty or nolo plea that reserves in writing defendant's appellate review of a specified pretrial motion); Rule 15(c)(1) (defendant's waiver of right to be present at a deposition); Rule 17.1 (written waiver by defendant and counsel of right to exclude statements made at pretrial conference); Rule 20(a) (defendant's written waiver consent to transfer and disposition of case in transferee district and approval of transfer in writing by the U.S. Attorneys in both districts); Rule 20(d) (juvenile's written consent to the transfer of case and written approval of transfer by the U.S. Attorneys in both districts); Rule 32(e) (defendant's written consent to submission of presentence report before the defendant has been found guilty or pleaded guilty or nolo contendere); Rule 32.2 (defendant's written consent to transfer of forfeited property to a third party before appeal becomes final); Rule 43(b)(2) (defendant's consent in certain low level misdemeanor cases to participate in arraignment, plea, trial, and sentencing by video teleconferencing or for procedures top take place in defendant's absence); Rule 58(b)(3)(A) (defendant's consent to trial before a magistrate judge and waiver of trial before district judge); Rule 58(c)(2)(a) (defendant's waiver of venue and consent to disposition of the case another district by guilty or nolo contendere plea).

[7] Indeed, noting the importance of the right to jury, a majority of circuits have endorsed, in *addition* to the written waiver required by rule, some form of colloquy between the defendant and the district judge in order to ensure that the waiver is knowing and voluntary. *See, e.g.*, *United States v. Lilly*, 536 F.3d 190, 197-98 (3d Cir. 2008) (joining and listing authority from First, Second, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits).

that the defendant's jury waiver was knowing and intelligent. By providing a mechanism to affirm convictions and sentences despite occasional violations of the requirement of a written waiver, the harmless error rule provides beneficial flexibility, reducing the pressure that might otherwise exist to modify the Rule itself.

B. Rule 6

Finally, the Committee received a request to consider several amendments to Rule 6, which governs grand jury procedures. The suggestion requested consideration of four aspects of grand jury procedure: providing for direct citizen submissions to the grand jury, providing certain instructions to the grand jury, modifying the requirements of grand jury secrecy, and providing for grand jury presentments. The suggestion did not identify any particular cases or developments that might justify these changes and did not include any supporting materials. Additionally, one aspect of the suggestion (grand jury instructions) is not covered by the Rules of Criminal Procedure.

The Committee voted to take no further action on this suggestion.

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APPENDIX

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APPENDIX
CRIMINAL RULES COMMITTEE REPORT TO STANDING COMMITTEE
MAY 2015

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A. CM/ECF Proposals Regarding Electronic Filing

1. Discussion at the spring meeting

At the time of the Criminal Rules meeting, a proposed amendment to the Civil Rules would have mandated electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments. The proposed Civil amendment was of particular concern to the Advisory Committee on Criminal Rules because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Advisory Committee on Criminal Rules has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 Cases, and these rules also incorporate Civil Rules.

Committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically unless they could show individual good cause not to do so, or the local district had exempted them from the national requirement.

The Committee's Clerk of Court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rulemaking to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners, the Advisory Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Advisory Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Advisory Committee that the proposed national rule should not be adopted if it will require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers has already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project should also include the Rules Governing 2254 and 2255 cases, for which the Advisory Committee has responsibility.

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
September 28, 2015, Seattle, Washington

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in the Federal Courthouse in Seattle, Washington, on September 28, 2015. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Morrison C. England, Jr.
Judge Gary Feinerman
James N. Hatten, Esq.
Chief Justice David E. Gilbertson
Judge Raymond M. Kethledge
Judge Terence Peter Kemp
Professor Orin S. Kerr (by telephone, for morning session)
Judge David M. Lawson
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Judge Reena Raggi, Outgoing Advisory Committee Chair
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:
Rebecca Womeldorf, Esq.
Laural L. Hooper, Esq.
Julie Wilson, Esq. (by telephone)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy thanked Judge Richard Tallman for welcoming the Committee in Seattle and attending. He acknowledged the Committee's outgoing members: Judges David Lawson, Morrison England, and Timothy Rice for their years of dedicated service and noted they will be deeply missed. He expressed special gratitude to Judge Raggi, the Committee's outgoing Chair, for her remarkable leadership.

Judge Raggi expressed her respect and affection for the members of the Committee and praised the Committee for its collaborative, thoughtful, and determined work with some very difficult issues. She noted the importance of the Committee's decisions declining to change rules

as well as its work in crafting changes. Judge Lawson stated that his service with the Committee has been a privilege, and he was grateful for the opportunity to work with great minds so motivated to get to the right place. Judge England echoed these sentiments and spoke with special admiration for the work of the Committee, its Reporters, and Judge Raggi on the multi-year effort to amend Rule 12.

Judges Sutton and Tallman spoke of their high regard for the work of Judge Raggi and the Committee's talented members to reach common ground and creative solutions. Professor Beale followed with particular thanks to Judges Raggi, Lawson, England, and Rice for their energy, humor, and skill, and all of the effort they put in "behind the scenes" chairing the Committee or its Subcommittees.

B. Review and Approval of Minutes of March 2015 Meeting

Professor Beale brought to the Committee's attention that the draft minutes of the March 2015 meeting include Item F, p. 38, which had been left out of the version of the draft minutes provided earlier to the Standing Committee. A motion to approve the minutes having been moved and seconded:

The Committee unanimously approved the March 2015 meeting minutes by voice vote.

C. Status of Pending Amendments.

Ms. Womeldorf reported on the status of the Rules amendments. The amendments to Rules 4 and 41 went to the Judicial Conference on the consent calendar and were approved. Judge Sutton commented on the process, indicated that the proposed amendments would advance to the Supreme Court in time for review by December, and thanked the Committee for its work.

III. Criminal Rules Actions

A. Amendments to Rule 49

Judge Lawson, Chair of the Rule 49 Subcommittee, presented the Subcommittee's work on Rule 49. Rule 49 presently mandates that papers must be filed and served "in the manner provided for a civil action." As the Reporter's Memorandum explained, the Committee had decided at its March 2015 meeting to ask the Subcommittee to draft a "stand-alone" rule for filing and service in criminal cases, as an alternative to continuing to work with the Civil Rules Committee on a change to Civil Rule 5. The Subcommittee now seeks feedback on that effort.

Judge Lawson first explained the Subcommittee's decision to propose a "delinked" or "stand-alone" criminal rule. He noted that following the March meeting the Civil Rules Committee had agreed to modify Rule 5 to accommodate the Committee's strong concern that the access to paper filing by pro se defendants and filers under Section 2255 must not require a

showing of good cause or local rule. Nonetheless, the Subcommittee had decided to continue with the effort to draft a stand-alone rule. There are different interests and policies at stake in civil and criminal litigation, which involve heightened due process concerns, and the Subcommittee thought it would be desirable to do a comprehensive review and decide affirmatively what the Criminal Rules should include, rather than having to react to a series of future changes in the Civil Rules.

Professor Beale added that one advantage of having everything in the Criminal Rules is that criminal practitioners won't have to toggle back and forth between two rule books. Also, because parts of the civil rule may not apply in criminal cases, a stand-alone rule would allow the Committee to ensure that the criminal rule governing filing and service is tailored to fit criminal cases. On the other hand, there have been some suggestions that a short, targeted amendment to Rule 49 would be better than rewriting this whole rule, and the Subcommittee wanted to hear from Committee members on whether they agreed that the reasons for a more comprehensive stand-alone revision are sufficiently compelling.

Judge Lawson queried whether there would negative repercussions if the Committee pursued a stand-alone rule after those drafting the proposed civil revision had agreed to accommodate the Criminal Rules Committee's concern. Professor Beale stated her understanding that the Civil Rules Committee will not be offended if we go in this direction. To the contrary, the Reporters from the Civil Committee had expressed support for the Subcommittee's approach, which would free them from the necessity to compromise, and permit them to return to what they saw as the optimal Civil Rules proposal. Professor King added that the other rules committees are watching some of the changes we are considering and may find some aspects of those changes attractive for their own rules.

Several committee members commented favorably on the decision to pursue a stand-alone rule, including Mr.Wroblewski, who noted the Department's support of the approach, and two others who noted that they had been initially skeptical of delinking or tinkering with things that should be left alone, but had been persuaded by the reasons stated by Judge Lawson and in the Reporters' Memo. One member noted that although those working on the Civil Rules came around this time to our way of seeing things, there might be times in the future when they would not do so. Thus for efficiency's sake it is best to take our own path.

Judge Raggi noted the benefits of uniformity across the rules, but emphasized that service and filing in criminal cases have constitutional implications different than in civil cases. Weighing the potential that uniform rules well suited to civil cases would be inappropriate for criminal cases against the cost of drafting a comprehensive revision that would be a more complex undertaking, she said had been persuaded the latter option was worth pursuing.

Judge Sutton stated he was glad the Committee was exploring the pros and cons of a separate rule and looked forward to hearing about it at the January Standing Committee Meeting. He noted that the Standing Committee and the Judicial Conference will be looking closely at any

negative inferences that a new Rule 49 might produce. Adopting Rule 49 language that is different from another set of Rules may not be a problem for the Criminal Rules Committee, but the choice to add, delete, or change language may affect the meaning of the Civil Rules. There are also big picture policy issues affected by the choice to stay linked to the Civil Rules, to delink, or to preserve linking while adding exceptions. He noted that one advantage of retaining the present linkage to the Civil Rules is that the Rules Committees must speak to each other before proposals to amend these rules reach the Standing Committee.

Professor Beale noted that there are other devices for unifying the rules and addressing coordination, such as the cross-committee group studying electronic filing.

Judge Sutton agreed, noting again that there can never be complete delinkage because slight differences in language may carry implications. He said he was looking forward to seeing what the Committee recommends.

Judge Lawson then moved that the Committee vote on whether it supports the Subcommittee's recommendation to compose amendments to Rule 49 to add language that governs filing and service in criminal cases, eliminating the link to the Civil Rules.

One member asked if new rule would continue to refer to the Civil Rules at all so that future dialogue between committees would be compelled. Judge Lawson replied that the Subcommittee's discussion draft did not refer specifically to Civil Rule 5, but was intended to preserve as much uniformity as possible.

Judge Sutton reiterated that because the criminal rule now refers to the civil rule, the committees have to speak with each other about proposed changes. If there was an independent rule, then the committees would no longer be required to speak to each other unless the Conference or the Court or the Standing Committee required that. He said it would not be that big a deal if the new criminal rule just lifts the exact same language already in the civil rule, because it would be incorporating all of the interpretations of the Rule 5 language that have been made over the past years. The further you get away from that, using different words, leaving out words, the more that is changed, every single one of those changes is going to be a potential complication.

Professor Beale noted that the Criminal Rules contain many provisions that use language that is identical or nearly identical to language in other rules (e.g., the rules governing indicative rulings and time computation), and we already have to be vigilant about those concerns. The Committee Notes to these rules typically explain that there is no intent to change the meaning from prior language or language from another set of rules.

A member agreed that so long as there is a continuing cross pollination between the Committees, concerns about delinkage are not an obstacle.

Judge Raggi added that at every Standing Committee meeting the reporters from the various committees have a lunch to discuss matters of cross-committee interest. What the Subcommittee has to consider is whether the situation is so different in the criminal as opposed to civil sphere that a different rule is warranted and what differences with civil cases warrant differences in language.

Professor Beale emphasized that the Committee should be careful about changing any of the language from the civil rule provisions unless we have a good reason or it is causing some problem. She noted that the draft of any comprehensive revision of Rule 49 would go back to all of the other Committees. At that point there may be choices by other Committees that allow all of us to make the same changes.

A member stated that the one book approach makes sense and that hopefully the Committees will be encouraged to work out any concerns before they get to the Standing Committee.

Judge Lawson restated his motion for an expression of the sense of the Committee in support of drafting Rule 49 as stand-alone rule governing filing and service in criminal cases, rather than depending upon the Civil Rules governing filing and service. After being seconded,

The Committee the unanimously approved the motion, expressing its sense that a stand-alone Rule 49 be pursued.

Judge Lawson then proceeded to some of the issues raised by the Subcommittee's discussion draft.

First, he sought feedback from the Committee on the Subcommittee's recommendation that the Committee not change Rule 49(a)'s description of what must be served (lines 3-5 of the discussion draft) because the existing language had caused no confusion or difficulty.

Discussion focused initially on whether 49(a) addressed presentence reports/probation reports, which are filed electronically, and pretrial service or probation reports that prompt a revocation. Judge Lawson responded that the Subcommittee had not considered these reports, because it was focusing on documents that propel the lawsuit, not pretrial release reports handled at first appearance, or probation reports covered by Rule 32. In response, a member stated that because these filings trigger hearings, it is important to get the rules for service right.

Judge Lawson noted that Rule 49 covers the conduct of the parties, and these documents are different, generated by the Court, or an officer who works for the Court. Professor Beale pointed out that under existing Rule 49, there appears to be no problems associated with filing and serving these reports.

Another member noted that Rule 32.1 governs these reports, and that any internal recommendation of the probation officer is not within the rubric of Rule 49. A member observed that Rule 32.1 does not cover pretrial services.

Mr. Wroblewski added that in many district those types of documents prompting revocation or modification are not served on all on the parties, just provided to the judge. The government may or may not be involved.

A member noted that districts handle these very differently, and that the Committee would need to know more about what the different districts do before we come up with a top-down rule governing such reports.

Professors King and Beale suggested that the Committee could revisit this when discussing the Subcommittee's proposed approach to filings and service by non-parties.

Judge Lawson noted that Rule 49(a) speaks to service on parties and suggested caution about extending the rule to documents that have often not been served on the parties.

Judge Molloy asked for objections to the Subcommittee's decision to leave the language in (a)(1) unchanged, noting that continued voting on sense of the Committee will help direct the activities of the Subcommittee. ***Raising no objections to the suggested approach to (a)(1), the Committee indicated its approval of that approach.***

Judge Lawson then presented the Subcommittee's suggestion that the Committee preserve the existing language in Rule 49(a)(2), lines 7-9 of the discussion draft, regarding serving an attorney when the party is represented. A member asked why the language in Rule 49 differed from that in Civil Rule 5. Professor Beale suggested that it may have been changed during restyling, and clarified that the Subcommittee's discussion draft retains the existing language of criminal rule even though it is different than civil language. To change the criminal language would have its own set of negative implications.

Hearing no objection to retaining the language in 49(a)(2), Judge Molloy asked Judge Lawson to continue.

Judge Lawson then turned to lines 11-13 of the discussion draft and the description of how service occurs through electronic filing. He noted that the proposed language saying that the party sends it through the court's electronic "transmission system" is misleading. The Court does not transmit the paper, instead the court system generates an electronic notification of filing, then the parties log on to access the paper. He wanted to know if the Committee had concerns about revising the language to read : "A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic case filing system . . ." That language best reflects what actually happens.

Professor Beale clarified that the language about 'transmission" comes from the proposed civil revision, and if the Civil Rules Committee ultimately agrees that this language is better, it may decide to change its proposal to conform to our suggested change.

After discussion clarifying that the term "registered user" includes pro hac vice and expressions of concern that the rules take into account the large proportion of filers who are not using ECF, Judge Lawson queried whether members thought the Rule should address the idea that some things filed need not be served, such as documents filed under seal. Professor Beale suggested that would not be necessary. The Rule does not say what must be served, it says how to serve. She noted that the Reporters would take new language back to the Reporters for the Civil Rules Committee so they can consider it as well.

The vote on the sense of committee was unanimously in favor of the suggested language for lines 11 through 13.

Judge Lawson next turned to the Subcommittee's suggestions for lines 14 through 16 of the discussion draft and the question of whether consent to other forms of electronic service must be in writing.

Professor Beale clarified that the question about whether consent to being served by email must be in writing was raised by the language proposed as part of the revision of the Civil Rule.

A member asked whether an email itself would constitute a writing. Professor King pointed out that the "in writing" language now appears in Civil Rule 5, and that one advantage of keeping it in is that whatever law there is about that language would carry over to Rule 49.

Professor Beale noted that another issue this provision raises is the bigger question whether it is a good idea to list other acceptable forms of electronic service, i.e., service by fax or email.

Mr. Wroblewski reported that he looked into whether the government ever consents to email service by pro se litigants. He explained that this never comes up. When a pro se person files a document, the clerk files it using ECF, and the government receives an electronic notice. So there is no need to consent to any other form of service.

Another member agreed, noting she could not remember ever being served by email by anybody. However, a third member noted that he is regularly served by email in criminal cases, with subpoenas, other motions, adjournments, and letters to the court. He stated these documents are often filed with the court, but there are things that the government serves but does not file, such as discovery. If there is a dispute whether something was delivered, there is a notice.

Two members agreed that it was a good idea to have consent in writing to fax or email, particularly if you are not a registered user, because otherwise there will be disagreements about whether the person ever consented.

When asked about the meaning of “person” Judge Lawson stated that it should be “person to be served.”

Another member expressed support for keeping the writing requirement, but noted the difficulty of getting consent from people in prison, and skepticism that prisoners could be served by any means other than mail.

A different member liked the "in writing" requirement, too, but noted that as drafted, the consent requirement did not address pro se people. Didn’t the Subcommittee want their consent “in writing” too?

Professor King responded that there is a later provision in the discussion draft for written consent to delivery by other means and that the Subcommittee’s choice to limit other electronic means (email and fax) only to represented parties was deliberate choice. Even if a prisoner consents to such service one day, he may not be able to receive that email or fax if moved between institutions, or if the computer at the facility’s library is down, or the mailbox is full, or other problems. Professor Beale added that the Subcommittee thought these access problems were so significant that permitting this kind of service would be a bad idea. She urged the Committee to consider that policy question.

A member asked why the Rule did not address service on other people other than parties. Professor Beale responded that Rule 49 presently just deals with service on parties, and that even proposed (d) in the discussion draft for filing and service by nonparties doesn’t deal with service on nonparties, and that the person language seems to come from the Civil Rule draft, so that may have to be changed to “party.”

Professor King noted that the word “person” is in Civil Rule 5, and Judge Raggi suggested that the word “person” must refer to the lawyer, so if “party” were substituted, it would have to include the lawyer.

When asked to vote on whether its sense was that the Subcommittee should add person "to be served" and to retain the requirement that consent be "in writing," the Committee unanimously agreed that it was.

Judge Lawson proceeded to line 15 of the discussion draft, indicating that service is not effective when the serving party did not reach the person to be served. A member raised a question about the meaning of this when service is by email (with consent). Professor King stated that this language was from the latest draft for revising the Civil Rule, which was lifted

from current Civil Rule 5, so that any uncertainty about the meaning is already raised by existing Rule 5.

Professor Beale noted that the policy question is whether to have this safeguard for the electronic filing/service system, in addition to the use of email, which could bounce back. If the Committee wants to keep this safeguard, then we can think about how to say it.

After members discussed when various sorts of service should be considered effective, discussion turned to whether email service by consent was an option that should be preserved. A member said he valued being served by email, because it provides notice to a sender if the email is rejected. That makes it better than ECF.

Mr. Hatten added that if there is a bounce back from ECF, there is a staff member in his office that would call the person and let them know. Other members agreed that if there is a bounce back on ECF, the Court knows that.

Judge Lawson commented that the other means are a good alternative and are not mandatory.

A member suggested the Subcommittee consider inserting language that indicates parties can email papers that don't have to be filed.

Judge Sutton urged the Committee to focus on the conceptual difference for the criminal process and leave the details for later.

Professor Beale offered that it is very helpful for the Subcommittee and the reporters to hear from the Committee members what procedures they follow and what their experiences are, and noted that this was actually the first time the Committee has had the chance to discuss these particular issues. That information is needed in order to hammer out the language in lines 11 through 18 of the discussion draft, which was drawn from the inter-committee proposal for amending the Civil Rule.

Judge Lawson summed up what he thought the sense of the Committee was on the conceptual ideas for 49(a)(3) so that the Subcommittee could work on the language: (1) that a represented party (or a pro se party with permission) may achieve service on a registered user by filing in ECF; (2) a represented party may achieve service on represented or unrepresented persons by other electronic means (e-mail) only with consent; and (3) if, using ECF or email, the filing or notice did not reach the intended recipient, then with that actual knowledge another attempt has to be made.

Judge Molloy asked for any disagreement with these ideas conceptually. Judge Lawson confirmed a member's understanding that ECF use by or service on unrepresented parties should require a court order. Judge Molloy noted that the Committee's input will help the Subcommittee

continue its work, and he stated his intention to add two more members to the Subcommittee to replace members whose terms of service had ended..

After asking for and receiving no objections to Judge Lawson's summary of the sense of the Committee regarding (a)(3) of the discussion draft, Judge Molloy suggested the Committee move on to the next section of the discussion draft, addressing whether there are conceptual issues other means of service.

Judge Lawson turned to lines 19 through 32 of the discussion draft, addressing traditional service techniques. He noted that the Subcommittee decided to flip the order of the civil rule, putting ECF before traditional means, because e-service is now the dominant means of service. The description of other means in the draft attempts to replicate language of the civil rule. He asked if the Committee agreed these methods should be retained. Judge Lawson stated the Subcommittee requested serious consideration of deleting (d), regarding leaving the paper at a person's office or home. Another option would be to look at whether (e) would provide a sufficient catch all.

Professor Beale stated that one reason for retention was to prevent negative inferences from changes or deletions. Professor King noted there are dozens of cases interpreting these provisions and that changing or dropping this language would mean dropping reliance on that case law as well.

Discussion also addressed the advantages of restricting (3) to ECF only, and moving the "other electronic means" language to (4), along with the restriction that it is not effective if the sender learns it did not reach the person to be served.

Judge Raggi questioned whether giving a document to a process server or putting in a FedEx box could ever be enough for service in a criminal case. Doesn't it have to reach the lawyer or the defendant? The Reporters responded that the Rule could specify an authorized means, but if in a particular case no notice is actually received, the defendant could raise a due process claim. Similarly, the proposed amendments to Rule 4 governing service on corporations outside the U.S. are supplemented by constitutional requirements. Judge Raggi said that may suffice.

She then asked about the purpose of specifying when the service is complete. Is this related to deadlines for service? She suggested that the Subcommittee ask the Civil Rules Committee what this requirement achieves and determine whether there is an analogy for criminal proceedings.

Judge Molloy solicited the Committee members' agreement that their sense was that the Subcommittee should retain the civil rule language describing other means of service on lines 19 to 32 of the discussion draft.

Judge Molloy then asked Judge Lawson to turn to section (b) addressing filing. The discussion turned to documents that are served but not filed. Mention was made of alibi notices under Rule 12.1, which some members noted are served but not filed, as well as documents such as coconspirator lists and discovery, which are provided to the other side but not filed. Some are not filed because it would be highly prejudicial if they were public.

Judge Lawson noted that in some districts alibi or insanity notices are docketed, but the Rule 12.1 does not require filing of such notices, yet Rule 49(b)(1) in combination with (a)(1) suggests they must be. Professor Beale commented that the existing language or Rule 49 already creates this tension, Rule 49(a) stating that notices need to be served on parties, but that there doesn't seem to be any problem with the current practice. Professor Beale suggested that one approach would be to add specific exceptions to filing to the Rule.

Judge Raggi warned that it is one thing to leave the language as is because even if parties are not always abiding by the present rule, it is not creating a problem. It is another thing to change the rule because certain districts are not abiding. That would require fuller discussion.

Members discussed why discovery was not filed. Rule 16 mandates disclosure, but does not require filing or service. Also, judges don't want it cluttering up the docket. Members questioned why alibi notices would not be filed.

Professor King asked if there were other documents, other than discovery and notices under Rules 12.1, 12.2, and 12.3 that that are served but not filed. Was there anything else the Subcommittee should think about exempting from Rule 49? Each member noted his or her experience, which varied among districts and from judge to judge. Most stated discovery was not filed unless it became the subject of a motion, nor were notices of alibi. Mr. Wroblewski stated that ex parte filings and filings under seal are already covered by Rule 49.

Both Judges Raggi and Tallman expressed their views that generally all documents in criminal cases should be filed, and noted the costs in transparency and for the appellate process when they are not filed or are sealed.

The Reporters indicated that the discussion would be very helpful for the Subcommittee.

Following the lunch break, Judge Lawson drew the Committee's attention to the material in (b)(2)(A) of the discussion draft, concerning the signature block (lines 41-47), as well as the phrase designating the attorney's user name and password as the attorney's signature. He explained that the information in the signature block is needed by readers of a paper in order to identify who signed it, because the user name and password does not appear on the filing. If a paper is filed outside ECF, he noted, you can look at the signature. In the electronic filing world, there may be no signature.

Professor Beale noted that the style consultant and the other reporters were opposed to the detailed listing of information.

Members asked why it is necessary now to spell out this level of detail if the civil rule didn't have it before, whether the absence of detail has created any problems, and whether there is a reason to require this information in criminal but not civil cases. Judge Lawson explained that Civil Rule 11 requires that (1) every paper must be signed by at least one attorney of record or by a party personally if the party is unrepresented, and (2) the paper must state the signer's address, e-mail address, and telephone number. The criminal rules do not have a counterpart to Civil Rule 11. Presently, by incorporating service and filing "in the manner" of the civil rules, current Rule 49 arguably incorporates Civil Rule 11. A new stand-alone rule with no cross reference to the Civil Rules would not. Also, he argued, it is a bad idea to allow people to file documents that have nothing on the last page to show who filed, and there should be certain features of identity that are mandatory for documents filed in our system.

Professor Beale noted that, as drafted, the proposed rule would not mandate this information be included on paper filings, only on papers filed electronically.

Members noted several reasons not to include these details in Rule 49. Some preferred that details of this nature be left to local rules. There was also a suggestion that these details do not belong in a rule about the manner of filing, and it would be more appropriate to adopt a new criminal rule about signing, something like Civil Rule 11.

Judge Raggi stated that the Civil Rules Committee also ought to be concerned about substituting electronic login and passwords for signatures since any registered user can file in any case.

Professor Beale noted that the past concern in the Bankruptcy Rules Committee about requiring wet signatures was different; they had focused on the need to establish the author of fraudulent filings.

When asked if members had experienced any difficulty with missing signatures or information in criminal cases in the past, the only member who recalled a problem said it had been in a civil case.

Judge Lawson noted that the Subcommittee could look at the language proposed for the civil rule, which has a lesser level of detail.

Judge Molloy asked for a voice vote on whether the Subcommittee should retain the material on lines 41-47, there were more nays then yays. ***The sense of the Committee was to remove the detailed language concerning what must be included in the signature block.***

Moving to non-electronic filing, lines 50-55 of the discussion draft, Judge Lawson explained that it would be useful if the Committee expressed its view on the desirability of retaining the option of filing by handing a paper to the judge. No objections were raised. ***The sense of the Committee was that allowing delivery to the judge should be retained***.

Professor Beale noted that there had been a suggestion at an earlier meeting that the provisions on nonelectronic filing might include a reference to the filing of an object, such as a disk or a bloody shirt. Discussion of whether something like "paper or item" should be used throughout the rule ended with a consensus. ***Objects would normally be filed along with or as exhibits to documents, and the Subcommittee should strike the word "item" in brackets.***

Judge Lawson presented the two alternative options for describing the presumption of ECF filing by represented parties. Option 1 was shorter. Option 2 was the language proposed by the latest consensus draft going forward in the Civil Rules Committee, and was preferred by the reporters and the style consultant. Professor Beale also noted that Option 1 does not emphasize the point that paper filings must be allowed for other reasons or local rule quite as strongly as Option 2. ***Judge Molloy noted that the discussion indicated that the Committee preferred Option 2.***

Judge Lawson explained that the language limiting use of ECF by unrepresented parties (lines 63-65 of the discussion draft) emphasized the strong sense from the spring Committee meeting that the Committee strongly opposes any rule that would *require* pro se defendants and 2255 filers to use electronic filing unless they can show good cause or the district has a local rule. Committee discussion of this section focused on concerns about the fragility and unreliability of the electronic system, and whether there is any guarantee that electronic files would be available and readable decades from now. Members noted outages in ECF and the burdens they had caused. Judge Raggi preferred there be at least one paper copy filed until there was greater assurance of permanent accessibility. Judge Sutton suggested that it might be useful to have Judge Thomas Hardiman, who chairs the Committee on Technology, come and talk to the Criminal Rules or the Standing Committee about these concerns.

On the section (lines 66-68 of the discussion draft) that prohibits a clerk from refusing a filing as lacking the proper form, Judge Lawson noted that this language was drawn from Civil Rule 5. The Civil Rule reflects a policy determination that a judge, rather than the clerk of court, should make the decision whether to reject a filing. Professor Beale added that the Subcommittee had considered whether this aspect of Rule 5 was part of "the manner" of filing provided by the Civil Rule—and thus currently incorporated by Criminal Rule 49(d)—and concluded that it probably was. Discussion of this provision noted that the language is needed because of Section 2255 cases. Mr. Hatten noted that, as a clerk, he appreciated not having this responsibility. ***The sense of the Committee was to include in Rule 49 the language forbidding the clerk from rejecting filings because of form.***

The discussion advanced to subsection (c) concerning notice of an order or judgment provided by the clerk of court. Professor Beale explained that what the clerk must do here wouldn't normally differ between civil and criminal cases. However, to complete the severance from the civil rules on filing and service, Rule 49 might incorporate the relevant provisions from Civil Rule 77. ***The sense of the Committee was that the Subcommittee should consider incorporating the language of Rule 77 in the proposed Rule 49.***

Judge Lawson explained that the tentative provision for nonparties who file and serve, on lines 82-83 of the discussion draft, was there to fill the absence of any guidance for nonparty filers. The Subcommittee's first take was that on those uncommon occasions when nonparties file in a criminal case they should follow the same rules as parties. If they are represented, they should file electronically; if not, they should file by delivering a paper to the clerk. Professor Beale explained that the Subcommittee wanted to make sure that any new language about nonparty filing wasn't granting any new rights to file, which is why it limited this to nonparties permitted or required by law to file. ***The Committee members had no objection to this approach to nonparty filing and serving.***

Professor Beale drew the Committee's attention to one last issue on lines 35-37 of the discussion draft: whether to include the "within a reasonable time after service" language. Civil Rule 5 says anything required to be served must be filed within a reasonable time after service. The Subcommittee thought the Criminal Rule could drop that phrase. Because late filing had not been a problem in criminal cases, this provision was not necessary. But the Reporters from the other committees were quite concerned about leaving this out, and Committee input would be useful.

Members noted points cutting both ways. Including the language would promote uniformity and avoid negative inferences. But no one could ever remember a filing too late after service, which seemed to be a problem that predated ECF. Now when a pro se defendant or prisoner files something on paper, notice is provided automatically through the ECF system when the clerk files it electronically. Service to unrepresented persons is accomplished by mail. ***The Committee agreed that the Subcommittee should keep the "reasonable time" language in brackets and continue to consider it.***

Professor King explained that there may be other specific omissions from the civil rule that may need review by the full Committee. The Subcommittee will go back through Civil Rule 5 and affirm that there is a good reason for each deletion and change.

Judge Molloy thanked Judge Lawson for his hard work on the Rule, and thanked Judge Feinerman for taking over Judge Lawson's duties as Chair of the Subcommittee.

B. Rule 12.4(a)(2)

Professor Beale introduced the proposal to amend Rule 12.4, explaining that the request came from the Justice Department. The rule of judicial conduct regarding disclosure of interest in organizational victims that was the basis for the Rule had changed, and literal compliance with the current rule was difficult for prosecutors in certain cases.

Mr. Wroblewski stated that the Department decided to ask the Committee to consider an amendment when the Appellate Rules Committee began looking into a rule about disclosure paralleling Rule 12.4(a)(2). Although existing Criminal Rule 12.4(a)(2) requires disclosure of *all* corporate victims, the Code of Judicial Conduct has been amended to require recusal only if there will be a substantial impact. The hope is that both committees could adopt the same standard.

Professor Beale stated that the Department has explained that there are cases in which there are scores or hundreds of corporate victims with minor damages, it is not feasible to provide notice about each of these entities, and it would be desirable to limit mandatory disclosure to cases in which there was a substantial impact.

Judge Sutton agreed that the Criminal and Appellate Rules need to be coordinated, but noted that not all judges take the position that recusal is needed only when it is required. Some may believe recusal to be appropriate even if not required. Mr. Wroblewski responded that the Department hopes the Committees will be able to find an acceptable middle ground between the extremes of disclosing every single entity that has been a victim when the damages are trivial and disclosing only when absolutely required. The language "may be substantial" is one example, and there may be other options.

Judge Molloy appointed a new Rule 12.4 Subcommittee to consider the issue and come up with a recommendation for the Committee's April Meeting. Judge Kethledge will serve as Chair, with Mr. Wroblewski, Mr. Hatten, Mr. Siffert, Mr. Fillip, and Judge Hood serving as members.

B. Rule 15(d)

Professor Beale introduced the second proposal by the Department, to address an inconsistency between text of Rule 15(d) and its Committee Note. This inconsistency was identified in 2004, but it could not be fixed because there is no procedure to change the Committee Note without changing the text. Now the language of the Committee Note is starting to cause some problems for the Department. That Note states that the Department must pay for certain deposition expenses, but the text of the rule does not. In addition, other statutory provisions about witness fees may bear on this, as well as Rule 17(b).

Mr. Wroblewski explained that in a handful cases a defendant wants to depose numerous witnesses overseas. If the government were required to pay all of those expenses it, the cost would threaten the prosecution. The question of who is going to pay can be debated, but the rule and text say different things. It doesn't come up very often, but when it does it is very difficult. In one case the defendant asked to depose 20 witnesses in Bosnia. The Criminal Division didn't have the funds, and the potential imposition of those costs threatened its ability to bring the prosecution. In some cases now there is negotiation about how much each side pays. The Department does not want to prevent defense depositions, but it wants clear guidance about who is responsible for what.

A member noted that the government is arguing that it shouldn't have to pay for depositions it did not request, and the member is not sure that should be the rule. Something should be done to fix Rule 15 and clarify the obligations. Also there is some uncertainty about is the interaction of Rule 15 with other statutes and rules, including the Criminal Justice Act, Rule 17 (the subpoena rule), and 18 U.S.C. § 4285 (the marshal's transportation rule).

Discussion noted the origin of the inconsistency seemed to be a mischaracterization of the Rule in the Note during restyling. Members discussed the pros and cons of amending a rule because of an inconsistency in the note. Professor Beale observed that once the Committee decides the correct substantive position about who pays, it can then decide how to say that and write a note that is consistent.

Judge Sutton suggested that if the Committee decides to take no action because it has no authority to amend the Committee Note without a rule text change, the minutes can reflect that conclusion. The Note is not the Rule, the Court does not approve the Committee Note, and there is no procedure for changing problematic Committee Notes.

One member voiced opposition to gearing up this process if the Rule is right and the Note is wrong, but Professor Beale pointed out that not everyone at the table agrees that the text of the Rule is right. Plus the Rule does not speak to what happens when the request is from a codefendant. A subcommittee may be useful to review these issues and determine whether the text of the rule is still correct or should be modified. It might also be something that could be addressed in the Benchbook.

Another member questioned whether it was part of this Committee's job to determine who bears the burden of deposition costs. Judge Sutton noted that although generally cost-shifting is governed by statute, this is not the only place in the rules where such issues arise. Judge Raggi questioned whether there might be some concern raised if the Committee were to say that the costs of a defendant's requested deposition must come out of the Department's budget instead of the CJA. Judge Tallman noted that he understood this Committee has no budgetary authority or right to recommend spending. Other Judicial Conference Committees have that responsibility.

Judge Molloy asked if a subcommittee could add anything to this discussion.

Mr. Wroblewski answered yes, noting that it would not be requiring the Committee to take up a new issue, the Rule addresses this now. The Subcommittee might recommend that no action be taken, but just a few conversations exploring it would not hurt. A member expressed doubt that any rule a subcommittee would come up with would be better for the defense than the existing text of the Rule. Judge Raggi stated that if the Subcommittee and the Committee decide that the text is right and the Note is wrong, that could go into the Committee's report to the Standing Committee, creating a public record that this has been considered.

Judge Molloy appointed a new Rule 15 Subcommittee, with Judge Dever as chair, and Judge Kemp, Justice Gilbertson, Ms. Brook, and Mr. Wroblewski, as members.

C. Rule 6 (15-CR-B)

Professor Beale introduced a proposal from a citizen who urged a series of reforms to increase the independence of the grand jury, including direct citizen submissions, new instructions to the grand jury, changes in grand jury secrecy, and the authority to issue presentments. The suggestion was not accompanied by any supporting materials. Professor Beale explained that although some states have adopted some of these proposals, each would be a change in practice in the federal courts. As to the charge to the grand jury, there is a model charge in the Benchbook, but this would be new territory for the Rules. Grand jury secrecy is carefully regulated by Rule 6. The matter of presentment is not regulated by the Rules, but it would be a change in practice to allow presentment without the signature of the prosecutor.

Judge Molloy asked if anyone had any questions or comments.

A motion to take no further action on the proposal was seconded and passed unanimously.

D. Rule 23 (15-CR-C)

Professor Beale explained that this proposal to amend Rule 23 to drop the requirement that a jury waiver be in writing was one of two proposals submitted by Judge Susan Graber of the Ninth Circuit. Rule 23(a) allows waiver of a jury if the waiver is in writing. Judge Graber asked the Committee to consider eliminating the writing requirement, noting that failure to make the waiver in writing is considered harmless error.

The Reporters' Memorandum on this proposal states that many Rules require something be done in writing. Allowing oral waivers of trial by jury would be more flexible, is a practice followed in many states, and would raise no constitutional concern. However, the writing makes a clear record in case there is a later dispute about the existence of or agreement to a waiver, and suggests the importance of the waiver to the defendant. Other far less important waivers require

writing. It is also not clear that the writing requirement is posing a problem for litigants or courts, as the harmless error rulings suggest.

Each member commented on the proposal. Without exception, each agreed that the reasons noted in the Reporters' Memo for leaving the writing requirement were compelling. One said that there are only three decisions clients make on their own: jury or bench trial, whether to plead guilty, and whether to testify. All are fundamental and should be in writing.

A motion to take no further action on the proposal was made, seconded, and passed unanimously.

E. Rule 32.1

Judge Molloy introduced this item, which was the second of two suggestions made by Judge Graber. Judge Graber suggested that Rule 32.1 be amended to require that the government be given the opportunity to address the court regarding the sentence to be imposed for a violation of the terms of supervised release. Her suggestion was prompted by a case in which the judge failed to ask the government to speak at a revocation proceeding, and the defendant successfully challenged his sentence on appeal. Professor Beale noted that Judge Graber's letter also raised a second related issue: whether the text of 32.1 ought to prohibit the disclosure of the sentencing recommendation to the defendant. More broadly, it raised the question how much Rule 32.1 should include--everything that Rule 32 includes?

A member focused on the nature of the revocation proceeding. The sentence has already been imposed, and this proceeding is about how the sentence is being executed. The attorney for the government does not ordinarily initiate revocation proceedings. The defendant is brought back for the court to address a problem that arose while the defendant was under the court's supervision. The government is making a courtesy appearance. It doesn't really have a dog in that fight, because the sentence has already been imposed. Requiring the court to allow the government to address it in supervised release revocation proceedings would change the character of the proceeding and recast the role of the government attorney.

Mr. Wroblewski stated that was precisely the litigating position the Department of Justice took in the Ninth Circuit. Around the country there is a lot of experimentation going on about reentry courts, and there are other very different practices concerning supervision. The Department is hoping to evaluate these experiments and identify the best practices. There may not be a full-fledged resentencing or sentencing type process for revocations. The probation officer may recommend a small modification, it is all done in chambers, and that may actually be a very good practice. The Department is not in a position to say that the practice should be much more formal with more process.

One member indicated that she was in complete agreement with the Department, and wanted that point to appear in the minutes.

Judge Molloy asked members whether they ask the government to offer its views when they do revocations. Members responded yes, although sometimes the government has nothing to say. One member found it unbelievable that a judge would not want to know what the government has to say if the government wants to speak on a supervised release matter.

Judge Raggi stated that there ought to be flexibility for the judge to approve a modification or a minor tweak without involving the government.

Another member suggested that the Ninth Circuit's recent case may be unique, and thus not a sufficient basis for a rules change. Judge Sutton suggested that it might be desirable to hold on to the issue for a year or two and see how the Ninth Circuit decision percolates in the other circuits.

After being made and seconded, a ***motion to retain Judge Graber's proposal on the Committee's study agenda, to be examined later to see if there are further developments that warrant going forward, passed unanimously.***

IV. Status Report on Legislation

Ms. Womeldorf reported on the document in the agenda book from the Department of Justice regarding access of the Inspector General to records over which the Department has control. A Departmental statement of policy that the Inspector General does not get access to grand jury records unless one of the exceptions in Rule 6 applies has led to a series of legislative proposals. There has been no action since the hearing discussed in the document in the Agenda Book.

Mr. Wroblewski explained that there is ongoing discussion about Inspector General access to grand jury records. The Department of Justice Office of Legal Counsel concluded that there are records to which the Inspector General is not entitled to have access, and Congress has held a number of hearings on proposed legislation. Because this might implicate the rules, it has been brought to the Committee's attention.

After brief discussion of why the Inspector General might want access to grand jury materials and the dangers of eroding grand jury secrecy, Ms. Womeldorf indicated she would keep the Committee apprised of developments.

V. Information Items.

Judge Molloy asked Judge St Eve to discuss developments in the Court Administration and Court Management (CACM) Committee. She reported that CACM has been working on a policy involving cooperators, in order to prevent violent attacks of prisoners based on suspicion

that the prisoner has cooperated with the government. These suspicions have been based in part on docket entries and documents available on PACER. Prisoners are also demanding that other prisoners produce sealed documents to prove they are not cooperating. It is an issue that has been around for many years. Judge Hodges, the Chair of CACM, agreed that it was a good idea to tell the Rules Committee that CACM had taken this up. Since he could not attend the Criminal Rules meeting, he asked Judge St. Eve to inform the Committee. CACM has not decided anything yet, is not sure what it will recommend, or the best way to coordinate going forward on this. Ms. Hooper stated that she understood that the research CACM is using is confidential. Judge St. Eve noted that CACM has traditionally looked at privacy policy and related issues.

A member noted that defenders have been fighting the increasing closure of criminal records, because it makes access to information and defending clients much more difficult. The situation is not as dire as it is suggested in this member's district, and people know who the cooperators are long before the presentence report.

Judge Raggi hoped that CACM had examined the published proceedings of a national conference held on this problem, that she co-chaired, at which everyone with a stake in this had a chance to express views on the problem – not just defense and prosecution, but also the press, researchers, the Bureau of Prisons, and more. The proceedings were published in the Fordham Law Review. The conference revealed many different local policies, all carefully thought out. One problem with these varying practices is that inmates are not aware of the variation. For example, although some districts seal certain documents in all cases, others do not, and inmates may incorrectly assume any inmate whose document was sealed must have been a cooperator. The Rules Committee should be at the table when changes are discussed. That people are being beaten and worse in prison is certainly a Bureau of Prisons problem. It may or may not be a rules problem, but the Criminal Rules Committee should be involved in the discussions.

Mr. Wroblewski stated that the BOP has taken several steps, but the problem goes beyond just the prisons. It also affects people outside of prison.

Judge Tallman said that he understood some courts are barring a defendant's access to his own presentence report so that he cannot be expected to produce his own presentence report in prison. He noted that the Ninth Circuit broadcasts arguments live on the internet, and it is receiving more and more requests to seal those proceedings. But this could be a problem if sealing an individual argument is taken as a signal that the person is a cooperator.

Judge St Eve suggested that CACM is looking to provide a recommendation to the Judicial Conference in March. When Professor Beale observed that the Criminal Rules Committee would have difficulty providing input before then, Judge Sutton inquired what a rules-related response might be. Professor King offered that the Committee might, for example, change access of the defendant to the presentence report in Rule 32 so that the defendant reviewed and returned a hard copy. Or it might amend Rule 11 concerning what is said on the record. There might be changes in the appellate rules concerning what must be filed. Judge

Sutton stated that the Standing Committee might decide to ask CACM to wait for this Committee's input, depending upon what CACM decides to do.

Judge Molloy noted that the Committee's next meeting was scheduled for April 18 and 19th in Washington D.C., and he urged members to make it a priority to attend. He hopes to find a week in October 2016 that will work for everyone, sufficiently in advance that there would be no reason for Committee members not to attend. With a final thank you to Judges Raggi, Lawson, England, and Rice, the meeting was adjourned.

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TAB 5

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TAB 5A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **December 14, 2015**

I. Introduction

The Advisory Committee on Appellate Rules met on October 29, 2015 in Chicago, Illinois. The Committee approved for publication three sets of proposed amendments. These amendments relate to (1) stays of the issuance of the mandate under Rule 41; (2) the authorization of local rules that would prevent the filing of an amicus brief based on party consent under Rule 29(a) when filing the brief would cause the disqualification of a judge; and (3) the extension of filing and serving a reply brief in appeals and cross appeals from 14 days to 21 days under Rules 31(a)(1) and 28.1(f)(4). The Committee also considered nine additional items and decided to remove three of them from its agenda. Since the October meeting, the Committee has received one additional new item to consider.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers the other matters under consideration.

The Committee has scheduled its next meeting for April 5-6, 2015. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items – for Publication

The Committee seeks approval for publication of three sets of proposed amendments as set forth in the following subsections.

A. Stays of the Issuance of the Mandate: Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

In light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), the Committee has studied whether Rule 41 should be amended (1) to clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) to address the standard for stays of the mandate; and (3) to restructure the Rule to eliminate redundancy. The Committee now seeks approval to publish proposed amendments to accomplish these changes. The proposed amendments are set out in an enclosure to this report.

Before 1998, Rule 41 referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. The proposed amendments to Rule 41(b) would specify that the mandate is stayed only "by order." Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and facilitate review of the stay.

The amendments to Rule 41(d) simplify and clarify the current rules pertaining to issuance of a stay pending a petition for a writ of certiorari to the Supreme Court. The deletion of subdivision (d)(1) is intended to streamline the Rule by removing redundant language; no substantive change is intended. Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. In *Schad* and *Bell*, without deciding whether the current version of Rule 41 provides authority for a further stay of the mandate after denial of

certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551. Because a court of appeals has inherent authority to *recall* a mandate in extraordinary circumstances, *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), the Committee thought there was little point in considering whether to forbid extensions of time altogether. The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances.

Some have suggested that under the current rule, a court may extend the time after a denial of certiorari *without* extraordinary circumstances under Rule 41(b). The proposed amendment to Rule 41(b) would establish that a court may extend the time only "in extraordinary circumstances" or pending a petition for certiorari under the conditions set forth in Rule 41(d). The "extraordinary circumstances" requirement is based on the strong interest of litigants and the judicial system in achieving finality. The proposed amendment would apply the "extraordinary circumstances" requirement both after a denial of certiorari and when no party petitions for a writ of certiorari, because the strong interests in finality counsel against extensions unless a heightened standard is met.

B. Authorizing Local Rules on the Filing of Amicus Briefs: Rule 29(a)

Federal Rule of Appellate Procedure 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." A potential concern is that the parties might consent to the filing of a brief by an amicus curiae, and that filing may cause the recusal of one or more judges either on the panel hearing the case or voting on whether to rehear the case en banc. Several Circuits have adopted local rules to address this concern. For example, D.C. Circuit Rule 29(b) states: "Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case or a member of the en banc court when participation is sought with respect to a petition for rehearing en banc." The Second, Fifth, and Ninth Circuits have similar local rules.

These local rules appear to be inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties in all instances. The Committee seeks approval to publish an amendment to authorize local rules limiting the filing of amicus briefs in situations when they would disqualify a judge. The proposed amendment is set out in an enclosure to this report. The Committee believed that the local rules should be authorized because they reasonably conclude that the court's interest in avoiding disqualification of one or more judges on a hearing panel or in a rehearing vote outweighs the interest of a putative *amicus curiae* in filing a brief.

C. Extension of Time for Filing Reply Briefs: Rules 31(a)(1) and 28.1(f)(4)

Federal Rule of Appellate Procedure Rules 31(a)(1) and 28.1(f)(4) give parties 14 days after service of the appellee's brief to file a reply brief in appeals and cross-appeals. In addition, Rule 26(c) provides that "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire." Accordingly, parties effectively have 17 days to file a reply brief. Pending amendments, however, soon will eliminate the "three-day rule" in Rule 26(c), thus reducing the effective time for filing a reply brief from 17 days to 14 days.

The Committee considered whether Rules 31(a)(1) and 28.1(f)(4) should be amended to extend the period for filing reply briefs in light of the elimination of the three-day rule. The Committee concluded that effectively shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days. The Committee now seeks approval to publish amendments to Rules 31(a)(1) and 28.1(f)(4) that would accomplish this result.

The Committee did not believe that extending the period for filing a reply brief would delay the completion of appellate litigation. For the 12-month period ending September 30, 2014, the median time from the filing of the appellee's "last brief" to oral argument or submission on the briefs was 3.6 months nationally. The Administrative Office does not specifically measure the time from filing of the "reply brief" to oral argument, perhaps because the reply brief is optional. Given this 3.6-month median time period, however, a four-day increase over the 17 days allowed under the current rules is not likely to have a discernible impact on the scheduling or submission of cases. *See* Administrative Office of the U.S. Courts, Table B-4A ("U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014"). The Committee's clerk representative reported his understanding that the circuits typically set cases for oral argument after receipt of the appellee's brief, and that a modest change in the deadline for a reply brief should not affect this scheduling.

III. Information Items

The Committee is studying a proposal to expand the disclosure requirements in Rules 26.1 and 29(c) so judges can evaluate whether recusal is warranted. Local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. At its October 2015 meeting, the Committee discussed six possible amendments to these Rules. The Committee plans to study the matter further, in coordination with other advisory committees and the Committee on Codes of Conduct as warranted.

The Committee is considering a proposal to address a potential problem involving class action settlement objectors. A member of a class may object to a settlement, file an appeal, and then offer to drop the appeal in exchange for consideration from counsel representing the class. A concern is that such class members might not make their objections in good faith based on genuine objections, but instead might simply be attempting to leverage their ability to delay the settlement in order to extract payment. Because the solution to this problem may involve changes to both the Civil and Appellate Rules, the Committee is coordinating with the Civil Rules Committee on this matter, and the Civil Rules Committee likely will report on this matter as well.

The Committee is studying possible amendments to Federal Rule Civil Procedure 62(a), which concerns bonds that an appellant must post to stay the execution of a judgment during the pendency of an appeal. Although the possible amendments would address a Civil Rule, the matter is of interest to the Appellate Rules Committee because appeal bonds are an appellate issue. The Appellate Rules Committee has conveyed its views to those working on the matter in the Civil Rules Committee, and the Civil Rules Committee likely will report on this matter.

The Committee is considering a recent suggestion that would address several aspects of appeals by litigants proceeding *in forma pauperis*. The issues raised include whether to exclude any part of a social security number in court filings, whether to seal motions to proceed in forma pauperis, and whether to require opposing counsel to make certain types of authorities available to pro se litigants. The Committee is studying the desirability and feasibility of the suggested reforms.

The Committee is considering whether to amend the Appellate Rules to address whether the $500 fee for docketing a case under 28 U.S.C. § 1913 is recoverable as costs in the district court or in the court of appeals. The Committee has been advised that there is a lack of uniformity in practice among the circuits and is seeking additional information from clerks of court about current practices. The Committee will continue to study the matter.

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APPENDIX

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

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[1] New material is underlined in red; matter to be omitted is lined through.

19 ~~(1) **On Petition for Rehearing or Motion.** The~~

20 ~~timely filing of a petition for panel rehearing,~~

21 ~~petition for rehearing en banc, or motion for stay~~

22 ~~of mandate, stays the mandate until disposition~~

23 ~~of the petition or motion, unless the court orders~~

24 ~~otherwise.~~

25 ~~(2) **Pending Petition for Certiorari.**~~

26 ~~(A)~~ (1) A party may move to stay the mandate pending

27 the filing of a petition for a writ of certiorari in

28 the Supreme Court. The motion must be served

29 on all parties and must show that the ~~certiorari~~

30 petition would present a substantial question and

31 that there is good cause for a stay.

32 ~~(B)~~ (2) The stay must not exceed 90 days, unless the

33 period is extended for good cause or unless the

34 party who obtained the stay files a petition for

35 the writ and so notifies the circuit clerk in

36 writing within the period of the stay. In that

37 case, the stay continues until the Supreme

38 Court's final disposition.

39 ~~(C)~~ (3) The court may require a bond or other security
40 as a condition to granting or continuing a stay of
41 the mandate.
42 ~~(D)~~ (4) The court of appeals must issue the mandate
43 immediately ~~when~~ on receiving a copy of a
44 Supreme Court order denying the petition ~~for~~
45 ~~writ of certiorari is filed~~, unless extraordinary
46 circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or

pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

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1 **Rule 29. Brief of an Amicus Curiae**

2 **(a) When Permitted.** The United States or its officer or
3 agency or a state may file an amicus-curiae brief
4 without the consent of the parties or leave of court.
5 Any other amicus curiae may file a brief only by leave
6 of court or if the brief states that all parties have
7 consented to its filing, except that a court of appeals
8 may by local rule prohibit the filing of an amicus brief
9 that would result in the disqualification of a judge.

10 * * * * *

Committee Note

Under current Rule 29(a), by the parties' consent alone, an amicus curiae might file a brief that results in the disqualification of a judge who is assigned to the case or participating in a vote on a petition for rehearing. The amendment authorizes local rules, such as those previously adopted in some circuits, that prohibit the filing of such a brief.

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1 **Rule 31. Serving and Filing Briefs**

2 **(a) Time to Serve and File a Brief.**

3 (1) The appellant must serve and file a brief within
4 40 days after the record is filed. The appellee
5 must serve and file a brief within 30 days after
6 the appellant's brief is served. The appellant
7 may serve and file a reply brief within ~~14~~ 21
8 days after service of the appellee's brief but a
9 reply brief must be filed at least 7 days before
10 argument, unless the court, for good cause,
11 allows a later filing.

12 * * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

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Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~ 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

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TAB 5B

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Advisory Committee on Appellate Rules
Table of Agenda Items —December 2015

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15

FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15

FRAP Item	Proposal	Source	Current Status
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-F	Recovery of appellate fees	Prof. Gregory Sisk	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion

TAB 5C

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Minutes of the Fall 2015 Meeting of the
Advisory Committee on Appellate Rules
October 29-30, 2015

Chicago, Illinois

I. Attendance and Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 29, 2015, at 9:00 a.m., at the Notre Dame Law Suite in Chicago, Illinois.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Mr. Gregory G. Katsas, Mr. Neal K. Katyal, Judge Stephen Joseph Murphy III, and Mr. Kevin C. Newsom. Solicitor General Donald Verrilli was represented by Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice, and by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division, both of whom were present. Judge Brett M. Kavanaugh was absent.

Reporter Gregory E. Maggs was present and kept these minutes. Associate Reporter Catherine Struve participated by telephone for all but brief portions of the meeting.

Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office.

Judge Robert Michael Dow Jr., a member of the Advisory Committee on Civil Rules arrived at 11:30 a.m. and left at 12:30 p.m. Mr. Alex Dahl of Lawyers for Civil Justice also attended portions of the meeting as an observer.

Judge Colloton called the meeting to order. He thanked Professor Barrett for her efforts in making the Notre Dame Law Suite available to the Committee for this meeting. Judge Colloton mentioned that Judge Peter T. Fay and Judge Richard G. Taranto had completed their service on the Committee. Judge Colloton welcomed Judge Murphy as a new member. Judge Colloton also explained that Judge Kavanaugh is a new member but was unable to attend. Judge Colloton thanked Professor Struve for her long and diligent service as the reporter and her great assistance during the transition, and the Committee applauded. Judge Colloton introduced Professor Maggs as the new

reporter for the committee. Judge Colloton also announced that Ms. Marie Leary, Research Associate for the Appellate Rules Committee was unable to attend.

II. Approval of the Minutes of the April 2015 Meeting

Judge Colloton directed the Committee's attention to the approval of the minutes from the April 2015 meeting. An attorney member asked about the Committee's policy regarding the identification of speakers in its meetings. He observed that the minutes mostly did not identify speakers by name but sometimes included identifying information. Professor Coquillette said that the tradition was not to identify members of the Committee when they speak because of concerns about outside lobbying and about the ability of speakers to speak freely.

Two attorney members favored having the minutes identify speakers. Another attorney member spoke in favor of identifying speakers, noting that it was a public meeting. A judge member said that the practice of not identifying members had been in place for many years. He believed that the practice should be the same across committees. But he further said that he did not think that identifying members in the minutes would affect lobbying. Mr. Letter said that representatives of the Department of Justice should be identified as such, which has been the practice. The Committee did not vote on whether to change the traditional practice, leaving the matter open for further consideration.

An attorney member called the Committee's attention to page 19 of the minutes [Agenda Book at 39], and asked Judge Colloton whether a representative of the Committee had spoken to the Fifth Circuit about its local rules on the length of briefs. Judge Colloton said that no conversation had yet occurred with the Fifth Circuit because it seemed premature. The proposed amendment to the federal rules is still pending, and if it is adopted, then the Fifth Circuit might opt out of the new length limits or modify its local rule.

The minutes of the Spring 2015 meeting were approved by voice vote.

Judge Colloton mentioned that the minutes of the Standing Committee's May 2015 meeting were not available in time for inclusion in the Agenda Book for this meeting. He summarized the meeting, noting that the Standing Committee had approved all of the amendments proposed by the Appellate Committee. The judicial Conference also has approved the proposed amendments, and they have gone to the Supreme Court. Judge Sutton said that the Standing Committee was grateful to the Appellate Rules Committee for preparing the proposed amendments.

III. Action and Discussion Items

A. Item No. 13-AP-H (FRAP 41)

Judge Colloton introduced Item No. 13-AP-H, reminding the Committee that the item concerns possible amendments to Rule 41 that would (1) clarify that a court of appeals must enter an

order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

Judge Colloton recounted that at its April 2014 meeting, the consensus of the Committee was that the words "by order" should be restored to Rule 41(b). Thus, a court would have to enter an order if it wished to stay the issuance of the mandate.

On the issue of the standard for ordering a stay, the Committee discussed whether to add an "extraordinary circumstances" test to Rules 41(b) and 41(d)(4). A judge member said that the standard under Rule 41(d)(4) was in fact already extraordinary circumstances and that the proposed amendment would be merely a codification of existing practice. The judge member said that it is not clear what the current standard is under Rule 41(b).

An attorney member asked whether judges should have to state their reasoning for an extension. Several members were opposed to adding such a requirement.

The consensus of the Committee was to add the "extraordinary circumstances" test to both Rules 41(b) and 41(d)(4). The Committee then discussed how to phrase the wording. An academic member suggested that Rule 41(b) and (d)(4) should be phrased consistently. An attorney member suggested that the phrase "unless extraordinary circumstances exist" for Rule 41(d). The Committee also agreed to this proposal by consensus.

The Committee then considered Professor Kimble's style suggestions as shown in the Agenda Book. The Committee approved the suggested changes, including his proposal to delete the word "certiorari" in Rule 41(d)(1) and (d)(4).

The Committee then set this item aside so that the Reporter could prepare a document showing all of the changes proposed at the meeting. The Committee resumed discussion of this item at the end of the meeting. The Reporter circulated electronically a document showing the changes.[1]

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[1] The circulated electronic document contained the following text, which the Committee approved:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time <u>by order</u>. <u>The court may extend the time only in extraordinary circumstances or under Rule 41(d).</u>

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate <u>Pending a Petition for Certiorari</u>.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a~~

An attorney member of the Committee asserted that Rule 41(b) is warranted by the interest in finality which warrants a high bar. The member also asserted that Rule 41(d)(4) codifies the Supreme Court's decisions.

After reviewing the changes, Committee approved the revised version of the rule by consensus. A judge member moved to send the draft, as approved, to the standing committee. An academic member seconded the motion. The Committee approved the motion by voice vote.

B. Item No. 08-AP-H (Manufactured Finality)

Judge Colloton introduced Item No. 08-AP-H and recounted its history. He explained that this item concerns efforts of a would-be appellant to "manufacture" appellate jurisdiction after the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Committee first discussed this matter in November 2008 and then revisited it at seven subsequent meetings. At the April 2015 meeting, by consensus, the Committee decided to take no action on the topic of manufactured finality. A judge member moved to remove the item from the agenda, and another judge member seconded the motion. Without further discussion, the Committee approved the motion by voice vote.

C. Item No. 08-AP-R (FRAP 26.1 & 29(c) disclosure requirements)

Judge Colloton introduced Item No. 08-AP-R. He reminded the Committee that local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. Judge Colloton said that the issue is whether additional disclosures should be required and, if so, which additional disclosures.

~~petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

The Committee turned its attention to the discussion drafts of Rules 26.1 and 29 [Agenda Book 117-119].

A judge member said that, as a general matter, judges would prefer more disclosure up front so that they do not spend time on a case before a conflict is discovered. An attorney member said that an opposing consideration was that requiring more disclosure could be onerous to attorneys.

The committee then turned its attention to specific issues in the discussion draft. The summary of the Committee discussion in these minutes has been re-ordered to follow the structure of the rules.

Rule 26.1(a)(1): Members of the Committee discussed the draft proposal to add the words "or affiliated." Given the indefiniteness of this phrase, the Committee considered whether the words should be omitted.

Rule 26.1(a)(2): Members of the Committee were concerned that merely requiring a party to list the "trial" judges in prior proceedings might be insufficient. In a habeas case, for example, both trial and appellate judges may have taken part in prior proceedings. A judge member proposed that the word "trial" should be removed.

Rule 26.1 (a)(3): An attorney member said the term "partners and associates" should be changed to "attorneys" or "lawyers." He also asked whether the term "law firms" was appropriate, given that entities other than law firms, such as public interest organizations, might represent parties in a lawsuit. He suggested replacing "law firms" with "legal organizations."

Rule 26.1(d): Mr. Letter observed that in antitrust cases, requiring the disclosure of an organizational victim could be problematic because there could be thousands of victims.

Rule 26.1(f): The Committee considered whether the word "intervenor" should be replaced with the term "putative intervenor." The Committee also considered whether subsection (f) should be deleted as unnecessary because, following intervention, intervenors would be parties and would be covered by the rule.

Rule 29(c)(5)(D): The discussion of this provision focused on two questions. One question was whether (D) should be deleted. Two attorney members said that attorneys often do not list everyone who worked on a brief. One of the attorney members asked this hypothetical: "If a lawyer read a brief and gave a few comments, would that have to be disclosed?" A judge member asked this hypothetical: "If a judge's son or daughter wrote a brief, should that have to be disclosed or not?" An academic member asked whether there were actual examples of past problems. A judge member thought that the rule was unrealistically strict. The second question discussed was, if (D) is not deleted, whether the phrase "contributed to" was too broad. A judge member suggested using the word "authored" because it would not include those who merely reviewed a brief and made

comments. Mr. Letter asked whether the Supreme Court has experience with what the word "authored" meant.

Following all of the discussion, the sense of the Committee appeared to be that the draft should be revised, to delete "trial" in Rule 26.1(a)(2); to replace "partners and associates" with "lawyers" and to replace "law firms" with "legal organizations" in Rule 26.1(a)(3); and either to strike Rule 29(c)(5)(D) or to replace the phrase "contributed to the preparation" with "authored in whole or part." The Committee did not make definite conclusions with respect to the other issues. Judge Colloton said that he did not think the item was ready to send to the Standing Committee.

D. Item No. 12-AP-F (FRAP 42 Class Action Appeals)

Judge Colloton introduced Item No. 12-AP-F, which concerns possible problems when objectors to class action settlements ask for consideration to drop their appeals. Judge Colloton then turned the discussion over to Judge Dow, who discussed the work of the Civil Committee. Judge Dow began by saying that Prof. Catherine Struve's memorandum [Agenda Book at 145-171] was directly on point.

Judge Dow explained that while it would be an error to say that all class action settlement objectors are bad, some objectors may be causing delays with extortionate appeals. He explained that a class member may lay low while a class action settlement is negotiated, file a pro forma objection to the settlement in the district court, and then surface by filing an appeal. After filing the appeal, the objector then may call counsel and ask for money to make the appeal go away.

Judge Dow said that the proposed changes have two parts. First, objectors must state their grounds for objection to a class action settlement under the proposed Federal Rule of Civil Procedure 23(e)(5)(A) [Agenda Book, at 203-204]. Second, a district court would have to approve any withdrawal of an objection under the proposed Rule 23(e)(5)(C) [Agenda Book at 204]. This requirement of approval would not only allow district judges to prohibit "a payoff" but also likely would discourage extortionate objections. Judge Dow said that the appellate and civil committees need to work together to determine the implementation.

A judge member asked whether the proposed Rule 23(e)(5)(C) was a permissible Civil Rule given that it effectively would limit what happens in the appellate courts. The judge member also asked how a payment would come to the attention of the court of appeals absent a rule that the objector or class counsel must disclose the payment. Another judge said that courts would not usually become involved in the withdrawal of an appeal. Judge Dow agreed that the Federal Rules of Appellate Procedure also should address the issue. Mr. Byron asked whether the sketch of Appellate Rule 42(c) [Agenda Book at 141] would suffice. Mr. Letter asked whether a payoff to a class action objector would be less of a concern if the money was coming out of the class counsel's fees. Judge Sutton asked whether an "indicative rule" under proposed Rule 42(c) would work. An attorney member said that proposed Rule 42(c) was inconsistent with general practice because it would require the court of appeals to refer a matter to the district court. Mr. Byron did not think it was inconsistent,

and Judge Sutton suggested that the procedure contemplated would be like sending a case back for a determination of whether there is jurisdiction. Mr. Letter also thought that if there was nothing in the Appellate Rules about withdrawing appeals, litigants might not know to look at Civil Rule 23. The clerk representative asked what the district court would do with the case when it was sent back. Judge Dow suggested that perhaps Rule 42 should require disclosure and approval of a fee. Judge Sutton suggested that an alternative would be for class counsel to seek an expedited appeal to reduce the pressure for class objectors. Mr. Letter said that the procedure might be burdensome because parties settle with appellants all the time. Prof. Coquillette suggested that it is an attorney conduct problem.

Judge Dow said that he would take this matter to back to Civil Rules Committee to discuss the issues. He emphasized that the sketch of proposed Rule 42(c) is a work in progress.

Mr. Dahl asked about the "indicative ruling" under Rule 23(e)(5): If the district court does approve the payment, could the objector appeal the indicative ruling? Judge Colloton suggested that it would remain in the Court of Appeals.

The Committee was in recess for lunch.

D. Item No. 15-AP-C (Deadline for Reply Briefs)

Judge Colloton introduced Item No. 15-AP-C. He summarized past discussions, which had recognized that most appellants now have effectively a total of 17 days to serve and file reply briefs because of the 14 days provided by Rule 31(a)(1) and the 3 additional days provided by Rule 26(c). The proposed revision of Rule 26(c) to eliminate the 3 additional days when appellants serve and file documents electronically will effectively reduce the time for serving and filing a reply brief to 14 days. Judge Colloton said that the questions for the Committee are whether to modify Rule 31(a) to extend the period from 14 days and, if so, whether the extended period should be 17 days or 21 days.

Judge Colloton noted that one question previously raised had been whether extending the time for filing and serving a reply brief would reduce the time before oral argument. On this point, he noted that statistics suggest that the extension from 14 days to 21 days would be unlikely to have a material effect because in federal courts of appeal the mean period from the filing of the last appellate brief to oral argument is currently 3.6 months [see Agenda Book at 265]. In addition, the clerk representative recalled that a study had shown that no courts had waited until a reply brief is filed before scheduling oral argument.

An attorney member said that 14 days was too short for preparing and filing a reply brief. He further said that he would prefer 21 days to 17 days, explaining that the time for filing and serving a reply brief was already shorter than the time for filing other briefs. He believed that the benefit to attorneys and clients would come at very little cost to the system. Another attorney member said that attorneys in practice had internalized the 17-day period. He noted also that the period for filing a reply brief starts when the response is actually filed, not when it is due, and the uncertainty of when

the response will be filed also may make filing a reply in 14 days difficult. He supported 21 days. Professor Coquillette supported 21 days because 21 days is a multiple of 7 days, which helps keep the reply brief due on a weekday. The appellate clerk liaison agreed that multiples of 7 days are slightly easier for the clerks office to work with. An attorney member believed that additional time will help lawyers produce better briefs. An appellate judge member said that the Supreme Court of Colorado has the same schedule as the current federal rule. Another appellate judge emphasized that there should be a replacement for the lost three days and that 21 days made more sense than 17 days.

The sense of the Committee was to modify the Rules to extend the period for filing and serving reply briefs from 14 days to 21 days. Judge Colloton suggested that the Committee's reporter prepare a marked-up draft showing the exact changes to Rules 31(a)(1) and 28.1(f)(4). The Committee would then have an opportunity to vote on the proposed changes by email.

E. Item No. 14-AP-D (amicus briefs filed by consent of the parties)

Judge Colloton introduced Item No. 14-AP-D, which came to the advisory committee's attention through discussion at the June meeting of the Standing Committee. He explained that some circuits have created local rules that appear to conflict with Rule 29(a). Although Rule 29(a) says that an amicus may file a brief if all parties have consented to its filing, some local rules bar filing of amicus briefs that would result in the recusal of a judge. Judge Colloton said that questions for the Committee are whether Rule 29(a) is optimal as written or whether Rule 29(a) should be revised to permit what the local rules provide.

An appellate judge member explained how allowing the filing of an amicus brief in some cases might require a judge to recuse himself or herself. Although this possibility might not happen often in panel cases, he explained that it could happen when a court hears a case en banc.

An attorney member supported the position of the local rules. He proposed adding this sentence to the end of Rule 29(a): "The court may reject an amicus curiae brief, including one submitted with all parties' consent, where it would result in the recusal of any member of the court." An appellate judge member asked whether there was a way to reword the proposal because it seemed odd to reject a brief after it had been filed.

Mr. Byron suggested that Rule 29(a) could be amended to allow circuits to adopt local rules. An attorney member responded that a broad authorization might be problematic because a circuit might bar all amicus briefs.

After further discussion, it was the sense of the Committee that the local rules were reasonable and that Rule 29(a) should be amended to allow the kinds of local rules that have been adopted by the D.C., Second, Fifth, and Ninth Circuits. Judge Colloton asked the Committee's reporter to draft and circulate proposed language for revising Rule 29(a) to achieve the Committee's objective. He suggested that the Committee could vote on a proposed amendment by email.

F. Item No. 12-AP-D (Civil Rule 62/Appeal Bonds)

Judge Colloton briefly recounted the history of this agenda item and thanked all those who had worked on it. Judge Colloton then invited Mr. Newsom to discuss the matter. Mr. Newsom began by asking the Committee to compare the current version of Federal Rule of Civil Procedure 62 to the proposed "September 2015 Draft" revision of Rule 62 [Agenda Book at 294]. Mr. Newsom then identified four principal points for consideration: (1) Under the current rule, there is a gap between the automatic 14-day stay of a judgment and the deadline for filing anything attacking the judgment. (2) Most appellants currently obtain a single bond (or other form of security) to cover both the post-judgment period and the appeal period, but the current rule seems to anticipate two different bonds. (3) Although the current rule contemplates that appellants will give a bond as security, sometimes appellants provide a letter of credit or other form of security. (4) The current rule does not specify an amount for the bond.

Mr. Newsom explained that the proposed Rule 62(a)(1) would extend the automatic stay from 14 to 30 days, unless the court orders otherwise. This extension would address the current gap between the 14-day stay of judgment and the deadline for filing an appeal or other attack on the judgment. Mr. Newsom explained that a court might "order otherwise" if the court is concerned about the possibility that the losing party might try to hide assets during the period of the stay. The proposed revision of Rule 62(a)(2) authorizes a stay to be secured by a bond or by other form of security, such as a letter of credit or an escrow account. Mr. Newsom noted that the proposed rule does not contemplate that the appellant would have to post more than one form of security. The proposed rule, like the current rule, does not specify an amount of the bond or other security. Proposed Rule 62(a)(3) authorizes a court to grant a stay in its discretion.

An attorney member was concerned about what might happen if a judge did not grant a stay to the appellant and the appellee lost on appeal. Mr. Newsom explained that the proposed revision of Rule 62(c) would allow a district court to impose terms if the district court denied a stay.

An attorney member was concerned that the proposed revision of Rule 62(b) would allow a court to refuse a stay for good cause even though an appellant had provided security. The attorney member thought that this proposed rule was contrary to current practice. The attorney member asserted that practitioners currently assume that if a client who has lost at trial posts a sufficient bond, the client is entitled to a stay. An appellate judge member asked whether the proposed Rule 62(b) should be rewritten to make clear that ordinarily a stay would be granted. Another appellate judge member asked whether this portion of the proposed Rule 62(b) should be eliminated.

Mr. Byron suggested that the appellee might have other options besides needing the denial of a stay.

Mr. Letter reminded the Committee that in a case in which the government is involved there is an automatic 60-day period in which to file an appeal. *See* Fed. R. App. P. 4(a)(1)(B). As a result, even extending the automatic stay from 14 to 30 days will still lead to a gap.

Judge Sutton said that the current version of Rule 62 is somewhat ambiguous. He wondered whether that ambiguity might not be beneficial because it affords discretion.

Judge Colloton reminded the Committee that the proposal concerned a Federal Rule of Civil Procedure, rather than a Federal Rule of Appellate Procedure. But he emphasized that the Committee may want to provide feedback to the Civil Rules Committee because the issue affects appellate lawyers. He suggested communicating to the Civil Rules Committee that concerns were raised among appellate lawyers that the current rule, in practice, has meant that there is a right to a stay if the appellant posts a bond, and that the proposed Rule 62(b) appears to represent a shift in policy, such that a stay upon posting security is not assured.

Summing up the discussion, Mr. Newsom asked whether the Committee thought it was acceptable for proposed Rule 62(a)(2) to require only a single bond and to allow for alternative forms of security other than bonds, and for proposed Rule 62(a)(1) to extend the period of the automatic stay from 14 days to 30 days. This was the sense of the Committee.

G. Item No. 12-AP-D (FRAP Form 4 and institutional-account statements)

The reporter introduced Item No. 12-AP-D, which concerns Federal Rules of Appellate Procedure Form 4. Question 4 requires a prisoner "seeking to appeal a judgment in a civil action or proceeding" to attach an institutional account statement. The proposal is to add the phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to Question 4 so that prisoners would not have to attach such statements in habeas cases. The reporter noted that Form 4 was amended in 2013 but the word processing templates for Form 4 which are available at the U.S. Courts website have not yet been updated and still contain the pre-2013 language.

The clerk representative said that institutional account statements are currently filed in many cases in which they are not needed. He further said that filed forms are not made public.

Mr. Letter said that he would ask the Bureau of Prisons to determine whether preparing the account statements is burdensome. The clerk representative said that he would inquire about whether the form is burdensome for clerks of courts.

The reporter said that he would notify those responsible of the need to update the word processing forms available on the U.S. Courts website.

The sense of the Committee was to leave the matter on the agenda until more information is obtained and the word processing templates are corrected.

H. Item No. 14-AP-C (Issues relating to *Morris v. Atichity*)

The reporter introduced Item No. 14-AP-C, which is a proposed rule that would require

courts to resolve issues raised by litigants. The reporter reminded the Committee that the item was included on the agenda for the April 2015 meeting, but the Committee did not have time to address it.

Following a brief discussion of the points raised in Professor Daniel Capra's memorandum [Agenda Book at 369-370], an attorney member moved that Committee take no action and remove the item from the agenda. Another attorney member seconded the motion. The Committee approved the motion by voice vote.

I. Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, and 15-AP-D (Possible amendments relating to electronic filing)

Judge Chagares introduced these items. The Committee's discussion focused on three issues. The first issue was whether pro se litigants should be permitted to file electronically. Judge Chagares said that a consensus appears to be emerging among the Advisory Committees that pro se litigants should be barred from using electronic filing unless local rules allow. Professor Coquillette cautioned that it may be undesirable to allow the circuits to adopt their own approaches because of the benefits of uniformity.

The clerk representative said that the Eighth Circuit allows pro se prisoners to file electronically and the clerk's office then uses the filing to serve the parties electronically. He said that this approach has not been problematic to date, but he cautioned that a handful of pro se litigants conceivably might abuse the system.

Judge Chagares said that the Advisory Committees have been discussing how to handle signatures on electronically filed and served documents. He suggested that the rules should specify that logging in and sending constitutes signature.

Finally, Judge Chagares addressed the current rules requiringg a filing to contain a proof of service. He suggested that proof of service should not be required when there is electronic filing.

Judge Colloton explained that the Committee at this time did not need to reach any final conclusion, but instead only to develop a sense of the issues. He suggested that the Committee should wait until the Advisory Committees on the Civil and Criminal Rules have considered the matters, and that the advisory committees should coordinate their approaches. This was the sense of the Committee.

J. Item No. 15-AP-E (FRAP amendments relating to social security numbers etc.)

The reporter introduced Item No. 15-AP-E, which concerns four proposals, namely: (1) that filings do not include any part of a social security number; (2) that courts seal financial affidavits filed in connection with motions to proceed in forma pauperis; (3) that opposing parties provide certain types of cited authorities to pro se litigants; and (4) that courts do not prevent pro se litigants from

filing or serving documents electronically. The reporter noted that the Committee had just discussed the fourth issue in connection with the previous item.

The social security number issue concerns Federal Rule of Civil Procedure 5.2(a)(1), which allows filed documents to contain only the last four digits of a person's social security number. Although this is a rule of civil procedure, the matter concerns this Committee because Federal Rule of Appellate Procedure 25(a)(5) makes Rule 5.2 applicable to appeals. In addition, Form 4 specifically asks movants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The clerk representative believed that these last four digits are no longer used for any purpose. He noted that similar forms (i.e., AO 239/240, "Application to Proceed in District Court Without Prepaying Fees or Costs") are used in the district courts.

After a brief discussion, based on the information available at the meeting, it was the sense of the Committee that Form 4 should not ask movants for the last four digits of their social security number. It was also the sense of the Committee that motions for leave to proceed in forma pauperis should not be sealed. A judge member expressed the view that these petitions are court documents and that the other party in a lawsuit should not be prevented from seeing them. No votes, however, were taken on either issue.

The proposal to require litigants to provide cited authorities to pro se litigants concerns local district court rules, but Federal Rule of Appellate Procedure 32.1(b) already partly addresses the concerns raised in the proposal. An attorney member asked whether Rule 32.1(b) refers only to free publicly accessible databases or would include databases like Westlaw and Lexis for which payment is required. Another Committee member responded that the Advisory Committee Note to Rule 32.1 says that publicly accessible databases could include "a commercial database maintained by a legal research service or a database maintained by a court."

Judge Colloton suggested that the item be retained on the agenda for the spring meeting. The Appellate Committee will see what the Civil Committee recommends before taking action.

K. Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal)

The reporter introduced this new item, which concerns the procedure by which an appellant who prevails on appeal may recover the $500 docketing fee. The majority of circuits allow recovery of this fee as costs in the circuit court but a few courts require litigants to recover this fee in the district court. The proposal was to amend Rule 39 to require courts to follow what is now the majority approach.

A judge member question whether an amended rule was necessary. It may be that the circuits that do not allow for the recovery of costs in the circuit courts are not following the current rule. The clerk representative said that the Eighth Circuit has not always been consistent in its approach. He further said that he would raise the issue with other clerks of court to determine their practice.

The Committee took no action on the matter and left it on the agenda.

L. Item No. 15-AP-G (discretionary appeals of interlocutory orders)

The reporter introduced Item No. 15-AP-G, explaining that its proponent requested a "general rule authorizing discretionary appeals of interlocutory orders, leaving it to the court of appeals to sort through those requests on a case by case basis." The reporter briefly summarized the proponent's argument as outlined in the memorandum on the item [Agenda Book at 491-494].

A judge member said that in Colorado all orders are appealable with leave of the Supreme Court. In her experience, the process often took a lot of time. She said that the trial courts typically will stay the litigation while the interlocutory appeal is pending.

A judge member and an attorney member spoke against the proposal, questioning both its benefits and the authority to pass such a rule.

Following brief discussion, an attorney member moved that the Committee take no action on Item No. 15-AP-G and remove the item from the agenda. The motion was seconded. After brief discussion, the Committee voted by voice to remove the item.

IV. Concluding matters

Judge Colloton explained that the reporter would circulate for vote by email the final proposed language for two items. For Item No. 14-AP-D, the reporter will circulate a revised version of Rule 29(a), as amended to authorize local rules that would prevent the filing of an amicus brief based on party consent when filing the brief might cause the disqualification of a judge. For Item 15-AP-C, the reporter will circulate revised versions of Rules 31(a)(1) and 28.1(f)(4), amended to extend the deadline for filing and serving a reply brief from 14 days to 21 days.

Judge Colloton said that proposed revisions of Rules 26.1 and 29(c) concerning disclosure requirements were not ready for circulation. The consensus among the Committee was that Item No. 08-AP-R should be held over until the spring.

The Committee adjourned at 5:00 pm.

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

DATE: November 7, 2015

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 9, 2015 at John Marshall Law School in Chicago. On the day of the meeting, the Committee held a Symposium on Hearsay Reform that served to establish much of the Committee's agenda going forward. The Committee at the meeting reviewed its proposed amendments that are currently out for public comment, and discussed ongoing projects involving matters such as notice provisions, authentication of electronic evidence, and eHearsay. A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Symposium on Hearsay Reform

The Symposium on Hearsay Reform explored recent proposals to loosen the strictures of the federal rule against hearsay. Prominent judges, lawyers and professors were invited to participate, and a number of proposals for reform were made. One proposal was for broader admissibility of prior statements of testifying witnesses, on the ground that the declarant is by definition produced for trial and is under oath and subject to cross-examination about the prior statement. Other proposals involved expanding admissibility of hearsay by substituting the current hearsay exceptions for either 1) a single exception allowing the judge to admit hearsay that she finds reliable; or 2) regulating the hearsay problem by way of Rule 403, under which the judge would balance the probative value against the risk that the jury would not be able to properly discount the hearsay.

The symposium proceedings—as well as accompanying articles by many of the participants—will be published in the Fordham Law Review.

After the Symposium, Committee discussion indicated that a number of proposals were worthy of further consideration, and will be placed on the agenda for future meetings. The new agenda items include the following:

● Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

● Replacing the current system with Rule 403 balancing (though the Committee is concerned that such a change might lead to unpredictability in the application of the hearsay rule).

● Retaining the current structure but expanding the residual exception (Rule 807) to allow easier and more frequent use.

● Broadening Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements if the statement has been recorded.

● Considering whether the impact of an expanded Rule 801(d)(1)(A) would have a negative impact on summary judgment cases, and if so whether that would warrant having a different rule in civil and criminal cases.

The Evidence Rules Committee is grateful for the Standing Committee's support for the Symposium on Hearsay Reform. We wish to express special thanks to Judge St. Eve, whose efforts were crucial to the Symposium's success.

B. Proposed Amendments Issued for Public Comment

The Committee has two proposed amendments out for public comment: 1) a proposal to eliminate the hearsay exception for ancient documents, Rule 803(16); and 2) a proposal that would add two subdivisions to the rule on self-authentication (Rule 902), which provisions would ease the burden of authenticating certain electronic evidence. Only a few comments have been received to date, but the Committee will of course continue to monitor the comments and will review all of them at its Spring 2016 meeting.

C. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

The Committee has been considering whether amendments should be proposed to some or all of the notice provisions in the Federal Rules of Evidence. One possibility considered by the Committee was to make all the notice rules uniform. But the Committee decided that it would not propose changes to the notice provisions in Rules 412-15 (admissibility of other acts in cases involving sexual assault) because those rules raised special considerations that are not conducive to a uniform approach with the other exceptions. The Committee determined, however, that substantive changes to two of the other notice provisions would be useful: 1) deleting the requirement in Rule 404(b) that a criminal defendant must request notice; and 2) providing a good cause exception to the pretrial notice requirement of Rule 807. But the Committee has also taken on a suggestion from a member that the notice provisions other than in Rules 412-15—specifically Rules 404(b), 609(b), 807, and 902(11)—should be amended to substitute the current disparate provisions with a uniform template. That template provides as follows:

> The proponent must give an adverse party reasonable [written] notice of an intent to offer evidence under this Rule—and must make the substance of the evidence available to the party—so that the party has a fair opportunity to meet it. The notice must be provided before trial—or during trial if the court, for good cause, excuses lack of notice.

This proposal for uniformity would make a number of substantive changes in addition to the two that have been preliminarily approved by the Committee (i.e., eliminating the request requirement of Rule 404(b) and adding a good cause exception to Rule 807). The additional substantive changes would be: 1) the Rule 404(b) notice requirement would extend to civil cases, and to the defendant in criminal cases; 2) the provisions on the "particulars" of notice in each provision would be eliminated, in place of the phrase "substance of the evidence"; and 3) each of the rules would require the notifier to identify the rule under which the evidence would be proffered.

The Committee will consider this uniformity proposal, as well as the proposals for substantive changes to Rules 404(b) and 807, at its next meeting.

C. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it can provide assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has been working on preparing such a manual with Greg Joseph and Judge Paul Grimm. The goal is to produce a pamphlet to be issued by the FJC. For the Fall meeting, the Reporter submitted drafts on best practices for authenticating email, texts, and social media postings. In addition a draft has been recently prepared for authentication of YouTube and other videos. The next steps are: 1) preparing best practices for authenticating web pages, search engines, and chatroom conversations; 2) revising the draft on judicial notice; and 3) adding an introduction on the applicable standards of proof that Judge Grimm has already prepared. We estimate that the final product should be ready for approval by the Committee no later than the Fall 2016 meeting. At that point, the Committee and the Standing Committee will have to decide how the work will be designated, i.e., whether it should be considered a work of the Advisory Committee, or the Standing Committee, or rather a work by individuals under the guidance of the Committees.

D. Possible eHearsay (Recent Perceptions) Exception

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without a new exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For each Committee meeting the Reporter submits, for the Committee's information, an outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most, there are only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The Reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration—as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall 2015 Meeting

The draft of the minutes of the Committee's Fall 2015 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 9, 2015

Chicago, Illinois

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 9, 2015 at John Marshall School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Milton I. Shadur, Former Chair of the Evidence Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Bridget Healy, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring, 2015 Committee meeting were approved.

June Meeting of the Standing Committee

Judge Sessions reported on the June meeting of the Standing Committee. The Evidence Rules Committee proposed two amendments to the Evidence Rules: abrogation of Rule 803(16), and new provisions in Rule 902 to ease the burden of authenticating electronic evidence. Judge Sessions stated that the Standing Committee unanimously approved the proposed amendments to be issued for public comment.

II. Symposium on Hearsay Reform

The morning of the meeting was devoted to a symposium on hearsay reform. The Committee determined that a symposium would be useful to help it to determine whether the hearsay rule and its exceptions should be subject to major reform. The calls for reconsideration of the hearsay rule and its exceptions have fallen into two categories: 1) replace the current system of categorical exceptions with a single rule allowing judges to admit hearsay subject to a balancing process of probative value and prejudicial effect (or alternatively, a broadening of the discretionary standards set forth in the residual exception, Rule 807 of the Evidence Rules); and 2) eliminate or alleviate the hearsay rule's coverage of prior statements of testifying witnesses, on the ground that the declarant who made the statement is at trial subject to cross-examination.

Panelists at the symposium included judges (Posner, Schiltz and St. Eve), professors, and outstanding practitioners from the Chicago area. The proceedings will be published in the Fordham Law Review, along with accompanying articles by many of the panelists.

The afternoon session of the Advisory Committee meeting was devoted mostly to discussion among Committee members about the many ideas and arguments raised at the Symposium. The Committee generally concluded that the Symposium was excellent; that it gave the Committee plenty to think about in determining whether amendments to the current system of hearsay regulation should be proposed; and that it set an agenda for the Committee for a number of years to come. Among the specific points raised by Committee members were the following:

● In reviewing the continued validity of any hearsay exception, it should not be evaluated solely by whether the statements admissible under the exception are reliable. Reliability is one basis for a hearsay exception, but it might also be validly supported by a finding that statements under the exception can be corroborated by other evidence, or by the fact that the type of hearsay admitted can be evaluated and properly weighed by jurors using their common sense. And some exceptions, such as those for party-opponent statements, require no reliability at all but rather are based on the adversary system.

● Any argument that a particular exception allows admission of unreliable statements should not necessarily give rise to more judicial discretion to admit hearsay. Rather the solution should be to tighten the exception by including trustworthiness requirements, or by allowing the opponent to convince the judge that the particular hearsay proffered is unreliable.

● Members were struck by the uniform position of practitioners--- that the current rule-based system of hearsay regulation was far preferable to a system based solely on judicial discretion. Allowing judicial discretion over hearsay would --- in the practitioners' view --- lead to unpredictable results and, consequently, more difficulty in settling the case, fewer cases disposed on summary judgment, and more costs of pretrial motion practice.

● A member found it interesting that there was disagreement among the panelists at the symposium as to whether expanding judicial discretion with regard to hearsay would result in more or fewer trials. One member of the Committee thought that a system of judicial discretion would not lead to more trials, but rather to more pretrial motion practice to seek advance rulings on evidentiary admissibility. But because those advance rulings are themselves discretionary with the trial judge, it would seem that more trials would end up occurring in a discretionary system --- because much more information is in play as being possibly admissible, and the trial judge might wait to decide admissibility until trial.

● One member noted that a discretionary system would be an especially ill fit for the coconspirator exception. That exception is not grounded in trustworthiness; it is simply based on the proponent establishing a ground for attribution. The exception is relatively easy to apply under current law. What factors would be relevant to determining admissibility under a discretionary system? And why would it be an advantage to discard the law on the subject that has been developed for over 40 years?

● One member stated that the best way to understand the hearsay rule is as a way to require the party to produce the best person to testify about a matter, in order to be fair to the adversary by allowing that adversary to test the witness who actually knows something about the event. It is difficult to see how a discretionary system of loose standards would lead to the judge choosing the best person to present the evidence.

● One member argued that the biggest problem with a discretionary system is that application of the hearsay rule would vary from judge to judge. For example, one judge may require empirical support for arguments about trustworthiness while other judges might not. The fact that some of the existing exceptions may not be empirically supported is a problem, but it is not apparent that the problem is solved if judges decide hearsay admissibility on whatever basis is personal to them.

● Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. This would allow some discretion but yet would be likely to provide some consistency from judge to judge. Another Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a).

● One member suggested that if the concern is that some of the hearsay exceptions do not in fact guarantee reliability, it would be useful to review whatever empirical evidence exists. The

FJC representative agreed to undertake a review of published data pertinent to contemporaneous and excited statements --- i.e., the purported guarantees for the hearsay exceptions criticized as being without empirical support by Judge Posner.

● Committee members discussed a proposal made at the Symposium that would substitute Rule 403 balancing for a system of categorical exceptions. Presumably this would mean that in assessing "unfair prejudice" under Rule 403, the judge would take into account the possibility that (and the degree to which) the jury would be unable to discount or properly weigh the hearsay statement. Members suggested that it might be difficult to make such an assessment with any particular piece of hearsay, and it would be difficult for such an analysis to be consistently applied from judge to judge.

● Committee members agreed that it would be worthwhile to explore possible compromise alternatives for hearsay reform --- i.e., something not as radical as removing all the exceptions in favor of a Rule 403-type balancing, and yet something more than retaining the current system of categorical rules. One possibility is to expand the applicability of Rule 807, the residual exception. This might be accomplished by removing the "more probative" requirement of that rule, so that it could be invoked without the showing of necessity that is currently required. The trustworthiness requirement might also be changed from one requiring "equivalence" with the other exceptions to something more freestanding and discretionary.

● As to prior statements of testifying witnesses, the Committee learned in the Symposium that the current Rule 801(d)(1)(A) encourages the practice of bringing "wobbler" witnesses before the grand jury --- in that way, the statement they provide would be substantively admissible should they decide to change their story at trial. Committee members observed that as a policy matter, this appears to be a good practice, albeit not an evidence-related result. Another collateral consequence is that the existing rule expands discovery in criminal cases, because the government must disclose grand jury materials, but need give no advance notice of prior witness statements outside the grand jury.

● At the Symposium, a speaker noted that the premise of excusing prior witness statements from the hearsay rule --- that the witness is available for cross-examination --- does not apply if the witness denies making the statement. A Committee member observed that such a denial would be unlikely if the statement were recorded, but another member stated that even if recorded, the witness could say something like, "they put the statement before me and I just signed it." But another member responded that the increasing use of videorecording for statements would belie that argument, because the circumstances of the preparation and signing of the statement could not be disputed.

● At the Symposium, a speaker stated that one possible problem with broadening substantive admissibility of prior inconsistent statements could arise at the summary judgment stage. A party who could suffer summary judgment due to witness statements by the party or agents might simply make an inconsistent statement for purposes of summary judgment, thereby creating a triable issue of fact. Committee members asked the Reporter to consider this problem. It might be that the impact of a change on summary judgment practice would warrant retaining the existing rule in civil cases, even if it were expanded in criminal cases. The Reporter and

Professor Broun will conduct research into the practice in states with broader substantive admissibility of prior inconsistent statements to see if there has been an impact on summary judgment practice in those states.

● One member noted that even if the Committee makes no changes to the existing rules on hearsay, the Committee's review of the suggestions made at the Symposium would be a good thing because it would show the public that the Committee continues to monitor and review calls for change.

At the end of the discussion, the Committee asked the Reporter to prepare materials on the following topics:

1. Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

2. Replacing the current system with Rule 403 balancing.

3. Retaining the current structure but expanding the residual exception to allow easier and more frequent use.

4. Broadening Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements if the statement has been recorded.

5. Considering whether the impact of an expanded Rule 801(d)(1)(A) would have a negative impact on summary judgment cases, and if so whether that would warrant having a different rule in civil and criminal cases.

III. Proposed Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it -- the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

The Committee's proposal to abrogate Rule 803(16) was approved by the Standing Committee for release for public comment. At the Fall meeting, the Reporter provided information on the public comment to date. He noted that there have been objections to the proposal by plaintiffs' lawyers in environmental, insurance and asbestos cases. However, most of the objections were about the difficulty of *authenticating* ancient documents --- and the Committee has not proposed any change to the existing authentication rules. Moreover, none of the objections address the possibility that ancient documents, if actually reliable, can still be admitted as business records or under the residual exception. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its last meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee's proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed amendment was issued for public comment. At the Fall meeting the Reporter notified the Committee that no meaningful comment on the proposal had yet been received. He did note, though, that some law professors had made inquiries to him about whether the proposal might raise an issue in criminal cases due to the Confrontation Clause. He reported to these professors that the Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee was satisfied that there would be no constitutional issue,

because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). Nonetheless the Reporter notified the Committee that it could expect that some public comment will raise the Confrontation issue. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

At the Spring 2015 meeting the Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

At the Fall meeting, the Committee reviewed the Reporter's memorandum that focused on deleting the request requirement of Rule 404(b) and altering the notice requirement of Rule 807. The Reporter added an issue not raised in the previous meeting --- whether Rule 807 should be amended to require the proponent to give not just notice of intent to use the hearsay but more specifically notice of intent to use the evidence *as residual hearsay*. He noted that some courts have required this more specific notice while others had not. While no vote was taken on the specific proposal, some Committee members observed that the requirement of a more specific notice would probably provide little benefit, because it would essentially become boilerplate in every case --- the proponent would provide such notice in an excess of caution, even if it was unlikely to offer the evidence as residual hearsay. Another member noted that adding procedural requirements to Rule 807 would be inconsistent with any future attempt to make the exception broader and more easily-used, which is a subject on the Committee's agenda, as discussed above.

Before the meeting, Paul Shechtman had submitted an alternative proposal to provide for a uniform approach to the notice provisions in Rules 404(b), 609(b), 807, and 902(11) --- i.e., all the notice provisions except those found in Rules 412-415. Under Paul's proposal, each of the notice provisions would be structured to provide as follows:

> The proponent must give an adverse party reasonable [written] notice of an intent to offer evidence under this Rule -- and must make the substance of the evidence available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice.[1]

[1] Rule 902(11) would retain an existing provision requiring the proponent to make the record and certificate available for inspection.

Paul's proposal would make a number of substantive changes in addition to the two that have been preliminarily approved by the Committee (i.e., eliminating the request requirement of Rule 404(b) and adding a good cause exception to Rule 807). The additional substantive changes would be: 1) the Rule 404(b) notice requirement would extend to civil cases, and to the defendant in criminal cases; 2) the provisions on the "particulars" of notice in each provision would be eliminated, in place of the phrase "substance of the evidence"; and 3) each of the rules would require the notifier to identify the rule under which the evidence would be proffered --- effectively that is an extension of the Reporter's proposal to amend Rule 807 to require notice of intent to offer the evidence as residual hearsay.

In a preliminary discussion of Paul's uniformity proposal, the DOJ representative objected to extending the Rule 404(b) notice requirement to civil cases. She argued that this would be a major change, and questioned its necessity given the breadth of civil discovery. Other members noted that the proposal, currently in brackets, to require notice in writing was a good idea. That is the best way to know that notice has been provided --- eliminating the possibility of a dispute over whether notice was ever given.

One member noted that two of the notice provisions (404(b) and 609(b)) require notice to be provided "before trial" while the other two (807 and 902(11)) require notice to be provided "before the trial or hearing." The Reporter stated that he would look into whether there would be any substantive change if the reference to a "hearing" would be dropped from one set or added to the other set.

The Committee resolved to further consider the possible substantive changes to Rules 404(b) and 807, as well as Paul Shechtman's proposal for uniform notice provisions, at the next meeting.

VI. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has been working on preparing such a manual with Greg Joseph and Judge Paul Grimm. The goal is to produce a pamphlet to be issued by the FJC. For the Fall meeting, the Reporter submitted drafts on best practices for authenticating email, texts, and social media postings. He informed the Committee that a draft had been recently prepared for authentication of YouTube and other videos. The next steps are: 1) preparing best practices for authenticating web pages, search engines, and chatroom conversations; 2) revising the draft on judicial notice; and 3) adding an introduction on the applicable standards of proof that Judge Grimm has already prepared. The Reporter estimated that the final product should be ready for approval no later than the Fall 2016 meeting.

VII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

VIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court in the last term decided *Ohio v. Clark*, in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to

report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

IX. Next Meeting

The next meeting of the Committee is scheduled for Friday, April 29, 2016, in Washington, D.C.

Respectfully submitted,

Daniel J. Capra

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TAB 7

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TAB 7A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

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JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

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

DATE: December 11, 2015

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at S.J. Quinney College of Law at the University of Utah on November 4, 2015. Draft Minutes of this meeting are included at Tab C.

All items in this Report are presented for information about pending and possible future Civil Rules work. Several of them may advance to recommendations for publication to be made to the Standing Committee in June. These subjects include the steadily developing work on potential revisions of Civil Rule 23, joint work with the Appellate Rules Committee on stays of execution under Rule 62, and joint work with several committees on e-filing, e-service, and e-certificates of service.

Other rules proposals are in different stages of development or have been removed from the Civil Rules agenda. "Requester-pays" discovery rules and the offer-of-judgment provisions of Rule 68 have been on the agenda for some time. The Committee is suspending work on the requester-pays topic and carrying Rule 68 forward. Several new suggestions have been made as well. Most have been removed from the Committee's agenda, while some will be studied further. Each of these matters will be described briefly.

Finally, the Committee has worked on matters that do not directly involve impending rules amendments. The Pilot Projects Subcommittee continues to consider several areas that may prove suitable for pilot projects in one form or another. A subcommittee report is included at Tab B. Work continues to encourage programs designed to educate the bench and bar about the Civil Rules amendments that became effective on December 1, 2015.

RULE 23: CLASS ACTIONS

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules was originally formed in 2011. It was created in recognition of several developments that seemed together to warrant another examination of class-action practice. These included (a) the passage of about a decade since the 2003 amendments to Rule 23 went into effect; (b) the development of a body of Supreme Court cases on class-action practice; and (c) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act. In addition, some specific topics had emerged in the case law that suggested consideration of rule amendments might be warranted.

The Subcommittee began by developing an initial list of possible topics for serious consideration as rule-amendment possibilities. These ideas were initially discussed with the Advisory Committee during its March, 2012, meeting. Thereafter, the Advisory Committee's work shifted focus to the discovery and related items in the package of amendments eventually published for public comment in August, 2013. That package, as revised, went into effect on Dec. 1, 2015.

In late 2013, the Rule 23 Subcommittee resumed considering possible revisions of Rule 23, and returned to the list of possible topics it had developed initially in 2012. Discussions during 2014 further shaped this list, and a revised list was presented to the Advisory Committee at its Fall 2014 meeting.

Since compiling the topic list discussed by the Advisory Committee at its Fall 2014 meeting, the Subcommittee, or members of the Subcommittee, have made (or will make) presentations about the ideas under consideration at a variety of meetings and conferences. These events include the following:

ABA 18th Class Action Institute (Chicago, IL, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, NY, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C., April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, CA, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 12, 2015)

Civil Procedure Professors' Conference (Seattle, WA, July 17, 2015) (special half-day program devoted to aggregate litigation issues)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24, 2015)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24, 2015)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015)

National Consumer Law Center Consumer Class Action Symposium (San Antonio, TX, Nov. 14-15, 2015)

Association of American Law Schools Annual Meeting (New York, NY, Jan. 8, 2016) (Special program of AALS Civil Procedure Section devoted to Rule 23 issues)

In addition, the Advisory Committee has during this period received more than 25 written submissions about possible changes to Rule 23 and related matters. These submissions are posted at www.uscourts.gov via the link "Archived Rules Comments."

As noted above, the Subcommittee held its own mini-conference on pending Rule 23 amendment ideas on Sept. 11, 2015. The notes regarding that mini-conference and the memorandum sent to conferees to introduce the issues are included in this agenda book.

Based on its work, the Subcommittee refined its focus and reported to the Advisory Committee at its November, 2015, meeting. That committee supported the basic outline for proceeding, which identified six subjects for rule amendments, two additional topics the Subcommittee had considered but put "on hold" pending further developments, and three other topics that it had considered at the mini-conference but would be taken off the current agenda.

Since the Advisory Committee meeting, the Subcommittee has held two further conference calls to respond to comments during the Advisory Committee meeting, and has further refined its sketches of possible amendment ideas. This report includes those refinements.

The report is organized in three sections:

I. Topics on which the Subcommittee recommends proceeding now to draft possible amendments. This report includes the current sketches that have emerged from the Subcommittee's discussions. As indicated by the presence of brackets on occasion, and footnoted materials, this drafting process is ongoing, and certain drafting questions about how best to approach the topics remain. These topics are:

1. "Frontloading" in Rule 23(e)(1), requring information relating to the decision whether to send notice to the class of a proposed settlement

2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f)

3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice does trigger the opt-out period in Rule 23(b)(3) class actions

4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions

5. Addressing issues raised by "bad faith" class-action objectors

6. Refining standards for approval of proposed class-action settlements under Rule 23(e)(2).

After all six sketches are introduced, the report also includes a mock-up of the entire set of changes as they might appear together, in hopes that will make the overall plan clear.

In addition, the report presents a request from the Department of Justice that Rule 23(f) be amended to extend the time for appealing from 14 to 45 days in any case in which the federal government or a current or former United States officer or employee is a party and is sued for an action occurring in connection with that person's official duties. This request (included in these agenda materials) was submitted in December, 2015, and neither the Rule 23 Subcommittee nor the Advisory Committee has had an opportunity to review and discuss it.

II. Topics the Subcommittee has concluded should remain on its agenda, but be put "on hold" pending further developments. These topics are "ascertainability" and "pick-off" Rule 68 offers of judgment.

III. Topics the Subcommittee has considered in some detail and concluded should be removed from the current agenda. These topics include settlement class certification, cy pres treatment, and "issue classes."

I. Topics on which the Subcommittee recommends proceeding to draft possible amendments

Below are the six topics on which the Subcommittee proposes to proceed with drafting possible amendments, along with the current sketches of possible amendment language and accompanying Committee Notes. At the end of Part I is a composite mock-up of all these changes to show how they might look together. After that, the recent Department of Justice proposal is introduced.

1. "Frontloading"

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a 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 class***

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the parties' showing regarding the prospect of:

(i) approval of the proposal; and

(ii) class certification for purposes of judgment on the settlement proposal.

Sketch of Draft Committee Note

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) in 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 at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement 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 amended rule makes clear that the parties must provide the court with sufficient information to enable it to decide whether notice should be sent. The amended rule also specifies the standard the court should use in deciding whether to send notice—that notice is justified by the parties' showing regarding the prospect of approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular 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 in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, 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 and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed certification for settlement should not be considered in relation to the later request for litigation certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature 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 on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the take-up rate after notice to the class is completed is also often important. And because some funds are often left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, 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 existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important. [Particular attention may focus on the breadth of any release of class claims included in the proposal.]

The proposed handling of an attorney-fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney-fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney-fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included is identification of 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. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

2. Rule 23(f) and the Rule 23(e)(1) order for notice to the class

Rule 23. Class Actions

* * * * *

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. <u>An order under Rule 23(e)(1) may not be appealed under subdivision (f).</u>

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of the proposed class certification. But it is not a final approval of 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.

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

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), <u>or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for settlement under Rule 23(b)(3),</u> 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. * * * * *

Sketch of Draft Committee Note

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 is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and 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 notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members.

(4) Notice in 23(b)(3) class actions

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), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice—by United States mail, electronic means or other appropriate means—to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

Subdivision (c)(2). 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 interpreted the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule calls for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by 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 the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. The amended rule emphasizes that the court must exercise its discretion to select appropriate means of giving notice.

Professional claims administration firms have become expert in evaluating differing methods of reaching class members. There is no requirement that such professional guidance be sought in every case, but in appropriate cases it may be important, and provide a resource for the

21 court and counsel. In providing the court with sufficient information to enable it to decide
22 whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), for
23 example, it may often be important to include a report about the proposed method of giving
24 notice to the class.
25
26 In determining whether the proposed means of giving notice is appropriate, the court
27 should give careful attention to the content and format of the notice and, if this notice is given
28 under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to
29 obtain relief. Particularly if the notice is by electronic means, care is necessary not only
30 regarding access to online resources, but also to the manner of presentation and any response
31 expected of class members. As the rule directs, the means should be the "best * * * that is
32 practicable" in the given case. The ultimate goal of giving notice is to enable class members to
33 make informed decisions about whether to opt out or, in instances where a proposed settlement is
34 involved, to object or to make claims. Means, format and content that would be appropriate for
35 class members likely to be sophisticated, for example in a securities fraud class action, might not
36 be appropriate for a class made up of members likely to be less sophisticated. As with the
37 method of notice, the form of notice should be tailored to the class members' likely
38 understanding and capabilities.
39
40 Attention should focus also on the method of opting out provided in the notice. As with
41 making claims, the process of opting out should not be unduly difficult or cumbersome. [At the
42 same time, it is important to guard against the risk of unauthorized opt-out notices.] As with
43 other aspects of the notice process, there is no single method that is suitable for all cases.

44 This amendment recognizes that technological change since 1974 calls for recalibrating
45 methods of notice to take account of current realities. There is no reason to think that
46 technological change will halt soon, and there is no way to forecast what further technological
47 developments will affect the methods used to communicate. Courts seeking appropriate means
48 of giving notice to class members under this rule should attend to existing technology, including
49 class members' likely access to that technology, when reviewing the methods proposed in
50 specific cases.

(5) Objectors

No other subject discussed in the many conferences and meetings Subcommittee members have attended—and in multiple individual communications—has generated as much concern and apparent unanimity as the problem of "bad faith" objectors. The claim repeatedly made is that such objectors exploit their ability to object and to appeal from approval of a settlement over their objections. The appeal allows them, in essence, to hold the settlement "hostage." The "business model" that has been described sometimes consists of submitting extremely uninformative objections to the district court, often seemingly cobbled together from other cases in which objector counsel has also lodged objections. These objections may not even apply to the settlement in the pending case. Persuading the district judge that the objection is warranted is not a priority. Then, when the uninformative or inapposite objection does not derail the proposed settlement and the court enters judgment on the basis of the settlement, the objector files a notice of appeal and objector counsel demands that class counsel "settle" the appeal by paying a substantial sum to objector counsel. From the perspective of class counsel, this payoff may be justified to ensure timely relief to class members, for the class action settlement ordinarily cannot be consummated until all appeals have been completed.

As amended in 2003, Rule 23(e)(5) included a provision that partly addressed the possibility of such behavior. Although it explicitly recognized the right of class members to object to a proposed settlement, the amended rule also directed that such objections could not be withdrawn unless the court approved. That provision affords a level of scrutiny regarding inappropriate demands of objectors in the district court, but the filing of a notice of appeal seemingly frees the objector from any further judicial scrutiny. Since the delay that can result from an appeal is much greater than the delay that would result from an ill-founded objection, the omission from the 2003 amendment of any ongoing approval requirement has—in at least some cases—produced unfortunate pressures on class counsel to accede to objector counsel's demands.

This post-2003 development has galvanized a significant portion of class-action practitioners to support rule changes to address these objector counsels' "business model." Several years ago, the Appellate Rules Committee received a formal proposal for adoption of an Appellate Rule forbidding any payment under any circumstances to objectors in return for dropping appeals from approvals of class-action settlements. Rule 23 Subcommittee members have received many requests to do something about abuse of the right of objectors to appeal. Even attorneys who often represent objectors favor effective action; some of them vigorously proclaim that they will not settle their own appeals for payoffs.

Despite the widespread agreement in the class-action bar that something should be done to end this practice, the Subcommittee has found it difficult to settle on a potential rule change that would be effective in defeating this "business model." A flat prohibition of any payments to settle objections or appeals seems overbroad. But the possibility that the question straddles proceedings in the district court and the court of appeals introduces complexity.

One possibility would be for the Appellate Rules Advisory Committee and the Civil Rules Advisory Committee to generate a combined amendment package that would deal with the reported problems. The Rule 23 Subcommittee has considered these possibilities, and Judge Colloton and Prof. Maggs have generously given their time to discuss the questions during Subcommittee conference calls. The possibility was also discussed during the Civil Rules Advisory Committee's Salt Lake City meeting in November, and during the Appellate Rules Advisory Committee's meeting in Chicago in October, which was attended by Judge Dow, Chair of the Rule 23 Subcommittee.

A theme that arose from these discussions was that a simpler change would be preferable to a more complicated one. Accordingly, this report presents two possibilities—a simpler one involving only a revision of Rule 23(e) and a more complicated one involving a revision of the Appellate Rules as well, along with further changes to Rule 23(e). Both approaches are sketched below, but it is important to appreciate that the Subcommittee strongly favors the simpler approach that involves only a revision of Rule 23. This proposal makes district court approval necessary for any payment or other consideration in return for forgoing, abandoning, or dismissing an objection to a proposed class-action settlement or an appeal from district court approval of a proposed settlement over an objection. It thus does not in any way affect the court of appeals' authority to rule on whether to dismiss an appeal, but permits payment for doing so only on approval of the district court.

Besides forbidding payments to objectors, the simple model seeks to assist the district court's review of proposed settlements by requiring that objectors provide specifics to support their objections. Bad-faith objectors too often do not, and failure to comply with this feature of the amendment would provide an additional reason to reject an objection.

A. Simple Model
(favored by Subcommittee)

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) 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 [despite the objection].

Drafting a Committee Note now seems premature, but one thing such a Note might say is that (B)(ii) means that even if an objector appeals and then moves to dismiss the appeal any payment or consideration in connection with that dismissal is forbidden unless approved by the district court.

Another thing a Note could observe is that this amendment means that withdrawal of an objection in the district court requires court approval only if there is a payment or other consideration in connection with it. Thus, the court-approval requirement of current 23(e)(5) is relaxed by this amendment, and the amendment focuses on the problem area we have heard about. There seems no reason, based on the experience under Rule 23(e)(5) since 2003, for requiring a formal court approval of withdrawal of an objection by a good-faith objector who decides not to pursue an objection once the specifics of a proposed settlement are explained.

It may be that research on the treatment of "collateral" matters in connection with appeals would bear on this approach.

Beyond that, some further observations may be in order:

(1) A Note should make it clear that objectors are not normally "bad," but instead provide a valuable service to the court and the parties. And the fact they want to be paid for providing this service does not make them "bad," as recognized in the Committee Note to 23(h) when adopted in 2003.

(2) (e)(5)(B) above does not explicitly require disclosure of the agreement to compensate, but that seems implicit. One cannot ask for approval of something one does not disclose.

(3) This approach does not change the Appellate Rules. The court of appeals will presumably proceed with whatever briefing schedule it would normally expect the parties to follow. That schedule might afford enough time for the parties to reach an agreement for dismissal in return for payment and submit it to the district court for its approval before the due date for the appellant's brief. But it should be noted that the district court may—under the amendment sketch—approve the payment only "after a hearing." So there may not be time to obtain that approval under the court of appeals' schedule. If so, the appellant presumably would have to file a motion in the court of appeals asking for an extension of time. It is hard to see how that motion could fail to explain that a motion has been made to the district court to approve the payment. Unless that happens, it is not clear that there is any need to direct that the parties report the deal to the court of appeals.

B. Changing Appellate Rule 42(c) also
(not favored by Subcommittee)

Sketch of possible Appellate Rule 42(c)

Rule 42. Voluntary Dismissal

* * * * *

(c) **(1)** Unless approved by the court, no payment or other consideration may be provided to an objector or objector's counsel in connection with dismissing or abandoning an appeal from a judgment approving a proposed class-action settlement despite an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure. Such payment or consideration must be disclosed to the court.

(2) Before or after ruling on a motion to dismiss [or dismissing for failure to prosecute], the court may itself decide whether to approve a payment or other consideration disclosed under Rule 42(c)(1), or may refer the question whether to approve the payment to the district court for a recommendation, retaining jurisdiction to review the recommendation [on request by any party to the appeal].

This approach seems somewhat incompatible with the sketch of Civil Rule 23(e)(5)(B)(ii), which gives jurisdiction to the district court. So maybe the right way to proceed would be as follows in 23(e)(5):

(B) 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 forgoing or withdrawing an objection[, or forgoing or abandoning an appeal, or seeking dismissal of an appeal under Rule 42(a) of the Federal Rules of Appellate Procedure] {, or forgoing, abandoning, or dismissing an appeal at any time before the appeal is docketed by the circuit clerk}.

(C) If the court of appeals refers to the district court the question whether to approve payment or other consideration for dismissal or abandonment of an appeal [under Rule 42(c)(2) of the Federal Rules of Appellate Procedure], the district court must[, after a hearing,] report its recommendation to the court of appeals.

This approach would be more elaborate. That is one of the reasons why the Subcommittee does not favor it. One question is whether or how to deal with "abandonment" in the court of appeals, or dismissal for failure to prosecute. One might expect that an order to show cause re dismissal would precede dismissal for failure to prosecute, and that is the hook for requiring disclosure of the payoff to the court of appeals in the abandonment situation. Whether that method really is employed (or would be employed) is uncertain. There does not seem to be an Appellate Rule that provides a parallel to Civil Rule 41(b) regarding failure to prosecute. It would seem that class counsel would not be willing to pay off the objector until certain that the appeal is gone, and that the abandonment situation makes that less clear. So maybe the abandonment for payoff problem is not really a problem on appeal.

This approach does not have a hearing requirement in the court of appeals. Should one be added? Is that useful in the court of appeals? The idea of requiring it before the district court is to reduce the prospect class counsel might be willing to stipulate but not to support the payment face-to-face with the judge.

(6) Settlement approval criteria

The centrality of settlement approval criteria probably cannot be overstated. Although a small number of certified class actions go to trial, a much larger number end in settlements, and certification is often only for purposes of settlement.

Rule 23 has, until now, said little about what a court should focus on in reviewing a proposed settlement. The 1966 version of Rule 23 only said that the court must approve any settlement or voluntary dismissal. The 2003 amendment clarified that it must find that the settlement is "fair, reasonable, and adequate," a standard derived from case law under original Rule 23(e). Much of that case law developed during the 1970s and 1980s, and in some places included a large number of factors. The ALI undertook to focus the analysis on core features of concern reflected in the factor lists of all circuits. See ALI, Principles of Aggregate Litigation § 3.05 (2010).

Building on the ALI approach, the sketch of possible revisions below also seeks to focus on a relatively short list of core considerations in the settlement-approval setting. This listing also may inform the decision under Rule 23(e)(1) about what information the court needs to make a decision whether a proposed settlement has enough promise to justify notice to the class.

Rule 23. Class Actions

* * * * *

(e) **Settlement, Voluntary Dismissal, or Compromise**. The claims, issues, or defenses of a certified class 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.

* * * * *

(2) 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 settlement was negotiated at arm's length;[1]

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

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

(ii) the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;

(iii) the terms, including timing of payment, of any proposed attorney-fee award; and

(iv) any agreement made in connection with the settlement proposal; and[2] [3]

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[1] The Subcommittee has discussed combining (A) and (B) into a single provision as follows:

> **(A)** the class representatives and class counsel have adequately represented the class in prosecuting the case and negotiating its settlement at arm's length;

Consideration of this approach continues. One reason for favoring the approach in text is that it emphasizes the need to focus on the general adequacy of representation and, somewhat separately, on the course of negotiation that led to the settlement proposal. One reason for a combined approach is that all these judgments essentially involve the same criterion—whether there has been adequate representation.

[2] During its discussions, the Subcommittee has also considered an additional factor for what is now (C):

34 **(D)** class members are treated equitably relative to each other.
35
36 Sketch of Draft Committee Note
37
38 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement
39 is that it is fair, reasonable, and adequate. This criterion emerged from case law implementing
40 Rule 23(e)'s requirement of court approval for class-action settlements. It was formally
41 recognized in the rule through the 2003 amendments. By then, courts had generated lists of
42 factors to shed light on this central concern. Overall, these factors focused on comparable
43 considerations, but each circuit developed its own vocabulary for expressing these concerns. In
44 some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal
45 of this amendment is to focus the court and the lawyers on the core concerns of procedure and
46 substance that should guide the decision whether to approve the proposal, not to displace any of
47 these factors.
48
49 One reason for this amendment is that a lengthy list of factors can take on an independent
50 life, potentially distracting attention from the central concerns that inform the settlement-review
51 process. A particular circuit's list might include a dozen or more separately articulated factors.
52 Some of those factors—perhaps many—may not be relevant to a particular case or settlement
53 proposal. Those that are relevant may be more or less important than others to the particular
54 case. Yet counsel and courts may feel it necessary to address every single factor on a given
55 circuit's list in every case. The sheer number of factors can distract both the court and the parties
56 from the central concerns that bear on review under Rule 23(e)(2).
57
58 This amendment therefore directs the parties to present the settlement to the court in
59 terms of a shorter list of factors, by focusing on the central procedural considerations and
60 substantive qualities that should always matter to the decision whether to approve the proposal.
61
62 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as
63 "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up
64 to the proposed settlement. Attention to these matters is an important adjunct to scrutinizing the
65 specifics of the proposed settlement. If the court has appointed class counsel or interim class

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(iii) the probable effectiveness of the proposal in accomplishing the goals of the class action;

Concern has been expressed, however, about what this additional factor means, if it is distinct from the others in (C).

[3] An alternative presentation of factor (C) has recently been proposed:

> (c) the relief awarded to the class—taking into account the proposed attorney-fee award [and the timing of its payment,] and any agreements made in connection with the settlement—is adequate, given the risks, probability of success, and delays of trial and appeal; and

This possible reformulation will be before the Subcommittee as it moves forward.

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 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 also be important. 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.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney-fee award, both as to 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. A central concern is the relief that the settlement is expected to provide to class members. Evaluating the proposed claims process and expected or actual claims experience (if the notice to the class calls for pre-approval submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, 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 what the likely range of possible classwide recoveries might be 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. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

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

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis other class 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 apportionment of relief.

Composite of whole package
of amendment sketches

The Subcommittee's goal has been to develop a set of rule changes that together operate as a sensible whole. So it seems useful to present a composite of these changes (without the complication of the objector approach including an Appellate Rule change):

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), <u>or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for settlement under Rule 23(b)(3),</u> the court must direct to class members the best notice that is practicable under the circumstances, including individual notice<u>—by United States mail, electronic means or other appropriate means—</u>to all members who can be identified through reasonable effort. * * * * *

* * * * *

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a 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 class***

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the parties' showing regarding the prospect of:~~.~~

(i) approval of the proposal; and

(ii) class certification for purposes of judgment on the settlement proposal.

(2) 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 settlement 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 proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;

(iii) the terms, including timing of payment, of any proposed attorney-fee award; and

(iv) any agreement made in connection with the settlement proposal; and

(D) class members are treated equitably relative to each other.

* * * * *

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) 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 [despite the objection].

* * * * *

(f) **Appeals**. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. An order under Rule 23(e)(1) may not be appealed under subdivision (f).

Department of Justice Proposal

On Dec. 4, 2015, Benjamin Mizer, Principal Deputy Assistant Attorney General, wrote to Judge Dow to submit a proposal that Rule 23(f) be amended as follows:

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The Department recommends a Committee Note as follows:

Committee Note

Subdivision (f). The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to assess the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

Present posture

Neither the Subcommittee nor the Advisory Committee has had a chance to review or discuss this proposed amendment. A copy of Mr. Mizer's Dec. 4, 2015, letter is included in this agenda book.

II. Issues "on hold"

The two issues described below also drew much attention during the various events attended by Subcommittee members. But the fluidity of current case law, and the prospect of significant change (including at least one seemingly imminent Supreme Court decision), persuaded the Subcommittee that neither issue warrants going forward with developing formal amendment proposals at this time.

A. Ascertainability

Ascertainability has emerged as a prominent issue in the last few years. The Subcommittee received many recommendations about how Rule 23 might be amended to address this concern directly. In particular, several comments urged that the rulemakers counter certain decisions by the Third Circuit about its interpretation of the ascertainability factor in class certification. Some argued that undue attention to the mechanics of distributing a class payout at the certification stage created inappropriate obstacles to class certification, particularly in class actions growing out of purchase of low-value consumer products. But others urged that a strong version of the perceived Third Circuit approach be written into the rule as an absolute prerequisite to certification, even in class actions for injunctive relief under Rule 23(b)(2).

The case law, meanwhile, appears to be fluid and continues to develop. The agenda book for the Advisory Committee's November meeting contained three court of appeals decisions issued since the Advisory Committee's April 2015 meeting that seem to reflect evolution of the courts' attitude toward handling ascertainability—*Brecher v. Republic of Argentina*, 802 F.3d

303 (2d Cir. 2015) (per Wesley, J.); *Mullins v. Direct Digital*, LLC, 795 F.3d 654 (7th Cir. 2015); *Byrd v. Aaron's, Inc.*, 784 F.3d 184 (3d Cir. 2015). And some parties seem to make very aggressive ascertainability arguments to defeat certification. *See, e.g.*, *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380, 396-97 (3d Cir. 2015) (upholding certification and rejecting defendant's ascertainability argument as "mired in speculation").

Supreme Court developments may also affect the handling of ascertainability issues. Two cases in which the Court heard arguments this Term—*Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015); *Tyson Foods, Inc. v. Bouaphakeo*, 765 F3d 791 (8th Cir. 2015), *cert. granted*, 135 S. Ct. 2806 (2015)—may bear on ascertainability issues. And two courts of appeals have stayed the mandate on decisions involving ascertainability issues to permit defendants to seek writs of certiorari—*Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), *mandate stayed*, Aug. 18, 2015, *petition for certiorari filed* (no. 15-549), Oct. 28, 2015; *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), *mandate stayed*, Oct. 28, 2015.

In addition to the volatility of current case law, the Subcommittee is not certain what should be in a rule amendment if one is warranted. For its mini-conference, it attempted to draft a "minimalist" approach (included elsewhere in this agenda book), but several participants in that event regarded it as adopting a strong version of the Third Circuit test that many have questioned. It may be that developments in the relatively near future will at least cast more light on how best to approach these issues in a possible rule change. For the present, the Subcommittee regards it as unwise to attempt to devise a reaction without regard to developments reasonably anticipated in the relatively near future.

B. "Pick-off" offers of judgment

For some time, the Subcommittee has considered various ways to deal with the possibility of inappropriate "pick-off" offers of judgment to putative class representatives that would moot their class actions. The Subcommittee does not recommend proceeding with work on an amendment to address this concern.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. *See Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to avoid the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of their own class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question

whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. *See, e.g.*, *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case (*Campbell-Ewald*, 768 F.3d 871 (9th Cir. 2015), *cert. granted*, 135 S.Ct. 2311 (2015)). The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and it is quite possible that the issue will recede from the scene after that decision. It could recede even if the Court ultimately does not decide the case, or the decision leaves some questions open.

III. Issues Subcommittee is removing from its current agenda

During the Advisory Committee's November meeting, the Subcommittee presented three additional issues that it did not favor retaining on its agenda. The Advisory Committee approved the decision not to proceed presently with amendment ideas on these three topics, all of which were discussed in many meetings Subcommittee members have attended with the bar and bench, and included in the issues memorandum for the mini-conference.

A. Settlement Class Certification

The question whether certification standards should apply differently when the question is certification only for settlement rather than certification for trial has emerged on occasion since Rule 23 was amended in 1966. In 1995, a Third Circuit decision stating that settlement

certification could not be granted in any case in which the court would not certify for full litigation prompted a published proposal to add a new Rule 23(b)(4) permitting certification for settlement in a 23(b)(3) case even though the case would not satisfy the full Rule 23(b)(3) requirements for certification for trial.

The amendment proposal proved controversial, and meanwhile the Supreme Court decided *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which noted that the settlement class action had become a "stock device," and held that at least the manageability requirement of Rule 23(b)(3) need not be satisfied when certification only for settlement was sought. But the Court did not say that the predominance requirement was relaxed in the settlement setting.

The materials for the mini-conference included a sketch of a new Rule 23(b)(4) that would relax the predominance requirement. Several commented that this relaxation would produce dangerous results, and might prompt the filing of inappropriate proposed class actions. But few urged that such a change is acutely needed. It seemed that experienced lawyers have found the current state of the practice to afford sufficient flexibility to handle settlement class certification without the need for an amendment.

Instead, it seemed that emphasis on careful scrutiny of settlements under Rule 23(e)(2) was a more important focus for rule amendments, something that is included on the Subcommittee's list of topics to develop at present.

Given the ambivalence of many in the bar, and the existence of serious concerns about whether any rule change is really needed to enable class settlements when they are appropriate, the Subcommittee decided after the mini-conference not to proceed further with this idea.

B. Cy Pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in *Marek v. Lane*, 134 S. Ct. 8 (2013). Petitions seeking certiorari continue to request Supreme Court review of cy pres provisions. The ALI Aggregate Litigation Principles, in § 3.07, offer a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one from the Aggregate Litigation Principles that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a fairly lengthy sketch of both a possible rule amendment and a possible Committee Note that were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the force of Rule 23 and the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. *See, e.g.*, Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

Items included on the Subcommittee's list of topics for present action can partly address some of these concerns. The proposed sketches for Rules 23(e)(1) and 23(e)(2) (items (1) and (6) on the list in Part I of this report) both call attention to the need to address the possibility of a left-over surplus after the claims period, and to plans for dealing with that surplus. Those sketches and the one on notice (item 4)) also emphasize the need for the court to attend to the effectiveness of the notice campaign and the way in which claims may be presented. Together, these measures may improve the handling of issues that have raised serious questions about provisions put forward as cy pres arrangements without encountering the difficulties outlined above.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed, (b) the challenges of developing specifics for a rule provision, and (c) concerns about the proper limits of the rulemaking authority cautioned against adopting a freestanding cy pres provision.

C. Issue classes

The Subcommittee included in its memorandum introducing its mini-conference several sketches of possible amendments to Rule 23(b) or (c) designed to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.

RULE 62: STAYS OF EXECUTION

Introduction

The Rule 62 provisions for a stay pending appeal came on for discussion in both the Civil Rules Committee and the Appellate Rules Committee. A district judge asked the Civil Rules Committee whether there is authority to order a stay after expiration of the 14-day automatic stay provided by Rule 62(a) but before any party has filed any of the motions that, under Rule 62(b), authorize a stay "pending disposition of" those motions. The Committee initially decided that the court's inherent authority over its own judgments is so clearly adequate to the occasion that there was no need to amend the rule. But it was recognized that amendment might be desirable if doubts arose in practice. The Appellate Rules Committee was concerned that Rule 62 does not clearly support the useful practice of posting a single bond (or other security) that supports a stay that lasts from post-judgment proceedings in the district court on through final disposition of any appeal. It also thought it would be useful to adopt a clear provision that security may be provided in a form other than a bond. The Appellate Rules Committee's concerns prompted both Committees to take up Rule 62.

Deliberations by the Appellate and Civil Rules Committees have been supported by the work of a joint Subcommittee chaired by Judge Scott Matheson. Reports of the Subcommittee have been considered at earlier meetings of the Advisory Committees. Discussion at this Committee's meeting last May provided helpful guidance. With this guidance, the Subcommittee worked through the summer to develop a draft that addressed the questions that

began the work, and took up a number of new issues. Each Committee considered a draft submitted by the Subcommittee at their meetings this fall. The Subcommittee has revised its draft in response to the conclusions reached at those meetings. The revised Subcommittee draft has not been considered by either Committee. But what remains is material that has been fully considered and tentatively approved by each Committee. If time allows, it will be useful to explore the draft fully at this meeting. The guidance provided by a full discussion will facilitate confident preparation of a recommendation to publish Rule 62 amendments for comment next summer.

The purposes of the amendments are described in the Committee Note.

The Proposed Amendments

The current draft addresses the three issues that prompted the initial revision project. The "gap" between expiration of the automatic stay and the time allowed to make a post-trial motion is eliminated by extending the automatic stay to 30 days. Security for a stay may be posted either as a bond or in some other way. And security may be provided by a single act that covers both post-judgment proceedings in the district court and all further proceedings through completion of the appeal. These changes are discussed here. The further proposals that have been withdrawn are described briefly at the end.

REVISED DRAFT

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay. 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 Other Means.

(1) ***By Court Order*****.** The court may at any time order a stay that remains in effect until **a** designated time [, which may be as late as issuance of the mandate on appeal], and may set appropriate terms for security or deny security.

(2) ***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 Injunction, Receivership, or Patent Accounting Orders. 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 a 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.

* * * * *

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 to both interlocutory injunction orders and final judgments that grant, refuse, or otherwise deal with an injunction.

The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means. A single bond or other form of security can be provided for the life of the stay.

The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (b)(2) provides for a stay by providing a bond or other security at any time after judgment is entered; it is no longer necessary to wait until a notice of appeal is filed. 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.

Subdivisions (a) and (b) address stays of all judgments, except as provided in subdivisions (c) and (d). Determining what the terms should be may be more complicated when a judgment includes provisions for relief other than—or in addition to—a payment of money, and that are outside subdivisions(c) and (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.

Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction, for example, is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.

Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This question is left to the court's inherent control of the contempt power and the authority to refuse a stay.

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 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. Thirty days of 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 execution 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 under Rule 62(b)(1) that lasts longer or requires security.

Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. An appellant may prefer a court-ordered stay under (b)(1), hoping for terms less demanding than the terms for obtaining a stay by posting a bond or other security under (b)(2). A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation—for example, a contract claim may be fully secured by a payment bond.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(2) 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 text makes explicit the opportunity to post security in a form other than a bond. The stay 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.

Rule 62(b)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as the form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.] The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, either may seek a stay.

Withdrawn Proposals

Subcommittee discussions over the summer generated a draft that included provisions designed to confirm the district court's broad authority to regulate the choices governing a stay, the terms of the stay, denial of a stay accompanied by security for damages caused by

enforcement pending appeal, and simple denial of any stay. Two basic sets of reasons appeared in the advisory committee discussions for omitting these provisions.

One set of reasons reflected the basic premise that the Enabling Act should be used to revise court rules only when a substantial need appears. Earlier discussions in the advisory committees and in the Standing Committee asked whether any problems with stay procedure have been encountered beyond the problems that launched the project. No other problems were identified. That does not of itself foreclose consideration of possible problems to ensure that present revision does not leave the work half-finished, so that new problems will require additional revisions in the near future. But once the possible problems are identified in the abstract, and efforts are made to draft solutions, it remains important to consider whether the risks of imperfect foresight and flawed implementation will generate real problems while solving only theoretical problems. That concern weighed heavily in the discussions.

The other reason was more direct, and thoroughly familiar. The Subcommittee repeatedly considered and reconsidered the question whether there should be a nearly absolute right to a stay on posting a bond. The sense of the advisory committee discussions, particularly as informed by the understanding of appellate lawyers, is that there is a right to a stay. The right may not be absolute. The language of present Rule 62(d) says that "the appellant may obtain a stay by supersedeas bond." This language is carried forward only by making it more general to encompass cross-appeals: "a party may obtain a stay." Whether "may obtain" encompasses an absolute right may be debated. But in conjunction with the requirement that the court approve the bond or other security, there is at least an ambiguity that may leave the way open for a court to deny any stay for compelling reasons.

The nearly absolute right to a stay on posting a bond or other security, moreover, does not defeat all (or nearly all) discretion. It seems to be accepted now that a court may approve security in an amount less than the judgment. The revised draft Rule 62(b)(1) makes this authority explicit by allowing the court to order a stay and set terms for security or deny security.

Omission of the provisions spelling out several details of a court's inherent power to control its own judgments does not imply any determination as to the scope of that power. The court's power is left where it is, and as it may be developed and articulated by the courts as need arises.

Post-Script

The Committee decided to dispense with the antique-sounding description of the appeal bond as a "supersedeas" bond. If that style decision is accepted, it will be appropriate for the Appellate and Bankruptcy Rules Committees to consider deleting "supersedeas" from their sets of rules.

e-FILING, e-SERVICE, AND NEF AS CERTIFICATE OF SERVICE

The Appellate, Bankruptcy, Civil, and Criminal Rules Committees have worked to develop common proposals to advance electronic filing and electronic service. Recognizing a notice of electronic filing as a certificate of service has become part of this effort. The Criminal Rules Committee faces the most challenging task because it has decided that it is time to create a Criminal Rule that directly addresses filing and service. Present Criminal Rule 49(a) provides simply that filing and service are made as in a civil action. The Criminal Rules Committee and its Subcommittee are working carefully to prepare an independent Rule 49. Their work includes consideration of the possibility that criminal practice is sufficiently different from civil practice to justify differences between the Criminal and Civil Rules. Representatives of the Civil Rules Committee are working with them in this task. There is every hope that all advisory committees will be prepared to recommend rules for publication next June.

REQUESTER-PAYS DISCOVERY

For a few years, the Discovery Subcommittee carried on its agenda the question whether to propose rules that would set a general framework for requiring payment by the party requesting discovery of some part, or all, of the response costs. The question was raised by groups interested in the rulemaking process, and some members of Congress showed interest. Accepting a recommendation by the Subcommittee, the Committee has concluded that current work on this subject should be suspended. It will remain open for future consideration if developing discovery experience seems to show a need.

The assumption that the costs of responding to discovery are borne by the responding party is deeply entrenched. The system of civil litigation that we know would be dramatically changed by reversing course to adopt a general rule that the requesting party ordinarily must pay the costs of responding. Less dramatic alternatives are easier to contemplate, but perhaps more difficult to carry into practice. A common version would allow the requesting party to get some "core" of discovery at the expense of the responding party, but would require the requesting party to pay for the costs of responding to requests beyond the core. That approach could be made to work under judicial direction on a case-by-case basis, and has been used by some judges. But any attempt to define core discovery in a general court rule would be extraordinarily difficult.

A more optimistic reason supplements these reasons to conclude that work on requester-pays issues would be premature. The case-management and discovery rules amendments that took effect on December 1, 2015, are designed to make discovery proportional to the needs of the case. If they can achieve in practice the high ambitions that they reflect, then the concern that disproportionate discovery costs can be reined in only by a requester-pays system will be substantially reduced. In addition, the 2015 amendments include a modest provision that calls attention to the power, already recognized in the cases, to enter a protective order under Rule 26(c) that adopts some measure of payment by the requesting party. This provision is not designed to become a general requester-pays provision, but it does recognize a safety valve when needed in a specific case.

RULE 68

The Rule 68 scheme for offers of judgment has prompted study at regular intervals. Specific proposed amendments were published for comment in 1983 and, with substantial revisions, in 1984. They were withdrawn from further consideration. The Committee studied Rule 68 again a decade later, but abandoned an intricate draft without proceeding to publication. Rule 68 continues to be addressed by more outside proposals than any rule other than the discovery rules. So it has reappeared on the agenda at regular intervals over the last twenty years without generating any specific proposals for consideration.

Rule 68 is back on the agenda again. Recognizing the challenges that have confronted earlier work, the Committee has concluded that similar state practices should be explored. It may be that practices exist that achieve the goal of encouraging earlier and fair settlements, initiated by plaintiffs as well as defendants, without coercing unwanted settlements for fear of rule-imposed consequences and without encouraging strategic posturing.

Committee resources have been absorbed by other projects. The study of state practices will be launched when resources are freed up for the work.

PRE-MOTION CONFERENCES: SUMMARY JUDGMENT

Judge Zouhary suggested consideration of the practice that requires a party to request a conference with the court before filing a motion for summary judgment. He and other judges find that this practice generates several benefits. The conference is not used to deny "permission" to make a motion—it is accepted that Rule 56 establishes the right to do so. But a conference with the court can work better than a conference between the parties alone (if one were to happen) in illuminating the facts and the law. The result may be that the motion is not made, or that the motion is better focused. The nonmovant may recognize that there is no basis for disputing some facts, further focusing the motion.

Committee members have experienced the benefits that Judge Zouhary describes. Important benefits can be gained at a pre-motion conference with a judge who is interested in actively assisting the parties as they develop the case.

A note of restraint qualified this enthusiasm. The pre-motion conference practice was actively explored by the Subcommittee that generated the package of case-management and discovery proposals that became the 2015 amendments. Rule 16(b)(3)(B)(v) was added to provide that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." Two compromises are reflected in this amendment. The first was to emphasize that the conference is an option available to the judge, not a mandate for all cases. This compromise responded to advice that a significant number of judges would resist a practice requiring a pre-motion conference for all discovery disputes. The second was to limit the encouragement to discovery motions. This compromise reflected a spirit of caution, even as the general benefits of pre-motion conferences were recognized. This quite recent work may suggest that further rules changes be deferred for a while.

Drafting a pre-motion conference rule would not be difficult, whether by simply expanding Rule 16(b)(3)(B)(v) to add summary judgment motions as a suitable scheduling-order topic or by amending Rule 56 to require a conference in all cases. The Committee concluded that the question should be held open, without yet moving toward developing a specific rule proposal, and with the hope that pre-motion conferences can be encouraged as a best practice.

DISCARDED PROPOSALS

Several outside proposals were considered and put aside. Brief descriptions should suffice.

One proposal, modestly enough, suggested only an addition to the Committee Notes to Rule 30. The Note would observe that it is improper to object to a question on oral deposition by saying only "objection as to form." Additional explanation would be required. Whether or not anything could be accomplished by adding a Note statement, a Note cannot be written without a simultaneous rule amendment. Amending the Rule 30(c)(2) directions on improper objections does not seem worthwhile.

Another proposal focused on a Rule 12(b)(6) motion to dismiss only part of a complaint, and went on to address the same question when the motion is converted to one for summary judgment. The concern is that some courts employ Rule 12(a)(4) to extend the time for a responsive pleading only as to the portions of the complaint challenged by the motion to dismiss. The proposed solution is to write into rule text the practice that seems to be followed by most courts, suspending the time to respond as to the whole complaint. This practice avoids duplicative pleadings and confusion over the proper scope of discovery. This subject was removed from the docket, but it was recognized that it will deserve study if it becomes apparent

that many judges require a partial response within the original time limits, unaffected by the pending motion.

The geographic reach of trial subpoenas was addressed by a proposal that went further to suggest that an entity should be subject to a trial subpoena just as it can be subjected to a deposition. The suggestion that a representative of a nonresident corporate defendant could be commanded to appear at trial was considered in broader terms during the work that led to the still-recent amendments of Rule 45. No new reason appears to reconsider the amended rule. The suggestion that a trial subpoena could name an entity as a trial witness, directing it to produce one or more real persons to appear to testify on designated subjects, was found too fraught with problems to justify further work.

The final set of suggestions addressed four topics, each of which affects several of the advisory committees. One topic is e-filing by pro se litigants, a matter under active consideration by four advisory committees. A second is a proposal that Rule 5.2(a)(1) be amended to prohibit filing any part of a social-security or taxpayer identification number. The concern is that it is not difficult to generate a complete social security number from the final four digits if combined with additional information about a person that is often available. This concern was considered in developing Rule 5.2(a)(1), and put aside because filing the final four digits seemed important in bankruptcy practice. This question seems worthy of further consideration, beginning with the Bankruptcy Rules Committee, although the initial suggestion has been that it continues to be useful to have the final four digits. The third suggestion is for a new rule that would direct that any affidavit made to support a motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed under seal and reviewed ex parte. Initial Committee discussion suggested that this practice would impose significant burdens on the court, and that the privacy interests involved in the details of showing entitlement to forma pauperis status may not be troubling when a grant of forma pauperis status itself suggests a lack of substantial assets. The final suggestion is that when counsel cites cases or other authorities that are unpublished or reported exclusively on computerized data bases, counsel must furnish copies to any pro se party. Counsel would be similarly required to provide copies on request of such citations by the court. This practice seems useful—the proposal is modeled on a local rule for the Eastern and Southern Districts of New York—but the Committee thought it a matter too detailed to be adopted as a national rule.

APPENDIX

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U. S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 4, 2015

The Honorable Robert Michael Dow, Jr.
Chair, Rule 23 Subcommittee
Advisory Committee on Civil Rules
c/o United States District Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn St., Room 1978
Chicago, IL 60604

Dear Judge Dow:

As discussed at the November 5, 2015, meeting of the Civil Rules Advisory Committee, the United States Department of Justice is pleased to submit to the Committee's Rule 23 Subcommittee, for consideration and approval for submission to the Committee, a proposal to amend existing Rule 23(f).

Rule 23(f) of the Federal Rules of Civil Procedure authorizes a permissive interlocutory appeal from a district court order granting or denying certification of a class. The rule requires that a petition for permission to appeal such an order must be filed in the court of appeals within 14 days after the certification order is entered. As explained below, the Department of Justice recommends that additional time—specifically, a 45-day deadline—should apply to petitions for permission to appeal under Rule 23(f) in civil cases when the federal government is a party.

Any appeal by the United States government must be authorized by the Solicitor General. 28 C.F.R § 0.20(b). That deliberative process requires substantial time to consult with components of the Department of Justice and other government agencies with an interest in the issues presented. The consultation process is particularly time consuming and searching because multiple agencies and offices within the government might have different interests implicated by a specific case. Moreover, the role of the United States is not limited to defending particular litigation. The Solicitor General must also take account of the government's interest in enforcing federal law. Those interests are sometimes in tension, particularly in cases involving class actions. Because the government's diverse interests need to be reconciled before the Solicitor General can reach a decision concerning appeal, the need for consultation and deliberation requires additional time.

The current 14-day appeal deadline in Rule 23(f) is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether the district court would have the authority to extend the 14-day deadline. See *Delta Airlines* v. *Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004). Moreover, unlike a notice of appeal, a petition under FRCP 23(f) is not a mere placeholder. Instead, the petition for permission to appeal is a substantive filing that must set forth reasons and arguments for reversing the class certification decision; that petition must be drafted by Justice Department attorneys, and authorized by the Solicitor General, in a very short period.

The United States government does not often seek permission to appeal under Rule 23(f), but in the circumstances where an appeal is warranted, the 14-day deadline creates serious problems of practicability and imposes extraordinary burdens on government officials. Fourteen days is not sufficient to permit the consultations and deliberations required to take account of the diverse government interests that often affect the issues and arguments the government might seek to present to the court of appeals.

Because of the time required for the Solicitor General to determine whether to authorize appeal, and to avoid unnecessary protective appellate filings that might later need to be voluntarily dismissed, other provisions of the federal rules provide additional time to appeal in cases where the United States government is a party. For example, Appellate Rule 4(a)(1)(B) provides that any party may file a notice of appeal within 60 days (rather than the usual 30 days) when the United States is a party to a civil case. 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 United States government is a party.

The example of the deadline for rehearing petitions is closely analogous here. There, as in Rule 23(f), a 14-day period had been prescribed and was retained for non-government cases, but the rules were amended to accommodate the additional time needed for the Solicitor General to determine whether to pursue rehearing en banc when the government is a party. Also, like a rehearing petition, a petition for permission to appeal under Rule 23(f) is a substantive articulation of the government's position, requiring more time for consultation and authorization. Although the additional time may not be necessary for a non-government party that seeks to appeal, the Department of Justice recognizes that the rules should provide parity to all parties in a case where the government is a party, as in the examples of the deadlines to file a notice of appeal or a rehearing petition in civil cases.[1]

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[1] The rules provide different deadlines for the government and non-government parties in criminal cases, see FRAP 4(b)(1), but there is no reason for different treatment in the class-action context.

The Department's proposal to extend the deadline to 45 days represents a compromise resolution of the timing problem—an extension beyond the current 14-day period but less than the full 60 days permitted to file a notice of appeal in a civil case in which the government is a party. The proposal thus reflects the need to avoid undue delay in the class-action certification context, while accommodating the government's need to consider whether an appeal would be appropriate. The final sentence in Rule 23(f), providing that an appeal does not automatically stay proceedings, would also remain unchanged under the Department's proposal.

The Department therefore recommends that Rule 23(f) be amended as follows:

> (f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

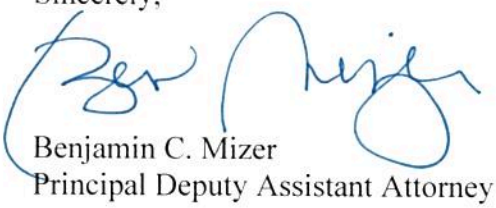
The Department also recommends the following Note to accompany the amended Rule:

> **Subdivision (f).** The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to address the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

* * *

We appreciate the Subcommittee's consideration of the Department's proposal, and we will be happy to respond to any questions you have concerning it. Please feel free to contact either me or Ted Hirt of the Civil Division at Theodore.Hirt@usdoj.gov or (202) 514-4785.

Sincerely,



Benjamin C. Mizer
Principal Deputy Assistant Attorney General

cc. The Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
c/o United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave. N.W. Room 4114
Washington, D.C. 20001

MINI-CONFERENCE ON CLASS ACTIONS
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Dallas, Texas
Sept. 11. 2015

Participating as representatives of the Rule 23 Subcommittee were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, and John Barkett. Also participating were Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Judge John Bates (Chair-designate, Advisory Committee), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Emery Lee represented the Federal Judicial Center. Representing the Administrative Office were Rebecca Womeldorf, Derek Webb, and Frances Skillman.

Invited participants included David M. Bernick (Dechert LLP), Sheila Birnbaum (Quinn Emanuel), Leslie Brueckner (Public Justice), Theodore H. Frank (Center for Class Action Fairness), Daniel C. Girard (Girard Gibbs LLP), Jeffrey Greenbaum (Sills Cummis & Gross, P.C.), Theodore Hirt (Department of Justice), Paul G. Karlsgodt (Baker Hostetler), Prof. Alexandra Lahav (Univ. of Connecticut), Jocelyn Larkin (Impact Fund), Brad Lerman (Medtronic), Gerald Maatman (Seyfarth Shaw LLP), Prof. Francis McGovern (Duke), Prof. Alan Morrison (G.W.), Prof. Martin Redish (Northwestern), Joseph Rice (Motley Rice LLC), Stuart Rossman (Nat. Consumer Law Center), Eric Soskind (Department of Justice), Hon. Amy St. Eve (N.D. Ill.), Hon. Patti Saris (D. Mass. and U.S. Sentencing Comm'n), Christopher Seeger (Seeger Weiss), Hon. D. Brooks Smith (3d Cir.), and Ariana Tadler (Milberg LLP).

Observers included Alex Dahl (LCJ), Prof. Brendan Maher (Univ. of Connecticut), Roger Mandel (Lackey Hershman LLP), and Mary Morrison (Plunkett Cooney and LCJ).

Judge Dow welcomed and thanked all the participants, and announced that the morning session would be focused on the first three of the Subcommittee's nine topics for possible rule amendments, with the next four topics occupying most of the time after lunch and the last two topics touched upon only if time allowed. He also invited participants to introduce themselves and indicate which topics they felt were most important. Among the topics so identified by several invitees were ascertainability, cy pres, settlement approval criteria, and settlement class certification.

Topic 1 -- Disclosures regarding
class-action settlements

This idea has been known as "frontloading," and emerged from the Subcommittee discussions with interested groups during the past year about possible class-action reforms. It is designed to focus more on the decision whether or when to send notice to the

class of a proposed settlement under Rule 23(e)(1) rather than as "preliminary approval" of the proposed settlement or (if the class has not yet been certified) of class certification. The ALI Aggregate Litigation Project and others have cautioned against the "preliminary approval" nomenclature, since the court should have an open mind until objectors have had an opportunity to state their views. In addition, the effort is designed to blunt arguments that Rule 23(f) review is available at the time of the decision to send notice to the class, while ensuring that the notice can call for class members in Rule 23(b)(3) cases to make their opt-out decisions.

Discussion began with the suggestion that it might be desirable to promote a more adversarial presentation at the "front end" of the class settlement process. In the Silicon Gel litigation, for example, Judge Pointer promoted an open process that got many class members involved at an early point. Is there a way to have the judge reach out to members or putative members of the class to solicit their views at this point?

A reaction to this suggestion was there is a serious problem with relying on the judge to take the place of the adversary process. There are strong reasons for getting objectors involved as soon as possible to ensure that the judge has an adversary process to evaluate the proposed settlement.

That idea brought the reaction "This is not doable. You don't know who the objectors are." Right now, counsel proceed on the basis of "preliminary approval." But there is no articulated standard for granting such preliminary approval. Instead, the parties themselves make sure that there are solid grounds to support the settlement proposal, and to support class certification if that has not yet been granted. They very much want to avoid final disapproval.

Putting aside the concern about the term "preliminary approval," a different concern was with a "laundry list" rule like the sketch in the materials, with fully 14 different topics to address. Many of those topics would not be relevant in many cases. In different types of cases, different concerns exist.

Another participant announced strong support for frontloading. This could "shift the paradigm," making the judge more inquisitorial. That is consistent with the view of courts that say that the judge has a fiduciary obligation to protect the interests of the unnamed class members. Indeed, it has been said that in most class actions the judge is "main objector," because there may not be any others.

Another reaction was that a detailed list of topics to address is useful for many of the lawyers who now are bringing class actions in federal courts. The lawyers invited to this

event are the leaders of the bar, and have broad experience in the field. They already know what they have to present to the judge. Many, many lawyers do not know, and judges need help in getting the information that is necessary to making the decision whether to send notice and, later, whether to approve the proposed settlement.

A judge applauded efforts to frontload, an important adjunct to the "contingent certification" that often attends a decision to send notice to the class. Even though it is long, the 14-factor list might be expanded. One thing that is not specifically raised is the basic fairness of the settlement -- why is this damage number appropriate? Actually, although there is no articulated standard for whether to send the notice, it is a reasonableness test; one might even call it a "blush" test.

Another participant agreed that it is good to prompt disclosure of more information. Nonetheless, a laundry list rule should be avoided. That sort of detail is more appropriate in a Committee Note or a Manual.

A note of caution was sounded. This sort of requirement will compound costs. Some factors are not relevant in many cases. How much does it help to have the parties say "We produced 4.2 million documents"? Does that mean that all the members of the class get access to all those documents? How about protective orders that apply to those documents? And the reference to insurance seems far too broad; insurance is simply not relevant in many cases. The inclusion of take rates creates difficulties because that is always hard to estimate at the outset, although calling for disclosure at the end would not be a problem. Requiring disclosure of side agreements could raise many difficulties. Consider agreements with "blow provisions" that permit the settling defendants to withdraw if more than a certain number of opt outs occur. That could produce serious problems. The 2003 amendments have worked pretty well in organizing and focusing the settlement-approval process; having this laundry list is not warranted.

Another participant reported that "We have high take rates." Laundry lists are not useful and can cause problems. And something like this one is not needed now. "Judges are beginning to do this right." For example, in the NFL concussion cases the judge promoted outreach early in the process. There was a even a liaison for the objectors. That sort of good and creative management of a class action cannot be mandated by rule. It was asked whether such outreach could be required by a rule, prompting the answer that the NFL concussion case was the first time this lawyer had seen such an aggressive effort on this front.

Another participant expressed disapproval of laundry list

rules, and worried that this might seem like "piling on" on this topic. But it is important to note that in (b)(2) cases many of these factors simply do not apply. More generally, the idea that the information this rule would require will be of use to class members is not persuasive. It will not be comprehensible to class members. For example, how many of them can interpret complicated insurance policies? The average American reading level is about the sixth grade, and if you want to provide class members with information that is useful to them you need to keep that in mind.

A judge observed that the idea of early notice to the court is very attractive. It is important, however, to say that the judge can insist on any information that seems likely to be useful, whether or not it is on the list. And even though there are instances of judges becoming active in soliciting input from class members, that sort of initiative is not true of all judges, perhaps not of most judges. A rule like this would likely produce more early involvement by judges.

Another lawyer participant expressed misgivings about laundry list rules. Guidance in some form for judges and for less experienced lawyers would be useful, but this lawyer is not confident that even this (rather costly) effort of assembling information will be useful to many objectors.

A competing view was that too often critical information does not surface until it is too late or almost too late for class members to act on it. The concern with costs is valid, but providing potential objectors with needed information need not raise costs too much. Nobody is going to want to look at 4.2 million documents. And if there is a protective order, the objectors would have to be bound by it with regard to documents covered by the order. Moreover, focusing on the claims process is very important. Having that front and center is valuable.

A suggestion was offered for those who dislike checklist or laundry list rules: How about a rule with a general direction to the court to require appropriate and pertinent information from the proponents of the settlement, coupled with a Committee Note offering a variety of ideas about topics that might be important in individual cases? That concept produced support from many participants.

A different concern emerged, however: "Why do this under the heading of notice. It's not about notice. It's about preliminary approval."

Another idea emerged: An ideal process in many cases is scheduling or case management conference with the judge when the possibility of a settlement proposal looks likely. Then the parties and the judge can review what's needed. After that's

done, the parties should prepare and file all their materials supporting approval of the settlement up front. There's no need to do this whole briefing effort twice. Then, if there are objections or if additional issues arise, supplemental briefing is available to address these matters. That is the way to go; laundry lists are not helpful, particularly in (b)(2) cases.

This suggestion drew support. At least it is critical that all pertinent materials be on file well before the date when class members must decide whether to opt out or object. Too often in the past, it has happened that such things as the attorney fee application come in only after it's too late to opt out or object.

Another participant noted that CAFA sometimes produces involvement by state attorneys general, particularly in consumer class actions. Having access to details on the case and the settlement would be useful for the AGs.

Another voice was raised for keeping the rule open textured and short. It was suggested that perhaps local rules or standing orders could be used to provide pertinent specifics instead of a rule with a laundry list. But a concern was expressed: Adding frontloading may not work without some specifics. Nonetheless, if one wants to do this by rule, it probably should be simple. That drew the response that the default position should be that all supporting materials should be filed up front.

Another participant asked "How can you fight the idea of notice to judges?" On the other hand, this participant did not understand how there could be an obligation to decide whether to opt out unless the class has already been certified. The opt out must follow certification.

That drew concerns. The way this is done is to combine all notices into one notice program. One question is what the judge's action should be called -- "preliminary approval" or "ordering notice." On that score, it seems important not to hamstring the judge. The other is to recognize that this should be done only once; the possible need for a second notice should be avoided.

Another reaction was that "This is certainly certification. You call them class members." That drew the reaction that this highlights the problem. Unless this is certification there's no authority to require an opt-out decision.

An effort to summarize the discussion suggested that a shift to a more general rule or a shorter list seemed indicated. On that score, one could compare the more general orientation of the second topic -- settlement review criteria -- in which one might say that the current reality is that each circuit has its own

laundry list for settlement review. Beyond that, it might be said at least that the best practice is to get all the specifics on the table early.

That drew a warning that one must be careful about the possibility that such a rule would lead to Rule 23(f) appeals from this preliminary or contingent decision.

Another participant suggested that the goal should be a rule that (1) prompts initial care in compiling information that will be needed; (2) makes it clear that notice can call for opt-out decisions; and (3) includes "preliminary certification." This approach will "make the documents" flow. At the same time, it should avoid wasteful and costly activity. Doing discovery just to be able to say that you did discovery is not sensible.

Topic 2 -- Expanded treatment of settlement-approval criteria

This topic was introduced as involving "11 dialects" of settlement review in the federal courts today. Indeed, considering the reaction to laundry lists in relation to Topic 1, one might suggest that Topic 2 seeks to replace competing laundry lists with a single set of considerations. The sketch before the group has four (and perhaps three) "core" factors that seek to consolidate and simplify the variety of expressions adopted in various circuits.

An initial reaction was skeptical: "This is a solution in search of a problem. The courts of appeals have developed their lists to make sure judges are careful. The lists we have now do the job."

A differing view was expressed: "I generally like this approach, but would add a catch-all." Certainly one could simplify too much. For example, if one argued that "fair, reasonable, and adequate" uses too many words, one answer would be that some courts have found that "fairness" and "adequacy" are different things. Meanwhile, the current lists include things that are not useful. For example, in the Third Circuit, the Gersh factors include several things that really don't often, or ever, matter.

It was observed that one thing that is not explicitly included is consideration of take rates and payouts to the class, and relating those to the attorney fee award. This is a difficult problem from the defense side, where the goal is to get the case resolved.

A reaction was that considering the take-up rate is very important. Indeed, a proposal has been submitted to the Subcommittee to mandate reports at the end of the claims period

on the take-up rate. That's where it's needed -- on the back end. That could come with some sort of hold-back of a portion of the attorney fee award.

Discussion returned to the standard for initial Rule 23(e) notice. The suggestion was that Alternative 4 on p. 5 of the materials expresses what should guide the court, looking to whether the court "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal." That would not be a "preliminary approval" supporting immediate review under Rule 23(f), but should suffice to support a requirement that class members decide whether to opt out.

A judge agreed. This reflects what is happening, and it is what should be happening.

That idea drew opposition: "What governs the opt-out is real certification." One can't skip that step. This same sort of problem comes up again with the settlement-class certification proposal. The fact that something is convenient does not mean that it is justified or proper.

Another participant shifted focus to the choice between Alternative 1 and Alternative 2 on p. 9 of Topic 2, expressing support for Alternative 2 because it permits the court to approve the settlement only when it can find that all four requirements are satisfied. Separate consideration of each and separate findings would be better than generalized "consideration" (as directed by Alternative 1) of all four sets of concerns. This participant also thought that it would be good to standardize the factors.

Another participant agreed with the skepticism of the first speaker on this topic. "I'm not sure these factors are better than the current lists." This participant would certainly keep "fair, reasonable, and adequate" as a standard for the overall consideration of the factors (as in Alternative 1). This participant also does not like the bracketed language in (D) on p. 10. It also seems dubious to focus so heavily on collusion; that is not a frequent concern.

The question whether this listing is exclusive was raised. One reaction was that even if such a rule is adopted, rote listing of existing circuit factors will continue.

Another participant noted that the Third Circuit Gersh factors are also aimed at collusion. In addition, factor (C) -- the adequacy of the benefits to the class, and comparison to the amount of the attorney fee award -- is very important. Emphasizing the importance of this factor is a good idea. In addition, this participant favors the Alternative 1 approach --

calling for an overall fairness assessment rather than discrete affirmative attention to each of the four factors. This participant agrees that it is important to avoid a rule that would permit a 23(f) appeal from these preliminary settlement review activities.

Topic 3 -- Cy pres provisions

This topic was introduced with a quick summary of some comments received from participants before the conference began. Several participants favored dropping the bracketed phrase "if authorized by law" and also favored removing any reference to making distributions to class members whose claims were rejected on grounds of timeliness. Other topics that have been raised in recent comments include reversion provisions, and the tightness of the nexus between the goals of the class action and the goals of a potential recipient of cy pres funds. Finally, some raised questions about whether cy pres amounts should count in making attorney fee awards.

The first participant raised two levels of problems. (1) It is troubling that the Civil Rules might be amended to include a substantive remedy. The "if authorized by law" proviso would be an important way to steer clear of this risk. But it's contradicted by the very next phrase -- "even if such a remedy could not be ordered in a contested case." (2) The whole idea presents great difficulties unless it is limited to cases involving trivial claims where delivering relief to class members would obviously not be possible. The procedure rules can't be used as a way to create or justify civil fines. Claims in federal court arise under the pertinent substantive law, and the procedure rules cannot augment the remedies that substantive law provides. Moreover, cy pres provisions in settlements are used too often to create faux class actions -- vehicles for enrichment of lawyers and "public interest" organizations affiliated with the lawyers.

Another participant disagreed. The "if authorized by law" phrase is inappropriate. These provisions are a matter of agreement. Certainly we want to avoid Enabling Act problems, but this is not necessary for that purpose. It's not right to say that the sole purpose of a suit is to compensate. It is also a method to enforce the law. Cy pres fulfills that private enforcement function. But there must be a significant nexus between the rights asserted in the lawsuit and the objectives and work of the cy pres recipient.

It was asked whether there is really any need for a rule. The ALI section on cy pres has gotten much support in the federal courts. Would that suffice without a rule?

One reaction was that there is a division between the state

and federal courts on these points. This speaker would favor applying the ALI standards, but they are not universally invoked even in the federal courts. Another participant noted that there are many state law provisions that deal, in one way or another, with these issues. That drew the question whether federal courts had ever applied those standards in cases governed by state law, and the answer was that there might be a Washington case that does so, but that it surely has not been frequent.

It was suggested that empirical data on the frequency of cy pres provisions would be useful. This participant has attempted to determine how often reported instances have occurred in the last seven years, and believes there have been about 550 cases.

One approach that was suggested is class member consent. Surely class members could consent to using their claims to support public service activities. Perhaps the class notice would support the conclusion that the class has consented to such use if it specifies the cy pres provisions and enables class members to object. If some do object, that shows that others do not.

Another participant expressed considerable concern about the use of cy pres. With "leftover money," this is not really troubling, so long as it's not a huge amount. But these sorts of provisions seem to invite what might be called the "classless class." Particularly troublesome is the possibility that some lawyer would devise a "claim" about a product and claim that everyone who bought it suffered some "harm," so that the solution is that the court should direct that the defendant pay a considerable sum to a "public interest" organization selected by the lawyer. This participant would worry that any rule provision would promote such activity. It would be better to leave this to the courts, particularly under the guidance of the ALI Principles.

A judge noted that in more than ten years on the bench, only two cases had involved cy pres provisions. That drew the reaction that "there's always leftover money."

Concern was expressed about reversionary provisions, under which the defendant gets back unclaimed money. One could read the Committee Note sketch on p. 16 as endorsing such provisions. It was asked whether a rule should forbid a reversion. That drew the response that in some districts, such as the N.D. Cal., the experience is that having such a provision will lead to disapproval of the settlement.

A response was offered to the idea that class member consent can be assumed from lack of objection to cy pres provisions in settlement agreements. The purpose of litigation is to compensate. If class members want to make donations, they can do

that on their own. But having this alternative to getting the money to class members raises very troubling issues. Whether or not this rises to a due process level, it would seem much better to give class counsel an incentive to make sure the money mainly gets to the class instead of the lawyer's pet charity. Indeed, it's odd that nobody has suggested the fluid class recovery concept. That is more like compensation than simply imposing a "civil fine" that is paid to a public interest outfit.

This prompted the observation that sometimes, particularly in some consumer class actions, the amounts left over are huge. It's very difficult to get the class members to make claims.

That prompted the reaction that, in such situations, reversion to the defendant is the logical answer. What this rule proposes instead is that the class's money can be used for public policy purposes the judge endorses. Why can't companies insist on a reversion? That facilitates settlements. The company knows that if the class members don't bother to claim the money, it will get the money back. In bankruptcy reorganizations, reversions occur all the time; why not here also? The class is not a judicial entity that can make a donation to a public interest outfit.

A reaction to this idea was that the Committee Note bracketed material on p. 16 seems to endorse reverter, but that endorsing it is a bad idea. To the contrary, the Enabling Act concern and the concern about the faux class action enabled by cy pres are both based on a false premise. The reality is that the defendant has been found to have violated the law, and the class consists of the victims. True, the defendant says that it does not concede violating the plaintiffs' rights, but usually the payment is enough to show that something wrong has occurred.

A different point was made: Usually there is money left after the initial claims process is completed. Speaking the realistically, the choice is between giving that money to the claims administrator or to the cy pres recipient.

That prompted the reaction that this is the place for reversion to the defendant. Indeed, there is no right to these funds unless the claimants come forward and claim them. Their failure to make claims does not make this a pot of money for "do good" purposes. But it was asked: What if the defendant has agreed to this arrangement. Why wouldn't that provide a sufficient basis for cy pres uses?

Another participant reacted that if defendant wants to insist on a reversion provision, that can be a target for objectors. A defense attorney participant reported that "I have been a proponent of reverters. I will push for them." Not all settlements are lump sum settlements. Some are claims made

settlements. Then a reversion provision makes perfect sense. The amount to be paid is determined by the amount that is claimed. It was asked how one presents a claims made settlement to the court. The answer that it is really about attorney fees. From the defendant's perspective, one looks to the maximum amount that could be awarded, and that is used for the fee award. But the amount paid to the class depends on claims actually made.

The question whether a rule amendment was needed returned. "This is the most cited section of the ALI Principles. Do we need to put it into a rule? It's already being adopted in the courts."

The response was that the district courts are "all over the map." A recent Eleventh Circuit case dealt with a situation in which the class got $300,000 and the lawyers got $6 million in fees.

Another response was that cy pres is not compensation. Even fluid recovery is compensatory in orientation, but cy pres is not. If there is a substantial amount left after the claims process is completed, that indicates that the case should not have been certified. The right solution is to add a new Rule 23(a)(5), saying that a class should not be certified unless it is determined that there will be an effective method to distribute relief to the class members.

That idea drew strong disagreement: The bottom line is that defendant has violated the substantive rights of the class members, even if they are hard to identify and do not all seek compensation. Defendant must disgorge its unjust benefits. The bankruptcy comparison offered earlier is not analogous. That does not involve law enforcement, as is often the case in consumer class actions where many class members do not claim what they could claim under the settlement. Under CAFA, attorney fees are a separate consideration. Claims made is not an alternative in consumer cases. Having a reverter is anathema.

A different reaction was that the right question is the substantive law question. The procedural rules should not be distorted in order to "punish" "bad" defendants. Defendants agree to cy pres provisions because they want settlements approved and expect that a reverter would not be accepted. That is "agreement" with a gun to your head.

A response was that there already are rules that deal with "remedies." Rule 64 deals with some, and Rule 65 addresses TROs and preliminary injunctions. Moreover, this is really a common law development. If state law requires escheat, for example, the federal courts must obey that state law. But we must avoid getting caught up in formalist distinctions.

That prompted the question why the Advisory Committee should not simply leave these matters to common law development. Does anyone favor rulemaking in this area?

One reaction was to agree that the rules committees need not venture into this area. Another participant agreed. Consider the Third Circuit Baby Products decision. The court dealt with the problem creatively using common law principles. What actually happened in that case was that another outreach effort located additional claimants; the massive cy pres provision proved unnecessary.

A contrasting view was expressed: There is a value in having a rule. We need to squelch arguments about what is permissible and how these recurrent issues should be handled. It would be good to have a rule saying (1) cy pres is allowed, and (2) reversion is disfavored.

Another plaintiff-side lawyer reported being "very much on the fence." It is good to have clarity. But these are really tough issues. The problem of nexus is serious; class action settlements are not a form of taxation to do public good. But it is also true that entities like legal aid have very worthy goals and very serious needs that cy pres may partly satisfy.

One approach was offered: Is there a case in the last few years in which the ALI approach was rejected by a court? Maybe that proves we don't need a new rule. A participant identified three -- an Eleventh Circuit case that declined to adopt the ALI approach, a Google case, and a Facebook case.

An observer observed that this discussion is missing a key point. This is in Rule 23(e). It is only about the parties' agreement. The reason to have a rule is to achieve consistent treatment, not to create important new authority for such arrangements.

A reaction was that "this is not really a private contract. It requires court approval, which shows that it is not entirely private. And it achieves the goals of the court (and the parties) only if the court order is binding on both sides, including the absent plaintiffs."

Topic 4 -- Objectors

This topic was introduced as involving two general subjects, disclosure by objectors and a ban on payments to objectors or objector counsel.

One participant reported seeking test cases to try to claw back payments to bad faith objectors on behalf of the class. Rule 23(e)(3) calls for disclosure of all side agreements, and

this should be a way to support such potential litigation.

A response was that the difficulty is with the delay after filing of a notice of appeal. At least the Rule 23(e)(5) requirement for court approval of withdrawal of the objection does not seem to apply then. The reaction was that even that sort of thing could be addressed in the settlement agreement, if one is really concerned about greenmail. Although an Appellate Rule amendment might close the appeal window partly, there would still be a 30-day gap between the entry of judgment in the district court and the filing of the notice of appeal. During that time there would be no policing.

Another participant noted that the big problem is that it makes great sense for class counsel to pay off the objectors to get the benefits to the class. Class members may be dying or in dire need of the relief that is being held up by the objector. But the proposed disclosure requirements are not effective. They are just a burden on the objector. The main solution is to require court approval of the payment to the objector or objector counsel.

That prompted the point that the amendment proposal made to the Appellate Rules Committee was that there be a flat ban on any payments to objectors or objector counsel, which would not alow payments even with court approval. Are all payments to be off limits after an appeal is taken, even those approved by the court? The response was that the important goal is to improve settlement agreements and avoid freeloading on them.

Another participant noted that there are surely good objectors, and this lawyer has recently seen several examples. A problem is that one often sees a mix of objectors. Requiring court approval is a way to shed light on this bad activity. Ideally, the courts of appeals would name names, and list the bad faith repeat-objector lawyers. But for class counsel to do this asks a lot. "Do we want to be in the business of name calling?"

Another plaintiff-side lawyer agreed. Hedge funds are stepping into this area and financing objections in hope of payoffs. We need as much transparency as possible. As a result, this lawyer likes the disclosure requirements, even though they may be burdensome to objectors, particularly good faith objectors.

Another plaintiff attorney agreed. There has to be a response. We need to know who these people are and do something about them.

A question was raised about the 2003 addition of the requirement in Rule 23(e)(3) about "identifying" side agreements. That did not require that the contents of the agreement be

revealed. For true transparency, revealing the details would be desirable. But it was observed that some things are properly and importantly kept secret. An recurrent example is the "blow factor," the level of opt-outs that will permit the defendant to withdraw from the settlement. 15 years ago "opt-out farmers" were thought to misuse such information.

Another reaction was that "the limitation on payments on page 25 is very appealing." Sunlight is desirable, and may be an antidote to the public disdain in many quarters for class actions. Suspicions are fed by secrecy.

A judge asked what the standard is for approving payments to objectors. Those who opt out can make whatever deal they prefer. Compare frivolous objectors. The judge suspects a hold up. What standard should the judge use in deciding whether to approve the payment that counsel has agreed to make?

A plaintiff-side lawyer said: "The only way to do it is to refuse to approve."

Another plaintiff-side attorney noted that the idea is that the court approval requirement will support court scrutiny. The district court could approve under some circumstances, but if the district judge refuses to approve the objector is really without a leg to stand on before the appellate court.

Another idea was suggested: What if a rule said the district court must not approve any payment to an objector unless it finds that the payment is reasonable in light of changes or improvements to the settlement resulting from the objection? That would be consistent with the orientation of Rule 23(h).

A first reaction to this idea was that often the improvement is hard to measure. "Cosmetic" improvements might be contrived. And on the other hand, changes in injunctive relief, for example, might be quite significant but difficult to value.

A defense-side lawyer noted that this is more a plaintiff-side problem. For the defendant, the delay in consummating the settlement may not be similarly urgent. Also, why can't the court approve the added payment even though it's not keyed to an "improvement" in the settlement?

Another participant warned "Be very careful what you ask for." Satellite litigation could easily occur about whether there has been an improvement. It's not always easy to determine what is a good faith objection. Indeed, the whole area is probably not typified by binary choices.

A counter to that was the example of the one-sentence objection to really says nothing. That robs the process of the

legitimate purpose of class member objections. The basic goal is to inform the district court about possible problems with the deal. The one-sentence objection is a ticket to the appellate court, where the objector attorney can play the delay game.

That prompted the objection that courts of appeals wouldn't credit a one-sentence objection. That would lead to summary affirmance.

A different topic arose: requiring objector intervention to appeal. That would, of course, require a close consideration of Devlin v. Scardeletti, but the desirability of such a rule would be dubious anyway. If that can be litigated, it will be litigated. This lawyer has confronted such litigation three times already, even though he offers to stipulate that he will not accept any side payments and wants only to get an appellate ruling on the merits of his objections. Disclosure, on the other hand, is o.k. so long as it does not create additional things to litigate.

A defense-side lawyer said he was not in favor of a separate intervention or standing requirement for objectors. "If you're bound, how can you not have standing?"

A judge expressed support for a standard that was keyed to improvements in the settlement. That could recognize that more money was not the only way in which a settlement could be improved, but would provide the judge guidance.

But another participant pointed out that this created another appealable issue -- where the payment is rejected, the propriety of that rejection under the rule's standard could be appealed.

Topic 5 -- Ascertainability

This topic was introduced as having received much attention and somewhat divergent treatment lately. A key question is whether a rule change should be pursued, or alternatively that the committee should await a consensus in the courts.

A plaintiff-side lawyer said that the "minimalist" sketch the Subcommittee had circulated seemed to adopt the Third Circuit standard from Carrera. But the Seventh Circuit decision in Mulins "takes apart" Carrera. Carrera should be rejected insofar as it requires that certification turn on whether the court is certain that the identity of each class member can be ascertained later, and that the method of ascertaining it will be administratively feasible. All that should be required at the certification stage is that there is an objective definition of the class. The sketch relies on the phrase "when necessary" to do too much work. Moreover, any rule should be addressed only to

(b)(3) class actions; even the Third Circuit has recognized that Carrera does not apply in (b)(2) cases. The Third Circuit standard makes identifiably a stand-alone factor for certification, and it should not be. The Committee should not proceed this way.

It was asked whether a rule change is needed. The answer was that it is needed. The Third Circuit decision in Bird v. Aaron's preserves the problem. "The Third Circuit has made it clear that you can't have a consumer class action." And the Eleventh Circuit seems to be siding with the Third Circuit on this subject.

A judge asked whether it might be that Carrera has been somewhat over-read in some quarters. A footnote in the case emphasizes that it was not announcing a new or additional requirement.

Another question was raised: Does this apply to settlements also? If so, that's a ground a for objections to settlements.

A defense-side attorney urged that any effort to address this question must take account of what happens after class certification is granted -- it is necessary to confront the question how you distribute the fruits of the suit.

Another response was that the Tyson case in the Supreme Court raises some of these issues.

Another defense lawyer argued that this "goes to the heart of what is a class action." Is it just about one person's gripe? Consumer fraud cases are good examples. It should be implicit in the rule that the objection is actually shared by others who can be identified. Indeed, typicality might be urged to require something of the sort. This lawyer supports the proposal, but thinks "it probably is a bit too early."

Another defense-side lawyer noted that trial plans also call for a relatively specific forecast of how a case will be handled. That drew the point that Judge Hamilton in Mullins said that the current rule has all the pieces needed to deal with these issues.

A plaintiff-side lawyer responded that "If you agree with Hamilton, the rule should be written to make it clear that at the certification stage only an objective definition is required." And it would be valuable to say that a Carrera-style ascertainability requirement is not a prerequisite for certification, and that self-identification is o.k.

Another plaintiff-side lawyer agreed.

Topic 6 -- Settlement class certification

The initial reaction expressed was skepticism from a defense-side lawyer. The settlement class dynamic has been in place for a long time. It reflects a fundamental tension about the proper role of class actions, and in particular about the centrality of the concept of predominance in the (b)(3) setting. Common question class actions are a precise exception to the normal course of business for American courts. They produce a quantum change in the dynamics of litigation. Though they may be very efficient for resolving multiple claims, they also exert huge leverage for compromise from defendants that have a strong basis for resisting claims on the merits. The 1990s experience emphasized mass torts, and involved quick certification decisions. First the courts of appeals put on the brakes. Then the Supreme Court emphasized in Amchem that predominance under (b)(3) is more than commonality under (a)(2). Since Amchem, the rules have tightened, but the problem of pressures has not gone away in the class action marketplace. The recent interest in issue classes and settlement class certification is evidence of this recent pressure. But the core point is that only with a vigorous predominance check can the collective pressure exerted by a (b)(3) class action be suitably cabined and focused. Weakening that check weakens the entire structure.

That statement produced the reaction "I'm not sure that's right. For example, the Third Circuit in Sullivan v. DB Investments struggled with the concept of predominance in the settlement class context." That reaction drew the response that there really is no way to try these cases. The Florida state court litigation following the Engle class action ruling, in effect an issues class outcome, proves that this effort produces a total mess. A judge that certifies for the "limited" purpose of resolving an issue will inevitably look for a settlement after that issue is resolved, at least if it is resolved in favor of the plaintiffs. We need a standards-driven activity, and removing predominance from its central position is the wrong way to go. Don't institutionalize this settlement urge.

Another participant added that there are serious Article III questions regarding a settlement class. "Contingent" certification in regard to a possible settlement destroys the adversarialness that is vital to American litigation. Similar Article III issues arise with regard to issue class certification. That produces an advisory opinion.

A defense-side lawyer responded that settlement classes are used all the time. If the courts shut down one avenue for resolving cases, lawyers will find another one. For examples, inventory settlements come into vogue if in-court resolutions are not possible. But there's no judicial involvement at all in relation to inventory settlements. That is not an improvement. With class settlements the court has a role to play, and these possible amendments can shape that role. Amchem is not really

illustrative of the issues that arise today. That case presented critical future claims problems. Compare the NFL concussion litigation. There is no comparable futures problem there.

A plaintiff-side lawyer identified the problem: Defendants don't have tools that can be used to settle cases. That is a reason to support the settlement class idea. We need more flexibility. If the Florida situation after the Engle decision is a mess it's a mess because this set of defendants won't settle. That prompted the question whether there is any need for a rule on this subject. One could say that the courts are not following Amchem. The response was "I strongly support a rule. We need to have this in the rule book rather than relying on judicial improvisation."

Another participant said the proper attitude had a lot to do with the type of case involved. Two things are important: (1) The reverse auction problem must be kept constantly in mind, and (2) Whatever the rules, there may be courts that in essence play fast and loose with the rules. It is clear that defendants want global peace and want to use settlement classes to get it. But they also want to make litigation class certification difficult to obtain. There is an innate tension between these two desires, which tempts one to regard settlement class certification as worlds apart from litigation class certification. But that view is often hard to maintain when claims are based on class members' very varied circumstances, or on significantly different state laws. Fitting mass tort class actions into a class-action settlement with a transsubstantive rule is a great challenge.

Another participant had no strong view about the necessity of a settlement class rule, and was not troubled by the question of different standards for the settlement and litigation settings. The real concern should be fair treatment of class members. That is the weakness of settlement classes -- how the settlement pot is divided up.

Another participant recalled opposing the 1996 Rule 23(b)(4) proposal, particularly because of the reverse auction problem. How can a plaintiff lawyer drive a hard bargain when there's no way to go to trial? Inevitably the defendant is in the driver's seat, and various plaintiff lawyers are tempted to "bid" against each other by undercutting other plaintiff lawyers.

This discussion produced a question: Should there be a rule forbidding settlement in any case unless a class has already been certified? That resembles the Third Circuit attitude that prompted the publication of the 1996 Rule 23(e)(4) proposal. It also corresponds to some mid 1970s interpretations of the "as soon as possible" language then in Rule 23 about when class certification should be resolved. The idea was that class certification was the absolute first thing that should be

resolved. That primacy has been removed, but maybe Rule 23(e) should forbid settlements in any case that cannot qualify for certification under existing Rules 23(a) and (b).

A reaction was that it's simply true that courts will try to achieve settlements. MDLs are like that; the judge regards reaching a settlement as a big part of the job. The point is that this existing pressure becomes overwhelming if the bar is lowered for certification. To offer a lower threshold for settlement certification will mean that there will be even more pressure to settle. The inventory analogy is not an apt comparison. With inventory settlements, one begins with clients who contact lawyers and have cases. That's the MDL model. Acting for the clients who have hired them, those lawyers can push for a settlement. But in a class action the "clients" don't hire the lawyer or otherwise initiate the process. They don't even know about it. The court deputizes the lawyer to make a deal for the "clients." Where is there another rule that is designed for settlement purposes? The class action setting is not the place to start.

A reaction to these points was that Rule 23 has a variety of protections in the settlement context that are not in place for MDLs. Doesn't that argue for favoring the class-action setting? The response was that the situations are qualitatively different -- in the MDL setting the client initiates the process, but in the class action the initiative belongs entirely to the lawyers.

A judge noted that the defendant can insist on a full-blown certification process. Then if that results in certification, the defendant can settle, and that sequence would not trouble those unnerved by the settlement class possibility. The reality, however, is that the parties -- including the defendant -- want resolution without that extra step. Indeed, the plaintiff lawyers could rebuff settlement overtures until the case is certified in order to strengthen their hand in settlement negotiations. But that does not happen much of the time. The parties are pushing for settlement before a full-dress certification decision.

A settlement-class skeptic responded that making a formal rule inviting settlement class certification will cause ripple effects. The process just described will be magnified. This prospect will affect how and whether cases are brought.

A settlement-class proponent noted that Rule 23(e) says that settlement is a valid outcome for a class action, albeit with the conditions the rule specifies. That drew the response that every other time settlement is referred to in the rules it is as an adjunct to the adversary proceedings that are the norm of American litigation. In this situation, that adversarialness is missing.

A reaction to this point was that it would make consent decrees unconstitutional. The response to that point was that consent decrees are a different category because they involve governmental enforcement. That is not the same as the settlement classes we should expect under this rule. In those cases, private profit-oriented lawyers are initiating and controlling the cases. Coupled with cy pres possibilities, they may even support a deal that involves absolutely no direct payments to the class members they "represent."

Topic 7 -- Issue class certification

This topic was introduced as involving two sorts of issues. (1) Is there a split in the courts that justifies some effort to clarify how courts are to approach the option provided by (c)(4) in cases certified under (b)(3)? (2) In any event, should there be an amendment to Rule 23(f) to deal with immediate review of the court's resolution of a common issue under (c)(4)?

An initial reaction was that the effect on MDL proceedings is an important consideration. This participant's bias is to "leave the matter to the marketplace."

Another participant (defense-side) agreed. "There are so many issues with issue classes. They are really very hard to do."

A plaintiff-side participant agreed. The case law is actually fairly stable. And it bears noting that (c)(4) is also used in (b)(2) cases. This sketch might disrupt that valuable practice.

Another plaintiff-side participant agreed. In consumer cases, the issue may be the same for all class members, and (b)(2) treatment may be preferred.

A defense-side participant said that changing the rule would be "very dangerous." There would be an explosion of issue classes." Such treatment raises important 7th Amendment jury trial issues, with the jury seeing only part of the case.

Another defense-side participant did not disagree, but mentioned that the sketch's invocation of a "materially advance the litigation" standard for using this device seemed a valuable gloss on the current rule. But the courts may well be embracing this attitude on their own. Rule 23(c)(4) already says that the court should use this route only "when appropriate." That seems the most important consideration in determining whether (c)(4) certification is appropriate.

No voices were raised to support moving forward on the possible revisions to (b)(3) or (c)(4), and the modification to

Rule 23(f) did not receive attention.

Topic 8 -- Notice

This topic was introduced with the widely shared view that everyone thinks that being flexible about ways to give notice makes sense, and that taking the 1974 Eisen decision as interpreting the current rule as requiring first class mail seems inflexible.

An initial reaction was that some public interest lawyers say the poor do not have easy access to the Internet, so email or other online notice may not reach them.

A public interest participant agreed. Consumers too often are not able to access online resources. But there may be another concern of at least equal importance -- the cognitive capability of the members of a consumer class. Even if notice "reaches" them, they may not be able to understand or interpret it. Finding ways to ensure that notices are understandable to such class members may be just as important as flexibility in method of delivery.

Another public interest participant said that electronic notice can usually be useful. But it would be important -- whatever the form of notice -- that the rule direct that it be in easily readable format. And creative use of online communications must be approached with suitable caution. For example, one might be intrigued by the possibility of opting out by email, but that raises concerns about verification of who is doing the purported opting out.

Another participant noted that first class mail is far from foolproof. Particularly with the vulnerable groups mentioned by others, is it clear that first-class mail is more likely to reach them and be understood than alternative means of communication? Don't people who have email actually change their email addresses must less frequently than their residential addresses? Many in the most vulnerable groups probably move often.

A different concern was introduced -- spam filters. As the volume of email escalates, those are increasingly prominent. How can one make sure that email notice of a class action certification or settlement does not end up in spam? A response was: How do you make sure first class mail is not discarded without being opened?

It was suggested that claims administrators actually have considerable experience and data about these very subjects. A participant with extensive experience in claims administration observed that people i the claims administration business are very resistant to revealing this information. The effectiveness

of various methods of reaching class members is regarded as proprietary information.

Beyond simply reaching people at all, it was emphasized, there are serious issues about what you reach them with, and what they actually will understand. The goal should be to write the communications in a way that makes it easy for a recipient to make a decision. That will increase the response rate. Another comment was that one needs to tailor the notice to the case involved. A securities fraud case and a consumer class action may call for very different strategies in communicating with class members. The fundamental issue is that the judge should be paying attention to the practicalities of notice to the class in the case before the court; that focus may be more important than what any rule says.

Attention shifted to what the amendment sketch on p. 46 said. It invites "electronic or other means" to give notice. But that seems to give electronic means priority. Is that right? For one thing, it's difficult to foresee what new means of communication may arise in the future; perhaps some of them may become almost universal but not be "electronic." For another, it is not clear that electronic means should be preferred to others across the board. The discussion thus far shows that class actions are not all the same, and that tailoring the notice program to the case before the court is important. Perhaps this amendment would send the wrong signal.

Another participant suggested that "appropriate" might be more appropriate in the rule than "electronic." Then the Committee Note could say that for many Americans electronic communications are the most utilized method of communicating, but that for others more traditional means continue to predominate.

A reaction to these suggestions about phrasing of a rule change was to note the Eisen interpreted the current rule to prefer, perhaps to require, first-class mail. Should that really be privileged over other forms in the 21st century?

A response was that you can make a case for use of email in many cases. But there is no reason to throw out first class mail altogether. At the same time, another participant cautioned, one would not want the rule to appear to require the court to use first class mail where it does not make sense. It's quite expensive, and can be cumbersome and time-consuming.

An observer suggested that the rule should direct that notice be given "by the most appropriate means under the circumstances." Then the Committee Note could say that Eisen's endorsement of first class mail no longer makes sense. The Note could also add a discussion of the manner of presentation and content of the notice. Claims administrators do have data on

what works, and it makes sense to prefer evidence-based decisions about such matters.

Another reaction focused on the method of opting out. At present, the norm still is that class members must mail in something to opt out. In practice, that can operate as a disincentive to opting out. Can this be done electronically instead?

A reaction was that things are evolving very rapidly on these techniques. Sometimes it seems that the preferred way of handling these topics changes between the time the settlement is negotiated and the time that it is presented to the court.

Another comment reminded the group to keep one more thing in mind -- the distinction between reach and claims rate. It is important for a realistic assessment of differing notice strategies to attend to the matters of greatest importance.

Topic 9 -- Pick-off offers and Rule 68

This topic was introduced by noting that the Seventh Circuit announced a month before the conference that it was abandoning its prior interpretation of the effectiveness of pick-off offers, and that the Supreme Court has granted certiorari in a case that may resolve some or all issues surrounding this topic. So the question presently is how the Advisory Committee should approach the issues.

The first response was that the Committee should "pass" -- not take amendment action at this time.

A second response was that the Rule 68 sketch has appeal. Since the Kagan dissent in the FLSA case, no circuit has embraced pick-off maneuvers, but there are a couple of circuits in which this continues to be a potential issue. But there's a considerable likelihood that the Supreme Court will decide the issue in the Campbell-Ewald case.

Another participant favored the "Cooper approach." Rule 68 is not the only place where this problem can arise. It would be desirable to direct in Rule 23 that if a proposed class representative is found inadequate the court must grant time to find a substitute representative. Another thing that might warrant attention is that some district courts are entertaining motions to strike class allegations. But Rule 12(f) is not designed for such a purpose, and the rules should say that it is not.

A judge agreed that it is prudent to see what the Supreme Court does with the case in which it has granted certiorari. That prompted a prediction from another participant that the

Court will not contradict what the lower courts have done. At the same time, this defense-side participant noted, a class action is extremely expensive to defend, and it's not at all clear that nullifying the pick-off offer possibility is important to protect significant interests of the class. That drew the response that this is a putative class upon filing of the proposed class action, and there has to be time to find another class representative if the defendant tries to behead the action at this point.

Other issues

Finally, participants were invited to suggest other topics on which the Advisory Committee might focus its attention.

One suggestion was back-end disclosures. Courts should order the parties to report back on take-up rates and other settlement administration matters when it approves a class-action settlement. This might link up to a court order deferring some of the attorney fee award until the actual claims rate is known. That might tie in somewhat with the cy pres discussion, and the question whether moneys paid to a cy pres recipient should be considered to confer a benefit on the class sufficient to warrant an award based on the "value" of the settlement.

Another topic was whether there should be a second try outreach effort if the initial claims process seems not to have drawn much response. There have been instances in which such second efforts very significantly increase the claims rate. A plaintiff-side participant reacted by saying that "I have a duty to the class to ensure delivery to class members of the agreed relief in an effective manner." Indeed NACA has guidelines on this very topic. See Guideline 15 at 299 F.R.D. 228. This is important.

* * * * *

The mini-conference having concluded, Judge Dow reiterated the hearty thanks with which he opened the event. The participants' contributions have been critical to a careful analysis of the various possible amendment ideas, and the Subcommittee is deeply indebted for the participation of each person who attended the event.

INTRODUCTORY MATERIALS
RULE 23 SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
MINI-CONFERENCE ON RULE 23 ISSUES
SEPT. 11, 2015

This memorandum is designed to introduce issues that the Rule 23 Subcommittee hopes to explore during its mini-conference on Sept. 11, 2015. This list of issues has developed over a considerable period and is still evolving. The Subcommittee has had very helpful input from many sources during this period of development. The Sept. 11 mini-conference will provide further insights as it develops its presentation to the full Advisory Committee during its Fall 2015 meeting.

Despite the considerable strides that the Subcommittee has made in refining these issues, it is important to stress at the outset that **the rule amendment sketches and Committee Note possibilities presented below are still evolving. It remains quite uncertain whether any formal proposals to amend Rule 23 will emerge from this process. If formal proposals do emerge, it is also uncertain what those proposals would be.**

The topics addressed below range across a spectrum of class-action issues that has evolved as the Subcommittee has analyzed these issues. They are arranged in a sequence that is designed to facilitate consideration of somewhat related issues together. As to each issue, the memorandum presents some introductory comments, sketches of possible amendment ideas, often a draft (and often brief) sketch of a draft Committee Note and some Reporter's comments and questions that may help focus discussion. This memorandum does not include multiple footnotes and questions of the sort that might be included in an agenda memorandum for an Advisory Committee meeting; the goal of this mini-conference is to focus more about general concepts than implementation details, though those details are and will be important, and comments about them will be welcome.

The topics can be introduced as follows:

(1) "Frontloading" of presentation to the court of specifics about proposed class-action settlements -- Would such a requirement be justified to assist the court in deciding whether to order notice to the class and to afford class members access to information about the proposed settlement if notice is sent?;

(2) Expanded treatment of settlement approval criteria to focus and assist both the court and counsel in evaluating the most important features of proposed settlements of class actions -- Would changes be helpful and effective?;

(3) Guidance on handling cy pres provisions in class-action settlements -- Are changes to Rule 23 needed, and if so what should they include?;

(4) Provisions to improve and address objections to a proposed settlement by class members, including both objector disclosures and court approval for withdrawal of appeals and payments to objectors or their counsel in connection with withdrawal of appeals -- Would rule changes facilitate review of objections from class members, and would court approval for withdrawing an appeal be a useful way to deal with seemingly inappropriate use of the right to object and appeal?;

(5) Addressing class definition and ascertainability more explicitly in the rule -- Would more focused attention to issues of class definition assist the court and the parties in dealing with these issues?;

(6) Settlement class certification -- should a separate Rule 23(b) subdivision be added to address this possibility?;

(7) Issue class certification under Rule 23(c)(4) -- should Rule 23(b)(3) or 23(c)(4) be amended to recognize this possibility, and should Rule 23(f) be amended to authorize a discretionary interlocutory appeal from resolution of an issue certified under Rule 23(c)(4)?;

(8) Notice -- Would a change to Rule 23(c)(2) be desirable to recognize that 21st century communications call for flexible attitudes toward class notice?; and

(9) Pick-off offers of individual settlement and Rule 68 offers of judgment -- Would rule amendments be useful to address this concern?

(1) Disclosures regarding proposed settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class 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) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal, including any release [of liability];

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) information concerning the anticipated take-up rate by class members of

50 benefits available under the proposal;
51
52 **(ix)** any plans for disposition of settlement
53 funds remaining after the initial claims
54 process is completed, including any
55 connection between any of the parties
56 and an organization that might be a
57 recipient of remaining funds;
58
59 **(x)** a plan for reporting back to the court
60 on the actual claims history;
61
62 **(xi)** the anticipated amount of any attorney
63 fee award to class counsel;
64
65 **(xii)** any provision for deferring payment of
66 part or all of class counsel's attorney
67 fee award until the court receives a
68 report on the actual claims history;
69
70 **(xiii)** the form of notice that the parties
71 propose sending to the class; and
72
73 **(xiv)** any other matter the parties regard as
74 relevant to whether the proposal should
75 be approved under Rule 23(e)(2).
76
77 **(B)** The court may refuse to direct notice to the
78 class until the parties supply additional
79 information. If the court directs notice to
80 the class, the parties must arrange for class
81 members to have reasonable access to all
82 information provided to the court.
83
84 *Alternative 1*
85
86 **(C)** The court must not direct notice to the class
87 if it has identified significant potential
88 problems with either class certification or
89 approval of the proposal.
90
91 *Alternative 2*
92
93 **(C)** If the preliminary evaluation of the proposal
94 does not disclose grounds to doubt the
95 fairness of the proposal or other obvious
96 deficiencies [such as unduly preferential
97 treatment of class representatives or
98 segments of the class, or excessive
99 compensation for attorneys] and appears to
100 fall within the range of possible approval,

101 the court may direct notice to the class.
102
103 *Alternative 3*
104
105 **(C)** The court may direct notice to the class only
106 upon concluding that the prospects for class
107 certification and approval of the proposal
108 are sufficiently strong to support giving
109 notice to the class.
110
111 *Alternative 4*
112
113 **(C)** The court should direct notice to the class
114 if it preliminarily determines that giving
115 notice is justified by the prospect of class
116 certification and approval of the proposal.
117
118
119 **(D)** An order that notice be directed to the class
120 is not a preliminary approval of class
121 certification or of the proposal, and is not
122 subject to review under Rule 23(f)(1). But
123 such an order does support notice to class
124 members under Rule 23(c)(2)(B). If the class
125 has not been certified for trial, neither the
126 order nor the parties' submissions in
127 relation to the proposal are binding if class
128 certification for purposes of trial is later
sought.[1]

Sketch of Draft Committee Note

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It is not the same as "preliminary approval" of a proposed settlement, for approval must occur only after the final hearing that Rule 23(e)(2) requires, and after class members have an opportunity to object under Rule 23(e)(5). It is not a "preliminary certification" of the proposed class. In cases in which class

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[1] To drive home the propriety of requiring opt-out decisions at this time, Rule 23(c)(2)(B) could also be amended as follows:

(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 settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

certification has not yet been granted for purposes of trial, the parties' submissions regarding the propriety of certification for purposes of settlement [under Rule 23(b)(4)] are not binding in relation to certification for purposes of trial if that issue is later presented to the court.

Paragraph (A). Many types of information may be important to the court in deciding whether giving notice to the class of a proposed class-action settlement is warranted. This paragraph lists many types of information that the parties should provide the court to enable it to evaluate the prospect of class certification and approval of the proposal. Item (i) addresses the critical question whether there is a basis for certifying a class, at least for purposes of settlement. Items (ii) through (xiii) call for a variety of pieces of information that are often important to evaluating a proposed settlement, [although in some cases some of these items will not apply]. Item (xiv) invites the parties to call the court's attention to any other matters that may bear on whether to approve the proposed settlement; the nature of such additional matters may vary from case to case.

Paragraph (B). The court may conclude that additional information is necessary to make the decision whether to order that notice be sent to the class. In any event, the parties must make arrangements for class members to have access to all the information provided to the court. Often, that access can be provided in some electronic or online manner. Having that access will assist class members in evaluating the proposed settlement and deciding whether to object under Rule 23(e)(5).

Paragraph (C). The court's decision to direct notice to the class must take account of all information made available, including any additional information provided under Paragraph (B) on order of the court. **[Once a standard is agreed upon, more detail about how it is to be approached might be included here.]**

Paragraph (D). The court's decision to direct notice to the class is not a "preliminary approval" of either class certification or of the proposal. Class certification may only be granted after a hearing and in light of all pertinent information. Accordingly, the decision to send notice is not one that supports discretionary appellate review under Rule 23(f)(1). Any such review would be premature, [although the court could in some cases certify a question for review under 28 U.S.C. § 1292(b)].

Often, no decision has been made about class certification for purposes of trial at the time a proposed settlement is submitted to the court. [Rule 23(b)(4) authorizes certification for purposes of settlement in cases that might not satisfy the requirements of Rule 23(b)(3) for certification for trial.]

Should certification ultimately be denied, or the proposed settlement not approved, neither party's statements in connection with the proposal under Rule 23(e) are binding on the parties or the court in connection with a request for certification for purposes of trial.

Although the decision to send notice is not a "preliminary" certification of the class, it is sufficient to support notice to a Rule 23(b)(3) class under Rule 23(c)(2)(B), including notice of the right to opt out and a deadline for opting out. [Rule 23(c)(2)(B) is amended to recognize this consequence.] The availability of the information required under Paragraphs (A) and (B) should enable class members to make a sensible judgment about whether to opt out or to object. If the class is certified and the proposal is approved, those class members who have not opted out will be bound in accordance with Rule 23(c)(3). This provision reflects current practice under Rule 23.

Reporter's Comments and Questions

The listing in Paragraph (A) is quite extensive. Some language alternatives are suggested, but a more basic question is whether all of the items should be retained, and whether other items should be added. The judicial need for additional information in evaluating proposed class-action settlements has been emphasized on occasion. See, e.g., Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation Mag. 18 (Spring 2015). The range of things that could be important in regard to a specific case is very broad, so Paragraph (B) enables the court to direct additional information about other subjects, and item (xiv) invites the parties to submit information about other subjects.

How often is this sort of detailed submission presently provided at the time a proposed settlement is submitted to the court? Some comments suggest that sophisticated lawyers already know that they should fully advise the court at the time of initial submission of the proposal. Other comments suggest that the "real" briefing in support of the proposed settlement should occur at the time of initial submission, and that the further briefing at the time of the final approval hearing is largely an afterthought. This sketch does not compel that briefing sequence. Would that be desirable, or unduly intrude into the flexibility of district-court proceedings? Then further submissions by the settling parties could be limited to responding to objections from class members.

Do class members already have access to this range of information at the time they have to decide whether to opt out or object? At least some judicial doctrine suggests that on occasion important information has been submitted only after the time to opt out or object has passed. For example, information

about the proposed attorney fee award may not be available at the time class members must decide whether to object.

Are there items on the list that are so rarely of interest that they should be removed? Are there items on the list that are too demanding, and therefore should not be included? For example, information about likely take-up rates (item (viii)) may be too difficult to obtain. But if so, perhaps a plan for reporting back to the court (item (x)) and/or for taking actual claims experience into account in determining the final attorney fee award (item (xii)) might be in order.

How best should the standard for approving the notice to the class be stated? To some extent, there is a tension between saying two things in proposed Paragraph (D) -- that the decision to send notice is not an order certifying or refusing to certify the class that is subject to review under Rule 23(f), and that it is nonetheless sufficient to require class members to decide whether to opt out under Rule 23(c)(2)(B).

(2) Expanded treatment of settlement criteria

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class 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.

* * * * *

Alternative 1

(2) 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~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~[2]

(A) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award and any ancillary agreement made in connection with the

[2] These two alternatives offer a choice whether a rule should be more or less "confining." Alternative 1 is less confining for the district court, since it only calls for "consideration" of the listed factors. It may be that a court would regard some as more important than others in a given case, and conclude that the overall settlement is fair, reasonable, and adequate even if it might not find that all four were satisfied. Alternative 2, on the other hand, calls for separate findings on each of the four factors, and thus directs that the district court refuse to approve the settlement even though its overall judgment is that the settlement is fair, reasonable and adequate. This difference in treatment might also affect the scope of appellate review.

17 settlement -- is fair, reasonable, and adequate,
18 given the costs, risks, probability of success,
19 and delays of trial and appeal; and
20
21 (D) class members are treated equitably relative to
22 each other [based on their facts and circumstances
23 and are not disadvantaged by the settlement
24 considered as a whole] and the proposed method of
25 claims processing is fair [and is designed to
achieve the goals of the class action].

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to direct that the court should approve a proposed settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a "checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment provides more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement in order to decide whether it is appropriate to send notice of the settlement to the class. The disclosures required under Rule 23(e)(1) will give class members more information to evaluate a proposed settlement if the court determines that notice should be sent to the class. Objections under Rule 23(e)(5) can be calibrated more carefully to the actual specifics of the proposed settlement. In addition, Rule 23(e)(5) is amended to elicit information from objectors that should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members, and focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

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. 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.

Rule 23(e)(1) disclosures may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery 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 also be important. For example, the involvement of a 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.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiation of the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Various Rule 23(e)(1) disclosures may bear on this topic. The proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular 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 what the likely range of possible classwide recoveries might be 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. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for deferring a portion of the fee award until the claims experience is known may bear on the fairness of the overall proposed settlement. Provisions for reporting back to the court about actual claims experience may also bear on the overall fairness of the proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Reporter's Comments and Questions

The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought.

Another question revolves around the phrase now in the rule -- "fair, reasonable, and adequate," which receives more emphasis in Alternative 1. That is an appropriately broad phrase to describe the concern of the court in evaluating a proposed settlement. But to the extent that a rule amendment is designed to narrow the focus of the settlement review, perhaps the breadth of that phrase is also a drawback. Changing that phrase would vary from longstanding case law on Rule 23(e) analysis. Will a new rule along the lines sketched above meaningfully concentrate analysis if that overall description of the standard is retained?

At least a revised rule might obviate what reportedly

happens on numerous occasions -- the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit. Would the sketch's added gloss on "fair, reasonable, and adequate" be useful to lawyers and district judges addressing settlement-approval applications?

If this approach holds promise to improve settlement review, are there specifics included on the list in the sketch that should be removed? Are there other specifics that should be added?

(3) Cy pres provisions in settlements

1 **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims,
2 issues, or defenses of a certified class may be settled,
3 voluntarily dismissed, or compromised only with the court's
4 approval. The following procedures apply to a proposed
5 settlement, voluntary dismissal, or compromise:
6
7 * * * * *
8
9 (3) The court may approve a proposal that includes a cy
10 pres remedy [if authorized by law][3] even if such a
11 remedy could not be ordered in a contested case. The
12 court must apply the following criteria in determining
13 whether a cy pres award is appropriate:
14
15 **(A)** If individual class members can be identified
16 through reasonable effort, and individual

---

[3] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. Thus, the sketch says such a provision may be used "even if such a remedy could not be ordered in a contested case." That phrase seems to be in tension with the bracketed "authorized by law" provision. One might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is no need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

17 distributions would be economically viable,
18 settlement proceeds must be distributed to
19 individual class members;
20
21 **(B)** If the proposal involves individual distributions
22 to class members and funds remain after initial
23 distributions, the proposal must provide for
24 further distributions to participating class
25 members [or to class members whose claims were
26 initially rejected on timeliness or other grounds]
27 unless individual distributions would not be
28 economically viable {or other specific reasons
29 exist that would make such further distributions
30 impossible or unfair}];
31
32 **(C)** The proposal may provide that, if the court finds
33 that individual distributions are not viable under
34 Rule 23(e)(3)(A) or (B), a cy pres approach may be
35 employed if it directs payment to a recipient
36 whose interests reasonably approximate those being
37 pursued by the class.
38

(4~~3~~) The parties seeking approval * * *

Sketch of Draft Committee Note

Because class-action settlements often are for lump sums with distribution through a claims process, it can happen that funds are left over after the initial claims process is completed. Rule 23(e)(1) is amended to direct the parties to submit information to the court about the proposed claims process and forecasts of uptake at the time they request notice to the class of the proposed settlement. In addition, they are to address the possibility of deferring payment of a portion of the attorney fee award to class counsel until the actual claims history is known. These measures may affect the frequency and amount of residual funds remaining after the initial claim distribution process is completed. Including provisions about disposition of residual funds in the settlement proposal and addressing these topics in the Rule 23(e)(1) report to the court (which should be available to class members during the objection/opt out period) should obviate any need for a second notice to the class concerning the disposition of such a residue if one remains.

Rule 23(e)(3) guides the court and the parties in handling such provisions in settlement proposals and in determining disposition of the residual funds when that becomes necessary. [It permits such provisions in settlement proposals only "if authorized by law." Although parties may make any agreement they prefer in a private settlement, because the binding effect of the

class-action judgment on unnamed class members depends on the court's authority in approving the settlement such a settlement may not bind them to accept "remedies" not authorized by some source of law beyond Rule 23.]

[One alternative to *cy pres* treatment pursuant to Rule 23(e)(3) might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program. But because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution.[4]]

Paragraph (A). Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving. Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Developments in telecommunications technology have made distributions of relatively small sums economically viable to an extent not similarly possible in the past; further developments may further facilitate both identifying class members and distributing settlement funds to them in the future. This rule calls for the parties and the court to make appropriate use of such technological capabilities.

Paragraph (B). Paragraph (B) follows up on the point in paragraph (A), and directs that even after the first distribution is completed there must be a further distribution to those class members who submitted claims of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.

[As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing

[4] Is this concern warranted?

requirements established under the settlement.[5]]

Paragraph (C). Paragraph (C) deals only with the rare case in which individual distributions to class members are not economically viable. The court should not assume that the cost of distribution to class members is prohibitive unless presented with evidence firmly supporting that conclusion. It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases. When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. Although such a distribution does not provide relief to class members that is as direct as distributions pursuant to Paragraph (A) or (B), it is intended to confer a benefit on the class.

Reporter's Comments and Questions

A basic question is whether inclusion of this provision in the rules is necessary and/or desirable. One could argue that it is not necessary on the ground that there is a growing jurisprudence, including several court of appeals decisions, dealing with these matters. And several of those decisions invoke the proposal in the ALI Aggregate Litigation Principles that provided a starting point for this rule sketch. On the other hand, the rule sketch has evolved beyond that starting point, and would likely be refined further if the rule-amendment process proceeds. Moreover, a national rule is a more authoritative directive than an ALI proposal adopted or invoked by some courts of appeals.

A different sort of argument would be that this kind of provision should not be in the rules because that would somehow be an inappropriate use of the rulemaking power. That argument might be coupled with an argument in favor of retaining the limitation "if authorized by law." It could be supported by the proposition that the only reason such an agreement can dispose of the rights of unnamed class members is that the court enters a judgment that forecloses their individual claims. And the only reason the class representative and/or class counsel can negotiate such a provision is that they have been deputized to

---

[5] This follows up on bracketed language in the sketch. Would this be a desirable alternative to further distributions to class members who submitted timely and properly filled out claims?

act on behalf of the class by the court.

One might counter this argument by observing that class-action settlements often include provisions that likely are not of a type that a court could adopt after full litigation. Yet those arrangements are often practical and supported by defendants as well as the class representatives. From this point of view, a rule that forbade them might seem impractical.

And it might also seem odd to regard certain provisions of a settlement agreement as qualitatively different from others. Assuming a class action for money damages, for example, one could contend that a primary interest of the class is in maximizing the monetary relief, via judgment or settlement. Yet nobody would question the propriety of a compromise by the class representative on the amount of monetary relief, if approved by the court under Rule 23(e). So it could be said to be odd that this sort of "plenary" power to compromise on monetary relief and surrender a claim that might result in a judgment for a higher amount is qualitatively different from authority to make arrangements for disposition of an unclaimed residue. Put differently, if the class representative and class counsel can compromise in a way that surrenders the potential for a much larger recovery, is there a reason why they can't also agree to a *cy pres* provision that creates the possibility that some of the money would be paid to an organization that would further the goals sought by the class action?

Another argument that might be made is that alternative uses for a residue of funds should be encouraged to achieve deterrence or otherwise effectuate the substantive law. Under some circumstances, a remedy of disgorgement may be authorized by pertinent law. And the law of at least some states directly addresses the appropriate use of the residue from class actions. See Cal. Code Civ. Pro. § 384. Whether a Civil Rule should be fashioned to further such goals might be questioned, however.

The sketch is not designed to confront these issues directly. Instead, it is inspired in part by the reality that cy pres provisions exist and have been included in class-action settlements with some frequency. One could say that the rules appropriately should address practices that are widespread, but perhaps treatment in the Manual for Complex Litigation is sufficient.

A related topic is suggested by a bracketed paragraph in the Committee Note draft -- whether courts should have a bias against reversionary clauses in lump fund class-action settlements. The sketches of amendments to Rule 23(e)(1) and 23(e)(2) both direct the court's attention to the details of the claims processing method called for by the settlement. Fashioning an effective and fair claims processing method is a challenge, and can involve

considerable expense. To the extent that a defendant hoping to recoup a significant portion of the initial settlement payment as unclaimed funds might be tempted to insist on unduly exacting requirements for claims, something in the rules that encouraged courts to resist reversionary provisions in settlements might be appropriate.

A related concern might arise in relation to attorney fee awards to class counsel. Particularly when those awards are keyed to the "value" of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate. Particularly if there were a reversionary provision and the bulk of the funds were never paid to the class, it could be argued that the true value of the settlement to the class was the amount paid, not the amount deposited temporarily in the fund by the defendant. But see Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (holding that the existence of the common fund conferred a benefit on all class members -- even those who did not submit claims -- sufficient to justify charging the entire fund with the attorney fee award for class counsel).

(4) Objectors

The problem of problem objectors has attracted much attention. Various possible responses have been suggested, and they are introduced below. They have reached different levels of development, and likely would not be fully effective without adoption of some parallel provisions in the Appellate Rules. The Appellate Rules Committee has received proposals for rule amendments that might dovetail with changes to the Civil Rules.

Below are two approaches to the problems sometimes presented by problem objectors. The first relies on rather extensive required disclosure, coupled with expanded court approval requirements designed to reach appeals of denied objections as well as withdrawal of objections before the district court, covered by the present rule. The second is more limited -- seeking only to forbid any payments to objectors or their attorneys for withdrawing objections or appeals, and to designate the district court as the proper court to approve or disapprove such payments.

Objector disclosure

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class 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:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e).~~;~~ ~~the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:

29 (i) the objector alone,
30 (ii) fewer than all class members, or
31 (iii) all class members;
32
33 **(E)** the grounds of the objection, including objections
34 to:
35 (i) certification of any class,
36 (ii) the class definition,
37 (iii) the aggregate relief provided,
38 (iv) allocation of the relief among class
39 members,
40 (v) the procedure for distributing relief[,
41 including the procedure for filing claims],
42 and
43 (vi) any provisions for attorney fees;
44
45 [**(6)** The objector must move for a hearing on the objection.]
46
47 [**(6.1)** An objector [who is not a member of the class
48 included in the judgment] can appeal [denial of the
49 objection] {approval of the settlement} only if the
50 court grants permission to intervene for that purpose.]
51
52 **(7)** Withdrawal of objection or appeal
53
54 **(A)** An objection filed under Rule 23(e) or an appeal
55 from an order denying an objection may be
56 withdrawn only with the court's approval.
57
58 **(B)** A motion seeking approval must include a statement
59 identifying any agreement made in connection with
60 the withdrawal.
61
62 *Alternative 1*
63
64 **(C)** The court must approve any compensation [to be
65 paid] to the objector or the objector's counsel in
66 connection with the withdrawal.
67
68 *Alternative 2*
69
70 **(C)** Unless approved by the district court, no payment
71 may be made to any objector or objector's counsel
72 in exchange for withdrawal of an objection or
73 appeal from denial of an objection. Any request
74 by an objector or objector's counsel for payment
75 based on the benefit of the objection to the class
76 must be made to the district court, which retains
77 jurisdiction during the pendency of any appeal to
78 rule on any such request.
79

80 **(D)** If the motion to withdraw [the objection] was
81 referred to the court under Rule *XY* of the Federal
82 Rules of Appellate Procedure, the court must
83 inform the court of appeals of its action on the motion.

[As should be apparent, this would be a rather extensive rule revision, and would likely depend upon some change in the Appellate Rules as well. That possible change is indicated by the reference to an imaginary Appellate Rule *XY*[6] in the sketch above. As illustrated in a footnote, such an Appellate Rule could direct that an appeal by an objector from a court's approval of a settlement over an objection may be dismissed only on order of the court, and directing that the court of appeals would refer the decision whether to approve that withdrawal to the district court.]

Sketch of Committee Note Ideas

[The above sketches are at such a preliminary stage that it would be premature to pretend to have a draft Committee Note, or even a sketch of one. But some ideas can be expressed about what points such a Note might make.]

Objecting class members play an important role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement that Rule 23(e)(1) requires be submitted to the court, objectors can make an accurate appraisal

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[6] The Advisory Committee on Civil Rules does not propose changes to the Appellate Rules. But for purposes of discussion of the sketches of possible Civil Rule provisions in text, it might be useful to offer a sketch of a possible Appellate Rule 42(c):

(c) Dismissal of Class-Action Objection Appeal. A motion to dismiss an appeal from an order denying an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure to approval of a class-action settlement must be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Civil Rule 23(e)(7). The district court must report its determination to the court of appeals.

As noted above, any such addition to the Appellate Rules would have to emanate from the Advisory Committee on Appellate Rules, and this sketch is provided only to facilitate discussion of the Civil Rule sketches presented in this memorandum.

of the merits and possible failings of a proposed settlement.

But with this opportunity to participate in the settlement review process should also come some responsibilities. And the Committee has received reports that in a significant number of instances objectors or their counsel appear to have acted in an irresponsible manner. The 2003 amendments to Rule 23 required that withdrawal of an objection before the district court occur only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. At the same time, the disruptive potential of an objection at the district court seems much less significant than the disruption due to delay of an objector appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to finalize the settlement and deliver the settlement funds to the class.

The goal of this amendment is to employ the combined effects of sunlight and required judicial approval to minimize the risk of possible abuse of the objection process, and to assist the court in understanding objections more fully. It is premised in part on the disclosures of amended Rule 23(e)(1), which are designed in part to provide class members with extensive information about the proposed settlement. That extensive information, in turn, makes it appropriate to ask objectors to provide relatively extensive information about the basis for their objections.

Thus, paragraphs (A), (B), and (C) of Rule 23(e)(5) seek "who, what, when, and where" sorts of information about the role of this objector. Paragraph (B) focuses particularly on the relationship with an attorney because there have been reports of allegedly strategic efforts by some counsel to mask their involvement in the objection process, at least at the district court.

Paragraph (D) and (E), then, seek to elicit a variety of specifics about the objection itself. The Subcommittee has been informed that on occasion objections are quite delphic, and that settlement proponents find it difficult to address these objections because they are so uninformative. Calling for specifics is intended to remedy that sort of problem, and thus to provide the court and with details that will assist it in evaluating the objection.

Paragraph 6 suggests, in brackets, that one might require an objector to move for a hearing on the objection. It may be that the ordinary Rule 23(e) settlement-approval process suffices because Rule 23(e)(2) directs the court not to approve the proposed settlement until after a hearing. Having multiple hearings is likely not useful.

Paragraph 6.1, tentative not only due to brackets but also due to numbering, suggests a more aggressive rein on objectors. It relies on required intervention as a prerequisite for appealing denial of an objection. Anything along those lines would require careful consideration of the Supreme Court's decision in Devlin v. Scardeletti, 534 U.S. 1 (2002), in which the Court held that an objector in a Rule 23(b)(1) "mandatory" class action who had been denied leave to intervene to pursue his objection to the proposed settlement nevertheless could appeal. The Court was careful to say that the objector would "only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections." Id. at 9. And the Court emphasized the mandatory nature of that class action (id. at 10-11):

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

The Court also rejected an argument advanced by the United States (as amicus curiae) that class members who seek to appeal rejection of their objections must intervene in order to appeal. The Government "asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded," id. at 12, and the Court noted that "[a]ccording to the Government, nonnamed class members who state objections at the fairness hearing should easily meet" the Rule 24(a) criteria for intervention of right. Id. The Court reacted (id.):

> Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the government's suggested requirement.

But it is not clear that the Court's ruling would prevent a rule requiring intervention. Thus, the Court rejected the Government's argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal." Id. at 14. It added that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to

appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291." Id.

And it may be that reports about allegedly abusive recent experience with objectors would provide a basis for adopting such a rule. Thus, in *Devlin* the Court noted that the Government did not cite the concern with abusive appeals that has been highlighted by commentators (id. at 13):

> It [the Government] identifies only a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members.

Court approval requirement

As an alternative to the objector disclosure sketch, the following sketch relies entirely on judicial approval of any payment to an objecting class member of the objector's lawyer. It is possible that this simpler approach would be effective in dealing with inappropriate behavior by objectors. But it should be borne in mind that court approval is also an integral feature of the objector disclosure approach.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class 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:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. <u>Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.</u>

Sketch of Committee Note Ideas

Many of the general comments included in the sketch of Committee Note ideas for the objector disclosure draft could introduce the general problem in relation to this approach, but it would emphasize the role of judicial approval rather than the utility of disclosure. The reason for taking this approach would be that the prospect of a financial benefit is the principal apparent stimulus for the kind of objections that the amendment is trying to prevent or deter.

A starting point in evaluating this approach could be the 2003 amendment to add Rule 23(h), which recognized that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." That involvement is no less important when the question is payment to an objector's counsel rather than to class counsel. Although payment may be justified due to the contribution made by the objector to the full review of proposed settlement, that decision should be for the court to make, not for the parties to negotiate entirely between themselves.

The sketch focuses on payments to objectors or their attorneys because that has been the stimulus to this concern; instances of nonmonetary accommodations leading to withdrawal of objections have not emerged as similarly problematical.

The rule focuses on "the benefit of the objection to the class." Particularly with payments to the objector's attorney, that focus may be paramount. If the objection raises an issue unique to the objector, rather than one of general application to the class, that may support a payment to the objector. As the Committee Note to the 2003 amendment to Rule 23(e) explained, approval for a payment to the objector "may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." But compensation of the objector's attorney would then ordinarily depend on the contractual arrangements between the objector and its attorney.

Ordinarily, if an objector's counsel seeks compensation, that compensation should be justified on the basis of the benefits conferred on the class by the objection. Ordinarily, that would depend in the first instance on the objection being sustained. It is possible that even an objection of potentially general application that is not ultimately sustained nonetheless provides value to the Rule 23(e) review process sufficient to justify compensation for the attorney representing the objector, particularly if such compensation is supported by class counsel. But an objection that confers no benefit on the class ordinarily should not produce a payment to the objector's counsel.

[Objections sometimes lack needed specifics, with the result that they do not facilitate the Rule 23(e) review process. It may even be that some objections raise points that are actually not pertinent to the proposed settlement before the court. Such objections would not confer a benefit on the class or justify payment to the objector's counsel.[7]]

Reporter's Comments and Questions

Both of these rule sketches are particularly preliminary, and should be approached with that in mind. Obviously, a basic question is whether the disclosure approach (coupled with court approval) or the court approval approach should be preferred. Requiring disclosures by objectors may be helpful to the court in evaluating objections as well as determining whether to approve payments to objectors or their lawyers. It may even be that the disclosure provisions would assist good-faith objectors in focusing their objections on the issues presented in the case.

One significant question in evaluating the court-approval approach is whether Rule 23(e)(5)'s current court-approval requirement has been effective. If it has not, does that bear on whether an expanded court-approval requirement, including a parallel provision in the Appellate Rules, would be effective? Perhaps Rule 23(e)(5) has not been fully effective because filing a notice of appeal after denial of an objection serves as something like an "escape valve" from the rule's requirement of judicial approval. If so, that may suggest that the existing rule is effective, or can become effective with this expansion.

A different question is whether the requirements of the disclosure approach would impose undue burdens on good-faith objectors. The Committee gave some consideration to various sanction ideas, but feedback has not favored that approach. One reason is that emphasizing sanctions has the potential to chill good-faith objections. The rule sketch says the disclosures must be signed under Rule 23(g)(1), which does have a sanctions provision. See Rule 26(g)(1)(C). Would that deter good-faith objectors? Except for some difficulty in supplying the information required, it would not seem that the disclosure requirements themselves would raise a risk of *in terrorem* deterrence of good-faith objectors.

Yet another question is whether such an elaborate disclosure regime could burden the court, the parties, and the objectors with disputes about whether "full disclosure" had occurred. Should there be explicit authority for a motion to require fuller

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[7] This point may be worth making if the objector disclosure provisions are not included. If they are included, these points seem unnecessary.

disclosure? Rule 37(a)(3)(A) could be amended as follows:

> **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), or if a class member fails to make a disclosure required by Rule 23(e)(5), any other party may move to compel disclosure and for appropriate sanctions.

But it might be said to be odd to have a Rule 37(a) motion apply to a class member, and also unnerving to raise the possibility of Rule 37(b) sanctions if the order were not obeyed (although one sanction might be rejection of the objection). This approach would have the advantage of avoiding the procedural aspects of Rule 11, such as the "safe harbor" for withdrawn papers, given that Rule 23(e)(5) says that an objection may be withdrawn only with the court's approval.

Alternatively, should the rule simply say that the court may disregard any objection that is not accompanied by "full disclosure"? Should satisfying the "full disclosure" requirement be a prerequisite to appellate review of the objection? Some comments have stressed that delphic objections sometimes seem strategically designed to obscure rather than clarify the grounds that may be advanced on appeal, or as a short cut to filing a notice of appeal without actually having identified any real objections to the proposed settlement, and then inviting a payoff to drop the appeal. Disclosure could, in such circumstances, have a prophylactic effect. Should the court of appeals affirm rejections of objections on the ground that full disclosure was not given without considering the merits of the objections? Could that appellate disposition be achieved in an expedited manner, compared to an appeal on the merits of the objection?

Although not principally the province of the Civil Rules Committee, it is worthwhile to note some complications that might follow from an Appellate Rule calling on the district court to approve or disapprove withdrawals of appeals. The operating assumption may be that the district court could make quick work of those approvals, while the appellate court would have little familiarity with the case. That may often be true, but not in all cases. A 2013 FJC study of appeals by objectors found that the rate of appellate decision on the merits of the objector's appeal varied greatly by circuit. Thus, in the Seventh Circuit, none of the objector appeals had led to a resolution on the merits in the court of appeals during the period studied, while in the Second Circuit fully 63% had. Had the parties in the Second Circuit cases reached a settlement after oral argument, one might argue that the court of appeals would by then be better positioned to evaluate the proposed withdrawal of the appeal than the busy district judge, who may have approved the settlement two years earlier.

Finally, it may be asked whether focusing on whether the objector "improved" the settlement might be useful. It seems that such a focus might invite cosmetic changes to a settlement that confer no significant benefit on the class. And it also may be that some objections that are not accepted may nonetheless impose significant costs on the objector that the court could consider worth compensating because the input was useful to the court in evaluating the settlement.

(5) Class Definition & Ascertainability

Relatively recently, the issue of ascertainability has received a considerable amount of attention. There have been assertions that a circuit conflict is developing or has developed on this topic. The concept that a workable class definition is needed has long been recognized; "all those similarly situated" is unlikely to suffice often. In 2003, Rule 23(c) was amended to make explicit the need to define the class in a meaningful manner. The amendment sketch below builds on that 2003 amendment.

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

(1) Certification Order:

* * *

(B) *Defining the Class*~~*; Appointing Class Counsel*~~. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Initial Sketch of Draft Committee Note

A class definition can be important for various reasons. Rule 23(a)(1) requires that the members of a class be too numerous to be joined, so some clear notion who is included is necessary.. Rule 23(c)(2) requires notice to the Rule 23(b)(3) class after certification. Rule 23(c)(3) directs that the judgment in the class action is binding on all class members. Rule 23(e)(1) says that the court must direct notice of a proposed settlement to the class if it would bind them. Rule 23(e)(5) directs objectors to provide disclosures showing that they are in fact class members. And Rule 23(h)(1) requires that

notice of class counsel's application for an award of attorney's fees be directed to class members. So a workable class definition can be important under many features of Rule 23.

But the class definition requirements of the rule are realistic and pragmatic. Thus, the rule also recognizes that identifying all class members may not be possible. For example, Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must send individual notice to "all members who can be identified through reasonable effort." And in class actions under Rule 23(b)(2) -- such as actions to challenge alleged discrimination in educational institutions -- there may be instances in which it is not possible at the time the class is certified to identify all class members who might in the future claim protection under the court's injunctive decree.

Under these circumstances, Rule 23(c)(1)(B) calls for a pragmatic approach to class definition at the certification stage. As a matter of pleading, a class-action complaint need not satisfy this requirement. The requirement at the certification stage is that the court satisfy itself that members of the class can be identified in a manner that is sufficient for the purposes specified in Rule 23. It need not, at that point, achieve certainty about such identification, which may not be needed for a considerable time, if at all.

[The rule says that the court's focus should be on whether identification can be accomplished "when necessary." This qualification recognizes that the court need not always provide individual notice at the certification stage, even in Rule 23(b)(3) class actions, to all class members. Instead, that task often need be confronted only later. If the case is litigated to judgment, it may then become necessary to identify class members with some specificity whether or not the class prevails. If the case is settled, the settlement itself may include measures designed to identify class members.]

Ultimately, the class definition is significantly a matter of case management. [It is not itself a method for screening the merits of claims that might be asserted by class members.[8]] As with other case-management issues, it calls for judicial resourcefulness and creativity. Although the proponents of class certification bear primary responsibility for the class definition, the court may look to both sides for direction in fashioning a workable definition at the certification stage, and in resolving class-definition issues at later points in the action. In balancing these concerns, the court must recognize that the class opponent has a valid interest in ensuring that a claims process limits relief to those legally entitled to it,

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[8] Is this a pertinent or helpful observation?

while also recognizing that claims processing must be realistic in terms of the information likely to be available to class members with valid claims. And the court need not make certain at the time of certification that a perfect solution will later be found to these problems.

Reporter's Comments and Questions

Would a rule provision along the lines above be useful? One might regard the sketch above as a "minimalist" rule provision on this subject, in light of the considerable recent discussion of it. It avoids the use of both "ascertainable" and "objective," words sometimes used in some recent discussions of this general subject.

Some submissions to the Advisory Committee have urged that rule provisions directly address some questions that have been linked to these topics,[9] including:

Ensuring that all within the class definition have valid claims: A class definition that is expressed in terms of having a valid claim can create "fail safe" class problems, because a defense victory would seem to mean that the class contains no members. A class definition that "objectively" ensures that all class members have valid claims may routinely present similar challenges.

Use of affidavits or other similar "proofs": Another topic that has arisen is whether affidavits or similar proofs can suffice to prove membership in the class. This problem can be particularly acute when the class claim asserts that defendant made false or misleading statements in connection with inexpensive retail products. A requirement that class members present receipts proving purchase of the product may sometimes be asking too much.

"No injury" classes: Somewhat similar to the two points above is the question whether the class includes many who have suffered no injury. Such issues may, for example, arise in data breach situations. In those cases, there may be a debate about whether the breach actually revealed confidential information from class members, and what use was made of that information. The Supreme Court has granted certiorari in a case that may present some such issues. See Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (6th Cir. 2014), cert. granted, 135 S.Ct. 2806 (2015).

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[9] In case these submissions might be of interest, an Appendix to this memorandum presents some of the suggestions that the Advisory Committee has received.

The rule sketch above does not purport to address directly any of these issues. There are likely additional issues that have been discussed under the general heading "ascertainability" that this sketch does not directly address. Would that mean a rule change along these lines would not be useful?

If it appears that a rule change requires an effort to confront the sorts of issues just identified, could it be said that those issues can be handled in the same way across the wide variety of class actions in federal courts?

The courts' resolutions of these issues appear to be in a state of rapid evolution. For one recent analysis, see Mullins v. Direct Digital, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015). Would it be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change that could become effective no sooner than Dec. 1, 2018? If the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

1 **(b) Types of Class Actions.** A class action may be
2 maintained if Rule 23(a) is satisfied and if:
3
4 * * * * * *
5
6
7 (4) the parties to a settlement [in an action to be
8 certified under subdivision (b)(3)] request
9 certification and the court finds that the proposed
10 settlement is superior to other available methods for
11 fairly and efficiently adjudicating the controversy,
and that it should be approved under Rule 23(e).[10]

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new

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[10] The Subcommittee has also discussed an alternative formulation that would invoke criteria proposed in the ALI Aggregate Litigation project:

> (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

This approach does not fit well with the current lead-in language to Rule 23(b), which says that class actions may be maintained "if Rule 23(a) is satisfied." But the reformulation appears either to offer substitute approaches to matters covered in Rule 23(a) ("significant common issues" and "sufficiently numerous") or to call for more exacting treatment of topics also covered in Rule 23(a).

subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed

to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation. See Rule 23(e)(1)(D).

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said

that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

(7) Issue Class Certification

This topic presents two different sorts of questions or concerns. One is whether experience shows that a change in Rule 23(b) or (c) is needed to ensure that issue class certification is available in appropriate circumstances. Various placements are possible for this purpose. An overarching issue, however, is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use of issues classes, it may be that a rule change is not indicated.

The second question looks to proceedings after resolution of the issue on which certification was based. Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment. But to complete adjudication of class members' claims might require considerable additional activity which might be wasted if there were later a reversal on appeal of the common issue. So a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.

A. Revising Rule 23(b) or (c)

Rule 23(b) approaches

Alternative 1

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

1 **(3)** the court finds that the questions of law or fact
2 common to class members predominate over any
3 questions affecting only individual members,
4 except when certifying under Rule 23(c)(4), and
5 finds that a class action is superior to other
6 available methods for fairly and efficiently
7 adjudicating the controversy. The matters
pertinent to these findings include: * * * *

Alternative 2

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

1 **(4)** the court finds that the resolution of particular
2 issues will materially advance the litigation,

3 making certification with respect to those issues
4 appropriate. [In determining whether
5 certification limited to particular issues is
6 appropriate, the court may refer to the matters
identified in Rule 23(b)(3)(A) through (D).]

Rule 23(c)(4) approach

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

* * * * *

1 **(4)** ***Particular issues.*** ~~When appropriate, a~~An action
2 may be brought or maintained as a class action
3 with respect to particular issues if the court
4 finds that the resolution of such issues will
5 materially advance the litigation. [In
6 determining whether certification limited to
7 particular issues is appropriate, the court may
8 refer to the matters identified in Rule
23(b)(3)(A) through (D).]

Sketch of Committee Note Ideas

[Very general; would need to be adapted to actual rule change pursued]

Particularly in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not. Since its amendment in 1966, Rule 23(c)(4) has recognized this possibility. This amendment confirms that such certification may be employed.

The question whether such certification is warranted in a given case may be addressed in light of the factors listed in Rule 23(b)(3)(A) through (D). A primary consideration will be whether the resolution of the common issue or issues will materially advance the resolution of the entire litigation, or the entire claims of class members. When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii).

[Resolution of the issues for which certification was granted may result in an appealable judgment. But even if those issues are resolved in favor of the class opponent, that may not mean that all related claims of class members are also resolved. Should resolution of the common issues not result in entry of an

appealable judgment, discretionary appellate review may be sought under Rule 23(f)(2).]

Reporter's Comments and Questions

These sketches are obviously at an early stage of development. At a point in time, it appeared that there was a circuit split on whether (c)(4) certification could be sought in an action brought under Rule 23(b)(3) even though predominance could not be satisfied as to the claims as a whole. It is uncertain whether that seeming split has continued, and whether amendments of this sort are needed and helpful in resolving it.

If a rule change is useful, which route seems most promising? Alternative 1 may be the simplest; it seeks only to overcome preoccupation with overall predominance. It could be coupled with a revision of Rule 23(c)(4) that recognizes that the "materially advances" idea is a guide in determining whether it is appropriate to certify as to particular issues. At present, Rule 23(c)(4) says only that such certification may be granted "when appropriate." Alternatively or additionally, one could refer to the factors in Rule 23(b)(3)(A) through (D). But would they be appropriate in relation to issue certification under Rule 23(b)(1) or (2)?

Is issue certification really a concern only as to Rule 23(b)(3) cases? It may be that, particularly after *Wal-Mart*, Rule 23(b)(2) cases are not suited to (c)(4) certification. Rule 23(b)(2) says that certification is proper only when the class opponent has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It may be that this definition makes issue certification unimportant. In (b)(1) classes, it may be that there is a common issue such as whether there is a "limited fund" that would warrant (c)(4) certification, but if that produced the conclusion that there is a limited fund certification under (b)(1)(B) seems warranted.

B. Interlocutory Appellate Review

1 **(f) Appeals.**
2
3 (1) *From order granting or denying class-action*
4 *certification.* A court of appeals may permit an
5 appeal from an order granting or denying class-
6 action certification under this rule if a petition
7 for permission to appeal is filed with the circuit
8 clerk within 14 days after the order is entered.
9 An appeal does not stay proceedings in the
10 district court unless the district judge or the
11 court of appeals so orders
12
13 (2) *From order resolving issue in class certified*
14 *under Rule 23(c)(4).* A court of appeals may
15 permit an appeal from an order deciding an issue
16 with respect to which [certification was granted
17 under Rule 23(c)(4)] {a class action was allowed
18 to be maintained under Rule 23(c)(4)} [when the
19 district court expressly determines that there is
20 no just reason for delay], if a petition for
21 permission to appeal is filed with the circuit
22 clerk within 14 days after the order is entered.
23 An appeal does not stay proceedings in the
24 district court unless the district judge or the
court of appeals so orders.

Sketch of Draft Committee Note Ideas

In 1998, Rule 23(f) was added to afford an avenue for interlocutory review of class-certification orders because they are frequently of great importance to the conduct of the action. That provision is retained as Rule 23(f)(1).

Rule 23(f)(2) is added to permit immediate review of another decision that can be extremely important to the further conduct of an action. Rule 23(c)(4) authorizes class certification limited to particular issues when resolution of those issues would materially advance the ultimate resolution of the litigation. In some cases, the resolution of the common issues may lead to entry of an appealable final judgment. But often it will not, and even though that resolution should materially advance the ultimate resolution of the litigation a great deal more may need to be done to accomplish that ultimate resolution.

Before the court and the parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue. Rule 23(f)(2) authorizes such review, which is at the discretion of the court of appeals, as is an appeal of a certification order under Rule 23(f)(1). Such an

appeal is allowed only from an order deciding an issue for which certification was granted. That would not include some orders relating to that issue, such as denial of a motion for summary judgment with regard to the issue.

[But to guard against premature appeals, an application to the Court of Appeals for review under Rule 23(f)(2) must be supported by a determination from the district court that there is no just reason for delay. For example, if the court has resolved one of several issues on which certification was granted, it may conclude that immediate appellate review would not be appropriate.]

Reporter's Comments and Questions

A basic question is whether adding Rule 23(f)(2) would produce positive or negative effects. Related to that is the question "What happens now when an issue is resolved in an issues class action?"

One answer to that second question is that if the defendant wins on the common issue judgment is entered in the defendant's favor and the class action ends. That may not mean that class members may not pursue individual claims, but they would likely be bound by the resolution of the common issue and limited to claims not dependent on it. Cf. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (after court ruled that there was no general pattern or practice of discrimination in defendant's operation, class members could still pursue claims of individual intentional discrimination but could not rely on pattern or practice proof). But it would ordinarily mean that immediate review is available under 28 U.S.C. § 1291 with regard to the class action.

Another answer is that common issue certification often involves multiple issues, so that even if some are definitively resolved in the district court others may remain to be resolved. Under those circumstances, it may be that the district court would conclude that there is just reason for delay. Is it important to condition immediate review on the district court's determination that there is no just reason for delay? That seems to afford the appellate court useful information about whether to allow an immediate appeal, but may also give the district court undue authority to prevent immediate review.

Yet another answer is that if the class opponent loses on the common issue, that might invariably lead to a settlement essentially premised on that resolution of that issue. It could be that the settlement sometimes preserves the class opponent's right to seek appellate review, but may often be that it does not. Is that an argument for adopting Rule 23(f)(2)? One view might be that it would become a "free bite" for the class

opponent.

Could appellate courts develop standards for decisions whether to grant review under Rule 23(f)(2)? Under current Rule 23(f), they have developed standards for review. But it may be that a similar set of general standards would not be easy to fashion. Would input from the district court be useful in making decisions on whether to permit immediate appeals? If so, is the bracketed provision calling for a district court determination that there is no just reason for delay in the appeal a useful method of providing that assistance to the court of appeals? Would it actually be more of a burden to the district court than boon to the court of appeals?

(8) Notice

This topic has received limited attention in discussion to date. Therefore this memorandum presents the discussion that appeared in the agenda memo for the April 9 Advisory Committee meeting and adds some comments and questions.

April 2015 Agenda Materials

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-74, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**

2 * * * * *
3
4 **(B)** *For (b)(3) Classes.* For any class certified under Rule
5 23(b)(3), the court must direct to class members the
6 best notice that is practicable under the
7 circumstances, including individual notice by
8 electronic or other means to all members who can be
identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. It appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as *Eisen* seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the

notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Reporter's Comments and Questions

Recurrent references in cases mainly addressing other issues to use of electronic means for giving notice and giving class members access to information about a class action or proposed settlement suggest that creative work is occurring without the need for any rule change. The sketch of additions to Rule 23(e)(1) in Part (1) above directs that the resulting information be made available to class members, and the likely method for

doing so would be some sort of electronic posting. In at least some cases, electronic submission of claims is done.

No doubt participants in the Sept. 11 mini-conference are more familiar with these developments than those who only read the case reports. But these developments raise the question whether there is really any need for a rule change.

If changes are warranted for Rule 23(b)(3) actions, the question remains whether the time has come for revisiting the question of required notice of some sort in (b)(1) and (b)(2) actions.

(9) Pick-Off and Rule 68

This topic has received limited attention since the April 9 Advisory Committee meeting. Accordingly, the material below is drawn from the agenda materials for that meeting.

One development is that the Supreme Court has granted cert. in a case that may address related issues. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). Another is the Seventh Circuit decision in Chapman v. First Index, Inc., ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015). See also Hooks v. Landmark Indus., Inc., ___ F.3d ___, 2015 WL _____ (5th Cir. No. 14-20496, Aug. 12, 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action"). Below in the Reporter's Comments and Questions section, a key inquiry will be whether the present state of the law calls for rule changes.

April 2015 Agenda Materials

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The

17 court may choose instead to hold the way open for certification
18 of a class different than the one it has refused to certify, or
19 for reconsideration of the certification decision. The court also
20 may treat the tender of complete relief as mooting the
21 representative's claim, but, to protect the possibility that a
22 new representative may come forward, refuse to dismiss the
23 action.
24
25 If the court chooses to dismiss the action, the would-be
26 class representative retains standing to appeal the denial of
27 certification. [say something to explain this?]
28
29 [If we revise Rule 23(e) to require court approval of a
30 settlement, voluntary dismissal, or compromise of the
representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

1 **(e)** **Inapplicable in Class and Derivative Actions.** This
2 rule does not apply to class or derivative actions
under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy

Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class 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:

(A~~1~~) The court must direct notice in a reasonable

19 manner * * * * *
20
21 (3) **Settlement after denial of certification.** If the court
22 denies class-action certification, the plaintiff may
23 settle an individual claim without prejudice to seeking
24 appellate review of the court's denial of
certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

Reporter's Comments and Questions

The above materials suggest a variety of questions that might be illuminated by discussion on Sept. 11. A basic one is the extent of the problem. One view is that (at least pending the Supreme Court's decision in the case it has taken) this problem was largely limited to one circuit, which has seemingly

overruled the cases that had presented the problem.

But another view might be that the existence of this issue casts a shadow over cases filed in other circuits. It has happened that parties in such cases have felt obligated to file out-of-the-chute certification motions, and some district judges have stricken such motions in the ground they are premature.

Assuming there is reason to give serious consideration to a rule change, there are a variety of follow-up questions. One is whether anything more than "the minimum" change is needed. And if the minimum is all that is needed, would a change to Rule 68 saying that it is inapplicable in actions under Rules 23, 23.1, and 23.2 suffice?

As illustrated by the above sketches, a number of other issues might be addressed. These include:

(1) Undoing the limitation of Rule 23(e) to settlements that purport in form to bind the class. This limitation was added in 2003. Before that, most circuits held that court review was required for "individual" settlements as well as "class" settlements, but that notice to the class was not.

(2) A rule could require court approval of a dismissal and also require that the parties submit details of the deal to the court.

(3) A rule could affirmatively preserve the settling individual's right to seek appellate review of the district court's denial of class certification.

(4) A rule could specify that the parties must seek judicial approval of an individual settlement before certification, but leave notice to the class to the discretion of the court.

There surely are additional possibilities.

APPENDIX
Selected Ascertainability Suggestions

This listing does not purport to exhaust the submissions on this topic.

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B)

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

TAB 7B

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M E M O R A N D U M

To: Standing Committee

From: Civil Rules Pilot Project Subcommittee

Date: December 12, 2015

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed to investigate pilot projects already completed in other locations and to recommend possible pilot projects for federal courts.

The subcommittee began its work by collecting information. Contact was made with the National Center for State Courts, the Institute for Advancement of the American Legal System, the Conference of State Court Chief Justices, and various innovative federal courts. Exhibits A, B, C, and D contain summary memos prepared by members of the subcommittee regarding pilot projects undertaken in various state and federal courts. Exhibit E describes a pilot project undertaken at the direction of Congress in the early 1990s.

After considering a number of alternatives, the subcommittee has focused on two possible pilot projects: one on enhanced initial disclosures, and another that calls upon judges to set more aggressive schedules for completion of litigation and, at the same time, trains them on case management techniques needed to adhere to such schedules.

A. Enhanced Disclosures.

This is a rule-driven project that would make more robust the voluntary disclosures already required by Civil Rule 26(a) at the beginning of a case to include helpful *and* hurtful information known by each party. It is similar to an Arizona state court rule that has been used with some success for over a decade, as well as an analogous rule in Colorado and the federal employment law protocols currently used by many federal judges. It also is akin to a proposed amendment to Civil Rule 26(a) that failed to pass in the late 1990s.

As you may know, the Civil Rules actually required mandatory disclosure of unfavorable information in the version of Rule 26(a)(1) that was in effect from 1993 to 2000, but it permitted individual districts to opt out. So many districts opted out that the Committee eventually concluded that elimination of the opt-out provision was needed, and the only way to get such a change through the full Enabling Act process was to dial back the Rule 26(a)(1) disclosure requirements to information a party may use to support its own claims or defenses.

Nevertheless, as shown in Exhibits A-D, many state court pilot projects have included enhanced initial disclosures. The idea, of course, is to get information on the table that otherwise would be found only through expensive discovery. The discovery protocols for federal employment cases appear to have shown that enhanced disclosures can improve the efficiency of litigation. Exhibit F is a summary of a study recently completed by the Federal Judicial Center on the effect of the employment protocols. It finds significantly fewer discovery disputes in cases where the protocols are used.

Some states require more substantial initial disclosures. One example is Arizona Rule 26.1(a), a copy of which is included as Exhibit G. The idea behind Rule 26.1(a)(9) is to require parties to produce all documents relevant to the case, including unfavorable documents, at the outset of the litigation. The Rule also requires parties to identify all persons with knowledge of the case, and to provide a general description of their knowledge. This Rule, combined with other Arizona innovations (depositions limited to parties and experts, depositions limited to four hours, only one expert per issue) appears to have produced favorable results. In a survey completed for the Advisory Committee's May 2010 conference, 73% of Arizona lawyers who practice in federal and state court said that they prefer state court, as compared to 43% of lawyers nationally.

Exhibit H includes a draft set of initial disclosure rules prepared by one of the subcommittee's groups. It includes portions of the Arizona rule, but is not as aggressive. The subcommittee feels that this draft must be more specific in its description of the documents to be disclosed. Otherwise, lawyers will provide only the most general descriptions of "categories" of documents and little that is helpful will be revealed. The subcommittee is working on more specific language, and welcomes any suggestions.

In considering such a pilot project, we should keep in mind the experience from the 1990s. Attached as Exhibit I is a summary of some of the arguments made in opposition to the enhanced disclosure rule proposed at that time.

We would appreciate your thoughts on several questions: Should the Advisory Committee promote a pilot project that tests the benefits of initial disclosures? Alternatively, should the Committee proceed directly to drafting and publishing a rule amendment requiring more robust initial disclosures? If a pilot project were undertaken, what would we measure to determine its success?

B. Case Expedition.

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case dispositions that are not speedy and inexpensive often are not just.

Under this pilot, judges would use the initial case management conference to set a firm time cap on discovery and a firm trial date no more than 12 to 14 months from the filing of each case. For such a schedule to work, judges would be required to resolve discovery disputes and dispositive motions promptly. Exceptions to the 12-14 month trial date would be needed for some complex cases, but the subcommittee is inclined to limit the exceptions to narrowly defined categories of cases, such as patent cases, MDLs, and class actions. Pilot judges would still be required to set firm caps on discovery and firm trial dates in these cases, and to resolve discovery disputes and dispositive motions promptly.

Building on the work of several federal and state courts, this project would attempt to seize on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to present its case at trial; redundancy is lessened and efficiency increases.

To increase the odds of success with this pilot, and to develop materials that might be used in general judge training if more aggressive schedules were to be proposed broadly, the pilot would include significant judicial training, in conjunction with the FJC, to educate the pilot judges on the kinds of tools that would make the pilot goals achievable. The pilot project could examine, over time, the ability of judges to set expeditious and effective litigation schedules as they are trained, gain experience, and share ideas in meetings with colleagues.

There are several premises for such a pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions,

and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; and (3) lawyer cooperation should increase when both parties must conduct discovery within a relatively short period of time.

C. Another Possible Pilot Project.

The subcommittee has considered a pilot project that would divide cases into separate tracks for simple, standard, and complex cases. Such case-tracking was tried in federal courts during the 1990s Congress-initiated CJRA pilots, and has been tried in several states. Case tracking is still used in some courts, but has at other times encountered difficulty in efficiently and accurately identifying cases for specific tracks. The Conference of State Chief Justices is currently preparing a tracking recommendation, and an initial draft is likely to be available in the spring. We will continue to watch that effort and consider the possible role of case tracking in our pilot project proposals.

D. Other Thoughts.

Any pilot effort would require not only the participation of the Civil Rules and Standing Committees, but also CACM and the FJC. We have made a report to CACM, which was received favorably, and CACM plans to designate one or two liaisons for our pilot project effort. Jeremy Fogel of the FJC has also been an active participant in our pilot project conference calls.

We are considering the following possible timetable:

- April 2016—approval by Civil Rules Committee.
- June 2016—approval by Standing Committee.
- September 2016—approval by Judicial Conference.
- Early 2017—initial implementation.
- End of 2019—completion.

Our current thinking is that pilot districts must be willing to make the pilot requirements mandatory, all judges in the district must be willing to participate, and at least three to five districts will be needed.

This is a work in process. We would very much appreciate your thoughts and suggestions.

EX. A

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MEMORANDUM

To: Simplified Procedures Working Group, Pilot Project Subcommittee

From: Virginia Seitz

Re: Summary of CO, MN, IA and MA Projects and Reforms

Date: October 2015

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To assist the Simplified Procedures working group of the Pilot Project Subcommittee, this memorandum summarizes recent reforms and pilot projects undertaken by courts in Colorado, Massachusetts, Iowa and Minnesota. The Colorado, Iowa, and Massachusetts pilots all focused on "business cases." Minnesota conducted an expedited case pilot project which focused on particular types of cases (e.g., contract and consumer injury cases). Generally, all of these actions were the product of study done by task forces within the states. As was true in the state reforms discussed in Judge St. Eve's memorandum, the purpose of the reforms and the pilots was to improve access to justice by decreasing costs and time to resolution in civil cases. I reviewed the task force recommendations, the pilot projects, available evaluations and the helpful material on the website of the Institute for the Advancement of the American Legal System's ("IAALS'") Rule One initiative project. As you will see, there was far more information about the Colorado pilot than any of the other three states' pilots which were less ambitious and which did not have the benefit of an IAALS evaluation.

I. Colorado Civil Access Pilot Project ("CAPP"). Based on the recommendations of a Task Force, Colorado implemented a pilot project that applied generally to "business actions" on January 1, 2012. Five district courts in the state participated in the project. Initially, the project had a term of two years, but it was twice extended and concluded only in June 2015.

A. Pilot Rules. The pilot rules incorporated a number of components that will sound familiar to this group:

1. The rules expressly provided that proportionality principles would guide the interpretation and application of the rules.

2. The rules required that complaints and responsive pleadings include all material facts. General denials in responsive pleadings were deemed admissions.

3. The rules required robust initial disclosures, including all matters beneficial and harmful, to be accompanied by a privilege log. Both the disclosures and the log had to be filed with the court. In addition, disclosures took place on a staggered schedule, that is, the plaintiff was required to make disclosures before the defendant was required to answer. The court had the power to impose sanctions if either party failed to make proper disclosures.

4. The rules required defendant(s) to answer the complaint even when moving to dismiss the complaint.

5. The rules required the parties to meet and confer on the preservation of documents shortly after the defendant answers the complaint. In addition, the parties were required to promptly prepare a joint case management report which states the issues, makes a proportionality assessment, and proposes timelines and levels of discovery.

6. Again every early on, the Judge was required to hold an initial case management conference to shape the pretrial process. That process was then set forth in a Case Management Order, which could be modified only for "good cause."

7. The rules provided that the scope of discovery should be matters that "enable a party to prove or disprove a claim or defense or to impeach a witness" and, again, should be subject to the proportionality principle.

8. The rules allowed each party only one expert per issue or specialty at issue. In addition, expert discovery and testimony was limited to the expert report. No depositions of expert witnesses were allowed.

9. The general rule was that one judge would handle all pretrial matters and the trial; the judge would engage in "active" management of the case, holding prompt conferences to address any issues that arise on summary briefing.

10. The rules provided that no continuances would be granted absent "extraordinary circumstances."

B. Pilot Hypotheses. The developers of the project had the following hypotheses about the effect of the CAPP rules:

1. There would be a reduction in the length of time to resolution for cases.

2. There would be a decrease in the cost of resolution for cases.

3. The process would be fair for all parties.

4. There would be a substantial increase in judicial involvement in cases.

5. The number of judges per case would decrease.

6. There would be a decrease in motions practice.

7. There would be a decrease in motions practice associated with discovery.

8. There would be a decrease in trial time.

9. There would be an increase in the number of cases that went to trial.

10. There would be a decrease in the amount of trial time per trial.

11. There would be an improvement in all aspects of proportionality.

C. Pilot Evaluation. At the request of the pilot project developers, IAALS conducted an evaluation and issued a report about the CAPP rules in October 2014. The report reached the following conclusions:

1. The CAPP rules reduced the time to resolution of cases over both the existing regular and expedited procedures. Four of five attorneys surveyed expressed the view that the time spent on the case was proportionate to the nature of the case.

2. Three of four attorneys surveyed expressed the view that the cost of cases under the CAPP rules was proportionate to the nature of the case.

3. Both a docket study and the attorney survey indicated that the CAPP process was not tilted toward plaintiffs or defendants.

4. The docket study and surveys reported a general adherence to the timelines imposed.

5. The evaluation reports that parties did see the judge in a case at a much earlier stage and that cases were generally handled by a single judge. This was by far the "most approved" part of the CAPP rules – the early, active and ongoing judicial management of the cases. In addition, the evaluation concluded that the initial case management conference was the most useful tool in shaping the pretrial process, including ensuring proportionate discovery. E.g., the evaluation states: "Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional."

6. The evaluation found that the CAPP rules significantly reduce motions practice, especially extension requests.

7. The evaluation found that far fewer discovery motions were filed.

8. The evaluation concluded that discovery was both proportionate and sufficient.

9. **Notable Non-Results.** The evaluators were surprised to see that the CAPP rules had little effect on the rate at which cases went to trial, the length of trials or the number of dispositive motions filed or granted.

The evaluation also identified certain "challenges" with respect to the CAPP rules which might more forthrightly be called criticisms. First, parties were generally critical of the staggered deadlines for a number of reasons. Because the timing of a defendant's responsive disclosures and pleadings were keyed to the time of a plaintiff's disclosures, there was no predictability about that deadline. In addition, plaintiffs sometimes sought to compress a defendant's timing by immediately filing disclosures with his or her complaint or shortly thereafter. Both the parties and the courts complained about the uncertainty resulting from making one deadline contingent upon a prior event, preferring rules that specify due dates. Second, there were complaints about the enforcement of the requirements of both expanded pleading and robust early disclosures. Third, both litigants and judges complained about the uncertainty of the extraordinary circumstances test for continuances and extensions. Fourth, the parties surveyed strongly advocated for the return of depositions of expert witnesses. Finally, the parties and judges found that the categorization of cases as "business" and within the pilot or not was too difficult and should be simplified.

One other interesting point: The evaluators noted that the anecdotal responses and comments in the attorney and judicial surveys were not nearly as positive as the data was. The parties in particular cited the complexity and bureaucracy of the CAPP rules, and observed that it was inherently confusing to have several different sets of civil rules operating at the same time in the same court. This may be an under-appreciated downside of pilot projects.

II. Minnesota Civil Justice Reform Task Force. Pursuant to a December 2011 report from the Civil Justice Reform Task Force, Minnesota implemented revisions to its Rules of Civil Procedure and General Rules of Practice and a pilot project. Minnesota's Rules of Civil Procedure and General Rules of Practice for District Courts were amended in February 2013. The rules amendments included:

1. Incorporating proportionality into the scope of discovery.

2. Adoption of the federal regime of automatic initial disclosures.

3. Requirement of a discovery conference of counsel and discovery plan in every case.

4. An expedited process for non-dispositive motions.

5. A new program to address Complex Cases.

No evaluation of these rule changes has yet occurred.

On May 7, 2013, the Minnesota Supreme Court also authorized the creation of a Pilot Expedited Civil Litigation Track in two districts. This track applies to cases involving "contract disputes, consumer credit, personal injury and some other types of civil cases." The project is intended to answer the question whether this package of changes will reduce the duration and cost of civil suits.

1. The track requires early automatic disclosures from both parties, as well as a summary of the contentions in support of every claim, a witness list and contact information and any statements of those witnesses.

2. The track requires both parties to produce copies of all documents and things that will be used to support all claims or defenses, a description of the damages sought, a disclosure of insurance coverage, and a summary of any expert's qualifications accompanied by a statement that sets forth any facts and opinions of that expert and their grounds.

3. The track requires an early case management conference that includes a discussion of settlement prospects and the setting of a trial date, as well as deadlines for the submission of documents that will be used in trial.

4. The track limits discovery to 90 days after issuance of the case management order. The track both limits written discovery and requires that it be served within 30 days of issuance of the case management order.

5. The track requires parties to meet and confer on all motions and then limits the parties to letter briefs of two pages on issues submitted to the judge for resolution.

6. The "intention" of the track is to secure the setting of an early trial date (within four to six months of filing) and to have that date be a "date certain."

It appears that the Court intended that an initial evaluation of the pilot should have occurred by this time, but I have been unable to locate any evaluation. The 2014 Annual Report of the Minnesota Judicial Branch stated that an evaluation of the pilot project is now expected sometime in 2015.

III. Iowa Civil Justice Reform Task Force. Iowa is implementing a report called *Reforming the Iowa Civil Justice System*, issued in March 2012. That report called for a specialty business court pilot project for three years starting in May of 2013. "Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged or the claims seek primarily injunctive or declaratory relief." Parties participate in the pilot only if both sides agree and if the state administrator accepts the case for the project. The court has assigned three judges who manage all cases assigned to the project. In every accepted matter, the court assigns one judge for litigation while another is assigned to handle settlement negotiations.

I found an "initial evaluation" of the pilot project that was issued in August 2014. At that point, this specialized court had handled only ten cases, and only one attorney had submitted an evaluation, so that data set was quite limited.

The judges assigned to the business court made the following observations:

1. The strategy of assigning a separate business court judge to handle settlement negotiations works well.

2. The judges suggested that videoconferencing could save travel time and money for lawyers using a specialized court.

3. Additional steps would be needed to publicize and promote the business court program.

In addition, on August 29, 2014, Iowa adopted new Iowa Rule of Civil Procedures 1.281, an expedited civil action rule for cases involving $75,000 or less in damages, to become effective January 1, 2015. Parties with higher damages may stipulate to proceeding under this rule. [The court separately amended its rules to require proportional discovery and initial disclosures; I did not review these provisions as they fall into another working group's area.] The key features of the expedited civil action rule are:

1. Limits on discovery, i.e., no more than 10 interrogatories, 10 requests for production and 10 requests for admission (absent leave of court). There are also limited numbers of depositions.

2. One summary judgment motion may be filed by each party.

3. When cases on this track go to trial, the jury includes only six persons, and trial time is limited to six hours. In addition, cases on this track shall be tried within one year of filing unless otherwise ordered for good cause.

The new expedited civil action rule has not yet been evaluated. Within the first month of its effective date, however, more than 25 cases were filed to proceed on the expedited track.

IV. Massachusetts Business Litigation Session Pilot Project. This project was implemented on a voluntary basis in only a couple of county courts. It is focused on initial disclosures and discovery, which are the purview of another working group. The project began in January 2010 and ran through December 2011. The pilot incorporated several of the IAALS principles, including:

1. Limiting discovery proportionally to the magnitude of the claims at issue.

2. Staging discovery where possible.

3. Requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the parties' claims, counterclaims or defenses."

4. Requiring the parties to confer early and often and to make periodic reports to the court especially in complex cases.

At the conclusion of the pilot, the court conducted a survey which had a low rate of response, but follow up questions elicited more feedback. A large majority

of users of the project rules reported high satisfaction (80%). I could locate no substantive evaluation of the project.

* * * *

There are several elements of any regime of simplified rules that we should consider if we pursue a pilot project in this area. The following elements seem to receive universal acclaim: Robust early disclosures; an early case management conference and case management order with firm deadlines for discovery and trial date; accessible, active judicial management of the case, with short letter briefs and quick decisions on non-dispositive motions. One regular bone of contention appears to be selecting the right cases for slimmed-down procedures.

EX. B

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SIMPLIFIED PROCEDURES SUBCOMMITTEE -- SUMMARY OF CERTAIN JUDICIAL REFORMS

As part of the "Simplified Procedures" Pilot Project Subcommittee, this memorandum summarizes recent judicial reforms employed by New Hampshire, New York, Ohio, and Texas. The New Hampshire and Ohio reforms arose out of pilot projects implemented in various counties in those states. The New York and Texas reforms were based on recommendations by Task Forces created by their respective Supreme Courts. The general goal of these judicial reforms was to increase access, decrease expenses, and increase judicial management in civil cases.

I have reviewed the relevant pilot projects, the Task Force recommendations, the new rules, various articles about the rules, an evaluation from the National Center for State Courts, and any relevant information on the Institute for the Advancement of the American Legal System's ("IAALS") Rule One initiative project.

I. New Hampshire Pilot Project:

In 2013, the Supreme Court of New Hampshire ordered the implementation of its Superior Court Proportional Discovery/Automatic Disclosure Pilot ("PAD") Rules in all counties in the state. New Hampshire originally implemented the pilot in two counties. The PAD Pilot Rules focus on changes to the pleading requirements and discovery rules. Specifically, the PAD Pilot Rules have five aspects:

1. **Pleading Standards:** The pleading standard changed from notice pleading to fact pleading for both complaints and answers. The parties must state the material factual basis on which any claim or defense is based. The intent behind the rule is to expedite the civil litigation process by giving sufficient factual information for the other side to evaluate the merits.

2. **Early Meet and Confer:** The parties must meet and confer within twenty days of the filing of the answer and establish deadlines for discovery, ADR, dispositive motions, and a trial date. The parties submit their agreement to the court and it becomes the "case structuring order." If the parties agree on the deadlines, they do not need a conference with the court.

3. **Early and Meaningful Initial Disclosures:** This requirement mandates automatic disclosure of names and contact information of those individuals who have information about a party's claims or defenses and a brief summary of such information. The parties also have to disclose all documents, ESI and tangible things to support their respective claims and defenses, including a) a category of damages, and b) insurance agreements or polices under which such damages may be paid. If a party fails to make

these disclosures, a court can impose sanctions including barring the use of them at trial. This rule is intended to expedite discovery.

4. Limit on Interrogatories and Deposition Hours: The fourth aspect of the pilot project limits the number of interrogatories to no more than 25 and the number of deposition hours to 20 hours. Given the early disclosures in number 3, the PAD Pilot Project anticipated that the parties would need less discovery. The parties can waive these limitations by stipulation or the court can waive them for good cause.

5. Preservation of ESI: The fifth rule requires the parties to meet and confer to discuss the preservation of ESI and to agree on deadlines and procedures for the production of ESI. This rule includes a proportionality requirement – the ESI costs must be proportional to the significance of the issues in dispute.

The National Center for State Courts ("NCSC") evaluated the New Hampshire PAD Pilot Rules. As part of the review, the NCSC interviewed judges, attorneys, court clerks, and staff of the Administrative Office of the Courts. They also evaluated pre-implementation and post-implementation case data. The NCSC's findings are discussed below.

First, the PAD Pilot Rules have not impacted the case disposition time, although the NCSC only had a small number of cases over a short period of time to evaluate. They have, however, significantly decreased the proportion of cases that ended in a default judgment.

Second, the PAD Pilot Rules have not had any real impact on discovery disputes based on the NCSC's review of the percentage of cases both pre-implementation and post-implementation with discovery disputes. New Hampshire thought the automatic disclosure requirement in number 3 would decrease discovery disputes.

The NCSC made several recommendations based on its review:

1. Clarify the existing ambiguity in the current appearance requirement.

2. Establish a firm trial date in the case structuring order.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

4. Establish a uniform time standard for return of service.

II. New York Task Force

New York created a Task Force on Commercial Litigation in the 21st Century to recommend reforms to enhance litigation in its Commercial Division. The New York Task Force submitted its final report to the Chief Judge in June 2012. The report made multiple recommendations that are not relevant to our pilot project's scope including endorsing the Chief

Judge's legislative proposal to establish a new class of Court of Claims judges; increasing the monetary threshold for actions to be heard in the Commercial Division; implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters"; assigning cases to the Commercial Division earlier in the process; creating standardized forms; improving technology in the courtrooms; and appointing a statewide Advisory Council to review the recommendations and guide implementation.

In addition, the Task Force made several recommendations, some of which have resulted in the implementation of new rules. All of the recommendations apply to cases in the Commercial Division only. These areas may be appropriate for pilot projects.

1. Robust expert disclosures: The Task Force recommended the parties make more robust and timely expert disclosures, similar to the disclosure requirements in the Federal Rules. The Rule would require expert disclosures, written reports, and depositions of testifying experts to be completed no later than four months after the close of fact discovery.

2. New privilege log rules to streamline discovery: The Task Force concluded that the creation of privilege logs has become a substantial, needless expense in many complex commercial cases. In order to limit unnecessary costs and delay in the creation of such logs, the Task Force recommended limitations on privilege logs. Specifically, the Task Force recommended that parties meet and confer in advance in an effort to stipulate to limitations on privilege logs. It referenced four orders or principles as examples for limiting privilege logs:

a) <u>The Sedona Principles</u>: The Sedona Principles encourage parties to meet in advance and reach mutually agreed-upon procedures for the production of privileged information. The Principles encourage the acceptance of privilege logs that classify privileged documents by categories, rather than individual documents.

b) <u>The Facciola-Redgrave Framework</u>: Magistrate Judge John Facciola and attorney Jonathan Redgrave have proposed that parties should meet regarding privilege logs and agree to limit documents that require logging, use categories to organize privileged documents, and use detailed logs only when necessary. *See* John Facciola & Jonathan Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 The Fed. Cts. L. Rev. 19 (2009).

c) <u>The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases</u>: The SDNY addresses privilege assertions in its pilot project for complex cases. The following documents do not have to be included on a privilege log: 1) communications exclusively between a party and its trial counsel; 2) work product created by trial counsel, or an agent of trial counsel other than a party, after the commencement of

the action; 3) internal communications within a law firm, a legal assistance organization, a governmental law office, or a legal department of a corporation or of another organization; and 4) documents authored by trial counsel for an alleged infringer in a patent infringement action. The order also provides a specific procedure for a person who challenges the assertion of a privilege regarding documents, including the submission of a letter to the court with no more than five representative documents that are the subject of the request.

d) The District of Delaware's Default Standard for Discovery: The District of Delaware has a Standing Order governing default standards for discovery, including privilege logs. Under this order, parties must confer on the nature and scope of privilege logs, "including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged." It also excludes two categories of documents from inclusion on privilege logs: 1) any information generated after the complaint was filed and 2) any activities "undertaken in compliance with the duty to preserve information from disclosure and discovery" under Rule 26(b)(3)(A) and (B). In addition, the order directs the parties to confer on a non-waiver order under Federal Rule of Evidence 502.

In response to the Task Force's recommendation, New York adopted a rule in the Commercial Division that requires parties to meet and confer at the inception of the case to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order."

3. E-discovery: The Task Force recommended that parties who appear at a preliminary conference before the court have an attorney appear who has sufficient knowledge of the client's computer systems "to have a meaningful discussion of e-discovery issues." The Task Force also encouraged the E-Discovery Working Group to examine how other courts are addressing e-discovery issues.

4. Deposition and Interrogatory Limits: The Task Force recommended, and the Supreme Court ultimately adopted rules, that limit depositions to ten per side for the duration of seven hours per witness. The parties can extend the number by agreement or the court can order additional depositions for good cause. In addition, New York implemented a new rule consistent with the Task Force's recommendation to limit interrogatories to 25 per side unless the court orders otherwise.

5. An accelerated adjudication procedure: The Task Force recommended an accelerated adjudication procedure for the Commercial Division. This recommendation amounts to an expedited bench trial. The Task Force suggested that this procedure involve highly truncated discovery. The Chief Judge of the New York Supreme Court

adopted an accelerated adjudication rule in response to the recommendation. Under the rule, the parties have to agree to the procedure. By agreeing to the procedure, the parties agree to waive any objections based on lack of personal jurisdiction, the right to a jury trial, and the right to punitive or exemplary damages. Under this procedure, discovery is limited to seven interrogatories, five requests to admit, and seven depositions per side. The parties also agree to certain limits on electronic discovery. As part of the accelerated adjudication procedure, the parties agree to be ready for trial within nine months from the date of the filing of a request for assignment of the case to the Commercial Division.

New York adopted the new Commercial Division rules primarily in 2014. It is too early to assess their effectiveness.

III. Ohio Pilot Project

In April 2007, the Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets to "develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas." Four counties agreed to serve as pilot project courts and commercial dockets were created in all four counties in 2009. The Supreme Court of Ohio's Task Force on Commercial Dockets made 27 recommendations for the permanent establishment of commercial dockets in Ohio's courts of common pleas. The recommendations pertained to the permanent establishment of commercial dockets in Ohio, the selection of judges to handle the commercial dockets, the training of judges, the assignment of cases, the balancing of the workload of the judges who handle commercial dockets, and certain case management procedures. The relevant case management procedures include:

1. **The Use of Special Masters:** The Task Force recommended the use of special maters because they provided a process through which pretrial, evidentiary, and post-trial matters could be addressed timely and effectively through extra-judicial resources.
2. **Alternative Dispute Resolution:** The Task Force recommended that a commercial docket judge in one county be able to refer a commercial case to a commercial docket judge of another county.
3. **Pretrial Order:** The Task Force recommended against adopting a mandatory model case management pretrial order because most of the participating pilot project judges use their own pretrial orders and procedures.
4. **Motion Timeline:** The Task Force also recommended that commercial judges decide dispositive motions no later than 90 days from completion of briefing or oral arguments, whichever is later. It also suggested that they decide all other motions no later than 60 days from completion of briefing or oral arguments, whichever is later.

The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state. The Supreme Court of Ohio thereafter adopted rules pertaining to commercial dockets.

IV. Texas Task Force

In May 2011, the Texas legislature passed a bill regarding procedural reforms in certain civil actions, and directed the Texas Supreme Court to adopt rules to "promote the prompt, efficient and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000." In November 2012, the Texas Supreme Court issued mandatory rules for the expedited handling of civil cases. The rules limit pre-trial discovery and trials in cases where the party seeks monetary relief of $100,000 or less. In response to the legislation, the Texas Supreme Court appointed a Task Force to address the issues and "advise the Supreme Court regarding rules to be adopted" to address the legislation. The Task Force focused on: scope of discovery, disclosure, proof of medical expenses, time limits, expedited resolution, monetary limits, and alternative dispute resolution. The Task Force submitted various recommendations to the Texas Supreme Court, but it could not agree on whether the process should be mandatory or voluntary. Based on the recommendations of the Task Force, the Supreme Court issued mandatory rules in November 2012. The goal of the new rules is to "aid in the prompt, efficient and cost effective resolution of cases, while maintaining fairness to litigants." The Texas project is not based on a pilot project, although the Task Force apparently looked at the procedures that some other States were implementing.

The new rules include the following:

1. Expedited Actions: This Rule applies to all cases that seek $100,000 or less in damages, other than cases under the Family Code, Property Code, Tax Code, or a specific section of the Civil Practice & Remedies Code. It provides for limited, expedited discovery and a trial within 90 days after the discovery period ends. A court can only continue a trial for cause twice and each continuance cannot exceed a 60 days. Each side is allowed no more than eight hours to complete its portion of the trial. The Rule also limits the court's ability to require ADR and limits challenges to expert testimony. A court may remove a case from this process for good cause.

2. Pleading Requirements Regarding Relief Sought: The Texas Supreme Court amended its pleading requirements to require a more specific statement of the relief sought. A party must state the monetary relief it seeks so a court can determine if it falls within an Expedited Action. Texas does not require fact pleading for the underlying claims.

3. Discovery Plan: For Expedited Actions, the discovery period starts when the suit is filed and continues until 180 days after the date the first request for discovery is served on a party. Parties can serve no more than 15 written interrogatories, 15 requests for production, and 15 requests for admission, and spend no more than six hours in total to

examine and cross examine all witnesses in depositions. It also provides for requests for disclosure from a party that are separate and distinct from its requests for production.

I could not find any data on the effectiveness of these new rules. The NCSC currently is evaluating the use and effectiveness of the new rules and is expected to issue its report at some point in the Fall of 2015.

CONCLUSION

Based on the evaluations that exist of these reforms and the scope of our sub-committee to focus on "simplified procedures", I recommend having further discussion on three particular reforms:

1. The New Hampshire rule requiring early and meaningful initial disclosures. A pilot project focusing on these disclosures would be fairly easy to achieve and should expedite discovery. Interestingly, the NCSC found that the PAD Pilot Rules (which include early and meaningful initial disclosures) did not have any real impact on discovery disputes. This conclusion may be based, in part, on the fact that NCSC did not have a wide range of data to work with given the initial limited implementation of the program.

2. The New York Task Force's recommendation regarding new privilege logs to streamline discovery. This recommendation focuses on the expense such logs generate in relation to the usefulness of the logs in most cases. This proposal is worth discussing further, especially given the amount of privileged information ESI generates.

3. Expedited Actions. Both Texas' and New York's Task Forces recommended expedited actions for certain types of cases. Judge Campbell has been trying to get lawyers to adopt this efficient concept for some time. It is worth discussing with Judge Campbell's insights because it would save significant time and money for the parties.

Amy J. St. Eve
September 24, 2015

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EX. C

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M E M O R A N D U M

To: Pilot Project Subcommittee

From: Dave Campbell

Date: September 25, 2015

Re: Innovations in Arizona, Utah, Oregon, and the District of Kansas

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This memo will summarize my review of materials related to civil litigation innovations adopted in Arizona, Utah, Oregon, and the Federal District Court for the District of Kansas. I have plagiarized language from various reports I have reviewed. I include a few conclusions at the end.

A. Arizona.

In 1990, the Arizona Supreme Court appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation. The result was the "Zlaket Rules," a thorough revision of the state rules of civil procedure adopted by the Supreme Court effective July 1, 1992. Arizona has adopted a number of other unique procedures since then. Key provisions of the Arizona rules are described briefly.

1. Disclosures.

The rules require broad initial disclosures by all parties within 40 days after a responsive pleading is filed. Each disclosure must be under oath and signed by the party making the disclosure. The rules require disclosure of the following (in addition to disclosures required in the federal rules):

- The legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities;
- The names and addresses of all persons whom the party believes may have knowledge or information relevant to the case, and the nature of the knowledge or information;
- The names and addresses of all persons who have given statements related to the case, whether or not the statements were made under oath;

- The names and addresses of expert witnesses, including the substance of the facts and opinions to which the person is expected to testify;
- A list of the documents or ESI known by a party to exist and which the party believes may be relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence, and the date on which the documents and ESI will be made available for inspection and copying.

2. Depositions.

Only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission, and depositions are limited to four hours each.

3. Experts.

Each side is presumptively entitled to only one independent expert on an issue, except on a showing of good cause.

4. Medical Malpractice Cases.

Within ten days after defendants answer, the plaintiff must serve on all defendants copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. All defendants must do the same within ten days thereafter.

5. Mandatory Arbitration.

Arizona rules require mandatory arbitration of all cases worth less than $50,000. At the time the complaint is filed, the plaintiff must file a certificate of compulsory arbitration stating the amount in controversy. If the defendant disagrees, the issue is determined by the court. Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.

The arbitrator must set a hearing within 60 to 120 days. Because the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, the arbitrator is directed to limit discovery "whenever appropriate." In general, the Arizona Rules of Evidence apply to arbitration hearings, but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible. The arbitrator must issue a decision within 10 days of the hearing.

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award. If an appeal is filed, a trial de novo is held in the state trial

court, and any party entitled to a jury may demand one. If the appellant fails to recover a judgment on appeal at least 23 percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.

A 2004 study revealed that, in most counties, an arbitration award was filed in less than half the cases assigned to arbitration (suggesting the cases settled before the arbitration), and a trial de novo was sought in less than a third of all cases in which an award was filed. This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing.

6. Complex Case Courts.

The Maricopa County Superior Court has established complex litigation courts staffed by judges experienced in complex case management. Cases are eligible for assignment to the complex litigation courts based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether the case would benefit from permanent assignment to a judge who has acquired a substantial body of knowledge in the specific area of the law. A 2006 survey of attorneys who had used these courts found that 96% favored their continuation. Responding attorneys gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.

7. Commercial Courts.

A few months ago, the Maricopa County Superior Court launched commercial courts for all business disputes that exceed $50,000, other than those that qualify for the complex case courts. Cases in these commercial courts will include an early conference on ESI, use of an ESI checklist and a standard ESI order, and an early case management conference that focuses on ADR options, sequencing of discovery, and proportionality in discovery.

8. Survey Results.

In a 2008 survey of fellows of the American College of Trial Lawyers, 78% of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court. In contrast, only 43% of the national respondents to the ACTL survey preferred litigation in state court. 67% of the Arizona respondents indicated that cases were disposed of more quickly in state court. 56% believed that processing cases was less expensive in the state forum.

In 2009, the IAALS conducted a survey of the Arizona bench and bar about civil procedure in the State's superior courts. Over 70% of respondents reported litigation experience in federal district court, and they preferred litigating in state court over federal court by a two-to-one ratio. Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules. Respondents favoring the state forum also indicated that state court is faster and less costly.

B. Utah.

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

The three tiers and their limits are as follows:

- Tier 1 applies to cases of $50,000 or less and allows no interrogatories, 5 requests for production, 5 requests for admission, 3 total hours for depositions, and completion of discovery within 120 days.

- Tier 2 applies to cases between $50,000 and $300,000 and allows 10 interrogatories, 10 requests for production, 10 requests for admission, 15 total hours for depositions, and completion of discovery within 180 days.

- Tier 3 applies to cases of $300,000 or more and allows 20 interrogatories, 20 requests for production, 20 requests for admission, 30 total hours for depositions, and completion of discovery within 210 days.

Since these changes were adopted, some Utah courts have also adopted a procedure for expediting discovery disputes. It requires a requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The statement must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute.

In April, 2015, the National Center for State Courts completed a comprehensive study of the Utah rule changes. The study produced the following findings:

- The new rules have had no impact on the number of case filings.
- Some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and more discovery.
- There have been increases of 13% to 18% in the settlement rate among the various tiers. The study associates this with the parties obtaining more information earlier in the litigation.
- Across all case types and tiers, cases filed after the implementation of the new rules tended to reach a final disposition more quickly than cases filed prior to the revisions.
- Contrary to expectations, the parties sought permission for additional discovery (called "extraordinary discovery" in the rules) in only a small minority of cases.

Stipulations for additional discovery were filed in 0.9% of cases, and contested motions were filed in just 0.4% of cases.

- Discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. Attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules.

The NCSC study included a survey of attorneys that afforded the opportunity to make open-ended comments. Although it may have been due to self-selection by those unhappy with the new rules, 74% of the comments were negative, with only 9% positive. The negative comments were equally divided between plaintiff and defense lawyers.

The NCSC also did judge focus groups. Among the results:

- A recurring theme across all of the focus group discussions was the difficulty involved in changing well-established legal practices and culture in a relatively short period of time.
- The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame.
- Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the new rules.
- In general, the judges who participated in the focus groups were fairly positive about the impact of the rule revisions thus far.
- There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms and that larger firms could no longer bury the small firms with excessive discovery requests.

C. Oregon.

Although not on our list, I have heard for some time about innovative practices in Oregon, so I took a quick look. These are some of the practices used in the Oregon state courts:

- Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." The Oregon Supreme Court has interpreted this to mean that "whatever

the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery."

- Oregon's civil rules impose limitations on discovery. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all.
- Discovery of experts is also significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. A party may defeat summary judgment simply by filing an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.
- Plaintiffs must file a return or acceptance of service on the defendant within 63 days of the filing of a complaint. If the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.
- Motions for summary judgment are relatively rare compared to federal court. In an IAALS study, only 91 motions were filed in 495 cases, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). Interestingly, more than half of the summary judgment motions filed in Multnomah County (where Portland is located) never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part.
- As in Arizona, Oregon requires that all civil cases with $50,000 or less at issue, except small claims cases, go to arbitration.
- For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.
- The IAALS study found that when compared to Oregon federal court, the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time.

D. District of Kansas.

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort to increase the just, speedy, and inexpensive determination of every matter. Spearheaded by the court's Bench-Bar Committee, the Rule 1 Task Force divided into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions. Nearly all of the Rule 1 Task Force's recommendations were approved by the Bench-Bar Committee, and then by the court.

As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

I am not aware of any studies that have been completed regarding these changes, but the form orders contain many best practices and helpful suggestions. In addition to standard case management orders, the district has adopted helpful ESI guidelines and a form protective order.

E. Thoughts.

1. Arizona and Utah seem to have had success requiring greater disclosures at the outset of the case. We should consider that as part of a potential pilot program.

2. The Utah model for tiering cases, limiting the discovery in each tier, and limiting the time for discovery in each tier, is intriguing. It may be responsible for the reduced disposition time found in the NCSC survey. We have heard that assigning cases to tiers based solely on the amount in controversy could be problematic in federal court.

3. I find the Utah limit on total deposition hours very appealing. It creates the right incentive for lawyers – to conclude each deposition as efficiently as possible. I have used it in several cases and have received positive feedback. Such limits could be included in any pilot that involved tiering.

4. Mandatory arbitration of cases worth $50,000 or less seems to be working well in Utah and Oregon. The statistics in Arizona suggest that it is quite successful in removing a large number of cases from the trial court and resolving them quickly. It is not clear how many federal court cases would fall in this damages range (no diversity cases would). Could we get away with setting the number higher in a pilot – say $100,000?

5. The severe limitations placed on expert discovery in Oregon is another interesting idea, but it likely would be viewed as directly contrary to Rule 26(a)(2). I also suspect it is something unique to the Oregon culture (which the IAALS survey found quite different than other states) and would not be received well in federal court.

6. If we end up putting together a package of proposed orders or forms for pilot projects, we should look at Kansas's.

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EX. D

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MEMORANDUM

To: Judge Neil M. Gorsuch

From: Stefan Hasselblad

Date: September 24, 2015

Re: Summary of Materials Concerning Simplified Federal Procedures

This memorandum briefly summarizes three reports and two law review articles that discuss the past, present, and future of efforts to reform the federal rules to create simplified procedures for less complex cases.

* * *

I. The Federal Simplified Procedure Project: A History, Institute for the Advancement of the American Legal System, 2009.

In 1999, Judge Niemeyer proposed that the Advisory Committee on Civil Rules develop a set of simplified procedural rules applicable to simple federal cases. This proposal stemmed from a concern that the current federal rules provided too much procedure for smaller cases, which raises costs and effectively bars access to courts for many litigants.

In response, the Advisory Committee initiated the Simplified Procedure Project, which aimed at developing procedures that would shift emphasis away from discovery, and toward disclosure and pleading in an effort to ensure prompt trials. As the Committee began its work, it discussed a number of possible options and difficulties: the interaction between simplified rules and federal diversity requirements, the possibility of capping damages, the possibility of simple majority jury verdicts, and whether simplified procedures could draw litigants from state to federal courts, thereby increasing federal case loads.

The Simplified Procedure Project met nine times between 1999 and 2001. The project's discussions were guided by a set of draft rules provided by Professor Edward H. Cooper, discussed below and later published in a law review article. During the project's two years of activity, some committee members

raised significant reservations about the possibility of capping damages, interference with ADR, and unintentionally creating a "cheap and inferior set of rules" for small claims. In 2001, the Advisory Committee found that the project lacked direction because of difficulty identifying the cases appropriate for application of the simplified rules. The project was then held in abeyance. Over the next seven years the project was occasionally mentioned in Committee minutes, but no further progress was made.

Professor Cooper wrote the draft rules that guided the committee's discussions. He later published these rules in a 2002 law review article. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002). The rationale behind Professor Cooper's simplified rules is that "current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery." *Id.* at 1796. The following is an overview of these simplified rules.

- The simplified rules are to be construed and administered to secure the just, speedy, and economical determination of simplified actions. Furthermore, discovery should be limited, and the costs of litigation should be proportional to the stakes.

- The simplified rules apply to all cases where the amount in controversy is less than $50,000, and may be applied voluntarily when the amount in controversy is between $50,000 and $250,000.

- The simplified rules provide for fact pleadings no longer than 20 pages. To the extent practicable, claims and answers must state details of the time, place, participants, and events involved in the claim. Furthermore, any documents relied on must be attached to the pleadings. This approach is designed to encourage careful preparation before litigation and limit costs for small claims. The rules also make clear that fact pleading should still be construed in the same spirit of liberality as notice pleading.

- The rules provide for a demand judgment procedure for plaintiffs, in which they may submit a demand asserting a contract claim for a sum certain. The demand must include any writings or sworn statements that establish the obligations owed under the contract. Sworn responses to demands for judgment, or admission of the amount due, must be submitted in the answer. Then, the clerk of the court is required to enter judgment for any amounts admitted due.

- Federal Rule 12 applies to simplified procedure cases, but the time frame for filing motions is limited. Motions to dismiss based on 12(b)(2)-(5) and (7) may be made in the answer or in a motion filed no later than 10 days after the answer.

- The simplified rules combine Rule 12(b)(6) and Rule 56 motions into a single motion filed no later than 30 days after an answer or reply. This reduces delay while preserving the functions of both rules.

- The simplified rules favor enhanced disclosure in an effort to make the pre-trial process more efficient. Both parties must disclose 1) the names and phone numbers of any person likely to have relevant information, 2) the source of information in any pleadings, 3) a sworn statement of known facts, and 4) any documents or tangible items known to be relevant to the facts disputed. Disclosure is based on information reasonably available to the parties and is not excused because either party has not completed an investigation or because a party believes an opponent has not provided sufficient disclosure.

- While pleading and disclosure requirements are expanded under the rules, discovery is limited. An FRCP 26(f) conference is available, but no discovery requests are available until after the conference. Even then, requests for production of documents and tangible things must specifically identify the things requested. Parties are limited to three depositions of three hours each.

- Expert witnesses are discouraged. The court should evaluate the issues and stakes of the claim to determine if party experts should be allowed.

- The simplified rules provide an early and firm trial date six months from the filing date in most cases. The rules specifically preclude consideration of a party's failure to complete investigations, disclosure, or discovery as a rationale for delaying trial.

II. Reforming Our Civil Justice System: A Report on Progress and Promise, The American College of Trial Lawyers Task Force on Discovery and Civil Justice & The Institute for the Advancement of the American Legal System, 2015.

The report presents 24 principles that aim to both reform civil rules and improve legal culture in a way that leads to full, fair, and rational resolution of disputes.

There are two "fundamental principles" for civil justice reform. The first principle makes FRCP 1 applicable to lawyers (in addition to parties and judges) in an effort to encourage lawyers to "secure the just, speedy, and inexpensive determination of every action." The second principle states that the "one size fits all approach" to current state and federal rules should be abandoned in favor of a flexible approach that applies different rules to different types of cases.

The report presents nine principles relating to case management. The first two of these principles relate to case management conferences. The report urges an initial, robust case management conference that informs the court about the issues (allowing judges to better plan case management), narrows the issues, and rationally limits discovery. These early conferences should discuss such topics as limits on discovery, financial limitations of the parties, a trial date, dispositive motions, preservation of electronic information, and the importance of cooperation and collegiality.

The report recommends engagement between the court and parties early in litigation. First, the court should set an early and firm trial date to encourage parties to work more efficiently and narrow the issues. Second, counsel should be required to confer and communicate early and often. Studies have shown that this reduces discovery and client costs. Third, all issues to be tried should be identified early so as to limit discovery.

The final case management principles deal with the general process of litigation. First, courts should have discretion to order mediation or other alternative dispute resolution unless *all* parties agree otherwise. Second, the court should rule promptly on motions, and prioritize motions that will advance the case more quickly. Third, judges should be more involved throughout the litigation process, which will likely require more judicial resources. Fourth, judges should be trained on managing trials and trial practice.

The report provides a single pleading principle: "[p]leadings should

concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses." Parties may plead facts on "information and belief" if they cannot obtain information necessary to support a claim, but they must still submit the basis for their belief. The report argues that more specific pleadings would enable courts to make proportionality determinations and allow parties to better target discovery.

The report's eleven principles on discovery begin by stating that proportionality should be the most important principle of discovery. Currently, discovery is crippling the legal system by creating inefficiency and undue expense. The first step is for courts to supervise an agreement to proportional discovery between the parties. Second, parties must recognize that all facts are not necessarily subject to discovery. This agreement should appropriately limit parties' expectations as they enter discovery.

The principles also call for parties to produce all known and reasonably available documents and tangible things that support or contradict specifically pleaded factual allegations. This principle is broader than the federal rules because it requires *production* rather than merely description. The next principle provides that, in general, discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness. In addition, parties should be required to disclose trial witnesses early in litigation.

After initial production, only limited discovery subject to proportionality should be allowed. And, once that discovery is complete, further discovery should be barred absent a court order granted only with a showing of good cause and proportionality. This would create more active judicial supervision of the discovery process, while reducing discovery in conjunction with increased disclosure. Finally, in some cases, courts should stay discovery and disclosure until after a motion to dismiss is decided. This procedure would ensure discovery is used to prove a claim, rather than to determine whether a valid claim exists.

Early in litigation, parties should meet and agree on procedures for preservation of electronically stored information (ESI). All parties should be responsible for reasonable efforts to protect ESI that may be relevant to claims, but all parties must also understand that it is unreasonable to expect other parties to take every conceivable step to preserve all potentially relevant ESI. Furthermore, the same principle of proportionality that controls discovery generally should apply to ESI specifically. To make ESI discovery more efficient, attorneys and judges should be trained on principles of ESI technology.

Finally, there should be only one expert per issue per party. Experts should furnish a written report setting forth their opinion, the basis for that opinion, a CV, a list of cases in which they have testified, and the materials they have reviewed. This final principle will limit the "battle of the experts" and reduce the cost of expert testimony.

III. Summary of Streamlined Pathway Efforts, Conference of Chief Justices, Civil Justice Improvements Committee, Rules/Litigation Subcommittee, 2015.

The Civil Justice Improvements Committee anticipates that in making recommendations for improving the civil justice system it will address three different paths for civil cases: the streamlined pathway, the general pathway, and the highly-managed pathway. Defining different approaches for different paths recognizes the modern reality that one size does not fit all.

In the streamlined pathway are cases with a limited number of parties, simple issues relating to liability and damages, few or no pretrial motions, few witnesses, and minimal documentary evidence. Case types that could be presumptively assigned to the streamlined pathway include:

- automobile, intentional, and premises liability torts
- insurance coverage claims arising out of such torts
- cases where a buyer or seller is a plaintiff
- consumer debt
- appeals from small claims decisions

The subcommittee is undertaking a draft of procedural rules for the streamlined pathway. Key features of rules applied to the streamlined pathway may include:

- a focus on case attributes rather than dollar value
- presumptive mandatory inclusion for cases identified by streamlined-pathway attributes
- mandatory disclosures
- truncated discovery
- simplified motion practice
- an easy standard for removal from the pathway
- conventional fact finding
- no displacement of existing procedural rules consistent with streamlined pathway rules
- an early and firm trial date

IV. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The Federal Rules rightly provide for open-ended rules that call for wise discretion. However, there is reason to believe our litigation system does not sufficiently prevent inept misuse and deliberate strategic over-use of the rules. The draft rules in this article provide for more detailed pleading, enhanced disclosure obligations, restricted discovery opportunities, reduced motion practice, and an early and firm trial date. The purpose of these simplified rules is not to establish second-class procedures for second-class litigation, but rather to enable access to justice by creating more efficient and more affordable procedures without the unnecessary complexity of rules designed for high-stakes, multi-party litigation.

There are some potential problems with these rules. For one, it is unclear if they could be adopted as a local experiment because Civil Rule 83 only authorizes the adoption of national rules. Second, these simplified rules assume knowledge of the Federal Rules of Civil Procedure. This made drafting the rules easier, but it would make it more difficult for a *pro se* party to litigate. A self-contained, short, and clearly stated set of rules might be a better approach.

As for the rules themselves, Rule 102 states that the simplified rules apply in actions where the plaintiff seeks monetary relief less than $50,000, where the plaintiff seeks monetary relief between $50,000 and $250,000 and the defendants do not object, and where all parties consent. This rule is tentative and is included in part to illustrate the difficulty of defining the cases appropriate for simplified procedural rules. Other approaches are also possible. For example, consent of all parties could always be required, or the power to determine when to use simplified procedures could be left to the discretion of the district court.

Fact-based pleading is at the heart of the simplified rules. Rule 103 requires that a claim state, to the extent reasonably practicable, the details of time, place, participants, and events involved in the claim. Furthermore, pleaders must attach each document the pleader may use to support the claim. Answers require the same. And avoidances and affirmative defenses must be specifically identified in a pleading. These provisions should enhance parties' ability to litigate small claims effectively and efficiently. It is important to note, however, that fact-pleading should not be approached in a spirit of technicality. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement in the detail that might be provided in proposed findings of fact. One question that remains to be answered is the

applicability of Rule 15's amendment procedures. Allowing amendments might lead to delay and strategic misuse, but *pro se* plaintiffs in simple cases may need to use good-faith amendments even more than typical litigants.

Rule 104 provides for a demand for judgment in which a party may attach a demand to a pleading that asserts a contract claim for a sum certain. The demand must be supported by a writing and sworn statements that evidence the obligation and the amount due. A defendant must admit the amount due or file a response. If the defendant admits an amount due, a court clerk may enter judgment. Essentially, Rule 104 creates a plaintiffs' motion for summary judgment. This rule is necessary because a substantial number of actions in federal court are brought to collect small sums due on contracts or unpaid loans.

Rule 104A limits motions practice. A motion to dismiss under the defenses of Rule 12(b)(2)-(5) and (7) may be made in an answer or within 10 days of an answer. The time periods to answer provided under Rule 12(a)(1)-(3) cannot be suspended by motion. And, a party seeking relief under Rule 56, 12(b)(6), 12(c), or 12(f) must combine that relief in a single motion filed no later than 30 days after the answer or reply. These rules are meant to prevent the strategic delays often created by protracted motion practice.

Rule 105's disclosure requirements are designed to reduce discovery. No later than 20 days after the last pleading, a plaintiff must provide 1) the name and telephone number of any person likely to have discoverable information relevant to the facts disputed in the pleadings, 2) sworn statements with any discoverable information known to the plaintiff or a person reasonably available, 3) a copy of all reasonably accessible documents and tangible things known to be relevant, and 4) damages computations and insurance information. 20 days later, other parties must make a corresponding disclosure. Such disclosures cannot be excused because a party has not fully completed an investigation, challenges another party's disclosure, or has not been provided another party's disclosure.

Of course, with heightened disclosure comes more limited discovery. Under Rule 106, a discovery request may only be made with the stipulation of all parties or in a Rule 26(f) conference. And a conference must be held only if requested in writing. Parties are limited to three depositions of three hours each, and 10 interrogatories. Finally, Rule 34 discovery requests must specifically identify the items requested.

Rule 108 provides that a court should first consider the issues, the amount in controversy, and the resources of the parties, and only then determine whether

to allow expert testimony. This rule is meant to reduce the risk that a better-resourced party will introduce expert testimony merely to increase the costs of litigating.

Finally, the draft rules provide for setting a trial date six months from the initial filing. This trial date should not be extended on the basis that discovery is incomplete or an action is too complex. There may be problems with this proposal. For example, it seems to give docket priority to cases that courts typically consider low-priority.

V. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

The current federal civil process is inadequate for the purpose of discharging justice speedily and inexpensively. It takes three years and hundreds of thousands of dollars to try a medium-sized commercial dispute. Meanwhile, the private bar is fleeing from courts to alternative dispute resolution systems.

Although well-intentioned, the 1938 transition from fact pleading to notice pleading is part of the problem. The reformers of 1938 sought to avoid procedural maneuvering in the pleading stage that often proved too complex for the common lawyer, effectively denying litigants access to courts. The reformers' solution was notice pleading and liberal discovery rules. This reassigned resolution of procedural battles from court-supervised pleading to attorney-controlled discovery. Then, reforms in 1946, 1963, 1966, and 1970 further liberalized pleading and discovery rules. The process grew increasingly expensive, complicated, and time-consuming.

In the late 1970s, the tides shifted and courts and reformers began to attempt to limit discovery practice. In 1993, the Civil Justice Reform Act required federal districts to conduct self-study and develop a civil case management plan to reduce costs and delays. In addition, the Act called for evaluation of these plans to identify best practices. That evaluation came to three conclusions. First, early court intervention in the management of cases reduced delay, but increased litigant costs. Second, setting a firm trial date early was the most effective tool of case management – reducing delay without producing more costs. Finally, reducing the length of discovery reduced both costs and delays without adversely affecting attorney satisfaction.

In 2000, the Rules Committee and Supreme Court made several small but

beneficial changes. First, they limited discovery to any matter related to a "claim or defense of a party," rather than any matter related to a "subject matter involved in the pending action." Under the new rules, parties could still seek broader discovery, but they would need a court order that required a showing of good cause. This amendment was designed to allow courts to better supervise discovery. Second, the Rules Committee expanded mandatory disclosure and reduced interrogatories and depositions. After these reforms, Supreme Court cases in the 2000s heightened pleading standards, requiring that a complaint allege enough factual matter to state a plausible claim for relief.

It is within this context that the Civil Rules Committee chaired by Judge Niemeyer sought to draft rules that would further reduce costs and delays. From 1999 to 2000, the Rules Committee discussed a number of reform proposals but did not begin detailed debate before Judge Niemeyer's term expired. However, the Committee's reporter, Professor Edward Cooper, drafted a set of proposed simplified rules that should be the starting point for further reforms.

Professor Cooper's proposed rules would apply to all small money-damage actions and parties could choose to apply them to larger money-damage actions. These draft rules incorporated five basic elements that address known problems of costs and delay in the federal civil process. First, the rules required more detailed pleadings, enabling an early look at the merits of a case. Second, the rules would enhance early disclosures, which would have to be made within twenty days of the filing of the last pleading. Third, the draft rules restrict discovery, authorizing only three depositions and ten interrogatories. Fourth, the draft rules would reduce the burden of motions practice, combining all motions to dismiss into a single motion that must be filed early in the proceedings. Finally, the draft requires an early and strict trial date scheduled six months from the filing.

Professor Cooper's draft rules are a good basis for further reform, but there are three other ideas worthy of consideration. First, simplified rules should be applied to a wider range of cases by making them available for all damage actions, and mandatory for a larger segment of damage actions. Second, it may be wise to include incentives to encourage plaintiffs' and defendants' attorneys to use simplified rules in damage actions, as some attorneys may initially shy away from the simplified track. Third, practice under Rule 56 may need to be trimmed down, as summary judgment is now often an expensive mini-trial within the pretrial phase, creating disproportionate costs and delays.

EX. E

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To: Rebecca Womeldorf

Cc: Simplified Procedures Pilot Project Subcommittee

From: Amelia Yowell, Supreme Court Fellow

Date: October 15, 2015

RE: CACM report on the CJRA pilot program

The Civil Justice Reform Act of 1990 (CJRA) outlined a series of case management principles, guidelines, and techniques to reduce cost and delay in civil litigation. To test these procedures, Congress established a pilot program in ten districts. Congress directed the Judicial Conference to commission an independent evaluation of the program,[1] study the results, and assess whether other districts should be required to implement the same case management principles. Report at 11. I've provided a brief summary of the Judicial Conference's May 1997 final report below,[2] with an emphasis on the topics that overlap with those discussed at the pilot project subcommittee's conference call on Friday, October 9, 2015.

The CJRA Pilot Program

The pilot program consisted of twenty district courts. Report at 14–15. To obtain representative results, the Judicial Conference did not allow districts to volunteer. *Id.* at 15. Instead, the Judicial Conference chose districts based on their "size, the complexity and size of their caseloads, the status of their dockets and their locations." *Id.* At least five districts were located in a metropolitan area. *Id.* Ten of the districts were "pilot districts,"[3] which were required to implement the following principles:

- Differentiated Case Management, where cases are sorted into expedited, standard, and complex tracks that have a specific set of procedures and time lines;

- Early and ongoing control of the pretrial process, including setting early dispositive motion and trial dates and controlling the extent of discovery;

[1] The RAND Corporation conducted the independent evaluation. Report at 15.

[2] The Judicial Conference delegated oversight responsibility to the Court Administration and Case Management Committee (CACM). Report at 12–13.

[3] The ten pilot courts were: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. Report at 15 n.5.

- "Careful and deliberate monitoring" of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions, unless accompanied by a good faith certification; and

- Encouraging alternative dispute resolution programs

Id. at 15, 26–38. The Judicial Conference also asked the pilot districts to implement the following litigation management techniques:

- Requiring the submission of joint discovery plans;

- Requiring a representative with the power to bind the parties to be present at all pre-trial conferences;

- Requiring all requests for extensions of discovery deadlines or trial postponements to be signed by an attorney and the party;

- Implementing a neutral evaluation program to hold a nonbinding ADR-like conference early in the litigation; and

- Requiring a representative with the power to bind the parties to be present at all settlement conferences

Id. at 15, 39–44.

These pilot districts were compared with ten "comparison districts,"[4] which were not required to implement the above principles or techniques. *Id.* at 15. In total, the RAND Study compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. *Id.* The Study also collected data from

[4] The ten comparison courts were: the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania. Report at 15 n.6.

five other districts,[5] which implemented "demonstration programs to test systems of differentiated case management and alternative dispute resolution." *Id.* at 9.

The Judicial Conference's Assessment and Recommendation

After review, the Judicial Conference cautioned against implementation of the pilot program nationwide, at least "as a total package." *Id.* at 2, 15. The Conference based its recommendation on the RAND Study's finding that the pilot project, as a whole, did not have a great impact on reducing cost and delay.[6] *Id.* at 26. Assessing these results, the Conference noted that "there is a need for individualized attention to each case that a 'one size fits all' approach cannot satisfy."[7] *Id.* at 46.

The RAND Study outlined six procedures that likely were effective in reducing cost and delay: (1) establishing early judicial case management; (2) setting the trial schedule early; (3) establishing shortened discovery cutoff; (4) reporting the status of each judge's docket; (5) conducting scheduling and discovery conferences by phone; and (6) implementing the advisory group process. *Id.* at 15–16.

Notably, the RAND Study did not address several important questions: (1) the possible differential impact of procedural reforms on small law firms, solo practitioners, and those serving under contingency fee arrangements; (2) the impact of front-loading litigation costs under accelerated case management programs; and (3) the effects of the procedural reforms on particular case disposition types. *Id*. at 45–46. In particular, the Study noted that "[r]eforms that actually increase costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims." *Id.* at 46.

The following chart summarizes the relevant parts of the CJRA Pilot Program, the RAND Study's findings, and the Judicial Conference's resulting recommendation.

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[5] The Western District of Michigan and the Northern District of Ohio experimented with systems of differentiated case management while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia experimented with various methods of reducing cost and delay, including ADR. Report at 16–17.

[6] One reason for this may be that the judiciary had already adopted many of the CJRA's case management procedures. Report at 26.

[7] The RAND Study reported that "reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in 'time to disposition.'" Report at 46.

Tested Procedure	Findings	Recommendation
Differentiated case management using a "track" system Report at 26–28	· The districts sorted cases into expedited, standard, and complex tracks. · The districts employed a variety of identification methods; many courts used an automatic track assignment process based on subject matter outlined in the initial pleadings. · Districts encountered significant difficulties classifying cases at the pleading stage, especially when identifying and evaluating complex cases. Because of this difficulty, most districts placed the vast majority of cases in the "standard" track. · Many districts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.	· Some form of differentiated case management should be used. · However, track systems "can be bureaucratic, unwieldy, and difficult to implement." · Therefore, individual districts should determine on a local basis whether the nature of the caseload calls for a more rigid track model or a judicial discretion model.
Early judicial case management Report at 19, 29–31	· Early judicial case management included "any schedule, conference, status report, joint plan, or referral to ADR that occurred within 180 days of case filing. · Early case management alone significantly reduced time to disposition (by up to two months), but significantly increased lawyer work hours. · If early judicial intervention was combined with shortened discovery (from 180 days to 120 days), then lawyer work hours (and therefore cost) decreased.	· Courts should follow Rule 16(b), which requires entry of a scheduling order within 120 days and encourages setting an early and firm trial date as well as a shorter discovery period. · The Conference was "opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin," mainly because a standard time line would slow down cases that could be resolved more quickly.

Early voluntary exchange of information and use of cooperative discovery techniques Report at 33–	· All pilot and comparison courts instituted some form of voluntary or mandatory early exchange of information. · It was difficult to analyze the effects of voluntary disclosure versus mandatory discovery. · Discovery deadlines were a major factor in decreasing the cost and length of litigation.	· The Judicial Conference did not find enough information in the RAND Study to make a specific recommendation about voluntary versus mandatory initial disclosures · The Committee on Rules of Practice and Procedure should re-examine the need for national uniformity in applying Rule 26(a).

Based on these results and recommendations, the Judicial Conference proposed the following alternative cost and delay procedures:

- Continued and increased use of district court advisory groups, composed of attorneys and other litigant representatives;
- Public reporting of court dockets;
- Setting early, firm trial dates and shorter discovery periods in complex cases;
- Effective use of magistrate judges;
- Increased use of chief judges in case management;
- Increased use of visiting judges to help with backlogged dockets;
- Educating judges and lawyers about case management, especially considering the RAND Study's finding that one of the primary drivers of litigation costs is attorney perception of case complexity; and
- Increased use of technology

Id. at 18–26.

The Judicial Conference also made several recommendations that required the action of Congress or the Executive branch. For example, the Conference pointed out that "a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and

delay." Report at 22. The Conference also noted that a court's ability to try cases in a timely manner depended on available courtrooms and facilities. *Id.* at 25.

EX. F

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Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action

Emery G. Lee III & Jason A. Cantone
Federal Judicial Center

October 2015

Executive Summary

In November 2011, a task force of plaintiff and defendant attorneys, working in cooperation with the Institute for the Advancement of the American Legal System ("IAALS"), released a pattern discovery protocol for adverse action employment cases. The task force intended for this protocol to serve as the foundation for a pilot project examining whether it reduced costs or delays in this subset of cases. About 75 federal judges nationwide have adopted the protocols; in some districts, multiple judges have been using them.

The Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center ("FJC") to report on the pilot. FJC researchers identified almost 500 terminated cases that had been included in the pilot since late 2011 ("pilot cases"). For purposes of comparison, the researchers created a random sample of terminated employment discrimination cases from approximately the same filing cohorts ("control cases"). Information was collected on case processing times, case outcomes, and motions activity in the pilot and control cases. The key findings summarized in this report:

- There was no statistically significant difference in case processing times for pilot cases compared to control cases.
- There was generally less motions activity in pilot cases than in the control cases.
- The average number of discovery motions filed in pilot cases was about half the average number filed in control cases.
- Both motions to dismiss and motions for summary judgment were less likely to be filed in pilot cases.
- Although the nature of private settlements makes it difficult to determine conclusively, it appears that pilot cases were more likely to settle than control cases. On average, however, the pilot cases did not settle faster than the control cases.

Background

In May 2010, the Judicial Conference Advisory Committee on Civil Rules ("Committee") sponsored a major Civil Litigation Review Conference at Duke University School of Law ("the Duke conference"). The Duke conference was motivated by the perception that cost and delay in civil litigation required a reevaluation of the Federal Rules of Civil Procedure. One idea to arise from the conference was that pattern discovery in certain types of civil cases could streamline the discovery process and reduce delays and costs.

A committee of plaintiff and defendant attorneys highly experienced in employment matters began meeting to debate and finalize the details of what became the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action ("protocols"). Joseph Garrison chaired the plaintiffs' subcommittee and Chris Kitchel chaired the defendants' subcommittee. District Judge John G. Koeltl (Southern District of New York) and the Institute for the Advancement of the American Legal System ("IAALS") and its director, Rebecca Love Kourlis, facilitated these meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were formalized in November 2011 and posted, along with a standing order and model protective order, to the FJC public website (www.fjc.gov). Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. As of this writing, about 75 judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, several judges participate.

The introduction to the protocols identifies the pilot's purposes in the following way:

> The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

In spring 2015, FJC researchers searched court electronic records to identify cases that participating judges had included in the pilot. This search used key words likely to be found on

the dockets of pilot cases, with the language largely drawn from the standing order made available as part of the protocols.

The searches resulted in a sample of 477 pilot cases, which was determined to be adequate for analysis. Pilot cases were identified in 10 districts (Arizona, California Northern, Connecticut, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern). Not all districts are represented evenly in the terminated pilot cases. More than half (55%) were in Connecticut, and almost another quarter were in New York Southern (22%). The finding that more than three-quarters of pilot cases came from only two of the districts could reflect differing docketing practices, the number of judges employing the protocols, and/or the number of eligible cases in the various districts.

A nationwide random sample of terminated employment discrimination cases (nature of suit = 442), filed in 2011 or later, was drawn for a control sample. The control sample included 672 terminated cases alleging employment discrimination.

Findings

Disposition Times. The mean disposition time for pilot cases (N=477) was 312 days, with a median of 275 days. The mean disposition time for control cases (N=672) was 328 days, with a median of 286 days. These miniscule differences in disposition times, although in the expected direction, are not statistically significant (p = .241).

Case Outcomes. The most common case outcome for pilot cases (N=477) was settlement, observed in 51% of cases. The second-most common outcome for pilot cases was voluntary dismissal, observed in 27% of cases. Many, if not most, voluntary (stipulated, in most cases) dismissals are probably settlements, but for this project a case was only coded as settled if there was some positive indication on the docket or in the stipulation that a settlement had been reached. If every voluntary dismissal is presumed to be a settlement, adding that number to the number of settlements provides a maximum estimate of 78% cases settling.

Pilot cases were dismissed on a Rule 12 motion 7% of the time, and resolved by summary judgment 7% of the time. Three pilot cases (< 1%) were resolved by trial. Seven percent of the pilot cases were resolved some other way (including dismissals for want of prosecution and for failure to exhaust administrative remedies).

The most common case outcome for control cases (N=672) was voluntary dismissal, observed in 35% of the cases. Settlement was the second-most common outcome, at 30%. The maximum, combined estimate for the settlement rate in the control cases is around 65%. The lower settlement rate for control cases corresponds with these cases being much more likely to be dismissed on a Rule 12 motion (13%) or resolved through summary judgment (12%). These two outcomes account for fully a quarter of dispositions in control cases, but only about an eighth of dispositions in pilot cases. Ten control cases (2%) were resolved by trial. Eight percent of the control cases were resolved in some other way.

Comparing the pilot cases and control cases that were either settled or voluntarily dismissed, the pilot cases did not reach settlement earlier. The pilot and control cases have essentially the same mean disposition time (just under 300 days).

Motions Practice. Fewer discovery motions were filed in the pilot cases than in the control cases. This analysis is limited to motions for protective orders and motions to compel discovery, including motions to compel initial disclosures required under the pilot. One or more discovery motions were filed in 21% of the control cases, compared to only 12% of pilot cases. The difference of means for the number of discovery motions filed between pilot and control cases is statistically significant ($p < .001$).

Cases with more than two discovery motions were quite rare. Three or more discovery motions were observed in about 1% of pilot cases and 2% of control cases.

Motions to dismiss were filed in 24% of the pilot cases and in 31% of the control cases. Motions for summary judgment were filed in 11% of pilot cases and in 24% of control cases. The court decided 71% of the motions to dismiss in the pilot cases and 87% of the motions to dismiss in the control cases.

Discussion

Some of the findings summarized above are consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that less motions practice is associated with lower costs overall. Costs are difficult to measure directly. The findings are also consistent with the hypothesis that the pilot cases were more likely to result in settlement, although not necessarily

an earlier settlement. Indeed, the findings indicate that case processing times were very similar for the pilot and control cases overall and for settlement cases. The pilot does not, in short, appear to have an appreciable effect on reducing delay.

Two caveats are in order, however. First, while the initial disclosures required by the pilot were docketed in some cases, this does not appear to be standard practice. Thus, it is impossible to determine how often the parties in the pilot cases actually complied with the discovery protocols and exchanged the required initial disclosures. In fact, in some cases, it was relatively clear that the parties delayed the exchange while engaging in settlement efforts. Second, this report makes no claim that the *only* factor differing between the pilot and control cases was the pattern discovery in the former. Cases were not randomly assigned to be pilot or control cases. Individual judges' practices vary and judges inclined to adopt new discovery procedures may vary in some systematic fashion from judges who decline to do so. Individual districts' local rules and procedures also vary. Some districts in the study appear to commit more resources to mediating employment disputes than others, which may explain some of the variation in settlement rates. Thus, some caution is warranted before concluding that the pilot program caused the above described differences between the pilot and control cases.

Appendix 1: Control cases

This section summarizes the results of a study of a random, nationwide sample of terminated employment discrimination cases (Nature of suit 442) filed after January 1, 2011 (N=672). Because of the focus on terminated cases, cases filed in 2011-2013 comprise the bulk of the sample; only about 11% of the sample cases were filed in 2014 or 2015.

Disposition times by case outcomes. The median time to disposition for all control cases was 286 days (9.4 months). The mean time to disposition was 328 days (10.8 months). Leaving aside "other" outcomes, voluntary dismissals had the shortest median disposition time, 239 days (7.9 months), followed by dismissal on motion, 247 days (8.1 months), and settlement, 290 days (9.5 months). Not surprisingly, cases decided by summary judgment take much longer to resolve, median time to disposition, 504 days (16.6 months), and the small number of cases decided by trial had the longest disposition time of all, median 526 days (17.3 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 186 days (6.1 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 299 days (9.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 69 days (2.3 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in three cases had a motion to dismiss, and about one in four had a motion for summary judgment. Motions to dismiss were filed in 31% of the sampled cases, and motions for summary judgment were filed in 24%. More than one motion for summary judgment was filed in about 5% of the sample cases. Motions to compel were filed in 10% of the sampled cases, and motions for protective orders were filed in 18%. The latter figure includes stipulated protective orders.

Appendix 2: Pilot cases

This section summarizes more detailed findings of the identified pilot cases (N=477).

Disposition times by case outcomes. The median time to disposition for all pilot cases was 275 days (9.1 months). Leaving aside "other" outcomes, dismissal on motion had the shortest median time to disposition, 236 days (7.8 months), followed by voluntary dismissals, 237 days (7.8 months), and settlement, 280 days (9.2 months). Again, cases decided by summary judgment take much longer to resolve, median time to disposition, 623 days (20.5 months), but the small number of cases decided by trial was shorter, median 459 days (15.1 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 168 days (5.5 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 329 days (10.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 75 days (2.5 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in four cases had a motion to dismiss, and about one in ten had a motion for summary judgment. Motions to dismiss were filed in 23% of the sampled cases, and motions for summary judgment were filed in 11%. More than one motion for summary judgment was filed in about 1% of the sample cases. Motions to compel were filed in 5% of the sampled cases, and motions for protective orders were filed in 9%. The latter figure includes stipulated protective orders.

EX. G

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tions. The 1984 amendment to Rule 11 adequately accomplishes the purposes of Federal Rule 26(g).

The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

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INITIAL DISCLOSURE - DISCOVERY PILOT PROJECT RULE

Proposed Rule Sketch

The sketch set out below is proposed as a starting point in working toward a rule that might be tested to expand on the initial disclosure provisions in present Rule 26(a)(1). It is derived from Arizona Rule 26.1, but simplified in several ways. The reasons for this proposal follow.

(a) [*Version 1*: Within the times set forth in subdivision (b),[1] each party must disclose in writing to every other party:[2]] [*Version 2*: Before seeking discovery from any source, except in a proceeding listed in Rule 26(a)(1)(B), each party must answer these Rule 33 interrogatories {and Rule 34 requests to produce or permit entry and inspection}, providing:]

(1) (A) the factual basis of its claims or defenses;

(B) the legal theory upon which each claim or defense is based;

(C) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of the injuries suffered;

(D) for inspection and copying as under Rule 34 any insurance [or other] agreement under which an insurance business [or other person] may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment;[3] and

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[1] The times established in present Rule 26(a)(1)(C) and (D) may need to be reconsidered in light of the increased disclosures required by this rule. See footnote 2.

[2] Version 2 makes this exchange of information a first wave of discovery. Adopting the full incidents of those rules will set times to respond, and address many other issues that may arise.

[3] This is present Rule 26(a)(1)(A)(iv) as a placekeeper. Are there reasons to broaden the disclosures it requires? Indemnification agreements, for example, are not covered. It has been observed that these questions do arise. The

26 (2) whether or not the disclosing party intends to use them
27 in presenting its claims or defenses:

28 (A) the names and addresses of all persons whom
29 the party believes may have knowledge or
30 information relevant to the events,
31 transactions, or occurrences that gave rise
32 to the action;

33 (B) the names and addresses of all persons known to
34 have given statements, and — if known — the
35 custodian of any copies of those statements; and

36 (C) a list of the categories of documents,
37 electronically stored information,
38 nondocumentary tangible things or land or
39 other property, known by a party to exist
40 whether or not in the party's possession,
41 custody or control and which that party
42 reasonably believes may be relevant to any
43 party's claims or defenses, including — if
44 known — the custodian of the documents or
45 electronically stored information not in the
party's possession, custody, or control.

Discussion

RULE DESIGN

Designing the rule to be tested in a pilot project is not entirely separate from designing the project's structure. But the first task is to determine the elements of the rule that is to be tested.

Many real-world models could be used as a point of departure, perhaps combining elements from different models, adding new elements, or subtracting elements from a truly demanding model. This proposal was framed by reducing the scope of Arizona Rule 26.1. This foundation provides solid reassurance that the elements of the proposal have been tested in practice, and in combination with each other.

Arizona Rule 26.1 is the broadest disclosure rule we know of. Over the course of twenty years it seems to have built toward substantial success. It would be difficult to implement a more

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bracketed language is used to contrast with the otherwise unchanged language of the present rule; if disclosure is to reach further, integrated language may prove more attractive. Whatever may be done on that score, the Committee decided recently that the time has not yet come to consider disclosure of litigation finance arrangements.

demanding model. And to the extent that it may be possible to structure a pilot project in ways that make it possible to evaluate different components of the model, separating those that work from those that do not work, aiming high has real advantages.

Caution, however, suggests adoption of a model that is robust but not aggressive. The project will fail at the outset if the model is so demanding that no court can be found to test it. As described in more detail below, there may be independent reasons to question whether the Arizona rule can work on a nationwide basis, across courts with different mixes of cases and different local cultures. The proposal aims at a less demanding but still robust regime.

The first question to be addressed in working from the Arizona model is whether to frame the model as initial disclosure or as first-wave discovery. The original version of Rule 26(a)(1) was adopted in 1993 in an effort to streamline the exchange of information that inevitably would be sought in the first wave of discovery. Although more demanding than the version adopted in 2000, it was focused on a sufficiently narrow target to make it work as disclosure. The disclosure approach is illustrated by Version 1 in the model.

An alternative is to frame the model as mandatory initial discovery. This approach has at least two potential advantages. First, by incorporating Rules 33 [and 34], it incorporates the provisions of those rules that set times to respond and obligations in responding. (It might be helpful to complicate the rule text by prohibiting objections, but the complication seems unnecessary.) The second advantage is to avoid claims that the model is inconsistent with present Rule 26(a)(1). Everything in the model is well within the court’s authority to control discovery and disclosures, particularly through Rule 16(b)(3) and (c)(2)(F). These advantages may well lead to adopting this alternative.

The next questions go to the details: What elements of the Arizona rule might be reduced? Some of the changes are simple matters of drafting. For example, it suffices to say "the factual basis of its claims or defenses," instead of "the factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense." Other changes are more substantive.

Model (a)(1)(B) is limited to "the legal theory on which each claim or defense is based." It omits "including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Requiring these added details will often lead to unnecessary information and provides a rich occasion for disputes about the adequacy of

the disclosures.

Arizona Rule 26.1(a)(3) calls for initial disclosure of expected trial witnesses, including a fair description of the substance of the expected testimony. It is omitted entirely, in the belief that present Rule 26(a)(3) pretrial disclosures do the job adequately, and at a more suitable time. Arizona Rule 26.1(a)(8) calls for initial disclosure of documents, electronically stored information, and tangible evidence the party plans to use at trial. It is omitted for similar reasons; the part that calls for disclosure of "relevant insurance agreements" is reflected in Model Rule (1)(D).

Model Rule subparagraphs (1)(C) and (D) are drawn verbatim from present Rule 26(a)(1)(A)(iii) and (iv). These rules seem to work well. They displace Arizona Rule 26.1(a)(7) on computation of damages and the part of (8) that calls for identification of "relevant insurance agreements."

Paragraph (2) of the model begins by requiring disclosure of additional matters "whether or not the disclosing party intends to use them in presenting its claims or defenses." Although this obligation is implicit in the initial direction to disclose, it seems wise to emphasize that this model goes beyond the "may use" limit in present Rule 26(a)(1)(A)(i) and (ii).

Subparagraph (2)(A), requiring disclosure of persons believed to have knowledge of the events in suit, is taken verbatim from the first part of Arizona Rule 26.1(a)(4), but omits "and the nature of the knowledge or information each such individual is believed to possess." There may be sufficient uncertainty or outright mistake, and sufficient difficulty in describing these matters, to urge caution in going so far.

Subparagraph (2)(B) departs from Arizona Rule 26.1(a)(5) in two ways. It omits the description of witness statements "whether written or recorded, signed or unsigned." Those words seem ambiguous as to oral "statements" not reduced to writing or recording. And it adds "if known" to the requirement to disclose the custodian of copies of the statement. This provision may need further work to decide whether to include oral statements, or to exclude them explicitly.

Subparagraph (2)(C) substantially shortens Arizona Rule 26.1(a)(9). First, the Arizona rule initially requires a list of all documents or electronically stored information, allowing a list by categories only "in the case of voluminous" information. The Model Rule is content with a list by categories for all cases. That is enough to pave the way and direction for later Rule 34 requests. Second, the Arizona rule invokes a term omitted from Federal Rule 26(b)(1) by the proposed amendments now pending in Congress: "relevant to the subject matter of the action." The

Model Rule substitutes "relevant to any party's claims or defenses." Third, the Model Rule eliminates the direction to list documents "reasonably calculated to lead to the discovery of admissible evidence." Whatever might be made of that familiar phrase in defining the outer scope of discovery, it overreaches for initial disclosure. Finally, and most importantly, the Model Rule eliminates the direction to serve a copy of the documents or electronically stored information with the disclosure "[u]nless good cause is stated for not doing so." The related provisions for identifying the custodian if production is not made, and for the mode of producing, are also omitted. Full production at this early stage is likely to encompass more — often far more — than would actually be demanded after the categories of documents and ESI are described. Too much production does no favors, either for the producing party or for the receiving party. The Arizona alternative of stating good cause for not producing everything that is listed might work if all parties behave sensibly, but it also could add another opportunity for pointless disputes.

Pilot Project Design

Designing the project itself will take a great deal of work, much of it by the experts at the Federal Judicial Center. It is imperative that the structure provide a firm basis for evaluating the model chosen for testing. But a few preliminary and often tentative thoughts may be offered.

The initial recommendation is to structure the pilot to mandate participation. The choice between mandatory or voluntary participation is one of the first questions common to all pilot projects. A choice could be introduced in various ways — as opt-in or opt-out, either at the behest of one party or on agreement of all parties. Resistance to a pilot is likely to decline as the degree of voluntariness expands. But there is a great danger that self-selection will defeat the purposes of the test. To be sure, it would be useful to learn that more and more parties opt to stay in the model as experience with it grows. But in many circumstances it would be difficult to draw meaningful lessons from comparison of cases that stay in the model to cases that opt out.

The second recommendation is that the pilot should include all cases, subject to the possibility of excluding the categories of cases now exempted by Rule 26(a)(1)(B) from initial disclosure. Those cases were selected as cases that seldom have any discovery, and they occupy a substantial portion of the federal docket. Nothing important is likely to be lost by excluding them, and much unnecessary work is likely to be spared. Beyond those cases, arguments can be made for excluding others. One of the concerns about the original version of Rule 26(a)(1) was that it would require useless duplicating work in the many cases in which the parties, not trusting the initial disclosures,

would conduct discovery exactly as it would have been without any disclosures. That might well be for complex, high-stakes, or otherwise contentious cases. But the more expanded disclosures required by the model provide some reassurance that this danger will be avoided. The model, particularly when seen as an efficient form of focused first-wave discovery, is designed in the hope that it really will reduce the cost and delay of discovery in many cases, including — perhaps particularly including — complex cases.

A quite different concern arises from cases with at least one pro se party. It may be wondered whether these initial requirements will prove overwhelming. But pro se litigants are subject to discovery now. And here too, it may be hoped that simple rule directions will provide better guidance than the complex language of lawyer-formulated Rule 33 [and Rule 34] discovery demands.

One particularly valuable consequence of including all cases is that information will be provided on how well the model actually works across the full range of litigation. There may be surprises, but that is the point of having a pilot. Any national rule that is eventually adopted would be crafted on the basis of this experience. If, for example, broad initial disclosures prove useless or even pernicious in antitrust cases, a way can be found to accommodate them. (It seems likely that the rule would recognize judicial discretion to excuse or modify the disclosure requirements, but that choice will await evaluation of the pilot’s lessons.)

Selection of pilot courts is also important. Potentially conflicting considerations must be weighed. There are obvious advantages in selecting courts in states that have some form of initial disclosure more extensive than the present federal rule. Lawyers will be familiar with the state practice, and can adapt to the federal model with some ease, at least if they can check reflexes ingrained by habitual state practice. The same may hold, although to a lesser extent, for the judges. From this perspective, the District of Arizona might be a natural choice. Another might be the District of Connecticut, where the judges have widespread experience with the protocols for initial discovery in individual employment cases. Courts in Colorado, New Hampshire, Texas, and Utah also might be considered: each state has experience with initial disclosure systems more extensive than the current federal model. A particular advantage of selecting such courts may be that because they are already primed, they will achieve better results than would be achieved in other courts. That could mean that other courts will be encouraged to adopt the practice, or the national rules to embrace it, even though success will take somewhat longer to achieve in other courts.

Reliance on courts already familiar with expanded disclosure, however, might undermine confidence in whatever favorable findings might be supported by the pilot court. That a rule works with courts and lawyers who have favorable attitudes is not a sure sign that it will work with lawyers who remain hostile. And there may be a further problem. A means must be found to compare cases managed under the model with other cases. Comparison of pilot cases with cases in the same court in earlier years runs the risk that the earlier cases were shaped by habits developed under the already familiar disclosure regime. Comparison of pilot cases with cases in other courts might encounter similar difficulties.

In the most attractive world, it might prove possible to engage a number of courts with different characteristics in the pilot program. But if the project is to be tested in only one court, or even two, it will be necessary to decide whether to look to a court that already has some experience, whether it is by vicarious connection to local practice or by direct experience.

The proper duration of a pilot project may vary by subject. A model that departs substantially from present practice in discovery and disclosure is likely to require a rather extensive period of adjustment. It takes time for lawyers and judges to learn how to make the most of a new model, and to learn how to defeat efforts to subvert it. Surely anything less than three years would be too short, and five years seems a more realistic duration.

There is a point of structure peculiar to disclosure. Comparison of results depends on sure knowledge whether the model was actually used. The pilot should include a requirement that the parties file a certificate of compliance that will lead researchers to the proper starting point.

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EX. I

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MEMORANDUM

To: Judge Jeffrey S. Sutton
From: Derek Webb
Subject: Rule 26(a) Disclosure Reform History: A Canvas of the Criticisms in the 1990s.
Date: December 7, 2015

In the 1990s, the Civil Rules Committee attempted to reform Civil Rule 26 disclosures. The goal was to require disclosures of helpful *and* hurtful information held by each party. The rule gave district courts the choice of opting out and most of them did. Ultimately, the "hurtful" part was abandoned because too many lawyers thought it was not their job to help the other side. In response to your request, I have done a quick survey of the precise criticisms of this reform and the individuals who made them.

Let me start first with the Supreme Court's reaction. On April 22, 1993, Justices Scalia, Thomas, and Souter officially dissented from the proposed Rule 26(a) requiring the duty to disclose helpful and harmful information held by each party. Before this dissent, Supreme Court Justices had only objected twice to the substance of a proposed rule since the early 1960's. Scalia objected to the proposed rule change, which he called "potentially disastrous," for the following reasons:

> 1) It would actually add another layer of discovery, requiring litigants to determine and fight over what information was "relevant" to "disputed facts" and whether either side had adequately disclosed the required information.
>
> 2) It would undermine the adversarial nature of the litigation process and infringe upon lawyers' ethical duties to represent their clients and not to assist the opposing side.
>
> 3) It had not been tested locally in three-year "pilot project" experiments prior to the implementation of a nation-wide rule change.
>
> 4) It had been widely opposed by the bench, bar, and ivory tower.

I am appending Justice Scalia's dissent to this memo.

The response from lawyers appears to have been overwhelmingly negative. Of the 264 written comments submitted to the Federal Judicial Center, 251 opposed the rule change.

Many politicians opposed the rule change. The House of Representatives actually passed a bill, co-sponsored by William Hughes of New Jersey and Carlos Moorehead of California, to block its passage. Perhaps distracted by NAFTA, health care reform, and other pressing matters, and rushed by the eleventh-hour nature of the debate, the Senate, despite the support of Senator Howell Heflin, did not pass its own bill and thereby allowed the rule change to go into effect on December 1, 1993.

A host of academics and other lawyer-commentators chimed in with other criticisms. Some who weighed in critically included Michael J. Wagner, Randall Samborn, Carl Tobias, Carol Campbell Cure, John Koski, Thomas Mengler, Griffin Bell, Chilton Varner, and Hugh Gottschalk. Among their additional criticisms included these concerns:

1) It would lead litigants on both sides to bury the other side in voluminous and often irrelevant documents, thereby frontloading the costs of litigation to its early stages and impeding settlement because both sides would have already invested too much in the case and would want to go to trial.

2) It would make complex litigation, which is often highly technical and document-intensive, more difficult and expensive under the new rules.

3) It would be particularly onerous for defendants, especially large corporations, who have less time than plaintiffs to consider the case and determine what documents are relevant. For large corporations, it might incline them to settle more rather than go to trial.

4) It would ironically add extra responsibilities to district court judges who would have to preside over satellite litigation and mini-trials on which documents were relevant.

5) It would chill attorney-client communications, with both sides reluctant to discuss pending cases lest their content eventually need to be disclosed.

6) The ability of district courts to opt out of the rule would undermine national uniformity and make practice all that more difficult.

This is just a quick survey of the relevant terrain. Please let me know if you would like me to layer this with further research (e.g., more arguments, names, details).

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 507

[April 22, 1993]

Justice Scalia, with whom Justice Thomas joins, and with whom Justice Souter joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

…

II
Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, ***511** in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own

initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments ***512** relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.
I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. §2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

*** * ***

Constant reform of the federal rules to correct emerging ***513** problems is essential. Justice White observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

Footnote:

2. For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

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TAB 7C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 5, 2015

The Civil Rules Advisory Committee met at S.J. Quinney College of the Law at the University of Utah on November 5, 2015. (The meeting was scheduled to carry over to November 6, but all business was concluded by the end of the day on November 5.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by telephone); and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, Judge Amy J. St. Eve (by telephone), and (also by telephone) Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Esq.. Rebecca A. Womeldorf, Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the Administrative Office. Emery G. Lee attended for the Federal Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); and Ariana Tadler, Esq..

Judge Bates opened the meeting by greeting new members, Judge Ericksen and Judge Morris.

Judge Bates also noted the presence of former Committee member Judge Grimm and former Committee Chair Judge Campbell. They, and Judge Diamond who rotated off the Committee at the same time, contributed in many and invaluable ways to the Committee’s work. Looking to the package of rules amendments that are pending in Congress now, Judge Grimm chaired the Discovery Subcommittee and was a member of the Subcommittee chaired by Judge Koeltl that worked through proposals generated by the Committee’s 2010 Conference on reforming the rules. Judge Campbell has devoted a decade to Committee work, and continues with the work on pilot projects and on educating bench and bar in what we hope will, on December 1, become the 2015 amendments. The Reporters also described the many lessons in drafting, practice, and wisdom they had learned in working closely with Judge Campbell as chair of the Discovery Subcommittee and then Committee Chair.

Judge Bates concluded these remarks by observing that the new members would soon witness the Committee's determination to work toward consensus in its deliberations. The package of amendments now pending in Congress emerged from a remarkable level of agreement even on the details. Judge Campbell's strong and tireless leadership was demonstrated at every turn. Professor Coquillette "seconded" all of this high praise.

Judge Campbell expressed appreciation for the "overly kind comments." He noted that special praise is due to Judge Grimm for contributions "as substantial as anyone," especially in chairing the Discovery Subcommittee. He emphasized that the Committee is indeed a collaborative group. It is the profession's best example of collective thinking, good-faith effort, and agenda-less work. Every member who moves into alumnus standing has expressed this view. The Reporters provide excellent support. Judge Bates and Judge Sutton will carry the work forward in outstanding fashion.

Judge Campbell also noted that in 1850 his great-great grandparents came to the valley where the Committee is meeting as Mormon pioneers. Robert Lang Campbell became the first Commissioner of Public Education and was a regent of the University of Deseret, a progenitor of the University of Utah. "The University is home to me and my family."

Dean Robert W. Adler welcomed the Committee to the Law School and its new building. The new building is designed both to improve the learning experience and to advance the Law School's involvement with the community. He noted that as a professor of civil procedure he always demands that his students read the Committee Notes as they study each rule. "You can see the lights going off in their heads" as they read the Notes and come to understand that there is more in the rule texts than may appear on first reading.

April 2015 Minutes

The draft minutes of the April 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Standing Committee and Judicial Conference

Judge Campbell reported on the May meeting of the Standing Committee and the September meeting of the Judicial Conference.

The Standing Committee meeting went well. There was a good discussion of pilot projects.

At the Judicial Conference, the Chief Justice invited Judge Sutton and Judge Campbell to present a summary of the amendments now pending in Congress. They urged the Chief Judges to offer programs to explain to judges and lawyers the nature and importance of these amendments in the hoped-for event that they emerge from

91 Congress.

92 The Judicial Conference approved and sent to the Supreme Court
93 amendments to Rule 4(m) dealing with service on corporations and
94 other entities outside the United States; Rule 6(d), clarifying
95 that the "3-added-days" provision applies to time periods measured
96 after "being served," and eliminating from the 3-added days service
97 by electronic means; and Rule 82, synchronizing it with recent
98 amendments of the venue statutes as they affect admiralty and
99 maritime cases.

100 *Legislative Report*

101 Rebecca Womeldorf provided the legislative report for the
102 Administrative Office. Two familiar sets of bills have been
103 introduced in this Congress.

104 The Lawsuit Abuse Reduction Act of 2015 (LARA) has passed in
105 the House. It would amend Rule 11 by reinstating the essential
106 aspects of the Rule as it was before the 1993 amendments. Sanctions
107 would be mandatory. The safe harbor would be removed. This bill has
108 been introduced regularly over the years. In 2013 Judge Sutton and
109 Judge Campbell submitted a letter urging respect for the Rules
110 Enabling Act process, rather than undertake to amend a Civil Rule
111 directly. The prospects for enactment remain uncertain.

112 H.R. 9, the Innovation Act, embodies patent reform measures
113 like those in the bill that passed in the House last year. There
114 are many provisions that affect the Civil Rules. Parallel bills
115 have been introduced in the Senate, or are likely to be introduced.
116 The earlier strong support for some form of action seems to have
117 diminished for the moment.

118 A proposed Fairness in Class Action Litigation Act would
119 directly amend Rule 23. A central feature is a requirement that
120 each proposed class member suffer an injury of the same type and
121 scope as every other class member. The ABA opposes this bill.

122 *Publicizing the Anticipated 2015 Amendments*

123 Judge Grimm described the work of the Subcommittee that is
124 seeking to support programs that will educate members of the bench
125 and bar in the package of rules that will become law on December 1
126 unless Congress acts to modify, suspend, or reject them.

127 The 2010 Conference emphasized themes that have persisted
128 through the ensuing work to craft these amendments. Substantial
129 reductions in cost and delay can be achieved by proportionality in
130 discovery and all procedure, cooperation of counsel and parties,
131 and early and active case management. These concepts have been
132 reflected in the rules since 1983. They have been the animating

133 spirit of succeeding sets of rules amendments. The need for yet
134 another round of amendments has suggested that amending the rules
135 is not always enough to get the job done. So it was decided that
136 the amendments should be advanced by promoting efforts to bring
137 them home to members of the bench and bar by focused education
138 programs. Work on the programs is progressing.

139 Five videotapes are being prepared. They will be structured in
140 segments, facilitating a choice between a single viewing and
141 viewing at intervals. Judge Fogel and the FJC have been a wonderful
142 resource. Tapes by Judge Koeltl and Judge Grimm have been done. The
143 remaining tapes will be done on November 6.

144 Letters from Judge Sutton and Judge Bates will alert district
145 judges to the new rules. A powerpoint presentation is being
146 prepared.

147 Bar organizations have been encouraged to prepare programs.
148 The ABA has done one, and will do more; John Barkett is
149 participating. The American College of Trial Lawyers has planned a
150 program. The Fifth Circuit and Eighth Circuit will have programs;
151 it is hoped that other circuits will as well.

152 Many articles are being written. Judge Campbell has prepared
153 one for Judicature. Professor Gensler, a former Committee member,
154 has prepared a very good pamphlet.

155 One indication of the value of educational efforts is provided
156 by a poll Judge Grimm undertook. He asked 110 judges — 68
157 Magistrate Judges and 42 District Judges — whether they actively
158 manage discovery from the beginning of an action or, instead, wait
159 for the parties to bring disputes to them. More than 80% replied
160 that they wait for disputes to emerge. "We hope to educate them
161 that early management reduces their work."

162 One caution was noted. The Duke Center for Judicial Studies
163 has convened a group of 30 lawyers, evenly divided between 15 who
164 regularly represent plaintiffs and 15 who regularly represent
165 defendants, to prepare a set of Guidelines on proportionality. Some
166 present and former Committee members reviewed drafts. These
167 guidelines will be used in 13 conferences planned by the ABA and
168 the Duke Center that aim to advance the practice of
169 proportionality. The first conference will be held next week, a few
170 weeks before we can know that the proposed amendments will in fact
171 take hold. Professor Suja Thomas has expressed concern that these
172 guidelines will be used to "train" judges, and to be presented in
173 a way that casts an aura of official endorsement. In response to
174 this concern, Judges Sutton, Bates, and Campbell have sent out a
175 letter to federal judges making it clear that the guidelines are
176 not endorsed by the rules committees. The letter also notes that
177 these conferences are not being used to "train" judges.

178 Judge Sutton noted that December 1 has not yet arrived. "We
179 must be very careful to show that we are not presuming Congress
180 will approve the amendments." It is appropriate to anticipate the
181 expected birth of the amendments by preparing to encourage
182 implementation from and after December 1. And it is appropriate to
183 participate in programs that are presented before December 1 if it
184 is made clear that the amendments remain pending in Congress and
185 will become law only if Congress does not intervene by December 1.
186 It is proper for Committee members and former Committee members to
187 participate in these educational programs, but it is important to
188 continue the tradition that no favoritism should be shown among the
189 outside groups that organize the programs. An invitation should be
190 accepted only if the same invitation would be accepted had it been
191 extended by a different organization. And, as always, it is
192 important to emphasize both in opening and in closing that no
193 member speaks for the Committee.

194 Judge Campbell noted that the Duke Center has invested great
195 effort in promoting the new rules. "We should be grateful." It is
196 unfortunate that Professor Thomas has become concerned that the
197 Center is too closely connected to the Committee. It continues to
198 be important that all branches of the profession, teaching,
199 practicing, and judging, understand that the Committee is in fact
200 independent of all outside groups. The letter to federal judges is
201 designed to provide reassurance.

202 Judge Bates echoed this appreciation of the Duke Center's
203 efforts.

204 John Rabiej noted that the Duke Center says, explicitly and
205 repeatedly, that the Guidelines are not binding. They are only
206 suggestions. And they emerged from a working group evenly divided
207 between plaintiff interests and defense interests.

208 A Committee member noted that she observed e-mail traffic,
209 including messages focused on the Duke Center's involvement, that
210 reflects a widespread perception that the rules result from an
211 adversary process in which "someone wins and someone loses." That
212 wrong impression is unfortunate. "The rules are for everyone." As
213 a private person, she tells people that the best course is to read
214 the rules and Committee Notes. Practicing lawyers may be forgiven
215 for misperceiving the process because they are largely unaware of
216 it. But it is difficult to forgive similar ignorance when it is
217 shown by academics — within the last few weeks she had occasion to
218 ask a civil procedure teacher what he thought of the pending
219 amendments and he asked "what amendments"?

220 Another Committee member observed that it is a good process.
221 The 2010 Conference contributed a lot. But it remains important to
222 stress, without overdoing it, that the Duke guidelines are not
223 ours.

224 Another Committee member underscored the importance of making
225 it clear that members do not speak for the Committee. "I always do
226 it." But it also is important to emphasize that the Committee is
227 seeking to achieve the effective administration of justice.

228 Yet another member noted that at least some judges are
229 uncertain whether it is appropriate to attend the ABA-Duke Center
230 presentations. Reassurances would be helpful.

231 *Rule 23*

232 Judge Bates introduced the Rule 23 proposals by noting that
233 the Class-action Subcommittee has been working with extraordinary
234 intensity. Over the course of the summer he participated in 10
235 Subcommittee conference calls working on the substance of the
236 proposals, and there was much other traffic by messages and calls
237 on incidental matters. Judge Dow and Professor Marcus deserve much
238 credit for pushing things along.

239 For today, the goal is to form a good idea of which proposals
240 should move forward. It may be possible to work on some specifics,
241 but "this is not the final round." The Committee will report to the
242 Standing Committee in January. By this Committee's meeting next
243 April we may be in a position to make formal recommendations for
244 publication in 2016. For today, we can view the package as a whole.
245 Much of it deals with settlements.

246 Judge Dow introduced the Subcommittee report by noting that it
247 presents 11 items for discussion, generally with illustrative rule
248 text and committee notes.

249 Six topics are recommended for continuing work: "frontloading"
250 the initial presentation of a proposed settlement; adding a
251 provision to Rule 23(f) to ensure that appeal by permission is not
252 available from an order approving notice of a proposed settlement;
253 amending Rule 23(c)(1) to make it clear that the notice of a
254 proposed settlement triggers the opt-out and objection process,
255 even though the class has not yet been certified; emphasizing
256 opportunities for flexible choice among the means of notice;
257 establishing a requirement that a court approve any payment to be
258 made in connection with withdrawing an objection to a settlement or
259 withdrawing an appeal from denial of an objection, along with
260 provisions coordinating the roles of district courts and circuit
261 courts of appeals when dismissal of an appeal is involved; and
262 expanding the rule text criteria for approving a proposed
263 settlement.

264 One topic, adoption of a separate provision for certifying a
265 settlement class, is presented for discussion, although the
266 Subcommittee is not inclined to move toward adopting such a
267 provision.

268 Two other topics are on hold. Each awaits further development
269 in the courts. One is "ascertainability," a set of questions that
270 are percolating in the circuits. The other is the use of Rule 68
271 offers of judgment or other settlement offers as a means of
272 attempting to moot a class action by "picking off" all class
273 representatives; this question has been argued in the Supreme
274 Court, and any further consideration should await the decision.

275 Finally, the Subcommittee recommends that two other topics be
276 removed from present work. One is "cy pres" awards in settlements.
277 The other is any attempt to address the role of "issue" classes.
278 The reasons for setting these topics aside will be developed in the
279 later discussion.

280 Frontloading: Draft Rule 23(e)(1) tells the court to direct notice
281 of a proposed class settlement if the parties have provided
282 sufficient information to support a determination that giving
283 notice is justified by the prospect of class certification and
284 approval of the settlement. The basic idea was developed in
285 response to discussion at the George Washington conference
286 described in the Minutes for the April meeting, and with help from
287 an article by Judge Bucklo about the things judges need to know
288 about a proposed class settlement but often do not know. The
289 information will enable the judge to determine whether notice to
290 the class is justified. If the class has not already been
291 certified, the notice will be in the form required by Rule 23(c)(2)
292 — for a (b)(3) class, it will trigger the opportunity to request
293 exclusion, and for all classes it will provide a basis for
294 appearing and for objecting to the proposed settlement. These
295 purposes are best served by detailed notice of the terms of
296 settlement. Many courts follow essentially this practice now, but
297 express rule text will advance the best practice for all cases.

298 This proposal begins by adding language to the initial part of
299 Rule 23(e)(1), making it clear that court approval is required to
300 settle the claims not only of a certified class but also of a class
301 that is proposed for certification at the same time as the
302 settlement is approved.

303 The frontloading concept was presented to the September
304 miniconference in the form of rule text that listed 14 kinds of
305 information the parties should provide. This "laundry list"
306 approach met a lot of resistance. There is constant fear that an
307 official list of factors will be diluted in practice to become a
308 simple check-list that routinely checks off each factor without
309 distinguishing those that are important to the specific case from
310 those that are not. The present draft channels all these factors
311 into an open-ended behest that the parties provide "relevant" or
312 "sufficient" information. Perhaps some other descriptive word
313 should be found to emphasize the purpose to provide as much as
314 possible of the information that will be presented on the motion

315 for final approval. This approach, leaving it to the court and
316 parties to identify and focus on the considerations that bear on a
317 particular proposed settlement, seemed to win support at the
318 miniconference. The Committee Note can go a long way toward calling
319 attention to the multiple factors that appeared in the "laundry
320 list" draft.

321 Judge Dow noted that the sophisticated lawyers who bring class
322 actions in his court commonly provide the kinds of information
323 required by the proposal. But not all lawyers do it. "The less
324 sophisticated practitioners need" more guidance in the rule.

325 Judge Dow further noted that the proposed rule text does not
326 address the question of what to do with the residue of a class
327 defendant's agreed relief when not all class members make claims.
328 It would be possible to say something on this score, and to support
329 the rule text with a Committee Note that identifies the factors
330 included in the original laundry list rule draft. Professor Marcus
331 added that the Note attempts "to identify, advocate, convey." It
332 does not say that all 14 factors need be checked off every time.

333 A Committee member said that the draft rule reflects what has
334 become "procedural common law." Judges created this procedure. The
335 Manual for Complex Litigation adopts it. When the parties present
336 a proposed settlement for approval in an action that has not
337 already been certified as a class, the practice calls for
338 "preliminary approval" of certification and settlement, notice to
339 the class with opportunity to opt out or object, and final
340 approval. Many experienced lawyers and judges believe that Rule 23
341 says this. "The proposal is to have the rule say what many think it
342 says now." But too often, in the hands of those who are not
343 familiar with Rule 23 practice, the important information comes out
344 too late. But the draft is ambiguous in calling for relevant
345 information about the proposed settlement — is this information
346 about the quality of the settlement, or does it include information
347 about the reasons for certifying any class and about proper class
348 definition? The response was to point to the statement in the draft
349 Committee Note that "[o]ne key element is class certification." But
350 perhaps more could be said in the rule text.

351 A drafting question was raised: would it be better to begin in
352 this form: "The court must direct notice," etc., if the parties
353 have provided the required information and if the court determines
354 that giving notice is justified, etc.? And is either of the
355 alternative words used the best that can be found to describe the
356 quantity and quality of information that must be provided?
357 "'Relevant' calls to mind the scope-of-discovery provision in rule
358 26(b)(1)." The answer was recognition that work will continue on
359 the drafting. The earlier draft that set out 14 factors was
360 troubling because in many cases several of the 14 "do not matter."
361 But drafting a more open-ended approach is a work in progress.

This answer prompted the reflection that "the information relevant is quite different from one type of action to another." A complex antitrust action may call for quite different types of information than will be called for in an action involving a single form of consumer deception.

A similar style suggestion was offered: "I like better rules that tell the parties to do things," rather than "rules that tell the court to do things." The purpose of this rule is to tell the parties to provide more information. Such was the approach taken in the 14-factor draft, set out at p. 189 in the agenda materials: when seeking approval, "the settling parties must present to the court" all of the various described items of information.

A finer-grained drafting comment also was made. The draft simply grafts a reference to a proposed settlement class into the present text of subdivision (e)(1):

> The claims, issues, or defenses of a certified class<u>, or a class proposed to be certified as part of a settlement,</u> may be settled, voluntarily dismissed, or compromised only with the court's approval. * * *

There is a miscue — the proposal described in the new operative text is only to settle, not to voluntarily dismiss or compromise the action. The broader sweep that includes voluntary dismissal or compromise fits better with the class that has already been certified. It would be better to separate this into separate parts: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval; the claims, issues, or defenses of a class proposed to be certified as part of a settlement may be settled only with the court's approval. The following procedures apply in seeking approval: * * *.

Judge Dow concluded the discussion by observing that the Committee agrees that the frontloading proposal should be pursued further, with work to refine the drafting. The rule will speak to the parties' duty to provide information, and other improvements will be made.

<u>Rule 23(f)</u>: This proposal would add a new sentence to the Rule 23(f) provision for appeal by permission "from an order granting or denying class-action certification": "An order under Rule 23(e)(1) may not be appealed under Rule 23(f)." The concern arises from the common practice that refers to "preliminary certification" of a class when the court approves notice to the class. An appeal was attempted at this stage in the NFL concussion litigation; the Third Circuit decided not to accept the appeal. But the possibility remains that appeals will be sought in other cases. And the sense is that there should be only one opportunity for appeal, at least

407 as to a single grant of certification.

408 This introduction generated no further discussion. It was
409 noted later, however, that the Department of Justice continues to
410 study a proposal to expand the time available to ask permission to
411 appeal under Rule 23(f) when the request is made in actions
412 involving the United States or its officers or employees. The
413 Department expects to have a concrete proposal ready fairly soon.

414 Rule 23(c)(2)(B): This proposal is intended to solidify the
415 practice of sending out notice to the class before actual
416 certification when a proposed settlement seems likely to be
417 approved:

418 For any class certified under Rule 23(b)(3), or upon
419 ordering notice under Rule 23(e)(1) to a class proposed
420 to be certified [for settlement] under Rule 23(b)(3), the
421 court must direct to class members the best notice
422 practicable under the circumstances * * *.

423 Judge Dow noted that sending out notice before certification
424 and approval of the settlement is intended to accomplish the
425 purposes of notice in a (b)(3) class, including establishing the
426 deadline to request exclusion and affording the opportunities to
427 enter an appearance and to object. This is consistent with present
428 practice. And it is mutually reinforcing with the frontloading
429 proposal: frontloading will support notice that provides more
430 comprehensive information, enabling better-informed decisions
431 whether to opt out or to object. The opt-out rate and objections in
432 turn will advance further evaluation of the proposed settlement at
433 the final-approval stage. An important further benefit will be to
434 reduce the risk that initial notice made defective by providing
435 inadequate information to the court will, by objections that show
436 the need for better notice or that demonstrate the inadequacy of
437 the proposed settlement, require a second round of notice.

438 Professor Marcus added that this proposal is useful to respond
439 to an argument forcefully advanced by at least one participant in
440 the miniconference. The common practice, carried forward in this
441 package of proposals, is that actual certification of the class is
442 made only at the same time as approval of the settlement. As Rule
443 23(c)(2)(B) stands now, its text literally directs that notice
444 satisfying all the requirements of (B) be sent out then, never mind
445 that the notice of proposed settlement sent out under (e)(1) has
446 already triggered an opt-out period and so on. It is better to make
447 it clear that class members can be required to decide whether to
448 opt out, to appear, or to object before the class is formally
449 certified.

450 A committee member observed that courts believe now that the
451 notice of a proposed settlement discharges the function of

452 (c)(2)(B). Characterizing the court's initial action as preliminary
453 certification and approval brings it within the rule language. But,
454 in turn, that triggers the prospect that a Rule 23(f) appeal can be
455 taken at that stage, a disruptive prospect that is so unlikely to
456 prove justified by a grossly defective proposal that it should
457 never be available. This revision of (c)(2)(B) helps in all these
458 dimensions.

459 General Notice Provisions. Discussion turned to the draft that
460 would introduce added flexibility to the description of notice in
461 Rule 23(c)(2)(B):

462 For any class certified under Rule 23(b)(3), the court
463 must direct to class members the best notice that is
464 practicable under the circumstances, including individual
465 notice [by the most appropriate means, including first-
466 class mail, electronic, or other means] {by first-class
467 mail, electronic mail, or other appropriate means} to all
468 members who can be identified through reasonable effort
469 * * *.

470 Judge Dow noted that this proposal would "bring notice into
471 the 21st Century." First-class mail may not be the best means of
472 informing class members of their rights, but it seems to be settled
473 into general practice. The proposal is designed to establish the
474 flexibility required to provide notice by the most effective means.
475 The objective is the same as before — to provide the best notice
476 possible to the greatest number of class members. The alternative
477 presented in the first bracketed alternative, focusing on "the most
478 appropriate means," emphasizes the importance of the choice.
479 Whatever choice is made for rule text, it is important to have text
480 that supports the examples that may be useful in the Committee
481 Note.

482 The first suggestion, made and seconded, was that it might be
483 better to simplify the rule text by referring only to "the most
484 appropriate means." Amplification could be left to the Committee
485 Note. The response was that it may be important to add examples to
486 rule text to make it clear that the choice of means is technology-
487 neutral. The ingrained reliance on first-class mail may make it
488 important to make it clear that other means may be as good or
489 better. This response was elaborated by suggesting the advantages
490 of the first alternative, calling for the most appropriate means
491 and referring to "electronic means" rather than "electronic mail."
492 It may be, particularly in the not-so-distant future, that
493 appropriate means of electronic communication will evolve that
494 cannot be fairly described as part of the familiar "e-mail"
495 practices we know today.

496 Further discussion suggested that limiting the rule text to
497 "the most appropriate means" would avoid an implication that first-

498 class mail or e-mail are always appropriate.

499 A separate question was addressed to the parts of the draft
500 Note that discuss the format and content of class notice: is it
501 appropriate to address these topics when the amended rule text does
502 not directly bear on them? The only response was that any amendment
503 addressing effective means of notice will support discussion of the
504 importance of making sure that the notice conveyed by appropriate
505 means is itself appropriately informative. Merely reaching class
506 members does little good if the notice itself is inadequate.

507 Objectors: Judge Dow began by observing that the Subcommittee has
508 repeatedly been reminded that there are both "good" and "bad"
509 objectors. Class-member objections play an important role in class-
510 action settlements. As a matter of theory, the opportunity to
511 object is a necessary check on adequate representation. As a
512 practical matter, objectors have shown the need to modify or reject
513 settlements that should not be approved as initially proposed. But
514 there are also objectors who seek to enrich themselves — that is,
515 commonly to enrich counsel — rather than to improve the settlement
516 for the class. The advice received at several of the meetings the
517 Subcommittee has attended, and at the miniconference, is that bad-
518 faith objections can be dealt with successfully in the trial court.
519 The problem that persists is appeals or threats to appeal a
520 judgment based on an approved settlement. An appeal can delay
521 implementation of the judgment by a year or more. That means that
522 class members cannot secure relief, in some cases relief that is
523 important to their ongoing lives. The objector offers not to
524 appeal, or to dismiss the appeal, in return for a payment that goes
525 only to the objector's counsel, or perhaps in part to the objector
526 as well. Too often, class counsel are unwilling to submit the class
527 to the delay of an appeal and agree to buy off the objector.

528 Starting in 2010, the Appellate Rules Committee has been
529 considering rules to regulate dismissal of objector appeals. The
530 Subcommittee has been working in coordination with them.

531 The first step in addressing objectors is a draft that
532 requires some measure of detail in making an objection. This draft
533 responds to suggestions that some "professional objectors" simply
534 file routine, boilerplate objections in every case, do nothing to
535 explain or support them, fail to appear at a hearing on objections,
536 and then seek to appeal the judgment approving the settlement. The
537 draft adds detail to the present provision that authorizes
538 objections:

539 (A) Any class member may object to the proposal if it
540 requires court approval under this subdivision (e)~~;~~. The
541 objection must [state whether the objection applies only
542 to the objector or to the entire class, and] state [with
543 specificity] the grounds for the objection. [Failure to

544 state the grounds for the objection is a ground for
545 rejecting the objection.]

546 The first comment was that "this is the most oft-repeated
547 topic at all the conferences." The materials submitted for
548 discussion at the miniconference included a lengthy list of
549 information an objector must provide in making an objection. "It
550 seemed too much."

551 Later discussion provided a reminder that the Subcommittee
552 will continue to consider whether to retain the bracketed words
553 stating that failure to state the grounds for the objection is a
554 ground for rejecting the objection.

555 The draft in the agenda materials addresses the question of
556 payment by adding to present Rule 23(e)(5) a new subparagraph:

557 (B) T~~t~~he objection, or an appeal from an order denying an
558 objection, may be withdrawn only with the court's
559 approval. If [a proposed payment in relation to] a motion
560 to withdraw an appeal was referred to the court under
561 Rule 42(c) of the Federal Rules of Appellate Procedure,
562 the court must inform the court of appeals of its action.

563 This draft is supplemented by alternative versions of a new
564 subparagraph (C) that require court approval of any payment for
565 withdrawing an objection or an appeal from denial of an objection.
566 The overall structure is built on the premise that payment to an
567 objector may be appropriate in some circumstances. Rather than
568 prohibit payment, approval is required. It may be that the district
569 court finds it appropriate to compensate the costs of making an
570 objection that, although it did not result in any changes in the
571 settlement, played an important role in assuring the court that the
572 settlement had been well tested and does merit approval. That
573 prospect, however, is not likely to extend to payment for
574 withdrawing an appeal.

575 Recognizing that the Appellate Rules Committee has primary
576 responsibility for shaping a corresponding Appellate Rule, a sketch
577 of a possible Appellate Rule is included. The Appellate Rules
578 Committee met a week before this meeting. Their deliberations have
579 suggested some revisions in the package.

580 One question is how the court of appeals will know the problem
581 exists. A new sketch of a possible Appellate Rule 42(c) would
582 direct that a motion to dismiss an appeal from an order denying an
583 objection to a class-action settlement must disclose whether any
584 payment to the objector or objector's counsel is contemplated in
585 connection with the proposed dismissal. Then a possible Rule 42(d)
586 would provide that if payment is contemplated, the court of appeals
587 may refer the question of approval to the district court. The court

588 of appeals would retain jurisdiction of the appeal, pending final
589 action after the district court reports its ruling to the court of
590 appeals. The court of appeals can instead choose to rule on the
591 payment without seeking a report from the district court. Finally,
592 a new Civil Rule 23(e)(5)(D) would direct the district court to
593 inform the court of appeals of the district court's action if the
594 motion to withdraw was referred to the district court.

595 One initial question is whether there should be any provision
596 regulating withdrawal of an objector's appeal when there is no
597 payment. As a matter of theory, it may be wondered whether other
598 objectors may have relied on this appeal to forgo taking their own
599 appeals. But that theory may bear little relation to reality. It
600 was not developed further in the discussion.

601 The focus of the new structure is to provide the court of
602 appeals a clear procedure for getting advice from the district
603 court. The district court is familiar with the case and often will
604 be in a better position to know whether payment is appropriate. The
605 Appellate Rules Committee is anxious to retain jurisdiction in the
606 court of appeals. That can be done whether the action by the
607 district court is simply a recommended ruling or is a ruling by the
608 district court subject to review by the ordinary standards that
609 govern the elements of fact and the elements of discretion.

610 The first question was what happens when the district court
611 refuses to approve a payment and the objector wants to appeal. The
612 response was that the draft retains jurisdiction in the court of
613 appeals. The objector can address his grievance to the court of
614 appeals, whether the question be one of independent decision by the
615 court of appeals as informed by the district court's
616 recommendation, or be one of reviewing a ruling by the district
617 court.

618 An analogy was offered: Appellate Rule 24(a) directs that a
619 party who desires to appeal in forma pauperis must file a motion in
620 the district court. If the district court denies the motion, the
621 party can file a motion in the court of appeals, in effect renewing
622 the motion. Here, the motion to dismiss the appeal is made in the
623 court of appeals, disclosing whether any payment is contemplated.
624 But what happens if the court of appeals simply dismisses the
625 appeal without deciding whether to approve the payment? The draft
626 prohibits payment without court approval, so the objector would
627 have to seek approval from the district court. The district court's
628 action would itself be a final judgment, subject to appeal.

629 Another analogy also is available. There are many
630 circumstances in which a court of appeals finds it useful to retain
631 jurisdiction of an appeal, while asking the district court to take
632 specific action or to offer advice on a specific question. The
633 court of appeals can manage its own proceedings as it wishes, but

634 is most likely to defer further proceedings until the district
635 court reports what it has done in response to the appellate court's
636 request. There is a further analogy in the "indicative rulings"
637 provisions of Civil Rule 62.1 and Appellate Rule 12.1 — one of the
638 paths open under those rules is for the court of appeals to remand
639 to the district court for the purpose of ruling on a motion that
640 the district court otherwise could not consider because of a
641 pending appeal. The court of appeals retains jurisdiction unless it
642 expressly dismisses the appeal.

643 Further discussion suggested that at least one participant
644 thought it better to think of this process as a "remand," because
645 a "referral" does not seem to contemplate factfinding in the
646 district court.

647 A member expressed a skeptical view about the value of this
648 process. The hope is for an in terrorem effect that will deter
649 payments by the threat of exposure and the prospect that courts
650 will never approve a payment that is not supported by a compelling
651 reason. But the problem is delay in implementing the judgment; the
652 more elaborate the process for withdrawing an appeal, the greater
653 the delay.

654 This view was countered. "The use of delay as leverage for a
655 payoff is the problem. If we say no payoff without court approval,
656 we do a lot. The bad-faith objector wants delay not for its own
657 sake, but for leverage." A legitimate objector will not be affected
658 by the need for approval of any payment.

659 A different doubt was expressed: the incentive is to get rid
660 of objectors, but will this process simply encourage objectors to
661 pad their bills? The response was that the objector's lawyer does
662 not get paid unless there is a benefit to the class. But the doubt
663 was renewed: that can be met by a stipulation of the objector and
664 counsel that there was a benefit to the class. The response in turn
665 was that this procedure will eliminate the incentive for delay.
666 Bad-faith objectors self-identify before taking an appeal, or after
667 filing the notice of appeal. They do not appear at the hearing on
668 approval, they often do no more than file form objections. And the
669 good-faith objectors articulate their objections in the district
670 court. They appeal for the purpose of defeating what they view as
671 an inadequate settlement, not for the purpose of delay or coercing
672 payment for abandoning their objections.

673 This view was supported by noting that a good-faith objector
674 who participated in the miniconference reported that the business
675 model of bad-faith objectors does not support actual work on an
676 appeal. But why not let the district court be the one that decides
677 whether to approve payment? The court of appeals can grant the
678 motion to dismiss the appeal, and remand to the district court to
679 decide on payment. The district-court ruling can be appealed. This

680 view was supported by noting that once the district court has
681 ruled, "there is something to review."

682 General support for the proposed approach was offered by
683 noting that "rulemaking cannot resolve every problem." But we can
684 accomplish the modest goal of insisting on sunlight, and creating
685 a mechanism for courts to address the issues as promptly as
686 possible.

687 A wish for simplicity was expressed by suggesting that it may
688 be enough to provide in Rule 23(e)(5)(B) that court approval is
689 required to withdraw an objection or an appeal from denial of an
690 objection, and to limit new provisions in Appellate Rule 42 to a
691 direction that any payment for dismissing the appeal be disclosed
692 to the court of appeals. The court of appeals then "does what it
693 does." It may choose to decide the appeal. Or it can simply dismiss
694 the appeal; the case is over. But an objector who wants payment
695 must apply to the district court. The key is disclosure to the
696 court of appeals. Appellate Rule 12.1 and Civil Rule 62.1 already
697 provide the opportunity to seek an indicative ruling if a motion to
698 approve payment is made in the district court while the appeal
699 remains pending. The full set of draft provisions is "too much
700 process."

701 A different vision of simplicity was suggested: the rules
702 should leave it open to the court of appeals to choose between
703 acting itself, referring to the district court, making a limited
704 remand, or adopting whatever approach seems to work best for a
705 particular case.

706 The next question was whether it might be possible to provide
707 some guidance in rule text on the circumstances that justify
708 payment for withdrawing an objection or appeal? Apart from that,
709 should we be concerned that there may be means of compensation that
710 are not obviously "payment"? One possibility may be to accord some
711 form of benefit in collateral litigation — the objector may
712 represent clients who are not in the class, or it might be agreed
713 to acquiesce in an objection made in a different class action.

714 These questions were addressed by the observation that the
715 only familiar demands are for payments to lawyers, or to clients
716 who want more than the judgment gives them. But it is possible to
717 imagine a threat of objections in all future cases, or a promise to
718 withdraw objections in other cases. So the sketch of a possible
719 Appellate Rule 42(c) on p. 102 of the agenda materials refers to
720 "payment or consideration."

721 The discussion concluded by noting the paths to be tested by
722 further drafting. It will be good to achieve as much simplicity as
723 possible. Full disclosure should be required of any payments (or
724 consideration) for withdrawing an objection or appeal from denial

725 of an objection. The district court should be the place for
726 determining whether to approve any payment. Beyond that, this
727 structure can be effective if lawyers for the plaintiff class do
728 their part in resisting requests for payment.

729 Settlement Approval: Judge Dow introduced the draft criteria for
730 approving a class-action settlement by noting that the draft is
731 inspired in part by the approach taken in the ALI Principles of
732 Aggregate Litigation. The ALI approach was shaped by the same
733 concerns that the Subcommittee has encountered. There are as many
734 dialects as there are circuits; each circuit has its own
735 differently articulated list of factors to be applied in
736 determining whether a settlement is "fair, reasonable, and
737 adequate." The draft is an effort to capture the most important
738 procedural and substantive elements that should guide the review
739 and approval process. In its present form, it seeks to capture the
740 most important elements in four provisions that might be viewed as
741 "factors," or instead as the core concerns. The first question is
742 whether this focus will support meaningful improvement in current
743 practices.

744 Professor Marcus supplemented this introduction by identifying
745 two basic questions: Will the draft, or something like it, prove
746 helpful to judges and lawyers? The purpose begins with helping the
747 parties to shape the information they submit in seeking approval.
748 Every circuit now has a list of multiple factors. The draft
749 presented to the Committee last April included a catch-all
750 "whatever else" provision. Discussion then suggested that the
751 provision was not helpful. It was dropped during later drafting
752 efforts, but has found renewed support and is included in the
753 agenda drafts for further discussion. It takes different forms in
754 the two alternative structures. In alternative 1, the court "may
755 disapprove * * * on any ground the court deems pertinent, * * *
756 considering whether." That is less restrictive than alternative 2,
757 which directs that the court "may approve" "only * * * on finding"
758 the four core criteria are met and also that "approval is warranted
759 in light of any other matter that the court deems pertinent." The
760 choice here is whether to suggest the relevance of considerations
761 in addition to the four core showings that are explicitly
762 described, and whether to be more or less restrictive.

763 The second question is related: what prominence should be
764 given to the present rule formula, which was drawn from well-
765 developed case law, looking to whether the settlement is "fair,
766 reasonable, and adequate"? These words support consideration of
767 every factor that has been identified by any circuit. Should the
768 process remain that open?

769 The first comment was that both alternatives are open-ended.
770 A "ground" or "matter" that "the court deems pertinent" is not a
771 legal standard.

772 The next comment was that the second alternative displaces the
773 present "fair, reasonable, and adequate" standard from its present
774 primacy, demoting it to a role as part of the factor that asks
775 whether the relief awarded to the class is fair, reasonable, and
776 adequate, taking into account the costs, risks, probability of
777 success, and delays of trial and appeal. The fair, reasonable, and
778 adequate standard is the over-arching concern. Another member
779 agreed — this is an argument for alternative 1, which allows
780 approval "[only] on finding it is fair, reasonable, and adequate."
781 The brackets would be removed, allowing approval only on making
782 this finding.

783 Alternative 2 is "more focused." It allows approval only on
784 finding that all four factors are satisfied, compared to
785 Alternative 1 that allows a finding that the settlement is fair,
786 reasonable, and adequate, after simply "considering" the four.
787 Alternative 1 is less rigorous.

788 Turning to one of the four core elements, it was asked how a
789 court is to determine whether a settlement "was negotiated at arm's
790 length and was not the product of collusion." Why is that not
791 implicit in finding the settlement is fair, reasonable, and
792 adequate?

793 This question was addressed by observing that a number of
794 circuits distinguish between procedural and substantive fairness.
795 The parties must show that the process was free of collusion. This
796 showing is made by describing the process, or by having a special
797 master or mediator participate and report. Account is taken of how
798 long the negotiations endured, and whether there was actual
799 negotiation.

800 The open-endedness of "considering whether" in Alternative 1
801 provoked the suggestion that, taken literally, it overrides a lot
802 of circuit law. It would allow a court to find a settlement is
803 fair, reasonable, and adequate, even though it was not negotiated
804 at arm's-length and was the product of collusion. But then perhaps
805 the intention is to overrule the various laundry lists of factors
806 found across the circuits?

807 A Subcommittee member responded that the purpose is not to
808 overrule existing circuit factors. In all but two circuits, these
809 factors were developed in the 1970s and 1980s. Any of these factors
810 may, at some time with respect to some proposed settlement, prove
811 relevant. But the purpose of identifying the core concerns is to
812 encourage the court to look closely at the settlement rather than
813 move unthinkingly down a check list of factors, none of them
814 clearly developed by the parties and many of them not relevant to
815 the particular settlement. Part of the purpose is to respond to the
816 increasing cynicism found in public views of class actions. Many
817 people view settlements in consumer-class actions as devices that

818 provide no meaningful value to consumers and provide undeserved
819 awards to class counsel.

820 In a similar vein, it was observed that the purpose of
821 focusing on four core concerns seems to be to simplify and codify
822 the purposes and best elements of present practice. But we should
823 consider whether the "considering whether" formula in alternative
824 1 might be seen as overruling the circuit factors. "Would any
825 circuit think we're changing what it can do"?

826 A response was that the ALI concern was that the lengthy lists
827 of factors distract attention from the central elements. A related
828 concern was that there is a tendency to view the various "factors"
829 as things to be weighed in a balancing process, albeit without any
830 direction as to how any one is to be weighed. It is better to adopt
831 the approach of Alternative 2: the court may approve "only on
832 finding." This will redirect attention to the essential elements of
833 approval.

834 But it was noted that the four subparagraphs attached to both
835 alternative 1 and alternative 2 are conjunctive: the court must
836 consider, or find, all of them. The rule is written not for the
837 experts, who understand this now. It focuses everyone on the key
838 factors in a way that is not always understood.

839 The fifth element, "any other matter" or "any ground" the
840 court deems pertinent, was questioned: what does it add? What is
841 there that could not be read into the four central elements
842 identified in the first four subparagraphs? The response was that
843 "there still will be X factors." The four factors focus on what is
844 important, and focus the parties on what to present to the court,
845 and on what to present in the notice to the class. But the
846 rejoinder asked again: what else is relevant if all four are
847 satisfied — there is adequate representation, not tainted by
848 collusion, adequate relief, and equitable treatment of class
849 members relative to each other? Should it be made clear that the
850 burden is on the objector to show reasons to reject a settlement
851 when all of these elements are present?

852 It was noted that the alternative 2 formulation, "may approve
853 only * * * on finding" the four elements leaves discretion to
854 refuse approval even if all four are found. And it implies that the
855 standard of review should be abuse of discretion. So the court can
856 draw on any factor that has been identified in any circuit that
857 seems relevant to evaluating the settlement. "There are any number
858 of things that cannot be captured in factors." As one example: the
859 settlement is negotiated while the defendant is teetering on the
860 brink of insolvency. By the time of the hearing on objections, the
861 defendant has been restored to a financial position that would
862 support more adequate relief. How do you write a specific factor
863 for that? Still, it was suggested that alternative 1, "considering

whether," provides a more emphatic statement of discretion.

A more particular question was asked: what happens if a lawyer who initially supported a proposed settlement changes position to challenge the proposal? No answer was attempted.

The summary of this discussion began by observing that the really good lawyers the Subcommittee has been meeting in its travels do all these good things now. But not all lawyers do. "These four factors are aimed at the lowest common denominator" of lawyers who bring class actions without much experience or background learning. They are not intended to displace the factors identified in the many appellate opinions that have been written over nearly a half-century of review. The intent instead is to focus attention on the important core. The plan is to displace the process in which parties and court are distracted by routine, uninformative submissions that simply run through the local check-list of factors, some important to the particular case, some not important, and some irrelevant.

All of this pointed toward a synthesis of alternative 1 and alternative 2. "fair, reasonable, and adequate" will be retained as the entry point. The court may approve a settlement only on making the four core findings. And "fair, reasonable, and adequate" will be removed from the third core:

> 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 because: * * *
>
> (C) the relief awarded to the class * * * is ~~fair, reasonable, and~~ adequate, given the costs, risks * * *.

<u>Settlement Classes</u>: Judge Dow introduced this topic by asking whether it would be useful, or perhaps necessary, to adopt a separate provision for settlement classes. The underlying question arises from uncertainty in applying the "predominance" requirement of Rule 23(b)(3) to settlements. The Subcommittee has reached a tentative view that it should table this question, but is not prepared to recommend that course without guidance from the Committee.

The dilemma can be framed by asking what might be gained by adopting an express settlement-class provision, and what are the "unnerving things that might happen" if one were adopted.

The first question was whether settlements have failed because a class could or would not be certified? The answer was that this in fact has happened. And there is a concern that people are deterred from even attempting settlements by the obscurity of the

907 predominance requirement as applied to settlement.

908 The most common illustration of the value of subordinating
909 predominance is choice-of-law concerns. A class that spans several
910 states may present thorny choice-of-law questions, and present the
911 prospect that different laws will be chosen for different groups
912 within the class, forestalling predominance in litigation. These
913 problems can be readily resolved, however, by settlement. At least
914 the Second and Third Circuits have approved settlements despite
915 choice-of-law predominance concerns. Beyond that, a number of
916 lawyers believe that courts are pretty much ignoring the statements
917 in the Amchem opinion that predominance is required in certifying
918 a class for settlement.

919 This comment was amplified by the observation that the role of
920 predominance in settlement classes has generated many objections by
921 "those who take Amchem literally." But courts have developed a
922 gloss on Amchem that takes the fact and value of settlement into
923 account in finding that (b)(3) criteria have been satisfied. Still,
924 the objections come in — often from "serial objectors." Adopting a
925 settlement-class rule would clarify the law, restating where it is
926 in practice today, helping to identify how account should be taken
927 of settlement in determining whether to certify a class. But as for
928 the empirical question, "I do not know how many settlements are
929 disapproved, or not attempted," for want of a clear rule.

930 But, it was asked, why not require predominance? An immediate
931 response was that Amchem would require the laws of 50 states to
932 apply at trial; on settlement, there is no need to worry about that
933 — "everyone gets the same." But it was objected that giving
934 everyone "the same" may not be right if different sets of laws
935 would prescribe differences in the awards. The rejoinder was that
936 choice-of-law questions can be resolved in settlement, perhaps
937 choosing different laws and relief for different subclasses. And if
938 the case comes to be tried, the court may chose a single state's
939 law to govern, or may choose the law of a few states to govern,
940 grouping subclasses around the similarities in the chosen separate
941 laws. So long as the class is given notice of a proposed settlement
942 — everyone gets to see what is proposed and can object — why force
943 it to trial?

944 A further response was that predominance addresses the
945 efficiencies of trial on class claims. It does not address the
946 fairness of settlement. The Court in Amchem recognized that
947 manageability is not a concern on settlement, despite the inclusion
948 of difficulties in managing a class action among the matters
949 pertinent to finding predominance and superiority. The same can be
950 true of predominance.

951 In the same vein, it was noted that in 1993 the Third Circuit
952 said that a class action cannot be certified for settlement unless

953 the same class could be certified for trial. Amchem has superseded
954 that. Amchem led the Committee to stop work on its pre-Amchem
955 proposal to add a settlement-class provision as a new Rule
956 23(b)(4). The current draft (b)(4), however, is different from the
957 1996 version.

958 A Subcommittee member said he was impressed by how little
959 reaction was provoked by the draft of a settlement-class rule.
960 People did not even seem to be worried about the prospect that
961 representations made in promoting a proposed settlement might be
962 used against them if the settlement falls through and a request is
963 then made to certify a class for trial.

964 A different perspective was suggested by the observation that
965 settlement generally is in the interests of the immediate parties.
966 But that does not ensure fairness to absent class members.
967 Settlement does avoid the risks of class adjudication, and that may
968 justify some dilution of the predominance requirement. But does it
969 justify abandoning any shadow of predominance?

970 It was suggested that the evolution that has followed Amchem
971 shows a reduced emphasis on predominance in reviewing proposed
972 class settlements.

973 Beyond that, an alternative approach that incorporates
974 settlement classes into Rule 23(b)(3) itself is also sketched in
975 the agenda materials from p. 130 to p. 132. This approach would
976 allow certification on finding "that the questions of law or fact
977 common to class members, or interests in settlement, predominate *
978 * *." (The parallel structure could be tightened further by looking
979 to "common interests in settlement.")

980 Still another approach was suggested. The role of predominance
981 could be diminished by a rule provision that the court can consider
982 whether settlement obviates problems that would arise at trial.

983 But it also was recognized that the defense bar is concerned
984 that reducing the role of predominance in settlement classes will
985 unleash still more class actions. And on the other side, there is
986 concern that the bargaining position of class representatives will
987 be eroded if they cannot make a plausible threat of certification
988 for trial.

989 It was noted again that the interest in doing anything to add
990 a separate provision for settlement classes diminished steadily as
991 the Subcommittee made the rounds of many outside groups. There was
992 substantial enthusiasm for doing something several years ago,
993 prompting the ALI to address the question in the Principles of
994 Aggregate Litigation. But that has faded.

995 The conclusion was to not go further with the settlement-class

996 proposal.

997 Ascertainability: The question of criteria for the
998 "ascertainability" of class membership has come to the fore
999 recently. The most demanding approach is reflected in a series of
1000 Third Circuit decisions, many of them in consumer actions. The
1001 Seventh Circuit has expressly rejected the Third Circuit approach.
1002 Other circuits come close to one side or the other. This is an
1003 important topic, and it continues to be developed in the lower
1004 courts. There is some prospect that the Supreme Court may address
1005 it soon. And it is difficult to be confident about drafting rule
1006 language that would give effective guidance. The Subcommittee has
1007 put this topic on "hold," keeping it in the current cycle but
1008 without anticipating a recommendation for publication over the next
1009 several months. The Committee approved this approach.

1010 Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee
1011 looked at the use of Rule 68 offers of judgment in an attempt to
1012 moot class actions because of the Seventh Circuit decision in the
1013 Damasco case. Under that approach, an offer of complete relief to
1014 the representative plaintiffs before class certification moots
1015 their individual claims and defeats certification. Plaintiffs
1016 commonly worked around this rule by moving for certification when
1017 they filed, but also by requesting that consideration of the motion
1018 be deferred until the case had progressed to a point that would
1019 support a well-informed certification ruling. The Seventh Circuit
1020 recently overruled this approach. Most circuits now refuse to allow
1021 a defendant to defeat class certification by offers that attempt to
1022 moot the individual claims of any representative plaintiffs who may
1023 appear. More importantly, this question has been argued in the
1024 Supreme Court. The Subcommittee has deferred further work pending
1025 the Court’s decision. The Committee agreed this course is wise.

1026 Separately, it was noted that the Committee is committed to
1027 further study of Rule 68 in response to regularly repeated
1028 suggestions for revision. The timing will depend on the allocation
1029 of available resources between this and other projects that may
1030 seem more pressing.

1031 Cy pres: For some time, the Subcommittee carried forward a proposal
1032 to address cy pres awards. The proposal was based, at least for
1033 purposes of illustration, on the model adopted by the ALI. This
1034 model attempts to achieve the maximum feasible distribution of
1035 settlement funds to class members. Only when it is not feasible to
1036 make further distributions could the court approve distribution of
1037 remaining settlement funds — and even then, the first effort must
1038 be to identify a beneficiary that would use the funds in ways that
1039 would benefit the class.

1040 It seems to be generally agreed that many classes are defined
1041 in terms that make it impracticable to identify every class member

1042 and achieve complete distribution to class members. Some
1043 undistributed residue will remain. The ALI proposal would confine
1044 cy pres awards to those circumstances. That set of issues seems to
1045 fall comfortably within the scope of the Rules Enabling Act. But
1046 these are not the only circumstances that characterize cy pres
1047 awards in present practice. More creative awards are structured,
1048 often in cases involving small injuries to large numbers of
1049 consumers, most of whom cannot be easily identified. Attempting to
1050 address cy pres awards of this sort would present tricky questions
1051 about affecting substantive rights.

1052 Cy pres awards have evolved in practice and have been accepted
1053 in many judgments. Some states have statutes addressing them. Given
1054 the difficulty of knowing how to craft a good rule, the
1055 Subcommittee recommended that further work on these questions be
1056 suspended. The Committee accepted this recommendation.

1057 Issue Classes: Judge Dow introduced the question of issue classes
1058 by noting that the subject was taken up because of a perceived
1059 split between the Fifth Circuit and other circuits on the extent to
1060 which the predominance requirement of Rule 23(b)(3) limits the use
1061 of an issue class to circumstances in which the issue certified for
1062 class treatment predominates over all other issues in the
1063 litigation. More recent Fifth Circuit decisions, however, seem to
1064 belie the initial impression. "Dissonance in the courts has
1065 subsided." There seems little need to undertake work to clarify the
1066 law. And any attempt might well create new complications.

1067 A Subcommittee member said that the Subcommittee has learned
1068 that courts address issue-class questions in case-specific ways.
1069 Difficult questions of appealability would be raised by any
1070 distinctive changes in the issue-class provisions in Rule 23(c)(4)
1071 so as to focus on final decision of a discrete issue without
1072 undertaking to resolve all remaining questions within the framework
1073 of the same action. The problems could be similar to those that
1074 arise after separate-issue trials under Rule 42.

1075 The Committee agreed with the Subcommittee recommendation that
1076 further work on these questions be suspended.

1077 Judge Bates concluded the class-action discussion by stating
1078 that the Committee had done good work. Thanks are due to both the
1079 Subcommittee and the Committee.

1080 *Requester Pays for Discovery*

1081 For some time the Committee and the Discovery Subcommittee
1082 have deliberated the questions raised by periodic suggestions that
1083 the discovery rules should be revised to transfer to the requesting
1084 party more of the costs incurred in responding to discovery
1085 requests. Many different approaches could be taken. Many

1086 suggestions cluster around a middle ground that would leave the
1087 costs of responding where they lie as to some "core" discovery, but
1088 require the requesting party to pay — or perhaps to justify not
1089 paying — for the costs of responding to requests outside the core.
1090 Those suggestions present obvious challenges in the task of
1091 defining core discovery in terms that apply across different
1092 subjects of litigation.

1093 Beyond these questions, the assumption that the responding
1094 party bears the costs of responding is well-entrenched. Hundreds of
1095 comments addressed to the package of discovery amendments that is
1096 pending in Congress emphasize the role of discovery in supporting
1097 enforcement of public policies that provide important protection
1098 beyond the disposition of the particular action. Great difficulty
1099 would be encountered in attempting to devise a wise rebalancing of
1100 the competing interests.

1101 Additional reasons for diffidence about requester-pays
1102 proposals arise from the pending discovery amendments. They are
1103 designed in many ways to reduce the costs of discovery. The renewed
1104 emphasis on proportionality, coupled with the strong encouragement
1105 of early and active case management, and perhaps supported by the
1106 encouragement of party cooperation, may achieve substantial
1107 reductions in the cost and delay that occasionally result from
1108 searching discovery. Beyond that, if the amendments take effect the
1109 Rule 26(c) protective-order provisions will be modified to
1110 recognize expressly the court's authority to allocate the costs of
1111 responding in a particular case. This provision is not designed to
1112 inaugurate any general practice of shifting response costs, but it
1113 can be used to address specific needs in particular cases.

1114 In all, it was agreed that further work on requester-pays
1115 proposals would be premature. One or another aspect of discovery is
1116 usually on, or close to, the active agenda. Requester-pays issues
1117 will remain in the background, to be taken up again when it may
1118 seem appropriate.

1119 *Rule 62: Stays of Execution*

1120 Rule 62 came on for study in response to separate suggestions
1121 made to the Civil Rules Committee and to the Appellate Rules
1122 Committee. The work has been pursued through a joint subcommittee
1123 chaired by Judge Matheson. The materials in the agenda book were
1124 also on the agenda of the Appellate Rules Committee, which
1125 considered them last week.

1126 Judge Matheson opened the Subcommittee Report by reminding the
1127 Committee that these questions were discussed in a preliminary way
1128 last April. The Appellate Rules Committee also took up the topic
1129 then, and both Committees agreed that it makes sense to carry the
1130 work forward. At the same time, no one identified any actual

1131 difficulties that have emerged in practice under the current rule,
1132 apart from the specific questions that prompted the project from
1133 the beginning. The Subcommittee worked through the summer and fall
1134 to simplify and improve the draft revision. The current version
1135 appears in the agenda materials at p. 342.

1136 The draft reorganizes the allocation of subjects among present
1137 subdivisions (a) through (d), and changes the provisions for
1138 judgments that do not involve an injunction, an accounting in an
1139 action for patent infringement, or a receivership.

1140 Draft Rule 62(a) addresses three kinds of stays: (1) the
1141 automatic stay; (2) a stay obtained by posting a bond; and (3) a
1142 stay ordered by the court. These provisions address all forms of
1143 judgment, whether the relief be an award of money or some other
1144 form of relief such as foreclosing a lien or a decree quieting
1145 title.

1146 Several changes are made over the current rule.

1147 The automatic stay is extended from 14 days to 30 days. This
1148 eliminates the "gap" in present Rule 62(b), which recognizes the
1149 court's authority to order a stay "pending disposition" of post-
1150 judgment motions that may be made up to 28 days after entry of
1151 judgment. This revision addresses one of the two questions that
1152 prompted the Committees to take up Rule 62. The draft also
1153 expressly recognizes the court's authority to "order otherwise,"
1154 denying or terminating an automatic stay. (In response to a later
1155 question, it was explained that the stay was extended to 30 days to
1156 allow an orderly opportunity to begin to prepare for a further stay
1157 when expiration of the 28-day period shows there will be no post-
1158 judgment motion and while a brief period remains before expiration
1159 of the 30-day appeal time that governs most civil actions.)

1160 The draft revises the supersedeas bond provisions of present
1161 Rule 62(d) in various respects. It allows the bond to be posted at
1162 any time after judgment is entered, rather than "upon or after
1163 filing the notice of appeal." It allows "other security," not only
1164 a bond. These provisions address the questions that prompted the
1165 Appellate Rules Committee to study Rule 62 by enabling a party to
1166 post a single bond or other security that runs from entry of
1167 judgment through completion of any appeal. It also expressly
1168 recognizes the opportunity to rely on security other than a bond —
1169 one example might be a letter of credit, or establishment of an
1170 escrow fund.

1171 Draft Rule 62(a)(3) allows the court to order a stay at any
1172 time. This authority could, for example, be used to substitute a
1173 stay with security for the automatic stay.

1174 Draft Rule 62(b) authorizes a court, for good cause, to refuse

1175 a stay sought by posting security under draft 62(a)(2), or to
1176 dissolve or modify a stay. This is new.

1177 Draft Rule 62(c), also new, authorizes the court to set
1178 appropriate terms for security, or to deny security, both on
1179 entering a stay and on refusing or dissolving a stay. One example
1180 could be an order denying a stay only on condition that the
1181 judgment creditor post security to protect the judgment debtor
1182 against the injury caused by execution in case the judgment is
1183 reversed on appeal.

1184 Proposed Rule 62(d) does little more than consolidate the
1185 provisions in present subdivisions (a) and (c) for injunctions,
1186 receiverships, and accountings in actions for patent infringement.
1187 It does bring into rule text the complete array of actions that
1188 support appeal from an interlocutory order with respect to an
1189 injunction.

1190 Some attention was paid to the possibility of revising present
1191 subdivisions (e) and (f), but it was decided that no changes are
1192 needed. Subdivisions (g) and (h) were addressed in extensive
1193 memoranda prepared by Professor Struve as Reporter for the
1194 Appellate Rules Committee, but no action has been recommended as to
1195 them.

1196 The discussion by the Appellate Rules Committee led to
1197 agreement on extending the automatic stay to 30 days, closing the
1198 gap; to supporting the opportunity to post a single bond; and to
1199 recognizing alternative forms of security.

1200 The practitioner members of the Appellate Rules Committee,
1201 however, expressed concern about the features of the draft that
1202 would authorize the court to deny a stay even when the judgment
1203 debtor offers adequate security in the form of a bond or another
1204 form. They believe that the present rule recognizes a nearly
1205 absolute right to a stay on posting adequate security, and that
1206 allowing a court to deny a stay, even for "good cause," would be a
1207 dangerous departure. This question must be taken seriously.

1208 This introduction was followed by a reminder that there seems
1209 to be general agreement on the answers to the questions that
1210 launched this work. The automatic stay should be extended to 30
1211 days, closing the potential gap between its expiration on the 14th
1212 day and the time when the court is authorized to order a stay
1213 pending disposition of a motion that may not be made until 28 days
1214 after judgment is entered. A judgment debtor should be able to post
1215 security in a form other than a bond, and should be allowed to post
1216 a single security that covers both post-judgment proceedings in the
1217 district court and all proceedings on appeal.

1218 The questions that go beyond the initial concerns arose in a

1219 familiar way. Studying Rule 62 suggested ways in which it might be
1220 made more flexible, for the most part by provisions that would
1221 expressly recognize steps a court might well be prompted to take to
1222 protect the judgment or the parties even without explicit rule
1223 provisions. This approach often leads to the common dilemma: many
1224 ideas look good in the abstract. But there may be unforeseen
1225 problems that show both abstract and practical defects, and further
1226 difficulties may arise from the attempt to translate even good
1227 ideas into specific rule language. The wisdom of restraining
1228 ambition is underscored by the responses in the Standing Committee
1229 and both advisory committees that there have been no general
1230 complaints about Rule 62 in practice.

1231 Turning more pointedly to the concerns raised in the Appellate
1232 Rules Committee, the Subcommittee discussed repeatedly, and in
1233 depth, the question whether there should be a nearly absolute right
1234 to a stay on posting adequate security. There does seem to be a
1235 general belief in this right. And it might be seen as an integral
1236 part of the system that assures one appeal as a matter of right
1237 from a final judgment. The purpose of appeal is to provide an
1238 opportunity for reversal, even if the standards of review narrow
1239 the opportunity with respect to matters of fact or discretion.

1240 Counter considerations persuaded the Subcommittee to recognize
1241 authority to deny a stay. There may be cases in which the district
1242 court can accurately predict that there is little prospect of
1243 reversal, while also recognizing the risk of injuries that cannot
1244 be compensated even by assurance that the amount of a money
1245 judgment can be collected after affirmance. The judgment creditor
1246 may have immediate needs for money that cannot be addressed by
1247 collection of money after the delay of an appeal. For example, it
1248 may be possible to revive a damaged business by immediate action,
1249 while it may fail irretrievably pending appeal. A judgment for some
1250 other form of relief may pose comparable problems. A decree
1251 quieting title, for example, may open an opportunity for an
1252 immediate transaction that will be lost by delay. The "good cause"
1253 standard was thought to be sufficient protection of the judgment
1254 debtor’s interests, particularly when coupled with the court’s
1255 further authority to require security for the judgment debtor as a
1256 condition of denying a stay.

1257 Discussion began in two directions. One question was whether
1258 there truly is a right to a stay on posting security. The other
1259 went in the other direction: why should the rule allow the court to
1260 order a stay without any security, as the draft clearly
1261 contemplates? Is the judgment itself not assurance enough of the
1262 judgment creditor’s probable right to require that the judgment be
1263 protected against defeat by delay — with the potential for
1264 concealing or dissipating assets — by requiring security?

1265 The question of absolute right turned into discussion of

1266 present Rule 62(d). It says that an appellant "may obtain a stay by
1267 supersedeas bond." Does "may obtain" imply discretion, so that the
1268 court may refuse the stay even though the bond is otherwise
1269 satisfactory in its amount, terms, and guarantor? That possible
1270 reading may be thwarted by the reading of parallel language in Rule
1271 23(b), which begins: "A class action may be maintained if Rule
1272 23(a) is satisfied and if" the requirements of paragraphs (1),(2),
1273 or (3) are satisfied. In Shady Grove Orthopedic Associates, P.A. v.
1274 Allstate Ins. Co., 130 S.Ct. 1431, 1437, 1438 (2010), the Court
1275 read "may be maintained" to entitle the plaintiff to maintain a
1276 class action on satisfying Rule 23(a) and one paragraph of Rule
1277 23(b). Rule 23 says not that the court may permit a class action,
1278 but that the class action may be maintained. "The Federal Rules
1279 regularly use 'may' to confer categorical permission." "The
1280 discretion suggested by Rule 23's 'may' is discretion residing in
1281 the plaintiff: He may bring his claim in a class action if he
1282 wishes." Parallel interpretation of present Rule 62(d) would read
1283 it to mean that all discretion resides in the judgment debtor, who
1284 has categorical permission to obtain a stay on posting suitable
1285 security.

1286 It was noted that Appellate Rule 8(a)(1) directs that a party
1287 must ordinarily move first in the district court for a stay pending
1288 appeal or approval of a supersedeas bond. But Rule 8(a)(2)
1289 authorizes a motion in the court of appeals if it is impracticable
1290 to move first in the district court, or if the district court
1291 denied the motion or failed to afford the relief requested. Rule
1292 8(a)(2)(E) says blandly that the court of appeals "may condition
1293 relief on a party's filing a bond or other appropriate security."
1294 This locution clearly recognizes appellate discretion to deny any
1295 stay — as seems almost inevitable if application has been made to
1296 the district court and denied — and to grant a stay without
1297 security.

1298 It was suggested that district courts have authority now to
1299 order a stay without any security, but that it may be unwise to
1300 emphasize that authority by explicit rule text.

1301 A tentative solution was suggested: the draft should be
1302 shortened by deleting subdivisions (b) and (c). Subdivision (b)
1303 reads: "The court may, for good cause, refuse a stay under Rule
1304 62(a)(2) or dissolve a stay or modify its terms." Subdivision (c)
1305 reads: "The court may, on entering a stay or on refusing or
1306 dissolving a stay, require and set appropriate terms for security
1307 or deny security." The final words of (c) would be transferred to
1308 paragraph (a)(3): "The court may at any time order a stay that
1309 remains in effect until a time designated by the court[, which may
1310 be as late as issuance of the mandate on appeal,] <u>and set</u>
1311 <u>appropriate terms for security or deny security</u>.

1312 A separate issue was raised. The draft rule does not describe

1313 the appeal bond as a "supersedeas" bond. It was agreed that it
1314 would be better to move away from that antique-sounding word. But
1315 "supersedeas" appears in Appellate Rule 8(a)(1)(B), most likely
1316 because it directs that application for a stay be made first to the
1317 district court. (Appellate Rule 8(a)(2)(E) is simpler — it refers
1318 only to conditioning a stay on "a bond or other appropriate
1319 security.") The Bankruptcy Rules also refer to a supersedeas bond.
1320 It would be good to strike the word from each set of rules.

1321 Discussion concluded with the suggestion that the proposed
1322 rule should be simplified along the lines indicated above. The
1323 practicing lawyers on the Appellate Rules Committee believe there
1324 is a nearly absolute right to a stay on posting an adequate bond or
1325 other security. No one is pressing for revision. If the rule is
1326 amended to authorize the court to deny a stay by posting bond, even
1327 if the court must find good cause to deny the stay, there will be
1328 an increase in arguments seeking immediate execution. And it will
1329 be difficult to implement the good-cause concept. Imagine one
1330 simple argument: The judgment creditor is 85 years old and wants
1331 the chance to enjoy the fruits of judgment in this life time.

1332 Judge Matheson agreed that the Subcommittee will reconsider
1333 these problems in light of the discussion here and in the Appellate
1334 Rules Committee.

1335 *e-Rules*

1336 The Committee was reminded of the recent history of work on
1337 the rules for electronic filing, electronic service, and use of the
1338 Notice of Electronic Filing as a certificate of service. Last
1339 April, this Committee voted to recommend publication of a set of
1340 rules amendments addressing these topics. The Criminal Rules
1341 Committee, however, decided at the same time that the time has come
1342 to write independent provisions for these topics into Criminal Rule
1343 49. Rule 49 currently incorporates the practice of the civil rules
1344 for filing and service. Their project is designed to avoid
1345 cumbersome cross-references between different sets of rules, and
1346 also to determine whether differences in the circumstances of
1347 criminal prosecutions justify differences in the filing and service
1348 provisions. Brief discussions led to modifications in the Civil
1349 Rules provisions that were presented to the Standing Committee for
1350 discussion. The revised provisions are included in the agenda
1351 materials for this meeting. This Committee did not recommend
1352 publication at the May Standing Committee meeting. The Criminal
1353 Rules Committee continues to work on its new Rule 49. A conference
1354 call of the Criminal Rules Subcommittee will be held on November
1355 13; representatives of this Committee will participate.

1356 The goal of this work is to work toward common proposals on
1357 all topics that merit uniform treatment across the different sets
1358 of rules. That goal leaves the way open to different treatment of

1359 topics that warrant different treatment in light of differences in
1360 the circumstances that confront the different sets of rules. The
1361 parallel proposals for the Appellate Rules already include some
1362 variations that integrate these subjects with the structure of the
1363 Appellate Rules. So it may be that the Criminal Rules Committee
1364 will find that criminal prosecutions deserve different treatment of
1365 some aspects of electronic filing and service.

1366 One of the topics that has been discussed is access to
1367 electronic filing and service by pro se litigants. The Civil Rules
1368 proposals reflect a belief that a pro se litigant, the court, and
1369 all other parties may benefit from allowing electronic filing and
1370 service by a pro se litigant. The question is how to manage this
1371 practice. It may be that uniform provisions are suitable for all
1372 sets of rules. It may be that different approaches are desirable.
1373 These questions will be addressed as all committees work toward
1374 final proposals for publication. One committee member noted that
1375 her court has had difficulty with local rules that track each other
1376 for pro se litigants in criminal and civil proceedings — the
1377 problems really are different.

1378 Once decisions are reached as to the appropriate level of
1379 substantive uniformity, style questions will remain. It will be
1380 important to work out style questions with the help of the style
1381 consultants so as to avoid any occasion for asking the Standing
1382 Committee to resolve any differences.

1383 *Pilot Projects*

1384 Judge Bates opened the discussion of pilot projects by asking
1385 Judge Campbell, who has chaired the pilot projects committee, to
1386 report on the committee's work.

1387 Judge Campbell began by noting that many people have worked in
1388 the effort to advance consideration of pilot project proposals.

1389 The interest in pilot projects was stimulated by experience in
1390 attempting to translate the lessons offered at the 2010 Conference
1391 into specific rules proposals. There are limits to what can be
1392 accomplished by rules. If a page of history is worth a volume of
1393 logic, the purpose of pilot projects may be to create pages of
1394 history by actual experience in testing new approaches. One result
1395 may be rules amendments. But pilot projects may provide valuable
1396 lessons that are implemented in other ways. The Committee on Court
1397 Administration and Case Management may find valuable practices that
1398 it can foster through its work. The Judicial Conference may gain
1399 similar benefits. It may be that approaches that have been tested
1400 and found valuable will be adopted by emulation without the need
1401 for formal action by any committee.

1402 For the rules committees, the immediate plan is to prepare

1403 concrete proposals for possible pilot projects that can be
1404 discussed with the Committee on Court Administration and Case
1405 Management and with the Standing Committee this coming spring. The
1406 goal will be to identify one or more projects that could be
1407 implemented late in 2016.

1408 One informal pilot project, the protocols for initial
1409 discovery in individual employment actions, is already being
1410 studied. Emery Lee at the FJC has been tracking experience.

1411 Emery Lee reported that the first thing he learned was that
1412 the employment protocols are being used by more judges than he had
1413 thought. He has identified 70 judges that are using them. Drawing
1414 on cases that have concluded since 2011, he identified some 500
1415 terminated cases. He drew a random sample of cases that did not use
1416 the protocols during the same period. Overall, he studied data on
1417 1,150 cases.

1418 The positive lesson is that there are fewer discovery motions
1419 in protocol cases: motions were made in 12% of these cases, as
1420 compared to 21% of the comparison cases. The average number of
1421 motions made was half as many in the protocol cases. "That is a big
1422 number." The number suggests that the protocols made an important
1423 difference. But it is not possible to draw firm conclusions because
1424 the judges who choose to adopt the protocols may be judges who are
1425 actively engaged in managing discovery in any event.

1426 The negative lesson is that the time to disposition appears to
1427 be essentially identical in protocol cases as in non-protocol
1428 cases. The essential identity held true for the time taken to reach
1429 disposition by different methods — by motion to dismiss or by
1430 summary judgment. The time to settlement, however, appears to be
1431 different. The identity of times to disposition is puzzling.

1432 The first comment was made by a judge who requires a request
1433 for a conference before a motion can be made. That may be happening
1434 in the employment cases — the same number of discovery disputes
1435 arise, but many of them are resolved at the pre-motion conference,
1436 reducing the number of motions.

1437 A second comment was that the times to disposition may track
1438 closely if courts set the same discovery cut-off time in protocol
1439 cases as in non-protocol cases. The timing of dispositive motions
1440 tends to feed off the discovery cut-off.

1441 Another judge offered a guess that protocol judges are likely
1442 to be "more progressive — to require a conference before a
1443 discovery motion can be made." But he uses the protocols, and
1444 thinks he is seeing fewer discovery disputes. "They don’t fight
1445 over things they used to fight over because of automatic
1446 disclosures." As one example: confronted with a request to identify

1447 the person who made the decision to terminate a plaintiff,
1448 defendants used to argue that the information was protected by work
1449 product. It is not protected, but the argument had to be resolved.
1450 Now the information is automatically disclosed and there is no
1451 dispute.

1452 Yet another judge said that lawyers use the protocols and
1453 "play nicely together." The similarity in times to disposition is
1454 probably because the case schedules are not changed.

1455 Discussion turned to pilot projects in general. Various pilot
1456 projects aimed at reducing cost and delay have been identified in
1457 eleven states. Before that, the Civil Justice Reform Act stimulated
1458 a massive set of local experiments. The Conference of Chief
1459 Justices is working on a Civil Justice Improvement Project. The
1460 Institute for the Advancement of the American Legal System has
1461 studied several pilot projects, and recommended principles to
1462 improve civil litigation. The National Center for State Courts has
1463 evaluated some projects. Projects are upcoming in Texas and
1464 Minnesota. New York State is developing a program that is aimed at
1465 trading early trial dates for curtailed pretrial procedure.

1466 One possible pilot project that has drawn attention is the one
1467 that would involve some form of expanded initial discovery, perhaps
1468 moving beyond the form embodied by Civil Rule 26(a)(1) between 1993
1469 and 2000 to a model drawn from the Arizona rule.

1470 Other possibilities focus on assigning cases to different
1471 tracks that embody different levels of pretrial procedure, as many
1472 of the CJRA plans attempted. One problem that has confronted these
1473 programs has been identification of criteria for assigning cases to
1474 the different tracks. When dollar limits are set, lawyers tend to
1475 plead around them. Other criteria become difficult to manage.

1476 A quite different approach would forgo formal experiments with
1477 new procedures to focus on training. The RAND study of the CJRA
1478 experiments confirmed that time to disposition can be reduced by a
1479 combination that includes early judicial case management, shorter
1480 discovery cut-offs, and early setting of a firm trial date. This
1481 learning could be demonstrated by a quasi-pilot project that trains
1482 judges in a district, gathers statistics, measures the progress of
1483 judges in reducing times to disposition, and seeks to persuade
1484 other judges of the value of these practices. Emery Lee noted that
1485 gathering information on individual judge performance can be
1486 sensitive. But the RAND study shows that there is real value. We
1487 know it is there.

1488 A Committee member noted that he does a lot of arbitrations as
1489 an arbitrator, usually as a neutral member. "There is a convergence
1490 of what happens in arbitration with civil litigation." In
1491 arbitration, you get only the discovery the arbitrator orders. So

1492 a lawyer may request 10 depositions; the order is to come back
1493 after talking with the client about the cost. The next request is
1494 for one deposition. "People sign up for this." "At the Rule 16
1495 conference you quickly learn what the case is about." The idea of
1496 training judges is terrific. But we have to be able to distinguish
1497 cases for tracking purposes — small cases have to be dealt with
1498 differently. And they must be identified early. Tracking can work.
1499 Arbitration hearing dates tend to be quite firm because they must
1500 coordinate the schedules of 8, 9, 10 different people — a missed
1501 date may push the next hearing back by half a year.

1502 A judge noted that before he became a judge he was a member of
1503 the CJRA committee for his district. "We're still doing tracking."
1504 But "I can't say whether it's good or bad." Lawyers are required to
1505 address tracking in their Rule 26(f) conference. Then they discuss
1506 it with the judge. There are five tracks: expedited, standard,
1507 complex, mass tort, and administrative.

1508 Another judge reported that "tracking works." For example, he
1509 reduces the time for discovery in FDCA cases and reduces the number
1510 of discovery events.

1511 The same judge then asked how does the Arizona initial
1512 disclosure of legal theories relate to practice on motions to
1513 dismiss for failure to state a claim? Judge Campbell suggested that
1514 it does not seem to have made a significant change.

1515 A broader perspective was suggested. The RAND study of CJRA
1516 experience was expensive. We should focus on what we can try to do,
1517 and on what resources are available. Comparing pilot projects in
1518 some districts with others can be interesting, but "we do not have
1519 a lot of resources for data-driven projects." Pilot projects,
1520 however, "can be about norm changing." None of the suggested
1521 projects embodies an idea that is strong enough to be adopted
1522 without testing in a national rule that binds all 94 districts.
1523 Instead, we can find 5 or 10 districts to implement known good
1524 ideas. The hope will be that they will like the experience, carry
1525 on with it, and perhaps encourage other districts to emulate their
1526 experience. A similar comment suggested that it may be more
1527 effective to develop ideas, label them as best practices or
1528 innovations, and then draw attention to successful adoptions. But
1529 another judge expressed doubt whether "it catches on that way among
1530 judges." A different judge, however, thought that judges will be
1531 willing to adopt a practice when they become convinced that it will
1532 help move cases effectively. The question "is how to get people off
1533 the mark." A more specific suggestion was that "we can convince
1534 people to have a pre-motion telephone conference."

1535 Federal Judicial Center training of all judges may be another
1536 means of fostering ideas that have proved out in one or a few
1537 districts.

1538 A judge suggested that the idea of pilots is to test ideas,
1539 such as initial disclosure. Initial disclosure can be tested to see
1540 how it affects the number of motions, the time to disposition, and
1541 other variables. The Committee on Court Administration and Case
1542 Management will meet to discuss these same pilot-project ideas in
1543 December. They support work on this. It was agreed that involving
1544 "CACM" is essential. If they identify districts that have long
1545 times to disposition, they can help to focus enhanced training
1546 there. And it may be possible to measure the results.

1547 A suggestion from an absent member was relayed: "Why are we
1548 thinking of small cases"? We need fact pleading, short discovery,
1549 and firm trial dates in all cases. "Do we need two rounds of
1550 pleading in every case"? Unlimited discovery? State courts working
1551 along these lines are achieving cheaper, faster resolutions. "We
1552 should be driving toward pretty radical rule change."

1553 Another judge noted that it is difficult to measure
1554 achievement of the "just" aspiration expressed in Rule 1. But it is
1555 possible to measure satisfaction of the parties, and that may be a
1556 good thing to study.

1557 The initial disclosure proposal came on for more detailed
1558 discussion. This model aims at "robust, but not aggressive"
1559 disclosure. It works from the Arizona model, but reduces the level
1560 of required disclosures in several dimensions.

1561 The first question asked why the model requires only
1562 identification of categories of relevant documents, rather than
1563 actual production. The Arizona rule requires actual production
1564 unless the documents are voluminous. Arizona lawyers report that
1565 the rule operates as a presumption for production of particular
1566 documents. The response was that the model reflects concern that
1567 too much burden will be imposed by requiring actual production at
1568 the outset of an action, particularly if that were added to the
1569 obligation to identify witnesses, the fact basis for claims and
1570 defenses, and legal theory. To be sure, not much is accomplished by
1571 disclosing that relevant information can be found in such
1572 categories as "personnel files," "R & D files," or the like. But
1573 the parties can figure out where to start discovery by other means.
1574 Still, this question is open to further consideration if this model
1575 moves toward testing in a pilot project.

1576 Initial disclosure was viewed from an expanded perspective.
1577 The bar was not ready for the 1993 rule that required disclosure of
1578 information unfavorable to the disclosing party. "The Arizona
1579 experience may not convince" federal judges in 49 other states. It
1580 would be difficult to move directly to adopting a rule that
1581 embodies the Arizona practice. But if it works in 5 or 10 pilot
1582 districts, there could be support for adopting a national practice.

1583 A member reported work on a CJRA committee that adopted an
1584 initial disclosure rule. "It failed. Lawyers weren't ready." But
1585 the "pilot project" label may not be effective in selling a
1586 program. We want to test ideas to see whether they work. We need
1587 something that facilitates culture change. Seeing that something
1588 actually works can do a lot.

1589 A truly pointed question was asked: (a)(2) and (a)(2)(A) of
1590 the model require disclosuring:

1591 (2) whether or not the disclosing party intends to use
1592 them in presenting its claims or defenses:

1593 (A) the names and addresses of all persons whom the
1594 party believes may have knowledge or information
1595 relevant to the events, transactions, or
1596 occurrences that gave rise to the action * * *.

1597 Just what is intended? The purpose is to require disclosure of
1598 information unfavorable to the disclosing party — it is enough that
1599 the information is relevant to the events, etc.

1600 The alternative of judge training programs came back for
1601 expanded discussion with the question whether it is a fool's
1602 errand. A judge responded that there are some judges who will
1603 resist training. But overall, training can do more than can be done
1604 by rules. Still, it would be a mistake to adopt a pilot that forces
1605 all judges into training. Another judge said that newer judges are
1606 particularly likely to want to take training in subjects they do
1607 not know well. But forcing it will not work. Still another judge
1608 agreed that new judges are more amenable to this sort of training.

1609 "Baby judges school" also was noted, but it was suggested that
1610 new judges are still so new at this point that it cannot do the job
1611 of more focused and advanced programs. And in any event, "I'm not
1612 sure the problem is newer judges." However that may be, the
1613 training has to be meaningful. It will not work just to tell us
1614 judges that early case management is important. "Tell me how to
1615 make it happen."

1616 A similar perspective was offered. "The important thing is to
1617 move from the abstract to the concrete." "Here's what actually
1618 works." A phone call on a 3-page statement of a motion to dismiss
1619 leads to an amended complaint. If the motion is renewed, whatever
1620 is dismissed is with prejudice. The ideas must be packaged in a way
1621 that makes it easier for the judge to do it.

1622 So it was noted that "we learn more in gatherings of judges
1623 where we talk together." Mid-career judges help newer judges in
1624 informal exchanges that often are more useful than formal training
1625 programs. So one promising approach may be to go to the districts

1626 to get the local judges talking among themselves about topics they
1627 would not "fly to D.C. to learn about."

1628 Other questions were raised about pilot projects. "We know a
1629 lot about what works." A pilot project will take 3 or 4 years in
1630 practice. Then it will have to be evaluated. And the result may be
1631 a simple message that it works better with more judge involvement.

1632 One note of frustration was expressed. In many districts the
1633 district judges refer all pretrial matters to magistrate judges,
1634 but do not set trial dates. The magistrate judge can move cases,
1635 but the district judge has to be involved.

1636 It was noted that sometimes a pilot project will not be able
1637 to enlist every judge in a district. It may be necessary to look
1638 for judges. The Administrative Office can tell a district whether
1639 it is moving faster or slower than the national average. "It's a
1640 question of putting the resources in the right place."

1641 A final suggestion was that it could be useful to get on the
1642 agenda of the Chief District Judges conference.

1643 *New Docket Items*

1644 **15-CV-C**

1645 This suggestion protests the overuse of "objection as to form"
1646 during oral depositions. The proposed remedy is to create a
1647 Committee Note "indicating that it is improper to merely object to
1648 'form' without providing more precise information as to how the
1649 question asked is 'defective as to form' (e.g., compound, leading,
1650 assumes facts not in evidence, etc.)."

1651 It is well established that a Committee Note can be written
1652 only as part of the process of adopting or amending a rule. Rule
1653 30(c)(2) could be amended to say something like this: "An objection
1654 must be stated in a nonargumentative and nonsuggestive manner <u>that</u>
1655 <u>reasonably explains the basis of the objection</u>." But the Committee
1656 concluded that any revisions of the rule text are unlikely to
1657 change behavior for the better, and might easily create more
1658 problems than would be solved.

1659 This suggestion was removed from the docket.

1660 **15-CV-E**

1661 This suggestion addresses the time to file a responsive
1662 pleading when a Rule 12(b)(6) motion to dismiss addresses only part
1663 of a complaint or when the motion is converted to a motion for
1664 summary judgment. The concern is that some courts rule that the
1665 time to respond is suspended by Rule 12(a)(4) only as to the parts

1666 of the complaint challenged by the motion; an answer must be filed
1667 as to the remainder of the complaint. The same problem can persist
1668 if the motion to dismiss is converted to a motion for summary
1669 judgment.

1670 It is urged that it is better to suspend the time to respond
1671 as to the entire complaint. This practice avoids duplicative
1672 pleadings and confusion over the proper scope of discovery. Many
1673 cases support it.

1674 Discussion revealed that even though many cases support the
1675 suggested approach, not all judges follow it. One Committee member
1676 reported that some judges in his home district require a response
1677 to the parts of a pleading not addressed by the motion, even though
1678 the time to respond is suspended as to the parts addressed by the
1679 motion. There is some reason for concern.

1680 Despite these possible concerns, the Committee concluded that
1681 there is not yet evidence of a problem so general as to warrant
1682 amending the rules. This suggestion will be removed from the
1683 docket, although without any purpose to suggest that it should not
1684 be considered further if a general problem is shown.

1685 **15-CV-X**

1686 This suggestion raises two or three issues.

1687 One suggestion is that Rule 45 should be revised to extend the
1688 reach of trial subpoenas so as "to force a representative of a non-
1689 resident corporate defendant to appear at trial in the court that
1690 has jurisdiction over the parties and the case." This question was
1691 thoroughly explored in working through the recent amendments of
1692 Rule 45. A proposal similar to this one was published for comment,
1693 albeit without any recommendation that it be adopted. No sufficient
1694 reasons are offered to justify reexamination now.

1695 A second suggestion would adopt the procedure of Rule 30(b)(6)
1696 for trial subpoenas. A trial subpoena could name an entity as
1697 witness and direct the entity to produce one or more real persons
1698 to testify for the entity. Discussion noted that Rule 30(b)(6)
1699 itself has been examined twice in the recent past. Each time the
1700 Committee found problems in practice, but concluded that the
1701 problems were not sufficiently pervasive to justify amending the
1702 rule. It was concluded that however well Rule 30(b)(6) works for
1703 discovery, extending it to trial would generate additional problems
1704 that could become serious.

1705 The suggestion also might be read to urge that a nonparty
1706 entity be required to produce witnesses to testify at a deposition
1707 in the district where an action is pending.

1708 The Committee concluded that this set of suggestions should be
1709 removed from the docket.

1710 **15-CV-EE**

1711 This submission offers four discrete suggestions, all of which
1712 touch on other sets of rules in addition to the Civil Rules.

1713 The first suggestion is to amend Rule 5.2(a)(1). The rule now
1714 permits disclosure in a filing of the last four digits of the
1715 social-security number and taxpayer-identification number. The
1716 suggestion is that no part of these numbers be disclosed. The
1717 reason is that the method of generating social security numbers
1718 relies on a well-known formula that, together with additional
1719 information about a person that is often readily available, can be
1720 used to reconstruct the full number. This phenomenon was considered
1721 by the joint subcommittee that drafted Rule 5.2 and the parallel
1722 Appellate, Bankruptcy, and Criminal Rules. The decision to allow
1723 filing the last four digits was made because this information was
1724 thought important for the Bankruptcy Rules. A preliminary inquiry
1725 suggests that this information may remain important for bankruptcy
1726 purposes. This suggestion will be carried forward for consultation
1727 with the other advisory committees.

1728 The second suggestion is that any affidavit made to support a
1729 motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed
1730 under seal and reviewed ex parte. The court could order disclosure
1731 to another party for good cause and under a protective order, or
1732 permit unsealing in appropriately redacted form. The concern seems
1733 to be to protect privacy interests. Again, the other advisory
1734 committees are involved. Brief discussion suggested that filing
1735 under seal is not a general practice now. One judge says that he
1736 does not order sealing because it imposes costly burdens on the
1737 court. Another participant suggested that i.f.p. disclosures
1738 generally invade privacy only to the extent of disclosing a lack of
1739 financial resources, a state that could be inferred from a grant of
1740 in forma pauperis permission in any event. This suggestion too will
1741 be carried forward for consultation with other advisory committees.

1742 The third suggestion is for a new Rule 7.2. It is modeled on
1743 a local rule for the Eastern and Southern Districts of New York. It
1744 would address citation by counsel of cases or other authorities
1745 "that are unpublished or reported exclusively on computerized data
1746 bases." Counsel who cites such authority would be required to
1747 provide copies to a pro se litigant. In addition, on request,
1748 counsel would be required to provide copies of such cases or
1749 authorities that are cited by the court if they were not previously
1750 cited by counsel. Discussion began by asking whether other courts
1751 have local rules similar to the E.D. & S.D.N.Y. rule; no one had
1752 information to respond. A judge noted that he makes copies
1753 available when he cites unpublished authority. A lawyer suggested

1754 that Assistant United States Attorneys seem to do this in some
1755 districts. It was suggested that some way might be found to
1756 encourage this as a best practice. A note of this suggestion will
1757 be sent to the head of the FJC. But it was concluded that this
1758 practice involves a detail of practice that need not be enshrined
1759 in the Civil Rules.

1760 The final suggestion is that pro se litigants should be
1761 permitted, but not required, to file by paper, and should be
1762 permitted to qualify for e-filing and service to avoid burdens that
1763 other parties do not have to bear. These questions are being
1764 actively considered by several advisory committees, as noted during
1765 earlier parts of this meeting. They will continue to be considered.

1766 **Pre-Motion Conference: Rule 56**

1767 Judge Jack Zouhary, a member of the Standing Committee, has
1768 offered an informal suggestion that this Committee consider the
1769 practice of requiring a party to request a conference with the
1770 court before making a motion for summary judgment. He follows that
1771 practice, and finds that it has many benefits.

1772 The benefits that may be realized by pre-motion conference
1773 include these possibilities: The movant may decide not to make the
1774 motion, or may focus it better by omitting issues that are
1775 genuinely disputed. The nonmovant may realize that some issues are
1776 not genuinely disputed or are not material. Discussion in the
1777 conference may lead the parties to a better understanding of the
1778 facts, the law, or both. A conference with the court may work
1779 better than a conference of the parties alone. The court may not
1780 use the conference to deny permission to make the motion — Rule 56
1781 establishes a right to move. But the court can suggest and advise.

1782 Similar advantages can be gained by holding a conference with
1783 the court before other motions are made. These advantages were
1784 discussed in developing the package of case-management amendments
1785 now pending in Congress. The result of those deliberations is to
1786 add a new Rule 16(b)(3)(B)(v), which provides that a scheduling
1787 order may "direct that before moving for an order relating to
1788 discovery, the movant must request a conference with the court."
1789 This provision was limited to discovery motions in a spirit of
1790 conservatism in adding details to the rules. It was recognized that
1791 many courts require pre-motion conferences for motions other than
1792 discovery motions, including summary-judgment motions. But it also
1793 was recognized that some judges do not. One step was to reject any
1794 general requirement — the new Rule 16(b) provision serves simply as
1795 a reminder and perhaps as an encouragement.

1796 It would be easy enough to expand pending Rule 16(b)(3)(B)(v)
1797 to encompass summary-judgment motions. It would authorize a
1798 scheduling-order provision that "direct[s] that before moving for

1799 an order relating to discovery or for summary judgment, the movant
1800 must request a conference with the court." Or Rule 56(b) could be
1801 amended to mandate this procedure: "a party may, after requesting
1802 a conference with the court, file a motion for summary judgment at
1803 any time until 30 days after the close of all discovery."

1804 Discussion began with a judge who requires a pre-motion
1805 conference for "all sorts of motions." This practice has many
1806 benefits. Recognizing that some judges would oppose a mandate, why
1807 not expand Rule 16(b) to encompass not only discovery but any
1808 "substantive" motion?

1809 Another judge thought the underlying idea is good. "But we
1810 have just been through one round of amendments. We did it
1811 carefully." We can find a way to recommend pre-motion conferences
1812 as a best practice, but should wait before suggesting another rule
1813 amendment. And then we will need to think about how broadly the
1814 rule should apply. For example, is there a sufficiently clear
1815 concept of what is a "substantive motion" to support use of that
1816 term in rule text?

1817 A lawyer noted that the AAA rules used to provide for summary
1818 disposition in general terms. The rules were amended to require
1819 permission of the arbitrator before making the motion. As an
1820 arbitrator, he has denied permission when the motion seemed
1821 inappropriate. That is not to suggest that a judge be authorized to
1822 deny leave to make a summary-judgment motion, but requiring a
1823 conference would give the judge an opportunity to observe that a
1824 motion would not have much chance of succeeding.

1825 The discussion concluded by determining to hold this
1826 suggestion open, without moving forward now.

1827 **Rules 81, 58**

1828 Two additional items were included in the agenda materials.
1829 One addresses the provisions of Rule 81(c) that govern demands for
1830 jury trial in an action that has been removed from state court. The
1831 other addresses the Rule 58 requirement that a judgment be entered
1832 in a "separate document." These items will be carried forward on
the agenda.

Respectfully submitted,

Edward H. Cooper
Reporter

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TAB 8

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TAB 8A

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

JEFFREY S. SUTTON
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EVIDENCE RULES

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 10, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on October 1, 2015. The draft minutes of that meeting are attached.

At the meeting the Committee approved conforming amendments to one rule and minor amendments to three official forms. It seeks the Standing Committee's approval of these amendments without publication. The Committee also voted to recommend that amendments to one rule be published for public comment in August 2016. These matters are discussed in Part II of this report, along with a request for a limited delegation of authority to the Committee to make minor changes to official forms, subject to subsequent approval by the Standing Committee and the Judicial Conference.

Part III presents four information items. The first concerns the Judicial Conference's submission to the Supreme Court of the "*Stern* amendments," which address how a party gives its consent to a bankruptcy court's adjudication of adversary proceedings. The Committee reconsidered these previously approved, but withdrawn, amendments at the fall meeting in light of the Supreme Court's decision in *Wellness International Network v. Sharif*, 135 S. Ct. 1932

(2015). The Standing Committee and the Judicial Conference, acting on an expedited basis, accepted the Committee's recommendation that the amendments be resubmitted to the Court.

The next item provides an update on the Committee's continuing deliberations about a proposed official form for chapter 13 plans and related rule amendments.

The final information items concern two matters on the Committee's agenda that are the subject of continuing deliberations. The first concerns whether Rule 4003(c) (Exemptions) impermissibly imposes the burden of proof on a party that objects to a claimed exemption, even though some state laws place the burden on the debtor. The other matter relates to Rule 9037 (Privacy Protections for Filings Made with the Court) and how to implement a procedure for redacting previously filed documents that improperly contain personal identifiers.

II. Action Items

A. Items for Final Approval without Publication

The Committee requests that the Standing Committee approve the following rule and form amendments without publishing them for public comment due to their conforming or limited nature. The Committee recommends that the amended forms take effect on December 1, 2016. The rule and forms in this group appear in Appendix A.

Action Item 1. Rule 1015(b) (Cases Involving Two or More Related Debtors). Rule 1015(b) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are "a husband and wife." The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, the Committee received a suggestion that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples. The Committee considered the suggestion at its spring 2014 meeting. It concluded that the first reference to "husband and wife" in Rule 1015(b) falls squarely within the holding of *Windsor*. Section 302 of the Bankruptcy Code, unlike the language of Rule 1015(b), authorizes the filing of a joint petition under a chapter by "an individual that may be a debtor under such chapter and such individual's spouse." The rule's use of the more restrictive term "husband and wife" could be justified only by reliance on § 3 of DOMA, which amended the Dictionary Act to provide that "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. *Windsor*'s invalidation of the DOMA provision removed support for the rule's deviation from the statutory language.

The other reference to "husband and wife" in Rule 1015(b), however, is consistent with the statutory language. The rule implements § 522(b)(1) of the Code, which imposes a restriction on the choice of exemptions in cases in which the debtors are a "husband and wife." While some of the Court's reasoning in *Windsor* could be read to suggest that same-sex married couples in bankruptcy should not have a greater choice of exemptions than husbands and wives have, the decision is not directly on point. The Committee voted at the spring 2014 meeting to propose the substitution of "spouses" for both references to "husband and wife" in Rule 1015(b), but to await further clarification of the law on same-sex marriages before presenting the amendment to the Standing Committee.

At this fall's meeting, the Committee revisited the issue in light of the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015),which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604. The Committee concluded that the decision supported the proposed amendments to Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under § 303 and that same-sex married couples are subject to different rules regarding their choice of exemptions. Because the Committee viewed the proposed changes as conforming amendments, it voted unanimously to seek approval of them without publication for public comment.

Action Item 2. Official Forms 20A (Notice of Motion or Objection) and 20B (Notice of Objection to Claim). These official forms were overlooked by the Forms Modernization Project, and thus they were not included with the large group of modernized and renumbered forms that went into effect on December 1, 2015. The Committee recommends that these forms be renumbered and that a minor wording change be made to them.

Under the new numbering convention, the forms should be designated as Official Forms 420A and 420B. In addition, the Committee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Committee recommends that "mail" be changed to "send," as indicated on the proposed forms in Appendix A.

Action Item 3. Official Form 410S2 (Notice of Postpetition Fees, Expenses, and Charges). Rule 3002.1(c) requires a home mortgage creditor in a chapter 13 case to give notice of any fees, expenses, or charges that are assessed during the course of the case to the debtor, debtor's counsel, and the trustee. This information assists a debtor who wants to maintain mortgage payments while in bankruptcy to make payments in a sufficient amount to emerge from bankruptcy current on the mortgage. Official Form 410S2 implements the rule provision. The Committee became aware of a possible inconsistency between the rule and the form. The instructions to Part 1 of the form state, "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Rule 3002.1(c), however, requires the creditor to give notice of all

postpetition fees, expenses, and charges without excepting ones already ruled on. This issue was discussed in *In re Sheppard*, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012). Noting the difference between the rule and the form's instruction, the court held that the form's instruction "best effectuates the ultimate goal of Rule 3002.1 to provide debtors with accurate information regarding postpetition obligations that await them at the conclusion of their bankruptcy case." *Id.* at *4. The court explained that requiring creditors to file a notice for amounts already approved by the court would result in duplication and uncertainty. Accordingly, it concluded that there was no need for the creditor to file notice of fees that had been included in a consent order resolving the creditor's motion for relief from the stay. *Id.*

Participants at a mini-conference the Committee held in 2012 came out the other way on the issue. They suggested that the instruction regarding amounts previously ruled on be deleted from Official Form 410S2 because giving notice of previously authorized fees would allow the trustee to determine if they had been paid.

The Committee concluded that the inconsistency between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. Because this is a minor conforming amendment, the Committee recommends that the proposed change be approved without publication.

B. Item for Publication in August 2016

The Committee requests that the Standing Committee approve the following rule amendments for publication for public comment.

Action Item 4. Rule 3002.1(b) (Notice of Payment Changes) and (e) (Determination of Fees, Expenses, or Charges). As discussed in Action Item 3, Rule 3002.1 prescribes several noticing requirements for home mortgage creditors in chapter 13 cases. The rule was enacted to ensure that chapter 13 debtors who maintain mortgage payments over the life of the plan, as permitted by Bankruptcy Code § 1322(b)(5), will have the information they or trustees need to make correct payments. Rule 3002.1(b) requires chapter 13 mortgage creditors to file a notice of any change in the mortgage payment amount at least 21 days before payment is due. Unlike subdivision (e) of the rule, which governs notices of claimed postpetition fees, expenses, and charges, subdivision (b) does not provide a procedure for challenging payment changes that are noticed. Based on concerns expressed at the Committee's 2012 mini-conference on the mortgage rules, the Committee concluded that it would be beneficial to have a national procedure for raising and determining objections to payment changes.

The Committee's proposed amendment to Rule 3002.1(b) would allow a party in interest to file a motion for a determination of the validity of a payment amount change. Although the

rule does not set a deadline for such a motion, it does provide that if a motion is not filed within 21 days after the notice is served, the payment change goes into effect. If a payment change is later determined to be inconsistent with the underlying agreement or governing law, the court can order that payment adjustments be made to reflect any overpayments that have occurred.

The Committee also proposes an amendment to Rule 3001.2(b) that is intended to provide more flexibility in the application of the provision to home equity lines of credit ("HELOCs"). The problem that a HELOC creditor faces in complying with Rule 3002.1(b) is illustrated by *In re Adkins*, 477 B.R. 71 (Bankr. N.D. Ohio 2012). The creditor in that case sought an order excusing it from the requirements of Rule 3002.1(b) on that ground that compliance would be "'virtually impossible.'" *Id.* at 72. The bank explained that, because the loan was an open-ended revolving line of credit, its balance was constantly changing. The payment amount could change monthly due to interest rate adjustments, increased draws on the line of credit, or payments of principal in addition to the finance charges. These frequent adjustments in the payment amount, contended the creditor, would make it especially difficult to comply with the 21-day notice requirement. *Id.*

The *Adkins* court denied the creditor's Motion to Excuse Notice. Rule 3002.1(b) clearly applied, as the creditor conceded, and the court found no authority to waive its requirements. The judge, although sympathetic with the creditor's position, pointed out that the rule provides no leeway in its application. Unlike numerous other bankruptcy rules, Rule 3002.1(b) does not say "unless the court orders otherwise." *Id.* at 73.

The difficulties of compliance expressed by the creditor in *Adkins* were echoed by participants at the mini-conference, and there was a general consensus that Rule 3002.1(b) should be amended to deal more appropriately with HELOCs.

The Subcommittees on Consumer Issues and on Forms considered a proposal for the reporting of HELOC payment changes that a chapter 13 trustee and a representative of a HELOC creditor submitted to the Committee. The proposed provision would have imposed different requirements based on the amount of the payment change and whether the debtor or the trustee was making the mortgage payments, but the Subcommittees decided that a simpler approach would be preferable. They therefore recommended and the Committee approved at the fall 2014 meeting a proposed amendment to Rule 3002.1(b) that authorizes courts to modify the requirements of the provision for HELOCs. This would allow the details of an alternative procedure to be developed by local rulemaking or court order.

Finally, the Committee proposes a wording change to Rule 3002.1(e). Rather than providing that only a debtor or trustee may object to the assessment of a fee, expense, or charge, the amended rule would expand the category of objectors to any party in interest. This change would parallel the language of the proposed amendment to subdivision (b) and would authorize a

United States trustee or bankruptcy administrator to challenge the validity of a claimed postpetition assessment.

C. Request for a Limited Delegation of Authority

Action Item 5. Non-substantive, Technical, or Conforming Amendments to Official Forms. December 1, 2015 marked the culmination of the Forms Modernization Project. The Project was begun in 2008, and by the 2015 effective date, virtually all official bankruptcy forms had been replaced by nearly 70 completely new official forms. Given the large scope of the project, it is almost inevitable that minor issues will arise regarding the wording, formatting, or other aspects of the content of some of the new forms. Indeed, as detailed below, several issues have already arisen since the Judicial Conference approved the new forms in September.

Currently, if a necessary change is sufficiently minor or technical, the Committee will propose that it be approved without publication, as in Action Items 2 and 3 of this report. Even without publication, this process is lengthy. Approval of the change has to be considered and approved by the Committee, the Standing Committee, and the Judicial Conference, a process that can take from several months to more than a year.

The Committee suggests that it would be preferable to set up a process that would allow the Committee to make needed noncontroversial and technical changes to the official bankruptcy forms, subject to retroactive notice and request for approval by the Standing Committee and the Judicial Conference. It therefore recommends that the Standing Committee request the Judicial Conference to delegate this limited authority to the Committee.

There is some precedent for this request. At its May 2015 meeting, the Standing Committee authorized the Committee to correct typographical and other minor errors in the modernized forms before they were submitted to the Judicial Conference. And the Judicial Conference on several occasions has authorized a Conference committee to make non-substantive, technical, and conforming amendments to policies it has approved.[1]

The Committee recognizes that a request for this authority needs to provide assurance to the Standing Committee and the Judicial Conference that the authority, if granted, would be exercised in a narrow set of circumstances and only for changes that do not affect the substance

[1] *See, e.g.*, JCUS - MAR 15, at 13 (the Conference authorized the Bankruptcy Committee to make "non-substantive, technical and conforming changes" to guidance for producing tax information); JCUS - SEP 14, at 9 (the Conference authorized the Court Administration and Case Management Committee (CACM) to make "non-substantive, technical or conforming amendments" to policy guidance regarding requests to redact bankruptcy records already filed); JCUS - SEP 14, at 11 (the Conference authorized CACM to make "non-substantive, technical, or conforming changes" to the Bankruptcy Noticing Center Appropriate Use Policy); JCUS - MAR 14, at 14 (the Conference, on CACM's recommendation, authorized the AO to make "non-substantive, technical and conforming revisions" to the Records Disposition Schedules).

of a form or the rights or obligations of any entities. To this end, it includes examples of the types of amendments that would be made if authorized. They would generally fall into three categories: (1) the correction of typos and punctuation; (2) reformatting to facilitate data capture by CM/ECF; and (3) non-controversial conforming amendments needed to implement changes in the rules (such as renumbering statutory provisions), to Judicial Conference policies (such as changes in fee amounts), or statutes (such as when a temporary benefit sunsets).

Under the proposed procedure, the Committee would immediately implement minor changes it determines are non-substantive, technical, and conforming, and the Standing Committee and the Judicial Conference would be notified and asked to approve the changes at their next regular meetings. Should any change not be subsequently approved by the Standing Committee any the Judicial Conference, the prior version of the form would be restored.

The first category of changes—correction of typos and punctuation—will be the most common. The new forms were developed over the course of seven years, and there have been thousands of revisions over that time frame, including changes to line numbers, form names, and cross-references across and within forms. It is perhaps inevitable that as the forms are being implemented and put into use, new typos and inaccurate cross-references will be discovered that will need to be fixed. Since September 2015, four such changes have been identified:

- Official Form 106E/F – Line number references in the instruction at the top of Part 2 need to be changed from “4.3 followed by 4.4” to “4.4 followed by 4.5.”
- Official Form 119 – The reference to “Part 3” at the top of page 1 needs to be changed to “Part 2.”
- Official Form 206 Summary – Cross-references to line numbers 6a and 6b of Official Form 206E/F need to be changed to 5a and 5b.
- Official Form 423 – The reference near the top of the form to §1141(d)(3) needs to be changed from “does not apply” to “applies.”

The second category—reformatting to facilitate data capture—will likely be less common, but this situation has come up several times over the past several years as CM/ECF developers create and test the next generation CM/ECF database (“NextGen”) that will store the information collected on the forms. For example, as originally promulgated in 2014, the means-test forms used by individual debtors required a detailed breakdown of any net income received by the debtor from operating a business. The forms did not, however, clearly indicate how the information should be provided in the rare situation where each of two joint debtors received income from separately owned businesses. NextGen developers reported the problem shortly after the forms were approved by the Judicial Conference in 2014. The problem was addressed through a pro forma update to the means-test forms that was approved by the Committee, the

Standing Committee and the Judicial Conference this year as a technical change that went into effect December 1, 2015.[2]

The final category—changes in the rules, Judicial Conference policy, or statutory changes requiring noncontroversial adjustments that become effective before official forms can be conformed in the ordinary course—is somewhat rare, but there is one pending example of a needed change.

- Official Form 424 – At the top of page 2, the form incorrectly refers to Rule 8001(f)(3)(C). As a result of the recent reorganization of the bankruptcy appellate rules, the correct reference should be to Rule 8006(f)(1).

An example of a Judicial Conference policy change that required expedited technical changes to official bankruptcy forms was an increase in the amount of filing fees proposed by the Committee on Court Administration and Case Management ("CACM") and approved by the Judicial Conference at its March 2014 session to become effective two and a half months later on June 1, 2014. Because filing fees are listed on some official bankruptcy forms, there was a need to get the Executive Committee of the Judicial Conference to approve revision of the forms to reflect the new amounts.

The Committee expects that expedited form changes associated with statutory changes will be very rare. There is one upcoming example of a situation of a possible change to the Bankruptcy Code where it would be helpful to expedite a form change, subject to subsequent approval. After the Bankruptcy Abuse and Consumer Protection Act of 2005 made it more difficult for individuals to qualify for chapter 7 relief, Congress enacted the National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, 122 Stat. 5000, to reward National Guard members and Reservists for their service. The law became effective on December 19, 2008. The Act was scheduled to expire in 2011, but was extended on the eve of expiration, and it is now due to sunset on December 19, 2015.

The Act creates an exception to the means test's presumption for members of the National Guard and Reserves who, after September 11, 2001, served on active duty or in a homeland defense activity for at least 90 days. Official Form 122A-1Supp includes language that implements the exemption, and that form will need to be amended if the Act expires.

Because taking away benefits from service members is controversial, the decision to allow this benefit to sunset may be changed at the last minute, and so the Committee has not started the process of obtaining approval for a corresponding change to the form. If the benefit

[2] At the time this problem was discovered, NextGen development was still at least a year away from implementation in the courts, so it was possible to make the needed change through the current one-year approval process for technical changes. Once NextGen is adopted, similar changes will need to be made much more quickly.

does sunset as scheduled, it would be helpful for the Committee to have the authority to make the appropriate technical changes to the form to address the expiration of this benefit, subject to retroactive approval by the Standing Committee and the Judicial Conference. Having the authority in the future to make uncontroversial technical changes such as this, subject to retroactive approval, would minimize the adverse effects of leaving a form unchanged and inconsistent with the law until the current approval process has time to run its course.

The Committee unanimously recommends that the Standing Committee seek Judicial Conference delegation to the Committee of the authority to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive notice and request for approval by the Standing Committee and Judicial Conference.

III. Information Items

A. ***Stern* amendments resubmitted to the Supreme Court**

In 2011, the Committee began considering whether the Bankruptcy Rules needed to be amended in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The holding in *Stern*—that the bankruptcy court lacked authority under Article III to hear and enter a final judgment on a state-law counterclaim by the estate against a creditor who had filed a claim against the estate—arguably created ambiguity concerning the meaning of the terms "core" and "non-core" in 28 U.S.C. § 157. The Committee therefore decided to propose amendments to Bankruptcy Rules 7008(a) and 7012(b) that would eliminate the distinction between core and non-core proceedings and would require parties in all adversary proceedings to state in their pleadings whether they do or do not consent to entry of a final judgment or order by the bankruptcy judge. The Committee also proposed related amendments to Rules 7016 (Pre-Trial Procedures), 9027(a) and (e) (Removal), and 9033 (Proposed Findings of Fact and Conclusions of Law).

The Committee's proposed amendments addressing the *Stern* issue were published for comment in August 2012, and were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013. The Judicial Conference withdrew the amendments from the Supreme Court, however, given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), a case raising issues that, among other things, implicated the effect of the parties' express or implied consent to a bankruptcy court entering final judgment on *Stern* claims. Although the Supreme Court decided *Arkison* without reaching the consent issue, it subsequently heard and decided *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). In *Wellness*, the Supreme Court held that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent." *Id.* at 1949.

In light of the foregoing, the Committee reconsidered the originally proposed *Stern* amendments (as well as potential alternative amendments) at its fall 2015 meeting. It determined that the original amendments (as approved by the Standing Committee and Judicial Conference in 2013) offered the best proposal to address the *Stern/Wellness* issue, and it voted to ask the Judicial Conference to resubmit the proposed amendments to the Supreme Court on an expedited basis. First the Standing Committee and then the Judicial Conference considered this request in October 2015 and approved the resubmission of the proposed *Stern* amendments to the Supreme Court. If approved by the Supreme Court, the amendments will go into effect on December 1, 2016.

B. Chapter 13 plan form and opt-out proposal – update

The Committee began considering the possibility of creating a chapter 13 plan official form at its spring 2011 meeting. At that meeting, the Committee discussed Suggestions 10-BK-G and 10-BK-M, which proposed the promulgation of a national plan form, and the Committee approved the creation of a working group to pursue the suggestions. A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the Committee made significant changes to the form in response to comments it received, the revised form and rules were published again in August 2014.

At last spring's Committee meeting, in response to comments that were submitted after republication, the Committee discussed a number of options relating to the chapter 13 national form and associated rules. No member favored completely abandoning the project, and no one favored proceeding with the proposed amendments to the nine rules without also proposing a national plan form. Although there was widespread agreement regarding the benefit of having a national plan form, Committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the Committee was generally inclined to explore the possibility of a compromise along the lines suggested by a group of commenters, led by Bankruptcy Judges Marvin Isgur and Roger Efremsky ("the compromise group"). After a full discussion, the Committee voted unanimously to give further consideration to pursuing a proposal that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of the Official Form if certain conditions were met.

Following the spring meeting, the Committee's Forms Subcommittee and the Consumer Subcommittee worked together to: (i) study and refine an opt-out proposal, (ii) obtain further input from a broad spectrum of the bankruptcy community, and (iii) consider the detailed substantive comments submitted on the republished Official Form and related rules. The Subcommittees also corresponded with the compromise group and other bankruptcy constituencies throughout this process. The Subcommittees reached the following conclusions:

- The opt-out proposal could be implemented primarily by further amending Rule 3015 (Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 or a

Chapter 13 Case).[3] As published in 2014, Rule 3015 included amendments to subdivision (c) that required the use of the Official Form for a chapter 13 plan and declared ineffective any nonstandard provisions that were not placed in the section specified for such provisions or that were not identified as the Official Form required. To allow for an opt-out, proposed subdivision (c)(1) would now allow use of either the Official Form or a Local Form meeting the rule's requirements. The Local Forms would have to satisfy the requirements that the debtor identify any nonstandard provisions and place them in a section specified for such provisions. A definition of "nonstandard provision" has been added to the end of subdivision (c)(1). A proposed new Rule 3015.1 would specify the requirements that a Local Form would have to meet. The Subcommittees shared their proposed approach to implement the opt-out proposal, including the proposed revisions to Rule 3015, new Rule 3015.1, and a minor related change to Rule 3002, with the compromise group, and the reaction was favorable.

- The Subcommittees extensively reviewed all 138 comments submitted after republication of the proposed plan form (Official Form 113) and the related rules. Based on this review, the Subcommittees proposed a number of technical changes to the plan form and to Rules 3002, 3007, 3015, and the Committee Note to Rule 7001. No additional changes were proposed for Rules 2002, 3012, 4003, 5009, and 9009.

- The Subcommittees also considered the concerns expressed by the National Association of Consumer Bankruptcy Attorneys and some members of Congress regarding the publication process relating to the proposed plan form and the related rules. They also discussed and identified ways to continue productive discussions regarding the opt-out proposal with various bankruptcy constituencies, including the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter 13 Trustees, and the National Conference of Bankruptcy Judges.

The Subcommittees ultimately recommended that the Committee approve proposed Official Form 113 and the related revisions to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009, but defer submission of those items to the Standing Committee. This deferral would allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication. More specifically, the Committee could consider the opt-out proposal (proposed revisions to Rules 3015 and 3002, and new Rule 3015.1) and the republication issue at its spring 2016 meeting. The Committee approved this approach at its fall 2015 meeting.

[3] The only proposed change to Official Form 113 related to the compromise is the revision of Part 1 to require that the debtor indicate whether three types of provisions are included or are not included in the plan. Previously, the form required checking boxes only if those provisions were included.

C. Rule 4003(c) (Exemptions – Burden of Proof) – under consideration

Under section 522 of the Bankruptcy Code, an individual debtor may claim certain property interests as exempt from her bankruptcy estate. Bankruptcy Rule 4003(c), in turn, places the burden of proof in any litigation concerning a debtor's claimed exemptions on the party objecting to the exemptions. The Committee received a suggestion from Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, questioning the validity of Bankruptcy Rule 4003(c). Chief Judge Klein asserts that, based on the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), Rule 4003(c) alters a substantive right of litigants in violation of the Rules Enabling Act. The *Raleigh* decision involved the burden of proof on claims objections in bankruptcy cases, and the Supreme Court held, "[T]he burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Id.* at 21. Notably, the *Raleigh* decision did not involve the interpretation of a federal bankruptcy rule; the bankruptcy rules do not address the burden of proof in claims litigation.

Based on the Committee's preliminary review, the primary issue in this matter concerns the interplay of the *Raleigh* decision and the Rules Enabling Act. Although the Supreme Court has consistently held, both before and after *Raleigh*, that the burden of proof is a substantive element of a claim, those decisions generally arise in a choice of law context. Based on research to date, it appears that none of the decisions discusses the Rules Enabling Act. This distinction is highly relevant because the Supreme Court has expressly noted that the meaning of the terms "substance" and "procedure" can "shift[] depending on the particular problem for which it is used." Hanna v. Plumer, 380 U.S. 460, 471 (1965). Accordingly, an argument exists that the Supreme Court's characterization of the burden of proof as substantive in the choice of law context does not necessarily prevent it from being procedural for purposes of the Rules Enabling Act. This analysis is just one of the several important questions underlying the issue.

The Committee is currently reviewing this matter, performing an extensive review of Supreme Court jurisprudence, as well as the legislative history to section 522 and the adoption of the federal bankruptcy rules following the enactment of the 1978 Bankruptcy Code. It plans to further deliberate on this matter at its spring 2016 meeting.

D. Rule 9037 (Privacy Protection for Filings with the Court) – redaction of previously filed documents – under consideration

CACM submitted a suggestion (14-BK-B) to the Committee regarding the procedure for redacting personal identifiers in documents that have already been filed in bankruptcy cases. It suggests that Rule 9037 (Privacy Protection for Filings Made with the Court) be amended to require that notice be given to affected individuals of a request to redact a previously filed document. This amendment would reflect the recent addition of § 325.70 to the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) by the Judicial Conference of the United States, which states in part that "the court should require the . . . party [requesting redaction] to

promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable)."

The Committee began its consideration of this suggestion in 2014, and its research has included a survey of bankruptcy clerks' offices to determine how these matters currently are handled. The Committee reviewed the survey results at its fall 2015 meeting. A working group of the Committee's Consumer Subcommittee is further studying the matter and exploring potential amendments to Rule 9037. This working group is considering, among other things, the procedures for requesting a redaction, whether a closed case must be re-opened to facilitate a requested redaction, the timing of any redaction, the manner of redaction, and how to restrict public access to unredacted portions of the document while the redaction request is pending. The Consumer Subcommittee anticipates making a recommendation to the Committee at its spring 2016 meeting.

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APPENDIX A

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Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of ~~a husband and wife~~spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the

* New material is underlined in red; matter to be omitted is lined through.

16 Code and the other has elected the exemptions under
17 § 522(b)(3), fix a reasonable time within which either may
18 amend the election so that both shall have elected the same
19 exemptions. The order shall notify the debtors that unless
20 they elect the same exemptions within the time fixed by the
21 court, they will be deemed to have elected the exemptions
22 provided by § 522(b)(2).
23 * * * * *

Committee Note

Subdivision (b) is amended to replace "a husband and wife" with "spouses" in light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Because this amendment is made to conform to the Supreme Court's decision in *Obergefell v. Hodges*, final approval is sought without publication.

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____ _____	)))))))))))))))	Case No. _____ Chapter _____

NOTICE OF [MOTION TO] [OBJECTION TO]

_____has filed papers with the court to [relief sought in motion or objection].

<u>Your rights may be affected</u>. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before <u>(date)</u>, you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response*, an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request}{response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also ~~mail~~send a copy to:

{movant's attorney's name and address}

{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on <u>(date)</u>, <u>(year)</u> , at ____ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____

Signature: _____
Name:
Address

Committee Note

Form 420A replaces Official Form 20A, *Notice of Motion or Objection*. It is renumbered to conform to the forms numbering scheme adopted as part of the Forms Modernization Project. It is also amended to reflect that a responding party may serve its request or response on the movant's attorney by means other than mailing.

Because this amendment consists of a minor wording change and renumbering to conform to the current forms numbering system, final approval is sought without publication.

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____	))))))))))))))	Case No. _____ Chapter _____

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before (date), you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.

You must also ~~mail~~send a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

Attend the hearing on the objection, scheduled to be held on (date), (year) , at ___ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name:
Address:

Committee Note

Form 420B replaces Official Form 20B, *Notice of Objection to Claim*. It is renumbered to conform to the forms numbering scheme adopted as part of the Forms Modernization Project. It is also amended to reflect that the claimant may serve its response on the objector's attorney by means other than mailing.

Because this amendment consists of a minor wording change and renumbering to conform to the current forms numbering system, final approval is sought without publication.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges

12/16

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

q No

q Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case~~or ruled on by the bankruptcy court~~.
If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid.
See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

q I am the creditor.

q I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

û _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Committee Note

Official Form 410S2 is amended to eliminate a possible inconsistency with Rule 3002.1(c). The instructions to Part 1 are revised to omit the statement that fees, expenses, and charges that have been ruled on by the court should not be listed. Instead, such an assessment that has not been reported on a previously filed Form 410S2 should be listed, and it should be noted in the column labeled "Dates incurred" that the court has previously approved the fee, expense, or charge.

Because this amendment is made to conform to Rule 3002.1(c), final approval is sought without publication.

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APPENDIX B

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Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

1 **Rule 3002.1 Notice Relating to Claims Secured by**
2 **Security Interest in the Debtor's**
3 **Principal Residence**

4 * * * * *

5 (b) NOTICE OF PAYMENT CHANGES;
6 OBJECTION. The holder of the claim shall file and serve
7 on the debtor, debtor's counsel, and the trustee a notice of
8 any change in the payment amount, including any change
9 that results from an interest-rate or escrow-account
10 adjustment, no later than 21 days before a payment in the
11 new amount is due. For a claim arising from a home-equity
12 line of credit, this requirement may be modified by court
13 order. A party in interest that objects to the payment
14 change shall file a motion to determine whether the change

* New material is underlined in red; matter to be omitted is lined through.

15 in the payment amount is required to maintain payments in
16 accordance with § 1322(b)(5) of the Code. If no motion is
17 filed within 21 days after service of the notice, the change
18 goes into effect, unless the court orders otherwise.
19 * * * * *
20 (e) DETERMINATION OF FEES, EXPENSES,
21 OR CHARGES. On motion of ~~the debtor or trustee~~a party
22 in interest filed within one year after service of a notice
23 under subdivision (c) of this rule, the court shall, after
24 notice and hearing, determine whether payment of any
25 claimed fee, expense, or charge is required by the
26 underlying agreement and applicable nonbankruptcy law to
27 cure a default or maintain payments in accordance with
28 § 1322(b)(5) of the Code.
29 * * * * *

Committee Note

Subdivision (b) is amended in two respects. First, it is amended to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust

frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, subdivision (b) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under this subdivision. The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed within 21 days after service of the notice on the debtor, the debtor's attorney, and the trustee, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b), leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

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TAB 8B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 1, 2015
Washington D.C.

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert James Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Arthur I. Harris
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Jill Michaux, Esquire
Thomas Moers Mayer, Esquire
Professor Edward R. Morrison

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Professor Daniel Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Bankruptcy Judge Roger Efremsky
Bankruptcy Judge Martin Isgur
Bankruptcy Judge Eugene R. Wedoff
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Molly Johnson, Senior Research Associate, Federal Judicial Center
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
James Wannamaker, Esq., consultant to the Committee
Derek Webb, Administrative Office
Michael T. Bates, Lindquist & Vennum, LLP, Minneapolis, Minnesota
John Crane, John M. Crane, P.C., Port Chester, New York
Sims Crawford, Chapter 13 Trustee, Northern District of Alabama

Marcy Ford, Trott Law Firm, Farmington Hills, Michigan
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia
Raymond J. Obuchowski, National Association of Bankruptcy Trustees
Lance Olson, RCO Legal, Bellevue, Washington
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees
Daniel A. West, SouthLaw, P.C., St. Louis, Missouri

Discussion Agenda

1. Introductions.

Judge Sandra Ikuta started the meeting at 9:00 am. She introduced assistant reporter Professor Michelle Harner, who was appointed in July 2015. Professor Harner spoke briefly. Judge Ikuta noted the re-appointments to the Committee, and thanked Judge Arthur Harris for his work in reviewing the forms. She completed her remarks by welcoming Judge Eugene Wedoff and Jon Waage, who both served as consultants for the Committee's work on the chapter 13 plan form. The members and visitors introduced themselves.

2. Approval of minutes of spring 2015 meeting.

The minutes were approved with minor edits.

3. Oral reports on meetings of other committees.

(A) May 28-29, 2015 meeting of the Committee on Rules of Practice and Procedure.

All of the bankruptcy action items were approved, including the chapter 15 items, the 3-day rule change, the various issues related to mortgage reporting, and the final approval of the modernized forms. The modernized forms were approved by the Judicial Conference on September 17, 2015, and are set to go into effect on December 1, 2015. Two rule amendments were published in August 2015: Rules 1006(b) and 1001.

(B) June 11-12, 2015 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

The Bankruptcy Committee concurred in a recommendation from the Committee on Court Administration and Case Management (CACM) to amend the preamble of the miscellaneous fee schedule regarding Bankruptcy Appellate Panel services. Also, the Bankruptcy Committee approved a request for the Federal Judicial Center (FJC) to study the impact of Chapter 9 cases on the bankruptcy system. Finally, the Bankruptcy Committee

recommended that the Administrative Office (AO) develop procedures regarding interpretation services.

4. Report by the Subcommittee on Consumer Issues.

(A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Judge Harris reported that this was an information item. Jim Waldron surveyed clerks' offices to determine how these matters are handled. The results showed that courts are divided as to notice to affected parties. Most courts do not require the reopening of a closed case to request a redaction. Since submitting the suggestion to the Committee, CACM made a separate request to the Judicial Conference for a specific fee for redaction requests, thus permitting redactions without requiring case reopening. As part of the request to the Judicial Conference, CACM included language regarding the potential impact and notice to affected parties. CACM's recommendation was approved by the Judicial Conference.

Judge Harris noted that the subcommittee has a small group working on the issue; they will consider privacy issues, appropriate notice, and developing a simple procedure for courts and parties. They plan to have a draft amendment ready for consideration for the spring 2016 meeting.

(B) Suggestion 15-BK-E to amend Rule 4003(c) to change the burden of proof where state law provides the rule of decision.

Judge Harris explained that the suggestion is to amend Rule 4003(c) to accommodate the decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000). The primary issue is the burden of proof in litigation involving a debtor's entitlement to a claimed exemption under section 522 of the Bankruptcy Code. Specifically, the suggestion asserts that the language of Bankruptcy Rule 4003(c), which places the burden of proof on the party objecting to the claimed exemption, alters the substantive rights of the parties in violation of the Rules Enabling Act. Judge Harris advised that the issue would remain under consideration by the subcommittee.

5. Joint Report by the Subcommittees on Consumer Issues and Forms.

(A) Discussion regarding proposed chapter 13 plan form (Official Form 113), and related proposed amendments to certain bankruptcy rules.

Judge Dennis Dow explained the subcommittee's process, discussion, and final recommendation regarding the chapter 13 plan and related rules. He reminded the group that the plan form and rules were published twice; after the second publication, the Committee received a compromise proposal from a group of bankruptcy judges and others that suggested permitting districts to opt out of using the national plan form if certain conditions were met. The subcommittees consulted with Judge Wedoff and Mr. Waage, as a former Committee member and Chapter 13 trustee, respectively, regarding the compromise proposal and related matters.

The subcommittees reviewed the comments on the published form and rules (these comments were included in the spring 2015 Committee meeting agenda materials), evaluated the compromise proposal, and considered the impact on the related rule amendments. The subcommittees also sought input from Judge Marvin Isgur and Judge Roger Efremsky as representatives of the group that submitted the compromise proposal.

The subcommittees' recommendation included revisions to Rule 3015 that would permit a district to opt out of using a national plan form and impose specific requirements for opting out. The subcommittees included in the agenda materials a proposed amended version of 3015 and a proposed new Rule 3015.1, along with proposed changes to the form itself, including language regarding the location of non-standard provisions to address the problem at issue in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010).

Judge Dow advised that subcommittee members would continue to share the revisions with the bankruptcy community in an effort to ensure that all interested parties are aware of the revised plan and rules. He reached out to the National Association of Chapter 13 Trustees (NACTT), the National Conference of Bankruptcy Judges (NCBJ), the American Bankruptcy Institute (ABI), the National Bankruptcy Conference (NBC), and the National Association of Consumer Bankruptcy Attorneys (NACBA). In doing this, he also asked for recommendations from these groups as to others who could be notified.

Judge Isgur and Judge Efremsky noted their individual support for the revised form and rules. They also indicated that they had surveyed members of the group that submitted the compromise proposal, and that such survey showed a lack of controversy over the revised form and rules. In addition, they reached out to the NACBA and the NACTT in both submitting the compromise proposal earlier in the year and in consideration of the revised plan form and rules. Judge Dow advised that while the majority of the subcommittee supported the recommendation to approve the plan form and related rules, there were a few members who objected.

Professor Gibson spoke briefly about the issue of republication. She stated that if a decision were made to republish, it would likely be to publish the revised Rule 3015 and new Rule 3015.1 rather than the plan form and other related rules. The subcommittee recommended postponing a decision on republication until the spring 2016 meeting. Judge Dow advised that the Rules Committee Support Office was contacted by two members of Congress, who expressed concern about the publication process for any revised plan or rules.

The specific recommendations of the subcommittee for approval were: (1) to approve the final version of Official Form 113 and the related rules other than Rules 3015 and 3015.1, with the understanding that the form and rules would not go forward to the Standing Committee at this time, and (2) to defer the final decision regarding republication until the spring 2016 meeting. Judge Ikuta advised that nothing would prevent the Committee from revisiting the plan form or related rules at a later time. She noted the Committee's consensus that the proposed amendments to the rules and the national plan form were a package, and neither would go forward without the other.

A motion was made to approve Official Form 113, Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009, pending submission to the Standing Committee. It passed with one opposition. Proposed amended Rule 3007 was referred to the Business Subcommittee for consideration of an issue with the language in the version of the rule in the agenda materials. Amended Rule 3015 and new rule 3015.1 will continue to be considered by the Forms Subcommittee for a recommendation at the spring 2016 meeting.

(B) Report concerning the development of forms for subsections (f) and (g) of Rule 3002.1 - Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence, and additional amendments to the rule.

Professor Gibson explained that these issues relate to the mortgage form and rule amendments that went into effect in 2011. The issues were raised as part of a 2012 mini-conference on mortgage issues.

First, there are two proposed new Director's Forms: Form 4100N, Notice of Final Cure Payment (to implement Rule 3002.1 (f)); and Form 4100R, Response to Notice of Final Cure Payment (to implement Rule 3002.1(g)). The forms provide a vehicle for reporting information regarding the cure of arrearages, and were reviewed by the NACTT. Both proposed forms were included in the agenda materials. Currently courts have various requirements for reporting this information, and uniformity would be helpful, although the subcommittee determined that the forms did not need to be official forms. As these forms are issued by the Director of the Administrative Office and their use is not mandatory, approval of the Standing Committee and the Judicial Conference is not necessary, and the forms could be issued on December 1, 2015 along with other forms scheduled to go into effect this year. On motion, the Committee recommended that the Administrative Office issue the forms effective December 1, 2015.

Second was a proposed amendment to Rule 3002.1(b), the section of the rule that requires notice of post-petition changes to a mortgage payment. Rule 3002.1(e) provides a procedure for challenging a claimed fee, expense, or charge after the servicer gives notice of it under subdivision (c), but the rule does not provide a similar procedure for payment changes that are reported under subdivision (b). The proposed amendment would suspend the change in payment from going into effect if the debtor or trustee challenges the change within 21 days after the notice is served. If approved, it would be published in August 2016, along with a prior amendment to the same subsection that the Committee approved for publication at the fall 2014 meeting. That amendment regarding home equity lines of credit was held in abeyance so that it could be submitted with any additional amendments to the rule that the Committee decided to propose. Issues were raised with shifting the burden of persuasion to the objecting party and with limiting objections to the debtor or the trustee. The group discussed whether other parties in interest have standing to object without a change in the proposed language.

A motion was made to approve the version of the amended rule in the agenda materials with the clarification that parties in interest (in addition to the debtor and trustee) may object, and the motion passed. The amendment will go forward for publication and the outstanding issues can be considered, if needed, following the publication period.

The final issue was an amendment to Official Form 410S2 regarding notice of post-petition fees and charges. The proposed amendment deletes an instruction to Form 410S2 not to report fees and charges already approved by the court and adds an instruction that requires the creditor to indicate if a fee has previously been approved by the court to avoid double-payments. The recommendation was to seek approval without publication as a conforming amendment. The motion to approve the recommendation was approved.

6. Report by the Subcommittee on Forms.

(A) Recommendation to request that the Judicial Conference delegate to the Advisory Committee the authority to make non-substantive, technical, conforming changes to Official Bankruptcy Forms as needed.

The Forms Subcommittee recommended that the Committee approve a request to the Judicial Conference to delegate authority to the Committee to make non-substantive, technical, and conforming changes to the Official Forms as needed. The types of changes include: typos and erroneous cross-references, amendments to conform to a change in the law, a change in fee amounts that appear on the forms, or a technical change to accommodate a requirement of the Next Generation of CM/ECF (Next Gen). Scott Myers provided several examples of these changes, including proofreading edits. Judge Sutton suggested that a process be developed to provide notice to the Judicial Conference and the Standing Committee. Judge Ikuta suggested that the subcommittee's recommendation be changed to permit the Committee to implement these types of changes immediately, with retroactive notice and request for approval to the Standing Committee and Judicial Conference. A motion was made to approve the amended recommendation, and the motion was approved.

(B) Report regarding suggestion for Notice of Change of Address Form (Suggestion 15-BK-D) submitted by Russell C. Simon, Chapter 13 Standing Trustee, on behalf of National Association of Chapter 13 Trustees.

The suggestion, from a subcommittee of the NACTT, was to create a form to provide notice of changes of address. Professor Harner reported that there are several options for implementing the suggestion, including a new Official Form, a new Director's Form, an amendment of Form 410, or an amendment to the instructions for Form 410. Samples of these options were included with the agenda materials. The subcommittee determined that it did not have enough information or data to make a decision as to how to best approach this issue, and it instructed the assistant reporter to conduct a survey of courts to determine how the matter is currently handled along with an analysis of any technological issues with implementing a new form or method of indicating a change of address. Nancy Whaley (NACTT) stated that a form would be helpful for chapter 13 cases as chapter 13 trustees are under pressure about the amount of money contributed to the registrars of courts, and that correct changes of address would likely help.

7. Report by the Subcommittee on Business Issues.

(A) Recommendation regarding *Stern* amendments to Rules 7008, 7012, 7016, 9027, 9033, previously approved by the Judicial Conference in September 2013, but withdrawn from Supreme Court consideration pending decisions in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) and *Wellness International Network, Ltd. v. Sharif*, 35 S. Ct. 1932 (2015); recommendation regarding *Stern*-related Suggestions 11BK-K and 15-BK-F.

The rule amendments were previously approved by the Committee but were withdrawn from consideration by the Supreme Court following the Supreme Court's grant of certiorari in *Executive Benefits Ins. Agency v. Arkison*, 134 S.Ct. 2165 (2014). Later the Court held in *Wellness International Network, Ltd. v. Sharif*, 35 S.Ct. 1932 (2015 that parties could consent to a bankruptcy court's adjudication of proceedings that would otherwise be outside the scope of its constitutional authority. The subcommittee considered whether the original proposed rule amendments should be resubmitted or if any amendments were required based on the Court's decisions. The rule amendments, which were included in the agenda book, were published for public comment in August 2012. They were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013.

After deliberations, the subcommittee recommended that the Committee ask that the Judicial Conference resubmit the original amended rules to the Supreme Court. In making its recommendation, the subcommittee considered three possible approaches for amending the Bankruptcy Rules to authorize bankruptcy courts, with the parties' consent, to adjudicate proceedings that would otherwise require Article III adjudication: (1) the pending amendments; (2) the magistrate judge model; and (3) the Seventh Amendment model. The subcommittee determined that the alternative models had practical issues as well as possible concerns regarding knowing and voluntary waivers.

A motion to approve the subcommittee's recommendation to request that the Judicial Conference resubmit the amended rules to the Supreme Court was approved. Judge Sutton stated that he would give consideration as to the best process for the approval of the amended rules.

(B) Suggestion regarding rule amendment for district court treatment of bankruptcy court judgment as proposed findings and conclusions (Suggestion 12-BK-H).

In response to the suggestion that proposed a rule amendment to address the situation in which a district judge treats a judgment or order entered by a bankruptcy judge as proposed findings of fact and conclusions of law, the subcommittee recommended amendments to the title of Rule 9033 and subsection (a) of the rule. The subcommittee concluded that *Arkison* provides legal support for the validity of the approach contained in the suggestion. After the agenda materials were published, a Committee member submitted a suggestion to change the amendment slightly to incorporate references to the other sections of the rule. The group discussed the suggested amendments, and several edits and other revisions were proposed. The Committee decided to return the issue to the subcommittee for further discussion.

(C) Report on work plan for bankruptcy rules noticing project.

The Advisory Committee has received several comments that relate to noticing issues in bankruptcy cases. Professor Harner proposed a work plan for considering general notice issues, and the specific suggestions related to noticing, including Suggestions 12-BK-M, 12-BK-B, 15-BK-H, and Comment BK-2014-0001-0062.

8. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning pending amendments to the Federal Rules of Appellate Procedure (FRAP) and whether to publish similar amendments to the Federal Rules of Bankruptcy Procedure.

The recently revised bankruptcy appellate rules (the Part VIII Rules), are modeled on many FRAP provisions. Because the Part VIII rules track FRAP wording rather than incorporate FRAP by reference, the pending FRAP amendments will not automatically apply to bankruptcy appeals in district courts and bankruptcy appellate panels.

The prospect of changes to FRAP required the subcommittee to determine which of the FRAP provisions proposed for amendment have parallels in the Part VIII rules and whether those bankruptcy rules should be similarly amended. One of the main issues considered by the subcommittee was the change in the length limit rules in FRAP. The subcommittee will continue to consider these issues and make any suggested amendments at the spring 2016 meeting. Professor Gibson reminded the group that any changes to the bankruptcy rules would go into effect in 2018.

9. Report by the Subcommittee on Technology and Cross Border Insolvency.

(A) Proposed amendment to Rule 5005(a)(2) to address proposed amendments to Civil Rule 5(d).

Professor Gibson reported that at the spring 2015 meeting the Committee voted to propose for publication an amendment to Rule 5005(a)(2) that would conform to the proposed amendment to Civil Rule 5(d). Because the language of the proposed amendment to Civil Rule 5(d) was still under discussion at that time, the Committee authorized the chair and the reporter to participate in inter-committee negotiations over the language of the proposed Rule 5(d) amendment and to incorporate into the proposed amendment to Rule 5005(a)(2) language that was acceptable to the advisory committees. The Civil Rules Committee subsequently decided not to seek publication of amendments to Rule 5 in order to give the other advisory committees more time to consider any similar amendments they want to propose. The main concern raised by the advisory committees was the impact on pro se filers of a change in Civil Rule 5.

The proposed amendments to Civil Rule 5, as well as a possible amendment to Criminal Rule 49, are still under consideration. The subcommittee discussed how any amendment to the Civil Rule would impact Bankruptcy Rule 5005. The potential versions of Civil Rule 5 were included in the agenda materials. The subcommittee preferred the more recent version of the Civil Rule 5 amendment. No concerns were raised with regard to the specific amendments being considered by the Civil Rules Committee.

In addition to the filing amendments, the Civil Rules Committee is considering an amendment to permit notice via a court's electronic filing system. The Criminal Rules Committee is considering a similar amendment to Criminal Rule 49. The proposed amendment to Rule 5(b)(2)(E) would eliminate the consent requirement for the use of electronic service of documents filed after the original complaint, and the proposed versions of the amendments were included in the agenda materials. Members of the subcommittee expressed a preference for the second version of the Civil Rule amendment, which would eliminate the consent requirement only for service through the CM/ECF system.

A final issue is to allow the Notice of Electronic Filing (NEF) to take the place of a certificate of service. This was original proposed by CACM and is under consideration by the Civil Rules Committee. The proposed Civil Rule amendment to Civil Rule 5(d), if approved, would become applicable in adversary proceedings pursuant to Rule 7005. Rule 9014, however, does not incorporate Rule 5(d). No concerns were raised by the Committee in its prior consideration of the proposed amendment.

Judge Sutton recommended that the Civil, Criminal, and Bankruptcy Committee reporters meet to develop a consensus recommendation for the Standing Committee.

10. Report by the Subcommittee on Attorney Conduct and Health Care.

(A) Recommendation concerning the subcommittee's consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 (Employment of Professional Persons).

The subcommittee determined to take no further action on this suggestion to amend the requirement that an application to hire a professional list all of the professional's connections with specified persons. Judge Jonker explained the history of the Committee's consideration of this issue. The subcommittee considered various alternatives in reviewing the suggestion, and determined that there were good points in the suggestion. Some of these could be implemented through training and educational programs rather than a rule change.

11. Report on the status of bankruptcy-related legislation.

Mr. Myers advised that legislation granting an exception from the means test requirements for service members and certain homeland security members is set to expire in December 2015. It has been renewed in the past; however, if not, an amendment to the means test forms (Official Forms 122) will be required.

12. Future meetings.

The spring 2016 meeting will be held March 31-April 1, 2016 in Denver, Colorado.

13. New business.

A suggestion was submitted within the past few weeks for consideration of several amendments, including one regarding social security numbers. The Privacy, Public Access and Appeals subcommittee will consider these issues.

Consent Agenda

The Chair and Reporters proposed several items for study and consideration prior to the Advisory Committee's meeting for approval by acclamation at the meeting if no objection was raised. Judge Ikuta advised that no comments were received on the items listed on the consent agenda. A motion was made to approve the items on the consent agenda and the motion was approved. The items are detailed below.

1. Subcommittee on Consumer Issues.

(A) Suggestion 13-BK-G to amend Fed. R. Bankr. P. 1015(b)

The subcommittee recommended amending Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under §303 or that single-sex married couples are subject to different rules regarding their choice of exemptions, per Suggestion 13-BK-G. The suggestion was previously approved at the spring 2014 meeting, but held pending a decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The subcommittee also recommended that the Standing Committee approve the amendment without publication.

(B) Suggestion 14-BK-G regarding inclusion of the debtor's full social security number on the version of the meeting of creditor's notice that is sent to the creditors listed in the debtor's schedules.

The subcommittee recommended that the Committee not consider the issue, given its thorough consideration of a similar suggestion in 2012. The subcommittee will engage in some additional informal outreach to certain creditors to inquire whether they are reliant on full social security numbers and report back at the spring 2016 meeting.

2. Subcommittee on Forms.

(A) Suggestion 15-BK-A by Derek S. Tarson recommending that bankruptcy schedules be made gender neutral in light of *United States v. Windsor*, 570 U.S. 12 (2013).

The subcommittee determined that because the amended Official Forms that take effect December 1, 2015 address Mr. Tarson's concerns, it recommended no further action on this matter.

(B) Suggestion 15-BK-B by Bankruptcy Judge Martin Teel Jr. proposing revisions Director's Form 263, Bill of Costs.

The subcommittee agreed with the proposal to amend Director's Form 263, and an amended version of the form was included in the agenda materials. The subcommittee recommended that the Director of the Administrative Office adopt the changes as set forth in the revised Director's Form 263 and the related instructions.

(C) Recommendation to renumber Official Forms 20A, Notice of Motion or Objection, and 20B, Notice of Objection to Claim.

The subcommittee recommended that the forms be renumbered, a minor wording change be made, and that the Committee propose the forms for final approval without publication.

3. Subcommittee on Business Issues.

(A) Possible changes to Official Forms 25A-C, and 26, and Exhibit A to Official Form 201 (renumbered as Official Form 201A at the spring 2015 meeting, and on track to go into effect December 1, 2015).

The subcommittee recommended no further revisions to Official Form 201A (formerly Exhibit A), and will consider possible changes to Official Forms 25A-C, and 26 with recommendations at the spring 2016 meeting.

4. Privacy, Public Access, and Appeals.

(A) Suggestion regarding amendment of Rule 8018 (Serving and Filing Briefs; Appendices) (Suggestion 15-BK-C).

The subcommittee determined that Bankruptcy Rules 8018(a)(1) and 8010(c) adequately provide that the briefing schedule set forth in Rule 8018(a) is triggered only upon the transmission of the complete record by the clerk, unless otherwise ordered by the court. Accordingly, the subcommittee recommended no action on this matter at this time.

(B) Recommendation concerning timing of publication of deferred recommendations to revise Rules 8002(a)(5) and 8006(b) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting), and Rule 8023 (approved at the spring Advisory Committee meeting); and concerning Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding designation of the record in bankruptcy appeals.

As to the three previously approved amendments, revisions to Rules 8002(a)(5) and 8006(b) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting), and Rule 8023 (approved at the spring Advisory Committee meeting), the subcommittee recommended that they be submitted to the Standing Committee in June 2016, with a request that they be published with the Part VIII amendments that will be proposed to conform to the FRAP amendments. With regards to Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding designation of the record in bankruptcy appeals, the subcommittee initially referred the matters to the Standing Committee's CM/ECF Subcommittee. Given that the CM/ECF Subcommittee took no action on the comments and is now disbanded, the subcommittee recommended no further action on the comments.

Following the vote to approve the matters on the consent agenda, the meeting was adjourned at 2:40 pm.

Respectfully submitted,

Michelle Harner, assistant reporter

TAB 9

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TAB 9A

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Survey of Harm to Cooperators: Final Report

Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States

Margaret S. Williams, Donna Stienstra, and Marvin Astrada

Federal Judicial Center

June 2015

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct research and education programs for the judicial branch. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendation of the Board of the Federal Judicial Center.

We would like to thank Judge Julie Robinson, Judge Terry Hodges, Judge Catherine Blake, Judge Irene Keeley, Judge Roger Titus, Matthew Roland, Geoff Cheshire, Cait Clarke, John Fitzgerald, Mark Miskovsky, Michelle Gardner, Jane MacCracken, Jim Eaglin, David Rauma, and David Smith (Executive Office for U.S. Attorneys) for their assistance with this project.

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Executive Summary

In March 2015, pursuant to an August 2014 request made to the Federal Judicial Center, we surveyed federal district judges, U.S. Attorney's Offices, federal defenders, CJA district panel representative's offices, and chief probation and pretrial services offices about harm or threat of harm to government cooperators. We summarize the results of the survey below.

- Respondents were asked to report harm to defendants/offenders and witnesses in the past three years for up to five cases. We limited the number of cases to five to prevent overtaxing respondents.
- Of 1,371 recipients, 976 completed the survey—a response rate of 71%.
- Respondents reported a minimum of 571 instances of harm to defendants/offenders and witnesses. Cases often involved harm to both defendants/offenders and witnesses.
- Among all types of harm or threat, respondents most often reported threats of physical harm to defendants/offenders or witnesses and to friends or family of defendants/offenders or witnesses.
- Defendants were most likely to be harmed or threatened when in some type of custody, while witnesses were either in pretrial detention or not in custody at the time of harm or threat.
- Respondents frequently reported court documents or court proceedings as the source for identifying cooperators.
- Respondents reported that concerns of harm or threat affected the willingness of both defendants/offenders and witnesses to cooperate with the government in the past three years.
- Respondent generally agreed that harm to cooperators was a significant problem and that more needed to be done, by the judiciary and/or the Bureau of Prisons, to protect cooperators from harm.

Introduction

In August 2014, Judge Julie Robinson, then chair of the Court Administration and Case Management Committee (CACM), asked the Federal Judicial Center (FJC) to conduct a study to determine the number of offenders harmed or threatened with harm because they cooperated, or were suspected of cooperating, with the government. The population of concern included inmates who were post-conviction and in the custody of the Bureau of Prisons (BOP) and identified as cooperators through the use of court documents.[1] The request, made on behalf of CACM, the Criminal Law Committee, and the Committee on Defender Services, asked that we survey federal defenders, Criminal Justice Act (CJA) panel attorneys, federal prosecutors, and probation officers and ask them to report the number of offenders harmed or threatened with harm. We added district judges, witnesses, pretrial services offices, and pretrial detention to the study design as a result of early discussions with staff from the Administrative Office of the U.S. Courts (AO staff).

After receiving feedback from the three requesting committees, the Executive Office for U.S. Attorneys (EOUSA), and AO staff, the FJC designed a research study involving Web surveys of the groups listed above. The design of the survey instrument included asking the same basic questions of all groups, with additional questions targeted to specific populations based on which ones were most likely to have the information sought. The need to target questions to specific groups resulted in multiple versions of the survey instrument (see below). The FJC worked closely with the CACM Privacy Subcommittee (Subcommittee) to develop questionnaires that would acquire the needed information and be understood by recipients.

The Subcommittee approved the questionnaires on February 24, 2015.[2] The five groups surveyed included all chief district judges, all district judges (active and senior status), U.S. Attorney's Offices, federal public defender and CJA district panel representative's offices, and chief probation and pretrial services offices. We obtained email lists for each group from various sources, including staff of the AO and EOUSA, as well as electronically available sources. Several groups made efforts to alert respondents to the survey before the initial mailing. In September 2014, Judge Julie Robinson, Judge Catherine Blake, and Judge Irene Keeley, as chairs of their respective committees, sent an initial letter to all district judges alerting them to the problem of harm to cooperators. Several other groups made efforts to alert respondents to the study at the end of February 2015, days before the survey went into the field. The EOUSA sent an email to all U.S. attorneys alerting them to the importance of their participation in the survey. The probation and pretrial services office of the AO included notification of the survey in a weekly email to all probation and pretrial services chiefs. Judge Terry Hodges, the chair of CACM, sent a letter to all circuit chief judges asking for their help in alerting judges in their circuits to the forthcoming survey invitation. Lastly, staff from the defender services office of the AO

1. Letter from Judge Julie A. Robinson, chair of the Committee on Court Administration and Case Management, to Judge Jeremy D. Fogel, director of the Federal Judicial Center, August 14, 2014.

2. We asked the initial set of questions, regarding cases involving harm and the details of that harm, of all respondents, with slight variations in wording. For most respondents, we referred to "defendants and/or witnesses" while for chief probation and pretrial services offices we referred to "defendants/offenders and/or witnesses." We use these terms interchangeably in this report.

mentioned the survey to participants at their federal defender meeting prior to survey distribution.

Survey Implementation and Administration

On March 3, 2015, we distributed the surveys electronically. A cover email, signed by the chairs of the three requesting committees, explained the purpose of the survey and included the link for completing the survey.[3] Two weeks later, we sent a reminder email to everyone who had not completed the survey. We sent a final reminder email on March 31, 2015, to everyone who had not yet completed the survey. The survey closed on April 8, 2015, although anyone asking to submit a late response was permitted to do so until we began drafting the report.[4]

A few issues pertaining to survey administration merit consideration before we present our analysis of the results. First, while chief district judges and district judges responded to the surveys for themselves, the other three groups of respondents reported for their offices. The efforts to coordinate office-wide responses made completion of the survey more difficult for these groups. Moreover, the results for all judges represent the experience of individual judges over the past three years, while the results for the other groups represent the experiences of an unknown, but substantially larger, number of people for that same period. If more harm is reported by the office respondents, this should not be considered an indication of anything more than inclusion of the responses of more people. These differences in respondent groups should be kept in mind as the results are discussed below.[5]

The overall response rates, shown below in Table 1, are quite strong. Chief probation and pretrial services offices responded at the highest rate, while district judges and U.S. Attorney's Offices responded at relatively lower rates, but still at levels sufficient for analysis.

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3. We provide a copy of this email and final versions of the survey in Appendix A. Because of an error in the survey software provided by the vendor, only half of the district judges received the email invitation on March 3. The remaining judges received the initial request for the survey on March 17, 2015. To ensure that these judges had ample time to complete the survey, we extended the field period of the survey. Like all respondents, the judges in this second wave received a follow-up email if they did not complete the survey, which we sent on March 31, 2015. Thus, the first wave of judges received an invitation and two reminders, while the second wave received the follow up and one reminder. This error did not substantially affect the overall response rate of judges, as shown below.

4. A small number of respondents, either by preference or because of technical problems, requested to complete the survey on paper. For those submitting paper responses, FJC staff electronically entered their answers to all survey questions after the survey period ended.

5. While survey responses might be weighted in such circumstances, the results reported below are the unweighted survey responses. We did not weight survey responses for two reasons. First, we did not sample any of the respondent groups; we surveyed populations. Without a sampling frame, there is nothing by which to weight survey responses—except for probability of responding. We cannot weight by the probability of responding for a second reason: the respondent groups are not the same. Chief district judges and district judges responded as individuals. All other respondent groups were responding for an entire office, representing an unknown number of respondents. Because we do not know how many people each response represents, we cannot weight the responses as such. For these reasons, and given that we report only the frequencies with which responses occurred, it is not problematic to report unweighted survey results.

Table 1. Survey Response Rate

Respondents	Questionnaires Sent	Questionnaires Completed	Response Rate
Chief District Judges	94	77	82%
District Judges	929	611	66%
U.S. Attorney's Offices	93	62	66%
Federal Defenders and CJA District Panel Representative's Offices	178	128	72%
Chief Probation and Pretrial Services Offices	113	110	97%
Total	**1,407**	**988**	**70%**

A second issue of survey administration affected the responses of judges more than the other groups, though its impact was minimal. The list of district judges participating in the survey included active and senior status judges. Some senior status judges are in inactive status, while others are in active status, but no longer hear criminal cases as a matter of preference. Additionally, judges newly appointed to the bench may not have criminal cases on their docket, especially if they served in the U.S. Attorney's Office prior to their appointment. Thus, there are two groups of judges—those very new to the bench and those very senior—for whom a survey of harm to cooperators in criminal cases did not apply. To include the responses of these individuals would bias the number of instances of harm reported toward zero (they know of no instances of harm, but that is because they have no criminal cases). While, ideally, we would have excluded these judges from the survey population at the outset, such information was not systematically available on all judges, and we were not able to do so. After receiving the survey invitation, a number of judges contacted the FJC regarding their experience with criminal cases, either because they were new to the bench or they were in senior status (inactive or active but not taking criminal cases). We gave judges who contacted the FJC the option to complete the survey if they chose.[6] We closed the surveys of judges who opted against completing the survey for these reasons and removed them from the reported results. These exclusions bring the total response rate for district judges to 599 completed surveys out of a possible 899 district judges, or 67% of potential respondents. Table 2 shows the final response rates, after excluding those judges who notified us they were ineligible to answer the questionnaire.

6. A small number of additional judges were unable to complete the survey during the allotted time for other reasons, including poor health and international travel. We also removed these judges from the survey results reported below. Undoubtedly, more newly appointed and senior status judges could have been excluded from the survey totals. If the judges did not contact the FJC, however, there is no way for us to know this information.

Table 2. Revised Survey Response Rate

Respondents	Questionnaires Sent	Questionnaires Completed	Response Rate
Chief District Judges	94	77	82%
District Judges	899	599	67%
U.S. Attorney's Offices	93	62	66%
Federal Defenders and CJA District Panel Representative's Offices	178	128	72%
Chief Probation and Pretrial Services Offices	113	110	97%
Total	**1,377**	**976**	**71%**

We addressed a third issue of survey administration, related to the first, after closing the survey on April 8, 2015. For some survey respondents (but only in groups coordinating an office response) duplicate answers appeared in the data. Typically duplicates occurred because a respondent began answering the survey and then thought a designee, such as the criminal division chief in a district office of the U.S. attorneys, would be better suited to answer the questions. In all instances of duplicate answers, respondents notified the FJC of the issue and asked for a second survey link to be emailed to the designee. We compared the two responses to ensure no loss of data occurred with the removal of duplicate (partial) answers. One response, whether for an individual or office, remains in the data.

Despite these three issues, we find the survey results to be robust and reliable. Given the difficult nature of recalling the detailed events of the last three years, the limited timeframe for completing the survey, and the required efforts to coordinate a single office-wide response for the non-judge groups, a 71% response rate is high. Undoubtedly, the advance efforts to alert recipients to the survey, the follow-up reminders, and the salience of the topic contributed to so many people completing the survey. The high response rate increases our confidence in the results of the survey, reported below.

The geographic distribution of the survey responses further increases our confidence in the results. At least one judge from each of the 94 judicial districts responded to the survey, and 61% of the districts had responses from all groups. Defender and panel representative's offices responded from 83 different districts. The responses of probation and pretrial services offices represent the experiences of 92 different judicial districts. U.S. Attorney's Office responses were distributed across 62 judicial districts. Overall, we are confident the responses to the survey represent the national picture.

We should note one final issue affecting the reporting of the survey responses. Judges, defenders, prosecutors, probation officers, and pretrial services officers all see the same defendants/offenders and witnesses at different times. The instances of harm reported below undoubtedly include responses that detail the events in the same case from the perspectives of the judge, the attorneys, and the probation officers. Totaling the instances of harm across these groups risks over-counting the same event multiple times. Because we have no way of knowing if all groups are reporting the same events from different per-

spectives, we cannot remove any duplicate reporting of events. Instead, the results below report the range in instances of harm.

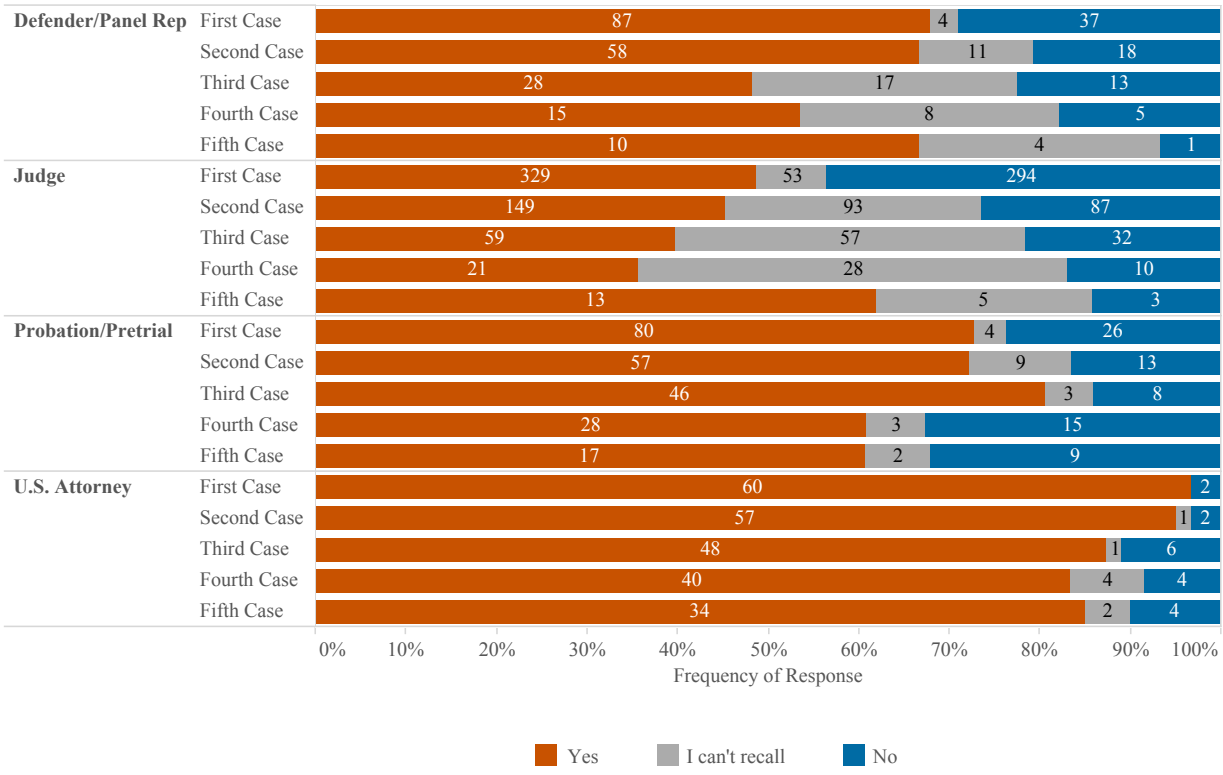
Analysis of Results

The first question on the survey asked respondents to report whether they knew of an instance in the past three years of harm or threat to defendants/offenders or witnesses (or their friends or family) because of the defendant/offender's or witness's cooperation with the government. If the respondent answered yes, we asked additional questions about the details of the harm or threat (described below). After the respondent answered the detailed questions on the first case, the initial screening question, followed by the detailed questions, repeated for up to five cases.

The results in Figure 1 show the percentage of respondents in each group reporting harm on each of up to five cases. The percentages reported for cases two through five were calculated for the subgroup that reported harm in the prior case. Ninety-seven percent of the 62 responding U.S. Attorney's Offices reported harm in a first case, while 49% of the 599 responding judges, 68% of defender offices, and 73% of probation offices reported a first case with harm.[7] Of the U.S. Attorney's Offices reporting harm in a first case, 95% reported harm in a second case as well. Overall, as a percentage of respondents, U.S. Attorney's Offices reported harm with greater frequency than any other group. In fact, more than 50% of U.S. attorneys responding to the survey reported harm in all five cases. Only 3% of U.S. Attorney's Offices reported no instances of harm or threat, whereas 27% of probation offices, 32% of defender offices, and 51% of the judges reported no instances of harm or threat.

7. Twenty-nine of the judges reporting no instances of harm stated later in the survey that they knew of no instances of harm because they were very new to the bench or in senior status and no longer hearing criminal cases. If we removed these judges from the total, as we did with the judges who alerted us to their status prior to completing the survey, the percentage of judges reporting on a first case of harm would be just over 50%.

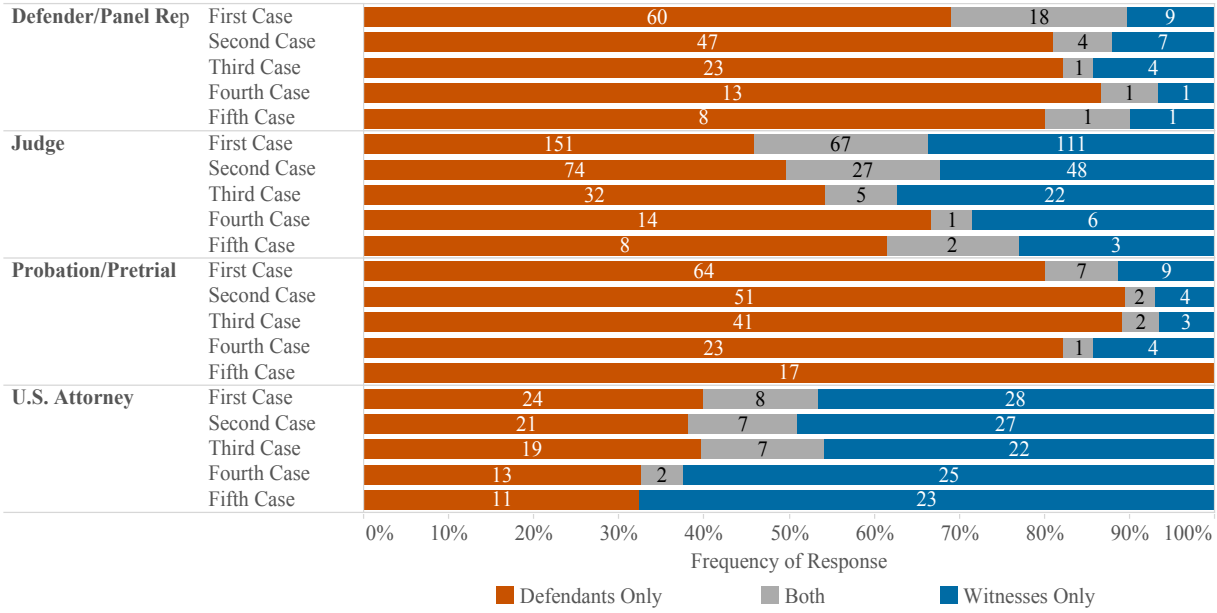
Figure 1. Frequency of Harm Reported, by Respondent Group[8]



After reporting an instance of harm, respondents then described whether the harm or threat was directed at defendants/offenders or witnesses (or their family or friends). A respondent could choose both defendants/offenders and witnesses, if both were involved in the same case. Figure 2 shows the frequency with which defendants/offenders and witnesses were the subject of harm across all reported incidents. Respondents often reported harm to both defendants/offenders and witnesses in the same case.

8. Figures in this report, including Figure 1, show the frequency of an event by respondent groups, both as a percentage of the group and a number of reported events. The bars in Figure 1 show the frequency of harm as a percentage of the group, while the number on the bar is the actual number of instances of harm reported. For purposes of reporting, chief district judges and district judges are combined into a single group for all tables with one exception: Table 10, which reports district steps to protect cooperation information, includes the responses of chief district judges only, as they were the only group to receive that question.

Figure 2. Frequency of Harm to Defendants and Witness, by Respondent Group



Taking these facts together, the results of the survey show that the 976 questionnaire respondents reported at least 571 instances of harm or threat to as many as 381 defendants/offenders and 292 witnesses in the past three years. These numbers, which are those reported by the judicial respondents, are the minimum number of instances of harm or threat. We assume that some number of instances reported by the other three groups of respondents are not duplicates of the instances reported by the judges and thus the actual incidence of harm and threat is higher.

Both the frequency of occurrence and the number of people harmed or threatened in the past three years are sufficient to provide details about the nature of threats and harm (reported below). While respondents did not always have complete information on the events that occurred, they provided a substantial amount of detailed information on the type of harm, the location of the individual at the time harm occurred, and the source for identifying cooperators. We report summaries of the details for defendants/offenders and witnesses separately below. The results are aggregated across all cases, though we would expect that the details of the first case are somewhat more cognitively available to the respondent (as it is the first case occurring to them) than the details of the fifth case. Of course, availability bias is more likely to be a problem for individual judicial respondents than other groups who provided an office response.

Harm or Threat to Defendants/Offenders

When respondents reported an instance of harm or threat to a defendant/offender, we asked them to detail the type of harm or threat that occurred. These details included the type of harm or threat, the location of the defendant/offender at the time of harm or threat, and the source used to identify the defendant/offender as a cooperator.

Types of harm or threat to defendants/offenders

Respondents could select as many categories as described the case in question.[9] If, for example, a defendant/offender was threatened with physical harm and then beaten, the respondent could check the boxes for both threats of physical harm and actual physical harm. Figure 3 reports all threats and harm to defendants/offenders reported by all respondent groups for all instances in the past three years. While the bar represents the frequency of the answer as a percentage of the group, the number on the bar is the actual number of responses in that category. Respondents most often reported threats of physical harm to the defendant/offender and to the friends and family of the defendant/offender. Over 80% of the incidents reported involved threats of physical harm, a minimum number of 339 instances. The minimum number of instances of actual harm (murder and other physical harm) is 133.

Those selecting the "Other" category detailed a variety of types of harm to the defendant.[10] While some of the incidents could be classified into the existing categories, two additional categories emerged from the "Other" responses: Internet/community/general threats and property damage. Internet/community/general threats included responses such as "told family members to put his name on rats.com," "flyers posted in his neighborhood," "[d]efendant's status as a cooperator was put on the internet," and "[n]ame posted on Top Snitches Facebook page." Property damage included shooting at the cars or houses of defendants, or harm to pets. We report the remaining details, which are too varied to categorize, in Appendix B.

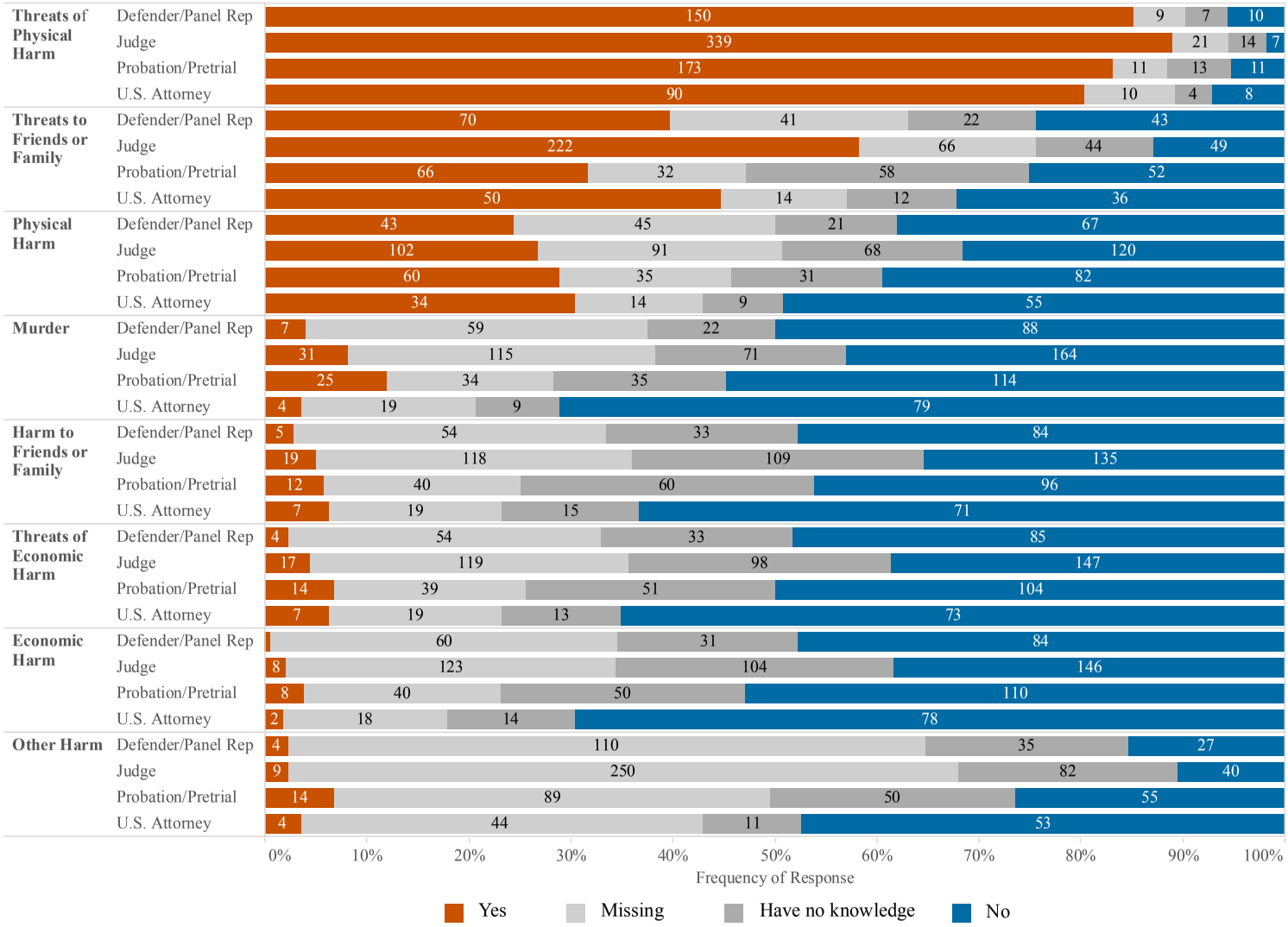
Table 3. Categories of "Other" Harm to Defendants Specified by Respondents

Category of "Other" Harm	Number of Responses
Internet/Community/General Threats	16
Existing Categories	9
Property Damage	9
Other	5

9. It is for this reason that the types of harm or threat reported are higher than the number of defendants harmed or threatened.

10. When the questionnaire gave respondents the option to choose "Other," they were asked to specify what they meant. For every question where respondents could select "Other," we found instances of respondents selecting other without specifying what they meant, or writing in a specification without having chosen "Other." To prevent loss of information, the Appendices report all specified comments, regardless of whether "Other" was selected as a category or not. For each of the "Other" options, we made an initial attempt to categorize these comments. We report this categorization in the tables in the text, while the items coded into each category can be found in the Appendices. All specifications and open-ended responses reported in the Appendices were lightly edited for clarity and redacted to prevent identifying either the case or the respondent.

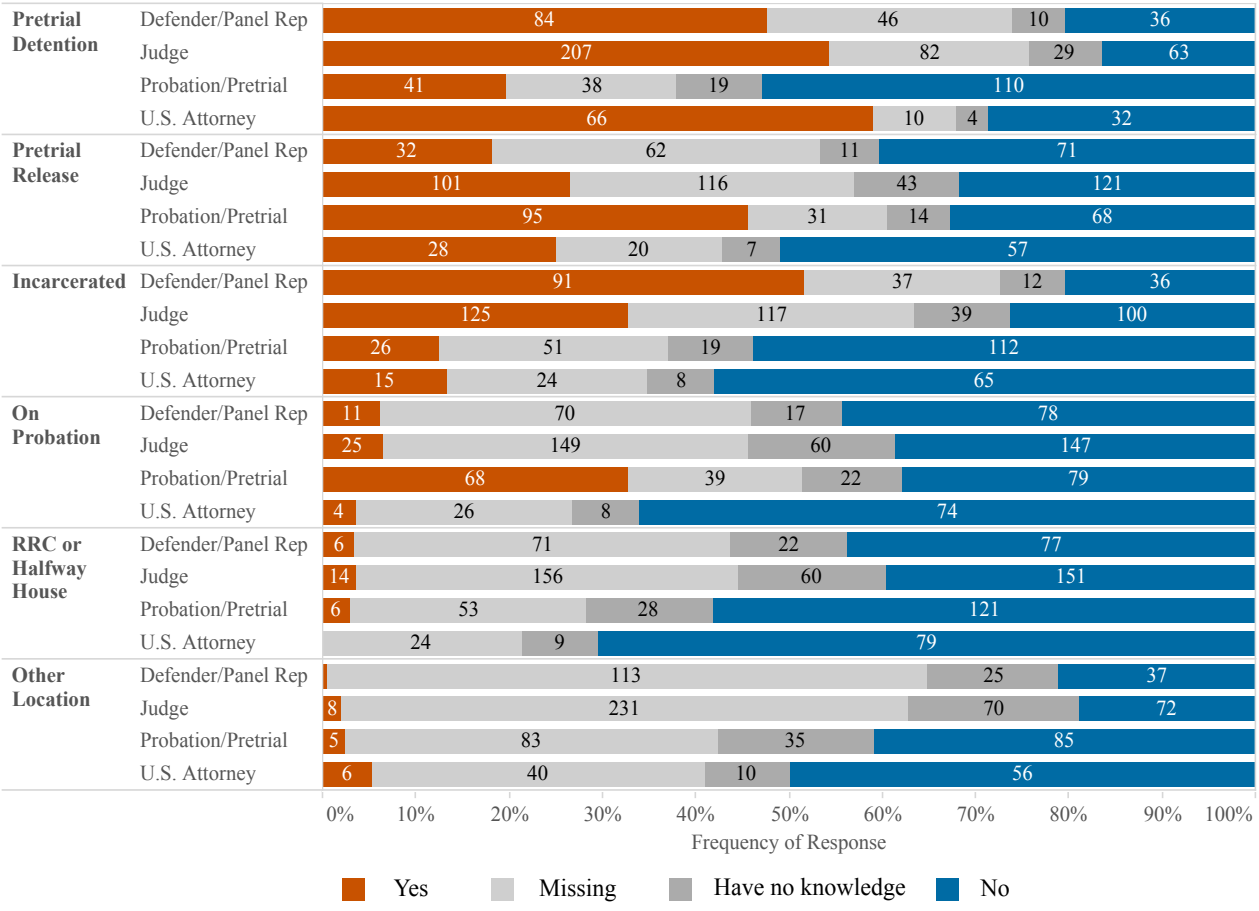
Figure 3. Frequency of the Type of Harm or Threat Directed at Defendants, by Respondent Group



Location of the defendant/offender at the time of harm or threat

After reporting the details of harm or threat, respondents identified the location of the defendant/offender at the time the harm or threat occurred. Once again, because respondents reported multiple instances of harm or threat for each case, more than one location could be chosen. Figure 4 reports the number and percentage of respondents reporting each location across all respondents and all cases. Respondents most often reported that defendants/offenders were harmed or threatened while in pretrial detention—a minimum of 207 instances—followed by pretrial release and incarceration—a minimum of 125 instances. Chief probation and pretrial services offices reported the location of the defendant/offender as "on probation" more often than other groups, which is not surprising given their contact with defendants/offenders at that time. Overall, as a percentage, respondents reported a substantial amount of harm occurring while defendants were in custody of some kind.

Figure 4. Frequency of Reported Location of Defendant at the Time of Harm or Threat, by Respondent Group



Respondents also specified "Other" locations for the defendant/offender at the time of harm or threat. The "Other" response provided most often was that the defendant/offender was not in any form of custody. The second most common response included defendants/offenders who were in some other form of custody that we did not specify. We report other specified options provided by respondents in Appendix C.

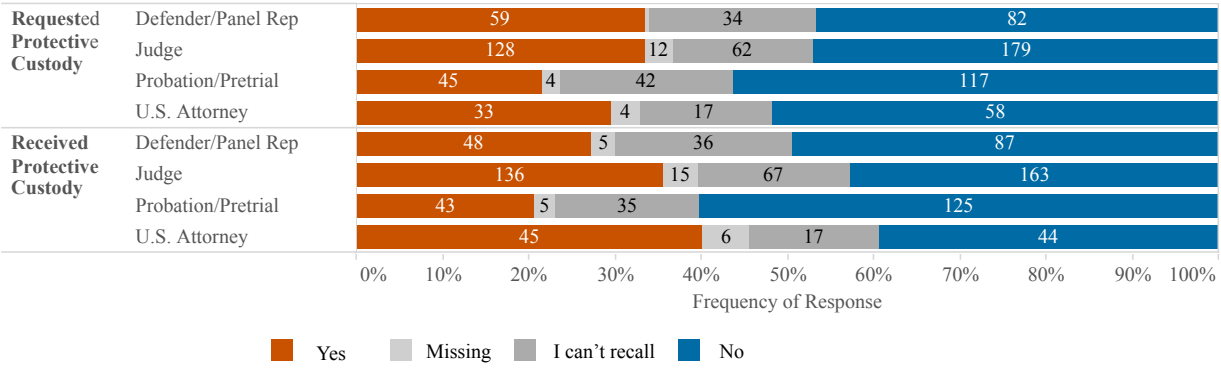
Table 4. Categories of "Other" Defendant Locations Specified by Respondents

Category of "Other" Locations	Number of Responses
Not in Custody of Any Kind	13
Other Forms of Custody	10
Other	7

Protective custody

One set of questions, only for those reporting harm to defendants/offenders, asked respondents if the defendant/offender requested or received protective custody or placement in a special housing unit (SHU). Figure 5 shows the number of respondents reporting that defendants/offenders requested protective custody and the number receiving it. Because respondents may know of defendants/offenders requesting but not receiving protective custody (or receiving it without knowing if they requested it) we asked both questions of all respondents reporting harm to defendants/offenders. Respondents knew of a minimum of 128 instances of defendants/offenders requesting protective custody and a minimum of 136 instances of defendants/offenders receiving protective custody.

Figure 5. Frequency of Defendants Requesting and Receiving Protective Custody, by Respondent Group

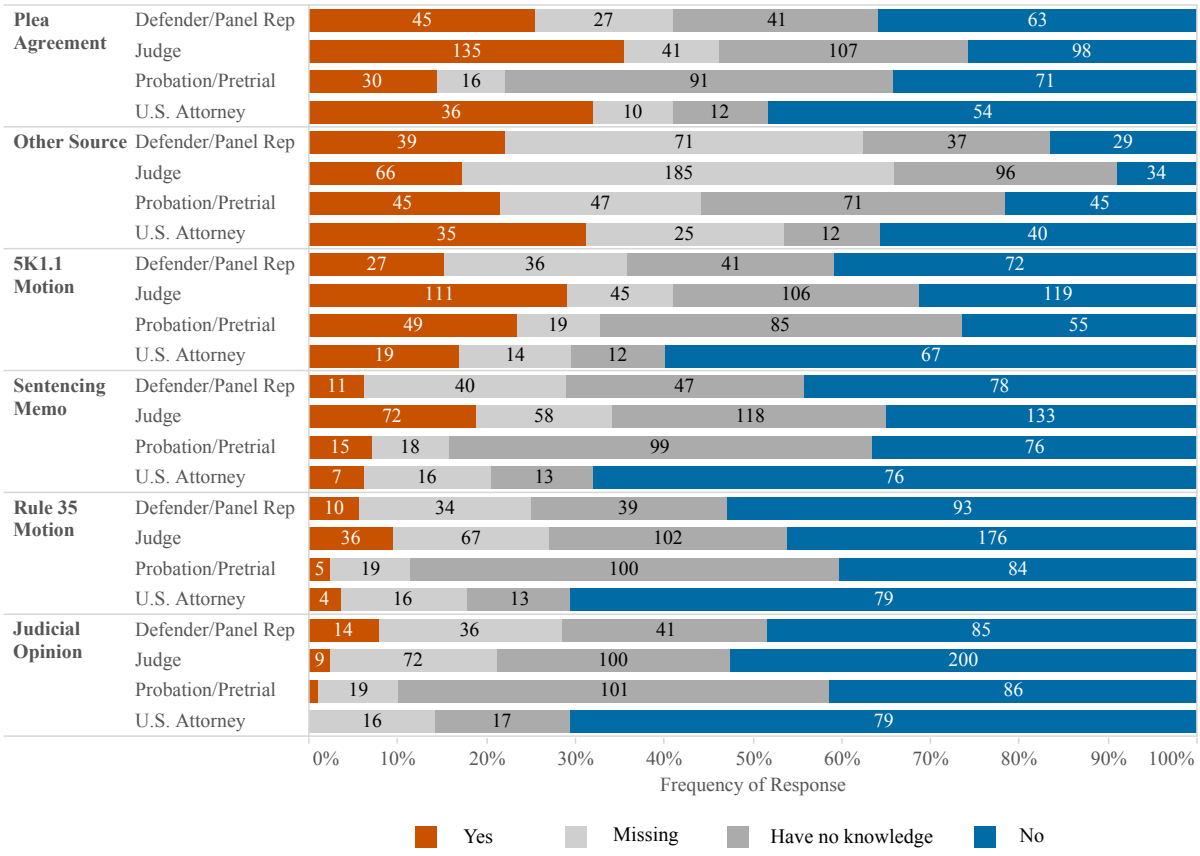


Sources for identifying defendants/offenders

We asked respondents to report any court documents used to identify the defendant/offender as a cooperator. Respondents could report multiple sources. Figure 6 shows the percentage and number of respondents reporting the use of each type of document for

identifying the defendant/offender as a cooperator. The plea agreement or plea supplement was the document most frequently used to identify a defendant/offender as a cooperator—a minimum of 135 instances—with a 5K1.1 motion used nearly as often—a minimum of 111 instances.

Figure 6. Frequency of the Use of Court Documents to Identify Defendant Cooperators, by Respondent Group



Regarding the "Other" sources by which cooperators were identified, a single category emerged. Respondents frequently reported use of other court documents or proceedings, especially discovery, testimony, and inferences from docket activity (such as sealed entries or gaps in docket sequence numbers) to identify defendant/offender cooperators. Appendix D details the exact sources of information while Table 5 shows the categorization of those details.

Table 5. Categories of "Other" Sources Used to Identify Defendant Cooperators Specified by Respondents

Categories of "Other" Sources	Number of Responses
Other Court Documents/Proceedings	165
Talking to Agents/Debriefing/Government Disclosure	14
Codefendant/Known	14
Suspicion	12
Other	11
News Reports	5

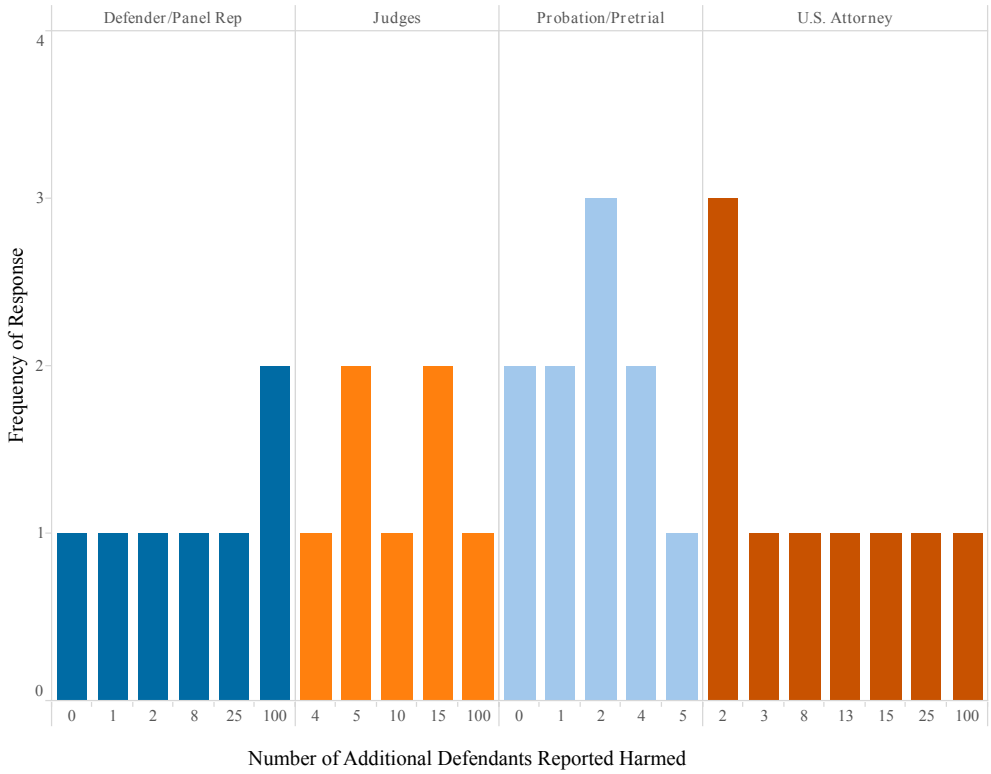
Additional instances of harm or threat to defendants/offenders

To avoid overtaxing respondents with an excessively long questionnaire, we capped the number of cases on which respondents could provide detailed information at five. We did not, however, want the total amount of harm reported by the survey to be artificially capped by this number. To provide an indication of how much additional harm occurred in the past three years, we asked respondents reporting on a fifth case two additional questions, one regarding defendants and one regarding witnesses (discussed below). If the fifth case involved harm to a defendant/offender, we asked the following: "Not including the defendants regarding whom you've provided information in this survey, how many more defendants from your cases have you learned were harmed or threatened in the past three years?" For this question, we required respondents to enter a whole number, between 0 and 100.[11]

Figure 7 shows the number of defendants/offenders reported by all groups. If we sum the numbers provided by all respondents, and assume there were no duplicate answers across groups, we find a maximum of 579 more defendants/offenders harmed or threatened with harm in the past three years. The number of additional defendants/offenders harmed ranged from a low of 21 (reported by chief probation and pretrial services offices) to a high of 236 additional defendants/offenders (reported by defender and panel representative's offices). While few respondents reported information on a fifth case, those who did were often reporting for an office. The office responses were more likely to report 100 or more additional defendants/offenders harmed in the past three years.

11. Initial discussions within the FJC and with AO staff suggested capping this number at 100 would yield more reliable data. A handful of respondents found this cap to be a source of frustration and chose to report their frustration, as well as a number over 100, in their open-ended responses (see below).

Figure 7. Frequency of Additional Instances of Harm or Threat to Defendants, by Respondent Group



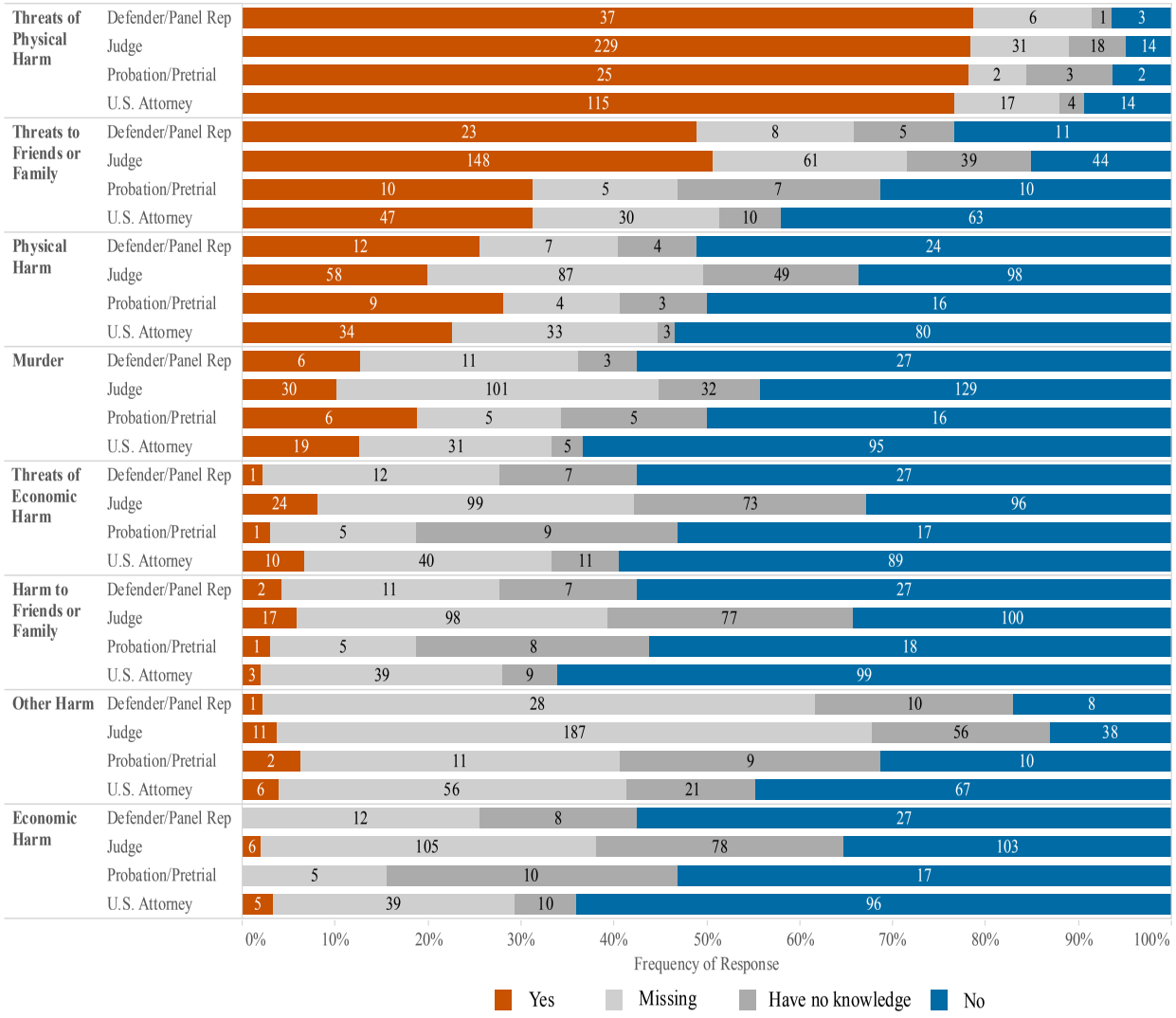
Summary of results on harm to defendants/offenders

To summarize the findings regarding harm to defendants/offenders, respondents reported a minimum of 381 instances of harm or threat directed at defendants/offenders for their cooperation (or perceived cooperation) with the federal government over the past three years (Figure 2). A minimum of an additional 236 defendants/offenders experienced harm or threat, though we have no additional information on the circumstances of these events (Figure 7). When the harm or threat occurred, the defendant/offender was in some form of custody, including pretrial detention or incarceration. In many instances defendants/offenders were identified as cooperators by use of court documents, especially plea agreements or plea supplements, 5K1.1 motions, and docketing activity such as the presence of sealed entries and gaps in docket sequence numbers (Figure 6 and Table 5).

Harm to Witnesses

In addition to reporting information on the harm to defendants/offenders for cooperating with the government, the survey asked respondents to report on harm to witnesses. While the questions are largely the same as those for defendant/offender cooperators, the results are somewhat different. Overall, detailed information on harm to witnesses appears to be less readily available to respondents. Nonetheless, there is still sufficient information for examination.

Figure 8. Frequency of the Type of Harm or Threat Directed at Witnesses, by Respondent Group



Types of harm or threat to witnesses

Figure 8 reports the types of harm or threat directed at witnesses thought to be cooperating with the government. Similar to defendants/offenders, the most common types of harm are threats of physical harm, threats to friends and family, and actual physical harm. At minimum, in the three-year period, respondents reported 229 instances where a witness was threatened with physical harm, 148 instances involved threats to a friend or family member, and 88 instances involving actual physical harm (murder or physical harm other than murder). Because some of the instances reported by defender, probation, and U.S. Attorney's Offices are almost certainly not duplicates of the instances reported by judges, the actual number of instances of harm or threat of harm to witnesses was likely higher.

Relatively few respondents chose "Other" as the type of harm or threat directed at witnesses. We report the details of these other types of harm in Appendix E, including attempted murder, contracting to kill a witness, general threats and harassment, and property damage. Table 6 shows the categorization of the "Other" categories.

Table 6. Categories of "Other" Harm to Witnesses Specified by Respondents

"Other" Categories of Harm	Number of Responses
Other	15
Internet/Community/General Threats	8
Property Damage	4
Attempted Murder	3
Existing Categories	2

Location of witnesses at the time of harm or threat

Figure 9 shows the reported location of witnesses at the time the harm or threat occurred. Here we see a number of differences from the locations listed for the defendants. Witnesses were likely to be in pretrial detention (often because they are uncharged coconspirators or codefendants—as reported in the open-ended comments) or on pretrial release. At a minimum, 85 incidents occurred when the witness was in pretrial detention and 63 instances occurred when the witness was on pretrial release. The next most common locations for witnesses were "Other"—a minimum of 55 instances—and incarceration—a minimum of 49 instances. As Table 7 shows, the "Other" location for witnesses was almost always not in custody—i.e., they were at home, at work, or in their community—because they were uncharged. We report the complete list of locations in Appendix F. We should note that many respondents were unable to report the location of witnesses at the time the harm or threat occurred.

Figure 9. Frequency of Reported Location of Witness at the Time of Harm or Threat, by Respondent Group

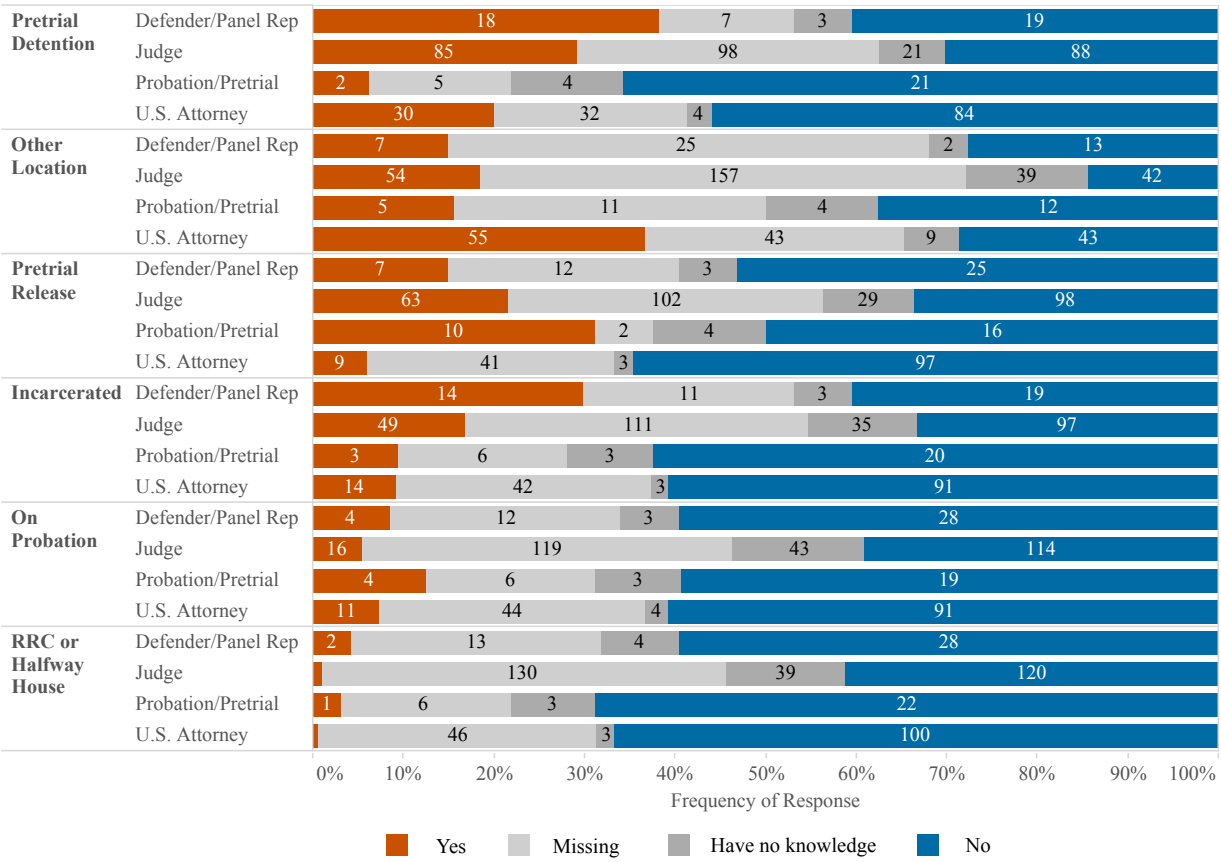


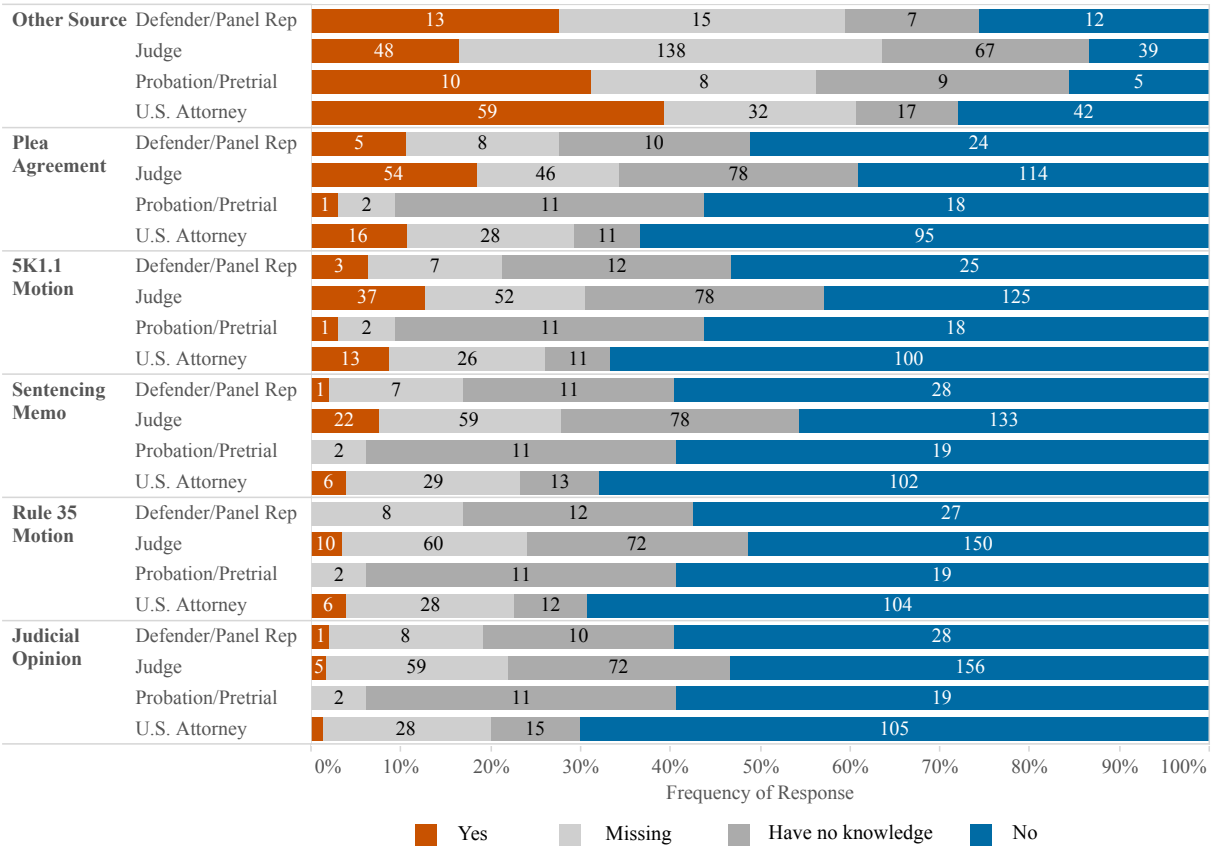
Table 7. Categories of "Other" Witness Locations Specified by Respondents

Categories of "Other" Locations	Number of Responses
Not in Custody of Any Kind	130
Other	21
Existing Category	4

Sources for identifying witnesses

The sources for identifying a cooperating witness also show a different pattern than we reported for the defendants/offenders. While respondents reported that cooperating defendants/offenders were identified in 5K1.1 motions or plea agreements, witness identification occurred most often through "Other" sources, discussed in more detail below. Figure 10 reports the sources used to identify cooperating witnesses and shows that at a minimum witnesses were identified through "Other" sources 59 times. Plea agreements or plea supplements were used to identify cooperating witnesses in 54 instances.

Figure 10. Frequency of the Use of Court Documents to Identify Witness Cooperators, by Respondent Group



Similar to defendants/offenders, respondents often reported witnesses being identified through other court documents, especially testimony, witness lists, and during discovery. Table 8 reports the categorization of the specified responses, which are provided in Appendix G.

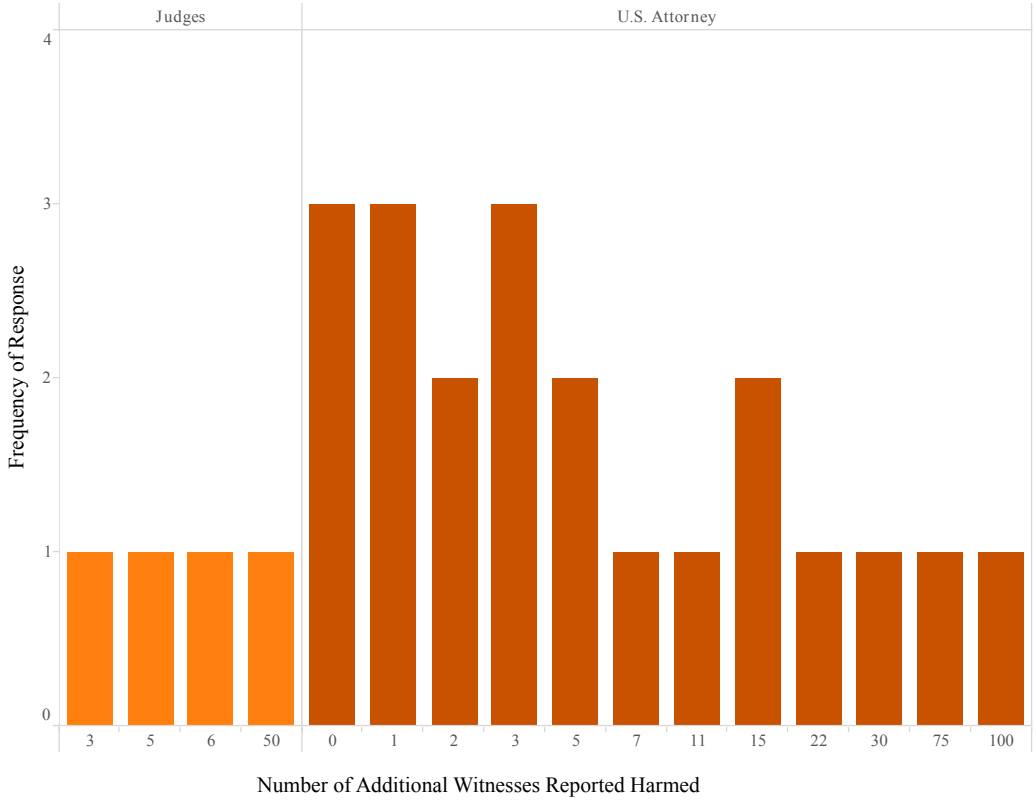
Table 8. Categories of "Other" Sources Used to Identify Witness Cooperators Specified by Respondents

Categories of "Other" Sources	Number of Responses
Other Court Documents/Proceedings	135
Codefendants/Known	15
Other	12
Suspicion	7
Talking to Agents/Debriefs/Government Disclosure	2
News	1

Additional instances of harm to witnesses

We asked respondents reporting information about a fifth case of harm to witnesses to report any additional harm to witnesses from the past three years. Once again, we required the respondents to choose a number between 0 and 100. Figure 11 shows the reported number of witnesses. If we total the number of witnesses reportedly harmed, again assuming no duplicate responses, we find a maximum of 365 additional witnesses threatened or harmed in the past three years. U.S. Attorney's Offices reported an additional 301 instances of harm or threat to witnesses, while judges reported an additional 64 instances. As with defendants/offenders, while few respondents reported information on a fifth case, those who did were often reporting for an office. The office responses were more likely to report higher numbers of additional witnesses than individual respondents. It is worth noting, however, that no respondents from probation and pretrial services offices or federal defender offices reported additional instances of harm.

Figure 11. Frequency of Additional Instances of Harm or Threat to Witnesses



Summary of results on harm to witnesses

While respondents reported harm to witnesses less frequently than they reported harm to defendants/offenders, a minimum of 292 instances of harm or threat to witnesses occurred in the past three years (Figure 8). An additional 301 instances of harm or threat occurred, but we cannot report the details of these additional events (Figure 11). Witnesses were more likely than defendants/offenders to be out of custody at the time they were harmed, though many were also in custody as codefendants or uncharged coconspirators (Figure 9). Identification of witnesses often occurred through court documents, specifically witness lists, testimony, and during discovery (Figure 10).

Additional Questions

In addition to questions about the frequency of harm to defendants/offenders and witnesses, the questionnaire included other items designed to shed light on harm to cooperators. We asked those questions only of the relevant respondent groups.

Defendant/offender requests for court documents or docket sealing

We asked federal defenders and CJA district panel representative's offices about the frequency with which their clients requested court documents to prove they were not a cooperator, and the frequency with which their clients asked them to seal all or part of the CM/ECF docket. For both questions, we asked respondents to enter a number between 0 and 100. The results in Figures 12 and 13 summarize the number of federal defenders and CJA district panel representatives who reported such requests, by number of defendant/offenders who made such requests. As the results demonstrate, many more defense attorneys report requests for court documents than requests to seal all or part of a CM/ECF docket. When we total the number of defendants/offenders requesting court documents, we find 1,941 requests, likely a low number given the frequency with which defense counsel reported "100 defendants" (the maximum permitted by the question format). Defense counsel also reported a total of 704 defendants/offenders requesting sealing all or part of their CM/ECF dockets.

Figure 12. Frequency of Requests for Court Documents

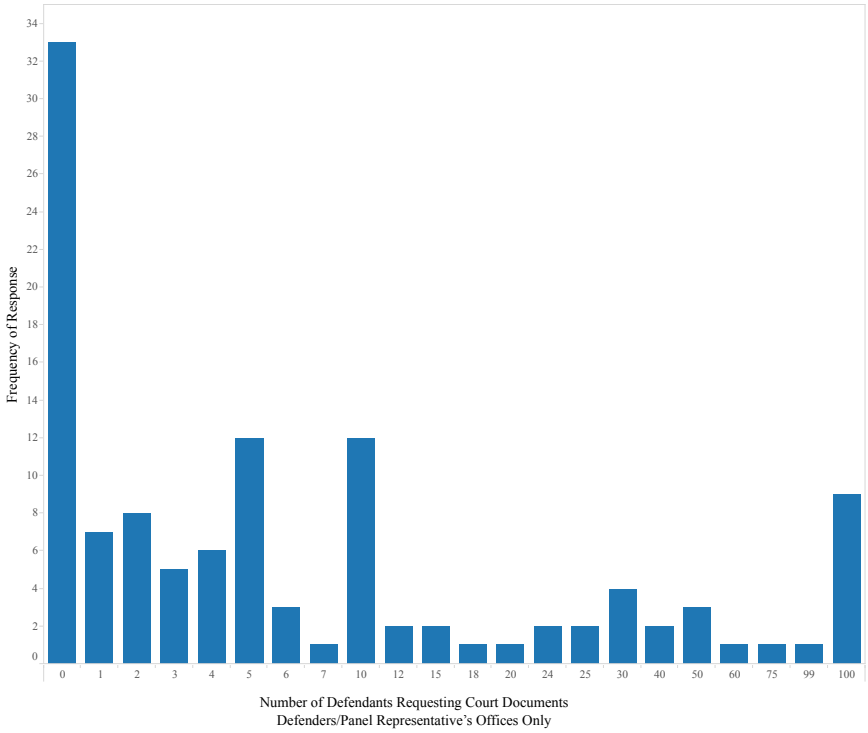
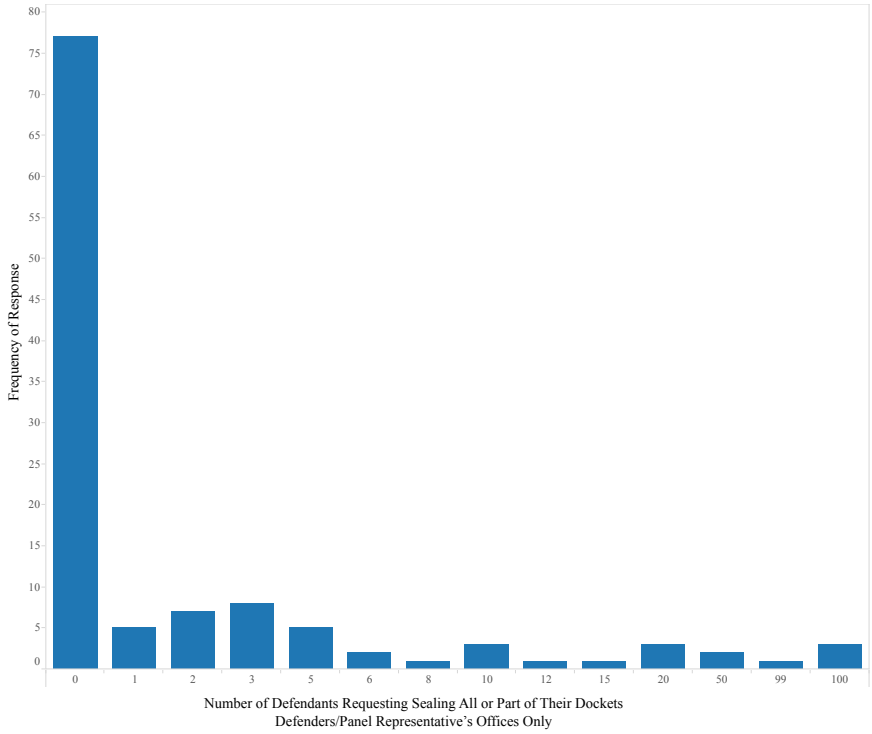


Figure 13. Frequency of Request for Docketing Sealing



Withdrawing or refusing cooperation

Both defense and prosecuting attorneys answered two questions about the frequency with which, in the past three years, defendants/offenders and witnesses withdrew offers of cooperation, or refused cooperation, because of actual or threatened harm. Once again, we asked respondents to report a number between 0 and 100. Figures 14 and 15 report the number of respondents who reported defendant/offender withdrawal or refusal of cooperation, and Figures 16 and 17 report the same information for witnesses. The number of defendants/offenders withdrawing offers ranged from a low of 197 (reported by U.S. Attorney's Offices) to a high of 247 (reported by defenders and panel representative's offices). The number of defendants/offenders refusing cooperation ranged from a low of 527 (U.S. Attorney's Offices) to a high of 758 (defenders and panel representative's offices). Respondents reported the number of witnesses withdrawing offers of cooperation less often. U.S. Attorney's Offices reported 174 withdrawals while defender and panel representative's offices reported 192 instances of witnesses withdrawing offers of cooperation. Respondents reported witnesses refusing to cooperate more frequently than withdrawing offers. The number of witnesses refusing cooperation ranged from a low of 364 instances (defender and panel representative's offices) to a high of 467 instances (U.S. Attorney's Offices).

Figure 14. Frequency of Defendants Withdrawing Cooperation

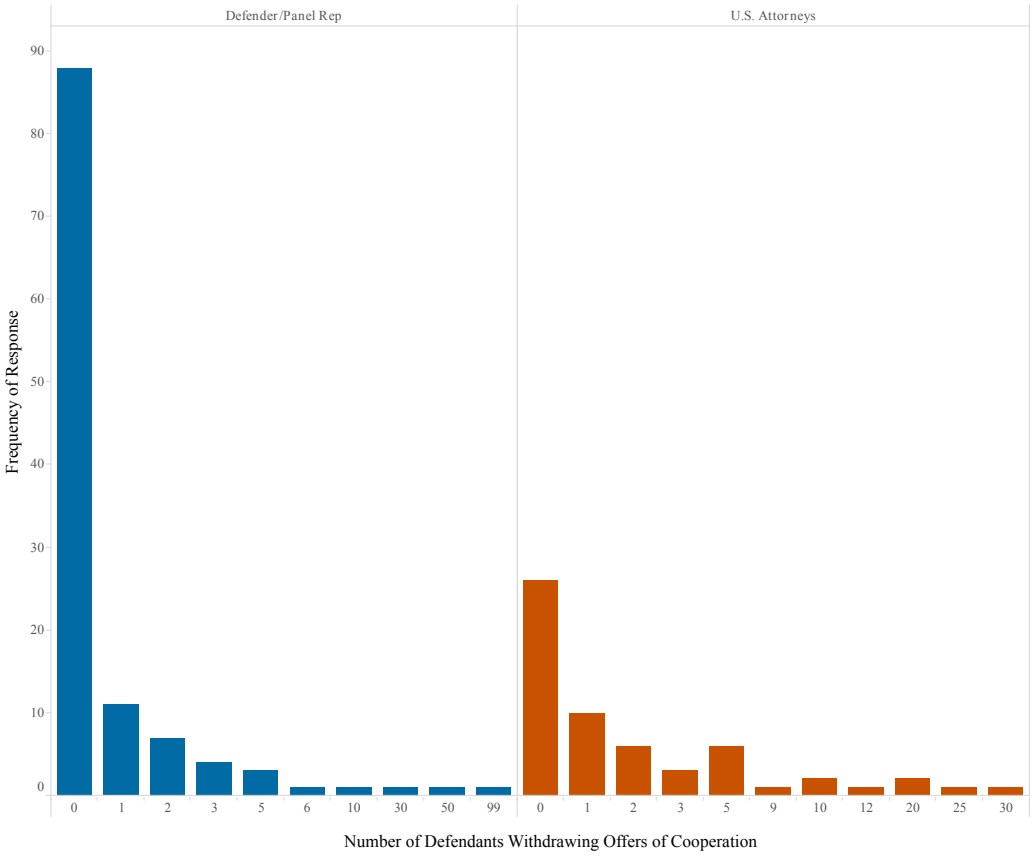


Figure 15. Frequency of Defendants Refusing Cooperation

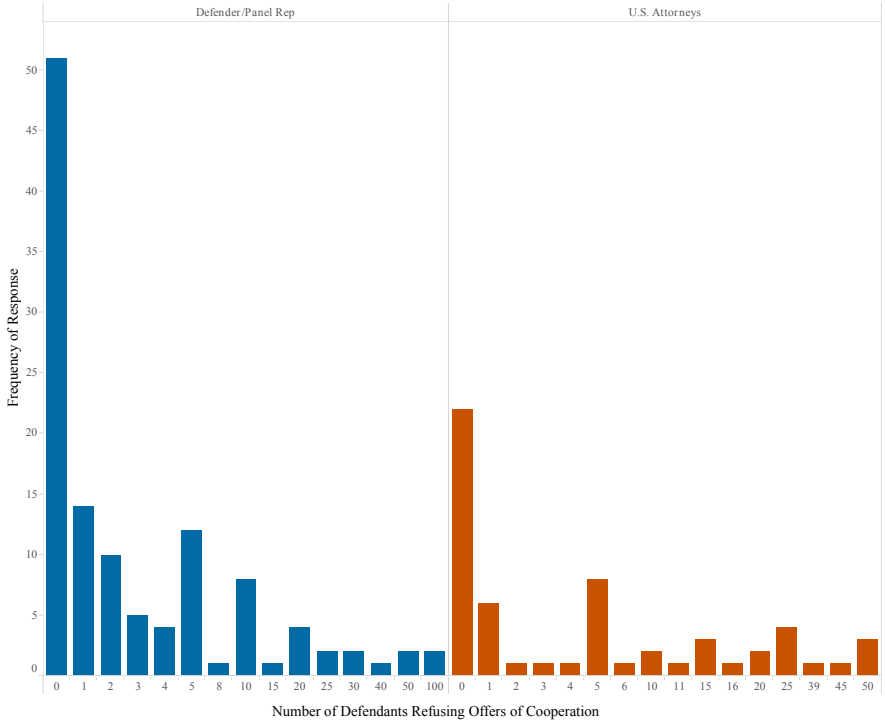


Figure 16. Frequency of Witnesses Withdrawing Cooperation

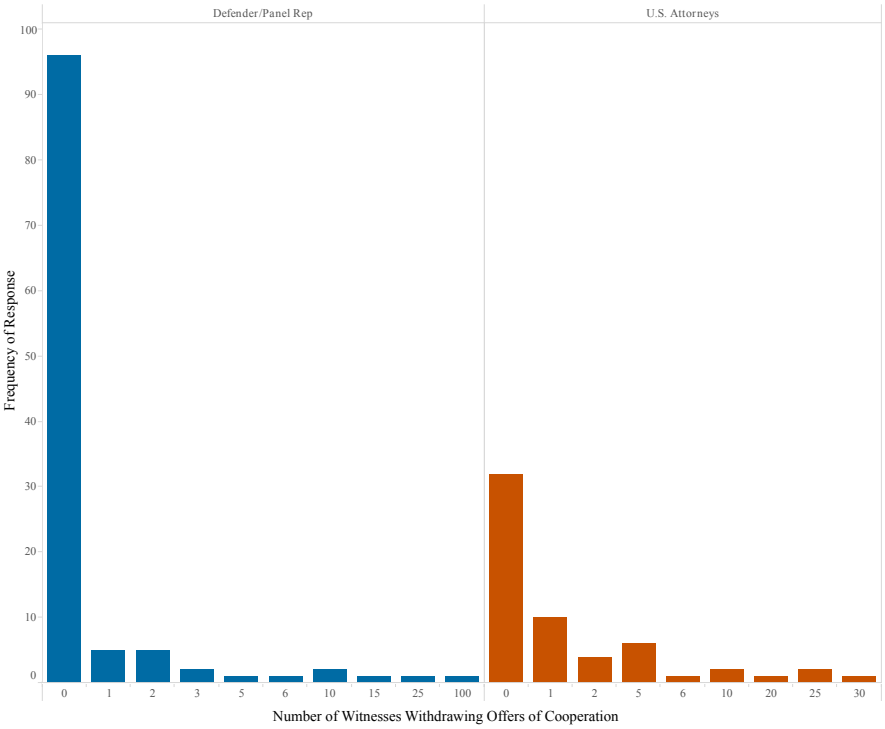
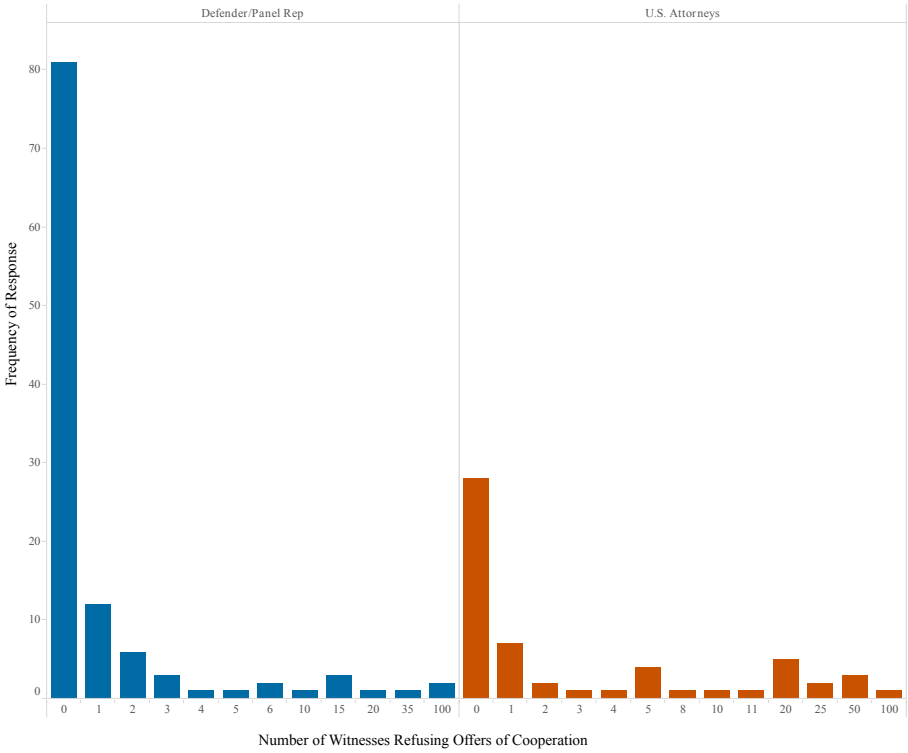


Figure 17. Frequency of Witnesses Refusing Cooperation



Comparing the frequency of harm in 2014 to 2013

We asked all respondent groups to compare the frequency with which defendants/offenders and witnesses were harmed in 2014 compared to 2013. Table 9 reports the results, but they should be interpreted with caution. The vast majority of respondents, across all groups, were unable to provide a comparison, choosing "I don't know" over all other options. Of the substantive categories, respondents most often reported the frequency of harm being about the same in 2014 compared with 2013. Given that respondents clearly did not have trouble remembering instances of harm, or the details of such harm, their inability to compare two years is more likely the result of the wording of the question or the difficulty of the task (for a question at the end of the survey) than a lack of harm one year to the next. The results should be read with these caveats in mind.

Table 9. Comparing the Frequency of Harm, 2014 to 2013, by Group

Respondents	Higher in 2014	About the Same in 2014	Lower in 2014	I don't know/missing	Total
Judges	32	147	15	480	**674**
Defenders/Panel Representative's Offices	10	44	5	67	**126**
U.S. Attorney's Offices	14	32	3	13	**62**
Chief Probation and Pretrial Services Offices	11	32	8	58	**109**

District steps to protect cooperating information

One final question on the survey, asked only of chief district judges, attempted to uncover actions taken by districts to protect cooperator information. The list of options provided (shown below) allowed respondents to choose multiple items. Table 10 shows the frequency with which chief district judges reported their courts taking these steps. No one chose "none of the above" and relatively few chose to specify an "Other" option, suggesting the categories covered the majority of steps taken by districts to protect information about cooperators.

Clearly the most common action taken by the district courts has been, at the request of parties, to seal documents containing cooperation information; sixty-six of the seventy-seven chief district judges who completed the questionnaire said their district had taken this action. Nearly half of the respondents also reported that their district seals, *sua sponte*, documents containing cooperation information and/or makes criminal documents appear identically on CM/ECF to obscure cooperation information. The other specific actions are less frequently used, as shown in Table 10. (We report the specified "Other" options in Appendix H.)

Table 10. District Efforts to Protect Cooperation Information

Method of Protecting Cooperation Information	Frequency of Selection
Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	33
Sealing documents containing cooperation information *sua sponte*	37
Sealing documents containing cooperation information at the request of the parties	66
Ordering parties to redact cooperation information from documents	19
Restricting remote access of documents containing cooperation information	29
Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	9
Removing documents containing cooperation information from public files	19
Requiring the entry of documents containing cooperation to be private entries in CM/ECF	21
Other (please specify) _____	7
None of the above	0

Open-ended comments summary

At the end of the survey, respondents were offered an opportunity to provide additional comments. Over a third of all respondents chose to make additional comments, and they covered a wide range of topics. We read the content of these comments and found we could group them into twelve different categories. Comments that were especially lengthy or detailed were coded into multiple categories, with no comment falling into more than six categories. Table 11 below shows the frequency of comments in each category. For those categories where comments could take a negative tone, instead of the positive or affirmative tone implied by the category, the number of negative comments is reported below the main category heading.

Table 11. Open-ended Comment Coding

Coding of Comments	Frequency
General comment about the frequency of harm	148
Harm is not frequent	15
General comments about the sources to identify cooperator	106
Court documents were not the source	4
Details about a specific incident	96
Nothing to report	85
Procedures for protecting defendants	81
General comment about harm in prison/prison culture	76
Takes issue with the survey[12]	33
Policy comments	29
Concerns about a national judiciary policy	7
Comments about refusal to cooperate out of fear	27
Refusals out of fear do not occur	1
Procedures to protect witnesses	15
"Missing"	2
Procedures for protecting juries	1

Some categories required no additional coding for tone or nuance. For example, if a respondent provided additional information about an already reported event, or chose to add information about additional instances of harm, the comment was coded into the category for "details about a specific incident." Likewise, when respondents reported spe-

12. While most of the survey comments reported more information about the scope of harm or the policy implications of harm or threat, some respondents used the open-ended comments to take issue with the use of a survey to determine the scope of the problem, or to complain about the upper bound on the number of people they could report. Overall, these comments could be categorized as suggesting that the harm occurring is more than they were able to report in the survey.

cific procedures for protecting defendants, juries, or witnesses, we coded the comment into those categories. The comments falling into the four categories of details about incidents, or procedures to protect defendants, witnesses, or juries, provided interesting information about what has happened in the past, and how districts have worked to overcome these problems. Typically the procedures to protect defendants or witnesses included sealing, either as a general principle or by local rule, or obscuring docket entries, including substituting revised plea agreements for the original, or discussing cooperation in a court proceeding rather than through written motions.

Other categories, however, required some additional clarification. Comments about the frequency of harm, for example, could either suggest that harm or threats were frequent or infrequent. Of the 148 comments about the frequency of threat or harm in the district, only 15 suggested that harm or threats were infrequent (eight judges, five defenders, one U.S. Attorney's Office, and one chief probation and pretrial services office). At times the respondents noted that harm was infrequent because of recent steps taken by the district to better protect cooperation information. Other times, respondents were noting that harm to a specific group, such as witnesses, was infrequent. Lastly, respondents also noted they did not have or were not likely to be told of such threats, so they thought such instances were infrequent. Of course, the 85 respondents who specifically said they had nothing to report, because they didn't have criminal cases, could be included with other respondents who said harm was infrequent based on their experience. Nonetheless, even after combining "nothing to report" with the 15 respondents who said harm was infrequent, the tone of the comments overall would still suggest respondents found harm to be frequent rather than infrequent.

The remaining 133 respondents who said harm was frequent used words such as "often," "every," "many," "most," "all," or "the vast majority," to describe how often cooperators were threatened, explicitly or implicitly, with harm or were victims of harm. Several of these respondents noted that the problems of threat and harm to cooperators are especially pronounced in drug and gang cases, as well as in certain geographic communities. Overall, when respondents were noting the frequency with which harm or threat occurred, they found it to be pervasive.

Comments about the sources used to identify cooperators typically provided information about which court documents were most likely to identify a cooperator, including those most frequently demanded in federal prisons when a new inmate joins a facility (discussed below). In fact, only 4 of 106 comments about sources used to identify cooperators explicitly said that court documents or docket activity were not used (three chief probation and pretrial services offices and one judge). The remaining 102 comments either mentioned a court document (the most common outcome) or were neutral with respect to court documents but focused on another source to identify a cooperator, typically the details of a specific incident. Those comments that did not explicitly mention court documents focused instead on other sources for identifying cooperators including "social media," "rats.com," "YouTube," or more generally "the internet." Of course, talk within a community, newspapers, movement in and out of the prison, and prior knowledge of the cooperator were also mentioned as sources of identification.

A final category of comments meriting further consideration was policy comments made by respondents. The 29 respondents offering specific policy comments covered two dimensions. First are those who commented on whether a national policy was necessary or not. Seven of the twenty-nine respondents made comments about a national judiciary

policy that could be considered negative in tone (four judges and three defenders). Included in this group were respondents' explicitly negative comments, such as "the need for blanket rules . . . is a canard," as well as more cautionary comments, such as "be sensitive to the public right to know." Other policy comments were more positive, suggesting a need for policy, though four suggested that this was an issue for the Department of Justice (DOJ) or, more specifically, the Bureau of Prisons (BOP) to address (three judges and one chief probation and pretrial services office). For instance, one respondent noted that the DOJ and the U.S. Attorney's Office do not consider protection of cooperators to be a priority, but they should. One comment noted that past efforts to work with BOP on this issue had not been successful. Seventeen other respondents suggested there was a need for national policy, made by the judiciary, or that the judiciary should do "something" about the issue. One judicial respondent's comment combined both elements, suggesting that this was a DOJ/BOP issue about which the judiciary needed to be concerned and take action.

Overall, while specific policy comments were rare, relative to the other types of comments provided, their tone could be categorized as suggesting a need for something to be done to protect cooperators. This is especially true if we consider all the comments as a group. In addition to the policy comments noted above, 76 respondents spoke about life in prison for cooperators, or prison culture in general, clearly noting a problem where there is an expectation of harm in prison for those who do cooperate or are unable to prove that they did not. These respondents consistently told a story of a new inmate reporting to a specific individual (the "shot caller") in the prison and being required to provide their "paperwork" within a few weeks of coming to prison. If the inmate for any reason was unable to prove they were not a cooperator, they were told to request protective custody. These concerns prompted inmates to request their docket information, or (in the case of those who did cooperate) go so far as to request fake documents to protect them in prison.

Moreover, the general comments about the frequency of harm more often suggested that threat or harm was a frequent occurrence, and this was true even after including in our count those respondents who said they had nothing to report. Further, the steps reported for protecting defendants, witnesses, and (in one case) juries, suggest that the concerns about harm are real enough for districts to make affirmative steps to better protect cooperators from harm. Despite these efforts, respondents noted that there continue to be problems. The fear of being harmed or threatened is affecting the willingness of defendants and witnesses to cooperate, a comment made by 26 respondents (with one defender/panel representative's office as the exception). Taken as a whole, but certainly not unanimously, the open-ended comments support the results reported above: harm is occurring, court documents are often the sources for identifying cooperators, and this is a problem for the criminal justice system.

Conclusion

To answer the question of how often cooperators, both defendants/offenders and witnesses, were harmed, we surveyed federal district judges, U.S. Attorney's Offices, the offices of the federal defenders and CJA district panel representatives, and chief probation and pretrial services offices. With a 71% response rate, and representation from all 94 judicial districts, we are confident that the reported results are representative of the harm experienced by

witnesses and defendants/offenders in the past three years. These groups reported a substantial amount of harm. Overall, respondents reported a minimum of 571 cases involving harm or threat. These instances of harm involved a minimum of 381 defendants/offenders and 292 witnesses; often, both were involved in the same case. Respondents reported a minimum of an additional 236 defendants/offenders and 301 witnesses harmed, but limits placed on the survey prevent us from knowing the details of such harm.

Respondents reported that the nature of harm or threat to defendants/offenders and witnesses was largely the same. Threats of physical harm and threats to friends or family occurred most frequently, and many respondents reported multiple types of threat made against the same defendant/offender or witness. It is worth noting, however, that defendants/offenders were more likely to be subject to multiple types of threat than witnesses were, though this difference could be the result of the availability of the information to our respondent groups.

We found, not surprisingly, that the location differed for defendants/offenders and witnesses when harmed or threatened. Defendants were most often in some form of custody (pretrial detention, pretrial release, or incarceration) while witnesses were not likely to be in custody, or, if they were in custody, they were in pretrial detention as a codefendant.

The sources for identifying cooperation by defendants/offenders and witnesses also differed somewhat, according to our respondents. While court documents and proceedings were overwhelmingly the source for identifying both types of cooperators, the specific sources are different. Defendants/offenders were identified in plea agreements, 5K1.1 motions, or through general docketing practices, especially the presence of a number of sealed CM/ECF docket entries or a sentencing reduction. Respondents also reported discovery and testimony as common sources for identifying defendant/offender cooperators. We found that witnesses, while also identified through court documents, were often identified through witness lists, because they give testimony in open court, or through discovery.

Respondents also reported on the willingness of defendants/offenders and witnesses to provide cooperating information. Defense attorneys as well as prosecutors reported that, in the past three years, hundreds of defendants/offenders and witnesses withdrew offers of cooperation and refused cooperation out of concerns about harm or threat. These results are echoed in the open-ended comments of these two groups as well. Concerns about harm are so real defendants requested court documents to prove they were not a cooperator over 1,900 times in the past three years.

While respondents were able to report on specific instances of harm or threat in the past three years, they were largely unable to compare the amount of harm in 2014 to 2013. When they did answer, they reported similar levels of harm across the two years.

The final question, asked of chief district judges, sought to identify policy changes that might be considered to protect cooperating defendants/offenders and witnesses. As reported by respondents, the district courts have adopted a number of measures in an attempt to protect cooperators. Among these measures is the sealing of docket entries such as plea agreements, often *sua sponte*, to shield cooperation information. Some districts have taken the additional step of docketing all criminal cases the same way—for example, docketing blank sealed documents where no cooperation occurred. Respondents' answers to questions about sources used to identify cooperators, especially defendants/offenders, raise questions about the effectiveness of such steps. Although sealing documents may seem like a logical solution to protecting information about cooperators, the presence of sealed documents and gaps in docket sequence numbers by themselves are

considered enough by other inmates to identify cooperators and put them at risk of harm. The open-ended comments describe this phenomenon in detail. In these comments, respondents noted the problems inherent in sealing and made additional suggestions for protecting cooperating information, including a separate filing system for the public from that used by the courts. A small set of comments questioned the need for any policy for protecting cooperator information, as well as raising issues of public access to court documents and proceedings. We include all these suggestions in Appendix I.

Though the direction that policy should take is not clear from the information provided in this survey, the scope of the problem is. Respondents reported a substantial amount of harm, to both defendants and witnesses, resulting from use of court documents to identify cooperators. The problem occurs both during criminal prosecutions and once defendants (whether they cooperated or not) begin serving sentences in BOP and other facilities. Efforts to protect cooperating information, while in some instances successful, have not eliminated the problem of harm to cooperators. While respondents recognized that limiting access to these court documents would not completely eliminate harm to cooperators, there was general agreement that something needed to be done—by the judiciary, BOP, or both—to better protect cooperating information and reduce the risk of harm to defendants and witnesses assisting in criminal prosecutions.

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Appendix A: Survey Invitation and Questionnaires

Dear ${m://Title} ${m://LastName}:

There is a growing concern that information contained in publicly accessible court documents is being used to threaten or harm defendants in criminal cases because of their cooperation or suspected cooperation with the government. Some courts have already acted in a variety of ways to safeguard such documents.

We write as the chairs of three Judicial Conference Committees to ask for your help in collecting information that will assist our committees in making an important policy decision – whether to propose to the Judicial Conference the establishment of national procedures for protecting information in court documents indicating a defendant's cooperation, or intent to cooperate, with the government.

In an effort to measure the extent of this problem, we have asked the Federal Judicial Center to conduct a survey on our behalf to gather information on threats of harm to, or actual harm suffered by, defendants and witnesses in criminal cases because they were actual or suspected cooperators with the government.

District judges, federal prosecutors and defenders, CJA district panel representatives, and chief probation and pre-trial officers are being surveyed.

When you click on the link below, you will connect to the survey. It will provide important information about how to respond. **Please be assured that all survey responses will be confidential and reported to the committees only in the aggregate.**

Thank you for your time. Your participation is greatly appreciated. Click on the link below to begin the survey. **Please complete the survey by March 17th, 2015.**

Sincerely,
Wm. Terrell Hodges, Chair
Court Administration and Case Management Committee

Irene M. Keeley, Chair
Criminal Law Committee

Catherine C. Blake, Chair
Defender Services Committee

Follow this link to the Survey:
${l://SurveyLink?d=Take the Survey}

Or copy and paste the URL below into your internet browser:
${l://SurveyURL}

Cooperators - Chief District Judges Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses on your docket because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases on your docket, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases on your docket in the last three years.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study, you may contact any of the three committee chairs or Dr. Margaret Williams, who is directing the study. If you have questions about the items in this survey, or technical problems with the questionnaire, Dr. Williams can be reached at 202-502-4080 or mwilliams@fjc.gov.

In cases on your docket over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases from your docket.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant
- ❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases on your docket from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases on your docket have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases on your docket have you learned were harmed or threatened in the past three years?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

To the best of your knowledge, what steps, if any, has your district taken to better protect cooperation information in court documents? (Check all that apply)

- ❑ Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)
- ❑ Sealing documents containing cooperation information sua sponte
- ❑ Sealing documents containing cooperation information at the request of the parties
- ❑ Ordering parties to redact cooperation information from documents
- ❑ Restricting remote access of documents containing cooperation information
- ❑ Allowing public access of documents containing cooperation information only in the courthouse or clerk's office
- ❑ Removing documents containing cooperation information from public files
- ❑ Requiring the entry of documents containing cooperation to be private entries in CM/ECF
- ❑ Other (please specify) _____
- ❑ None of the above

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases on your docket in the past three years.

Cooperators - District Judges Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses on your docket because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases on your docket, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases on your docket in the last three years.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study, you may contact any of the three committee chairs or Dr. Margaret Williams, who is directing the study. If you have questions about the items in this survey, or technical problems with the questionnaire, Dr. Williams can be reached at 202-502-4080 or mwilliams@fjc.gov.

In cases on your docket over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases from your docket.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant
❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases on your docket from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases on your docket have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases on your docket have you learned were harmed or threatened in the past three years?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases on your docket in the past three years.

Cooperators - Federal Defenders and CJA Panel Representatives Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from your cases, not those of a colleague, and report information you or your staff consider to be reliable. Please consider only instances of harm or threats of harm from cases in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In your cases over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant
❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from your cases have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from your cases have you learned were harmed or threatened in the past three years?

In the past three years, how many defendants, because of actual or threatened harm, requested case information (CM/ECF docket, pre-sentence report, etc.) to prove they were not a cooperator?

In the past three years, how many defendants, because of actual or threatened harm, requested all or part of their CM/ECF docket be sealed?

In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many defendants refused cooperation because of actual or threatened harm?

In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many witnesses refused cooperation because of actual or threatened harm?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

- ❍ Higher in 2014
- ❍ About the same in 2014
- ❍ Lower in 2014
- ❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from your cases in the past three years.

Cooperators - Probation/Pre-Trial Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants/offenders or witnesses from your district because of their actual or perceived cooperation with the government. Please consider only defendants/offenders or witnesses from your district and report information you or your staff consider to be reliable. Please consider only instances of harm or threats of harm from cases from your district in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant/offender or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant/offender or witness by name.

Who to Contact. If you have any questions about the study or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In cases from your district over the past three years, have you learned of any defendants/offenders and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant/offender's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants/offenders or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant/Offender
❑ Witness

Did the defendant/offender experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant/offender was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant/offender request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant/offender receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant/offender as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases from your district in the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants/offenders regarding whom you've provided information in this survey, how many more defendants/offenders from cases in your district have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases in your district have you learned were harmed or threatened in the past three years?

Was the number of defendants/offenders and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants/offenders and/or witnesses (or their family or friends) from cases in your district in the past three years.

Cooperators - U.S. Attorneys Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases prosecuted by your office, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have questions about the items in this survey, or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In cases prosecuted by your office over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant
❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases prosecuted by your office in the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases prosecuted by your office have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases prosecuted by your office have you learned were harmed or threatened in the past three years?

In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many defendants refused cooperation because of actual or threatened harm?

In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many witnesses refused cooperation because of actual or threatened harm?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

- ❍ Higher in 2014
- ❍ About the same in 2014
- ❍ Lower in 2014
- ❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases prosecuted by your office in the past three years.

Appendix B: Other Types of Harm to Defendants

Categories of Other Harm	Description
Property Damage	Animal
Property Damage	destruction of property
Property Damage	homes or automobiles [shot] at while occupied
Property Damage	property damage
Property Damage	The home that he and his family resided in was shot up a day before he was schedule to testify
Property Damage	Family house shot at
Property Damage	Shot window out of residence
Property Damage	they burned his house down
Property Damage	Defendant's home was fired upon by unknown individual.
internet/community/general threats	One offender [redacted] claims to have been shot at leaving the Residential Reentry Center after providing a drug test. A second [offender] [redacted] advised she had repeated threats at the gas station where [she worked] and on Facebook postings. A third offender [redacted] [is receiving] threats in the community and on [Facebook].
internet/community/general threats	isolation at prison due to threats
internet/community/general threats	made uncomfortable
internet/community/general threats	Potential threat due to offender at RRC testifying against another offender's brother
internet/community/general threats	Believed he [cooperated] but did not and he continues to receive threats
internet/community/general threats	Although not physically harmed, defendant was physically grabbed when the threat was made against him.
internet/community/general threats	Defendant's status as a cooperator was put on the internet.
internet/community/general threats	Flyers posted in his neighborhood that he cooperated.
internet/community/general threats	Name posted on Top Snitches Facebook page
internet/community/general threats	told family members to put his name on rats.com
internet/community/general threats	After testifying against co-defendants, intimidated via activity around home
internet/community/general threats	Note on floor or halfway house identifying defendant as cooperator

Categories of Other Harm	Description
internet/community/general threats	person contacted offender's mother at her residence and his wife, via Facebook, and make some veiled verbal threats and name calling
internet/community/general threats	Intimidation; showed up at work and in the neighborhood
internet/community/general threats	veiled threats via text message
internet/community/general threats	Video / You Tube Rap Video Threat
Existing Categories	One offender [redacted] claims to have been shot at leaving the Residential Reentry Center after providing a drug test. A second [offender] [redacted] advised she had repeated threats at the gas station where [she worked] and on Facebook postings. A third offender [redacted] is receiving threats in the community and on [Facebook].
Existing Categories	Implications of cultural beliefs/acts that may harm defendant/offender and family
Existing Categories	Arson of mother's house killed six people
Existing Categories	Shot 3 times
Existing Categories	[Threats] were made regarding the safety and welfare of defendant's family members in [redacted]
Existing Categories	As with the last question answered, I have had multiple defendants in pretrial detention face threats for themselves or family members abroad if they proceeded to cooperate
Existing Categories	Cultural beliefs/acts that may harm defendant and family.
Existing Categories	In [immigration] drug cases routinely defendant and family are threats by drug lords
Existing Categories	was assaulted in the middle of trial testimony
Other	Especially true in codefendants' providing substantial assistance
Other	threats to prosecution and defense counsel
Other	[Missing Comment]
Other	Media and Courtroom Testimony
Other	relocated 4 times

Appendix C: Other Locations at the Time of Harm to Defendants

Categories of Other Locations	Description
Not in custody of any kind	after completion of imprisonment and supervised release
Not in custody of any kind	less than a year following his termination of supervised release
Not in custody of any kind	Not arrested
Not in custody of any kind	not charged
Not in custody of any kind	post conviction and [sentence]
Not in custody of any kind	the defendant was harmed prior to being charged due to his cooperation
Not in custody of any kind	Witness- out of custody
Not in custody of any kind	not yet charged
Not in custody of any kind	upon release
Not in custody of any kind	one cooperator was uncharged at the time of the threat
Not in custody of any kind	pre-arrest
Not in custody of any kind	Prior to arrest - narc traffickers in [redacted]
Not in custody of any kind	non-incarcerated family members in [redacted]
Other forms of custody	pre sentencing release
Other forms of custody	state custody on another charge
Other forms of custody	witness protection program
Other forms of custody	Threats were numerous, starting while on bond and continuing into time on probation.
Other forms of custody	While awaiting sentencing.
Other forms of custody	The defendant was arrested on new criminal charges.
Other forms of custody	USMS lock-up pending a court proceeding
Other forms of custody	Custody
Other forms of custody	in [redacted] following deportation while on supervised release
Other forms of custody	USMS lock-up pending court proceeding
Other	During the course of the investigation
Other	For family members none of these applies
Other	I don't remember
Other	defendant absconded pretrial release supervision and was

Categories of Other Locations	Description
	living in [redacted]
Other	the threat -made to defendant - was of harm to his himself or his family
Other	[missing comment]
Other	suspected cooperating witness during drug conspiracy

Appendix D: Other Sources to Identify Defendants

Categories of Other Sources	Description
Suspicion	After the target's arrest, the defendant was suspected of cooperating. When the defendant was arrested (and in pre-trial detention) he was threatened. I took proactive steps to prevent disclosure of information during the court proceedings.
Suspicion	co-defendant suspicion
Suspicion	co-defendant [suspicions]
Suspicion	Defendant in an [redacted] RICO gang case was suspected by other incarcerated gang members of cooperating with law enforcement as to the murder of a police officer, and he was stabbed in a federal detention facility.
Suspicion	gossip
Suspicion	gossip
Suspicion	prison gossip
Suspicion	rumor
Suspicion	rumor of cooperation
Suspicion	rumor of cooperation
Suspicion	The Defendant was released with conditions and the co [defendants] were under the belief that anyone released was cooperating with the [government].
Suspicion	word of mouth
Other Court Document/Proceeding	302 report after debriefing
Other Court Document/Proceeding	a criminal complaint unsealed in a related case identified statements made by the defendant upon his arrest
Other Court Document/Proceeding	A plea agreement that was not filed and was presumed to include a substantial assistance provision because it was filed under seal
Other Court Document/Proceeding	a request letter to the judge to use the offender as an informant
Other Court Document/Proceeding	A tape recorded conversation between the D and the CI was disclosed in discovery. Other Defendants obtained a copy of that recorded call and threatened the D and her family as a result.
Other Court Document/Proceeding	affidavit

Categories of Other Sources	Description
Other Court Document/Proceeding	After live testimony
Other Court Document/Proceeding	Again, it is an issue with BOP inmates obtaining Docket Sheets.
Other Court Document/Proceeding	BOP inmates demanded the defendant's docket sheet, and looked for "holes" in the docket sheet--which corresponded to sealed motions, plea agreement attachments, sentencing memorandum, and the like. From those sealed docket entries, they correctly surmised the defendant was a cooperator.
Other Court Document/Proceeding	Change in Offender's length of time listed in BOP data base
Other Court Document/Proceeding	CI Agreement
Other Court Document/Proceeding	co-defendant discovery
Other Court Document/Proceeding	Community became aware client would testify at trial of co-defendants. Threats were then made to defendant and family
Other Court Document/Proceeding	court-ordered discovery
Other Court Document/Proceeding	Courtroom testimony
Other Court Document/Proceeding	courtroom testimony
Other Court Document/Proceeding	Courtroom [testimony]
Other Court Document/Proceeding	Criminal Complaint
Other Court Document/Proceeding	criminal complaint
Other Court Document/Proceeding	DEA 6
Other Court Document/Proceeding	debrief statement provided in discovery to target's [attorney]
Other Court Document/Proceeding	Defendant did NOT cooperate but was threatened until produced clean docket sheet as proof
Other Court Document/Proceeding	Defendant's cooperation was noted in a memorandum of interview that was produced to the defense in discovery. Report is that members of criminal organization will attend sentencing to hear if there are any references to cooperation.
Other Court Document/Proceeding	Defendant's Motion to Vacate
Other Court Document/Proceeding	disclosure of cooperation id discovery to codefendant
Other Court Document/Proceeding	disclosure pre-trial
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery

Categories of Other Sources	Description
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery Documents
Other Court Document/Proceeding	discovery documents
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery from co-defendant
Other Court Document/Proceeding	discovery in state case
Other Court Document/Proceeding	discovery information
Other Court Document/Proceeding	Discovery material
Other Court Document/Proceeding	Discovery material was distributed into community.
Other Court Document/Proceeding	discovery materials
Other Court Document/Proceeding	Discovery materials
Other Court Document/Proceeding	Discovery materials
Other Court Document/Proceeding	Discovery materials to codefendants
Other Court Document/Proceeding	Discovery of co-defendants
Other Court Document/Proceeding	discovery provided to counsel of codefendants
Other Court Document/Proceeding	Discovery provided to the party who issued the threat
Other Court Document/Proceeding	discussion during sentencing
Other Court Document/Proceeding	docket
Other Court Document/Proceeding	Docket entries would allow inference

Categories of Other Sources	Description
Other Court Document/Proceeding	docket entry scheduling change of plea
Other Court Document/Proceeding	docket reports of filings under seal
Other Court Document/Proceeding	docket sheet
Other Court Document/Proceeding	docket sheet
Other Court Document/Proceeding	Docket sheet
Other Court Document/Proceeding	docket sheet
Other Court Document/Proceeding	Docket sheet had sealed filings
Other Court Document/Proceeding	ECF-docket report
Other Court Document/Proceeding	everything sealed
Other Court Document/Proceeding	evidence and transcripts from co-defendant's trial
Other Court Document/Proceeding	evidence at co-defendant's trial
Other Court Document/Proceeding	FBI 302
Other Court Document/Proceeding	Gave testimony on conduct of others within prison setting.
Other Court Document/Proceeding	government witness list
Other Court Document/Proceeding	Grand jury transcript.
Other Court Document/Proceeding	He testified in a public trial but he was transported with the people against whom he testified.
Other Court Document/Proceeding	I read about the issue in the PSR
Other Court Document/Proceeding	in PSR & SOR
Other Court Document/Proceeding	[indictment]
Other Court Document/Proceeding	indictment
Other Court Document/Proceeding	indictment
Other Court Document/Proceeding	inference from docket entry
Other Court Document/Proceeding	J&C, Presentence Report
Other Court Document/Proceeding	J&C, Presentence Report
Other Court Document/Proceeding	J&S, docket sheet - sealed documents
Other Court Document/Proceeding	J&S, presence of sealed items on docket
Other Court Document/Proceeding	Jencks
Other Court Document/Proceeding	Judgment obviously reflecting a reduction from a mandatory minimum
Other Court Document/Proceeding	Letter from counsel
Other Court Document/Proceeding	memos with redactions

Categories of Other Sources	Description
Other Court Document/Proceeding	Modification of Pretrial Conditions of Release Order
Other Court Document/Proceeding	motion for transfer
Other Court Document/Proceeding	motion practice
Other Court Document/Proceeding	Motion to Seal - sealed justification
Other Court Document/Proceeding	Motion to Seal-sealed justification
Other Court Document/Proceeding	NJ state discovery
Other Court Document/Proceeding	[observers] at plea and sentencing
Other Court Document/Proceeding	Of these documents, only the [redacted] Circuit opinion publicly identified defendant as a cooperator; however BOP inmates confronted the defendant and obtained a copy of his Docket sheet, which showed gaps in entries for sealed documents. From these gaps, BOP inmates correctly deduced defendant had cooperated.
Other Court Document/Proceeding	Order Setting Conditions of Release
Other Court Document/Proceeding	Police report provided in discovery
Other Court Document/Proceeding	police report, co-defendant
Other Court Document/Proceeding	Presentence Investigation
Other Court Document/Proceeding	Presentence Investigation
Other Court Document/Proceeding	Presentence Investigation Report
Other Court Document/Proceeding	presentence report
Other Court Document/Proceeding	presentence report
Other Court Document/Proceeding	presentence report
Other Court Document/Proceeding	Proffer
Other Court Document/Proceeding	Proffer agreement, GJ testimony in discovery file
Other Court Document/Proceeding	proffer statements
Other Court Document/Proceeding	Proffer-DEA Released to defense attorneys.
Other Court Document/Proceeding	Prosecutor's Statement and quotes copied from PSI
Other Court Document/Proceeding	Prosecutor's Statement or copies of PSI
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR, GJ, Discovery

Categories of Other Sources	Description
Other Court Document/Proceeding	PSR,GJ, Discovery
Other Court Document/Proceeding	PSR, GJ, Discovery
Other Court Document/Proceeding	related state court documents
Other Court Document/Proceeding	report of proffer
Other Court Document/Proceeding	Rule 16 discovery (search warrant affidavit--although the defendant was referred to generally as CS. I took proactive steps to seal other documents to prevent additional disclosure.
Other Court Document/Proceeding	Rule 16 discovery (search warrant affidavit--although the defendant was referred to generally as CS. I took proactive steps to seal other information to prevent additional disclosure.
Other Court Document/Proceeding	scheduling a change of plea appearing on the docket
Other Court Document/Proceeding	search warrant affidavit
Other Court Document/Proceeding	sentencing transcript
Other Court Document/Proceeding	sentencing transcript
Other Court Document/Proceeding	Statement of Reason
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	statement to police
Other Court Document/Proceeding	Suspected source was an ATF report provided in discovery as Jencks material prior to a suppression hearing.
Other Court Document/Proceeding	Testified against co-defendants
Other Court Document/Proceeding	testified in public trial
Other Court Document/Proceeding	testified vs co- deft.
Other Court Document/Proceeding	Testimony and Media
Other Court Document/Proceeding	Testimony at trial
Other Court Document/Proceeding	The defendant was believed to be a cooperator because he was on bond (after a drug arrest) when the main target of the investigation was arrested.

Categories of Other Sources	Description
Other Court Document/Proceeding	the defendant was forced to sign a letter requesting docket sheets. These docket sheets were to be used to determine whether the defendant cooperated with the [government]. The letters of request were sent to the US Probation Office and the Clerk's Office. we [redacted] chose not to send the requested documents to the defendant. The defendant's mother contacted the probation officer [who] wrote the presentence report to advise of threats being made against her son (the defendant).
Other Court Document/Proceeding	The defendant's name was noted in the grand jury testimony on a state case in which she provided testimony as a witness and received credit for on her federal case.
Other Court Document/Proceeding	the document being requested was the docket sheet which specifically indicates if the documents are sealed. We chose not to send the defendant his docket sheet as he requested.
Other Court Document/Proceeding	The Presentence Report
Other Court Document/Proceeding	Threat court paperwork would be used to determine if defendant had a 5K1.1
Other Court Document/Proceeding	transcript/discovery
Other Court Document/Proceeding	transcript/discovery
Other Court Document/Proceeding	transcripts/discovery
Other Court Document/Proceeding	transfer of inmate to attend court
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	Trial witness list
Other Court Document/Proceeding	trial witness list
Other Court Document/Proceeding	Under seal hearing in magistrate court
Other Court Document/Proceeding	under seal not disclosed
Other Court Document/Proceeding	witness disclosure
Other Court Document/Proceeding	witness list
Other Court Document/Proceeding	witness list
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	writ

Categories of Other Sources	Description
Other Court Document/Proceeding	writ
Other Court Document/Proceeding	writ
Other Court Document/Proceeding	writted back
News	A newspaper article regarding the plea was published in [redacted]. The article made reference to my client's cooperation and named one of the person against whom he cooperated.
News	[newspaper] report about trial
News	Newspaper
News	Newspaper article
News	Government Detention Motion - which was quoted in news article
talking to agents/debriefs/ government disclosure	At initial arrest, deft was seen talking to agents by his co-defendants.
talking to agents/debriefs/ government disclosure	Defendant at government's request called drug distributor while he was under detention
talking to agents/debriefs/ government disclosure	Defendant was identified because he came to the courthouse for debriefs on days when he did not have a scheduled court hearing.
talking to agents/debriefs/ government disclosure	FBI advised PO/offender
talking to agents/debriefs/ government disclosure	Government disclosure
talking to agents/debriefs/ government disclosure	Government's disclosure of the defendant's cooperation in other unrelated cases.
talking to agents/debriefs/ government disclosure	Govt. revealed cooperation in preparation of trial
talking to agents/debriefs/ government disclosure	Jailhouse observation
talking to agents/debriefs/ government disclosure	Observed cooperating
talking to agents/debriefs/ government disclosure	questioning by FBI
talking to agents/debriefs/ government disclosure	The defendant provided [information] that was used by law enforcement to contact the person. The law enforcement contact was used as identification that the defendant was a cooperator.
talking to agents/debriefs/ government disclosure	Trips out of jail to proffer, where no court hearing was scheduled.

Categories of Other Sources	Description
talking to agents/debriefs/ government disclosure	Was pulled from the facility for multiple debriefs with agents.
talking to agents/debriefs/ government disclosure	Was pulled from the jail and brought to meet with agents.
co-defendants/known	codefendant
co-defendants/known	Co-defendant
co-defendants/known	direct threat [from] father against his son in person
co-defendants/known	Ex-boyfriend
co-defendants/known	from a co-defendant
co-defendants/known	info from other co-defendants
co-defendants/known	info from others involved in case
co-defendants/known	info from witnesses in case
co-defendants/known	Information [received] from other defendants
co-defendants/known	known cooperation
co-defendants/known	One defendant's attorney told the attorney for another defendant of his [client's] cooperation
co-defendants/known	statements by co-conspirators
co-defendants/known	The defendant is one of many defendants in a large [redacted] gang prosecution. Cooperators in this gang are routinely murdered. This defendant has pleaded guilty and everything possible is being done to assure his safety, including the use of sealed filings and proceedings
co-defendants/known	The defendant self-identified himself as cooperating against a co-defendant
Other	A 5K1.1 [motion] was filed but the defendant was shot prior to the sentencing. It is no exactly clear as to how the defendant was identified as a cooperator.
Other	extra-judicial knowledge
Other	Murdered due to cooperation
Other	narcotics traffickers in [redacted]
Other	Not sure. Was killed within a day or two of arrival at prison.
Other	other

Categories of Other Sources	Description
Other	The defendant was believed to be cooperating (post-indictment); daughter (who was believed to be an anonymous source to law enforcement) was assaulted. I took proactive steps to prevent the disclosure of sensitive documents.
Other	Unknown
Other	[Unknown]
Other	USAO submitted
Other	Was FBI Informant

Appendix E: Other Types of Harm to Witnesses

Categories of Other Harm	Description
Attempted Murder	Attempt to Murder
Attempted Murder	contract to kill witness
Attempted Murder	Defendant [solicited] the killing of witness
Other	[missing comment]
Other	Agents developed information that the defendant was associated with a gang and was part of a plan to kill an ATF agent and an AUSA.
Other	defendant was going to be a witness
Other	Disclosure of suspicion that person was a cooperator
Other	economic harm to family
Other	free world
Other	Other
Other	Other
Other	promise of gifts for favorable testimony
Other	relocation
Other	same as mentioned earlier
Other	Same person
Other	The person was not a defendant in the particular criminal action but was perceived by defendants as a cooperator. The perceived witness was in custody on a different matter.
Other	The witness was the defendant who cooperated and testified
Other	under seal
internet/community/general threats	3rd party [harassment]
internet/community/general threats	being ostracized by defendant's family and community
internet/community/general threats	[harassment] of sex trafficking victim by posting pictures
internet/community/general threats	identity of cooperator posted on [YouTube]
internet/community/general threats	nonspecific threats via social media

Categories of Other Harm	Description
internet/community/general threats	threat that defendant would sue the witness for defamation or other civil money damages or that the witness could be prosecuted for perjury if willing to testify against the defendant
internet/community/general threats	threatened by defendant
internet/community/general threats	threatened multiple times
Property Damage	destruction of property
Property Damage	homes and automobiles [shot] up while occupied
Property Damage	The witness' apartment was burned
Property Damage	Witness' home was riddled with bullets from a high-powered weapon and a child was narrowly missed on the eve of the witness/ testimony.
Existing Categories	In this case, the threating conduct occurred prior to the arrest and was part of the criminal conduct/charges. There was a threat of physical harm to a potential witness.
Existing Categories	threats of murder

Appendix F: Other Locations at the Time of Harm to Witnesses

Categories of Other Locations	Description
Not in Custody	A victim not under Court supervision and not in custody
Not in Custody	abroad
Not in Custody	At his workplace
Not in Custody	at home
Not in Custody	at home
Not in Custody	at home - not accused
Not in Custody	at large
Not in Custody	at [liberty] with no pending charges
Not in Custody	at liberty
Not in Custody	at place of employment
Not in Custody	at residence
Not in Custody	Case not yet charged
Not in Custody	[civilian] witness
Not in Custody	[civilian] witness
Not in Custody	[civilian] witness
Not in Custody	Community
Not in Custody	community
Not in Custody	Community
Not in Custody	Community
Not in Custody	cooperating witness
Not in Custody	FBI agent
Not in Custody	Free
Not in Custody	free
Not in Custody	Free
Not in Custody	Free
Not in Custody	Free from custody
Not in Custody	free world
Not in Custody	free world

Categories of Other Locations	Description
Not in Custody	Had not yet been charged. She was cooperating with the government.
Not in Custody	Home
Not in Custody	home
Not in Custody	Home
Not in Custody	Home
Not in Custody	home - not a co-conspirator
Not in Custody	Home and Work
Not in Custody	home and work
Not in Custody	Home and Work
Not in Custody	Home and work
Not in Custody	Home and Work-FBI Case Agent
Not in Custody	Home County
Not in Custody	in community
Not in Custody	in community/not [an] offender
Not in Custody	in his/her community
Not in Custody	in his/her community
Not in Custody	in home
Not in Custody	In home or automobile
Not in Custody	In one case a [defendant's] former lawyer was threatened with [murder]. In another a bank robbery witness was killed two weeks post trial. Was a brother of the defendant who was acquitted.
Not in Custody	in the community
Not in Custody	in the community
Not in Custody	informant was not in custody; he was a paid CI
Not in Custody	living at home
Not in Custody	living at home
Not in Custody	living at home
Not in Custody	living at home
Not in Custody	living in the community where the other defendants lived
Not in Custody	Living with a suspect
Not in Custody	living with Defendant [(fiancée)]

Categories of Other Locations	Description
Not in Custody	lured away from her home by defendant
Not in Custody	no pending charges
Not in Custody	No pending charges
Not in Custody	non-defendant
Not in Custody	non-incarcerated family member of witness and witness
Not in Custody	non-incarcerated family members
Not in Custody	normal residence
Not in Custody	Not arrested
Not in Custody	not arrested
Not in Custody	Not charged
Not in Custody	not charged
Not in Custody	Not charged
Not in Custody	Not charged
Not in Custody	not charged. cooperating with government
Not in Custody	not facing charges
Not in Custody	NOT IN ANY KIND OF CUSTODY
Not in Custody	not in custody
Not in Custody	Not in custody
Not in Custody	not in custody
Not in Custody	Not in custody
Not in Custody	Not in custody
Not in Custody	Not in custody
Not in Custody	not in custody- not charged
Not in Custody	not in custody though had an attorney and was attempting to cooperate
Not in Custody	Not in custody.
Not in Custody	not in [custody]
Not in Custody	Not under Court supervision or custody
Not in Custody	On street
Not in Custody	on the street
Not in Custody	On the street.
Not in Custody	on the streets

Categories of Other Locations	Description
Not in Custody	on the streets
Not in Custody	on the streets
Not in Custody	out
Not in Custody	out of custody
Not in Custody	out of custody
Not in Custody	out of custody witness
Not in Custody	public
Not in Custody	some witnesses were not charged.
Not in Custody	Someone fired a gun at a confidential informant in a bar after his picture was posted online identifying him as the source for a defendant's indictment
Not in Custody	the assailant and witness were not locked up
Not in Custody	The threat of harm occurred prior to the initial arrest.
Not in Custody	The threating conduct occurred prior to the initial arrest of the defendant.
Not in Custody	The witness was not charged with a crime
Not in Custody	The witness was not charged with any crime
Not in Custody	the witness wasn't in the criminal [system]
Not in Custody	trial witness, not in custody
Not in Custody	Uncharged
Not in Custody	under investigation
Not in Custody	under investigation
Not in Custody	[unindicted] witness not in custody
Not in Custody	[non-incarcerated] witness
Not in Custody	[non-incarcerated] witness
Not in Custody	was a trial witness
Not in Custody	was a witness
Not in Custody	was just witness
Not in Custody	Was not charged
Not in Custody	while in the community
Not in Custody	Witness in Community
Not in Custody	Witness not charged
Not in Custody	Witness not charged

Categories of Other Locations	Description
Not in Custody	Witness not charged
Not in Custody	Witness not in custody
Not in Custody	witness not in system
Not in Custody	witness was a citizen
Not in Custody	Witness was a [redacted] Police officer in the murder of a Border Patrol Officer. He testified at pre-trial hearings in a hood and with the courtroom closed. The case involved in the death of the agent and the elimination of 3 to 5 other [redacted] that were aware of the circumstances leading up to the Agent's killing.
Not in Custody	witness was an informant and a police officer giving information about police corruption
Not in Custody	witness was an informant living in society
Not in Custody	witness was an informant who was shot at
Not in Custody	witness was at liberty
Not in Custody	witness was child victim
Not in Custody	witness was the victim
Not in Custody	witnesses not in system
Other	[missing comment]
Other	a business owner
Other	co defendants, criminal
Other	confidential source
Other	cooperator
Other	court-ordered discovery
Other	defense attorneys were threatened
Other	For family members none of these applies
Other	I had a person convicted of sexual assault threaten the victim's family after a jury verdict
Other	in courtroom testifying
Other	in [redacted]
Other	in state court proceeding
Other	Individual was a member of organized crime.
Other	known to defendant
Other	paid cooperator
Other	returned to the danger zone

Categories of Other Locations	Description
Other	still in the conspiracy
Other	The person was a cooperating witness for the government who may have been a coconspirator as well as friend of defendant but do not know if government ever charged cooperator.
Other	under seal
Other	was a confidential informant
Other	witness protection
Existing Category	It is my understanding that the witness was on supervised release
Existing Category	Post conviction release
Existing Category	Post-plea pre-sentence release
Existing Category	the witness, a gang member, testified for the government in a trial before one of my colleagues. The witness would have been a witness in my court in a case related to similar issues, but he was murdered [redacted]. The witness was not in custody at the time of his death, but I believe he was on supervised release.

Appendix G: Other Sources to Identify Witnesses

Categories of Other Sources	Description
Suspicion	all were by word of mouth that he was a cooperator
Suspicion	jail house talk
Suspicion	rumor
Suspicion	suspicion of [co-conspirators]
Suspicion	The witness was murdered [because] it was believed that he was a snitch
Suspicion	word of mouth
Suspicion	word on street
Other Court Document/Proceeding	affidavit
Other Court Document/Proceeding	All documents reflecting cooperation are sealed.
Other Court Document/Proceeding	announced as a witness during the trial
Other Court Document/Proceeding	ATF Agent's Report
Other Court Document/Proceeding	Audio tapes that were used to charge an obstruction count.
Other Court Document/Proceeding	believe child protective services call disclosed cooperation
Other Court Document/Proceeding	case is pending; witness roles revealed in discovery
Other Court Document/Proceeding	Change of plea notice on ECF
Other Court Document/Proceeding	co-defendant discovery
Other Court Document/Proceeding	complaint
Other Court Document/Proceeding	Court testimony
Other Court Document/Proceeding	Court testimony
Other Court Document/Proceeding	court-ordered discovery
Other Court Document/Proceeding	court-ordered discovery
Other Court Document/Proceeding	Criminal Complaint
Other Court Document/Proceeding	Criminal Complaint
Other Court Document/Proceeding	criminal complaint
Other Court Document/Proceeding	Deduced from docket sheet
Other Court Document/Proceeding	Defendant learned that witness appeared before grand jury
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery

Categories of Other Sources	Description
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
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Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery Documents
Other Court Document/Proceeding	Discovery documents -- Agent reports
Other Court Document/Proceeding	discovery material
Other Court Document/Proceeding	Discovery material
Other Court Document/Proceeding	discovery materials
Other Court Document/Proceeding	discovery materials
Other Court Document/Proceeding	Discovery provided to defense counsel for the person against whom the witness testified.
Other Court Document/Proceeding	Discovery revealed identity
Other Court Document/Proceeding	discovery to defendant
Other Court Document/Proceeding	Docket Sheets

Categories of Other Sources	Description
Other Court Document/Proceeding	fact of sealed filings
Other Court Document/Proceeding	fact of sealed filings
Other Court Document/Proceeding	FBI 302
Other Court Document/Proceeding	FBI 302
Other Court Document/Proceeding	FBI 302 and trial testimony
Other Court Document/Proceeding	Grand Jury testimony & discovery
Other Court Document/Proceeding	grand jury transcript
Other Court Document/Proceeding	grand jury transcripts/discovery
Other Court Document/Proceeding	Grand Jury Transcript
Other Court Document/Proceeding	Gvmt witness list
Other Court Document/Proceeding	identified in pretrial
Other Court Document/Proceeding	identity of informant made clear by discovery
Other Court Document/Proceeding	indictment
Other Court Document/Proceeding	Informant was identified after video surveillance was produced by the [government] in discovery
Other Court Document/Proceeding	informant's role made clear in discovery
Other Court Document/Proceeding	Interview report provided in discovery
Other Court Document/Proceeding	Investigation reports
Other Court Document/Proceeding	Jencks Act Material turned over in advance of trial despite protective orders prohibiting defendant from keeping a copy in the jail
Other Court Document/Proceeding	[Jencks] r. 16 materials
Other Court Document/Proceeding	Letter from USAO to Defense Counsel
Other Court Document/Proceeding	police report
Other Court Document/Proceeding	police report
Other Court Document/Proceeding	police report describing witnesses cooperation provided in discovery
Other Court Document/Proceeding	Police reports
Other Court Document/Proceeding	police reports
Other Court Document/Proceeding	Police Reports and proffer statements
Other Court Document/Proceeding	Possible the [redacted] Police report when one of the suspects was apprehended in [redacted].
Other Court Document/Proceeding	Presentence report
Other Court Document/Proceeding	presentence report

Categories of Other Sources	Description
Other Court Document/Proceeding	pretrial service report
Other Court Document/Proceeding	pretrial witness list
Other Court Document/Proceeding	Proffer report provided in discovery
Other Court Document/Proceeding	Prosecutor's Statement and copies of PSI
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	Public testimony as [cooperating witness]
Other Court Document/Proceeding	recordings
Other Court Document/Proceeding	related state court documents
Other Court Document/Proceeding	role of witness made clear in discovery
Other Court Document/Proceeding	role of witness made clear in discovery
Other Court Document/Proceeding	rule to show cause hearing
Other Court Document/Proceeding	saw investigation information
Other Court Document/Proceeding	sealed trial witness list
Other Court Document/Proceeding	search warrant
Other Court Document/Proceeding	search warrant affidavit
Other Court Document/Proceeding	sentencing docs
Other Court Document/Proceeding	state complaint
Other Court Document/Proceeding	state complaint and state search warrant
Other Court Document/Proceeding	State court discovery and plea documents.
Other Court Document/Proceeding	subpoena
Other Court Document/Proceeding	testified against codefendant
Other Court Document/Proceeding	Testified at trial
Other Court Document/Proceeding	Testified in a Court Proceeding
Other Court Document/Proceeding	Testifying
Other Court Document/Proceeding	testimony
Other Court Document/Proceeding	Testimony at hearings
Other Court Document/Proceeding	Testimony at probable cause hearing

Categories of Other Sources	Description
Other Court Document/Proceeding	testimony in trial of co defendant
Other Court Document/Proceeding	testimony of the witness
Other Court Document/Proceeding	The witness was threatened and then badly beaten following his testimony before me
Other Court Document/Proceeding	The witness was verbally threatened in the [courthouse], and was targeted as a [snitch] by use of Facebook and Instagram
Other Court Document/Proceeding	the writ that identified him as a government witness was circulated at the jail
Other Court Document/Proceeding	They were identified by not being publicly filed like codefendants' documents
Other Court Document/Proceeding	transcript of trial
Other Court Document/Proceeding	trial
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	Trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial transcript
Other Court Document/Proceeding	trial witness list
Other Court Document/Proceeding	withdrawal from the case
Other Court Document/Proceeding	withdrawal from the pending case
Other Court Document/Proceeding	witness list provided in advance of trial pursuant to court order
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	Witness Statements
Other Court Document/Proceeding	witness testified at trial
News	newspaper
co-defendants/known	circumstances of drug sale
co-defendants/known	cooperating co def
co-defendants/known	defendant knew witness had disclosed information
co-defendants/known	Defendant knew witness was present at time of crime and observed events

Categories of Other Sources	Description
co-defendants/known	in a [redacted] Mafia case the word got out that the wife of a co-conspirator was going to be a witness and she was [targeted] to be killed.
co-defendants/known	known to defendant
co-defendants/known	known to defendant
co-defendants/known	known to target
co-defendants/known	known to target
co-defendants/known	Named co-defendant in indictment
co-defendants/known	source disclosure
co-defendants/known	statement by defendant
co-defendants/known	The witness was previously employed by the defendant, and he knew she planned to testify against him.
co-defendants/known	unindicted co-conspirators
co-defendants/known	usually identified as family members of the cooperating defendant
talking to agents/debriefs/ government disclosure	Observation in jail
talking to agents/debriefs/ government disclosure	Seen talking with authorities on a routine matter
Other	[missing comment]
Other	His lawyer disclosed
Other	I meant to share the following information as it relates to type of harm experienced by the witness. The victim was a witness in a criminal case in which her son was murdered. The victim (the young man's mother) was raped and nearly killed.
Other	Not sure how Marshal Service learned of the hit but the suspect was apprehended across the street from the court house at the time the [witness] was testifying,
Other	Not sure. he was killed within a day or two of arrival at prison
Other	on the streets
Other	Other
Other	other
Other	Other
Other	same as mentioned earlier

Categories of Other Sources	Description
Other	under seal
Other	Was detained as a material witness in alien smuggling case.

Appendix H: Other Steps to Protect Cooperation Information

Other Steps Taken, Specified by Chief District Judges
Info regarding cooperation at plea or sentencing heard at sidebar and then sealed
Not mailing out PSRs on request.
sealed portions of transcripts in every guilty plea and sentencing
The cooperation provisions of a plea agreement are in a separate document, not filed with the Clerk of Court, and maintained only [by] the judge and the prosecutor and the defense attorney. Also, the prosecutor's sentencing memo describing cooperation is not filed -- indeed even a non-cooperator's sentencing memo is not filed, so that there is no way to determine by deduction that a defendant "must" be a cooperator. Finally, any sentencing transcript is redacted for cooperating information before it is published on the docket.
unaware of clerk's procedures
US Attorney has taken steps to remove references to cooperation in hearings and documents. Court is discussing better ways to protect PSRs.
We have levels of access and access restriction and use those on a case by case basis.

Appendix I: Open-Ended Comments

Categories	Open-Ended Comments
Missing	[missing comment]
Nothing to report	[During] my tenure as a judge in the [redacted district], none of the defendants/witnesses in any of the criminal cases I presided over were ever harmed or threatened to my knowledge.
Nothing to report	I have handled only one criminal case in the past 8 years -- and there were no threats in that one. Sorry I can't be of any help.
Takes issue with the survey	I am extremely uncomfortable participating in in this survey. Your questions cross or come perilously close to crossing the line into attorney-client confidentiality. Had I possessed concrete information concerning harm or threats, I probably would have decided to assert the privilege. A lawyer is not likely to have acquired the type of information the survey seeks except by privileged communication, especially given the parameters the survey places on how to answer the question. It does not solve the problem to promise that the information will remain confidential; the disclosure is [to] be complete once the question is answered. In addition, your survey form demanded specific numerical answers. I do not keep records concerning this issue. So, in particular, my answer to the question "how many requests for file materials to show that they were not a cooperator?" is an estimate based upon my best recollection of the number of inquiries I might have received over the last several years. In a three year parameter, the number may very well be "1". Finally, in my experience, it is virtually impossible to quantify refusals to cooperate based upon threats to personal safety. There are a myriad of moral, ethical, legal and other factors, different in each case, that a client might weigh--and properly so--in reaching a decision about whether to provide information concerning associates. Because the question of whether to cooperate is intensely and uniquely personal, many lawyers, myself included, consider their fiduciary duty to be met by listing those factors and letting the client reflect upon them alone, or with loved ones. Decisions, as far as I can tell, are made after balancing all such factors. It is very rare that the decision is based upon any single one.

Categories	Open-Ended Comments
general comment about harm in prison/prison culture	The prison environment is very difficult and tense, both in my [redacted] and [redacted]. Paperwork is demanded, and people - even people who exerted a fair amount of power on the street - are genuinely intimidated.
procedures for protecting defendants; general comments about the sources to identify cooperator	On [redacted], [redacted] adopted Standing Order Regarding Sealing Documents Filed in Criminal Matters. The Order provides prior authorization for the Clerk of Court to file, under seal, documents from pro se defendants seeking reduction of sentence based on cooperation. Filings by counsel under 5K1.1, Rule 35 and section 3553(e) must be accompanied by a motion to seal. [redacted]
procedures for protecting defendants	The threatened person wrote the court advising of a threat. The court [conferred] with the defense atty and the Government atty. Also the court called the warden of the prison in the presence of the attorneys and made them aware of the alleged threat
procedures for protecting defendants; general comment about the frequency of harm	I generally will ask defendants whether they or any member of their family has been threatened as a part of the plea colloquy in an [appropriate] case. Not infrequently they will either answer yes or no. If I think from the facts or [circumstances] that it is likely that threats have occurred I will ask whether they would tell me truthfully whether such a threat had been made. It happens [a lot] in drug and immigration related cases.
details of a specific incident	I am aware of a large drug conspiracy case that involved a threat to a prosecutor and myself. The prosecutors in the case informed me that threats had been made against co-defendants in the case.
details of a specific incident	I had a large number of defendants in a heroin case which involved two murders and several threats.
general comment about the frequency of harm	I have had 2 or 3 defendants explain why, as former felons, they possess weapons all the while knowing that doing so is a violation of their [supervised release]. On these occasions, the defendants have persuasively explained to me that gang members or other criminal actors threaten to kill the defendants if they will not re-engage with gang/criminal activities. They knowingly possess guns in violation of [supervised release] to protect themselves and family. This is not linked to perceived or actual cooperation with the government, but is responsive to the "additional information about harm or threats of harm....in the past three years."
Procedures for protecting witnesses	It is difficult to determine how many of our witnesses were harmed or threatened as a result of their cooperation in our cases. We take preventive measures to assure witness safety and often relocate witnesses as soon as they begin cooperating. There are times when our witnesses are threatened in their communities because they are suspected of cooperating or they are recognized by the defendant and threatened or harmed. When that happens we immediately bring them

Categories	Open-Ended Comments
	in and offer them relocation services. It is a rare case when our witnesses are identified as cooperators through court proceedings (other than at trial) or court documents because all such documents are placed under seal. Because the [redacted district] has a high witness retaliation rate, we wait until the last possible moment to disclose the names of our witnesses and cooperators.
general comment about the frequency of harm	It seems the perception of harm/ threat is greater earlier in the process, due to the associates co-defendants have made.
general comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Most threats (real or perceived) are in drug cases. Defense attorneys routinely ask that absolutely no record of their clients' cooperation be shown anywhere in the record, including plea agreements and 5K1 motions. One defendant was so worried about being identified as a snitch that he asked to be sentenced to his statutory mandatory minimum [redacted] imprisonment) even though he qualified for a 5K1 motion at sentencing. He had been told by other defendants that when he showed up at his designated BOP facility, he would be asked to provide his Pre-Sentence Report or J&C as "proof" as to whether or not he was a rat.
details of a specific incident; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	1) Social media has been used to post discovery. 2) We had one defendant who managed to get a criminal associate hired at the law firm of a co-defendant out of desperation to determine whether anyone was cooperating, including the co-defendant. 3) Inmates regularly abuse "legal mail" privileges to send written threats to witnesses and judges while in BOP custody; 4) We had a defendant go pro se in an attempt to undermine a protective order which limited dissemination of discovery; 5) We had to relocate a witness and their entire family after he was [threatened] at gunpoint; 6) We had a witness who was shot [at] by two males, each [carrying] a gun. Had they not missed, he would have been dead; 7) threats against judicial officers have required recusal of the USAO, necessitating appointment of an SAUSA and costly travel and lodging expenses. In one such case, our AUSA was required to make [redacted] overnight air trips to another District and was out of town in a hotel during [redacted] long trial.
general comment about harm in prison/prison culture; general comment about the frequency of harm	A BOP investigator in a civil rights case testified in my court that upon entry into the FCIs he has worked in, new inmates are routinely and quickly confronted and made to produce their sentencing "paperwork" by a deadline to prove that they did not cooperate with authorities. The inmates are told that if they cannot do so, they should seek protective custody (usually by requesting transfer into the "secure" (maximum security) unit, or face violence from other inmates. An inmate corroborated this account.

Categories	Open-Ended Comments
details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants	A co-defendant in a multi-defendant drug conspiracy flipped and testified for the Government. He was being housed in the Metropolitan Correctional Center on a different floor from the other defendants. One day during trial, the defendant and the cooperator were brought over in the same van.
details of a specific incident; procedures for protecting defendants	A defendant in a drug conspiracy indictment before another judge in this district conspired with others to kidnap 2 defendants on pretrial release with cases before me, have the defendants transported to [redacted], then murdered. The 2 defendants cooperated with law enforcement, one posing for pictures as having been shot in a bathtub, and the government filed 5K motions for reduction.
details of a specific incident	A defendant's home was burned down when his cooperation was made known. A mother and her daughter (both witnesses) were threatened with a gun and were directed to submit affidavits prepared by the defendant regarding why they would not testify before the grand jury. A defendant made it known that anyone who testified against him would be shunned in a small rural [community]. In a case in which a member of the conspiracy was murdered for stealing drugs, cooperators described pressure from Defendant and his family members to not submit to pressure from government.
procedures for protecting defendants	Again, all the cases were filed under seal
procedures for protecting defendants	All of my knowledge is anecdotal, and non-specific. We work hard to use preventive measures identified above to avoid these situations.
general comment about the frequency of harm	Almost all inmates request Docket. I am certain they are pressured to get that information but I know of no actual threats of harm that leads them to make this request.
general comment about the frequency of harm; general comment about harm in prison/prison culture	Almost all of our clients who are sentenced to incarceration call the office from the designated institution and request some court document to prove that they have not cooperated.
Nothing to report	Although the issue is occasionally raised in criminal cases I believe that the threat to family/friends was only remotely credible on one [occasion] and the specifics were lacking.
details of a specific incident; procedures for protecting defendants; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	An offender under supervision reported being assaulted on more than one occasion while in BOP custody. Another offender under supervision reported being severely beaten while in BOP custody and threatened several times while on supervised release. One officer reported preparing presentence reports for a [redacted] defendant drug conspiracy where numerous defendants cooperated. The cooperation activities were only disclosed through confidential memorandums and sentencing memorandums filed under seal. The case agent and a defense attorney reported one cooper-

Categories	Open-Ended Comments
	ating defendant and his/her family received numerous violent threats from other codefendants and members of the community, which caused the cooperating defendant's family to move to another city. The defendant's name and the words "rat" or "snitch" was written numerous times on the walls of the Marshals' holding cells.
Nothing to report	As noted we have no documented instances of harm or threats in these types of cases so they were neither higher nor lower from one year to the next.
Takes issue with the survey	Asking how many defendants and witnesses refused cooperation is asking for an unknown, because we don't know if a defendant or witness was interested in cooperating or why they chose not to do so. We also do not know whether threats were directed to potential witnesses.
details of a specific incident	[redacted] I presided over a trial of a heroin kingpin. All of his co-defendants pleaded guilty and none testified against him. However, one of the co-defendants had death threat from a [redacted] cartel. This may have been because the co-defendant was suspected of cooperating with the government, although the co-defendant did not have a cooperation agreement provision in his written Plea Agreement.
policy comments	Be [sensitive] to the public's right to know about the details of criminal cases even those that involve a potential for harm to cooperators.
general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator	Before taking senior status, I had a fairly heavy criminal caseload. Given the number of cases, it is difficult for me to remember all the ones in which cooperating defendants and witnesses received threats. In 2014, for example, I held [redacted] sentencing hearings. Very few of those involved simple immigration cases. Most were drug conspiracies, fraud type offenses, and firearms offenses. There are often concerns in the drug cases about retaliation against cooperators. The drug gangs do their best to obtain court documents indicating who cooperates and who does not. I am sure that I have had many criminal defendants, their family members, and witnesses in criminal cases who have received threats. One was the victim of a drive-by shooting in retaliation.
general comment about the frequency of harm	Belligerent attitude among and between defendants and their respective witnesses has intensified; threatened murders of relatives of defendants is much more common and whether they have occurred may not be available information to the Court. Whatever "restraints" on behavior that may have previously existed, they have vanished!
details of a specific incident; procedures for protecting defendants	Both of the offenders experienced threats of physical harm to self and family while on supervised release; and didn't request or receive protective custody of special housing unit placement.

Categories	Open-Ended Comments
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Clients call to request PSR and court documents to document that they are not cooperating. I have recently heard that convicts are more apt to be requested info from other [redacted] inmates. I question whether convicts from [redacted] cooperate after conviction and threaten or force other [redacted] inmates to provide information proving that they are not "rats".
details of a specific incident; general comment about harm in prison/prison culture	co-defendant died under suspicious circumstances while at the detention center
general comment about the frequency of harm; general comment about harm in prison/prison culture	Co-Defendants and witnesses who cooperate are often threatened even though their cooperation is to be confidential. [Occasionally] actual physical violence occurs. There is clearly an element of [intimidation] present in the detention and prison facilities.
general comment about harm in prison/prison culture; general comment about the frequency of harm; procedures for protecting defendants; procedures for protecting witnesses; details of a specific incident; general comments about the sources to identify cooperator	Comments offered by AUSAs: / / / Comment 1: Defense attorneys often ask about whether it is possible to leave cooperation out of plea agreements or to seal plea agreements. Defendants who are considering cooperation are concerned about the presence of sealed 5K motions being a red flag for cooperator status with other BOP inmates, and many fear general reprisal upon reaching the BOP. The above case is a good example of this prisoner notion of being considered "soft" if one is housed in prison with a "snitch." The defendant was suspected of having a gang connection to the ultimate instigator of the violence, but his accomplices were motivated to help simply in order to remove a cooperator from their midst, or to "check the snitch off the block." / / Comment 2: The threat of harm is always a major issue in prosecuting gang cases. It is difficult to determine when there have been actual threats that we do not know of, and when the reluctant witness fears retribution in the future, but nothing has been threatened yet. In general, a substantial number of potential witnesses to gang violence appear nervous about cooperating, and it takes a great deal of effort to get people to cooperate. / / Comment 3: We are seeing an increase in defense attorneys telling us that their clients don't want to cooperate nor do they want us to put a cooperation provision in their plea agreements – and are [leery] of sealed entries in their docket sheets because when they get to prison, the cooperation or sealed entries are taken to mean they are snitches. Not sure if they are concerned only about harm to themselves, but the harm to their families, especially those back home in [redacted]. / / Comment 4: I have one defendant who cooperated in a state case. He was never explicitly threatened, but life on the street doesn't require explicit threats. When we first met this defendant he refused to discuss the source of the counterfeit currency he was caught distributing. In fact, he got it from some gang members in [re-

Categories	Open-Ended Comments
	dacted] area, but wouldn't discuss it with us. He did tell us that he wouldn't talk about the currency because he knew that members of the gang would come after his mother. He was never threatened, but there was no need of a threat. / / I don't know exactly what the survey is trying to capture, but it's missing a big problem. There need not be an actual threat to shut down cooperation, as the above example shows. I recall other anecdotes but they're older than three years. / / Comment 5: Threats from the Cartels in [redacted] continue to be an issue. One defendant and her children were forced to flee and face prosecution here because of threats to her regarding possible cooperation of her and her husband. A material witness in that same case has been pursuing asylum from the Immigration Court out of [redacted]. /
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	cooperating defendants who are incarcerated are routinely asked to show their plea agreements to prove they are not cooperating with the government
details of a specific incident	[redacted], who agreed to cooperate with the government, was murdered the very night of her first interview. Two defendants in a multi-defendant drug conspiracy case were charged with her murder. One was convicted by jury of murder, one pleaded guilty to the murder charge.
general comment about harm in prison/prison culture; general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	Defendants are frequently confronted and asked to provide their Docket Sheet upon arrival at their BOP facility. That Docket Sheet is then examined by other inmates for sealed documents that create "gaps" in the Docket Sheet sequential numbering. Any gaps are viewed with suspicion--as the inmates usually correctly assume those are sealed motions, plea agreements, orders, and memorandum related to cooperation. The defendant is then labeled a cooperator. This forces the defendant into protective custody, or leads to assaults, harassment, threats, and other behavior. I have tried to work with BOP Legal Counsel to ban BOP inmates from having Docket Sheets (much like the BOP bans PSRs, which were excluded from inmate possession for similar reasons). I have not heard back from BOP legal counsel on the issue.
general comment about harm in prison/prison culture; general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator	Defendants are threatened with bodily harm when they arrive at their designated institutions by the prisoners that are designated the "shot callers". Before the defendants are permitted to be on the yard, he must show his paper work, (plea agreement and judgment). Some have requested their presentence report which is not permitted in the possession of an inmate. One defendant was beaten so bad, he was hospitalized. He did not cooperate, but rather another inmate with the same name. The prisoners received the information after having had family and friends look up the defendant's name.

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general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Demands by inmates for new inmates to supply a copy of their Plea Agreements and sentencing transcripts for verification that they were not cooperators. Failure to provide the required information meant they were considered to be "rats"
details of a specific incident; Procedures for protecting witnesses; procedures for protecting defendants	During our office's prosecution of multiple defendants who were part of a local [redacted] gang, a cooperating witness ("CW") was threatened with death, and so were members of his family in [redacted]. The Government arranged for members of the CW's family to be brought to the United States for their safety. Following their arrival, the Government provided funds for the CW's family members to change residences due to additional threats from the defendants. During this prosecution, eight of the defendants who cooperated with the Government sought and received custodial wit-sec protection due to likely retaliation and threat assessment. / / During our office's investigation of several gang members of [redacted] descent, 3 cooperating defendants were threatened while in custody. / / During our office's prosecution of several corrupt police officers involved in illegal drug activities, the confidential informant ("CI") was threatened via text message by one of the defendants. Prior to receipt of the threat, the Government had already arranged for the CI to be relocated out of state for his protection. /
details of a specific incident; Procedures for protecting witnesses; procedures for protecting defendants	Each of the cases that I have had involving witnesses have been victims of domestic violence where the defendant is on supervised release and I am informed that the defendant has threatened the victim. It is brought to my attention through a supervised release revocation report. The case with the cooperating defendant being threatened and put into protective custody was also brought to my attention due to a pretrial services officer informing me.
policy comments; general comment about the frequency of harm; general comments about the sources to identify cooperator	Electronic dissemination of case information, particularly when informants are involved, is problematical for incarcerated defendants. It makes motion and appellate practice cumbersome, and it is nearly impossible to control sensitive information to the detriment of defendants and government witnesses as well. As a defense attorney, I much prefer that these matters not be publicized.
general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	Every client sent to BOP asks for a copy of their docket sheet, even the clients who did cooperate. The cooperating clients want us to somehow amend the docket sheet so there are no sealed documents. Meanwhile, as someone who also represents the people who are cooperated against, I know that finding out information about cooperation efforts, even though it's important impeachment evidence, is becoming more and more difficult.
Nothing to report	Fear of the prosecutor and agents more prevalent fear.

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Nothing to report	Fortunately, I have none to report
general comment about the frequency of harm	Have been a number of cases where illegal alien defendants were participants in drug distribution in U.S., usually as low-level couriers or mules, for a relatively nominal payment of money, but not otherwise a significant part of the drug operation. Many report having been threatened, or having their families threatened, in [redacted] by drug cartels operating there. The government has conceded, in at least some of the cases, that the threats and risks are real.
details of a specific incident	Higher in 2014 due to Robbery Case where four Defendant's/witnesses were assaulted or threatened.
Nothing to report	I am a new Judge appointed in [redacted]
Nothing to report	I am a recently appointed judge, and have no criminal docket at this time.
Nothing to report; Takes issue with the survey	I am not aware of any harm or threats in the past 3 years. Thus, in answering this question I was not sure whether to select "I don't know" or "about the same"....
Nothing to report	I am not aware of any instances where cooperators were threatened or harmed.
Nothing to report	I am not aware of any reported incidents or threats to defendants from our district.
Nothing to report; general comment about the frequency of harm	I am relatively new to the bench. But this has been going on for years.
Nothing to report	I am Senior Status and have not handled any criminal [cases] for the last three years.
general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting witnesses; general comments about the sources to identify cooperator	I am very concerned about cooperating witnesses once they get to prison, whether they cooperated initially and received a benefit for cooperation at their initial sentencing or later got a Rule 35. Even though we try to protect them by sealing certain documents, allies of those who want to know for improper reasons can access the court file from outside of prison, and they do. When a sealed Order in an otherwise dormant file shows up, you can just about bet it is a Rule 35 reduction, and allies of others in prison know that. I had one instance of where I somehow found out about such an inquiry being made for others in prison.
Nothing to report	I began my service as a federal district court judge on [redacted]
Nothing to report	I believe I had one and possibly two alleged threats to family members, but all of it was hearsay and not much collaboration.

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Takes issue with the survey; general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	I believe the survey calls for speculative answers. To the extent such threats or harm can be linked [with] any court activity, which is speculative itself, if there is a link, it is the following: if anyone who wants to do harm to a so-called cooperator is sophisticated in any [respect], they know that the word "sealed" on any court docket means only one thing" : a cooperation provision is part of the case. / The fact of cooperation cannot be kept from the public [vis-à-vis] the specifics of the cooperation. At sentencing the judge of course must announce the amount of time being reduced from the sentence for cooperation. The details of the cooperation are never placed on the record except in the rare case where the defendant chooses to.
general comment about the frequency of harm; general comments about the sources to identify cooperator	I believe there was a concern that threats are generated from those who gain access to public documents that discuss cooperation or potential cooperation by a defendant in custody.
general comment about the frequency of harm; comments about refusal out of fear	I can not recall threat of harm to cooperators but do recall 1) defendants and family members who [were] threatened/harassed because people thought the defendant was cooperating or might do so, and 2) defendants who declined to proffer and help [themselves] because people might think they were cooperators
Takes issue with the survey; general comment about the frequency of harm; general comment about harm in prison/prison culture; comments about refusal out of fear	I can only answer for defendants because that's whom we represent. I can't answer for witnesses. / Limit of 100 is insufficient to express number of defendants who 1) request court documents to show they didn't cooperate (virtually all of those incarcerated make this request, so many hundreds; 2) I can't quantify number of defendants who refuse to cooperate out of fear. This is a constant theme and vastly exceeds 100.
Nothing to report; general comment about the frequency of harm; policy comments	I cannot recall the last time a client, defendant or witness in a matter I was involved in was threatened in any way. In my practice, which overwhelmingly involves the representation of federal defendants and witnesses in federal criminal matters, the threat or risk of harm has not presented itself in years. The extent to which such is an issue depends on the nature of the case and the defendants involved in it. For example, in my district, the risk of harm to a cooperating defendant or witness in a health care fraud case is typically much lower than that faced by a similar defendant or witness in large scale drug trafficking case where the leaders of the conspiracy remain free while a low ranking conspirator is enlisted as witness in an ongoing investigation that has yet result in additional arrests and charges against the leaders. I also perceive that defendants and witnesses in many cases, including drug trafficking and other organized criminal activities, are more likely to cooperate today than in the past. It is more common and there is less taboo therefore associated with "cooperating" among defendants and wit-

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	nesses. The current mechanism whereby the parties must articulate to the court why something should be sealed appears to be working. The purported need for blanket rules allowing court records and documents to be sealed or shielded from the public is a canard.
Nothing to report	I can't recall any others
Takes issue with the survey; general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator; comments about refusal out of fear	I could not accurately answer the previous questions with a number. We frequently have clients call asking for their file and/or docket to prove they are not cooperators - even client who have cooperated. Most [do] not claim they are being threatened but some do. I cannot quantify how many call but it is often. Most ask that the cooperation portion of a plea agreement be placed under seal (that is not automatically done here). 5K motions and anything referencing cooperation (e.g. mtns to adjourn) are under seal. I cannot quantify. I will say that most often when they want to withdraw it is because they do not want to be exposed as a cooperator through testimony but not necessarily because they've already been threatened. It is a concern they will be threatened/harmed once their name is on a witness list. Since most cases plea, cooperators are not exposed. We also have clients who choose not to cooperate. Some make that choice because they do not want to help the government or turn on their family/friends. Others are scared of retaliation. I cannot quantify this because we do not necessarily ask our clients why they are making this decision. / / I don't know if this is helpful. I am sorry that I cannot provide a number.
Nothing to report; Takes issue with the survey; policy comments	I do believe that this is an important issue. But it is my opinion that Judges are the least likely to have knowledge of what happens after his/her case is closed.
Nothing to report	I do not recall receiving reports of harm or threats of harm experienced by any defendant, witness, or family or friends of a defendant or witness from cases on my docket in the past three years.
general comment about the frequency of harm; general comment about harm in prison/prison culture	I do not recall specifics but I do recall being informed (primarily in connection with sentencings that defendants have been threatened in detention facilities and/or their families threatened with physical harm in connection with actual or suspected cooperation. All in drug cases, some of which also involved charges of violent crime (including murder) against the person to whom the threats were attributed.
Nothing to report	I do not see any change in harm, threats, or worries about harm over the last three years (or over the last [redacted] years, for that matter). Clients are often worried about retaliation; however, I have never seen any evidence or stories about actual harm.

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details of a specific incident; Takes issue with the survey	I don't recall any cases involving witnesses being harmed or threatened before 2014. The harm experienced by a witness' family was a drive-by shooting of the family home allegedly arranged by one of the defendants.
general comment about the frequency of harm; Takes issue with the survey; general comments about the sources to identify cooperator	I got tired of answering the same way but I probably see 15 or so cases per year where a cooperating defendant in pretrial custody is [threatened] based on the knowledge he is cooperating based on debriefing statements placed in the [discovery] file of -co-[conspirators].
details of a specific incident; general comment about the frequency of harm	I had a multi-defendant case arising out of brutal assault of an expelled member of the [redacted]. All but one of the defendants pled. Three or four testified for the Government in the trial of the one defendant who went to trial. The "rule" of this prison gang is that one does not get out of it alive. Those who testified were under threat of death, and one in particular -- who had a prior State sentence to serve -- sought (unsuccessfully) a deal to avoid having to serve his State term in the State prison for fear that he would be killed. The Assistant U.S. Attorney who led the initial prosecution was removed from handling further [redacted] cases at his request after he received death threats. / / Frequent death threats are made in illegal alien trafficking cases, to control the illegal aliens until transportation fees are collected, and occasionally some of these aliens are called as witnesses. / / An assistant U.S. Attorney and [I] are currently under death threats from a detained defendant awaiting sentencing on convictions including on one count of solicitation to commit a crime of violence.
details of a specific incident	I had one cooperating witness who was concerned about potential threats once he was sentenced and started serving his custodial sentence. His main area of concern, however, centered around his deportation to [redacted] and the threat of harm facing him from drug cartels in [redacted].
details of a specific incident	I have a large drug case involving about [redacted] defendants. Two of them claim that they were threatened not to cooperate.
details of a specific incident	I have a pending case involving a local gang and allegations of 2 or more killings of cooperating witnesses.
Nothing to report	I have been a judge [redacted].
Nothing to report	I have been on senior status for [redacted] and have not had a criminal docket for the past three years.
Nothing to report	I have been on the bench less than [redacted].
Nothing to report	I have been on the bench less than [redacted].
Nothing to report	I have been on the bench only [redacted] and have had my criminal docket for only [about] [redacted]. I have am not aware of any threats thus far experienced by defendants and/or witnesses, or their family or friends.

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Nothing to report	I have had counsel represent that there may be a potential threat of harm to a defendant or witness, however, I do not believe that there has been any actual harm or threat of harm. Or, maybe, I have just not been made aware.
Nothing to report	I have had no problems with threats of harm to clients or witnesses. If I ever had any issues, I am sure I could work with the government and the court to handle them on a case-specific basis.
details of a specific incident; general comment about the frequency of harm	I have had one case in which a codefendant was murdered just before he was scheduled to appear for a change of plea. I have had other cases in which I learned that a witness was [threatened] but I cannot recall whether any of those instances occurred within the past three years.
Nothing to report	I have no information that any defendant or witness was harmed or threatened due to perceived or actual cooperation.
general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	I have no other specific information to provide, but have the impression that the US Department of Justice and US Attorney's offices do not consider the protection of cooperating defendants (and to a lesser extent witnesses) to be much of a priority, despite the rapid increase in electronic access and search capabilities in recent years. Perhaps this is reflective of better information about the real threat to an incarcerated individual's relative safety, but fear there is a certain amount of fatalism (even cynicism) about what can be or should be to follow through on these protections. Instead, prosecutors seem to be defaulting on their telling the potential informant that, while efforts will be made to protect them, at the end of the day their safety cannot be assured.
Nothing to report	I have not been advised of any threats to anyone
Nothing to report; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator; comments about refusal out of fear	I have not had any clients that, to my knowledge before or after, were threatened or harmed because of cooperation. I can tell you that the CW in jail is that other inmates at the FCI's they will be assigned to, will have access to their judgment and other docs and so will be able to tell if an inmate was granted a 5K or a reduced sentenced for cooperation and they fear retribution for that. The effect is to limit D.'s willing to cooperate. I have had a handful, maybe 6, cases in the past 3 years that the fear of retribution prevented their cooperation.
Nothing to report; general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; comments about refusal out of fear	I have not had defendants/witnesses who have received actual threats or have been harmed because of cooperation or possible cooperation. However, it is common that defendants do not wish to have a cooperation provision in the plea agreement because of safety concerns. Those concerns are two-fold. One is the general concern about their family who will remain in the community. The other concern is that the paperwork at BOP will indicate they are cooperat-

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	ing. The fact that a defendant's cooperation is not kept secure by BOP is a major factor keeping many defendants from desiring to cooperate.
Nothing to report; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	I have not known of documents or transcripts to have been used. Typically it is the movement of the prisoner/witness in and out of the facility to meet with the AUSAs which enlighten fellow inmates.
Nothing to report	I have not received any information that defendants who are serving time after sentencing have been threatened in prison for cooperating.
details of a specific incident	I have one case where the parties' attorneys have expressed serious concerns about any possible threats being made to the defendant during the cooperation period, especially because he is in custody.
Nothing to report	I have only been a District Judge for [redacted].
Nothing to report	I have only been a federal judge for [redacted]. During my tenure, I have not experienced harm/threats to witnesses or cooperators in any of my cases.
Nothing to report	I have only been a judge for [redacted].
Nothing to report	I have only been on the bench for [redacted].
Nothing to report	I have only been on the bench for [redacted].
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	I have only heard of threats to prisoners where their cooperation was discovered through reference to their plea agreements or 5K petition. I have no first hand knowledge of such activity in cases on my docket.
Nothing to report	I have only served as USDJ since [redacted] so I have a limited basis to compare.
Nothing to report	I have polled all current officers and supervisors and they do not recall [any] incidents within the past three years.
general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture; policy comments; general comments about the sources to identify cooperator	I have practiced actively in the [redacted] since [redacted]. Only one defendant (during the 90's) has been the subject of credible threats during a case and he was appropriately given a place to live outside of town by the FBI for a brief period. It is not infrequent that clients communicate from prison about cooperation allegations, including two or three times during the last three years. Clients have requested their PSR, docket sheet, phony letters from the US Attorney's office or from me. I am not aware of any client being the subject of actual harm. The current system of sealing cooperation agreements does not offer protection since plea agreements are public and anybody can do the math and compare guideline levels to actual sentences. Now that the Guidelines are discretionary, there is a risk of being falsely accused of being a cooperator if one gets a reduced sentence for some other reason. / / My view is that the only way to protect defendants is for less of the docket to be public records.

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details of a specific incident; Takes issue with the survey; general comment about the frequency of harm	I have presided over the [redacted] [trials] lasting [redacted]; The [redacted] that were [redacted]; subsequent subsets of [redacted] trials [redacted]; The [redacted] trials [redacted] and numerous other cases involving organized criminal gangs [redacted]. Cooperating witness and [witness] intimidation are standard and the present procedures highlight their cooperation and endanger witnesses. / I did not limit my comments the last three years. / [redacted]
Nothing to report	I just became a judge in [redacted] so I can't compare . . .
Nothing to report	I just took the bench on [redacted].
details of a specific incident; general comments about the sources to identify cooperator	I know of only one case in the past three years. The case involved the exportation of military grade munitions. Once his cooperation was published in the local paper, his family in [redacted] asserted that they were compelled to move. His wife reported that [someone] shot into her vehicle, she added that her son was beaten up, and that they live in constant fear.
general comment about the frequency of harm	I learn from defense lawyers about threats. They learn about threats from [their] clients. Typically I do not learn of the details. I also am not told if the defendant requested protection. Lawyers are very reluctant to give much information about threats because sharing entails may place their clients at further risk. I believe this is a problem that is under reported to the courts.
Nothing to report	I only became a judge in [redacted], so I have no basis for comparison.
details of a specific incident; general comments about the sources to identify cooperator	I only recall one person who, when filing a 2255, requested it be sealed due to fears of threats as he had been a cooperating defendant.
details of a specific incident; general comments about the sources to identify cooperator	I recall one case where I was informed that a cooperating witness was subjected to threats, including on the internet, for participating in the trial
details of a specific incident; general comments about the sources to identify cooperator	I recall only the one case I have previously described and the Motion to Vacate at issue and the opinion were issued in 2014 but defendant's allegation of being [harassed] by inmates based on the opinion were raised in 2015
details of a specific incident; general comments about the sources to identify cooperator	I recently sentenced a defendant who had from jail instructed his girlfriend to identify a co-conspirator on rats.com for cooperating.
procedures for protecting defendants	I require all documents that reference cooperation or potential cooperation to be filed under seal. I also seal transcripts. I have sealed or moved sentencing hearings.
Nothing to report; Takes issue with the survey; general comment about the frequency of harm	I spoke with [redacted] and was told if i did not recall a specific number I should respond with the number "0", which I have done. / / Also this survey is too absolute in its questioning. A whole host of factors may go into the client's decision to cooperate or not, not only the fear of harm or retaliation. So any cause and effect analysis is misleading. Suffice it to say that fear is present in almost any drug case where there is cooperation.

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details of a specific incident	I took the oath in [redacted], so I have a limited data set from which to answer. / / The one case I described, where a shot was taken aimed at an informant, (which missed), is the only incident with which I am familiar.
general comment about harm in prison/prison culture; general comment about the frequency of harm; details of a specific incident	I tried to indicate that every client who is sent to BOP requests their "paperwork" to prove they are not a cooperator. The number is much higher than I indicated but the survey did not accept the number I put in so I dropped it to 10. A client has two weeks to produce their documents once they enter BOP to prove they are not a cooperator otherwise they are subjected to physical harm. One client was beat senseless with a lock in a sock, he suffered severe head wounds. They are all threatened once they arrive in BOP custody.
general comment about the frequency of harm; policy comments	I understand that the only way generally for a defendant to receive a departure, is to cooperate, the extension of that cooperation can not only lead to a dangerous situation for the defendant, but also for the officer supervising that defendant. It is critical that the AUSA and the agents advise officers of a defendant's cooperation, so that they are not put in an unnecessary high risk situation.
Nothing to report	I was confirmed in [redacted], so I am unable to make a comparison between 2013 and 2014.
details of a specific incident; comments about refusal out of fear	I was dealing with defendants associated with the [redacted] drug cartel. Cooperators and their family members were under constant threat. Numerous defendants refused to protect their family members in [redacted].
Nothing to report	I was not on the bench in [redacted].
Nothing to report	I was off of our criminal law draw for most of the past three years. I went on the draw for about three months in about [redacted], and drew three long cases and, therefore, took myself out of the criminal draw again. The trials were [redacted] weeks, respectively. So, I probably have little to add to this survey.
Nothing to report	I was sworn in on [redacted], so my experience is very limited.
Nothing to report	I would not have information about this because it is not a matter ordinarily brought to my attention.
general comment about the frequency of harm; comments about refusal out of fear	I wrote 15 for the number for people who withdrew. It is likely higher. We are in [redacted] where many of our clients are so fearful, b/c of the environment, that we can't even get clients to have a safety valve interview. Clients would rather do their mandatory minimum than be labeled a "snitch." Dozens and dozens of our clients refuse to cooperate out of fear and the threats.
general comments about the sources to identify cooperator	if there are sealed pleading on the docket sheet, the assumption is that client is cooperating
Nothing to report	I'm a new judge and therefore do not have relevant information.

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general comment about the frequency of harm; policy comments	I'm afraid my lack of recollection does not allow me to recount the many more instances over the [redacted] years I have been on the bench in which cooperating defendants have been afraid after they have provided information. My experience is that there is a complete disconnect between the United States Attorneys Office and the Bureau of Prisons such that once a defendant is no longer needed, he is discarded and the interest and knowledge in how best to protecting him or her is minimal to non-existent. There is no sense of commitment to the safety of the cooperator for the duration of his term in custody or upon release.
details of a specific incident; general comment about the frequency of harm	In a large drug trafficking case, a witness/cooperator received a threat via letter. The letter was sent to the witnesses/defendant's family. The FBI is investigating the case. Often, in other cases, many defendants allege that they will be harmed for cooperating - however it's difficult to verify if any actual harm might befall them.
details of a specific incident; general comment about the frequency of harm; general comments about the sources to identify cooperator	In approximately 2010 there was a huge upsurge in drug conspiracy cases involving violence. Two of the cases that I make reference to in this survey involved RICO drug conspiracies. One of the cases was a RICO drug conspiracy involving a prison gang. It was through trial testimony that I learned of the extensive use of court documents (particularly PreSentence Investigation Reports and Plea Agreements) in prison to identify cooperators.
procedures for protecting defendants	In coordination with the District Court, we have implemented a procedure to keep cooperation provisions of plea agreements under seal. Standard non-cooperation plea agreements are filed and appear on PACER. Cooperation provisions in all cases are contained in Supplemental Plea Agreements which are filed under seal using a single Magistrate (MJ) case number.
procedures for protecting defendants; general comment about the frequency of harm; details of a specific incident	In every 5K motion there is a section about potential harm -- most of the time the government says there are no known threats but that given the cooperation threats are a possibility -- my experience has been that they disclose the threats orally at sidebar at sentencing, because they don't want to write the details down, so we don't have records and my memory is not great about individual cases. The most blatant example I had involved a defendant's father's convenience store selling Tshirts with the cooperator's photo and the words "[cooperator's name] is a snitch" -- but the knowledge did not come from court, people learned of it during the investigative stage
details of a specific incident; general comments about the sources to identify cooperator	In [redacted], the defendant on supervised release in my case testified before a federal grand jury in an unrelated matter. He was murdered in [redacted] in [redacted]. It appears that the defendants in the unrelated matter found out about his grand jury testimony.

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procedures for protecting defendants	In multiple Defendant drug cases where a Defendant has cooperated, I am seeing situations where the defense attorney and prosecutor schedule a meeting with me to explain the Defendant is cooperating; however, because of safety concerns for the defendant and his family members, they do not want the docket to reflect any notations to a sealed proceeding. Instead of the U.S. filing a sealed 5k motion, there is a Rule 11(c)(1)(C) plea agreement to a specific sentence or to a specific range and the joint request by defense counsel and the prosecutor is to accept the plea agreement without making any reference on the record to the defendant's cooperation for personal safety reasons. / / My clear preference would be for a sealed 5k motion for downward departure for substantial assistance; however, I have agreed to the off the record procedure requested by defense counsel and the prosecutor because I do not want to see any harm come to the defendant and/or his or her family members.
general comment about harm in prison/prison culture; general comment about the frequency of harm	In my cases, many of my clients have contacted me to obtain transcripts of their sentencing hearings, or copies of the dockets in their cases so that they can show other inmates that they did not cooperate. They have told me that other inmates require this information so that they can prove that they are not "snitches."
details of a specific incident; general comments about the sources to identify cooperator	In one case prosecuted recently, the informant /witness was threatened after the defendant's family posted the tapes of the undercover buys the informant made on YouTube. The tapes had been provided to the public defender as discovery. The public defender turned these over to the defendant's family, and subsequently, the family posted the videos on-line. The office has addressed this problem with the public defender to ensure that such an episode will not be repeated.
details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	In one case, the defendant was involved with members of violent known street gangs, such as [redacted], but who also would engage in unaffiliated acts of violence for hire in connection with their drug trafficking activities. The defendant used information obtained pursuant to the Jencks Act to ascertain the identities of potential witnesses, some of whom were incarcerated, some of whom had pled guilty but were at liberty (of these some received veiled threats not to testify and one was assaulted- presumably in connection with his anticipated testimony). This defendant also tried to provide economic assistance to one cooperator to buy his silence by providing commissary money and providing money to his family. / / In the third case, the defendants involved in assaulting a perceived cooperator were members of a violent ethnic criminal group. The assault occurred without any concrete proof that the alleged cooperator was, in fact, cooperating on their case. In fact, the per-

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	son was not providing information on their case. The assault was videotaped in the federal jail facility. Additional comments provided via email: There are certain circumstances that may serve as signs to defendants or persons trying to identify who is cooperating with the government in a criminal case or ongoing investigation. For example, --- If the person has pled guilty and the sentence has been held in abeyance for any unusual length of time, usually more than 3 or 4 months. --- If the person pled guilty to a prosecutor's information as opposed to an indictment before there was an indictment filed. --- Because incarcerated defendants who have been convicted by guilty plea (or sometimes trial) are pressured by other inmates to obtain a copy of their presentence report to prove they are not cooperators, our district's Probation Department no longer mentions the defendant's cooperation with the government or the possibility of a 5K1.1 motion as a possible departure factor in the presentence reports. Any cooperation is addressed in the sentence recommendation, which is not sent to the prison officials, and is submitted to the court separately from the presentence report.
details of a specific incident; general comment about harm in prison/prison culture	In one instance, a defendant attempted to recruit an inmate incarcerated with the co-defendant cooperator to harm the cooperator. In another instance, a spouse of a co-defendant (who was also a defendant) in a drug conspiracy case was raped by members of a gang involved in the conspiracy because she agreed to cooperate with the government.
details of a specific incident; comments about refusal out of fear	In one of the cases on which I worked as a magistrate judge, a confidential informant was murdered the day after agents arrested a number of participants in a drug conspiracy. In another case involving multiple defendants who were involved in a drug conspiracy, one of the [redacted] defendants who was a minor player in the conspiracy but who had information about at least one of the leaders of the conspiracy, declined an opportunity to cooperate with the Government out of concern for his family. In that case, we learned that another member of the conspiracy was paying the defendant's attorney fees and was participating in decisions about the defense provided to the defendant. I removed the defense attorney and appointed new counsel for the defendant.
procedures for protecting defendants; general comment about harm in prison/prison culture	In our Court [redacted] we have local rules that allow the sealing of such documents as Motions for 5Ki.i and 3553 relief, Sentencing memorandum, Guilty Plea Memos and Agreements when cooperation of the pleading defendant is at issue. We cannot (and I would not) seal an entire case file, but orders to seal enough documents in a case will be revealing on the docket to those assisting a defendant tar-

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	get. Pre-sentence Investigation reports should not cite cooperation of any defendant, either. / Separating the cooperator(s) in a particular case who are all housed [in] the same facility is also a challenge, but the effort must be made by the prosecutors as well as the FDC and BOP.
procedures for protecting defendants	In our district, all sentencing memoranda, 5K motions, and plea agreement cooperation agreements are sealed by default. I believe this has been very effective in controlling the effect on cooperating defendants and witnesses.
general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	In the [redacted], the United States Attorney's Office ("USAO") prosecutes a number of cases annually charging defendants who are members of violent street gangs, organized crime groups, and large-scale drug trafficking organizations. One of the central tenants of many of these organizations is that those who cooperate with law enforcement against these organizations are automatically targeted for murder or some other form of physical harm. As a result, it is not at all unusual for cooperating defendants and cooperating witnesses to receive threats directed by the criminal groups they are cooperating against. (Although, chiefly as a result of the great care that is typically taken to protect cooperating witnesses and defendants from harm, it is rare for these threats to materialize into actual harm that befalls these individuals.) / / As a result of the nature of the threat faced by cooperating witnesses and defendants who cooperating against some of the violent criminal organizations prosecuted in the [redacted], the USAO routinely seeks permission to file under seal with the court pleadings -- such as sentencing memoranda and plea agreements -- that disclose the fact a defendant or witness is cooperating with the government; and district courts in the [redacted] regularly provide authorization for the government to file such pleadings under seal. While this may provide some measure of protection for individuals who cooperate with the government, it is not a fool-proof method of concealing an individual's cooperation from those who may want to do him or her harm, as the fact that such a pleading has been filed under seal may alone signal to a member of one of these groups that a particular individual is cooperating and these groups often need only to speculate that an individual is cooperating before seeking to do him or her harm.
general comment about the frequency of harm	In the [redacted], we have a large percentage of defendants who cooperate with the government. The majority of threats are coming from drug cartel members who reside in [redacted] and travel back and forth across the border. Most of the defendants who report the threats state they have been kidnapped, beaten, and threatened by the cartel. The threats usually extend to the defendant's family members as well.

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general comment about the frequency of harm; general comments about the sources to identify cooperator	In the vast majority of the cases, rumors led to threats of harm or assault. However, the co-defendant or unindicted co-conspirator had no proof that the defendant was actually cooperating.
general comments about the sources to identify cooperator; details of a specific incident; procedures for protecting defendants	In this district both plea agreements outline the government's intent to request a sentence reduction for cooperation and the Statement of Reasons is still considered by the Court as a public document and thus is available with the judgment on CM/ECF. / / Of the two offenders threatened while on supervised release -- one we made arrangements to transfer supervision to another district and the other one is currently in process of attempting a transfer. The current one being threatened was sentenced in a different district.
procedures for protecting defendants; nothing to report; policy comments	In this district we have very few threats of harm. We believe taking actions to seal information for a minority of persons for the explicit reason of making the information more difficult to obtain, will harm the majority of our clients by making otherwise public information secret and by depriving them of potentially exculpatory or mitigating information (what agreements other similarly situated persons have obtained, how to compare others convicted of the same offense, etc.). We strongly oppose this idea for those reasons. In addition, some courts of appeals look unfavorably on sealing any documents and have strict rules as to when and how documents can be sealed.
details of a specific incident; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	In [redacted], the defendant [redacted] was a local rap artist in [redacted]. [redacted] compiled and released a rap video on YouTube that identified (by name) government cooperators. The government was successful in having the video removed from YouTube. This occurred in [redacted]. On a separate matter, we have received information in the past that inmates in BOP custody were being required to provide other inmates with a copy of their presentence report in order to confirm that they were not cooperating with the government. No specific case references are [available].
details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants; procedures for protecting juries	In [redacted], the government arrested [redacted] people involved with a very violent drug conspiracy known as [redacted]. Most of those arrested were held at the Federal Detention Center, and although there were separation orders, the A.U.S.A. reported to the Court a large number of threats made by the organization leaders [redacted]. The organization took the position that even a defendant's guilty plea qualified as cooperation, even if that defendant provided no further assistance against other co-defendants. The Court broke the organization up into three groups for trial and tried four individuals in the first of the three groups, resulting in convictions for all four. The Court ordered an anonymous jury and the U.S. Marshals escorted jurors to and from the juror parking lot from undisclosed

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	locations. None of the defendants has cooperated against his or her co-defendants, though some have pleaded guilty. Those who have pleaded guilty have made clear that they are putting in a plea for themselves only, not agreeing to cooperate against any of their co-defendants.
general comments about the sources to identify cooperator	It appears most harm was done by people who knew them previously, not [through] court documents or information made public through judicial means.
general comment about the frequency of harm; general comments about the sources to identify cooperator	It appears that more uncharged witnesses (not defendant-witnesses) are threatened, than defendants. Additionally, it appears that frequently, at least at the earlier stages of the cases, the witnesses are identified through conclusions drawn from discovery (even if redacted to protect identity for a time). Additionally, in many cases there are not actual threats, but an expressed fear by the defendant of cooperating due to concern for self or family. Many such defendants express concern through their counsel about the sealing of the cooperation agreement and how it appears on the court's docket (such as whether there is a missing number on the docket).
general comment about the frequency of harm; general comment about harm in prison/prison culture	It is a recurrent theme. I could have continued to answer yes over and over again in this survey. I often read it in PSR where the officer states that the defendant and/or his family was threatened when they learned or suspected that he was cooperating. So I really wasn't thinking of one specific case but of many. Everyone seems to find out in jail about who is a snitch!
Takes issue with the survey; procedures for protecting defendants; general comments about the sources to identify cooperator; general comment about the frequency of harm	It is almost impossible to know the exact number of witnesses or defendants who have been threatened from information learned or acquired from PACER. In our district, plea supplements contain the information about cooperation and the potential for downward departures. They are filed under seal. However, one can see that there is a sealed document by the fact that a numbered document is [missing]. Likewise, 5K1.1 motions are filed under seal. However, again the missing document number and the proximity to sentencing is a give away. The same is true for Rule 35 motions, filed under seal with a missing number and shortly thereafter an Amended [Judgment] is filed. Furthermore, witnesses and cooperating defendants, when threatened, generally do not know how the assailant learned of their cooperation.
policy comments	It is essential that we develop and implement on a national basis uniform procedures and practices to reduce or eliminate the risk of harm to cooperators arising out of public access to court records. My district, [redacted], has developed procedures to do so, but these will be of little effect unless [these] procedures, or something similar to them, are adopted throughout the country.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; policy comments	It is increasingly true that defendant's worry they will be asked, either during pre-trial incarceration or once placed in the Bureau of Prisons, for their plea paperwork to see if they have cooperated. Refusing to provide it is considered proof of cooperation. I have had a court allow me to submit the plea paperwork with a cryptic reference to a sealed document outlining the cooperation and its 5K benefits. We definitely need a way to help [defendants] who cooperate from being put in this predicament.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	It is now regular BOP inmate practice to demand "papers" to determine whether another provided cooperation and assistance to the government, or is a convicted sex offender where minors were involved. Inmates regularly request copies of their docketing statement, judgment and commitment order, and statement of reasons section.
Nothing to report	I've been in this position for less than a year, so my perspective on the questions is very limited.
details of a specific incident; procedures for protecting defendants; general comments about the sources to identify cooperator	I've [only] been on the bench [redacted]...so not a lot of context to respond. I had one case where the potential for 5K1.1 was mentioned in the plea agreement. Later, the FPD asked permission to substitute a revised plea agreement (so it would appear as the "original" [agreement] on the docket), deleting reference to cooperation because of threats conveyed to defendant's family. My clerk has also reported anecdotal instances of "rough and [suspicious]" looking people coming to the [public] viewing terminal to see plea agreements and/or 5K motions.
details of a specific incident; general comments about the sources to identify cooperator	Just the one incident mentioned earlier. It occurred in a multi-defendant drug case. The witness was a defendant in a related multi-defendant drug case and was seen coming back from court. Unclear how one of the defendants (the one who threatened him) knew he had cooperated.
general comment about harm in prison/prison culture; general comment about the frequency of harm	Many clients who were sentenced to a BOP facility have requested court documents that confirm that they were not cooperators.
general comment about harm in prison/prison culture; general comment about the frequency of harm; procedures for protecting defendants; comments about refusal out of fear	Many of our clients request their paperwork after they report to BOP and tell us that if they do not prove they were not cooperating they will be in physical danger. In our district we routinely seal matters on the docket and close hearings that are related to cooperation. We do not track numbers - but we often have witnesses refuse to be interviewed by us in fear that cooperation will tag them as a "snitch" and place them in physical danger.
general comment about the frequency of harm	Many of the threats were made by the defendants appearing before me of actual and potential witnesses against them. I have seen correspondence and transcripts of phone calls containing such threats.
procedures for protecting witnesses	Many of those [threatened] went into witness protection.

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general comment about harm in prison/prison culture; general comment about the frequency of harm	Many requests for transcripts because of demands from other inmates in prison to prove that the defendant was not a cooperator. Some threats to defendants whose sentencing hearings have been postponed when co-defendant trials are postponed because they are assumed to be cooperating.
comments about refusal out of fear; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	Many times defendants will refuse to cooperate because of threats to family, friends or themselves. There is also the fear of the unknown when they reach BOP, as it is common knowledge that "cooperators" are targeted. Further, all of our plea agreements contain boilerplate language regarding cooperation, so anyone in this district could be identified as a cooperator even when they did not cooperate. We also receive many variances on factors other than cooperation, and defendants are concerned that the variances, though not related to cooperation, may target them in prison. We routinely give a copy of the sentencing memorandum we prepare to clients. 5K motions prepared by the government are not shared with us.
general comment about the frequency of harm	Most cases involved illegal aliens with ties to drug cartels in [redacted]. Defendants feared for their [families'] safety. Whether actual threats or simply fear arising out of the retributive reputations of the cartels was the cause of reluctance to provide information, I cannot say.
procedures for protecting defendants; general comments about the sources to identify cooperator	Most information is anecdotal. No hard details are available. It is our practice to seal any filing or proceeding that references cooperators, except the testimony of a cooperator in open court.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Most of the cases involve individuals in either pretrial detention or release status who were threatened by individuals (often co-defendants) who knew the "victims" were assisting the government either after arrest, or had cooperated with law enforcement prior to arrest. I believe very little of the information about cooperators was gleaned through court documents, mostly it was by word of mouth or from the street.
general comment about the frequency of harm; details of a specific incident	Most of the cases where I have clients who reported threats of harm arise in in drug conspiracy cases, mostly involving [redacted]. The reported threats have been both implied and explicit. The implied threats typically involve someone telling the defendant they know where he lives or where his family lives. One [explicit] threat involved discussions as to whether to cut the defendant's fingers off or kill him.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Most of the problems our clients face are because of the nature of their charges, eg child pornography cases. Those clients are very concerned about the privacy of their court files and records.
general comments about the sources to identify cooperator; nothing to report	Most of the threats came as a result of actual trial testimony by the defendants/offenders who were threatened. I have no information in any of the cases that points to court documents being used to identify the defendants/offenders as cooperators.

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general comment about the frequency of harm; procedures for protecting defendants	Most requests to seal cases have been due to the protection of the ability of a defendant to cooperate without the possible targets learning of the Defendant's agreement to cooperate which would impede the Defendant's ability to lure into traps the government has devised for the cooperation. I have not heard of any person who was a witness to a case to whom a threat was made.
comments about refusal out of fear; general comment about harm in prison/prison culture	Mostly gang defendants and witnesses don't want to cooperate because of actual or perceived harm and the need to prove they are not co operators by sufficient documentation when they enter the bureau of prisons
details of a specific incident	my client that was harmed was attacked while in transit--he was threatened several other times, also while being transported to/from court or facilities
general comment about the frequency of harm; comments about refusal out of fear	My clients are concerned about harm to themselves or family in cooperation cases but I have not had any clients decline to cooperate for that reason.
Nothing to report	My judgeship began in [redacted].
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	My [only] [information] about possible harm to witnesses comes from occasional comments by agents or AUSAs that detained defendants have been "reaching out" to persons outside the jail to have them, in turn, contact persons believed to be [cooperators]. I don't know how often this happens, but assume that it's not uncommon. AUSAs & USMS Deputies would be better sources of data. / / I do know that prison inmates are being called on to get and provide to others copies of their PSRs and, perhaps, transcripts of sentencings. Docket sheets containing sealed plea agreements or sentencing [memoranda] area big red flag.
Takes issue with the survey	My responses to the two previous questions left blank is: fewer than 10.
Nothing to report	N.A.
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	n/a
Nothing to report; procedures for protecting defendants	Neither my staff nor I can remember any instance in the past three years of defendants or witnesses being harmed or threatened because of that person's cooperation with the government. In fact, I can't remember any such instance in my [redacted] on the bench. / I know we are careful in my jurisdiction to seal sentencing memos and transcripts of sentencing hearings whenever cooperation is involved or at least whenever I am requested to do so by defense counsel or the government. It is also, of course, possible that we just

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	haven't heard of harms or threats that occur after our cases are closed but I am [sensitive] on the subject and would remember if it had come to my attention.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses	Neither the USAO nor law enforcement agencies track this data, so we have been compelled to provide estimates. Further, it is not clear what the survey means by a witness "withdrawing an offer of cooperation" as opposed to "refusing cooperation." Witnesses, especially in drug and violent crime cases, frequently live in urban areas where "snitching" carries enormous danger. Law enforcement agents commonly hit a wall of silence in a community, stemming largely from the fear that powerful groups will kill witnesses who are seen as providing information to the government. Frequently, this wall of silence can be penetrated only if we manage to arrest and detain many members of the group, freeing residents of fear of retaliation.
Nothing to report; procedures for protecting defendants; general comments about the sources to identify cooperator	No client has reported harm or threats of harm in the last three (3) years. Requests for docket info have decreased since the [redacted] has instituted a policy of sealing ALL plea agreements, not just those entitled Plea and Cooperation Agreements. Those who have asked in the last three (3) years do not report harm or threats of harm in their requests as those requests are probably being screened by those threatening/doing the harm, but that cannot be verified.
Nothing to report	No harm or threats occurred.
Nothing to report	No incidents.
Nothing to report	no threats occurred to my knowledge
Nothing to report	No threats or harm that I am aware of
Nothing to report	No threats, thus no change.
Nothing to report	None
Nothing to report	None known.
Nothing to report	None of my cases that I supervised have experienced threats or harm.
details of a specific incident; comments about refusal out of fear	None of my clients were actually harmed. I had one defendant whose family in another country was threatened. He refused to cooperate.
Nothing to report	None of these matters have been brought to my attention.
Nothing to report	None that I can recall, after checking with my Courtroom Deputy and my Probation Officer liaison.
Nothing to report	None that I know of.
Nothing to report	not applicable
Nothing to report	not applicable, because [I'm] not aware of any such threat to a witness or defendant in any of my cases.
Nothing to report	Not aware of any harm or threat of harm
Nothing to report	Not sure this is a real issue in our district.

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general comment about the frequency of harm; policy comments; takes issue with the survey; comments about refusal out of fear	Obviously, gang and prison inmate prosecution create the greatest threat of actual violence and potential for frightening witnesses from testifying. While "transparency" is at the bedrock of our judicial system, with gang, organized crime, and prison prosecutions transparency comes at a high price when cooperators are an integral part of the prosecution or investigation. Questions 2 and 4 require a highly speculative response. My experience shows that a large number of potential witnesses and defendants are [deterred] and therefore refuse to cooperate because they perceive danger to themselves or their families. I would [not] know if they didn't tell me or refuse an offer, so, my quantification of the numbers is speculative.
details of a specific incident; procedures for protecting defendants	On the first defendant, that individual was placed in protective custody after being harmed/shot. / With respect to the second defendant, that individual was housed in protective custody in a hotel. / With respect to the third defendant, that individual had physical harm but declined any protective custody.
details of a specific incident; procedures for protecting defendants	One additional threat to report (can't go back in survey). Offender on supervised release, cooperated against fellow gang members, separated while in custody and USPO work to keep him separate during supervision activities. Threat was actual physical harm.
details of a specific incident; procedures for protecting defendants	One case in which a defendant on TSR was murdered after [testifying] in court (gang related) and another case were we had to transfer or move a pretrial defendant to another district.
details of a specific incident; general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; comments about refusal out of fear	One client got has face slashed in as a result of his cooperation. Numerous clients request information in order to show they did not cooperate. This number includes clients who did cooperate, but who may not have received a sentence reduction or whose plea agreement did not contain cooperation language. These clients believe they will be harmed if other inmates believe or find out the client cooperated. Two clients requested having solitary confinement protection because they could not provide the ECF docket report to other inmates, since the ECF docket report would show a reduction for cooperating with the government. No one recalls any instances where witnesses were threatened. Third party cooperators have backed out due to perceived danger.
details of a specific incident; procedures for protecting defendants	one client had to be placed in the BOP witness protection program due to the severity of the threats against him by other BOP inmates.
details of a specific incident; comments about refusal out of fear; general comment about the frequency of harm; general comment about harm in prison/prison culture	One client knew of a witness murdered in [redacted]. He flatly refused to cooperate. He received life after conviction at trial. I have many clients who ask for 'fake' documents. One client was beaten while in prison and did lengthy time in segregation. This problem has increased much in last 2 years. Not sure why.

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details of a specific incident; Takes issue with the survey	One defendant was charged with witness intimidation. Also, I assume the survey includes the gov't threatening witnesses with charges or perjury, misprision, and/or conspiracy.
details of a specific incident	One instance of a threat to family members. This was addressed by both counsel. If my docket is any example, threats and harm do not appear to be a significant problem in this district.
details of a specific incident	One of the cases was actively cooperating. The other case involved co-defendants who had been boyfriend/girlfriend and were both out on release.
general comment about harm in prison/prison culture; comments about refusal out of fear; general comments about the sources to identify cooperator	One of the main concerns regarding defendants /offenders in our district is the safety valve requirement. Once in custody and after they plea, [an] inmate has to demonstrate to other inmates that he/she is not cooperating with the government. As proof of this, they have to show their plea agreement and [often] they are not willing to comply with the safety valve for fear of retaliation
details of a specific incident; procedures for protecting defendants	One offender was victimized twice by [redacted] gang members in [redacted]. He was placed in a hotel for 30 days for safety and relocated to [redacted].
procedures for protecting witnesses; details of a specific incident	One witness was placed in the WITSEC program after cooperating. Testimony was not needed because all defendants pleaded guilty. The witness was not a successful participant in the programs due to rule violations.
general comment about the frequency of harm; policy comments; procedures for protecting defendants	Other than a general concern about a possible threat , I am unaware of a specific threat or attacks made to a specific defendant /witness, and I have handled a fairly heavy criminal docket involving "drugs and guns" for years. AUSAs have also mentioned to me that until recently there was no reason for alarm, but all of a sudden there is a big push either by defense lawyers and/or DOJ to have everything sealed for 35b's or 5k1s.. This is despite that there is not one documented incident that I am aware of in all the cases that I have handled of a problem. Many are advocating sealing everything of a cooperative nature now but this is in my opinion inconsistent with any empirical evidence that i am aware of and the first amendment right of the public to know about court proceedings and filings. / / /
general comment about the frequency of harm; procedures for protecting defendants	Our district has had numerous [redacted] cases and security is usually increased during trials/sentencings because of rumors of threats. I have very limited information regarding those threats or rumors.
procedures for protecting defendants; general comment about the frequency of harm; general comments about the sources to identify cooperator	Our practices have changed in recent years to make docket and in court references more oblique and less suggestive of cooperation. Often we [refrain] from discussion 5K1 documents and we [camouflage] them on the docket. We have been informed with increasing frequency that codefendants purchase transcripts of hearings regarding an alleged cooperating defendant and/or witness and manage to access

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	electronic dockets with help from others on the outside. These procedures require some careful management by the judge and others involved in the process.
general comment about the frequency of harm	Please keep in mind that my courthouse sits [redacted]. I hear from hundreds of defendants that they were threatened and/or harmed in [redacted] immediately prior their offenses in the [redacted]. For those who believe that narcotics traffickers are not dangerous criminals need to come sit in my court and hear/see the real stories of what happens in [redacted] by such traffickers.
Nothing to report	Please note that my statistical sample is quite small, in that I am a relatively new judge ([redacted] on the bench).
general comment about the frequency of harm	Primarily I recall threats against AUSAs and/or one defense or public defender.
general comment about harm in prison/prison culture	Prison gangs are an on-going problem.
general comment about the frequency of harm	Reported threats typically are brought to the court's [attention] by defense attorneys during the sentencing hearing, and mostly pertain to families outside the United States in drug trafficking cases. I am unaware of any reported threats being carried out.
general comment about the frequency of harm; details of a specific incident	Reports of threats against cooperating defendants are routine in this district. Actual harm is more rare, but it occurs. I have been personally involved in two cases in [redacted] in which witnesses were murdered.
general comment about harm in prison/prison culture; procedures for protecting defendants	Seems to me the real problem is what occurs after the cooperators begin serving a prison sentence. It is there that fellow prisoners request "proof" that the individual did not cooperate. It's there, too, where some have to seek refuge in the SHU. At least in my experience, it isn't that big of a problem pretrial.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Some cooperators are so fearful that they do not want to receive 5K1.1 reductions to their sentences, nor do they want any mention of cooperation in court records or in court proceedings. In some instances, defendants who have not cooperated, or those who did cooperate but did not want a sentence reduction, request copies of the sentencing transcript and presentence report so that they can "prove" that did not cooperate.
general comment about the frequency of harm; general comments about the sources to identify cooperator; procedures for protecting defendants	Some of the threats were vague in my opinion. I only recall one case with specificity, but believe the frequency of the issue has not increased in the last year. Frankly, when a motion is filed by the government under seal at or about the time of the defendant's sentencing-- if it is identified as a motion filed by the government, a reader of the docket could [easily] surmise the sealed motion is a 5K1.1. I am unsure but believe the "sealed motions" are now listed as sealed documents and the filer is not identified. This is how it should be.

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details of a specific incident	The answers to the questions on this page are [estimates] based on conversations with prosecutors in our office.
procedures for protecting defendants; policy comments	The better prosecutors and criminal defense bar have become much more sophisticated in keeping documentation reflecting cooperation by third party witnesses as well as defendants out of the public eye- i.e. no initial formal arrest paper work and/or bond allowing the defendant to cooperate fully prior to being formally charged which in many instances is driven by a post-cooperation negotiated plea to a particular offense that is actually capped in terms of available sentencing options- such as the 48 month maximum sentence for use of the telephone in a drug conspiracy. In other instances plea agreements are negotiated on the basis of specific relevant conduct that may defacto serve to cap the sentence without the Court necessarily having to formally become involved with the matter of the defendant's cooperation. / / Finally, given the fact that the sentencing guidelines are advisory, along with today's more infrequent use of the 21 U.S.C. 851 enhancement, there are more cases being processed without the Court ever having to address the subject of a reduced sentence under U.S.S.G. 5K1.1 or Rule 35(b). / / All of that said, there will never be a perfect solution to the dilemmas faced by defendants, witnesses, prosecutors, defense attorneys, as well we, as judges. All we might do collectively is to reduce where possible the wrong people learning about who is or has been a cooperating defendant or witness. Truly, the long-standing practice of sealing documents as well as formal sentencing hearings has not served the laudatory goal of providing anything close to a measure of protection for cooperating defendants. /
details of a specific incident; general comments about the sources to identify cooperator; general comment about the frequency of harm	The case I described earlier in this survey was one in which, if I recall correctly, a warrant was not sealed and retaliation was either threatened or likely. I am aware of other anecdotal instances in which prosecutors and defense attorneys have felt retaliation was likely, but I am not aware of any details. Often these instances are revealed when a prosecutor or defense attorney asks during sentencing to disclose cooperation information at the bench.
details of a specific incident; general comments about the sources to identify cooperator	The case [referenced] was [redacted], in which [redacted], a member of [redacted], learned that another member of [redacted], [redacted], was quoted in [redacted] presentence report as identifying [redacted] as a made member of the [redacted]. The page from the presentence report was shown to [redacted], [redacted], who ordered a hit--the murder--of [redacted]. [redacted] was convicted of the murder at trial.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants	The client is worsening for everyone, cooperators and non-cooperators, especially in prison. It is reported by clients in our District and nationwide that when you arrive in prison you are given a certain length of time to prove through your documents that you are not a snitch. Without such proof, you are not allowed safe access to the prison yard. If you can't prove that you are not a snitch you end up in segregation or bouncing from prison to prison or worse.
general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; general comment about the frequency of harm	The consistent theme that we have heard about regarding defendants or offenders in our District, is incarcerated offenders being coerced or threatened while in BOP custody or RRC facility (pre-release) if they did not try to get a copy of their presentence investigation, or plea agreement and provide it to the threatening party. The threatening party is usually doing this to ascertain whether an offender has been a cooperating witness or received a sentence reduction for cooperation (snitching) to government officials.
details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	The Defendant in question not only made a deal with the Government, he actually testified at a jury trial against the other two defendants. There was no question but that his file contained plea deal specifics, and that the co defendants knew what the deal was (it was brought out on cross examination before the jury). When he went to prison for his part in the crimes, we did everything we could to protect his location, as well as his identity, but it somehow leaked about his true identity.
details of a specific incident	The defendant referenced was residing in our District and case agents relocated the individual to another District.
details of a specific incident	The defendant/witness referred to in this survey is the same person.
procedures for protecting defendants; general comment about the frequency of harm	The district court has adopted split plea procedure by which cooperation agreements are protected. We have seen no change in the level of threats to witnesses and/or cooperating defendants based on this procedure.
procedures for protecting witnesses; general comments about the sources to identify cooperator; general comment about the frequency of harm; general comment about harm in prison/prison culture	The [redacted] attempts to obtain protective orders in cases involving cooperating witnesses, and does not allow that information in the jails. Nonetheless, targets and defendants infer who the cooperators are from review of their discovery and spread the word about their cooperation in the jail. We have prosecuted two witness retaliation cases in the past three years, and have investigated several others. In the past several years, threats against cooperators have increased, and pre-trial separation orders have been ineffective in avoiding confrontations.
procedures for protecting defendants; general comments about the sources to identify cooperator	The documents where it was apparent that someone was cooperating were filed under seal. However, sophisticated reviewers of docket entries usually presume that that means cooperation.

Categories	Open-Ended Comments
Nothing to report	The entire current staff of probation officers were polled. There were no other cases identified.
details of a specific incident; general comment about harm in prison/prison culture; procedures for protecting defendants; general comment about the frequency of harm	The first case I mentioned involved very serious assaults on the defendant who provided useful cooperation relating to a number of cases. He was threatened and then beaten in two different prisons before finally being provided what appears to be secure housing. He was also in pretrial detention for many years in unacceptable segregated isolation because of the recognition he was in the process or would cooperate. (In my experience, defendants who cooperate during pretrial supervision often end up being housed in the most segregated and restrictive conditions.) This particular defendant's son, who was incarcerated in a state facility, was also threatened in connection with his father's cooperation. Viable threats were made against the family members also -- who as a result had to move from their home. / / The main pattern involved in other cases involves defendants who are in pretrial detention who face threats on the safety and welfare of the family members at home in [redacted] or [redacted] if they cooperate. We often do not end up knowing what happens under these circumstances. These defendants usually are too scared to even alert authorities regarding the threats. / /
Takes issue with the survey; general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; procedures for protecting defendants; policy comments	The format of this survey was troublesome for me because this is not a yes/no/# of cases issue. I don't have exact numbers, but I can say that in the last 5 years, the number of present and former clients who have demanded that I provide them their discovery or sentencing documents to show to other inmates to prove that they are not cooperating has skyrocketed. The demand to see PSR's is very high also, which causes problems for inmates because a lot of jails/prisons will not allow inmates to receive them in the mail. Many inmates are branded as snitches who are not actually cooperating, but there is often no way to prove that they are not cooperators. Additionally, a lot of my clients do not want to ask to go into PC because it is a horrible way to serve their sentences and the fact that they requested PC once will follow them around to other institutions and increase the likelihood that they will be placed their against their wills, for institutional safety. I honestly don't know how to balance a defendant's right to review the evidence against him with protecting him from harm based on suspicion, sometimes baseless, that he is cooperating.
general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	The government regularly claims that cooperators are at risk but have never cited an example. AUSAs want files sealed to conceal cooperation agreements even AFTER the cooperators testified in open court in front of the defendant. Fear is rampant. I have a [redacted] participant who testified twice against a [co-conspirator] in a case which lasted more [than] [redacted]. She was never concerned.

Categories	Open-Ended Comments
procedures for protecting defendants; policy comments	The harm or threats of harm experienced by my clients was directly related to the practice of one Judge who refused to seal documents in his cases and NOT to the practice or Local Rule with respect to sealing. This particular Judge's philosophy was 'this is a public courtroom, the public should have access.' As a consequence, and to avoid harm, many clients were advised of his practice and urged to factor that practice into the decision on whether or not to offer assistance.
details of a specific incident	The last two cases, individuals went to the homes of defendants' families and threatened them, if defendant cooperated.
general comment about the frequency of harm; general comments about the sources to identify cooperator	The most common threats and attempted acts of harms, that I have encountered, occur when a defendant or a witness is a member of a well knit group of friends, gang members or connected families. Some of the acts of intimidation are not assisted by the contents of court orders, opinions or events in open court. Community knowledge of events is a common source of information about who is (or might be) allied with police or prosecution. But there are incidents where a witness or a defendant's role for the prosecution is uncovered only because lawyers and judges do not consider the danger to cooperators. There are general incentives (in gang cases) to promote a policy of harming snitches within local culture.
general comment about the frequency of harm; general comments about the sources to identify cooperator; details of a specific incident	The most frequent [occurrence] of threats is with cooperating non-defendant witnesses. Their cooperation is revealed through discovery: disclosure of immunity letters and interview reports. I had one witness kidnapped and beaten due to cooperation during investigation. Several other witnesses have been threatened once the witness list for trial is released.
Takes issue with the survey; general comment about the frequency of harm	The number 50 is a plug number because you would not accept a three figure number. These sorts of threats happen so routinely in gang and drug cases that i have lost count. The number of times I have become aware of such threats is EASILY in the hundreds.
general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	The number of instances of threats were down in 2014 because the number of cases were down dramatically. Most defendants request that counsel alter court documents because inmates demand the plea agreements, court docket entries, and a [transcript] of the proceedings. If the inmate does not turn over the documents, they claim they are beaten. Sealing the documents would not be helpful in these cases. The larger problem is that co-defendants learn of cooperation against them and then disseminate the information to other co-defendants or unindicted co-conspirators. Mentally challenged defendants and older defendants seem to particularly be at risk.

Categories	Open-Ended Comments
procedures for protecting defendants; general comment about the frequency of harm; general comments about the sources to identify cooperator	Additional comments provided over email: For more than three years we have following a practice of attaching a sealed supplement to every Statement in Advance of Plea regardless or whether there is a cooperation agreement or not. We do this to avoid it being apparent on the docket whether there is a cooperation agreement. Prior to our court adopting this practice, we received regular comments from counsel that defendants were subjected to threats and accusations once they arrived at the prison. I have not received similar comments since we adopted this practice. I hope this may be of help.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	The numbers listed above are only place holders to enable us to complete the survey. What numbers we do have and the relevant explanations are attached below. / / Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases prosecuted by your office have you learned were harmed or threatened in the past three years? / / 113 – This number is based on separation memos filed with the USMS to keep cooperators separated due to safety concerns and covers the years 2012 thru 2014. It may overstate the number of threats from co-defendants as most of these separation requests are based on concerns of AUSAs and may not necessarily involve an actual threat. / / Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases prosecuted by your office have you learned were harmed or threatened in the past three years? / / 22 – This number is based on the number of times the USAO provided assistance to witnesses to relocate due to concerns for their safety. This number probably under-estimates the actual number as it does not include those witnesses assisted by investigative agencies or witnesses who relocate on their own. / / / In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm? / / While there is anecdotal evidence of defendants who withdraw offers of cooperation out of fear of retaliation, exact numbers are not known. But it is believed to be rare. / / In the past three years, how many defendants refused cooperation because of actual or threatened harm? / / We do not keep records of defendants who refuse to cooperate because of actual or threatened harm. However, regularly we do have defendants who offer to plead guilty and decline to cooperate in any way against their co-defendants for fear of retaliation. / / In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm? / / Again, we have no specific number; it does happen, but it is rare. / / In the past three years, how many witnesses refused cooperation because of actual or threatened harm? / / Unknown / / / Please use the space below to pro-

Categories	Open-Ended Comments
	vide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases prosecuted by your office in the past three years. / / In every case involving gangs, illegal narcotics, violent crime and now even some white collar crimes, our office is very sensitive to the safety of cooperators, be they defendants or witnesses. And while we don't currently have a specific system for tracking threats against cooperators, anecdotally, we know it happens regularly. / / In the last three years, the U.S. Attorney's Office has provided assistance in [redacted] different cases to witnesses and/or their families to temporarily or permanently relocate due to concern for their safety as a result of their cooperation with the government. And while not specific to the last three years, people have been murdered on suspicion of being a government witness, even when they were not. In the same time period, our office has sponsored [redacted] defendants to the Federal Witness Security Program, and we anticipate [redacted] more this year. / / There are several ways by which cooperation becomes known. The criminal element has its own intelligence system which can be very effective. In a recent case we learned members of a gang were accessing PACER to look for documents to confirm cooperation. The most common method to signal cooperation seems to be the delay between a guilty plea and sentencing. If the defendant is not sentenced in a timely manner and removed to BOP, he is suspected of cooperating and may be at risk. Even at BOP, inmates are demanding that newly arrived inmates provide copies of their plea agreements or transcripts of plea proceedings to verify they were not cooperators. / / At times, as a result of a motions hearing or of the discovery process, witness information is obtained. Most of the direct assistance to witness mentioned above [redacted] is a result of one of these two events. / /
comments about refusal out of fear; details of a specific incident; general comments about the sources to identify cooperator; general comment about the frequency of harm	The offenders are reluctant to report the threats/harm to law enforcement since in some instances, the individuals reside in the same community; some have gone back to their prior criminal associates to seek support--could pose a risk to returning to the "gang lifestyle;" all incidents have been reported to federal or local authorities, but very little action has been taken; one offender asked for political [asylum] as threat was overseas; offenders are not aware of how the information "leaked and the threats are coming by way of messages sent by unknown individuals or means (e.g., unknown texts, callers).
details of a specific incident; general comments about the sources to identify cooperator	The one case I recall involved a witness testifying at trial, and the threats came from defendant's family.

Categories	Open-Ended Comments
details of a specific incident	The only cases reported as possible threats involved co-defendants (both female) who has been continuously threatened and abused throughout the course of the offense generally. Once they made the decision to cooperate, there were no further threats or intimidation, but the women remain fearful based on both actual and threatened harm to them during the course of the offense. There is nothing to indicate that the fact of their cooperation resulted in additional threats or actual harm in either case.
details of a specific incident	The only incident I am aware of is the alleged murder of an FBI informant in a bank robbery case. I do not recall the details of how the informant's identity may have been disclosed. The U.S. Attorney never prosecuted the murder. He would have additional information that I do not have.
general comment about the frequency of harm	The only information the office has relative to threats are a number of allegations from defense attorneys that a client or family member was threatened. None of the allegations have been confirmed as being valid or related to the case being prosecuted.
details of a specific incident	The prison guard was accused of "diming" the defendant. Never able to verify.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	The rate of former clients (defendants) incarcerated at BOP facilities requesting copies of the their plea agreement, final judgment order, docket sheet, and sentencing transcripts, rose dramatically in calendar year 2014.
general comments about the sources to identify cooperator; general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture	The Rule 35 and 5K process is problematic. Our judges are resistant to routinely sealing these motions. We are increasingly hearing from cooperators about information taken from public filings being posted on sites such as "Who's a Rat". Additionally, threats to witnesses and cooperating defendants often result when the defendant learns from the discovery process that a particular co-defendant or witness is cooperating. Lately, we have begun hearing from cooperators in the BOP that when they leave their assigned institution on an ASR they are branded a cooperator and are retaliated against when they return.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; details of a specific incident; general comments about the sources to identify cooperator	The survey asked for overall numbers regarding harm or threats of harm to defendants and witnesses over the last three years. Our office does not have a system that captures such data, and therefore accurate numbers were difficult to collect. Individual Assistant United States Attorneys who are currently in the office tried to provide information based on their recollection of cases and incidents. Accordingly, we do not feel like we have an adequate quantitative result. Moreover, the actual numbers reported do not provide an adequate picture of the seriousness of the problem as, in our District, the fear of being identified as a cooperator because of fear of harm or retaliation has dramatically

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	reduced the number of individuals willing to provide information to the government and testify against others. Indeed, the experience in our District is that we are unable to get individuals to cooperate because of their fear that something will happen to them or their family if they do. This seems to be an increasing problem over the years. One reason for this change is the increased focus on drug trafficking organizations with connections to [redacted]. Defendants and witnesses are worried about violence against themselves as well as their families in [redacted]. For example, one AUSA noted that in her last three cases that involved drug trafficking organizations that had connections to [redacted] (all large, multi-defendant cases, which used wiretaps), none of the defendants or putative defendants would cooperate for fear of retaliation against them or their families, both in [redacted] and [redacted]. In addition, in the violent crime cases, witnesses will often refuse to provide information, from the earliest stages of the investigation, to law enforcement for fear of retaliation. Even when we have had success in obtaining their testimony through grand jury testimony, these same witnesses will often refuse to testify at trial or will provide different version at trial. The witnesses do not want to be perceived as cooperating with the government. / / Accordingly, in response to the questions above regarding how many witnesses and defendants refused cooperation because of actual or threatened harm, the answer that we want to provide is "many." A precise number is not available. It is very difficult for us to capture how many witnesses and defendants have told us that do not want to cooperate because of the risk. It seems to happen regularly in violent crime and drug trafficking cases. / / In addition, the stigma of being a cooperator/perceived as a cooperator seems to be so problematic that we have heard from defense counsel that even if their client/defendants provide safety valve proffers pursuant to USSG 5C1.2, they receive word from co-defendants/others in the organization that they are at risk of retaliation. The number of safety valve proffers has reduced dramatically, and the repercussions of refusal are less significant (since there has been a policy decision to apply few mandatory minimum sentences in drug cases). / / The document that most signals that someone is cooperating is a sealed plea agreement. If a plea agreement is sealed, it is a “red flag” alerting others that a particular defendant is cooperating, as there is no other reason to seal the plea agreement. / / Moreover, in most of our threat incidents, the cooperating witnesses/defendants were also identified through the discovery process. Many witnesses had to be moved for their safety. /

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details of a specific incident	The threats arose in a RICO case involving a gang. Some of the members of the gang cooperated with the Government, and they and their families were subjected to threats from the gang.
general comment about the frequency of harm	The threats I see only arise in (1) gun prosecutions of street gang members and (2) drug cases in which the witness or defendant has direct ties to [redacted] dealers.
details of a specific incident; general comment about the frequency of harm	The threats involved were between rival families while a co-[defendant] who was a member of one family was cooperating against a member of another family during a co-[defendant's] trial. These types of threats are somewhat typical between the large extended families [redacted].
general comments about the sources to identify cooperator; details of a specific incident; general comment about the frequency of harm	The USAO for the [redacted] prosecutes major crimes committed by or against [redacted]. In such cases cooperators are readily identified by defendants and their families. This circumstance routinely leads to attempts to intimidate witnesses. Additionally, in at least one public corruption case from a [redacted] who cooperated with the government as a witness was the target of an attempt to oust him from office. That effort is believed to be motivated by a desire to retaliate against the witness for his cooperation. / / /
details of a specific incident; general comment about the frequency of harm; policy comments; procedures for protecting defendants; general comments about the sources to identify cooperator	The worst case I had involved the murder of several family members of two defendants (mother and son) to punish them for losing a substantial amount of contraband and also to intimidate them into not cooperating. Credible threats against defendants are frequent. I do not recall a precise number, but they are credible enough to keep the defendant from cooperating and receiving a lower sentence. Additional comments provided over phone: Respondent completed the survey with information, but he really focused on the last year and not the last three years. He said he feels like this happens 2-4 times per year in his district, and it is most often the defendants. Defendants will qualify for the "safety valve" but then not take it out of concern of being harmed. He suggested that the committees consider two levels for a filing system. Current CM/ECF only protects information through sealing. The sealed event still provides a record, and drug traffickers know how to read the dockets for what this sealed information is really saying. If there were a public version and a private version of the docket you could better protect the information. Sealing everything just triggers an alarm. He had a case involving a drug conspiracy where the main defendant was the brother of a high level member of a drug cartel. He told his lawyer he would not cooperate because he was concerned about the safety of his family and his

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	wife's family back [redacted]. The lawyer had the [redacted] contact people in [redacted] to obtain information about the cartel [redacted]. This information was provided to federal authorities so the defendant could receive the benefits of cooperation. Nothing was ever signed, and the judge was made aware of the cooperation only through conversations with counsel, both prosecution and defense. If there were a private version of the docket this information could be recorded, even noted in a pre-sentence report.
general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants	There are frequently threats of harm to defendants' families since my docket is close to [redacted]. In specific cases, such as the [redacted] trial, there were threats to defendants, witnesses, families, etc. In the gang conspiracy cases, there are usually threats to defendants, witnesses and family members. I am not aware of any documents [identifying] any person individually, but, of course, I do not know what happens once the BOP gets custody. All 5 K motions and orders are filed as are Rule 35 motions and orders and Presentencing memos are also sealed at sentencings, but have to be unsealed for appeal and other post sentencing actions.
Nothing to report	There has been no actual physical harm to a defendant to my knowledge. Defendants are more concerned with perceived harm and very few [ever] receive an actual threat of harm.
general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator; procedures for protecting defendants	There is a disconnect in the Bureau of Prisons between Washington senior management and the experience on the ground. I believe senior management has expressed the view that harm to cooperators while incarcerated is minimal. We have a federal prison in the district and have talked to the warden. He has indicated that the problem is significant and half of his [Special] Housing population consists of cooperators in protective custody. There are also a variety of other means those intent on harming cooperators are using to gather cooperation data. I presume there will be space elsewhere in the survey to report those findings. Additional comments provided in email: Those who are seeking to identify and verify cooperation of various defendants are extremely sophisticated. They are using a variety of means to gather information. By way of example, they are requiring incarcerated, suspected cooperators to obtain a copy of their judgment and turn it over to the prison gangs. There is apparently no BOP policy precluding this. They are requiring cooperator members' families to obtain transcripts and judgments so that they can compare sentencing exposure with sentencing results, and such documents clearly reflect cooperation without expressly saying so. In this District, we are using all means at our disposal to refrain from disclosing cooperation, including sealed doc-

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	uments, sealed proceedings and attachments to the judgment, among others. However, those protocols are not eliminating the problem. There is also a developing trend in our Circuit jurisprudence that seems oblivious to the cooperation issue. We do not discuss cooperation in the context of a plea, but we fully recognize that the prospect of a cooperation departure is a prime motivating factor for the plea. The Circuit has issued some opinions that question the absence of such a conversation during the Rule 11 plea colloquy. This entire problem is national in scope, and would benefit from a national policy. However, if there continues to be a disconnect between BOP's national management and prison officials on the ground, I am not sure that any policy will alleviate the problem.
general comment about harm in prison/prison culture; general comment about the frequency of harm	There seems to be an organized effort in the BOP by some inmates to determine whether other inmates have/are cooperating. We have received an uptick in former clients wanting information to prove they didn't cooperate.
general comments about the sources to identify cooperator; procedures for protecting defendants	There were direct threats to me and my family that the Marshall addressed. If there are closed sentencing hearing it is presumed that it is to discuss cooperation. I don't mention the [cooperation] agreement on the record or close a sentencing hearing unless specifically requested by the parties. Attorneys regularly [practicing] before me understand this and it works well. There are always reasons for a variance regardless of cooperation. Newer attorneys want to discuss the cooperation agreement in detail and we have to close the hearing. It is no secret after that.
Nothing to report	There were none in 2013 or 2014
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear	These are not all-inclusive. Exact numbers can't be known. The "no snitching" culture is strong in [redacted]. We have not kept statistics on this, but many witnesses and defendants fear to cooperate without identifying their reasons.
Takes issue with the survey; comments about refusal out of fear	these cases are difficult to follow. The clients stop talking to us when they get really scared
general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	They have access to PACER at the prisons and so prisoners and/or guards go through the dockets and tell people what the charges were and what the sentences were. This leads to being able to figure out if they cooperated.
Takes issue with the survey	This entire survey is a waste of time.
general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses; procedures for protecting defendants	This is [redacted] and many defendants have links to DTOs. As such, defendants often have to balance the possibility of threats against the possibility of reduced sentences. Indeed, AUSAs in our district believed that the perceived or potential of threat or harm (without any actual threat made or harm inflicted) deters many defendants from cooperat-

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	ing and/or inhibits them from following through with the cooperation addendum. In addition, we were involved with several incidents in 2014 in which cooperators had to be relocated or placed in WITSEC due to threats. Finally, we also would note that, several years ago, our district court developed a docketing system, in consultation with USAO and FPD, to endeavor to better protect cooperators entering pleas. Called the Master Sealed Event calendar, it creates a docket skip early in every case, and then going forward a separate cooperation addendum gets appended, without a docket skip, to a special sealed calendar.
policy comments; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; general comment about the frequency of harm	This is not a problem the judiciary can solve by sealing court records because inmates are required to "prove" they have not cooperated by producing their own paperwork. If the inmate has cooperated, which is often the case, he simply has no choice but to check himself into the Segregated Housing Unit because he knows the other inmates will access PACER and learn that he has cooperated. I have even had requests from defendants and attorneys to seal a defendant's entire court file so no member of the public could access it. Even then, however, the sealing of court documents related to sentencing raises a red flag as to whether a particular defendant has cooperated. This is a serious problem that needs to be promptly addressed by the DOJ. Defendants do not understand when they enter a plea and cooperation agreement that they are likely agreeing to serve their sentence in solitary confinement. Many of these inmates serve years in the SHU and if they are transferred to another institution the process simply starts over again and they enter the SHU for their own protection at the new institution. Although this is a DOJ/BOP problem, the judiciary has an interest in it because judges accept these pleas and they sentence defendants pursuant to the pleas. A sentence served in the SHU is a very different sentence than one served in general population. There is no programming. Any inmate serving a lengthy sentence in the SHU stands little if any chance at rehabilitation. The judiciary should insist the DOJ address this increasing problem.
Takes issue with the survey	This is useless when the relative of a defendant was murdered.
general comment about the frequency of harm; Takes issue with the survey	This issue is raised continually by defense counsel but I have no evidence of actual harm resulting. However, I lose track of cases after sentencing, so I am not the best person to ask.
details of a specific incident	This response only represents one case.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Threats against actual or perceived cooperators are very common. There is hardly a drug case where the ones caught with the drugs (or their families) are not threatened by leaders of the drug trafficking organizations. Others in the jail suspect cooperators when they get pulled from the facility and brought for a debrief. The government often discloses to codefendants the cooperation of one in order to coerce guilty pleas. I have never had a case where cooperation was learned from the filing of any document or something said in the courtroom. A person's cooperation is usually discovered or suspected long before the govt files a 5K1.1 or Rule 35 motion.
general comments about the sources to identify cooperator	Threats have been made after release of [discovery] (particularly Jencks).
general comment about the frequency of harm; general comment about harm in prison/prison culture; details of a specific incident; procedures for protecting defendants; procedures for protecting witnesses	Threats lower because our caseload has dropped since US Atty doesn't bring many cases here (he prefers [redacted] with lesser penalties). At BOP, prisoners often demand to see PSR or dkt sheet to alert them to prior cooperation. It's dangerous to give up documents and dangerous not to. One of my trials was against killers of a witness. Cooperators often face disapproving and threatening family and former friends when they get up on the stand. It causes some to be very cautious and not especially good witnesses. Family estrangement is a strong motivator to keep silent. A number of my defendants or cooperators are in WitSec and/or protective BOP custody.
general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; general comments about the sources to identify cooperator	Threats of harm and harm to inmates are not limited to cooperators. Sex offenders and clients who victimize children receive some of the worst threats and injuries. It is very common for inmates to request sentencing documents to prove they are not cooperators or sex offenders. When an inmate arrives on a housing unit in a BOP facility they are required to prove they are not a snitch or a sex offender. If they do not or cannot prove they have "clean paper" they have to request protective custody. Many of these clients end up serving their sentences in the most restrictive conditions with no access to treatment or other programs. They live in fear even in protective custody. The prisons are so understaffed that prison [authorities] rely on inmates to keep order. This system of social stratification is therefore tolerated if not condoned. While PACER and CM/ECF have conferred great benefits they also have made life much more difficult for many inmates. Many inmates have someone on the outside with access to PACER to verify the status of other inmates. It is not hard to spot a snitch or a sex offender if you have access to PACER.

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general comment about the frequency of harm	Threats of harm are often recited to me from defendants during sentencing but rarely do I have any method of verifying their reliability. I do not doubt, however, that retribution for cooperation is a serious concern for many defendants faced with the Hobson's choice of cooperating or not receiving the most favorable plea agreement or the 5K or Rule 35 motion essential for avoiding the minimum mandatory sentence.
general comment about the frequency of harm; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	Threats of harm to cooperators are routine in our principal pretrial detention facility and at various BOP [institutions]. Cooperators are sometimes identified through discovery documents when the case goes to trial (or very close to trial). We have reports of defendants (whether they cooperated or not) being told to provide sentencing and/or plea transcripts to prove to others at a BOP facility that they did not cooperate. Cooperators sometimes also are identified (or believed to be identified) through J&C's that contain a sentence not seeming consistent with the charges. We limit access to some documents sent to the BOP by requiring that they be viewed in the Warden's Office (or some other restricted space).
general comment about the frequency of harm; procedures for protecting defendants	Threats of harm usually made to cooperators while they are in pretrial detention with co-defendants. A request is then made to transfer to another detention center or to a different area of the present detention center. These requests are almost always granted.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Threats seem to occur more often when the Govt. lets co-defendants know that a cooperator will testify at trial. At sentencing, threats against cooperators [are] used to strengthen the Govt's 5K1 motion on behalf of the cooperator.
general comment about the frequency of harm	Threats that I am aware of were addressed either to me or to the prosecutor in a given case. I am unaware of any witness that has been threatened, and I have not received any reports from the Bureau of Prisons of harm done to a cooperating defendant/inmate.
general comment about the frequency of harm	Threats to co-defendants, witnesses and victims have occurred in assault, rape, child sexual abuse and drug conspiracy cases. Threats of harm are a particular problem in [redacted] cases.
general comment about the frequency of harm; policy comments	threats to cooperating co-defendants are reported fairly frequently but I do not know if they are real threats or just talk. It often appears to be just talk. It is hard to solve the problem, because the identity of the cooperating co-defendant or witness usually cannot be kept from the defendant, who is usually the perceived source of the threat.
general comment about the frequency of harm	Threats to victims, witnesses and cooperating defendants has been increasing each year.
Nothing to report	to my knowledge [there] have been no threats

Categories	Open-Ended Comments
details of a specific incident; general comments about the sources to identify cooperator	Two co-defendants were beaten in pre-trial detention when discovery/Jencks statements were given to defendants in jail and they learned of the co-defendants' cooperation. / An informant was killed when a gang learned he was informing to law enforcement.
details of a specific incident; procedures for protecting defendants	Two multi-defendant [redacted] cases in parallel prosecutions in which each had one or more cooperators and one in each case had veiled or express threats of violence or physical harm to the [cooperating] defendant or his family members which resulted in permission for each of the threatened families to relocate to another state pending completion of the case. The case ultimately ended with each/all of the defendants entering pleas of guilty and the last of them was sentenced [redacted].
general comment about the frequency of harm	Uncertain of number, but there are a few cases that have been verbally threatened.
procedures for protecting defendants	Usually the government and defense counsel have an agreed upon approach to these matters.
general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture; comments about refusal out of fear	Very few defendants ever tell me about threats or harm once they are sentenced. I have had a [few] (maybe 3-5) letters from prisons saying they are being threatened. In those situations we tell the AUSA or probation. Roughly half of the clients who could cooperate choose not to. A portion of these are concerned about their [safety].
Takes issue with the survey	Very hard to predict on a case [by] case basis.
general comment about the frequency of harm; general comment about harm in prison/prison culture	Virtually every defendant that we represent who ends up in BOP custody calls us to request proof that the defendant did not cooperate. Each inmate tells the same story -- he is confronted shortly after arrival at a BOP facility by an inmate or inmates saying that he has x number of days to prove he is not a cooperator or he will be beaten. Defendants routinely ask us to do things we cannot do -- i.e., provide a fake docket entry, fake statement of reasons for sentence, or to buy transcripts revealing the lack of cooperation.
procedures for protecting defendants; policy comments; general comment about harm in prison/prison culture	We are not allowed to provide copies of discovery and pre sentence reports to defendants detained due to potential threats of harm. However, this prohibition limits the defendant's ability to thoroughly review the evidence against them. / Often, once the Defendant has been sentence I have no further contact so I may not know if cooperation has [led] to threats of harm once in BOP custody.
details of a specific incident	We can only recall one other case approximately 6 years ago where a cooperator was assaulted due to his cooperation while in pretrial detention.

Categories	Open-Ended Comments
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We constantly hear from clients about their desire to have documents to use in BOP to prove they are not cooperating. That number is in the hundreds. Media coverage of sentencings on TV leads to threats and violence against our clients. They are [savvy] enough to know that a sentence is too low following a guilty plea without cooperation.
Takes issue with the survey; nothing to report	We do not track this information so I cannot answer these questions with a specific number so I had to put 0.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We do not track this information, so my numbers understate the occurrence. There has been a large increase in numbers of defendants calling or writing from BOP asking for their docket sheet. It is clear that most of the time it is because they are being pressured to produce this info to other prisoners. In one instance, another prisoner could be heard in the background telling my client what to ask for. / However, we don't track our defendants once they get to BOP, so we would not normally receive information about threats within BOP. Defendants who come back to us on Supervised Release Violations after release relate that this practice of checking docket sheets inside BOP is very common.
general comment about the frequency of harm; procedures for protecting witnesses	We experience this difficulty all the time, and constantly spend funds moving witnesses.
details of a specific incident; procedures for protecting defendants	We found two cases that fit the criteria of the [survey]. The first case is outlined above. Basically, the defendant was on bond and while he was on bond, he was working as a confidential informant. While on bond, he reported receiving death threats and was relocated for a time. He was in protective custody by A.T.F. So while he was on pretrial release we know he received death threats. We found out that after the defendant was on supervision by the probation office he was shot to death at a local bar. The second case involved a defendant reported being intimidated but not threatened. He reported a truck would drive by his house and park there and watch him. He noted several individuals also approached him and asked him questions about his family.
procedures for protecting defendants; general comments about the sources to identify cooperator; policy comments	We generally seal plea agreements with cooperation provisions, but it is an unsatisfactory approach. Inmates have become sophisticated in reading PACER, and many understand that a "sealed event" around the time of the plea is a strong indicator that the defendant is cooperating. This issue is of great concern to us, and we welcome the attention that is being paid to it.

Categories	Open-Ended Comments
general comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture	We have a large number of gun and drug cases that arise in the inner cities and often with gang involvement. It is very common for witnesses in these communities to experience threats and intimidation. In several state prosecutions witnesses have been harmed and in some cases murdered. We have not had any witnesses murdered but it is not uncommon for a [witness] to report that fellow gang members have made threatening remarks to them. In one of the cases referenced earlier a witness was confronted at the door to her house by a man with a gun threatening her and her son because her son was a witness to a shooting and warning not to talk to the authorities. Threats and assaults in jail on cooperating defendants or those thought to be cooperating is not uncommon.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; procedures for protecting defendants; procedures for protecting witnesses; details of a specific incident	We have a lot of anecdotal evidence from defense counsel that defendants are being confronted in BOP facilities based on cooperation (documents from PACER like 5K or Rule 35 motions, or even cooperation paragraphs in plea agreements), however, counsel have been reluctant to give us specifics about those threats. Many of our cases start out with the state, and defendants use documents from the state case, like complaints or search warrants, to find out who is cooperating and retaliate against them. Additional comments provided over phone: Respondent noted that his district sees a lot of harm to defendants and witnesses, but court documents, at least PACER documents, are rarely the source. Defenders know this to be an issue as well, and they were responding to the survey in the same way. Respondent then provided a brief description of how criminal cases work in his district. Even in purely federal cases, which he noted are quite rare for them, the prosecution is required early on to provide statements and plea agreements as part of discovery (within two weeks of the arraignment, by local rule). So these documents (5K, Rule 35, etc.) are given to the defense as part of discovery. The documents are sometimes the source of the information, but are RARELY obtained through PACER. Even if the name of the cooperator or witness is not included, the defendant often can figure out the name of the person based on the information (e.g., the sale of drugs on a specific day or at a specific place tells them who the buyer was). Respondent then relayed more information about the case he mentioned in his email contact. A multi-conviction drug dealer was under state investigation again. A search warrant was left as part of the investigation, so even before discovery, and from that information he was able to obtain the name of the cooperator, who he later lured onto the railroad tracks and shot. This is now a federal case. The only solution to preventing defendants from getting this kind of information is to seek a protective order, which the prosecutors almost never do be-

Categories	Open-Ended Comments
	cause they are difficult to obtain. The district does try to protect cooperation information by entering 5K and Rule 35 information orally during a sentencing hearing (after notifying the court via email that such information will be entered), so there is no PACER docket entry for this. However, if someone went to the trouble of paying to obtain the transcript, they could learn it from there.
procedures for protecting defendants	We have a procedure in place in the [redacted] to protect cooperating defendants. We have created a master sealed event in all criminal cases except immigration cases. This is where the attorneys can have docketed any matters relating to cooperation. It seems to work well.
general comments about the sources to identify cooperator	We have been informed of assumptions by outside individuals that anything sealed or any missing ECF docket numbers covers a sealed document that relates to cooperation.
general comment about the frequency of harm; general comments about the sources to identify cooperator; policy comments	We have experienced a distinct uptick in threatened and actual violence to witnesses and cooperator/targets in the last ten years. Drug traffickers are using their networks as well as [following] docket entries for sealed filings, transfer motions and waivers of pretrial motions. We believe a more secure system for filing sensitive pleading should be developed. There is also a "paralegal" who monitors some of the more significant drug cases. This [paralegal] is seen speaking with the defendants as well as the defense lawyers. Defense counsel do not welcome the input of the paralegal.
details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	We have had a "certified complex" drug conspiracy case where a codefendant was afraid for his life for cooperating with agents. This case has not been sentenced yet. There was no plea agreement or 5K filed (yet), but there was a debrief with this codefendant who implicated other codefendants. This codefendant was assaulted for no reason while in custody pending sentence for the instant case and believes the leader/organizer of this conspiracy ordered the assault. / / In the past three years, we have reviewed about 3 PSRs where the material witnesses in alien smuggling cases were threatened harm if they talked to agents concerning the defendant. Names of material witnesses are disclosed in PSR's with their statement regarding the defendant and the instant offense. It is unknown if the defendant actually carried out the threat of harm as most or all of these material witnesses in these types of cases are deported before the defendant is sentenced. No additional information about these cases is known. /
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We have had multiple reports that defendants in BOP custody are routinely asked to "show papers," meaning J&C, PSR, transcripts of plea and sentencing hearings, etc., and that if they could not or did not they were targeted for violence. In the case of at least one facility, this was confirmed by a Correctional Officer.

Categories	Open-Ended Comments
general comment about the frequency of harm	We have other cases where the defendant/offender has indicated they were threatened by others do to the cooperation but no evidence of the validity of the threat or how others became aware of his cooperation.
Nothing to report	We know of no harm or threats of harm in 2013 or 2014.
general comment about the frequency of harm; comments about refusal out of fear	We know that sometimes witnesses and cooperators refuse to cooperate due to threats or perceived threats, but that information is not always communicated to us. Also, the threats of harm or harm may not be the sole reason to refuse the cooperation.
general comment about the frequency of harm; procedures for protecting defendants	We prosecute a large number of cases in this district that depend on the cooperation of defendants and witnesses who have reason to fear retaliation or have been actually threatened. We do not track this information; therefore the numbers above are not reliable. There are merely a guess, but it is a substantial number each year. We are [redacted] and prosecute a large number of cartel and gang cases. This is a factor in every case. And, in almost every case, the fear of retaliation or the actual threats are made against cooperators or family members in [redacted], complicating matters substantially more than where the cooperators and/or their family members are entirely [redacted].
general comment about the frequency of harm; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	We receive frequent requests for sentencing transcripts from incarcerated defendants who have no appeal or habeas pending. These requests appear to be from defendants who are being pressured/threatened to demonstrate to other inmates that they did not cooperate with the government. Although I have no information of actual threats, I have a strong impression that this is a major problem for incarcerated inmates, whether or not they actually cooperated.
general comment about the frequency of harm; procedures for protecting defendants	We take extra precaution to try to prevent harm but it is sometimes inevitable.
Takes issue with the survey; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	You are asking the wrong person when you ask my office. We represent the LEAD defendant who is usually the person being snitched on, not the person doing the snitching. That said, we do regularly receive requests from defendants in the BOP for PSRs to prove they did not cooperate. We also occasionally receive requests to doctor documents to show cooperators did not cooperate.

Categories	Open-Ended Comments
procedures for protecting defendants; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; policy comments; general comment about the frequency of harm	We used to have mandatory plea agreement supplements that were sealed and filed in every case in an attempt to make it more difficult to tell which defendants were cooperating. Defense counsel reported that this was putting all defendants in jeopardy (including the people who did not cooperate) because the sealed docket entry suggested to fellow inmates that the defendant had cooperated. Accordingly, we stopped the practice of mandatory plea agreement supplements. Presently, motions for downward departure and cooperation agreements are automatically sealed documents. The docket entries are not visible to the public, but the docket will reflect a skipped number, which we are told is a signal to those who might wish to harm a cooperating defendant. Sealed cooperation-related documents are sealed for the duration of a defendant's term of incarceration. Counsel may move to seal things like sentencing memos which contain references to cooperation. On an adequate showing, those motions to seal are routinely granted. Our court has spent significant amount of time discussing this issue, and we have decided to await national guidance on the best way to balance the important interests at stake.
general comment about the frequency of harm	When defendants request reductions of their sentences under Rule 35, they and their lawyers generally contend that the defendants have been threatened, but I have no documented cases of such threats.
general comment about the frequency of harm; procedures for protecting defendants	While defendants at times ask for entire plea agreements to be sealed or not even docketed because of a perceived threat, I have never had any defendant or defense counsel or government attorney provide any details to support the perception.
general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	While I don't have additional information about actual harm or actual threats of harm, I am frequently reminded of the dangers for offenders of being associated with the Government. In one recent large, multi-defendant heroin distribution case in which some defendants had gang affiliations, virtually every defendant [redacted] requested a copy of the transcript of his sentencing. This was not done for appeal purposes - because in each case the appeal period had run when the request was made. My court reporter told me that, in several cases, she was advised by the person requesting (and paying for) the transcript that the transcript was needed so that the defendant could show to other inmates that he was not a "snitch."

Categories	Open-Ended Comments
general comment about the frequency of harm; Takes issue with the survey	While not many AUSAs in the district advised that they experienced defendants or witnesses experiencing harm or threats in the last three years, the AUSA who serves as the district's Professional Responsibility Officer (PRO) and Appellate Chief advised that he has heard of plenty of instances surrounding these issues in his capacity as PRO and Appellate Chief. Therefore, we submit that even though AUSAs may not be quantifying these situations in their daily casework, the issues do arise and the PRO and/or appellate division may be another good source for information. / / Note, that we entered 0 to the questions above because the approximate numbers, if any, are unknown.
general comment about the frequency of harm	While we have had a few [defendants] over the past three years express fears for their safety after cooperating with the government, these fears were based on the nature of the cooperation and no direct or indirect threats were made.
general comment about the frequency of harm; general comments about the sources to identify cooperator; comments about refusal out of fear	Within the District, there is a general perception that cooperators will be harmed, even if there is no specific credible threat of harm known. Even use of the safety valve provision is generally rejected by defendants in narcotics cases given their understanding that said provision could lead to the label of cooperator and the perceived risks that entails. Many defendants do not even consider cooperation or even the safety valve as a result.
policy comments; general comments about the sources to identify cooperator; procedures for protecting defendants	Additional comments provided over email: If the survey is like other FJC surveys, I expect there will be opportunity for open-ended comments. That will be important to me. I have very strong feelings about what the Judiciary should and should not be willing to do in this arena. We are obviously all concerned about threats, intimidation and actual harm inflicted on a defendant who chooses to cooperate. We should get real, hard data on how extensive the problem is. Right now, I hear lots of anecdotes, but have very little real, hard information. This will be a good first step. But even if the survey develops hard data of a genuine and significant problem, I think the Judiciary must be very cautious about compromising the transparency and accuracy of Court records to address the problem. I don't have any problem with Courts doing what we have always done: namely, make case specific decision on whether and what to file under seal. But the recent proposals I've heard go way beyond that and would, if adopted, involve scrubbing the docket entirely of all references to the filing of Rule 35 or 5K motions (not just sealing content in appropriate cases), and in some instances even filing a public version of a plea agreement that appears to be complete but really isn't because there is a private, undisclosed rider that covers cooperation and substantial assistance.

Categories	Open-Ended Comments
	In my view, adoption of proposals like these last two go way beyond sealing records in appropriate cases, and actually strike at the core of the transparency and accountability that is so essential to the integrity and operation of the Court. Court records should, in my view, fairly reflect what actually happened in a case. If there was a Rule 35 or 5K departure motion filed, the record needs to reflect that, even if the content of the motions is sealed for good cause. Otherwise, the Court is publishing a docket that distorts the reality of what occurred in a case. Similarly, if there is a Plea Agreement with a cooperation provision, and that is actually part of the plea deal, the record should not falsely suggest that there is Plea Agreement without such a cooperation provision. The proposal I've heard to file a public version of a Plea Agreement that does not include the cooperation provision, when everyone involved realizes the real deal actually does include cooperation, would in my view put the Judiciary in the position of creating a false and misleading record of what is actually occurring. And obviously I don't think the Judiciary should countenance that sort of thing. Making individualized decisions to seal some or all of the content of a document is perfectly proper and well-established judicial practice in my view. It does result in some compromise of the normal, presumptive right of public access to Court records. But the compromise is appropriate when a judicial officer determines there is good cause for the sealed filing. But the proposals that go beyond this, and that would distort the judicial record of what is actually happening in a case are totally different in my view. At least in my District, I'm hearing the US Attorney's Office--often with support from the Defender Service--push for the more extreme record scrubbing that would, in my view distort the reality of what is happening in a case. I understand and applaud the desire to protect people who choose to cooperate. But I don't think that protection can or should come at the expense of the integrity of the Court record.
details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants; Procedures for protecting witnesses; Takes issue with the survey	Additional comments provided over email: I have the following information to report regarding threats or harm to offenders due to their cooperation: 1) [redacted]- was prosecuted for threatening a material witness [redacted]- see below. 2) [redacted]- was threatened by [redacted] regarding her testimony against [redacted]. [redacted] threatened with physical harm to herself and her family. No actual harm was done. [redacted] was on pretrial release at the time of the threat. No information to indicate she requested protective custody or that she received same. No infor-

TAB 9B

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JUDICIARY STRATEGIC PLANNING (ACTION)

The Judicial Conference approved changes to the *Strategic Plan for the Federal Judiciary* in September 2015. In a letter dated November 6, 2014, Chief Judge William Jay Riley of the Eighth Circuit Court of Appeals, the judiciary's planning coordinator, requested all Judicial Conference committees to consider suggestions for the Executive Committee regarding *Strategic Plan* strategies and goals that should receive priority attention over the next two years.

BACKGROUND

On the recommendation of the Executive Committee, the Judicial Conference of the United States approved an updated *Strategic Plan for the Federal Judiciary* on September 17, 2015. The plan is included as **Attachment 1**.

The update followed committee assessments of the implementation of the 2010 *Strategic Plan*, an analysis of trends, and the consideration of committee-proposed updates and revisions. Drafts of the updated plan were prepared by an ad hoc strategic planning group that included Judicial Conference committee chairs, Executive Committee members, and at-large members, including a circuit executive and the clerk of a district court.

CHANGES TO THE *STRATEGIC PLAN*

The updated *Strategic Plan* carries forward the 2010 *Strategic Plan's* expression of the judiciary's mission and core values, and the seven strategic issues around which the plan is organized. Of the plan's 13 strategies, Strategies 4.1 and 7.2 were made broader and clearer and 11 remain unchanged.

Most of the changes are to the plan's goals and to the narrative describing the plan's issues and strategies. Highlights of the changes are described below.

Goals

- The 2015 plan includes five new goals addressing the supervision of offenders and defendants (Goal 1.1d), judiciary infrastructure (Goal 2.1c), jury representativeness (Goal 5.2c), civic education (Goal 7.2c), and communications with judges in other countries (Goal 7.2d).
- Goals about the restoration of judicial compensation and the handling of claims that cannot be properly addressed in the federal judicial system have been deleted.

- A goal about the protection of judges, their families, court employees, and the public has been separated into two goals (Goals 1.2a and 1.2b).
- Substantive changes and edits were made to eight additional goals (Goals 1.2e, 2.1a, 2.1b, 4.1a, 4.1b, 4.1c, 4.1d, and 6.2a).

Narrative

- The language describing the *Strategic Plan's* issues and strategies was updated, with many sections rewritten.
- References to specific projects and programs were limited in order to preserve the strategic nature of the document, to avoid dating the language in the plan, and to provide flexibility to committees in their policy deliberations.

IMPLEMENTATION OF THE *STRATEGIC PLAN*

Consistent with the approach to planning approved by the Judicial Conference in September 2010, efforts to pursue the strategies and goals in the updated *Strategic Plan* will be led by the committees of the Judicial Conference, with facilitation and coordination by the Executive Committee.

The primary mechanism for committee integration of the *Strategic Plan* into regular committee business has been through the identification and reporting on a series of "strategic initiatives." A strategic initiative is a project, study, or other effort with the potential to make a significant contribution to the accomplishment of a strategy or goal in the *Strategic Plan*. Strategic initiatives are intended to be distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.

Committee missions and responsibilities vary greatly. Similarly, there is great variety among the types of committee activities relating to the *Strategic Plan's* strategies and goals. The planning approach provides committees with substantial flexibility in the development of strategic initiatives. In general, committees are asked to identify the following for each initiative:

- the purpose and/or desired outcome;
- the timeframe or schedule;
- partnerships with other Judicial Conference committees or other groups; and
- the assessment approach.

Committees last reported on the implementation of strategic issues during the summer of 2014, as part of the effort to prepare for the update to the *Strategic Plan*.

Attachment 2 reports initiatives in progress during 2014, organized by the 13 strategies in the current plan.

According to the strategic planning cycle for Judicial Conference committees, the Committee will be asked to report on the implementation of strategic initiatives during its June 2016 meeting.

PRIORITY SETTING (ACTION)

The planning approach for the Conference and its committees assigns the responsibility for priority setting to the Executive Committee, with suggestions from Judicial Conference committees and others.

In March 2011, the Executive Committee reported that it had identified four strategies and one goal that should receive priority attention for the following two years:

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Strategy 4.1 Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts. *(2015 language)*

Goal 7.2b Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Following the identification of priorities, the Executive Committee provided guidance to committees about how to incorporate these priorities into committee planning and policy development efforts:

> All of the strategies and goals in the Strategic Plan are important, and should continue to be pursued. Some elements of the Strategic Plan are of immediate concern, while others should be addressed in the long term. Thus, given limited time and resources, over the next two years particular attention should be directed toward the priority strategies and the priority goal. Given the cross-cutting nature of the goal and strategies that have been identified as priorities, continued coordination of efforts across committees is essential.

In March 2013, the Executive Committee affirmed the previous priorities for an additional two years and modified the guidance to reflect the difficult budget environment confronting the judiciary:

> Everything in the Strategic Plan is important, and worthy of pursuit. However, the judiciary's financial environment will require difficult choices in the months and years ahead, and the establishment of priorities is particularly important at this time when resources are profoundly scarce. We therefore encourage you to weigh the impact on these priorities and related initiatives when considering potential cost-containment measures and other policy changes. This is not to suggest a litmus test for each policy proposal, but simply an overall commitment to each of these five priorities.

At its February 11-12, 2016 meeting, the Executive Committee will consider which strategies and goals from the updated *Strategic Plan* should receive priority attention over the next two years. Committee input is critical to the Executive Committee's deliberations.

Action Requested: The Committee is asked to provide suggestions to the Executive Committee regarding the prioritization of the strategies and goals for the *Strategic Plan* priorities over the next two years.

ATTACHMENT 1

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Strategic Plan for the Federal Judiciary

September 2015

Judicial Conference of the United States

January 7-8 2016

Strategic Plan for the Federal Judiciary

September 2015

Judicial Conference of the United States
James C. Duff, Secretary
Administrative Office of the U. S. Courts
Washington, DC 20544
202-502-1300

www.uscourts.gov

Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants which this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary—change that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law

Equal Justice: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect

Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management

Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources

Excellence: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and staff; commitment to innovative management and administration; availability of sufficient financial and other resources

Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner

The Plan in Brief

The *Strategic Plan for the Federal Judiciary*, updated in 2015, continues the judiciary's tradition of meeting challenges and taking advantage of opportunities while preserving its core values. It takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary's ability to perform its mission effectively. In addition, the plan recognizes that the future may provide tremendous opportunities for improving the delivery of justice.

This plan anticipates a future in which the federal judiciary is noteworthy for its accessibility, timeliness, and efficiency, attracts to judicial service the nation's finest legal talent, is an employer of choice for highly qualified executives and support staff, works effectively with the other branches of government, and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions needed to preserve the judiciary's successes and, where appropriate, bring about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, the plan focuses on issues that affect the judiciary at large, and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

Identified in the plan are seven fundamental issues that the judiciary must now address, and a set of responses for each issue. The scope of these issues includes the delivery of justice, the effective and efficient management of resources, the workforce of the future, technology's potential, access to the judicial process, relations with the other branches of government, and the public's level of understanding, trust, and confidence in federal courts.

Strategic Issues for the Federal Judiciary

The strategies and goals in this plan are organized around seven issues— fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Issue 1: Providing Justice
Issue 2: The Effective and Efficient Management of Public Resources
Issue 3: The Judiciary Workforce of the Future
Issue 4: Harnessing Technology's Potential
Issue 5: Enhancing Access to the Judicial Process
Issue 6: The Judiciary's Relationships with the Other Branches of Government
Issue 7: Enhancing Public Understanding, Trust, and Confidence

These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Issue 1. Providing Justice

How can the judiciary provide justice in a more effective manner and meet new and increasing demands, while adhering to its core values?

Issue Description. Exemplary and independent judges, high quality staff, conscientious jurors, well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Scarce resources, changes in litigation and litigant expectations, and certain changes in law challenge the federal judiciary's effective delivery of justice. To address this issue, this plan includes three strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the effective administration of justice:

Pursue improvements in the delivery of justice on a nationwide basis. (Strategy 1.1)

Strengthen the protection of judges, court staff, and the public at court facilities, and of judges and their families at other locations. (Strategy 1.2)

Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. (Strategy 1.3)

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Background and Commentary. Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of case management, and has a number of mechanisms to identify and assist congested courts. National coordination mechanisms include the work of the Judicial Panel on Multidistrict Litigation, which is authorized to transfer certain civil actions pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these

local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. Cooperative efforts with state courts have also proven helpful, including the sharing of information about related cases that are pending simultaneously in state and federal courts.

Despite ongoing efforts, pockets of delay persist in the courts. With the understanding that some delays and backlogs cannot be avoided and do not reflect upon a court's case management practices, this plan calls for a concerted and collaborative effort among courts, Judicial Conference committees, and circuit judicial councils to make measurable progress in reducing the number of cases that are unduly delayed, and the number of courts with persistent and significant backlogs that may be unwarranted.

The delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible, as is discussed in Issue 5. Litigation costs also have the potential to skew the mix of cases that come before the judiciary, and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive determination of every action and proceeding," and this plan includes a goal to reduce unnecessary costs as well as delay.

This strategy also includes a goal to ensure that persons entitled to representation under the Criminal Justice Act are afforded well qualified representation through either a federal defender or panel attorney. Well qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions.

In addition, the plan includes a goal to enhance the supervision of offenders and defendants. Probation and pretrial services offices have led judiciary efforts to measure the quality of services to the courts and the community, including the use of evidence-based practices in the supervision of offenders and defendants.

Other efforts to improve the delivery of justice should continue. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development and deployment of next-generation case management and financial administration systems. The work of the probation and pretrial services has also been enhanced through the use of applications that integrate data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts.

Goal 1.1a: Reduce delay through the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities.

Goal 1.1b: Reduce unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.

Goal 1.1c: Ensure that persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of criminal defendants.

Goal 1.1d: Enhance the supervision of offenders and defendants in order to reduce recidivism and improve public safety.

Strategy 1.2. Strengthen the protection of judges, court staff, and the public at court facilities, and of judges and their families at other locations.

Background and Commentary. Judges must be able to perform their duties in an environment that addresses their concerns for their own personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to the courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel, and jurors to use the same corridors, entrances, and exits as prisoners, criminal defendants, and others in custody. Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and the home. A key area of focus for the judiciary has been raising the level of awareness of security issues, assisting judges in taking steps to protect themselves while away from court facilities, and educating judges on how they can minimize the availability of personal information on the internet.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.3 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 4.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal 1.2a: Improve the protection of judges, court employees, and the public in all court facilities, and the protection of judges in off-site judicial locations.

Goal 1.2b: Provide increased training to raise the awareness of judges and judiciary Improve the protection of judges and their families at home and in non-judicial locations.

Goal 1.2c: Provide increased training to raise the awareness of judges and judiciary employees on a broad range of security topics.

Goal 1.2d: Improve the security of court facilities, including perimeter security at primary court facilities.

Goal 1.2e: Work with the U.S. Marshals Service and others to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary. The judiciary is likely to face an uncertain federal budget environment, with likely constraints on the ability of congressional appropriations committees to meet judiciary funding requirements. Uncertainty and shortfalls, when they occur, present

particular challenges to clerks' offices, probation and pretrial services offices, and federal defender organizations in ensuring that operations are adequately staffed.

Another key challenge for the judiciary is to address critical longer term resource needs. Many appellate, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990.

Resources are also needed for jurors. Compensation for jurors is still limited, with inadequate compensation creating a financial hardship for many jurors. And, while the judiciary has made progress in securing needed space, some court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking secure corridors separate from inmates appearing in court. As the judiciary's facilities continue to age, additional resources will be needed to provide proper maintenance and sustain courthouse functionality.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must work with these agencies to ensure that the judiciary's resource needs are met.

The ability to secure adequate resources serves as the foundation for a vast majority of the judiciary's plans and strategies. For example, to ensure the well qualified representation of criminal defendants (Goal 1.1c), the defender services program requires funding sufficient to accomplish its mission. Strategy 3.2 and its associated goals focus on the importance of attracting, recruiting, developing and retaining the staff that are required for the effective performance of the judiciary's mission, and will be critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 4.1 urges the judiciary to continue to build and maintain robust and flexible technology systems and applications, requiring a sustained investment in technology.

Goal 1.3a: Secure needed circuit, district, bankruptcy and magistrate judgeships.

Goal 1.3b: Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.

Goal 1.3c: Secure adequate compensation for jurors.

Issue 2. The Effective and Efficient Management of Public Resources

How can the judiciary provide justice consistent with its core values while managing limited resources and programs in a manner that reflects workload variances and funding realities?

Issue Description. The judiciary's pursuit of cost-containment initiatives has helped to reduce current and future costs for rent, information technology, bankruptcy and magistrate judges, the compensation of court staff and law clerks, and other areas. These initiatives have helped the judiciary operate under difficult financial constraints. Cost-containment efforts have also helped the judiciary demonstrate to Congress that it is an effective steward of public resources, and that its requests for additional resources are well justified (Strategy 1.3).

The judiciary relies upon effective decision-making processes governing the allocation and use of judges, staff, facilities, and funds to ensure the best use of limited resources. These processes must respond to a federal court workload that varies across districts and over time. Developing, evaluating, publicizing and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices should be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary-wide. This plan includes a single strategy to address this issue.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Background and Commentary. The judiciary has worked to contain the growth in judiciary costs, and has pursued a number of studies, initiatives, and reviews of judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth and make better use of resources are being implemented or are under consideration.

This strategy includes two goals to increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and staff to assist heavily burdened courts on a temporary basis, and to reduce the barriers to such assistance. Supporting these goals is a third goal to ensure that the judiciary utilizes its networks, systems, and space in a manner that supports efficient operations. A fourth goal speaks to the critical need to maintain effective court operations when disaster strikes.

Goal 2.1a: Make more effective use of judges to relieve overburdened and congested courts.

Goal 2.1b: Analyze and facilitate the implementation of organizational changes and business practices that make effective use of limited administrative and operational staff.

Goal 2.1c: Manage the judiciary's infrastructure in a manner that supports effective and efficient operations.

Goal 2.1d: Plan for and respond to natural disasters, terrorist attacks, pandemics and other physical threats in an effective manner.

Issue 3. The Judiciary Workforce for the Future

How can the judiciary continue to attract, develop, and retain a highly competent and diverse complement of judges and staff, while meeting future workforce requirements and accommodating changes in career expectations?

Issue Description. The judiciary can only meet future workload demands if it can continue to attract, develop, and retain highly skilled and competent judges and staff. Chief Justice Roberts has noted that judicial appointment should be the "capstone of a distinguished career" and not "a stepping stone to a lucrative position in private practice." Attracting and retaining highly capable judges and staff will require fair and competitive compensation and benefit packages. The judiciary must also plan for new methods of performing work, and prepare for continued volatility in workloads, as it develops its future workforce. Two strategies to address this issue follow:

Support a lifetime of service for federal judges. (Strategy 3.1)

Recruit, develop, and retain highly competent staff while defining the judiciary's future workforce requirements. (Strategy 3.2)

Strategy 3.1. Support a lifetime of service for federal judges.

Background and Commentary. It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges. In addition, education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. Technology training, for example, is moving away from a focus on software applications toward an emphasis on the tasks and functions that judges perform. Training and education programs, and other services that enhance the well being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Goal 3.1a: Strengthen policies that encourage senior Article III judges to continue handling cases as long as they are willing and able to do so. Judges who were appointed to fixed terms and are recalled to serve after retirement should be provided the support necessary for them to fully discharge their duties.

Goal 3.1b: Seek the views of judges on practices that support their development, retention, and morale.

Goal 3.1c: Evolve and adapt education, training, and orientation programs to meet the needs of judges.

Strategy 3.2. Recruit, develop, and retain highly competent staff while defining the judiciary's future workforce requirements.

Background and Commentary. The judiciary continues to be an attractive employer, and staff turnover is relatively low. Employees are committed to the judiciary's mission, and the judicial branch provides staff with many resources and services, including training and education programs.

Nonetheless, ongoing changes that the judiciary must address include an increase in the amount of work performed away from the office, shifting career expectations, and changes in how staff communicate and interact. Changes in how and where work is performed are related to Strategy 2.1, as certain types of changes provide opportunities for the judiciary to reduce its space footprint and rental costs while creating a better and more efficient work environment.

The judiciary also must develop the next generation of executives. The management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The most qualified candidates often come from within the system since the judiciary's management model is not currently replicated in other government systems. To ensure a sufficient internal supply of qualified candidates, the judiciary should initiate a meaningful leadership and executive development training program along with the creation of executive relocation programs to widen the pool of qualified internal applicants.

Goal 3.2a: Attract, recruit, develop, and retain the most qualified people to serve the public in the federal judiciary, emphasizing a commitment to nondiscrimination both in hiring and in grooming the next generation of judiciary executives and senior leaders.

Goal 3.2b: Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.

Goal 3.2c: Deliver leadership, management, and human resources programs and services to help judges (especially chief judges), executives and supervisors develop, assess and lead staff.

Goal 3.2d: Strengthen the judiciary's commitment to workforce diversity through expansion of diversity program recruitment, education, and training.

Issue 4. Harnessing Technology's Potential

How can the judiciary develop national technology systems while fostering the development of creative approaches and solutions at the local level?

Issue Description. Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, staff, and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be required to build and maintain effective IT systems in a time of growing usage, and judicial and litigant reliance. At the same time, the security of IT systems must be maintained, and a requisite level of privacy assured.

Responsibility for developing major national IT systems is shared by several Administrative Office divisions and Judicial Conference committees, and many additional applications are developed locally. In addition, local courts have substantial responsibilities for the management and operation of local and national systems, including the ability to customize national applications to meet local needs. The judiciary's approach to developing, managing, and operating national IT systems and applications provides a great deal of flexibility but also poses challenges for coordination, prioritization, and leadership. A key challenge will be to balance the economies of scale that may be achieved through certain judiciary-wide approaches with the creative solutions that may result from allowing and fostering a more distributed model of IT development and administration. The judiciary's strategy for addressing this issue follows.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

> **Background and Commentary.** The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. Next-generation case management and financial administration systems are being developed, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology.
>
> The effective use of advanced and intelligent applications and systems will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective to the development of certain systems. Another goal in this section focuses on the security of judiciary-related records and information.
>
> The effective use of technology is critical to furthering other strategies in this plan. In particular, the effective use of technology is critical to judiciary efforts to contain costs, and to effectively allocate and manage resources (Strategy 2.1). Technology also supports improvements in the delivery of justice (Strategy 1.1), efforts to strengthen judicial security (Strategy 1.2), the delivery of training and remote access capabilities (Strategies 3.1 and 3.2), the accessibility of the judiciary for litigants and the public (Strategies 5.1 and 5.2), and judiciary accountability mechanisms (Strategy 7.1).

Likewise, an effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the support of highly trained people, is it critical that the judiciary succeed in recruiting, developing, and retaining highly competent staff (Strategy 3.2). And, investments in technology also require adequate funding (Strategy 1.3).

Goal 4.1a: Continue to build and maintain robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, case management, and administrative support.

Goal 4.1b: Coordinate and integrate national IT systems and applications from a judiciary-wide perspective and more fully utilize local initiatives to improve services.

Goal 4.1c: Develop system-wide approaches to the utilization of technology to achieve enhanced performance and cost savings.

Goal 4.1d: Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.

Issue 5. Enhancing Access to the Judicial Process

How can courts remain comprehensible, accessible, and affordable for people who participate in the judicial process while responding to demographic and socioeconomic changes?

Issue Description. Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. This plan includes two strategies that focus on identifying unnecessary barriers to court access, and taking steps to eliminate them:

> Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process. (Strategy 5.1)
>
> Ensure that the federal judiciary is open and accessible to those who participate in the judicial process. (Strategy 5.2)

The views of participants — including parties, lawyers and jurors — should be solicited as a first step in implementing these strategies.

Strategy 5.1. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

> **Background and Commentary.** The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood.
>
> To improve access, rules of practice and procedure undergo regular review and revision to reflect changes in law, to simplify and clarify procedures, and to enhance uniformity across districts. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.
>
> To improve access for lawyers and litigants in the judicial process, this plan includes the following goals:
>
> **Goal 5.1a:** Ensure that court rules, processes, and procedures are published or posted in an accessible manner.

Goal 5.1b: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

Strategy 5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.

Background and Commentary. As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, witnesses, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with information about the courts themselves, court rules, procedures and forms, judicial orders and decisions, and schedules of court proceedings. Court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten in an effort to make them clearer and simpler to use, and court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints. The Judicial Conference is working to enhance citizen participation in juries by improving the degree to which juries are representative of the communities in which they serve, reducing the burden of jury service, and improving juror utilization.

However, federal court processes are complex, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants. Continued efforts are needed, and this strategy sets forth four goals to make courts more accessible for jurors, litigants, witnesses, and others.

Goal 5.2a: Provide jurors, litigants, witnesses, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal 5.2b: Reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petit jurors.

Goal 5.2c: Improve the extent to which juries are representative of the communities in which they serve.

Goal 5.2d: Develop best practices for handling claims of pro se litigants in civil and bankruptcy cases.

Issue 6. The Judiciary's Relationships with the Other Branches of Government

How can the judiciary develop and sustain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Issue Description. Increasingly, the judicial branch's ability to deliver justice in a manner consistent with its core values is dependent upon its relationships with the other two branches of the federal government. An effective relationship with Congress is critical to success in securing adequate resources. In addition, the judiciary must provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review. The judiciary's relationships with the executive branch are also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs. This plan includes two strategies to build relationships with Congress and the executive branch:

> Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress. (Strategy 6.1)
>
> Strengthen the judiciary's relations with the executive branch. (Strategy 6.2)

Strategy 6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

> **Background and Commentary.** This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress in implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may bring dividends.
>
> **Goal 6.1a:** Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.
>
> **Goal 6.1b:** Implement effective approaches, including partnerships with the legal, academic, and private sector organizations, to achieve the judiciary's legislative goals.

Strategy 6.2. Strengthen the judiciary's relations with the executive branch.

Background and Commentary. The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. This strategy focuses on enhancing the ability of the judiciary to provide input to the Department of Justice and others regarding proposed actions and policies that affect the administration of justice.

Goal 6.2a: Improve communications and working relationships with the executive branch to facilitate greater consideration of policy changes and other solutions that will improve the administration of justice.

Issue 7. Enhancing Public Understanding, Trust, and Confidence

How should the judiciary promote public trust and confidence in the federal courts in a manner consistent with its role within the federal government?

Issue Description. The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the system. In large part, the judiciary earns that trust and confidence by faithfully performing its duties, adhering to ethical standards, and effectively carrying out internal oversight, review, and governance responsibilities. However, public perceptions of the judiciary are also often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate.

Changes in social networking and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. For the judiciary, this challenge is an especially difficult one because judges are constrained in their ability to participate in public discourse. This plan includes two strategies to enhance public understanding, trust and confidence in the judiciary:

Assure high standards of conduct and integrity for judges and staff. (Strategy 7.1)

Improve the sharing and delivery of information about the judiciary. (Strategy 7.2)

Strategy 7.1. Assure high standards of conduct and integrity for judges and staff.

Background and Commentary. Judges and judiciary staff are guided by codes of conduct, internal control policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to conduct and the management of public resources. These mechanisms include complaint and dispute resolution processes, audits, and reviews of judiciary operations.

Accountability mechanisms must address critical risks and keep pace with changes in regulations and business practices. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and staff, will help to improve judiciary compliance and controls. In addition, guidance relating to conduct that reflects current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical internal controls, audit, investigation, and discipline functions.

Goal 7.1a: Enhance education and training for judges and judiciary employees on ethical conduct, integrity, and accountability.

Goal 7.1b: Ensure the integrity of funds, information, operations, and programs through strengthened internal controls and audit programs.

Goal 7.1c: Perform investigative, disciplinary, and other critical self-governance responsibilities to achieve appropriate accountability.

Strategy 7.2. Improve the sharing and delivery of information about the judiciary.

Background and Commentary. Sources of news, analysis and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and its work. At the same time, it is now easier to communicate directly with the public, which can help to improve the public's understanding of the federal judiciary's role and functions. The judiciary must keep pace with ongoing changes in how people access news and information when formulating its own communications practices.

Voluntary public outreach and civic education efforts by judges and court staff take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civic education organizations. Resources to help judges and court staff participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.

The federal judiciary also serves as a model to other countries for its excellence, judicial independence, and the delivery of equal justice under the law. The executive branch, in carrying out its foreign relations duties, often requests the assistance of federal judges in communicating with representatives of other countries about the mission, core values, and work of the federal judiciary.

Goal 7.2a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications.

Goal 7.2b: Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Goal 7.2c: Facilitate the voluntary participation by judges and court staff in public outreach and civic education programs.

Goal 7.2d: Communicate with judges in other countries to share information about the federal judiciary in our system of justice and to support rule-of-law programs around the world.

Strategic Planning Approach for the Judicial Conference of the United States and its Committees

Committees of the Judicial Conference are responsible for long-range and strategic planning within their respective subject areas, with the nature and extent of planning activity varying by committee based on its jurisdiction.

The Executive Committee is responsible for facilitating and coordinating planning activities across the committees. Under the guidance of a designated planning coordinator, the Executive Committee hosts long-range planning meetings of committee chairs, and asks committees to consider planning issues that cut across committee lines.

At its September 2010 session, the Judicial Conference approved a number of enhancements to the judiciary planning process:

Coordination: The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator facilitates and coordinates the strategic planning efforts of the Judicial Conference and its committees.

Prioritization: With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee identifies issues, strategies, or goals to receive priority attention every two years.

Integration: The committees of the Judicial Conference integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy development activities.

Assessment of Progress: For every goal in the *Strategic Plan*, mechanisms to measure or assess the judiciary's progress are developed.

Substantive changes to the *Strategic Plan for the Federal Judiciary* require the approval of the Conference, but the Executive Committee has the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* takes place every five years. (JCUS-SEP 10, p. 6)

Once approved by the Judicial Conference, updated or revised editions of the *Strategic Plan for the Federal Judiciary* supersede previous long range and strategic plans as planning instruments to guide future policy-making and administrative actions within the scope of Conference authority. However, the approval of an updated or revised strategic plan should not necessarily be interpreted as the rescission of the individual policies articulated in the recommendations and implementation strategies of the December 1995 *Long Range Plan for the Federal Courts*.

Acknowledgements

On recommendation of its Executive Committee, the 2015 edition of the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference of the United States on September 17, 2015. This edition was prepared following an assessment of the implementation of the 2010 *Strategic Plan*, an analysis of trends and issues likely to affect the federal judiciary, and the consideration of updates and revisions proposed by Judicial Conference committees. An Ad Hoc Strategic Planning Group prepared drafts of the revised plan for review by Judicial Conference committees and consideration by the Executive Committee, which facilitates and coordinates strategic planning for the Conference and its committees.

CHAIRS, COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES SEPTEMBER 2015

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U. S. Court of Appeals, Fourth Circuit

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U. S. District Court, District of South Dakota

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM
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U. S. District Court, Eastern District of Kentucky

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U. S. Court of Appeals, Sixth Circuit

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Honorable Rebecca B. Smith
U. S. District Court, Eastern District of Virginia

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U. S. District Court, Middle District of Florida

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U. S. District Court, District of Maryland

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U. S. District Court, Northern District of Georgia

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U. S. Court of Appeals, Third Circuit

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U. S. District Court, District of Columbia

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U. S. Court of Appeals, Ninth Circuit

COMMITTEE ON THE JUDICIAL BRANCH
Honorable Rodney W. Sippel
U. S. District Court, Eastern District of Missouri

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
Honorable Anthony J. Scirica
U. S. Court of Appeals, Third Circuit

COMMITTEE ON JUDICIAL RESOURCES
Honorable Timothy M. Tymkovich
U. S. Court of Appeals, Tenth Circuit

COMMITTEE ON JUDICIAL SECURITY
Honorable Nancy F. Atlas
U. S. District Court, Southern District of Texas

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM
Honorable Richard Seeborg
U. S. District Court, Northern District of California

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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ATTACHMENT 2

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Judicial Conference Committee Strategic Initiatives

by Strategy

The following report displays strategic initiatives that were reported by Judicial Conference committees to be in progress during the summer of 2014, organized by the 13 strategies in the *Strategic Plan for the Federal Judiciary* . This report may be helpful to committee planning efforts by illustrating areas that may be in need of additional attention, and by displaying complementary or related efforts from other committees. Updated reports on strategic initiatives will be requested during the summer of 2016. Please note that many initiatives appear more than once in the report, as they align with more than one strategy.

Strategy	Number of Initiatives	Number of Committees	Pages
1.1. Pursue improvements in the delivery of justice on a nationwide basis.	25	6	2 - 4
1.2. Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.	7	3	5
1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.	16	9	6 - 7
2.1. Allocate and manage resources more efficiently and effectively.	37	13	8 - 11
3.1. Support a lifetime of service for federal judges.	3	1	12
3.2. Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements.	4	3	13
4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.	18	10	14 - 15
5.1. Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.	8	3	16
5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.	6	5	17
6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.	6	5	18
6.2. Strengthen the judiciary's relations with the executive branch.	11	5	19 - 20
7.1. Assure high standards of conduct and integrity for judges and staff.	9	5	21
7.2. Improve the sharing and delivery of information about the judiciary.	14	8	22 - 23

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis

Study of Reentry Court Programs. Gather data and analyze the efficacy and cost-effectiveness of reentry court programs.	Criminal Law Committee
Evidence-Based Practices. Implement evidence-based practices in the federal probation and pretrial services system.	
Probation and Pretrial Services System Transformation. Transform the Probation and Pretrial Services System into an outcome-based organization with a comprehensive outcome measurement system.	
Case Budgeting. Encourage judges to use case budgeting in qualifying CJA panel attorney cases, to provide cost-effective representation that promotes and is consistent with the best practices of the legal profession.	Defender Services Committee
Litigation Support. Develop and implement litigation support strategies. Continue collaborating with the Department of Justice's National Criminal Discovery Coordinator regarding discovery protocols and formats.	
Establish Federal Defender Organizations. Establish Federal Defender Organizations in all districts (or combined districts) where feasible.	
Fair Compensation for Panel Attorneys. Seek funding to have CJA panel attorneys paid fair compensation.	
Request DOJ Streamline its Non-Death Authorization Procedure. Continue discussions with the DOJ about ways in which it can reduce the amount of time it takes for it to decide not to seek the death penalty.	
Panel Attorney Utilization of Expert and Other Services. Analyze the utilization of investigative, expert and other necessary services under the Criminal Justice Act in panel attorney representations.	

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis

Jurisdictional Improvements Project. Review problem areas in the jurisdiction and venue statutes and develop proposals to clarify the law.	Federal-State Jurisdiction Committee
Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	
Promoting Cooperation Between State and Federal Courts with Respect to Litigation Filed in Multiple Jurisdictions. Work with the Judicial Panel on Multidistrict Litigation and the Conference of Chief Justices to identify methods for promoting cooperation between federal and state judges presiding over related cases that have been filed in multiple jurisdictions.	
Staff Relief in Congested Courts. Assess the extent to which the addition of court law clerks provides relief to district courts with the highest congestion ratings and workloads.	Judicial Resources Committee
Improved Diversity in the Judiciary Workforce. Pursue actions, including partnerships with external leaders or organizations, to improve the judiciary's opportunities for increased minority representation among its employees.	
Comprehensive Judgeship Legislation. Pursue legislation to add judgeships throughout the judiciary.	
Targeted Judgeship Legislation. Pursue legislation to add judgeships in the courts with the most extreme workloads.	
Authority of Magistrate Judges. Consider possible legislation relating to magistrate judge authority.	Magistrate Judges Committee
Role of Magistrate Judges in Court Governance. Improve magistrate judge participation in court governance.	
Effective Utilization of Magistrate Judges. Improve courts' ability to utilize magistrate judges more effectively and to provide information, suggestions, and recommendations to courts on effective magistrate judge utilization practices.	
Technology for Magistrate Judges. Integrate additional statistical reporting into CM/ECF and consider possible alternatives to certain part-time magistrate judge positions.	

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis

Preserving the Judiciary's Core Values. Work with the advisory committees to ensure that the ongoing work of the Rules Committee has a strong impact on the judiciary's strategic planning issues, even when changes to the federal rules are under preliminary committee study or proposed changes are determined to be unnecessary.	Rules of Practice and Procedure Committee
Implementing the Results of the 2010 Conference on Civil Litigation. Work with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference held at the Duke University School of Law.	
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Analyzing and Promoting Recent Rules Amendments. Work with the advisory committees to analyze how recent rule amendments are being implemented in practice, and determine whether any educational tools might be used to make the bench and bar aware of recent rule changes.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	

Strategy 1.2 Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.

Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	Federal-State Jurisdiction Committee
Promoting Cooperation Between State and Federal Courts in Court Security and in Planning for Disaster Recovery. Facilitate exchange of information among federal and state courts on planning for natural disasters and other emergencies.	
Judge Overseas Security. Take measures to contribute to the safety and security of judges, court executives, and staff traveling overseas.	International Judicial Relations Committee
Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Facility Access Card. Create and implement the judiciary's version of the type of identification card required in Homeland Security Presidential Directive (HSPD)-12.	
Emergency Preparedness Program. Provide assistance to the courts in the areas of emergency preparedness, crisis response, and occupant emergency and continuity of operations (COOP) planning.	
Internet Security. Provide on-going assistance to the courts in the area of threats against judges and judiciary personnel communicated via the internet and reduce the amount of personal information about judges available on the internet.	

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Bankruptcy Judgeship Surveys. Conduct bankruptcy judgeship surveys to determine the need for additional bankruptcy judgeships and the continuing need for existing bankruptcy judgeships.	Bankruptcy Committee
Congressional Outreach. Continue to participate in targeted outreach and education of key members and staff, including congressional delegation visits to courts, meetings and events.	Budget Committee
Cost Containment Initiatives. Continue to coordinate with program committees to oversee the implementation of the cost-containment program and to identify and pursue areas of potential cost savings and/or cost avoidances.	
Courtroom Use and Sharing. In collaboration with other Conference committees, consider issues around courtroom use and sharing in accordance with a 2005 directive from Congress that the judiciary study courtroom sharing.	Court Administration and Case Management Committee
Fair Compensation for Panel Attorneys. Seek funding to have CJA panel attorneys paid fair compensation.	Defender Services Committee
Federal Defender Organization Case Weights. Evaluate the usefulness of Federal Defender Organization (FDO) case weights in developing FDO funding and staffing requirements.	
Judicial Compensation Restoration. Monitor economic and political conditions to gauge the receptiveness of Congress to proposals to restore judicial compensation.	Judicial Branch Committee
Judicial Benefits. Pursue benefits enhancements for judges.	

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Comprehensive Judgeship Legislation. Pursue legislation to add judgeships throughout the judiciary.	Judicial Resources Committee
Targeted Judgeship Legislation. Pursue legislation to add judgeships in the courts with the most extreme workloads.	
Magistrate Judges Program Cost Containment. Identify and pursue areas of potential cost containment and/or cost avoidances in the magistrate judge program area.	Magistrate Judges Committee
Technology for Magistrate Judges. Integrate additional statistical reporting into CM/ECF and consider possible alternatives to certain part-time magistrate judge positions.	
Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Facility Access Card. Create and implement the judiciary's version of the type of identification card required in Homeland Security Presidential Directive (HSPD)-12.	
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Cost Containment Initiatives. Continue to coordinate with program committees to oversee the implementation of the cost-containment program and to identify and pursue areas of potential cost savings and/or cost avoidances.	Budget Committee
Contingency Planning. Discuss efforts to develop contingency planning strategies and options for the fiscal year 2012 and 2013 budget cycles and beyond.	
Courtroom Use and Sharing. In collaboration with other Conference committees, consider issues around courtroom use and sharing in accordance with a 2005 directive from Congress that the judiciary study courtroom sharing.	Court Administration and Case Management Committee
Study of Reentry Court Programs. Gather data and analyze the efficacy and cost-effectiveness of reentry court programs.	Criminal Law Committee
Evidence-Based Practices. Implement evidence-based practices in the federal probation and pretrial services system.	
Probation and Pretrial Services System Transformation. Transform the Probation and Pretrial Services System into an outcome-based organization with a comprehensive outcome measurement system.	
Case Budgeting. Encourage judges to use case budgeting in qualifying CJA panel attorney cases, to provide cost-effective representation that promotes and is consistent with the best practices of the legal profession.	Defender Services Committee
Litigation Support. Develop and implement litigation support strategies. Continue collaborating with the Department of Justice's National Criminal Discovery Coordinator regarding discovery protocols and formats.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Request DOJ Streamline its Non-Death Authorization Procedure. Continue discussions with the DOJ about ways in which it can reduce the amount of time it takes for it to decide not to seek the death penalty.	Defender Services Committee
New Federal Defender Organization Case Management System. Develop a new, automated Federal Defender Organization case management system.	
Electronic Criminal Justice Act Voucher System. Develop and deploy an electronic Criminal Justice Act voucher processing system.	
Panel Attorney Utilization of Expert and Other Services. Analyze the utilization of investigative, expert and other necessary services under the Criminal Justice Act in panel attorney representations.	
Jurisdictional Improvements Project. Review problem areas in the jurisdiction and venue statutes and develop proposals to clarify the law.	Federal-State Jurisdiction Committee
Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	
Promoting Cooperation Between State and Federal Courts in Court Security and in Planning for Disaster Recovery. Facilitate exchange of information among federal and state courts on planning for natural disasters and other emergencies.	
Promoting Cooperation Between State and Federal Courts with Respect to Litigation Filed in Multiple Jurisdictions. Work with the Judicial Panel on Multidistrict Litigation and the Conference of Chief Justices to identify methods for promoting cooperation between federal and state judges presiding over related cases that have been filed in multiple jurisdictions.	
Promote Cooperation Between State and Federal Courts in the Recruitment and Retention of Court Interpreters. Encourage communication between state and federal courts with regard to recruiting and retaining court interpreters.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
IT Services for Courts. Provide a number of service initiatives which courts may use at their option, and which are designed to upgrade the judiciary's IT infrastructure and contain costs by realizing economies of scale for the judiciary.	Information Technology Committee
Planning for Collaborative Applications Development. Plan for collaborative application development across courts and between local court and national applications.	
Intercircuit Assignments Database System. Develop and deploy an automated system to process and track intercircuit assignments.	Intercircuit Assignments Committee
Staff Relief in Congested Courts. Assess the extent to which the addition of court law clerks provides relief to district courts with the highest congestion ratings and workloads.	Judicial Resources Committee
Improved Precision of Staffing Formulas. Use a more precise assessment technique to estimate staffing requirements.	
Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Emergency Preparedness Program. Provide assistance to the courts in the areas of emergency preparedness, crisis response, and occupant emergency and continuity of operations (COOP) planning.	
Enhancements to the Judicial Security Committee's Fiduciary Oversight of the Court Security Budget. Oversee a Business Process Re-engineering (BPR) review and improvement of the USMS's security systems and equipment program.	
Internet Security. Provide on-going assistance to the courts in the area of threats against judges and judiciary personnel communicated via the internet and reduce the amount of personal information about judges available on the internet.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Magistrate Judges Program Cost Containment. Identify and pursue areas of potential cost containment and/or cost avoidances in the magistrate judge program area.	Magistrate Judges Committee
Authority of Magistrate Judges. Consider possible legislation relating to magistrate judge authority.	
Role of Magistrate Judges in Court Governance. Improve magistrate judge participation in court governance.	
Effective Utilization of Magistrate Judges. Improve courts' ability to utilize magistrate judges more effectively and to provide information, suggestions, and recommendations to courts on effective magistrate judge utilization practices.	
Preserving the Judiciary's Core Values. Work with the advisory committees to ensure that the ongoing work of the Rules Committees has a strong impact on the judiciary's strategic planning issues, even when changes to the federal rules are under preliminary committee study or proposed changes are determined to be unnecessary.	Rules of Practice and Procedure Committee
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
General Services Administration Validation Improving the delivery of services that the judiciary receives from GSA.	
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	

Strategy 3.1. Support a lifetime of service for federal judges.

Judicial Compensation Restoration. Monitor economic and political conditions to gauge the receptiveness of Congress to proposals to restore judicial compensation.	Judicial Branch Committee
Judicial Benefits. Pursue benefits enhancements for judges.	
Judiciary Wellness. Encourage circuits to pursue initiatives that enhance the well-being of judges, including mental and physical health and aging.	

Strategy 3.2. Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements.

Promote Cooperation Between State and Federal Courts in the Recruitment and Retention of Court Interpreters. Encourage communication between state and federal courts with regard to recruiting and retaining court interpreters.	Federal-State Jurisdiction Committee
Improved Diversity in the Judiciary Workforce. Pursue actions, including partnerships with external leaders or organizations, to improve the judiciary's opportunities for increased minority representation among its employees.	Judicial Resources Committee
Broadened Workforce Competencies. Recruit, train, and retain a workforce with a broader set of competencies.	
Office of Magistrate Judge. Ensure a high caliber of magistrate judges and increase the diversity of magistrate judges.	Magistrate Judges Committee

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

Next Generation Case Management/Electronic Case Files (CM/ECF) System. Serve as the lead Conference committee on the development of requirements for a next generation case management system for all federal courts, and resolve policy issues related to the system's development.	Court Administration and Case Management Committee
Cameras in the Courtroom. Conduct a pilot to evaluate the effect of cameras in district court courtrooms.	
New Federal Defender Organization Case Management System. Develop a new, automated Federal Defender Organization case management system.	Defender Services Committee
Electronic Criminal Justice Act Voucher System. Develop and deploy an electronic Criminal Justice Act voucher processing system.	
Promoting Cooperation Between State and Federal Courts in Development of Information Technology. Promote sharing of information among state and federal courts on development of court technology.	Federal-State Jurisdiction Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
New Communications Network. Institute a new communications network to transmit voice, video, and data over a single, secure network.	Information Technology Committee
Enterprise Data Management. Put into place an infrastructure and common data architecture for a judiciary-wide set of data.	
IT Services for Courts. Provide a number of service initiatives which courts may use at their option, and which are designed to upgrade the judiciary's IT infrastructure and contain costs by realizing economies of scale for the judiciary.	
Planning for Collaborative Applications Development. Plan for collaborative application development across courts and between local court and national applications.	
IT Security Services. Protect the judiciary's infrastructure through various communication, planning, assessment, and procurement vehicles.	

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

Intercircuit Assignments Database System. Develop and deploy an automated system to process and track intercircuit assignments.	Intercircuit Assignments Committee
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	Judicial Branch Committee
JCD-DOCS (Judicial Conduct and Disability Act Document Submission and Database System). Develop a database and an online transactional system that will facilitate the transmission and management of certain complaint-related documents for required monitoring by the Committee.	Judicial Conduct and Disability Committee
Technology for Magistrate Judges. Integrate additional statistical reporting into CM/ECF and consider possible alternatives to certain part-time magistrate judge positions.	Magistrate Judges Committee
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	Rules of Practice and Procedure Committee
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	

Strategy 5.1. Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.

Monitoring Legislation Affecting Jurisdiction. Monitor legislation that would affect the allocation of jurisdiction to the federal courts and between the federal and state courts, and recommend positions for consideration by the Judicial Conference.	Federal-State Jurisdiction Committee
Promoting Cooperation Between State and Federal Courts with Respect to Litigation Filed in Multiple Jurisdictions. Work with the Judicial Panel on Multidistrict Litigation and the Conference of Chief Justices to identify methods for promoting cooperation between federal and state judges presiding over related cases that have been filed in multiple jurisdictions.	
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	Judicial Branch Committee
Implementing the Results of the 2010 Conference on Civil Litigation. Work with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference held at the Duke University School of Law.	Rules of Practice and Procedure Committee
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Analyzing and Promoting Recent Rules Amendments. Work with the advisory committees to analyze how recent rule amendments are being implemented in practice, and determine whether any educational tools might be used to make the bench and bar aware of recent rule changes.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	

Strategy 5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.

Pro Se Litigant Access Initiatives. The Committee, as part of its jurisdictional responsibility to study and make recommendations on matters affecting case management has studied pro se civil litigation and related district court programs to encourage courts to develop better practices in this area.	Court Administration and Case Management Committee
Juror Utilization. The Committee's jurisdiction includes consideration of policies related to jury administration and the operation of petit and grand juries in federal district courts.	
Promote Cooperation Between State and Federal Courts in the Recruitment and Retention of Court Interpreters. Encourage communication between state and federal courts with regard to recruiting and retaining court interpreters.	Federal-State Jurisdiction Committee
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	Rules of Practice and Procedure Committee
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	Judicial Branch Committee

Strategy 6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

Congressional Outreach. Continue to participate in targeted outreach and education of key members and staff, including congressional delegation visits to courts, meetings and events.	Budget Committee
Monitoring Legislation Affecting Jurisdiction. Monitor legislation that would affect the allocation of jurisdiction to the federal courts and between the federal and state courts, and recommend positions for consideration by the Judicial Conference.	Federal-State Jurisdiction Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
"Judiciary 101." Provide information about the judiciary, and host local court visits for members of Congress (particularly newly-elected members) and their staffs (e.g., swearing-in ceremonies).	Judicial Branch Committee
Congressional Member and Staff Contacts. Increase the number of contacts with members of Congress that are not directly related to the judiciary's legislative goals, including hosting congressional members and staff at local courthouses; inviting members to participate in naturalization ceremonies; and inviting local congressional staff to the courthouse to "shadow" a host federal judge.	
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	Space and Facilities Committee

6.2. Strengthen the judiciary's relations with the executive branch.

Litigation Support. Develop and implement litigation support strategies. Continue collaborating with the Department of Justice's National Criminal Discovery Coordinator regarding discovery protocols and formats.	Defender Services Committee
Request DOJ Streamline its Non-Death Authorization Procedure. Continue discussions with the DOJ about ways in which it can reduce the amount of time it takes for it to decide not to seek the death penalty.	
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
Outreach to the International Development Community. Provide information about the work of federal judges and federal courts to U.S. government officials and key organizations engaged in international rule of law and development work.	International Judicial Relations Committee

6.2. Strengthen the judiciary's relations with the executive branch.

Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Facility Access Card. Create and implement the judiciary's version of the type of identification card required in Homeland Security Presidential Directive (HSPD)-12.	
Enhancements to the Judicial Security Committee's Fiduciary Oversight of the Court Security Budget. Oversee a Business Process Re-engineering (BPR) review and improvement of the USMS's security systems and equipment program.	
Internet Security. Provide on-going assistance to the courts in the area of threats against judges and judiciary personnel communicated via the internet and reduce the amount of personal information about judges available on the internet.	
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
General Services Administration Validation Improving the delivery of services that the judiciary receives from GSA.	
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	

Strategy 7.1. Assure high standards of conduct and integrity for judges and staff.

Update and Review of Internal Control Policy. Update and revise the judiciary's internal control policy.	Audits and AO Accountability Committee
Risk-Based Approach to Updating the Judiciary's Cyclical Audit Program. Conduct a pilot to implement more of a risk-based approach to the judiciary's cyclical audit program for courts and federal public defender organizations.	
Ethics Guidance. Provide timely ethics guidance to judges and judiciary employees that will promote ethical conduct, integrity, and accountability.	Codes of Conduct Committee
Ethics Information. Develop ethics information that can be published and posted on JNet and that reflects the Committee's guidance on a broad range of common ethics topics.	
Ethics Education. Development of high-quality ethics education programs for judges and judicial employees, on a wide range of topics that can be adapted to fit the needs of individual courts.	
Electronic Criminal Justice Act Voucher System. Develop and deploy an electronic Criminal Justice Act voucher processing system.	Defender Services Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
Judicial Conduct and Disability Act Digest of Authorities. Produce and maintain an online, topically-organized digest of relevant sources of law and guidance.	Judicial Conduct and Disability Committee
JCD-DOCS (Judicial Conduct and Disability Act Document Submission and Database System). Develop a database and an online transactional system that will facilitate the transmission and management of certain complaint-related documents for required monitoring by the Committee.	

Strategy 7.2. Improve the sharing and delivery of information about the judiciary.

Congressional Outreach. Continue to participate in targeted outreach and education of key members and staff, including congressional delegation visits to courts, meetings and events.	Budget Committee
Cameras in the Courtroom. Conduct a pilot to evaluate the effect of cameras in district court courtrooms.	Court Administration and Case Management Committee
Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	Federal-State Jurisdiction Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
Outreach to the International Development Community. Provide information about the work of federal judges and federal courts to U.S. government officials and key organizations engaged in international rule of law and development work.	International Judicial Relations Committee

Strategy 7.2. Improve the sharing and delivery of information about the judiciary.

"Judiciary 101." Provide information about the judiciary, and host local court visits for members of Congress (particularly newly-elected members) and their staffs (e.g., swearing-in ceremonies).	Judicial Branch Committee
Congressional Member and Staff Contacts. Increase the number of contacts with members of Congress that are not directly related to the judiciary's legislative goals, including hosting congressional members and staff at local courthouses; inviting members to participate in naturalization ceremonies; and inviting local congressional staff to the courthouse to "shadow" a host federal judge.	
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	
Programs for Judges and Journalists. Develop programs that provide more information to journalists about the work of federal judges and federal courts.	
Judicial Conduct and Disability Act Digest of Authorities. Produce and maintain an online, topically-organized digest of relevant sources of law and guidance.	Judicial Conduct and Disability Committee
JCD-DOCS (Judicial Conduct and Disability Act Document Submission and Database System). Develop a database and an online transactional system that will facilitate the transmission and management of certain complaint-related documents for required monitoring by the Committee.	
Improving the Public's Understanding of the Federal Judiciary. Communicate and seek to collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.	Rules of Practice and Procedure Committee
Analyzing and Promoting Recent Rules Amendments. Work with the advisory committees to analyze how recent rule amendments are being implemented in practice, and determine whether any educational tools might be used to make the bench and bar aware of recent rule changes.	

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ATTACHMENT 3

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Chambers of
WILLIAM JAY RILEY
Chief Judge
United States Court of Appeals
Eighth Circuit

Roman L. Hruska Courthouse
111 South 18th Plaza, Suite 4303
Omaha, Nebraska 68102-1322
(402) 661-7575
Fax: (402) 661-7574

November 3, 2015

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: William Jay Riley
Judiciary Planning Coordinator

Re: JUDICIARY STRATEGIC PLANNING

As you know, the Judicial Conference approved an update to the *Strategic Plan for the Federal Judiciary* at its September 2015 session. I am grateful for your ideas and suggestions regarding the update to the *Strategic Plan*, and for the time you set aside for planning discussions during your meetings. Please extend my thanks to all committee members for their contributions and to staff for their support.

The materials for your December and January meetings will include a judiciary strategic planning agenda item that reviews changes to the *Strategic Plan* and describes the approach to implementation for the Judicial Conference and its committees.

An important aspect of that approach is setting priorities. The planning agenda item also will seek your suggestions regarding strategies and goals from the *Strategic Plan* that should receive priority attention over the next two years. Your suggestions will be reviewed by the Executive Committee at its February 11-12, 2016 meeting. Please provide your suggestions regarding priority strategies and goals to me, with a copy to Brian Lynch, the Administrative Office's Long-Range Planning Officer.

Printed copies of the *Strategic Plan* can be provided by your committee staff or by Brian Lynch. As always, please contact me or Brian if you have any questions or suggestions.

cc: Executive Committee
Committee Staff

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