

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**San Antonio, TX
April 2-3, 2019**

AGENDA

**Meeting of the Advisory Committee on Civil Rules
April 2-3, 2019
San Antonio, TX**

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ADVISORY COMMITTEE ON CIVIL RULES

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
Members, Advisory Committee on Civil Rules	Honorable Jennifer C. Boal United States District Court John Joseph Moakley United States Courthouse One Courthouse Way, Room 6400 Boston, MA 02210-3002 Honorable Robert Michael Dow, Jr. United States District Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street, Room 1978 Chicago, IL 60604 Honorable Joan N. Ericksen United States District Court United States Courthouse 300 South Fourth Street, Room 12W Minneapolis, MN 55415 Honorable Joseph H. Hunt Assistant Attorney General (ex officio) United States Department of Justice, Civil Div. 950 Pennsylvania Ave., N.W., Suite 3601 Washington, DC 20530 Honorable Kent A. Jordan United States Court of Appeals J. Caleb Boggs Federal Building 844 North King Street, Room 5100 Wilmington, DE 19801-3519

Members, Advisory Committee on Civil Rules
(cont'd)

Honorable Thomas R. Lee

Associate Chief Justice
Utah Supreme Court
450 South State, PO Box 140210
Salt Lake City, UT 84114-0210

Honorable Sara Lioi

United States District Court
John F. Seiberling Federal Building and
United States Courthouse
Two South Main Street, Room 526
Akron, OH 44308

Honorable Brian Morris

United States District Court
Missouri River Courthouse
125 Central Avenue West, Suite 301
Great Falls, MT 59404

Honorable Robin L Rosenberg

United States District Court
Paul G. Rogers Federal Building and
United States Courthouse
701 Clematis Street, Room 453
West Palm Beach, FL 33401

Virginia A. Seitz, Esq.

Sidley Austin LLP
1501 K Street, N.W.
Washington DC 20005

Joseph M. Sellers, Esq.

Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue N.W., Fifth Floor
Washington, DC 20005

A. Benjamin Spencer

Justice Thurgood Marshall Distinguished
Professor of Law
University of Virginia Law School
580 Massie Road, Rm. WB173E
Charlottesville, VA 22903

Ariana J. Tadler, Esq.

Milberg Tadler Phillips Grossman LLP
One Penn Plaza, Suite 1920
New York, NY 10119

Members, Advisory Committee on Civil Rules <i>(cont'd)</i>	Helen E. Witt, Esq. Kirkland & Ellis LLP 300 North LaSalle Chicago, IL 60654
Liaison Members, Advisory Committee on Civil Rules	Peter D. Keisler, Esq. <i>(Standing)</i> Sidley Austin, LLP 1501 K Street, N.W. Washington DC 20005
Liaison Members, Advisory Committee on Civil Rules <i>(cont'd)</i>	Honorable A. Benjamin Goldgar <i>(Bankruptcy)</i> United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 638 Chicago, IL 60604
Clerk of Court Representative, Advisory Committee on Civil Rules	Laura A. Briggs Clerk of Court United States District Court 105 Birch Bayh Federal Building and U.S. Courthouse 46 East Ohio Street Indianapolis, IN 46204
Secretary, Standing Committee and Rules Committee Chief Counsel	Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel 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

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	District of Columbia	Chair: 2015	2019
Jennifer C. Boal	M	Massachusetts	2018	2021
Robert M. Dow, Jr.	D	Illinois (Northern)	2013	2019
Joan N. Ericksen	D	Minnesota	2015	2021
Kent A. Jordan	C	Third Circuit	2018	2021
Thomas R. Lee	JUST	Utah	2018	2021
Sara Lioi	D	Ohio (Northern)	2016	2019
Brian Morris	D	Montana	2015	2021
Joseph H. Hunt*	DOJ	Washington, DC	----	
Robin L. Rosenberg	D	Florida (Southern)	2018	2021
Virginia A. Seitz	ESQ	Washington, DC	2014	2020
Joseph M. Sellers A.	ESQ	Washington, DC	2018	2021
Benjamin Spencer	ACAD	Virginia	2017	2020
Ariana J. Tadler	ESQ	New York	2017	2020
Helen E. Witt Edward	ESQ	Illinois	2018	2021
H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Associate Reporter	ACAD	California	1996	Open

Principal Staff: [Rebecca Womeldorf](#) 202-502-1820

* Ex-officio - Assistant Attorney General, Civil Division

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Judge Frank Mays Hull <i>(Standing)</i> Judge Pamela Pepper <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Judge William J. Kayatta, Jr. <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. <i>(Standing)</i> Judge A. Benjamin Goldgar <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Jesse M. Furman <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge Carolyn B. Kuhl <i>(Standing)</i> Judge Sara Lioi <i>(Civil)</i> Judge James C. Dever III <i>(Criminal)</i>

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

<p>Rebecca A. Womeldorf Chief Counsel Rules Committee Staff – Office of General Counsel Administrative Office of the U.S. Courts Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-300 Washington, DC 20544 Phone: 202-502-1820 rebecca_womeldorf@ao.uscourts.gov</p>	
<p>Bridget M. Healy Counsel (<i>Appellate / Bankruptcy</i>) Phone: 202-502-1313 Bridget_Healy@ao.uscourts.gov</p>	<p>Shelly L. Cox Administrative Analyst Phone: 202-502-4487 Shelly_Cox@ao.uscourts.gov</p>
<p>Scott Myers Counsel (<i>Bankruptcy / Standing</i>) Phone: 202-502-1913 Scott_Myers@ao.uscourts.gov</p>	<p>Frances F. Skillman Paralegal Specialist Phone: 202-502-3945 Frances_Skillman@ao.uscourts.gov</p>
<p>Julie Wilson Counsel (<i>Civil / Criminal / Standing</i>) Phone: 202-502-3678 Julie_Wilson@ao.uscourts.gov</p>	

FEDERAL JUDICIAL CENTER LIAISONS

<p>John S. Cooke Director Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-100 Washington, DC 20002 Phone: 202-502-4060 jcooke@fjc.gov</p>	
<p>Laural L. Hooper <i>(Criminal Rules Committee)</i> Senior Research Associate Phone: 202-502-4093 lhooper@fjc.gov</p>	<p>Marie Leary <i>(Appellate Rules Committee)</i> Senior Research Associate Phone: 202-502-4069 mleary@fjc.gov</p>
<p>Molly T. Johnson <i>(Bankruptcy Rules Committee)</i> Senior Research Associate Phone: 315-824-4945 mjohnson@fjc.gov</p>	<p>Emery G. Lee <i>(Civil Rules Committee)</i> Senior Research Associate Phone: 202-502-4078 elee@fjc.gov</p>
<p>Timothy T. Lau <i>(Evidence Rules Committee)</i> Research Associate Phone: 202-502-4089 tlau@fjc.gov</p>	<p>Tim Reagan <i>(Rules of Practice & Procedure)</i> Senior Research Associate Phone: 202-502-4097 treagan@fjc.gov</p>

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TAB 1A

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of January 3, 2019 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its winter meeting in Phoenix, Arizona, on January 3, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.

Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve (by telephone)
Elizabeth J. Shapiro, Esq.¹
Judge Srikanth Srinivasan

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules

Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules

Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules

Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules

Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules

Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Providing support to the Committee were:

Professor Catherine T. Struve (by telephone)
Reporter, Standing Committee

Rebecca A. Womeldorf
Secretary, Standing Committee

Professor Daniel R. Coquillette
Consultant, Standing Committee

Professor Bryan A. Garner
Style Consultant, Standing Committee

Professor Joseph Kimble
Style Consultant, Standing Committee

Ahmad Al Dajani
Law Clerk, Standing Committee

Rules Committee Staff

Bridget Healy (by telephone)

Scott Myers

Julie Wilson

Federal Judicial Center

John S. Cooke, Director

Dr. Tim Reagan, Senior Research Associate

¹ Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. He recognized the newest member of the Standing Committee, Judge William J. Kayatta, Jr., who sits on the U.S. Court of Appeals for the First Circuit. An attorney for many years in Maine, Judge Kayatta served in various capacities with the Maine Bar and the American Bar Association. Judge Campbell next welcomed Judge Kent A. Jordan, a new member of the Advisory Committee on Civil Rules who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Campbell also recognized participants who are serving in new capacities including: Judge Dennis Dow – who began his tenure as Chair of the Advisory Committee on Bankruptcy Rules last October; Director John Cooke – who recently replaced Judge Fogel as Director of the Federal Judicial Center (FJC); and Professor Catherine Struve, who became the Standing Committee’s Reporter as of the first of the year. Judge Campbell thanked Professor Dan Coquillette for his service as Reporter and announced that Professor Coquillette would continue to serve the Standing Committee in a consulting capacity. He presented a framed certificate of appreciation to Professor Coquillette on behalf of the Judicial Conference of the United States and signed by the Chief Justice.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process. The chart includes three-and-a-half pages of rules that went into effect on December 1, 2018. Also included are changes (to the Appellate and Bankruptcy Rules) that continue the rules committees’ joint project of accommodating electronic filing and service. The Judicial Conference approved these rules in September 2018 and transmitted them to the Supreme Court the following month. The Court will consider the package and transmit any approved rules to Congress no later than May 1, 2019. Provided Congress takes no action, these rules will go into effect on December 1, 2019.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 12, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 26, 2018, in Washington, DC. The Advisory Committee presented five information items.

Information Items

Rules 35 & 40 – Petitions for Panel and En Banc Rehearing, and Initial Hearing En Banc. At the June 2019 Standing Committee meeting, the Advisory Committee plans to seek the Standing Committee’s final approval to amend Rules 35 and 40. These amendments, which concern length

limits applicable to responses to a petition for rehearing, are currently published for public comment.

The Advisory Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only “suggest” rehearing en banc. The Advisory Committee has identified three possible approaches that further revisions might take. One approach would be to align Rules 35 and 40 more closely with each other. A second approach would use Rule 21 (extraordinary writs) as a model for revising both Rules 35 and 40. A third approach would be to consolidate the provisions governing both types of rehearing (panel and en banc) in a revised Rule 40, leaving revised Rule 35 to cover only initial hearing en banc.

Rule 3 – Notices of Appeal and the Merger Rule. At the next Standing Committee meeting, the Advisory Committee will seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Advisory Committee’s research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the “*expressio unius*” canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order.

Judge Chagares explained how the proposed amendments would address this issue. First, because the merger rule provides that interlocutory orders become appealable once they merge into a final judgment, adding the term “appealable” to Rule 3(c)(1)(B) would indicate that a party need only specify the judgment or order that grants an appellate court jurisdiction over the matter. Second, the amendments would add two rules of construction for notices of appeal. The first rule of construction rejects the *expressio unius* approach that some courts use to limit the scope of appellate review. The second clarifies, for purposes of civil appeals, that courts should construe a notice designating an order resolving all remaining claims as designating the final judgment, whether or not the final judgment is set out in a separate document.

Judge Chagares asked members of the Standing Committee for their views on two issues: whether the text of Rule 3 should explicitly discuss the merger rule, and whether removing the phrase “part thereof” from Rule 3(c)(1)(B) would help to avoid encouraging undue specificity in notices of appeal.

A judge member asked whether framing the proposals as rules of construction undermines their binding effect. Why say that additional specificity in the notice “must not be construed to limit” the notice’s scope rather than simply saying that such specificity “does not limit” the notice’s scope? Another participant asked whether such phrasing would remove an appellant’s ability to intentionally limit the scope of the appeal. Professor Hartnett agreed that the goal is not to foreclose intentional limitations, but rather to protect an appellant from *unintentionally* limiting the appeal’s scope through the inclusion of superfluous detail in the notice.

A judge member stated that courts should interpret the notice of appeal so as to bring up for review as much as possible; the parties’ appellate briefing suffices to narrow the issues. A different member noted that allowing appellants to curtail their appeal in the notice can conserve

resources for the parties because it alerts the opposing party to the narrowed scope of the appeal. The member expressed support for a rule change to displace the *expressio unius* approach, and also suggested that framing the amendments as rules of construction would leave an appellant with the option to limit the notice’s scope if the appellant desires.

The same member asked whether the Advisory Committee considered citing in the Committee Note the cases that the amendment would overrule. Professor Coquillette noted that citing cases in a Committee Note is a risky endeavor because case law continues to develop, and one cannot amend the Committee Note without a corresponding rule change. Sometimes, though, a Committee Note cites cases in order to illustrate the problems that a rule or amendment is addressing. Another judge member asked whether it might be worthwhile to incorporate the merger rule into the Rule 3 text. Judge Chagares explained that the Advisory Committee did not want to risk freezing the merger rule’s development by explicitly defining it in rule text.

A style consultant suggested revising the second rule of construction to use “is” rather than “must be construed as.” Judge Campbell asked whether the second rule of construction is inconsistent with Civil Rule 58 since it refers to “a designation of the final judgment” even in instances when Civil Rule 58 requires that the judgment be set out in a separate document and this requirement has been disregarded. Professor Cooper said that a court’s failure to enter a Civil Rule 58 judgment in a separate document does not defeat finality, and therefore, the clause’s directive to treat a reference to an order adjudicating all remaining claims as a reference to the final judgment is not a problem. He also remarked that the phrase “an appealable order” is fraught with the potential for confusion that could create a host of problems, and noted his support for referring to the merger rule without attempting to define it in the rule text. This approach, he suggested, would make clear that the merger rule applies without constraining its development.

Finally, Professor Coquillette reflected on a suggestion to reorder and renumber Rule 3’s subparts. He noted that renumbering a rule can raise practical legal research problems which is why the traditional practice has been to maintain the same numbering. Even when abrogating a rule, he observed, the practice is to state that the rule is abrogated rather than remove it and renumber the set. Professor Cooper recalled that, in restyling the Civil Rules, the rule makers made sure to leave untouched the “iconic” subdivision numbers – for example, Civil Rule 12(b)(6) – but Appellate Rule 3’s subdivisions, he suggested, were not in that “iconic” category.

Rule 42(b) – Voluntary Dismissals and Judicial Discretion. The Advisory Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk “may” dismiss an appeal if the parties file a signed dismissal agreement. Under this formulation, attorneys have noted that they cannot guarantee their clients that the court will dismiss the appeal if the parties file a dismissal agreement. Judge Chagares noted that one argument in favor of mandating dismissals is that prior to restyling, Rule 42(b) stated that the clerk “shall” dismiss the appeal – a term that arguably did not leave the courts any discretion. On the other hand, some have argued that requiring a court to grant a stipulated dismissal when an opinion has already been prepared and is ready for filing would waste judicial resources.

A judge member expressed support for making the rule mandatory to provide clarity for the parties. Another judge member stated that it would be improper to allow a court to file an opinion once the dispute is no longer justiciable. But the member distinguished stipulated dismissals that do not require any further action by the court from those that do. Some types of cases – such as Fair Labor Standards Act cases – require court review of settlements. Where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts should have the discretion to decide whether to take the action proposed in the parties’ agreement. But when no further action (other than dismissing the appeal) is needed, mandatory dismissal is appropriate.

A style consultant noted that the choice between mandatory and permissive terms is a substance issue, not a style issue. Professor Gibson pointed out that in Part VIII of the Bankruptcy Rules – a subset of the Bankruptcy Rules modeled after the Appellate Rules – Bankruptcy Rule 8023 mandates dismissal of an appeal to a district court or bankruptcy appellate panel if the parties file a signed dismissal agreement, specify allocation of costs, and pay any fees.

Potential Amendment to Rule 36 – Effect of Votes Cast by Former Judges. Also under consideration is an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk’s office. Judge Chagares noted that a case pending before the Supreme Court raises the issue, and the Advisory Committee will refrain from further action pending resolution of that case.

Other Matters Under Consideration. Judge Chagares noted that the Supreme Court’s decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), distinguished time limits imposed by rule from those imposed by statute. The Court characterized time limits set only by court-made rules as non-jurisdictional procedural limits. The Advisory Committee is considering whether this decision raises practical issues for the rules but will refrain from acting on any issues until the Court decides *Nutraceutical Corp. v. Lambert*, No. 17-1094, which asks the Court to address whether Civil Rule 23(f)’s 14-day deadline for filing a petition for permission to appeal is subject to equitable exceptions.

Finally, Judge Chagares noted that the Advisory Committee received a letter from the Committee on Court Administration and Case Management (CACM Committee) requesting that all Rules Committees ensure that the rules provide privacy safeguards in social security and immigration matters. The Advisory Committee concluded that this request did not require action to amend the Appellate Rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 13, 2018, in Washington, DC. The Advisory Committee sought approval of one action item and presented two information items.

Action Item

Restyling the Federal Rules of Bankruptcy Procedure. Professor Bartell reported the results of a spring 2018 survey that was both posted on the internet and sent to judges, court clerks, and stakeholder organizations. The survey responses revealed widespread support for restyling the Federal Rules of Bankruptcy Procedure to make them clearer and easier to understand. The Advisory Committee accordingly sought the Standing Committee's approval to begin the restyling process.

She explained that the unique nature of bankruptcy procedure means that restyling poses a risk of unintended consequences resulting from inadvertent changes to the substance of the rules. As a result, the Advisory Committee recommended that the restyling process go forward on the condition that the Advisory Committee, not the Style Consultants, retains final authority to recommend any modifications to the Standing Committee for final approval.

Judge Dow noted that the Advisory Committee, in collaboration with the Style Consultants, drafted a restyling protocol. The protocol outlines the timing, grouping, and phasing of the restyling process, identifies methods for tracking comments and revisions to the rules, and establishes policies to ensure that the style consultants can meaningfully participate in the restyling process.

The protocol also addresses the style consultants' concerns regarding the use of statutory terms. Judge Dow explained that statutory terms are used throughout the rules because the rules are closely tied to the Bankruptcy Code. That said, the Advisory Committee pledged not to reject a proposed change solely because existing language tracked statutory language, unless the change would have an adverse effect on daily bankruptcy practice.

The Style Consultants expressed their satisfaction with the restyling protocol that the Advisory Committee continues to develop. Judge Dow further noted that the Advisory Committee is not seeking the Standing Committee's approval of the draft protocol because it is subject to ongoing revisions.

Judge Campbell expressed his view that the Advisory Committee should have final say on what to recommend to the Standing Committee. He explained that the Standing Committee generally would not overrule the Advisory Committee's recommendations on matters of substance within bankruptcy expertise. That said, Judge Campbell noted that the Standing Committee retains its authority to review, discuss, and modify any recommendations made by the Advisory Committee. Judge Dow agreed with Judge Campbell's views on this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the commencement of the effort to restyle the Federal Rules of Bankruptcy Procedure with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval.**

Judge Campbell mentioned how helpful it had been to obtain the guidance of a number of current and former rulemaking colleagues who had participated in the restyling of other sets of rules. That guidance had stressed, inter alia, the desirability of keeping members of Congress apprised of the restyling project, and had suggested that this would be particularly important with respect to the Bankruptcy Rules. It was noted that, in contrast to the other sets of rules, the Rules Enabling Act framework does not provide that Bankruptcy Rules amendments supersede contrary statutory provisions.

Judge Campbell also suggested that a primer on bankruptcy law for the stylists and members of the Standing Committee might be helpful to the restyling process. A judge member noted that it would be helpful to have the primer before the next meeting at which restyled bankruptcy rules will be considered.

Information Items

Expansion of Electronic Notice and Service. Professor Gibson noted that the Advisory Committee has been considering ways to increase the use of electronic notice and service in bankruptcy courts. In addition to adversary proceedings, notice is often required in other aspects of a bankruptcy case, and notice by mail has proven costly for the judicial system as well as the parties. The Advisory Committee is considering ways to reduce costs (while still meeting the requirements of due process) by shifting to electronic noticing and service.

One suggestion from the CACM Committee is to mandate electronic notice for certain high-volume notice recipients. Professor Gibson explained that the Advisory Committee declined to act on an earlier version of this suggestion because the Bankruptcy Code provides some parties with the right to insist upon mail delivery at a particular mailing address. The current CACM Committee suggestion, however, explicitly recognizes that such parties retain the statutory right to opt for delivery at a stated physical address. Accordingly, the Advisory Committee is reexamining the idea and may have a proposal for publication this summer.

Suggested Amendment to Bankruptcy Official Form 113 – Chapter 13 National Plan. Another suggestion under consideration concerns instructions provided on the national form for chapter 13 plans. The form currently asks debtors to indicate whether the plan includes certain important provisions using two alternative checkbox answers to three questions on the front page. The instructions state that if the debtor marks the “Not Included” checkbox or marks both “Not Included” and “Included” checkboxes, then the relevant provision will not be effective.

The suggestion points out that the instructions do not address what happens if the debtor marks neither box. Professor Gibson explained that if one of the listed provisions is included in the plan, but the debtor fails to check the box stating that it is included in the plan, then the provision should be ineffective because the blank checkbox failed to alert creditors to the provision’s presence. She noted that while the Advisory Committee agrees with the suggestion, the form is relatively new. The Advisory Committee thus will defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met on November 1, 2018, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Multidistrict Litigation (MDL) and Social Security Disability Review subcommittees.

Information Items

Rule 30(b)(6) – Deposition Notices or Subpoenas Directed to an Organization. Judge Bates reported that the Advisory Committee received comments regarding its proposed changes to Rule 30(b)(6), and twenty-five witnesses will testify on the matter at a hearing scheduled for January 4, 2019. The subcommittee will hold the hearing at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

Judge Bates noted that most comments focus on proposed language requiring the party taking the deposition and the organization to confer about the identity of the witness(es) the organization will designate to testify on behalf of the corporation. Some submissions raised concerns that this will cause an unwarranted intrusion into the corporation's prerogative to designate who will testify. The Advisory Committee looks forward to hearing further input from stakeholders regarding the matter.

Judge Campbell invited those at the meeting to attend the hearing.

Rule 73(b)(1) – Consent to Magistrate Judge. The Advisory Committee's Report details three issues that have been raised about the procedure for consenting to referral for trial before a magistrate judge. One issue – concerning a question of consent by late-added parties – has been set aside. Another issue – relating to the means for obtaining consent after an initial random referral of a case to a magistrate judge – is still being considered. A third issue relates to the lack of anonymity, under the CM/ECF system, concerning consents to trial before a magistrate judge.

Judge Bates explained that the CM/ECF system currently notifies the judge assigned to the case whenever a party files its individual consent. This automatic notification defeats the anonymity provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. During its April 2019 meeting, the Advisory Committee will review options for preserving anonymity in this process.

Rule 7.1 – Disclosure Statements. Also under consideration are changes to Rule 7.1 that would require a non-governmental corporation that seeks to intervene to file a corporate disclosure statement. These changes parallel pending proposals to amend the Appellate and Bankruptcy Rules.

The Advisory Committee is also considering a proposal relating to the disclosure of the names and citizenship of members in a limited liability company (LLC) or similar entity. Judge

Bates explained that the citizenship of LLCs, partnerships, and similar entities depends on the citizenship of their members. As a result, disclosing the citizenship of an entity's members is necessary for determining the existence of a federal court's subject matter jurisdiction in diversity cases. But, Judge Bates noted, in some cases a member of a partnership or LLC is itself a partnership or an LLC. The Advisory Committee is considering the extent to which citizenship disclosures should extend up the chain of ownership in such cases. Judge Bates noted that, in considering whether to propose requiring additional disclosures, the Advisory Committee is taking into consideration the underlying reason for the disclosure. It is important to know whether the goal is to demonstrate the court's subject matter jurisdiction or to provide judges with information necessary to make recusal decisions.

A judge member noted that a rule alerting judges and parties to the necessity of pleading citizenship in diversity cases would be helpful, so long as it accounts for the variation in entity types. Judge Campbell agreed. He noted that standing orders are often used to remind parties pleading diversity jurisdiction that they need to take into consideration the citizenship of members in an LLC or partnership. He also noted that lawyers representing such entities often miss this crucial step.

Judge Bates noted, as well, a third type of disclosure issue that has come to the Advisory Committee's attention. This third issue has to do with third-party litigation funding (TPLF). Here a concern might be that judges need information concerning TPLF in order to know whether they have a recusal issue. Though it is very unlikely that judges would invest in well-known third-party litigation funders, the dynamic nature of the field raises the possibility that a company not known for engaging in such funding might in fact turn out to do so. Judge Bates noted that the Advisory Committee could look into the TPLF disclosure issue or could wait for practice to evolve further.

Judge Campbell suggested that the Advisory Committee might initially train its focus on the question of disclosures relevant to diversity jurisdiction, while also continuing to study TPLF. An inter-committee project on recusal-related disclosures, though, might not be warranted at this time.

Timing of Final Judgments in Cases Consolidated under Rule 42(a). Judge Bates said that the Advisory Committee has taken up consideration of the effect of consolidation under Civil Rule 42(a) on final judgment appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court held that an individual case consolidated under Rule 42(a) maintains its independent character, such that a judgment resolving all claims as to all parties in that case is an appealable final judgment, regardless of whether proceedings are ongoing in the other consolidated cases. Chief Justice Roberts, writing for the Court, noted that the appropriate Rules Committees could address any practical problems resulting from this holding.

Professor Cooper noted that the salient rules are Rule 42(a), which provides for consolidation, and Rule 54(b), which governs the entry of a partial final judgment. In considering whether and how to amend these rules in light of *Hall v. Hall*, the goal should be to minimize the risk that parties to a consolidated case might unwittingly forfeit their appeal rights out of confusion as to the effect of the consolidation.

Judge Bates noted that a subcommittee would be formed to consider these matters and that the subcommittee would benefit from the involvement of Judges Jordan and Chagares.

MDL Subcommittee. Judge Bates stated that the MDL Subcommittee, chaired by Judge Dow, has consulted various stakeholders and narrowed the subjects on which it will consider possible rulemaking. While some advocate rulemaking to govern MDL proceedings others stress the need to retain judicial flexibility and innovation in this area. The subcommittee has yet to reach any conclusions.

There are six topics under the subcommittee's consideration. These are:

- 1) Early procedures to winnow out unsupportable claims;
- 2) Interlocutory appeals;
- 3) Formation and funding of plaintiffs' steering committees (PSCs);
- 4) Trial issues;
- 5) Settlement promotion and review; and
- 6) TPLF.

1) *Winnowing Unsupportable Claims.* Judge Bates noted that certain laws require companies to report claims made against them, including unsupportable claims made in MDLs. Judge Bates explained that a number of MDL judges currently winnow unsupportable claims by requiring the submission of plaintiff fact sheets. These sheets are specific to the MDL under consideration and lack uniformity. He also noted that using these sheets to eliminate unsupportable claims early in the proceeding is difficult and requires that the court and parties expend substantial time and effort. Other suggestions under consideration include expanded initial disclosure requirements, Rule 11 sanctions, master complaints, requiring each plaintiff in an MDL to pay a filing fee, and/or requiring early consideration of screening tools.

2) *Interlocutory Appellate Review.* Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*. Judge Bates noted that the scope of this problem is not yet apparent and that the input received by the subcommittee imparts a healthy skepticism regarding this topic.

The subcommittee needs further information to resolve crucial questions including, but not limited to, whether appellate review should be mandatory or discretionary, what role trial courts should have in certifying issues for appellate review, and how to determine which orders will be subject to interlocutory appellate review. If the subcommittee decides to move forward, Judge Bates explained that it would do so in coordination with the Advisory Committee on Appellate Rules.

A judge member expressed support for an interlocutory appeal mechanism, to the extent that the avenue currently provided by 28 U.S.C. § 1292(b) is inadequate. That said, the member opposed expedited review because the timing of appellate decision making is affected by many variables that are difficult to control. One such variable is determining which cases to delay in

exchange for expediting review of an MDL ruling. Judge Bates noted that not expediting the appeal would cause further delay, and that delay impairs the MDL's efficiency and harms the parties. Judge Campbell agreed, stating that each interlocutory appeal in an MDL could take several years to resolve, and that if more than one such appeal occurs they could add up to many years of delay. Another member observed that key rulings may occur at different stages of the litigation; perhaps it would be possible to identify a single time when an interlocutory appeal might bring such rulings up for review. A different member suggested that the parties could brief questions of timing, so as to inform the courts' determinations about the proper balance between the need for appellate review and the risk of delay.

Another member expressed strong support for interlocutory appeals in MDLs, reasoning that, by definition, MDLs are important. Legal issues such as preemption or failure to state a claim can give rise to critical rulings with huge settlement values. The goal, this member suggested, is to reach the right result. And some courts of appeals, he reported, have been known to refuse to take up an issue that the district court has certified for interlocutory review under 28 U.S.C. § 1292(b).

A judge member, citing his experience presiding over an MDL, expressed skepticism that the challenges of MDL management are susceptible to rulemaking reforms. MDL judges, he stressed, need flexibility because every MDL is different. He suggested that sorting issues into dispositive and non-dispositive categories would help the subcommittee determine which issues are suitable for interlocutory appellate review, and he noted that more use could be made of the Section 1292(b) mechanism.

3) *Plaintiff Steering Committees.* A member suggested that the subcommittee should consider providing guidance for the appointment of lead counsel and PSCs. It might be helpful to examine the lead-plaintiff-appointment provisions in the Private Securities Litigation Reform Act (PSLRA). By analogy to the PSLRA's rebuttable presumption in favor of appointing the plaintiff with largest financial interest, he suggested, perhaps there should be a presumption in favor of appointing the lawyer with the largest number of cases in the MDL. The member stated that if the judge appoints too many law firms to the PSC, this may increase the complexity and expense of managing the MDL.

A judge member disagreed with the proposed presumption in favor of appointing to the PSC the lawyer with the largest number of cases; such a presumption, he argued, could exacerbate the problem of unsupported claims. This member said that he would not oppose possible amendments to Civil Rules 16 and/or 26 to require early discussion of screening tools such as plaintiff fact sheets (though he is not sure that such amendments are necessary).

Another judge member suggested that California state-court practice with PSC selection may be instructive. In California, she explained, the plaintiffs' lawyers organize themselves, subject to court approval; this approach relies on the plaintiffs' bar's knowledge concerning which lawyers conduct themselves fairly.

4) *Trial Issues.* Judge Bates noted several trial issues that are currently being considered by the subcommittee. One issue is whether MDL judges should have the authority to require party

witnesses to appear at trial to testify live. Another issue is whether a transferee court should only hold bellwether trials with the consent of all parties.

5) *Settlement Promotion, Review, and Approval.* The subcommittee is also evaluating whether it could provide a structure for courts to review settlements in MDL proceedings. Judge Bates distinguished MDL settlements from class action settlements (which are subject to court review and approval under Civil Rule 23(e)): whereas each plaintiff in an MDL is represented by his or her own counsel and can consult that counsel about a settlement's advisability, that is not the case in a class action. The subcommittee is considering whether any aspects of MDL settlement are suitable topics for rulemaking, or whether other measures, such as updates to the Manual on Complex Litigation, would be more appropriate.

A judge member suggested that an apparent lack of interest from stakeholders does not provide a reason to drop the topic of settlement from the subcommittee's agenda. This member observed that the ALI's Principles of the Law of Aggregate Litigation reflect concern for the lack of voice that individual plaintiffs may have in nonclass aggregate settlements.

6) *TPLF.* TPLF is a growing field with varied subparts. Funders might finance the prosecution of a case by a plaintiffs' firm, might finance individual plaintiffs' claims, or might finance the defense of a lawsuit. Some funding arrangements may raise concerns about who has control over the litigation.

Judge Bates noted that the Advisory Committee is looking at this issue through the MDL prism, though it is not a discrete MDL issue. One approach would be to focus on what disclosures may be necessary for purposes of judges' assessment of recusal issues. A question facing the subcommittee is whether the scope of the disclosure should be limited to the fact of funding and identity of the funder, or should include terms of the finance agreement as well. Another question is whether discovery in this area should be permissible.

Professor Coquillette cautioned that these issues are closely interwoven with the laws regulating lawyers. For example, this past fall the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 484, "A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee." This opinion addresses the financing of individual plaintiffs' claims and explains that when the plaintiff's counsel becomes involved in such financing, a great many of the ABA's Model Rules of Professional Conduct come into play. Professor Coquillette said that the Rules Committees' last foray into areas affecting the rules of professional conduct united every state bar association against them.

Subcommittee on Social Security Disability Review. A suggestion from the Administrative Conference of the United States asked the Advisory Committee to create rules governing cases in which an individual seeks district court review of a final decision of the Commissioner of Social Security. A subcommittee, chaired by Judge Lioi, created to address this suggestion has not yet concluded its work. Judge Bates noted that the most significant issues arising in these cases concern considerable administrative delay within the Social Security Administration as well as variation among districts in both local practices and rates of remand. The Social Security

Administration strongly supports the proposal for national rules, while the Department of Justice appears neutral on this topic. Claimants' attorneys generally oppose the idea of national rules, but if such rules are to be adopted they have views on what the rules' content should be. There is a real question whether any proposed rules would reduce the government's staffing burdens. And there is a question whether reducing the government's staffing burdens is an appropriate goal for the rulemakers. Judge Bates further noted that whatever rules the subcommittee might recommend, if any, still need to be considered by the Advisory Committee.

Professor Cooper reported that the subcommittee is approaching consensus on what the rules would look like if they were to be proposed. The subcommittee currently envisions (for discussion purposes) a narrow set of rules focused on pleading, briefing, and timing. There is a lingering tension between two possible models for the pleading rules. One, patterned after the appellate process, would cast the complaint as a limited document with the simplicity of a notice of appeal and would provide that the government's answer is to consist of the administrative record. In this model, further particulars would develop during briefing. The other model would provide for additional detail in both the complaint and the answer. As to briefing, one question is whether the plaintiff should be required to submit a motion for the relief requested in the complaint along with the brief.

A judge member reported that magistrate judges in his district were concerned about a uniform rule because approaches vary depending on the facts and circumstances of the individual case – such as whether the plaintiff has a lawyer or not. These circumstances may affect the judge's approach to (for example) the order and timing of briefing. In this member's view, flexibility is necessary to ensure adequate representation for parties proceeding pro se. Participants observed that there are variations both across and within districts concerning the extent to which these cases are referred to magistrate judges.

Judge Bates noted that the subcommittee is close to reaching a recommendation whether to abandon the effort or move forward. It will continue to include various stakeholders in the process and will ask for feedback and suggestions.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on October 10, 2018, in Nashville, Tennessee. The Advisory Committee presented five information items.

Information Items

Rule 16 – Expert Disclosures. The subcommittee, chaired by Judge Kethledge, is currently considering whether Rule 16 should be amended to expand pretrial discovery of expert testimony in criminal cases – a change that would bring Rule 16 closer to the more robust expert discovery requirements in Civil Rule 26. Judge Molloy announced plans for a mini-conference. This conference presents an opportunity for the Rule 16 Subcommittee to receive input from

prosecutors, private practitioners, and federal defenders around the country about whether an amendment is warranted and, if so, what its content should be.

Task Force on Protecting Cooperators. Judge Amy St. Eve provided an update on the progress of the task force. The task force's work is complete, and its reports and recommendations were finalized and delivered to Director Duff. These reports recommended practices to be implemented by the Bureau of Prisons (BOP) in ensuring the safety of cooperators. One recommendation asks the government to start tracking whether assaults on prisoners are related to the victim's status as a cooperator. The BOP wishes to avoid collecting this information within correctional institutions, so the information would instead be collected by the DOJ into an anonymized database that would be securely stored within the DOJ.

Another recommendation is that courts should store plea and sentencing documents in separate case subfolders with public access restricted to those physically present at the courthouse. Doing so allows the Clerk of Court to maintain an access log that would be useful in any investigations arising from retaliation against cooperators. Director Duff has referred this recommendation to the CACM Committee.

Judge Molloy noted that there continue to be concerns about the balance between protecting cooperators, on one hand, and government transparency and the public's right to information, on the other.

Rule 43(a) – Defendant's Presence at Plea and Sentencing. The Advisory Committee received a suggestion concerning the Rule 43(a) requirement that a defendant be physically present in court at plea and sentencing. In *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), the Seventh Circuit vacated a judgment of conviction due to the district court's decision to conduct the plea and sentencing proceeding with the defendant appearing by videoconference; the defendant's serious health issues made him susceptible to injury from even limited physical contact. The Seventh Circuit determined that Rule 43(a) by its terms permits no exceptions to the requirement of physical presence in the courtroom at sentencing and suggested that "it would be sensible" to amend Rule 43(a). In considering whether to propose an explicit exception in the rule, the Advisory Committee is investigating the frequency with which such extenuating circumstances occur.

Time for Ruling on Habeas Motions (Suggestion 18-CR-D). The Advisory Committee received a suggestion to require that judges decide habeas motions within 60-90 days. Judge Molloy explained the Advisory Committee's view that this is more of a systemic problem resulting from the fact that habeas petitions and Section 2255 motions are exempt from the reporting requirements of the Civil Justice Reform Act (CJRA). The Advisory Committee discussed the impact of these delays and decided to refer the suggestion to the CACM Committee to evaluate whether this exemption from the CJRA's reporting requirements should be reconsidered.

Disclosure of Defendants' Full Name and Date of Birth. The Advisory Committee received a suggestion to revise applicable rules and the PACER search structure so that users could search PACER using a defendant's full name and/or date of birth. The suggestion argues that providing this search capacity would enable background screening services to perform their

functions accurately and efficiently. A similar suggestion was rejected in 2006, and the Advisory Committee likewise decided not to pursue the current proposal.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which last met on October 19, 2018, in Denver, Colorado. The Advisory Committee presented four information items.

Information Items

Rule 702 – Admission of Expert Testimony. A September 2016 report issued by the President’s Council of Advisors on Science and Technology contained a host of recommendations for federal agencies, DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee’s consideration of changes to Rule 702.

In fall 2017, the Advisory Committee held a conference on Rule 702 and forensic feature-comparison evidence. Subsequently a subcommittee was formed to study what the Advisory Committee might do to address concerns relating to forensic evidence; Judge Schroeder chairs the subcommittee. The subcommittee recommended against attempting to draft a freestanding rule governing forensic expert testimony, because such a rule would overlap problematically with Rule 702. The subcommittee also advised against trying to craft Rule or Note language setting out detailed requirements for forensic evidence, and it concluded that a “best practices manual” could not be issued as a formal product of the Advisory Committee. The Advisory Committee concurred in these assessments, but it will explore judicial education measures to undertake in collaboration with the FJC.

The subcommittee did suggest considering whether to amend Rule 702 to address the problem of expert witnesses overstating their conclusions, and the Advisory Committee is proceeding with that suggestion. A roundtable discussion held during the last Advisory Committee meeting asked for input from practitioners on an amendment that would target the overstatement problem. The debate produced a variety of diverging views among civil and criminal practitioners. As a result, the Advisory Committee is carefully weighing the effects such an amendment would have for expert evidence across the spectrum of legal practice.

Another amendment under consideration would emphasize that Rule 702’s admissibility requirements of sufficient basis and reliable application present Rule 104(a) questions that must be determined by the court using a preponderance standard.

One member raised a concern with the feasibility of creating a rule addressing the accuracy of expert opinion because it would be difficult to craft a rule that would tell experts how to present a test’s error rate. Judge Livingston explained that black-box studies provide an error rate associated with some types of expert evidence. She noted that studies had not considered every aspect of expert evidence, and it would be difficult to determine standards for evaluating expert opinions where the data are murky.

Judge Campbell noted that it is a real challenge to articulate in a rule what constitutes an overstated opinion, and the Advisory Committee is working on fleshing out its definition of the term “overstatement.” Another participant noted that the DOJ has been strongly opposed to such a rule and asked whether the DOJ changed its position. The DOJ’s representative noted that the word “overstatement” was fraught with confusion. She explained that the DOJ is working with the subcommittee to craft a rule addressing this issue. The DOJ is also implementing a set of internal directives, targeting overstatement, that regulate how Department scientists can phrase their opinions when testifying at trial.

Finally, Professor Capra noted that the Advisory Committee is considering several approaches, some of which were suggested by Judge Campbell. One suggestion is to state that experts may not overstate the conclusion that can be drawn from the methodology they employ. Another suggestion is to state that the expert’s conclusion should accurately relate the methods used. Articulating the standard in a rule remains a challenge that the Advisory Committee continues to study.

Rule 106 – The Rule of Completeness. Judge Livingston said that the Advisory Committee is considering a suggestion to amend Rule 106 to provide that oral statements, in addition to written or recorded statements, fall within the rule’s scope. Another change would provide that a completing statement is admissible under this Rule notwithstanding hearsay objections. Judge Livingston noted that this is not the first time the Advisory Committee has considered amending Rule 106, and it previously declined to act on a similar suggestion.

She also noted a few additional concerns including that a cure might have the unintended consequence of creating another hearsay exception permitting parties to introduce an out of court statement whenever a party can persuade the court that a statement should, in fairness, be considered given the admission of another statement. Another concern is that an amendment adding oral statements to Rule 106 risks disrupting the presentation of evidence with side litigation on whether a completing oral statement was actually made.

Proposed Amendment to Rule 404(b) – Bad-Act Evidence. Professor Capra stated that the Advisory Committee received two comments so far on the proposed amendment to Rule 404(b). The proposed amendment would require that prosecutors in a criminal case provide more notice of their intent to offer bad-act evidence and would require the notice to articulate support for the non-propensity purpose of the evidence. Professor Capra predicted that the Advisory Committee would replace the term ‘non-propensity’ with ‘non-character’ since ‘character’ is used throughout the rule.

Proposed Amendment to Rule 615 – Excluding Witnesses from Court. Professor Capra said that the Advisory Committee decided against acting on some suggestions, but other suggestions for amending Rule 615 remain pending. The Advisory Committee decided against acting on a suggestion proposing that the rule provide for judicial discretion in determining whether a witness should be excluded, reasoning that the purpose of exclusion is to prevent witnesses from tailoring their testimony according to what other witnesses testified. Accordingly, the parties are in the best position to determine whether a witness should be excluded. The

Advisory Committee also decided against acting on another suggestion concerning issues of timing and dealing with experts under this rule because case law research did not reveal any significant problems.

In studying these suggestions, however, the Advisory Committee came to consider a few other changes. The original purpose for excluding witnesses from trial was to prevent witnesses from tailoring their testimony according to the testimony of prior witnesses. However, technological developments have made mere exclusion from trial less than completely effective because the testimony of prior witnesses is now accessible beyond the courtroom. Professor Capra noted that most courts hold that a Rule 615 order extends to an excluded witness's access to trial testimony outside the courtroom. However, some courts have held that such orders do not extend beyond the courtroom unless the parties specifically ask the judge to extend the order. One change would clarify how courts should determine the extent of a Rule 615 order and provide judges with discretion to extend orders beyond the courtroom.

Judge Campbell asked whether a rule amendment would have the effect of overruling circuits who have held otherwise. Professor Capra said it would and, for this reason, the Advisory Committee is carefully considering this amendment.

Finally, Judge Campbell noted that the Advisory Committee at its October meeting considered but decided against recommending a rule that would provide a roadmap for impeachment and rehabilitation of witnesses, similar to a rule adopted by the State of Maryland.

OTHER COMMITTEE BUSINESS

Procedure for Handling Comments Made Outside the Ordinary Process. Professor Struve noted a recurring issue regarding public submissions outside the formal public comment period, including submissions addressed directly to the Standing Committee.

There are instances when the Standing Committee receives submissions that discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting. The context might be a proposal of an amendment for publication, or it might be a proposal of an amendment for final approval after the public comment period has expired. It would be desirable to publish a policy for handling such comments.

Professor Struve asked Standing Committee members and other participants for feedback on the memo and tentative draft included in the agenda materials. One judge member observed that it is useful to be transparent about the process, but that it would be better to require off-cycle submitters to show cause why their input is off-cycle. Judge Campbell responded by pointing out proposed language in the agenda book that listed examples of reasons that might suffice to show such cause. The participant responded that it would be preferable to make more explicit that a person wishing to make an off-cycle submission must make a showing of why their submission is off-cycle. When the discussion later returned to the language in that paragraph, one participant observed that if someone at the last minute spots a glitch in a proposal, the rulemakers would want to take account of that insight. Professor Struve observed that the language in the agenda book did not account for that scenario. Another participant questioned that paragraph's use of the term

“extraordinary circumstances,” and pointed out that it is not extraordinary for a proposal’s language to be amended after the publication of the advisory committee’s agenda book. A participant wondered if “good cause” would be a better term than “extraordinary circumstances.” One participant argued that it would be better if the paragraph did not provide examples of instances that could justify an off-cycle submission.

Another thread in the discussion related to the norms for Committee members in settings where discussion turns to a matter that is currently before the Committee. A judge member asked what level of formality Committee members should undertake; when does a communication with an outsider to the Committee process trigger the constraints outlined in the materials (e.g., forwarding comments to the Standing Committee’s Secretary)? Professor Struve suggested distinguishing between communications made to a Committee member qua Committee member and communications that are part of a more general discussion (e.g., on a listserv or at a conference). Professor Coquillette observed that there is a distinction between someone lobbying a Committee member and someone engaging in a general discussion. Subsequently, a participant proposed defining the term “submission” in the proposed website language; such a definition, this participant suggested, could help to address this issue. Professor King noted that her practice, after receiving a comment on a rule amendment, was to provide the sender with a link to the rules committee website and to explain the submission process. She suggested that members can use this technique to educate the public on how to participate in the process.

Judge Campbell thanked participants for their input, which will be incorporated into any proposal put forward at the June meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019. Any legislation introduced in the last Congress will have to be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee’s members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 25, 2019, in Washington, DC. He reminded members that at this next meeting the Committee would resume its discussion (noted in the preceding section of these minutes) regarding submissions made outside the public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

- Federal Rules of Appellate Procedure pp. 2-4
- Federal Rules of Bankruptcy Procedure pp. 5-8
- Federal Rules of Civil Procedure pp. 8-10
- Federal Rules of Criminal Procedure..... pp. 11-12
- Federal Rules of Evidence pp. 12-15
- Other Matters pp. 15-16

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NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 3, 2019. All members were present.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC); and Judge Kent A. Jordan, member of the Advisory Committee on Civil

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Rules. Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Deputy Attorney General Rod J. Rosenstein.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and engaged in discussion of three information items.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

Possible Amendment to Rule 3 – the Content of Notices of Appeal

At its fall 2018 meeting, the Advisory Committee continued discussion of possible amendments to clarify the content of notices of appeal under Rule 3. Some cases apply an *expressio unius* rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order. Other courts treat a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment, even if the notice of appeal also references a specific interlocutory order in addition to the judgment.

The Advisory Committee is considering whether Rule 3 should contain some statement of the merger rule – the rule that earlier interlocutory orders merge into the final judgment. The Advisory Committee is also considering whether the phrase “or part thereof” should be deleted from Rule 3(c)(1)(B)’s directive that an appellant “designate the judgment, order, or part thereof being appealed” because the phrase has been read to require the designation of each order sought to be reviewed. The Advisory Committee is mindful that any amendment to Rule 3 would

require an amendment to Form 1 (the form notice of appeal). Finally, as part of its consideration of Rule 3, the Advisory Committee is considering whether to address problems in appeals from orders denying reconsideration.

Proposal to Amend Rule 42(b) – Agreed Dismissals

The Advisory Committee is considering a proposal to amend Rule 42(b). The current rule provides that the circuit clerk “may” dismiss an appeal “if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due.” Some have suggested that a dismissal in these circumstances should be mandatory. Prior to the 1998 restyling of the rules that intended no substantive change, Rule 42(b) used the word “shall” instead of “may” dismiss. Rule 42(b) also provides that “no mandate or other process may issue without a court order.” The Advisory Committee believes that the key distinction is between situations in which the parties seek nothing but a dismissal of the appeal, and situations in which the parties seek some judicial action in addition to dismissal.

Where the parties seek additional judicial action, the parties cannot control that judicial action. However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal might be appropriate, if not constitutionally compelled.

The Advisory Committee will continue to discuss whether the rule should mandate dismissal upon presentation to the clerk of an agreed dismissal request. If it decides to recommend that dismissal be made mandatory in some or all such circumstances, one approach would be simply to change the existing word “may” in Rule 42(b) to “must” or “will.” Another option would be to revise the rule more thoroughly to mirror Supreme Court Rule 46, which provides more detailed guidance than current Rule 42(b) on the appropriate treatment of dismissal agreements or motions, including the circumstances under which dismissal is mandatory.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

The proposed amendments to Rules 35 and 40 that were published for public comment in August 2018 would create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider the significant disparities between Rules 35 and 40. The disparities are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could “suggest” rehearing en banc. The Advisory Committee continues to consider different approaches to harmonize the two rules.

Given that many local rules address the relationship between panel rehearing and rehearing en banc, the Advisory Committee will consider whether there are local practices that should be adopted in Rules 35 and 40.

Counting of Votes by Departed Judges

Finally, the Advisory Committee has started considering how to handle the vote of a judge who leaves the bench, whether by death, resignation, impeachment, or expiration of a recess appointment. The question arises when an opinion has been drafted or a judge has voted in conference, and the judge leaves the bench before the opinion is filed by the court. This is a recurrent issue, and one treated differently across the circuits. One possibility is to amend Rule 36 to provide that an opinion may issue if it has been delivered to the clerk for filing before the judge leaves the bench. A subcommittee has been formed to consider this issue. The Committee recognizes that a case currently pending before the Supreme Court may affect this issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented one action item for the Standing Committee regarding restyling of the Federal Rules of Bankruptcy Procedure, but no action is needed by the Judicial Conference at this time.

Information Items

Restyling of the Federal Rules of Bankruptcy Procedure

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The proposed project follows similar restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. To inform its decision, the Restyling Subcommittee worked with the FJC and the Standing Committee's style consultants to solicit feedback from the bankruptcy community. A survey, along with a restyled version of Rule 4001(a) offered as an exemplar of the final product, was sent to all bankruptcy judges and clerks of court, as well as leaders of interested organizations. A link to the survey was also posted on the federal judiciary's website.

The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks, 19 respondents from organizations, and 109 members of the public. Over two-thirds of all respondents in every category supported restyling of the Bankruptcy Rules. Some respondents expressed concern that restyling could introduce unintended consequences, and that project members should take great care to avoid changes in a rule's meaning. Given the positive response to the survey, the Restyling Subcommittee recommended going forward with the project, consistent with the unique features of the Bankruptcy Rules.

The Bankruptcy Rules have not previously been restyled because bankruptcy is particularly statute-driven, and many rules echo statutory language. Bankruptcy is a highly technical area of practice, and one particularly prone to terms of art as well as generally understood terms, concepts, and procedures. To ensure consistency and clarity in the revised rules, the Restyling Subcommittee recommended, and the Advisory Committee agreed, that the linkage between the Bankruptcy Code and the Bankruptcy Rules should presumptively be retained, even if application of restyling guidelines might arguably improve or simplify existing statutory language.

The Advisory Committee recommended that the Standing Committee authorize commencement of the restyling process with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval. The Standing Committee discussed the considerable deference due to the Advisory Committee in restyling and accepted the Advisory Committee's recommendation, noting that final approval of the Advisory Committee's recommendation rests, as always, with the Standing Committee.

The Advisory Committee provided a tentative timeline for restyling the rules, which anticipates publishing the restyled rules for public comment in three batches beginning in August 2020 as follows:

Parts I and II of the Rules	August 2020 – February 2021
Parts III, IV, V, and VI of the Rules	August 2021 – February 2022
Parts VII, VIII, and IX of the Rules	August 2022 – February 2023

Although the Advisory Committee expects to restyle the rules in batches and obtain public comment on each group as it is restyled, none of the restyled rules would become effective until all groups have been approved. Absent delays and assuming approvals by the

Conference and the Supreme Court, and no contrary action by Congress, the full set of restyled rules would go into effect December 1, 2024. These dates are aspirational, however, and may change as the project develops.

Expansion of the Use of Electronic Noticing and Service

In August 2017, proposed amendments to two rules and one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts were published for public comment. Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and Official Form 410 would be amended to add a checkbox for opting into email service and noticing. As published, the amendments to Rule 9036 (Notice or Service Generally) would allow clerks and parties to provide notices or serve most documents through the court's electronic-filing system on registered users of that system. It also would allow service or noticing on any person by any electronic means consented to in writing by that person.

In response to publication, several comments raised substantial issues about the proposed amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions. Based on consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at its spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but to move forward with the amendments to Rule 9036, with minor revisions. The Standing Committee recommended and the Judicial Conference approved the proposed amendments to Rule 9036 in September 2018, and that revised rule is on track to go into effect December 1, 2019.

After the spring 2018 Advisory Committee meeting, the Committee on Court Administration and Case Management (CACM Committee) submitted a suggestion for a further

amendment to Rule 9036 that would require mandatory electronic service on most “high volume notice recipients,” a category that would initially be composed of entities that receive more than 100 court-generated paper notices from one or more courts in a calendar month. The CACM Committee’s suggestion built upon a 2015 suggestion submitted by the Administrative Office’s (AO) Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The prior suggestion was rejected as being inconsistent with § 342(e) and (f) of the Bankruptcy Code, which allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. The CACM Committee’s version of the proposed mandatory electronic service requirement would be “subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code.”

The CACM Committee strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. The AO has estimated that the savings could reach \$3 million or more a year.

The Advisory Committee’s Subcommittee on Business Issues is evaluating the CACM Committee’s suggestion as well as revisions to proposed Rule 2002(g) and Official Form 410 that address the concerns raised in the comments. The subcommittee hopes to present drafts for Advisory Committee review at its spring 2019 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on November 1, 2018. Discussion focused primarily on reports from two subcommittees tasked with long-term projects, as well as consideration of new suggestions related to expanding the scope of disclosure statements in Rule 7.1.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over the past year, the subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation (JPML). The outreach has included participating in several conferences hosted by different constituencies, including transferee judges. The purpose of the fact gathering is to identify issues on which rules changes might focus. While the subcommittee's work remains in an early stage, the information gathered thus far has allowed it to identify six issues for consideration: (1) early procedures to winnow out unsupportable claims; (2) interlocutory appellate review; (3) formation and funding of plaintiff steering committees; (4) trial issues (e.g., bellwether trials); (5) settlement promotion, review, and approval; and (6) third party litigation funding. Going forward, the subcommittee will continue to gather information with the assistance of the JPML and the FJC.

Social Security Disability Review Subcommittee

As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules to assist in focusing the discussion. While the subcommittee has not determined whether to recommend new rules, there is a growing consensus that the scope of any such rules would be limited to cases seeking review of a single administrative record, and would focus on pleading, briefing, and timing.

Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and the analogous provisions in Appellate Rule 26.1, Bankruptcy Rule 8012, and Criminal Rule 12.4 has been the subject of several suggestions in recent years. The Advisory Committee has determined to move forward with a suggestion that it amend Rule 7.1 to include a nongovernmental corporation that seeks to intervene, a change that will parallel the proposed amendments to Appellate Rule 26.1 (approved by the Conference at its September 2018 session and forwarded to the Supreme Court on October 24, 2018) and Bankruptcy Rule 8012 (published for public comment on August 15, 2018). At its November 2018 meeting, the Advisory Committee also kept on its agenda a suggestion to address the problem of determining the citizenship of a limited liability company (or similar entity) in diversity cases by requiring that the names and citizenship of any member or owner of such an entity be disclosed.

Proposed Amendment to Rule 30(b)(6) Published for Public Comment

On August 15, 2018, a proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, was published for public comment. The proposed amendment requires the parties to confer about the number and descriptions of the matters for examination, and the identity of each witness the organization will designate to testify. The comment period closes on February 15, 2019. A public hearing was held in Phoenix, Arizona on January 4, 2019. Twenty-five witnesses presented testimony. A second hearing is scheduled to be held in Washington, DC on February 8, 2019. Fifty-five witnesses have asked to testify.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

The Advisory Committee met on October 24, 2018. A large portion of the meeting was devoted to discussion of the work of the Rule 16 Subcommittee. The Advisory Committee also determined to retain on its agenda a suggestion to amend Rule 43.

Expert Disclosures

As previously reported, the Advisory Committee added to its agenda two suggestions from district judges that pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the more robust expert disclosure requirements in Civil Rule 26. The Advisory Committee devoted a portion of its October 2018 meeting to a presentation by the Department of Justice on its development and implementation of new policies governing disclosure of forensic and non-forensic evidence.

The Rule 16 Subcommittee will consider whether an amendment is warranted and, if so, what features any recommended amendment should contain. To assist in its work, the subcommittee is planning to hold a mini-conference this spring. Participants will include prosecutors, private practitioners, and federal defenders.

Defendant's Presence at Plea and Sentencing

At its October 2018 meeting, the Advisory Committee created a subcommittee to consider the panel's suggestion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentencing.

Although the Advisory Committee has twice rejected suggestions that it expand the use of video conferencing for pleas or sentencing, members concluded the issue should be revisited

given the explicit invitation in *Bethea*. The subcommittee is tasked with assessing the need for a narrow exception to the requirement of physical presence, how such an exception could be defined, what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and how to accommodate the right to counsel when the defendant and counsel are in different locations.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 19, 2018. At that meeting, the Advisory Committee conducted a roundtable discussion with a panel of invited judges, practitioners, and academics regarding four agenda items, including two proposed amendments to Rule 702, proposed amendments to Rule 106, and proposed amendments to Rule 615. Each is discussed below. The roundtable discussion provided the Advisory Committee with helpful insight, background, and suggestions.

Possible Amendments to Rule 702

Addressing Forensics. The Advisory Committee has been exploring the appropriate response to the recent scientific studies regarding the potential unreliability of certain forensic evidence. A subcommittee was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. After extensive discussion, the subcommittee concluded that it would be difficult to draft a new freestanding rule on forensic expert testimony because any such rule would have an inevitable and problematic overlap with Rule 702. Further, the subcommittee concluded it would not be advisable to set forth detailed requirements

regarding forensic evidence in rule text because substantial debate exists in the scientific community as to appropriate requirements.

The Advisory Committee agreed with the subcommittee's recommendations and is considering ways other than rule changes to assist courts and litigants in meeting the challenges of forensic evidence. These include assisting the FJC with judicial education. The Advisory Committee continues to consider a proposal to amend Rule 702 to focus on one important aspect of expert testimony: the problem of overstating results (for example, by stating an opinion as having a "zero error rate" when that conclusion is not supportable by the methodology).

Admissibility/Weight. The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence. Extensive case law research suggests confusion on whether courts should apply the admissibility requirements of a preponderance of evidence under Rule 104(a), or the lower standard of prima facie proof under Rule 104(b). Based on the roundtable discussion and other information, the Advisory Committee will continue to consider whether an amendment to Rule 702 is necessary to clarify that the court must find these admissibility requirements met by a preponderance of the evidence.

Possible Amendment to Rule 106

Over its last three meetings, the Advisory Committee has been considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement to correct the misimpression. The Advisory Committee has focused on whether Rule 106 should be amended to provide: (1) that a

completing statement is admissible over a hearsay objection; (2) that the rule covers oral as well as written or recorded statements; and (3) more specific language about when the rule is triggered (i.e., by a “misleading” statement) and when a completing portion must be admitted (i.e., when it corrects the misleading impression). The roundtable discussion provided important input on these questions.

Possible Amendments to Rule 615

The Advisory Committee considered a suggestion to amend Rule 615, the rule on sequestering witnesses. The suggestion noted three concerns: (1) the rule provides no discretion for a court to deny a motion to sequester; (2) there is no timing requirement for when a party must invoke the rule, so it would be possible for a party to make a mid-trial request for exclusion of witnesses from the courtroom after some witnesses had already testified; and (3) there should be an explicit exemption from exclusion for expert witnesses to substitute for the current vague exemption for witnesses who are “essential to presenting the party’s claim or defense.” These proposed changes were raised at the roundtable discussion, and the Advisory Committee obtained valuable information, especially from the participating judges.

The Advisory Committee rejected the proposal to make sequestration discretionary. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware of the risks of tailoring trial testimony. Also, discretion still exists in the rule given the exceptions to exclusion provided. Similarly, the Advisory Committee determined that the concerns regarding timing and an explicit exemption from exclusion for expert witnesses were not pervasive or significant issues.

In researching the operation of Rule 615, the Advisory Committee found another issue that has produced a conflict among the courts. The issue involves the scope of a Rule 615 order

and whether it applies only to exclude witnesses from the courtroom, as stated in the text of the rule, or extends outside the confines of the courtroom to prevent prospective witnesses from being advised of trial testimony. The Advisory Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615.

Proposed Amendment to Rule 404(b) Published for Public Comment

On August 15, 2018, the Advisory Committee published for public comment a proposed amendment to Rule 404(b), the rule that addresses character evidence of other crimes, wrongs, or acts. The proposal would expand the prosecutor’s notice obligations by requiring that the prosecutor “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” Three comments have been submitted thus far.

OTHER ITEMS

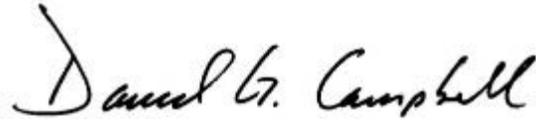
The Standing Committee’s agenda also included three information items. First, the Committee was briefed on the status of legislation introduced in the 115th Congress that would directly or effectively amend a federal rule of procedure.

Second, the Committee engaged in a discussion of whether to develop procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. Based on that discussion, the Reporter to the Committee will draft proposed procedures to be discussed at the June 2019 meeting.

Third, Committee members were provided with materials summarizing the September 12, 2018 long-range planning meeting of Conference committee chairs and members of the Executive Committee, as well as the status of the strategic initiatives meant to support

implementation of the *Strategic Plan for the Federal Judiciary* that have been identified by each Judicial Conference committee.

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive, flowing style.

David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Rod J. Rosenstein
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

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TAB 1C

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Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	An exception added to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	Adds a provision to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised March 2019

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised March 2019

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond”; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised March 2019

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Revised March 2019

Effective (no earlier than) December 1, 2019

Current Step in REA Process: transmitted to Supreme Court (Oct 2018)

REA History: approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised March 2019

Effective (no earlier than) December 1, 2020

Current Step in REA Process: published for public comment (Aug 2018-Feb 2019)

REA History: approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised March 2019

TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 1, 2018

1 The Civil Rules Advisory Committee met at the Administrative Office of the United States
2 Courts in Washington, D.C., on November 1, 2018. Participants included Judge John D. Bates,
3 Committee Chair, and Committee members Judge Jennifer C. Boal; Judge Robert Michael Dow, Jr.;
4 Judge Joan N. Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge
5 Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M.
6 Sellers, Esq.; Professor A. Benjamin Spencer; Ariana J. Tadler, Esq.; and Helen E. Witt, Esq..
7 Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated
8 as Associate Reporter. Judge David G. Campbell, Chair; Professor Daniel R. Coquillette, Reporter
9 (by telephone); Professor Catherine T. Struve, Associate Reporter (by telephone); and Peter D.
10 Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as
11 liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative,
12 also participated. The Department of Justice was further represented by Joshua Gardner, Esq..
13 Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Ahmad Al Dajani, Esq., represented the
14 Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers
15 included Jason Batson, Esq. (Bentham IMF); Amy Brogioli, Esq. (AAJ); Fred Buck, Esq. (American
16 College of Trial Lawyers); Jason Cantone, Esq. (FJC); Bob Chlopak (CLS Strategies); Stacy Cloyd,
17 Esq. (National Organization of Social Security Claimants' Representatives); Andrew Cohen, Esq.
18 (Burford Capital); Alexander Dahl, Esq. (Lawyers for Civil Justice); David Foster, Esq. (Social
19 Security Administration); Joseph Garrison, Esq. (NELA); William T. Hangle, Esq. (ABA Litigation
20 Section liaison); Ted Hirt, Esq. (DOJ Ret.); Brittany Kauffman, Esq. (IAALS); Zachary Martin, Esq.
21 (Chamber Institute for Legal Reform); Benjamin Robinson, Esq. (Lawyers for Civil Justice); Jerome
22 Scanlan, Esq. (EEOC); Professor Jordan Singer; Susan H. Steinman, Esq. (AAJ); and Andrew
23 Strickler (Law360 Reporter).

24 Judge Bates welcomed the Committee and observers to the meeting. He noted the Committee
25 is sad that former members Barkett, Folse, Matheson, and Nahmias have completed their terms and
26 have rotated off the Committee. Judge Shaffer, who has resigned the bench, is in the thoughts and
27 prayers of all members. All Committee members are pleased to welcome new members, and soon-to-
28 be friends Boal, Hunt, Jordan, Lee, Rosenberg, Sellers, and Witt.

29 Judge Bates further reported that in June the Standing Committee had a lively discussion of
30 Rule 30(b)(6), made some minor adjustments in the rule text, and approved publication for comment.
31 Rule 30(b)(6) was published in August; hearings are scheduled in January and February. The work
32 of the MDL Subcommittee also was described and was discussed briefly.

33 Judge Bates also noted that the only Civil Rules business at the September meeting of the
34 Judicial Conference was a brief information report from the Standing Committee on the work of the
35 MDL and Social Security Subcommittees.

36 *April Minutes*

37 The draft Minutes for the April 10, 2018 Committee meeting were approved without dissent,
38 subject to correction of typographical and similar errors.

39

Legislative Report

40 Julie Wilson presented the legislative report. She noted that most of the bills listed in the
41 agenda materials are familiar. There has been no legislative movement on the bills that were
42 described last April. Some new bills have been introduced. The Litigation Funding Transparency Act
43 provides for disclosure of third-party funding in class actions and MDL proceedings. The Federal
44 Courts Access Act would make several changes in federal diversity jurisdiction, particularly in Class
45 Action Fairness Act cases. The Injunctive Authority Clarification Act would address nationwide
46 injunctions by prohibiting orders that purport to restrain enforcement against a non-party of any
47 statute or like authority, with exceptions for representative actions. And the Anti-Corruption and
48 Public Integrity Act includes provisions that would Amend Civil Rule 12 to prohibit dismissal under
49 Rule 12(b)(6), (c), or (e) in terms that essentially undo the Supreme Court decisions in the *Twombly*
50 and *Iqbal* cases.

51 Two other bills were noted. A Judiciary Reform and Modernization of Justice Act is being
52 considered by the Committee on Court Administration and Case Management; its provisions include
53 internet streaming of court proceedings. Another bill would modify the structure of the Ninth Circuit,
54 dividing it into divisions.

55

Rules Amendments in Congress

56 Judge Bates noted that amendments to Rules 5, 23, 62, and 65.1 are pending in Congress, to
57 take effect this December 1 unless Congress intervenes before then. He also observed that the early
58 stages of Committee work on Rule 23 included provisions addressing cy pres remedies; those
59 provisions were deleted, and a case involving cy pres questions was argued in the Supreme Court
60 the day before this meeting.

61 Judge Bates also noted that as published in August, the proposal to amend Rule 30(b)(6)
62 directs the parties, or a nonparty subjected to a deposition subpoena, to confer about the number and
63 description of the matters for examination, and also to discuss the identity of the persons the
64 organization named as deponent will designate to testify for it. Few comments have come in so far,
65 but there are likely to be a fair number. The direction to discuss the identity of the witnesses has
66 encountered substantial resistance. "We look forward to comments from all parts of the public."

67

Report of the MDL Subcommittee

68 Judge Bates introduced the Report of the MDL Subcommittee by noting that this is one of
69 the two current subcommittees. Chaired by Judge Dow, with Professor Marcus as principal
70 Reporter, the subcommittee has been hard at work for a year. It has drawn from many sources, and
71 has met with several outside groups.

72 Judge Dow began the report by noting that several Subcommittee members and Judge Bates
73 attended the annual transferee judges conference of the Judicial Panel on Multidistrict Litigation on
74 October 31. About 150 transferee judges attended the morning session. The Subcommittee members
75 had a meeting in the afternoon with between 20 and 25 of the most experienced transferee judges.
76 "Every time we sit down with a group it's very fruitful." The November 2 Roundtable on third-party
77 litigation funding at George Washington University Law School will add still further insights, both
78 as to the role of financing in MDL proceedings and as to more general issues.

79 The judges at the JPML meeting were perhaps more interested than the Subcommittee has
80 been in some of the familiar topics that have been on the Subcommittee's short list for particular

81 study. They were particularly interested in sorting out supportable individual claims, appellate
82 review, and in third-party funding not only in MDL proceedings but more generally. There also is
83 interest in the analogies between MDL proceedings and class actions. Many MDL proceedings
84 include class-action cases, and Rule 23 procedures come into play whenever disposition includes
85 class certification, ordinarily for purposes of settlement. The possibility of creating formal rules to
86 apply like procedures to non-class MDLs may deserve closer study, in part because many judges now
87 apply them by analogy. The Subcommittee had not much focused on the proposals that every
88 plaintiff in an MDL should pay an individual filing fee, an issue that arises with actions “directly
89 filed” in the MDL court after consolidation. The MDL judges were interested.

90 Judge Bates added that the MDL judges agreed on many issues. On others there was a variety
91 of views. There was some discussion of the question whether formal rules are needed. “They thought
92 not, except perhaps for a few issues.” “Information gathering will not stop.” It may be that empirical
93 research by the Federal Judicial Center will be requested. The Judicial Panel has provided much
94 useful information. So have several conferences. “But there may be more conferences and events.”

95 Professor Marcus added that “We want reactions, not our own views,” on agenda topics. Six
96 major categories are identified at p. 142 of the agenda materials.

97 Real concern is shown in many quarters about the number of plaintiffs that appear in some
98 MDLs without any supportable claim. Is there an effective remedy — perhaps by imposing
99 heightened pleading requirements, or enhanced Rule 11 requirements for plaintiff’s counsel, or
100 plaintiff fact sheets? How should any such requirements apply to cases filed before the MDL
101 consolidation, or outside the MDL court after consolidation?

102 The need for increased opportunities for interlocutory appellate review has been stressed by
103 many, mostly representing defendants’ interests. Common examples include Daubert rulings on the
104 admissibility of expert testimony and rulings on preemption. If new appeal opportunities are to be
105 created, should the appeals be as a matter of right? If an exercise of discretion is required, should it
106 include both the district court and the court of appeals?

107 The process of forming and funding plaintiffs’ steering committees is another area of
108 continuing interest. Creative approaches have been adopted, including appointments for one-year
109 terms that enable the MDL judge to evaluate performance and encourage vigorous development of
110 the proceedings. Common-benefit funds to compensate lead counsel generate much interest,
111 including caps on fees. Related questions ask whether the court can limit fees charged by individual
112 plaintiffs’ lawyers who do not participate in the leadership and who contribute to, rather than gain
113 from, common benefit funds. Do Rule 23(g) and (h) on class counsel appointment and fees provide
114 useful models?

115 Trial questions have focused on “bellwether” trials, and particularly on the question whether
116 party consent is required if the MDL court is to hold a bellwether trial. Bellwether trials usually
117 proceed with party consent.

118 Settlement promotion and review are a central feature of MDL proceedings. But writing a
119 rule for reviewing settlements by analogy to Rule 23(e) is a challenge because it will be difficult to
120 define the distinction between truly individual settlement of individual actions in the MDL
121 proceeding and settlement efforts that seek to generate common terms for groups of cases or all
122 cases.

123 Third-party litigation funding occurs in MDL proceedings as well as others. It can provide
124 essential resources to develop the case, and may support efforts to diversify the ranks of those who
125 appear in leadership roles. Proposals for court rules have focused on disclosure, often raising issues
126 similar to those that are addressed in considering third-party funding as a more general phenomenon.
127 Should disclosure be limited to the fact there is funding, and the identity of the funder? Should it
128 include more detailed information about the funding arrangements — and if so, should the disclosure
129 be made in camera, or should it be made to all parties? To the world?

130 I. Unsupported Claims: Judge Dow noted that there is “some consensus” that substantial numbers
131 of unsupported claims are a problem, at least in large mass-tort MDL proceedings. Judges Fallon and
132 Barbier are experts, who agree that any rule that might be adopted to address the problem should
133 allow flexible responses by MDL judges. In turn, that raises the question — much discussed in the
134 Subcommittee — whether a rule framed at a high level of generality “will be much of a rule”?
135 Perhaps the most that should be attempted is to identify this as a subject for discussion in Rules 16
136 and 26.

137 Judge Bates added a reminder that at any time there are rather more than 200 pending MDL
138 proceedings. The focus of concern is on about ten percent of them, mostly mass torts, and among the
139 mass-tort proceedings mostly medical devices and pharmaceutical products. It seems probably true
140 that there is an issue with unsubstantiated claims in these proceedings. But there is not as much
141 agreement on what causes the problem. The perspective of judges is different from plaintiffs’
142 perspectives or defendants’ perspectives. Defendants add business concerns such as the impact of
143 sheer claim numbers on SEC filings and regulatory filings. Should such business concerns, of
144 themselves, be a reason for generating new rules?

145 A judge observed that plaintiff fact sheets are an option for identifying unsubstantiated
146 claims: may that be a sufficient remedy? Judge Dow responded that various approaches were
147 discussed at the October 31 MDL conference, including fact sheets, enhanced Rule 11 enforcement,
148 and other means. The variety of approaches underscores the value of flexibility. “Most experienced
149 MDL judges think the tools are there.” It is an open question whether one tool, such as plaintiff fact
150 sheets, should be elevated over others. “The judges often suggested we should not tie their hands.
151 Many judges focus more on getting the parties on a settlement track.”

152 Another judge reported that one MDL judge said he did not want to go through hundreds of
153 fact sheets. And there was a sense that the time frame for fact sheets could be a problem — a
154 plaintiff’s attorney may not be able to gather the information requested by a fact sheet within, for
155 example, 60 days after filing. Still, there was agreement that fact sheets work well.

156 A Committee member asked whether it would be useful to have a rule that presumes
157 plaintiffs must file fact sheets unless there is a special showing they are not needed? Judge Dow
158 replied that the judges at the conference likely think such a rule would be too specific. Judge Bates
159 added that a rule that adds fact sheets as a subject for discussion at Rule 16 and 26 conferences
160 would be acceptable, although this approach “has few teeth.” And “remember we are talking about
161 a subset of MDL proceedings.”

162 Another Committee member asked whether a fact sheet is a pleading subject to a Rule 12
163 motion? A judge answered that one role for fact sheets can be to take the place of an individualized
164 pleading in a direct-filed case. Prompt filing may be needed for limitations purposes. “The problem
165 is that some causes of action are easier than others to identify in 30 days.” Most fact-sheet responses
166 are general, addressing such questions as when the injury occurred.

167 A different judge reported that in a medical-product MDL the parties proposed there should
168 be a master complaint and plaintiff fact sheets. They recognized that it would be “too much” to insist
169 on individual complaints, individual answers, and individual Rule 12 motions. The MDL was formed
170 after 50 cases had been filed. The plaintiffs advertised. The MDL now counts 5,000 cases — 300
171 were filed last week alone. The master complaint “pleads every plausible claim.” Plaintiffs file a
172 short-form complaint identifying the product and injury, and checking the boxes on which of the
173 claims in the master complaint they are asserting. Then they have 60 days to file a specific fact sheet
174 that is like discovery; the order says that the fact sheet is treated as answers to interrogatories, so
175 Rule 37 applies. Defendants have 20 days to tell the plaintiff of perceived defects in the fact sheet.
176 The plaintiff has 20 days to respond. Then the defendant can request dismissal. No motions to
177 dismiss have been made, nor have any challenges been made to the adequacy of individual fact
178 sheets. The defendants go forward with discovery guided by the fact-sheet information about who
179 the plaintiff is, and what the product is. Daubert motions are made. Taken together, the fact sheets
180 inform the defendants of the value of the aggregate claims for settlement.

181 Still another judge noted that a variety of approaches are taken to winnowing out unsupported
182 claims. Some judges use “Lone Pine” orders. The master-complaint approach just described is
183 typical of many mass torts. Judges say it works, that there is no need for a rule.

184 A Committee member asked whether it would help to add a special disclosure rule for mass
185 tort cases to Rule 26(a)(1)? This approach is discussed at pages 146-147 of the agenda materials.
186 One question is whether the consequences of inadequate Rule 26(a)(1) disclosures under
187 Rule 37(c)(1) provide sufficient incentives to deter unsupported claims. Defendants want a rule that
188 can be the basis for early dismissal of unsupported claims. That could extend to requiring the judge
189 to consider individual plaintiffs, perhaps in unmanageable numbers. Another Committee member
190 added a reminder that “mass torts are only a slice of it.” Many class actions are gathered in MDL
191 proceedings. “A rule for all MDL cases would be a problem.”

192 This question was developed by asking how a fact sheet translates into winnowing out
193 unsupported claims. A judge replied that 95% of the cases in MDLs “never get transferred back. The
194 winnowing occurs in settlement.” Both sides have an understanding of the value of different
195 categories of claims, including, for example, a category of claims that are worthless because the
196 plaintiffs have no injury. It is a good question whether fact sheets are useful for winnowing out
197 unsupported claims early in the case. Defendants want to litigate some plaintiffs out of the MDL
198 early-on. Perhaps a survey could ask MDL judges for their views. It was suggested that if a survey
199 is to be done, practitioners should be surveyed as well to ask about all the procedures that have been
200 used to identify unsupported claims and about how well they work.

201 A judge said that fact sheets can be used for early winnowing. A procedure has been set up
202 in her MDL after talking with other judges. The defendant has an opportunity to tell the court what
203 is a deficient fact sheet. Once a case has been on the monthly docket two times, the defendant can
204 move to dismiss because the fact sheet is inadequate. “Cases do fall by the wayside.” The procedure
205 takes the place of Rule 8, especially with advertising to gather more plaintiffs and no direct-filing
206 fee for direct-filed cases. A master complaint makes a difference. And individual cases can be
207 dismissed with prejudice when there is no response at all to the order for a fact sheet. Other judges
208 agreed that fact sheets can be used to identify unsupported claims, but it may help to study this
209 further. “We get the sense that a lot of it washes out at the end.” It seems likely that most MDL
210 judges follow pretty much the same procedures. An example of dismissals for inadequate showings
211 by individual plaintiffs is provided by the decision in *Barrera v. BP, P.L.C.* (5th Cir. No. 17-30122
212 October 18, 2018).

213 Some proposals made to the Committee, or reflected in pending legislation, would require
214 the judge to deal with each plaintiff on the basis of the fact sheet. In proceedings with large numbers
215 of plaintiffs, that is a real problem for the judge. In the same vein, a Committee member asked
216 whether it is clear that plaintiffs have an adequate opportunity to find the facts they are required to
217 provide in fact sheets? If we do a survey, we should ask whether MDL judges are satisfied that
218 plaintiffs have a fair chance, including through discovery.

219 Discussion moved to the role of individual filing fees, a topic discussed at the October 31
220 conference. A judge who did not require individual filing fees for direct-filed cases expressed regrets
221 about the decision. There was some sense at the October 31 conference that more judges will move
222 toward requiring filing fees for each plaintiff, but some have not. If there is to be a survey, perhaps
223 this practice should be included.

224 II. Interlocutory Appeals: Judge Dow noted the range of questions that have been raised by proposals
225 that there should be more opportunities for interlocutory appeals from orders in MDL proceedings
226 that may add cost and delay that would be spared by appeal and reversal. Any actual rule proposals
227 will be coordinated with the Appellate Rules Committee, to our advantage. The first question may
228 be to learn whether there is a gap that somehow makes inadequate the opportunity to appeal on
229 certification under § 1292(b), adding in the prospect of partial final judgments under Rule 54(b) and
230 extraordinary writs under § 1651 when special circumstances warrant. Is it possible to identify
231 particular kinds of cases that deserve new appeal rules? Should any new appeal opportunity be a
232 matter of right? If permission is required, should permission be required from both courts, only the
233 district court, or only the court of appeals? District judges express concern about the prospect that
234 appeals will delay trial-court proceedings, even if there is no formal stay. It may be useful, but
235 difficult, to determine whether new appeal opportunities should be provided only for particular
236 categories of cases. And it will be interesting to speculate about the amount of work that would be
237 generated for the courts of appeals by either permissive or mandatory appeal rights — some
238 proponents have suggested that no more than one or two appeals per circuit per year are likely, but
239 that is only speculation.

240 A Committee member asked about the views of MDL judges about § 1292(b) — should we
241 find out more by including this as a question in any survey that may be made? A judge said that most
242 MDL judges think that § 1292(b) is adequate to the appeal needs of MDL proceedings. Another
243 judge suggested that if MDL judges are surveyed, it would be good to learn how many requests are
244 made for § 1292(b) appeal certification, and how many are granted by the district court and then the
245 court of appeals. An example of a recent district-court certification was noted. Another question
246 could ask about the effects of an accepted appeal on delay. In a class action, not an MDL, a § 1292(b)
247 appeal was certified from an order that, choosing among conflicting circuit precedents, denied
248 summary judgment. The appeal was accepted. The decision was made 27 months later. Delay of that
249 magnitude “gives pause.” In an MDL, the same judge denied a motion to dismiss that asserted state-
250 law claims were preempted, and denied certification for appeal because the answer seemed clear and
251 the first bellwether trial was almost ready to begin.

252 Another judge repeated that proponents of expanded appeal opportunities predict that there
253 will be few appeals, perhaps one or two per circuit per year. Predictions are likely to be shaped by
254 the types of MDL proceedings included in any proposed rule. But delay remains an issue.

255 Further discussion suggested that the criteria for certifying a § 1292(b) appeal are treated
256 differently in different circuits. Some take more formal, less flexible, approaches. Although most
257 MDL judges believe § 1292(b) suffices, their views may depend on the approach of the local circuit.

258 The defense bar argues that they will win a good number of appeals, yielding gains that will
259 offset any delay in district-court proceedings.

260 Another judge asked who are the proponents of expanded appeal opportunities? If MDL
261 judges do not think new opportunities are needed, we should know who feels the need and what
262 motives drive their views. A judge responded that “we have the equivalent of a survey” in meetings
263 with the defense bar. Another judge added that “part of it is a view of fairness.” Defendants argue
264 that when a defendant wins a ruling that defeats a plaintiff, the plaintiff can appeal. But if the
265 defendant loses the ruling on the same issue, there is no appeal and huge expenses follow.
266 Preemption issues are frequently advanced as an example. “Defendants are confident these are good
267 motions. And many defendants are repeat players.” Some defendants also think that some MDL
268 judges are too reluctant to certify appeals that should be allowed, whether from fear of reversal, a
269 sense that the cases will settle anyway, or a preference for settlement over dismissal without any
270 remedy for the plaintiffs.

271 Defendants also urge that delay can be reduced if appeals are expedited. But the committees
272 have been reluctant to adopt rules that require expedition on appeal. There are too many competing
273 demands on the time of appellate courts. When, for example, would an interlocutory appeal in an
274 MDL proceeding deserve priority over criminal appeals? A Committee member noted that rule 23(f)
275 appeals are attempted in almost every class action, and that the impact is delay. We might try to find
276 out more about the frequency of § 1292(b) appeals in MDL proceedings. It is important to remember
277 that the cost of delay is not simply money. In medical product cases delay may mean that some
278 plaintiffs die before the case resolves. “If we’re looking at a very thin slice of cases, why not be
279 transsubstantive”?

280 A further suggestion was that if cases are to be counted, we might look at how often courts
281 of appeals grant permission for § 1292(b) appeals, and in which types of cases.

282 One judge thought that at the October 31 conference some MDL judges showed they did not
283 understand the discretion they have under § 1292(b). Could it be useful to adopt a rule that clarifies
284 this?

285 Another judge noted that MDL judges have discussed the effect of remanding a case to the
286 court where it was filed, often in a circuit other than the circuit for the MDL court. Although there
287 is a prospect that differences in circuit law could defeat rulings made by the MDL court, it is agreed
288 that this is not a problem because the MDL rulings are treated as the law of the case.

289 III. PSC Formation and Funding: Judge Dow opened this topic by saying that nothing new was
290 discussed at the October 31 conference. No rule-based proposal has yet been made.

291 Professor Marcus noted that in drafting the amendments to Rule 23(g) on appointing class
292 counsel, the Committee drew from experience in appointing lead counsel in MDL proceedings. “This
293 is a two-way street.” So it is common for MDL judges to draw on analogies to Rule 23(g) in
294 appointing lead counsel. Judge Dow agreed, adding that MDL judges think the analogy to Rule 23(g)
295 provides guidance enough without any need for a new rule. Judge Bates also agreed, noting that in
296 both settings courts are concerned with the adequacy of the resources available to counsel to properly
297 develop the case.

298 A Committee member asked whether there is an interaction between unsupported claims and
299 the composition of the Plaintiffs’ Steering Committee. Judge Dow responded that the Subcommittee
300 has often heard that having a large number of clients is a ticket to a role on the steering committee.

301 “Some lawyers may seek to pump it up by advertising.” But judges do not think we need a rule.

302 This view was expanded by another judge. Very experienced judges think they are handling
303 the appointment of steering committees quite well. They look to the credentials of the lawyers who
304 vie for appointment. Some make one-year appointments, a practice that can easily lead to flushing
305 out lawyers who have garbage lists of clients. And a lot of attention is being paid to the repeat-player
306 problem, both by MDL judges and the JPML. Still another judge pointed out that MDL judges are
307 making active efforts to expand the ranks of steering committee participants, looking to expand the
308 MDL bar to more lawyers and more diverse lawyers. A website is available and the JPML provides
309 resources.

310 Professor Marcus pointed to estimates that the cost of preparing a single bellwether trial is
311 at least a million dollars, not counting lawyer time. Third-party financing may be a means for “those
312 who are not over-rich” to play a role.

313 IV. Trial Issues: Judge Dow reported that the October 31 conference supports the view that a number
314 of MDL judges are not doing bellwether trials. There is no groundswell of support for rules
315 addressing this practice. Here, as elsewhere, MDL judges want flexibility. Lexecon “workarounds”
316 are used, but there may be a trend toward more frequent remands to other courts for trial, both in
317 actions filed elsewhere and then transferred to the MDL and in actions direct-filed in the MDL but
318 naming the court where the case should be remanded for trial. Some MDL judges ask to be
319 transferred with the case so they can try it in the remand court. Again, there is no sense of a need for
320 new rules.

321 Judge Bates formed the same sense of the views expressed at the conference. He added that
322 there is a feeling that cases are dropped on the eve of a scheduled bellwether trial, that the plaintiff
323 dismisses or the defendant settles. There is a risk of strategic maneuvering to gerrymander the
324 selection of bellwether cases. Judges devise procedures to respond. One procedure, for example, is
325 to list a number of bellwether trials on a set schedule; if one drops, the next case on the list is
326 advanced for trial on the date set for the drop-out. “We did not even hear much in terms of proposed
327 rules.”

328 Another judge observed that in his MDL, the lawyers asked for bellwether trials. In other
329 MDL proceedings, lawyers may feel that bellwether trials are forced on them. Further conversation
330 among the judges suggested that MDL judges are not likely to force bellwether trials, but that they
331 want to move cases, and to have a pool of defendants willing to waive the Lexecon limits on transfer
332 for trial. Judges have not expressed concerns on this score, but proposals have been made to require
333 all parties’ consent. If we undertake a survey of lawyers, perhaps questions could be asked about
334 these concerns.

335 A judge noted one response to the risk that cases set for bellwether trials will be dismissed
336 or settled to skew what was intended to be a representative sample: he told the parties that once a
337 list of bellwether cases had been set, he would end the bellwether process if the cases started to
338 dismiss or settle, and would remand them all for trial. Another approach would be to allow
339 defendants to substitute a case for one dismissed by the plaintiff, and to allow plaintiffs to substitute
340 a case for one settled by the defendants.

341 V. Settlement: Judge Dow began the discussion of settlement by noting that many MDLs include
342 class actions, so that settlement brings compliance with Rule 23(e). Many non-class settlements
343 reflect involvement of the judge, but without the Rule 23 process: is this a problem? The
344 Subcommittee members at the October 31 conference made the possibility of a rule regulating

345 settlement a major focus. There was a lot of discussion. But the Subcommittee has not yet given
346 much thought to these questions, nor developed them as well as might be.

347 Judge Bates added that conversations with MDL judges suggest that they have pushed for
348 settlement in proceedings that never would have been certified as a class. Or they have suggested to
349 the parties what criteria might lead them to promote a settlement. “There is something like
350 Rule 23(e) only if the judge puts it in place.” It is easy to imagine that the Supreme Court might be
351 concerned about settlements accomplished without the guidance and protection of something like
352 Rule 23(e).

353 A Committee member suggested a need to ask whether the MDL court must look after the
354 interests of individual plaintiffs. What harms need to be guarded against? What role does the court
355 have when every plaintiff has a lawyer?

356 Professor Marcus responded that Individually Retained Plaintiffs Attorneys sometimes feel
357 they do not have much influence in the proceedings, and may feel pressure to accede to a proposal
358 for common settlement. A rule could tie settlement review to selecting the plaintiffs’ steering
359 committee, making court involvement a major feature. It seems likely that judges consider factors
360 similar to Rule 23(g) in appointing steering committees.

361 The caution was repeated: The Subcommittee has not much got into these questions. But
362 perhaps there is not much there. Still, the questions remain.

363 VI. Third-Party Litigation Funding: Judge Dow opened the topic of third-party funding by noting that
364 the Subcommittee has benefited from several meetings that included representatives of litigation
365 funding firms. There is a broad diversity among funding arrangements. Often a sharp distinction is
366 drawn between two settings. One involves small loans made directly to individuals in ordinary
367 litigation. The other involves large loans made to litigants or law firms in complex or high-stakes
368 actions. Many models of disclosure have been advanced. Judge Pollster’s order in the Opioids MDL
369 directing disclosure of funding agreements for in camera inspection, supplemented by affidavits
370 about actual practice under the agreements, is one model. Another is disclosure to all parties —
371 perhaps of the agreements themselves, or perhaps only of the fact of funding and the identity of the
372 funder. Yet another is to supplement disclosure with some discovery. The purposes of disclosure also
373 may vary. One purpose is to support recusal decisions by the judge. Another is to decide whether a
374 funder should be involved in settlement conferences. Yet another is to determine whether a funder
375 has influence or even a veto power over settlement.

376 Judge Bates noted that judges at the October 31 MDL conference were not opposed to a
377 disclosure rule, and thought there might be some benefit. But the discussion left open the same
378 questions whether disclosure should be confined to the fact of funding and the identity of the funder;
379 whether disclosure should be made in chambers, or to all parties; whether the full agreement should
380 be disclosed, and to whom; and whether discovery should be allowed.

381 A Committee member asked how third-party funding would be defined for purposes of any
382 disclosure rule. “Different funders define terms differently.” Should a rule aim only at case-specific
383 funding? At funding of a firm’s inventory of cases? At funding of an individual client? One or all
384 law firms in a case that involves many firms? “We aren’t always talking about the same thing.” This
385 caution was repeated in later parts of the discussion.

386 The Committee was reminded that disclosure is complicated by overlapping regulatory
387 regimes. Professional responsibility organizations are considering this.

388 A Committee member asked whether MDL judges generally require disclosure. Judge Dow
389 responded that there is a trend toward disclosure, especially given the order in the Opioid litigation,
390 but it is not yet a practice. Another judge agreed — more and more judges are directing disclosure.
391 The member followed up by asking whether a rule should start at the modest end of limited
392 disclosure, or should aim higher?

393 Professor Marcus suggested that it is useful to consider actual current practice in framing a
394 rule. The Rule 5 limits on filing discovery materials with the court, for example, were adopted after
395 about half of the districts had adopted rules that limited or prohibited filing. “You’ve got to put the
396 sidewalks where people are walking.” But it would be a mistake to approach disclosure of third-party
397 funding only for MDL proceedings. A broader approach should be considered. Judge Bates followed
398 up this advice by reminding the Committee that third-party funding has been lodged with the MDL
399 Subcommittee because disclosure had been proposed as part of package proposals for MDL
400 proceedings, and because this tie avoided the need to form a third major subcommittee. The
401 Subcommittee recognizes that the inquiry is not limited to MDL proceedings, and that funding
402 occurs in many forms.

403 This discussion framed the question whether disclosure should be approached incrementally.
404 One possibility would be a rule that requires only disclosure of the fact of funding and identity of
405 the funder, supplemented by a Committee Note stating that the rule sets a floor that can be
406 supplemented by the court on a case-by-case basis.

407 The question of professional responsibility regulation returned. Most districts incorporate
408 either the ABA Model Rules or the local state rules of professional responsibility. So Massachusetts
409 could adopt a rule that would thus be incorporated in the local rules for the District of Massachusetts.
410 The prospect of varying state rules, incorporated into district-court rules, should be taken into
411 account.

412 A judge noted that third-party funding happens without the knowledge of judges. “A number
413 of my colleagues are not even aware that it happens.” Learning about the phenomenon generates an
414 interest in disclosure. “You cannot do anything about what you do not know about.”

415 Another judge suggested that if there is a survey of judges, MDL or more generally, it could
416 ask what is done about third-party funding. And whether, when there is disclosure, it leads to
417 recusals. Judge Dow noted that a survey of MDL judges by the Panel this year asked about
418 experience with third-party funding. “There is an interest in the recusal problem.”

419 A familiar question was asked: do we know about what kinds of investments judges make
420 that might lead to recusal because of third-party funding? There are some big funding firms that
421 everyone recognizes. It may be that judges are quite unlikely to invest in them. But there are perhaps
422 a few dozen more, not all well known. More importantly, third-party funding has expanded rapidly
423 in just a few years. It is possible that many other forms of lenders will emerge, but uncertain whether
424 many lenders will be interested in the case-specific or nearly case-specific types of lending, and
425 particularly non-recourse lending, that give rise to the most pressing recusal issues.

426 A judge asked how third-party funding plays into settlement. And if the judge knows there
427 is funding, does that affect the judge’s approach? One reply was that one concern is that the lawyer
428 advises the client on settlement, and the advice may be affected by the fact and terms of funding even
429 if the funding agreement explicitly denies any role for the funder. As one example, a lawyer who
430 repeatedly deals with a funder may be influenced simply by knowing that the funder wants an early

431 settlement in a particular case.

432 A Committee member returned to the professional responsibility rules that deal with outside
433 influence: Are they adequate to deal with funding that does not of itself pay the lawyer's fees?

434 The discussion came back to MDL-specific issues by noting that Rule 23(g)(1)(A)(iv)
435 provides that in appointing class counsel, the court must consider the resources that counsel will
436 commit to representing the class. An MDL judge has a similar concern to appoint lawyers who can
437 fund the MDL. In one MDL the plaintiffs' lawyers have invested tens of millions of dollars in
438 expenses. If courts want to bring new lawyers into the ranks of lead and coordinating counsel, they
439 likely will need third-party funding.

440 When asked, a Committee member said she had not seen the question of third-party funding
441 come up in designating lead counsel. Lawyers seeking appointment simply state that they have
442 adequate resources. The questions do not go further to ask whether the lawyers are self-funding, have
443 a line of credit, or whatever. And remember that third-party funding occurs on the defense side as
444 well. It can be used to pay a defense firm every month. Is this any different from funding for
445 plaintiffs? She went on to ask what actions by the court might we contemplate after disclosure? And
446 she urged that third-party funding opens opportunities to lawyers, including minorities and young
447 lawyers. "MDLs are extremely costly. Most lawyers are working for contingent fees. Fee requests
448 are often cut, especially in class actions."

449 Judge Dow noted that some MDL judges say that they ask about third-party funding when
450 "people not in the usual mix" seek leadership positions.

451 Judge Dow concluded the Subcommittee report by suggesting that if the Subcommittee is to
452 go about gathering more information along the lines suggested in the Committee discussion, it may
453 be another year before the Subcommittee will be in a position to narrow the range of subjects that
454 might be developed into actual rules proposals.

455 *Social Security Disability Review*

456 Judge Bates introduced the Report of the Social Security Review Subcommittee by noting
457 that the Subcommittee has worked for a year gathering information and considering what it is
458 learning. Questions remain about the wisdom of developing rules for a specific substantive area,
459 about the scope of any rules that might be adopted, and whether rules can effectively reduce the
460 problems that inspired the request that the Committee take up these questions.

461 Judge Lioi began the report by summarizing the overall questions it addresses.

462 The task has been taken up in response to a recommendation by the Administrative
463 Conference of the United States based on an in-depth study of practices around the country. Since
464 the Committee meeting last April, the Subcommittee has held a conference call with the Social
465 Security Administration; another with a group of plaintiff attorneys gathered by the American
466 Association for Justice; and three additional calls among Subcommittee members to consider and
467 continually revise draft rules.

468 The current draft rules are limited to actions with one plaintiff, one defendant — the
469 Commissioner of Social Security, and no claim beyond review on the administrative record for
470 substantial evidence.

471 Among the questions that remain are how detailed the complaint should be, and whether the
472 answer should be anything more than the administrative record.

473 The draft also dispenses with Rule 4 service of the summons and complaint, substituting a
474 notice of electronic filing sent to social security officials and the United States Attorney. A few
475 details remain to be worked out, but this proposal has met with approval on all sides.

476 The draft rules set the times and order of briefing and require specific references to the
477 record. After considerable discussion, they require that the plaintiff begin with a motion for the
478 requested relief, supported and explained by the plaintiff's brief. The plaintiff is given an option to
479 file a reply brief.

480 The draft does not include several provisions requested by the Social Security Administration.
481 It does not set page limits for briefs. It does not prohibit the practice in some courts that require the
482 parties to file a joint statement of facts, although that practice should be found inconsistent with the
483 pleading and briefing rules. Nor does it take up the proposal to address requests for attorney fees
484 based in services on judicial review under § 406(b).

485 Several drafts framed these rules as a new set of supplemental rules. The current draft brings
486 them into the body of the Civil Rules, providing three rules to replace abrogated Rules 74, 75, and
487 76. It is possible that the three will be collapsed into a single rule. The result would not be
488 remarkably long, simply leaving more white space as rules become subdivisions and on down to
489 items. And the benefit would be to retain two vacant rules slots for future use. Some thought has
490 been given to framing a single new rule as a Rule 71.2, coming immediately after Rule 71.1 for
491 condemnation actions. Whether as Rule 74 or Rule 71.2, the new rule would fit into Title IX for
492 "Special Proceedings.

493 The Subcommittee will seek another round of comments on the current draft by the Social
494 Security Administration and plaintiffs' representatives. This draft was prepared too late to seek their
495 review before today's meeting. Representatives of these groups are observing this meeting, and will
496 provide comments on the draft and the discussion here today within three weeks. All of this
497 information will be considered in preparing the next draft and seeking comments on it.

498 Discussion began with Rule 74, which defines the scope of the rules. It limits Rules 74, 75,
499 and 76 to actions in which a single claimant names only the Commissioner of Social Security as
500 defendant and seeks no relief beyond review on the record under 42 U.S.C. § 405(g). If there is more
501 than one plaintiff, or a defendant in addition to the Commissioner, or a request for relief that goes
502 beyond review for substantial evidence in light of correct law, the new rules do not apply. The draft
503 Committee Note includes in brackets a possible suggestion that even in actions that are not directly
504 governed by the new rules, it may be appropriate to rely on the pleading standards of Rule 75 for the
505 parts of the action that seek review on the administrative record. The decision to narrow the scope
506 of the new rules reflects in part the value of avoiding the complications that arise from efforts to
507 integrate the simple review rules with the full sweep of procedure that is commonly invoked in more
508 complicated actions. The vast majority — likely nearly all — of § 405(g) review actions fit the
509 simple model. It seems better to separate out such things as class actions. Very few class actions seek
510 to base jurisdiction on § 405(g), and it seems better to leave them out of the new rules.

511 Draft Rule 74(b) is a relic of the drafts framed as supplemental rules. It says that the Federal
512 Rules of Civil Procedure also apply except to the extent they are inconsistent with the new rules.
513 There is no need for this subdivision if the new rules are swept into the regular body of Civil Rules.

514 The first question was whether two claimants can join in a single Social Security
515 Administration proceeding? The consensus was that this cannot be done, but this is a point that must
516 be made certain. If two claimants can proceed together before the Administration, it likely will make
517 sense to permit them to join in a single action for review.

518 The next observation went to where any rules should be located. The tentative decision to
519 put them in the main body of the Civil Rules should be reconsidered. Placing them in the body of
520 the rules risks setting a precedent that will lead to expanding the rules into a set that resembles the
521 Internal Revenue Code, a collection of special-interest rules. Making them supplemental rules poses
522 less of a threat. Supplemental rules emphasize that this is a separate universe and make it easier to
523 resist other efforts for special rules.

524 The Committee was asked to remember that this project comes from a request by the
525 Administrative Conference, joined by the Social Security Administration. Their goal is to achieve
526 a nationally uniform set of procedures for the 17,000 to 18,000 review cases that are filed every year.
527 The concern is that different districts follow markedly different procedures, including 62 districts
528 that have local rules for social security review cases. The hope is that a nationally uniform practice
529 would provide great benefits to the Social Security Administration, and would also provide real
530 benefits to plaintiffs' counsel. Although the Administration is represented by local United States
531 Attorneys, Administration lawyers commonly bear the brunt of the work and at times are appointed
532 special Assistant United States Attorneys. Administration lawyers frequently appear in different
533 districts and need to learn the local procedures. A uniform set of national rules might save as much
534 as two or three hours per case; if so, something like 35,000 hours of attorney time could be freed up
535 for more productive uses. In addition, the Administration believes that some local practices are
536 undesirable. Some courts, for example, require plaintiff and Commissioner to prepare a joint
537 statement of facts, a process that wastes time and can cause difficulties. Several courts rely on
538 summary judgment to frame the review, a practice that has the benefit of specific provisions for
539 citing to the record but that may cause difficulties because several provisions in Rule 56 are
540 inapposite to administrative review and the standard for summary judgment — no genuine dispute
541 as to any material fact — is inapposite to review on an administrative record.

542 It is important to remember that much of the delay in processing social security disability
543 claims occurs in the administrative process. New rules for district-court review will not affect that,
544 and are not likely to affect the high rate of remands. It is important to provide as efficient and prompt
545 review as possible, but the Committee should take care to remember that new rules will not do much
546 to cure problems that primarily arise from an understaffed administrative structure.

547 The argument for the values of uniform national procedures was met with the observation
548 that there are many areas of the law that encounter wide variations in local practice. But the rejoinder
549 is that social security review brings 17,000 to 18,000 cases to the district courts every year,
550 accounting for seven percent of the docket. And it is common to find district courts spending more
551 time on a case than was devoted to it in the administrative process.

552 A different response was that if local practices are indeed undesirable in this setting, it may
553 be important to ensure that the new rules foreclose local rules that undermine the goals of uniformity
554 and efficiency. This approach might even extend to setting page limits for briefs, although the Civil
555 Rules have never done that and there are good reasons to allow local variations that conform to local
556 practice in other types of cases.

557 Rule 75 came up next. In many ways it is the heart of the new rules, addressing the
558 complaint, service, answer, the time to answer, and the effect of motions on the time to answer. In

559 some ways it is a hybrid that blends an effort to analogize the proceedings to appeal procedure with
560 the greater detail customarily provided in civil pleading. Many questions remain about the success
561 of this blend. The effects of the blend are not limited to the complaint. As drafted, the rules allow
562 the Commissioner to answer by filing the administrative record and stating any affirmative defenses,
563 making it optional whether to respond to the allegations in the complaint.

564 As drafted, Rule 75(a) does not specifically state that the complaint must identify the decision
565 to be reviewed. Perhaps that should be added to the rule text.

566 The first information that the complaint must include is the plaintiff's name and address,
567 along with the last four digits of the plaintiff's social security number. It also must identify "the
568 person on whose behalf — or on whose wage record — the plaintiff brings the action." Serious
569 questions have been raised about requiring the address and the last four digits of the social security
570 number. Plaintiffs in other actions are not required to provide these details about themselves, and
571 there is an inevitable risk in providing them. The Social Security Administration insists that it needs
572 these details to make sure that it has identified the proper administrative proceeding and can file the
573 correct record. With more than a million administrative proceedings each year, there often are many
574 claimants with the same name. This insistence apparently reflects the absence of any other means
575 to identify the administrative docket, but it might be asked whether the Administration should protect
576 itself by developing a separate system to identify individual proceedings.

577 The next item specified for the complaint is "the titles of the Social Security Act under which
578 the claims are brought." One question is whether this is necessary. Although it is borrowed from a
579 draft prepared by the Social Security Administration, it is not clear why the Administration needs
580 to know anything more than the identity of its own proceeding: is new law, not invoked in the
581 administrative proceeding, often invoked on review? Is it simply that § 405(g) review provisions are
582 adopted by some other statutes? And for that matter, is "titles" a term sufficiently understood by
583 practitioners to convey the intended meaning? The Subcommittee will press the Administration for
584 more information on these questions.

585 After that, the complaint must name the Commissioner of Social Security as a defendant.
586 That is required by statute, but it may be useful to remind plaintiffs, particularly pro se plaintiffs, of
587 the proper form. Complaints in fact sometimes name a wrong defendant.

588 These three elements roughly correspond to Rule 8(a)(1), establishing the grounds of the
589 court's jurisdiction.

590 The fourth element provides the analogue to Rule 8(a)(2), stating the core requirement that
591 a claim be stated by asserting that the decision is not supported by substantial evidence or must be
592 reversed for errors of law. The reference to errors of law might be surplusage, since a substantial-
593 evidence argument can be framed by arguing that there is not substantial evidence when the record
594 is reviewed under the proper law. But it may be helpful. The draft includes in brackets possible
595 language that would limit the complaint to a general statement that the decision is not supported by
596 substantial evidence, "without reference to the record." These words would emphasize the analogy
597 to a notice of appeal. But it may be better to allow a plaintiff who wishes to plead greater detail about
598 the lack of substantial evidence to do so. Among other things, more detailed pleading might educate
599 the Administration to the reasons that lead to the frequent motions for a voluntary remand to correct
600 deficiencies in the administrative decision.

601 The fifth and final element is a request for the relief requested. This corresponds to
602 Rule 8(a)(3).

603 The first question raised about Rule 75(a) was why it requires so much detail? And what
604 happens if the plaintiff does not include more? In two different districts, located in different regions
605 of the Social Security Administration, “I have never seen any issue of finding the right record.” Nor
606 was the Administration ever defaulted for failure to respond.

607 The next question asked about the plaintiff’s name and address. The Committee on Court
608 Administration and Case Management has proposed that district courts should describe plaintiffs in
609 social security disability opinions only by first name and last initial because the opinions themselves
610 often include detailed personal information. Should these rules adopt a similar limit? Is it protection
611 enough that Rule 5.2(c)(2) limits nonparty remote electronic access to the file in an action for
612 benefits under the Social Security Act to the docket maintained by the court and the court’s opinion,
613 “but not any other part of the case file or the administrative record”? Nonparties can have access to
614 the complaint at the courthouse, but not by remote electronic means. The same holds true for Rule 12
615 motions. The opinion, on the other hand, is available on PACER. But, again, why does the
616 Administration need the last four digits to identify the proper record? If the complaint identifies the
617 date of the final administrative decision, as required to establish jurisdiction, why is that not enough?
618 the decision becomes final when the Appeals tribunal affirms or denies review. There is never a
619 doubt as to what is the final substantive decision. The administrative law judge’s decision is not the
620 trigger for appeal, but the decision “is the front of the record.”

621 Another Committee member expressed concern about having “all this personal information
622 all at one time in one place.” It is easily accessible for identity theft and other misuse. Yet another
623 member suggested we should learn more about why the Social Security Administration cannot
624 identify the proper record by other means. The Subcommittee “will press them on that.”

625 Separately, it was urged that draft Rule 75(a)(4) should retain the phrase “or must be reversed
626 for errors of law.”

627 A separate question was raised as to the phrase in draft Rule 75(a)(1) asking for the identity
628 of the person “on whose wage record” the action is brought. This phrase was offered by the Social
629 Security Administration, and they have offered assurances that it is the proper phrase to reflect
630 substantive rights.

631 A Committee member observed that a bare bones complaint seems to work: why require
632 more? The proceeding is really an appeal. It should work to frame the complaint as a notice of
633 appeal. The draft rule creates unnecessary complexity. We can call it a complaint, to conform to the
634 statutory direction that review is initiated by commencing a civil action and to Rule 3. So what is the
635 need to plead more? Do local rules now require more? This ties to the answer. The Social Security
636 Administration believes that the administrative record is a sufficient answer. In practice, complaints
637 typically are one page, or at most two. They say “I am me. I am appealing.”

638 The question of local rules returned to an earlier theme. The Social Security Administration
639 urges that tens of thousands of attorney hours can be saved by adopting uniform national rules. But
640 this depends on the expectation that the national rules will supersede local rules. It will be necessary
641 to identify what 62 sets of local rules — and perhaps more than 62 — now provide, and whether they
642 may persist in the face of new national rules. This is a perennial problem: if a national rule does not
643 say expressly that it preempts local rules, it may not effectively do that. But if we start adding
644 express preemption provisions here and there, we may create a risk that the absence of an express
645 preemption provision will be read to justify undesirable local rules.

646 A judge noted that the local rule in his court has five paragraphs detailing what must be in
647 the opening brief. If the brief asks for a remand to take additional evidence, it must describe what
648 the evidence is. Local rules like this are likely to persist so long as they are not inconsistent with a
649 set of simple national rules. A short national rule may not save any time for the Social Security
650 Administration.

651 Draft Rule 75(b) provides that the court must notify the Commissioner of a review action by
652 transmitting a Notice of Electronic Filing. The draft provides for notice to the regional Social
653 Security office and to the local United States Attorney; it leaves open the question whether notice
654 should also be sent directly to the Commissioner. The Commissioner's position on that question will
655 be important in moving toward any rule that might be proposed for publication. This description of
656 the draft elicited no further discussion.

657 Draft Rule 75(c) addresses the Commissioner's answer. It complements the provisions for
658 the complaint in a rather unusual way. The Commissioner would prefer a rule that states that filing
659 the administrative record is the answer. The draft provides that the answer must include the
660 administrative record and any affirmative defenses under Rule 8(c). One version says simply that
661 these responses suffice as an answer. Another version says explicitly that Rule 8(b) does not apply.
662 Ousting Rule 8(b) responds to the Commissioner's concern that it is a waste of scarce attorney time
663 to require a point-by-point response to any allegations in the complaint that go beyond asserting a
664 lack of substantial evidence. If Rule 8(b)(6) applies, however, there is a risk that failure to deny will
665 become an admission. The draft Committee Note supplements the rule text by stating that the
666 Commissioner is free to address any allegations in the complaint that the Commissioner wishes to
667 address.

668 Discussion began with the observation that it seems odd to leave it to the Commissioner to
669 decide whether to respond to allegations in the complaint. It can be predicted that different regional
670 offices and different United States Attorneys will respond to such rules in different ways,
671 undercutting uniform practice. In turn, this prospect leads to the question whether there is any
672 problem with ordinary rules for complaint and response — do the perceived problems that lead to
673 a desire for uniform national rules arise instead during later stages of review litigation?

674 Judge Lioi responded that the Social Security Administration complains of the differences
675 in practices among different districts. In the Northern District of Ohio there is no apparent problem
676 with pleading. But the Administration wants to streamline the process, relying on the administrative
677 record as the only answer. She also noted that delay does not seem to be a problem at the district-
678 court level.

679 The next suggestion was that these questions might be put aside by adopting a practice
680 analogous to a notice of appeal, addressed by filing the administrative record. "Why bother to plead
681 more"? But is there a problem with affirmative defenses? — if they are not pleaded, the plaintiff will
682 file the opening brief without addressing them. It does not seem likely that many cases will involve
683 affirmative defenses. Res judicata is one possible example. Still further, is there a risk that the
684 Administration will not yet have identified possible affirmative defenses when it files the answer?
685 Is it likely that a bare bones complaint will give the Administration notice of what affirmative
686 defenses might be available? Res judicata, for example, may not be apparent on the face of a
687 complaint that does not note that review of the same administrative decision was sought in a separate
688 action. Other issues may arise from filing in the wrong district, something that likely would be
689 apparent if the complaint must include the plaintiff's address, but not otherwise, especially as
690 plaintiffs may move after the date of the address provided in the administrative proceeding.
691 Exhaustion of administrative remedies also might be an issue, although in this context it might be

692 treated as a matter of jurisdiction by analogy to the requirement that there be a final administrative
693 decision. This part of the discussion concluded by noting that the risk is that affirmative defenses
694 will be waived if not timely pleaded, and by asking whether anyone present had seen a review action
695 that included an affirmative defense. No one had. But it was suggested that in some districts it may
696 be routine to advance half a dozen affirmative defenses.

697 However that may be, it makes sense to address the complaint and answer, but why go
698 beyond that? Support was provided for this suggestion. The goal is to develop a streamlined and
699 uniform practice. “We should have a rule that says ‘do not do anything more.’” The purpose of
700 uniform national rules can be undercut by persisting in different local practices. National rules
701 should expressly preempt them.

702 Another observation was that these pleading rules seek to streamline the process. It is an
703 appeal on a record. Why not go straight to briefing? But even uniformity at that opening level will
704 not prevent the continuation of different methods of processing cases in different districts. And of
705 course uniformity of outcomes could be achieved only by harmonizing the views of different circuits
706 on social security law, a matter outside the Rules Enabling Act.

707 Discussion of pleading led to a statement that the Department of Justice is concerned about
708 treating subsets of cases differently. The Executive Office of United States Attorneys has prepared
709 a model local rule that includes e-service, a mode of service that might creep into other kinds of
710 cases. “Efficiency is a concern.” Combining a national rule with local rules could lead to
711 inefficiencies. That prospect will not please the Social Security Administration.

712 The final comment on pleading was that the discussion had not shown that the draft rules
713 would save time for the Social Security Administration, unless we delete any provision for answers
714 that go beyond filing the administrative record. “All the problems seem to be post-pleading.”

715 Draft Rule 76 provides for briefing. The first step is a motion by the plaintiff for the relief
716 requested in the complaint, accompanied by a brief that must support arguments of fact by citations
717 to the record. The brief must be filed within 30 days after the answer is filed or 30 days after the
718 court disposes of all motions filed under Rule 75(c). The Subcommittee has debated at length the
719 question whether a motion should be required in addition to the brief. This draft retains the motion,
720 in part because it is the traditional means of asking the court for an order and in part because it will
721 protect against losing sight of a brief filed without a motion. The motion is not likely to exceed a
722 page or two, and will not impose a serious burden on the court or parties.

723 The plaintiff’s brief is followed by the Commissioner’s brief, due 30 days after service of the
724 plaintiff’s motion and brief. This brief too must support arguments of fact by citations to the record.

725 The final step is draft Rule 76(c), which gives the plaintiff an option to file a reply brief.

726 The motion requirement was addressed by suggesting that the question is related to the
727 analogy to a notice of appeal. It is a fair question whether a motion will often serve an important
728 purpose. But the burden will be slight.

729 A response suggested that the motion is an unnecessary piece of paper. Why not just file the
730 brief? That will avoid arguments that the motion does not cover the arguments made in the brief.

731 The time periods suggested by the draft were questioned. One court has a local rule that
732 provides 60 days from answer to opening brief, and the court frequently gets requests for an

733 additional 30 days. The same holds for the Administration's answer. The Subcommittee actually
734 began with 60-day periods, but thought it unwise to allow so much time. It is important to expedite
735 district-court proceedings for the benefit of plaintiffs. The importance of helping plaintiffs toward
736 speedy resolution is reflected in the six-month reporting period for motions that remain undecided.

737 Discussion of the draft social security review rules concluded by observing that many of the
738 provisions seem designed for the benefit of the Social Security Administration. Do they also provide
739 benefits for claimants? "We should be careful to consult with plaintiffs." Judge Lioi noted that
740 representatives of the Social Security Administration, the American Association for Justice, and the
741 National Organization of Social Security Claimants Representatives are present for the discussion.
742 She has asked them to respond to the draft and to the discussion here today within three weeks. The
743 draft will be revised further, and the Subcommittee will plan to meet with them to discuss the next
744 version. It would be helpful to arrange an in-person meeting, but it may be that only telephone
745 conferences will be possible.

746 Judge Bates thanked the Subcommittee for its work.

747 *Rule 73: Consent to Magistrate Judge Trial*

748 Judge Bates introduced the question that has been raised about Rule 73(b)(1). The Rule
749 applies when a magistrate judge has been designated to conduct civil actions or proceedings. It
750 implements the requirement of 28 U.S.C. § 636(c)(2) that when an action is filed the clerk shall
751 notify the parties of the availability of a magistrate judge to exercise trial jurisdiction. "The decision
752 of the parties shall be communicated to the clerk of court. * * * Rules of Court for the reference of
753 civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties'
754 consent." Rule 73(b)(1) seeks to protect voluntariness by providing that "the parties must jointly or
755 separately file a statement consenting to the referral. A district judge or magistrate judge may be
756 informed of a party's response to the clerk's notice only if all parties have consented to the referral."

757 The problem arises from the automatic operation of the CM/ECF system. The system
758 automatically sends notice of an individual consent to the judge assigned to the case, destroying
759 anonymity. The Committee has been informed that it is not possible to program this feature out of
760 the CM/ECF system. Nor does it seem practicable to pick up on the lead of the statute by providing
761 that the parties lodge individual consents with the clerk of court, to be filed only if all parties
762 consent. There is too much burden on the clerk's office, with an accompanying risk that something
763 will go astray in the process.

764 The agenda materials illustrate alternative possible approaches to the anonymity question,
765 and also address two other questions that have emerged in early discussions. One asks whether
766 Rule 73(b) should be revised to address the problem of consent in courts that automatically assign
767 cases to magistrate judges for trial. The other asks whether the rule should be revised to address the
768 problems that arise when a new party is joined after all original parties have consented to a referral.

769 The simplest amendment of Rule 73(b)(1) would simply delete the reference to separate
770 consents: "the parties must jointly ~~or separately~~ file a statement consenting." This approach could
771 be implemented by local procedures like the procedure adopted in the Southern District of Indiana.
772 A notice and consent form is delivered to the plaintiff. If the plaintiff wishes to consent, the plaintiff
773 is responsible to gather consents from all other parties. The form is filed only if all consent.

774 A somewhat more complex revision might substitute these words: "The parties may consent
775 by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than

776 all parties.]” Reference to a joint statement seems a bit more direct than reference to joint filing.

777 Discussion began with a suggestion that the part in brackets should be retained in the rule.
778 There is a risk that some party may seek an advantage by filing a separate consent. Another judge
779 observed that there are a lot of pro se complaints, and pro se plaintiffs do not understand the
780 difference between a reference for trial and a reference for discovery. The prohibition on consents
781 filed by fewer than all parties should remain in the rule. Yet another judge observed that in the
782 District of Massachusetts pro se plaintiffs get separate notices. They are instructed to send consents
783 to the magistrate judge’s clerk, who gathers consents from all sides.

784 A related observation was that in many districts there is an effort to get consents for more
785 referrals. Judges require the parties to discuss referral at the Rule 26(f) conference. The result may
786 be a Rule 26(f) report that expressly identifies parties who consent to referral and those who do not.

787 It was agreed that the question of joint consents should be developed further.

788 The next questions address party consent when a court routinely assigns some cases to
789 magistrate judges for trial as part of the random initial draw. This practice seems to be increasing;
790 although it does not seem to be followed in a majority of districts, it likely is followed in more than
791 a handful. The Committee may need more information about the prevalence of this practice, and
792 about the possible effects on it that would flow from different rule approaches.

793 A judge noted that districts vary in their uses of magistrate judges. In the Northern District
794 of Illinois cases are assigned at the outset, “off the wheel,” to both a magistrate judge and a district
795 judge. Some district judges automatically refer all discovery to the magistrate judge. Other district
796 judges keep discovery for themselves. Local terminology uses “reference” to designate assignment
797 to a magistrate judge for specified purposes, while “consent” is used to designate assignment for all
798 purposes, including trial.

799 Practice in the Southern District of Florida is similar. Cases are automatically assigned to a
800 district judge and a magistrate judge. Some judges automatically refer all discovery to the magistrate
801 judge. “My order has a very clear description.” At times when a particular motion is assigned to a
802 magistrate judge for a report and recommendation the magistrate judge may get the parties to consent
803 to a referral for decision of that particular motion. It was noted that this practice fits within
804 § 636(c)(1), which provides that a magistrate judge “may conduct any or all proceedings in a jury
805 or nonjury civil matter and order the entry of judgment in the case * * *.” An order granting
806 dismissal or summary judgment can be made the judgment of the court, for example.

807 In the District of Massachusetts, magistrate judges are on the initial case draw, but all parties
808 must consent to make the referral effective.

809 The draft of Rule 73(b)(1) in the agenda materials undertakes to illustrate the consent issue,
810 but in an awkward form. The illustration would work better if it is divided into separate paragraphs.
811 Paragraph 73(b)(1)(A) would adopt whatever provision is proposed for party consent when the case
812 is initially assigned to a district judge, Paragraph 73(b)(1)(B) might look like this:

813 (B) If a case is initially assigned to a magistrate judge without the parties’
814 consent, any party may refuse consent by [filing a refusal][lodging a refusal
815 with the clerk]. [Refusal by any party withdraws the action or proceeding
816 {from the magistrate judge}.] [A district judge or magistrate judge may not
817 be informed of any party’s refusal to consent.]

818 Further discussion noted that referrals for pretrial proceedings under § 636(b) do not need
819 party consent. The Northern District of California has had magistrate judges “on the wheel” for many
820 years. The right approach is to make it clear that the court is obliged to determine that all parties
821 consent to the reference. We should learn more about how this is accomplished in all the districts
822 that make referrals before all parties consent. At the same time, it may be necessary to address the
823 question of implied consent, lest parties play along with the referral until one is displeased by
824 something the magistrate judge does.

825 The suggestion that local rules should be examined prompted the observation that the search
826 may not be entirely straightforward. In Minnesota the question is addressed in Social Security Local
827 Rule 7.2 because those cases are the only cases that are routinely referred to magistrate judges.

828 Discussion concluded with the observation that automatic initial assignments to magistrate
829 judges raise a number of issues. Further thought should be given to the question whether they should
830 be taken up now, when the only proposal directly put to the Committee addresses the effects of the
831 CM/ECF system on anonymity.

832 Finally, the question of consent by late-added parties might be addressed. The agenda
833 materials sketch two possible approaches. One would require the new party to give consent within
834 30 days of joining the action. That approach might disrupt referrals more frequently than the
835 alternative of requiring that a refusal be filed within 30 days. Neither approach would protect
836 anonymity. Anonymity could be protected by requiring all parties, old and new, to file a joint consent
837 after a new party is joined. That would open the way for second thoughts by a party dissatisfied with
838 the direction of proceedings before the magistrate judge.

839 Professor Marcus noted that it may be better to leave the question of consent by new parties
840 where it lies. Courts have found different ways of coping with the question of consent by new
841 parties. The questions arise in different settings, and have elicited different responses. An extreme
842 example is provided by an argument that after class counsel and the defendant have agreed to a
843 referral and a class is certified, any class member can defeat the referral by objecting. That argument
844 did not succeed. But what of an intervenor? Courts have said that an intervenor must accept the case
845 as it is. But what of a Rule 19 party joined by court order? Or other later-added parties?

846 Brief discussion led to the conclusion that there is no need to pursue a rule-based solution
847 to the variety of questions that may be raised by consent of late-added parties.

848 *Rule 7.1 Disclosure Statements*

849 Three distinct sets of questions have been raised about Rule 7.1 disclosure statements. Each
850 can be approached separately.

851 Intervenors: The first questions arise from proposals before other advisory committees. A proposal
852 has been made to amend Appellate Rule 26.1 to require a disclosure statement from a
853 nongovernmental corporation that seeks to intervene. This proposal has been published, approved
854 for adoption, and received by the Supreme Court. It is on track to take effect on December 1, 2019.
855 A proposal to adopt a parallel amendment to Bankruptcy Rule 8012(b) was published this summer.

856 The Appellate and Bankruptcy Rules were initially adopted as part of a package with the
857 Civil and Criminal Rules developed by a subcommittee of the Standing Committee. The goal was
858 to have disclosure rules in the Appellate, Bankruptcy, Civil, and Criminal Rules that are as nearly
859 uniform as the different contexts permit. The desire to have uniform provisions provides strong

860 reason to make a parallel change in Rule 7.1(a):

861 (a) A nongovernmental corporate party and a nongovernmental corporation that
862 seeks to intervene must file two copies of a disclosure statement that: * * *

863 A potential complication was pointed out. New Appellate Rule 26.1 calls for a
864 nongovernmental corporation disclosure statement by a debtor that is a corporation. Is a parallel
865 provision needed in Rule 7.1 to cover cases on appeal from the bankruptcy court? Bankruptcy
866 Rule 8001(a) provides that the Part VIII Rules, which include Rule 8012, govern the procedure in
867 a district court and BAP on appeal from a judgment, order, or decree of a bankruptcy court. That
868 seems to be enough to do the job without further amending Rule 7.1. But there may be a
869 complication. Bankruptcy Rule 7007.1(a) calls for a corporate disclosure statement by any
870 corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit.
871 The advice of the Bankruptcy Rules Committee will be sought on the need to add to Rule 7.1
872 something about bankruptcy appeals to the district court. (Inquiry showed that there is no need to
873 further complicate Rule 7.1.)

874 The Committee agreed that this conforming amendment should be recommended for
875 publication, subject to answering the bankruptcy appeal question. The simple form of the amendment
876 might be recommended for adoption without publication as a noncontroversial adoption of a
877 proposal that has been examined in two separate publications by other committees. But it likely is
878 better to go through the full publication and comment process. The no-publication practice should
879 be indulged sparingly, mostly for purely technical amendments. And the possibility of bankruptcy
880 appeal complications may counsel publication even if the committees are satisfied there is no need
881 to address bankruptcy appeals in Rule 7.1.

882 Natural Persons' Names and Birth Dates: The second disclosure proposal, 18-CV-W, was advanced
883 by the National Association of Professional Background Screeners. They propose a new rule that
884 would require all natural persons who are parties to civil and criminal cases to file a disclosure
885 statement of the person's full name and full date of birth. The proposal, drawing from Bankruptcy
886 Rule 1007(f), would make the information available as a search criterion in the PACER system —
887 a nonparty who already has the information could put it into the PACER system and learn whether
888 the person identified by this information is a party to any civil or criminal case. The information is
889 described as not sensitive. The purpose of supporting the search would be to support more complete
890 reports to prospective employers, landlords, and others. The same proposal was made to the Criminal
891 Rules Committee in 2005 and was rejected. The Criminal Rules Committee has again rejected it at
892 its October meeting.

893 The first question for the Committee is whether a procedural purpose can be identified for
894 the proposed disclosure. Rules should be adopted and amended to pursue procedural goals, not to
895 serve outside interests.

896 Discussion failed to identify any procedural purpose for this proposal. It was removed from
897 the agenda.

898 Citizenship of LLCs, Trusts, and Similar Entities: The third disclosure proposal, 18-CV-S, is
899 advanced by Judge Thomas Zilly. It calls for “disclosure of the names and citizenship of any member
900 or owner of an LLC, trust, or similar entity.”

901 The proposal is inspired by experience with the difficulty of determining the citizenship of
902 some forms of entities for the purpose of establishing diversity jurisdiction. Judge Zilly describes

903 a case that went to judgment after a 10-day trial, only to be remanded by the court of appeals to
904 determine the citizenship of the LLC parties — the plaintiff and three defendants. An LLC is a
905 citizen of every owner’s state. If an owner of an LLC is itself an LLC, the citizenship of each of the
906 LLC owner’s owners must be determined. Often this information is not readily available. Indeed it
907 may be that an LLC itself does not know all of the citizenships ascribed to it for establishing or
908 defeating diversity jurisdiction.

909 This proposal draws from practical experience that diversity jurisdiction may not be
910 adequately ensured by the Rule 8(a)(1) requirement that a pleading that states a claim for relief must
911 contain a short and plain statement of the grounds for the court’s jurisdiction. The pleader may not
912 have ready access to the required information. And serious inefficiencies arise if a diversity-
913 destroying citizenship is uncovered only after substantial progress has been made in an action. One
914 judge noted an experience with a late-arising question. Another noted a slip-and-fall case that
915 involved half a dozen LLCs as parties, and urged that requiring disclosure of the owners’ citizenships
916 often will not be an onerous requirement. Another judge has a standard order, reflecting the common
917 involvement of LLCs as parties and the frequent lack of understanding of the rules that govern
918 diversity jurisdiction. Yet another court has an order to disclose, but has found that some parties
919 would rather discuss the question than disclose their owners and their citizenship.

920 Diversity jurisdiction does not seem likely to be a concern of the Bankruptcy and Criminal
921 Rules. But LLC ownership may bear on recusal as well as diversity jurisdiction. The subject deserves
922 discussion among the rules committees. The Civil Rules Committee can take the lead in raising the
923 issue.

924 The proposal extends beyond LLCs to a trust or a similar entity. Here too the questions
925 extend beyond diversity jurisdiction to information useful in knowing possible grounds for recusal.
926 A wide variety of entities may be involved. Some local court rules list many of them. Others speak
927 generally of disclosing anyone with a financial interest in the outcome. Discussion of financial
928 interests ties back to the MDL Subcommittee’s exploration of proposals to require disclosure of
929 third-party litigation funding arrangements. It may be time to ask whether these broader issues
930 should be considered by an all-committees group.

931 *Final Judgment in Consolidated Cases: Rule 42(a)(2)*

932 Judge Bates introduced this topic. In *Hall v. Hall*, 138 S.Ct. 1118 (2018), the Court ruled that
933 when originally independent cases are consolidated under Rule 42(a)(2) they remain separate actions
934 for purposes of final-judgment appeal under 28 U.S.C. § 1291. Complete disposition of all claims
935 among all parties to what began as a separate independent action establishes a final judgment. The
936 opinion concludes by observing that changes in the meaning of a “final judgment” “are to come
937 from rulemaking, * * * not judicial decisions in particular controversies.” “If the always-separate
938 approach “were to give rise to practical problems for district courts and litigants, the appropriate
939 Federal Rules Advisory Committees would certainly remain free to take the matter up and
940 recommend provisions accordingly.”

941 The Appellate Rules Committee has considered this question, noting that the always-separate
942 approach may create inefficiencies for courts of appeals by generating separate appeals involving the
943 same controversy and essentially the same record. The Committee also noted that the rule may
944 generate traps for the unwary, who do not realize that the time to appeal has begun to run. It decided
945 that “this matter is appropriately handled by the Civil Rules Committee.”

946 The immediate question is whether the Committee should wait to see whether practical
947 problems in fact emerge, or whether there is enough experience already to justify taking up this topic
948 for consideration now.

949 The question of practical effects was not much explored in the Court’s opinion. Primary
950 reliance was placed on a century’s worth of interpretations of the 1813 statute that first explicitly
951 authorized consolidation of federal-court cases. The always-separate rule was firmly established,
952 most recently in 1933. The Court concluded that the Federal Rules Advisory Committee must surely
953 have been aware of the established final-judgment rule, and must have intended the rule to carry
954 forward in the original Rule 42(a) language that authorized the court to “order all actions
955 consolidated.” But the Court also noted one pragmatic concern — forcing a party to wait for “other
956 cases” to conclude would substantially impair the right to appeal.

957 The Court’s decision can be set against the background of appellate decisions construing
958 Rule 54(b). Two clear rules were adopted, along with a more flexible middle ground. One rule was
959 the rule adopted by the Court: actions that begin life as separate actions are always separate for
960 purposes of final-judgment appeal, no matter how completely they have been consolidated with other
961 cases in a single trial-court proceeding. The opposing rule was that consolidation for all purposes
962 makes formerly separate actions a single action; complete disposition of all claims among all parties
963 to what was a separate action is appealable as a final judgment only on entry of a partial final
964 judgment under Civil Rule 54(b). In between these rules, several circuits — including the Third
965 Circuit in *Hall v. Hall* — looked to several factors to measure finality, including the overlap among
966 the claims, the relationship of the various parties, the likelihood of the claims being tried together,
967 and “serving justice and judicial economy.”

968 Several courts of appeals, in short, subordinated the important value of bright-line rules of
969 appeal jurisdiction to the belief that better results can be achieved by flexible consideration of the
970 many interests that bear on identifying the occasions for appeal. The trial court may have a strong
971 interest in maintaining control of closely related proceedings, serving the purposes that prompted
972 consolidation. The trial court also may have an interest in deciding whether it is better to have an
973 immediate appeal that will settle issues common to the matters that remain, or instead to move ahead
974 with the matters that remain so that related issues will be resolved on one appeal that considers the
975 full context of the entire proceedings. The appeals court has an interest in avoiding the prospect of
976 reexamining the same basic disputes in two or even more appeals. And the parties have parallel
977 interests. If one party has interests that would be advanced by an immediate appeal, or quite different
978 interests in moving promptly to execute a favorable judgment, other parties may have competing
979 interests that align with the interests of the trial and appeal courts.

980 This array of interests may be quite the same whether the proceeding began life as a single
981 multi-party, multi-claim action, or instead began as separate actions that were consolidated. When
982 the proceeding begins as a single action, Civil Rule 54(b) plainly controls. It vests the initial decision
983 whether to enter a partial final judgment in the district judge, often characterized as the “dispatcher.”
984 The wisdom of this approach may apply almost indistinguishably when separate actions are
985 consolidated, although the fact that the parties may have deliberately chosen not to join in a single
986 action must be considered if Rule 54(b) is to be invoked after consolidation.

987 Several sketches of possible rule amendments were provided to illustrate the approaches that
988 might be taken if *Hall v. Hall* is to take a place on the agenda. In short, it may be best to amend both
989 Rule 42(a) and Rule 54(b). One approach would be to revise Rule 42(a)(2) to provide that the court
990 may “consolidate the actions for all purposes.” Anything less than melding the actions into a single
991 action would be covered by (a)(1) and (3): “(1) join for hearing or trial any or all matters at issue in

992 the actions; * * * (3) issue any other orders to avoid unnecessary cost or delay.” Rule 54(b) would
993 be amended in parallel: “When an action — including one that consolidates [formerly separate]
994 actions under Rule 42(a)(2) — presents more than one claim for relief * * * or when multiple parties
995 are involved, the court may direct entry of a final judgment as to one or more, but fewer than all,
996 claims or parties only if the court expressly determines * * *.”

997 Discussion began with the question whether it is wise to “dive in now,” or might be better
998 to wait to see what practical problems may emerge.

999 A judge suggested that there are practical problems now. That is why different circuits took
1000 different approaches. The Third Circuit had settled law that guided its decision to dismiss the appeal
1001 in *Hall v. Hall* by an unpublished decision that looked to all the factors that bear on appeal timing.
1002 “The history sheds enough light to take a look at it.” There is a problem in the risk that failure to
1003 recognize the need to take a timely appeal will prove a trap for the unwary. And efficiencies in the
1004 system, in both trial and appeals courts, are important.

1005 Another judge asked whether the Court might take it amiss if the Committee were to begin
1006 immediate consideration of its decision. Would it be more seemly to wait for a while?

1007 A judge responded that the Court seems to have opened the door, to have invited the
1008 Committee to decide whether to take these questions up now. Others noted that it is not rare for the
1009 advisory committees to take up questions promptly after a Supreme Court decision. Rule 15(c) on
1010 the relation back of pleading amendments changing the party against whom a claim is asserted was
1011 taken up promptly after a “plain meaning” interpretation of the former rule. The proposed
1012 amendment was accepted without apparent difficulty. Rule 4(k)(2) was added in prompt response
1013 to a suggestion by the Court that it might be good to adopt a rule for serving process on
1014 internationally foreign defendants that fall within the reach of federal personal jurisdiction power
1015 but that could not be reached without an implementing rule for service. The Evidence Rules
1016 Committee has reacted promptly to a ruling on the admissibility of past convictions.

1017 It also was noted that these problems can be considered without reopening the rather recent
1018 ruling that individual actions consolidated for multidistrict pretrial proceedings under § 1407 remain
1019 separate for final-judgment appeals. That question is distinct from Rule 42(a) consolidation of cases
1020 that are before the court for all purposes. Nor do these problems have any direct bearing on the
1021 proposals to expand the opportunities to appeal in MDL proceedings in other directions.

1022 Reporter Coquillette observed that the Court understands there are things the Committees
1023 can do that the Court cannot do, studying a problem over time, gathering information, and proposing
1024 solutions informed by a variety of perspectives outside the pressures of adversary positions in a
1025 single action.

1026 Judge Bates concluded that no one had expressed a need to hesitate. A structure will be
1027 devised for taking the next steps.

1028 *Naming Parties in Social Security Review Opinions*

1029 Judge Bates reported a recommendation by the Committee on Court Administration and Case
1030 Management that opinions in social security review cases should identify the claimant only by first
1031 name and last initial. The recommendation is initially addressed to courts, but includes, 18-CV-L,
1032 a suggestion that Rule 5.2(c) might be amended. Rule 5.2(c) limits remote electronic access by
1033 nonparties to the court file, but subdivision (c)(2)(B) expressly allows remote electronic access to

1034 the court's opinion. Opinions often include substantial amounts of personal and medical information.
1035 The recommendation is being made to all courts without awaiting development of a national court
1036 rule. There are good reasons to hesitate about writing into Rule 5.2 provisions that dictate opinion-
1037 writing practices. It may be wise to wait to see how courts respond. The agenda materials include
1038 as an example a proposal by the Second Circuit Local Rules Committee that would respond to the
1039 CACM suggestion.

1040 A judge reported on experience in the Appellate Rules Committee considering sealing
1041 practices. One view is that a party who seeks court action should be prepared for public access to
1042 information about the case. "We may learn by waiting."

1043 A contrary view was expressed: "We should take it up."

1044 The outcome was to keep this item on the agenda, but to wait for a year before considering
1045 it again.

1046 *Time to Decide Motions*

1047 Judge Bates reported on 18-CV-V, a proposal to adopt court rules that mandate decisions on
1048 motions in a specific number of days, perhaps 60 days or 90 days. He noted that there are many
1049 competing demands on court time. "It is difficult to manage dockets by court rule." The Judicial
1050 Conference has long opposed docket priorities in rules or proposed legislation.

1051 This item will be removed from the docket.

1052 *Pilot Projects*

1053 Judge Campbell reported on the initial discovery pilot projects in the District of Arizona and
1054 the Northern District of Illinois. In short compass, they require initial discovery by providing other
1055 parties with facts and documents, favorable and unfavorable. The project has been under way in
1056 Arizona for 18 months, and for 17 months in Illinois. The Federal Judicial Center, led by Emery Lee,
1057 is doing good work in gathering data to evaluate the success of the pilots.

1058 No real problems have emerged in Arizona, most likely because the initial discovery rules
1059 closely parallel initial disclosure rules that Arizona has implemented for many years. The bar is
1060 comfortable with the procedure. Some mid-stream changes have been made in the rules. A real test
1061 of success will come if motions emerge to exclude evidence at summary judgment or trial because
1062 it was not revealed in the initial discovery process. Judge Bates added that although not many cases
1063 have proceeded to this point, so far this seems OK.

1064 Judge Dow reported that attorneys have not reported problems with the initial discovery
1065 process in individual conversations, but that an anonymous survey showed a need to modify the
1066 process to allow delaying disclosure when a motion to dismiss is filed. "Overall our judges feel
1067 pretty good about it." It has been reasonably smooth from the judges' perspective. The court has
1068 stressed that rolling discovery production is allowed in heavy discovery cases. "We're getting
1069 statements of compliance."

1070 A Committee member reported that there is still some unhappiness in the Northern District
1071 of Illinois, "especially on the defense side." When lawyers consider choice-of-court clauses, defense
1072 lawyers counsel against picking the Northern District of Illinois because of the initial discovery
1073 project. But there is a lot of behind-the-scenes cooperation to work on deadlines.

1074 Responding to a question, Judge Campbell noted that Arizona lawyers “had angst” for the
1075 first three years of the Arizona state-court rules, but came to accept it. One of its virtues is that it gets
1076 the parties talking to each other.

1077 Emery Lee reported that the FJC has completed three rounds of attorney surveys in closed
1078 cases in Arizona and Illinois. Data will soon be available. “We’re starting to see Rule 56 cases.” The
1079 survey response rate has been 30%. They hope for a better rate in future surveys. Judges will be
1080 surveyed soon.

1081 Judge Bates noted that efforts continue to recruit district courts to engage in the pilot project
1082 for expedited disposition practices.

1083 Emery Lee also reported that the employment disclosure protocols that have been adopted
1084 by some 50 district judges began life in 2011. A 2018 report can be found at FJC.gov. Comparing
1085 cases governed by the protocols with other cases shows that the protocol cases are not moving faster,
1086 and are resolving in the same ways. The median cases resolve in 10 to 11 months. They mainly
1087 involve Title VII claims. There are fewer discovery motions in the protocol cases, but it has not been
1088 possible to tell whether that is because judges who use the protocols also do other things to manage
1089 discovery.

1090 *Next Meeting*

1091 The next Committee meeting is scheduled to begin at 12:00 noon on April 2, 2019, in San
1092 Antonio, Texas. It is scheduled to conclude at 12:00 noon on April 3.

1093 *Closing*

1094 Judge Bates thanked all present for their input and hard work.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 3

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	H.R. 76 <i>Sponsor:</i> Biggs (R-AZ)	CV 23	<p>Bill Text: https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf</p> <p>Summary (authored by CRS): This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	H.R. 77 <i>Sponsor:</i> Biggs (R-AZ)	CV	<p>Bill Text: https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf</p> <p>Summary (authored by CRS): This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Litigation Funding Transparency Act of 2019	S. 471 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsors:</i> Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	<p>Bill Text: https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf</p> <p>Summary: Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/13/19: Introduced in the Senate; referred to Judiciary Committee

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4. Rule 30(b)(6) Subcommittee Report

The 30(b)(6) amendment proposal published for public comment drew much attention. Twenty-five witnesses appeared at the hearing in Phoenix and 55 at the hearing in Washington, DC. Some 1780 written comments were submitted, about 1500 of them during the last week of public comment.

A preliminary summary of the comments is included in this agenda book. It includes summaries of all the testimony at the hearings and summaries of the written comments submitted by February 8. The comments after that date were often very similar to one another, often emphasizing something that was not in the amendment proposal – setting a numerical limit on the number of matters that could be included with a notice of a Rule 30(b)(6) deposition. The summary included in the agenda book does not attempt to summarize all the comments after no. 500 but does attempt to include any of those later comments that made new points. An effort is being made to tabulate the number of comments repeating points included in the summarized comments. The current version of this tabulation is also in this agenda book.

After attending the hearings and reviewing the preliminary summary of the comments and testimony, the Subcommittee met by conference call on February 22. Notes of that call are included in this agenda book. This memorandum introduces the two alternatives that the Subcommittee is putting before the Committee.

The Subcommittee has concluded that the rule can be improved by requiring the parties to confer, before or promptly after the notice or subpoena is served, about the matters for examination identified in the 30(b)(6) notice. The Subcommittee is in equipoise – and seeks the full Committee’s collective wisdom – on the question whether the addition of this conference requirement goes far enough. As explained in greater detail below, the Subcommittee therefore brings before the full Committee an alternative to going forward now with a revised version of the published amendment proposal. That alternative would require that the organization identify the witness before the beginning of the deposition, even though it would not require that the noticing party and the organization confer about the identity of the witness. The Subcommittee was unable to reach consensus on how best to proceed. It accordingly is bringing two alternative courses of action to the full Committee, and members of the Subcommittee will elaborate on the factors that seem to bear on this choice during the April 2-3 meeting.

The Subcommittee discussed the possibility of making no change to the rule at all. Quite a number of comments and some witnesses favored this approach. Many comments emphasized that the rule was working well and had proved extremely important for litigants seeking usable information from corporations and other organizations. In addition, many witnesses and comments asserted that the practice already is often to do something much like the conference on the matters for examination that the amendment directs occur in every case. So making this rule change would leave things effectively unchanged in most cases. And a few comments urged that adding the conference requirement could delay discovery and make it more expensive.

The Subcommittee’s conclusion is that there is value in extending this best practice to all cases involving 30(b)(6) depositions. A number of commenters who said they routinely sought to confer with organizations about the topic list also said that too often they did not get any response to that invitation. The amendment would make it clear that the organization must confer in good faith “promptly.” Other comments said that at times organizations would appear for the deposition and only then make objections to various topics included in the notice. Arguably, that behavior could be deemed sanctionable or at least a waiver of the objections, but the amendment would likely make it less likely to occur.

47 Thus, Alternative 1 below is the revised version of the published preliminary draft, which
48 the Subcommittee considers superior to leaving the rule unchanged. It has been modified based
49 on the public comments, including removing the direction to confer about the identity of the
50 witness. Alternative 2 goes further and adds a requirement that the organization identify the
51 witness shortly before the deposition, though it does not call for any conferring about that
52 subject. The Subcommittee was divided about whether to prefer Alternative 1 or Alternative 2,
53 and some members of the Subcommittee would prefer making no changes to the rule rather than
54 proceeding with Alternative 2.

55 The Subcommittee decided not to pursue the suggestions of a significant number of
56 witnesses and comments that it go “back to the drawing board” and develop a different
57 amendment proposal. Items favored by those urging this action included (1) establishing an
58 objection procedure analogous to the one in Rule 45, which provides that upon objection the
59 deposition does not go forward unless the court so orders (possibly requiring a motion
60 proceeding whenever there is an objection); (2) setting presumptive limits on the number of
61 topics that could be listed in a 30(b)(6) notice; (3) prohibiting contention questions; (4) providing
62 by rule how 30(b)(6) depositions should be treated with regard to the ten-deposition limit and the
63 durational limit of one day of seven hours; (5) forbidding inquiry regarding any matter not on the
64 30(b)(6) list even if it is relevant and the witness has personal knowledge about it; (6) providing
65 that the organization may respond to a matter on the list by saying that it has no information
66 beyond what is contained in its files, and that it would make the documents available instead of
67 producing a witness to answer questions on the topic; (7) adding the opportunity and duty to
68 supplement testimony during a 30(b)(6) deposition; (8) providing that no 30(b)(6) discovery
69 would be permitted on any topic on which there had already been testimony from witnesses
70 drawing on personal knowledge; (9) forbidding inquiry into the documents reviewed by the
71 witness in preparation for the deposition; and (10) prohibiting courts from treating positions
72 taken by 30(b)(6) witnesses as judicial admissions.

73 The Subcommittee considered all these ideas in detail during the 2016-17 period. In mid-
74 2017, it invited public comment on many of them and received over 100 comments in response
75 to that invitation. After reviewing those comments and considering the matter further, the
76 Subcommittee concluded that rule changes along these lines do not hold the promise of
77 improving the 7 practice.

78 There is one exception to the Subcommittee’s general unwillingness to revive these
79 proposed rule changes – in Alternative 2 below, there is a minimum 30-day notice period, which
80 was also urged by several who commented or testified, because the initial timing seemed critical
81 to that alternative’s new requirement that the organization disclose the identity of the person to
82 testify a brief time before the deposition occurs. In general, one could say that organizations
83 often need this amount of time to prepare witnesses for the deposition, but with the additional
84 requirement that the organization disclose the identity of the witness a specified time before the
85 deposition occurs it seemed essential to add this timing requirement.

86 What remain, then, are two alternatives set out below. The first is to go forward now
87 with the proposal published for comment, but with changes. The primary change is to delete the
88 requirement that the parties confer about the identity of the witness. That and other changes
89 merit explanation.

90 Deleting the requirement to confer about witness identity: Very strong opposition to this
91 directive was expressed by many witnesses and in many comments. Witnesses emphasized that
92 the case law strongly supports the right of the organization to choose its witness unilaterally, and
93 asserted that the requirement that the organization confer in “good faith” would undercut that
94 case law. Although the Committee Note said that the choice of the witness remained the sole
95 prerogative of the organization, that raised the question how it could then be the subject of a

96 mandatory requirement to confer in good faith. The Subcommittee was persuaded.

97 It bears mention that there was limited comment in favor of the conference requirement
98 about witness identity from those who regularly use this rule to obtain information from
99 organizations. Some candidly acknowledged that they had no say in the organization's choice of
100 a witness so long as the person selected was properly prepared to address the matters on the
101 30(b)(6) list.

102 Instead of urging that there be a conference about witness identity, many who submitted
103 comments emphasized that they needed to know in advance who would be appearing at the
104 deposition. Though that might sometimes highlight possible misunderstandings about what the
105 deposition would address (e.g., if a sales manager were designated to testify about the
106 organization's information management architecture), the main thrust was on preparing to
107 question this particular person. Responding to those comments, the Subcommittee is also
108 bringing forward Alternative 2, which directs such pre-deposition disclosure of the identity of the
109 witness. But the issue of conferring on witness identity has been removed from Alternative 1.

110 Deleting "continue as necessary": The preliminary draft directed that the conference not
111 only be in good faith but also that it continue as necessary. To a large extent, that provision was
112 included because the draft directed the parties to confer about the identity of the witness. Very
113 often the organization could not be expected to settle on a specific person to testify without first
114 having obtained a clear understanding of what matters were to be addressed. So there was a need
115 for a rule provision emphasizing that this amendment requires an iterative interaction in most
116 instances.

117 Removal of this provision is not meant to say that the parties need never engage in an
118 iterative exchange about the matters for examination. Indeed, even though the conference is now
119 limited to the matters for examination it will often be fruitful for the parties to touch base more
120 than once with regard to the kinds of information available and the burdens of obtaining it. The
121 revised Committee Note makes this point.

122 Deleting the directive to confer about the "number and description of" the matters for
123 examination: As noted above, one of a number of changes advocated by those who urged the
124 Subcommittee to go "back to the drawing board" was to impose a presumptive limit on the
125 number of matters included in a 30(b)(6) notice. The Subcommittee did not propose such a limit,
126 and is not now advocating adding one.

127 The directive to discuss the number of matters in addition to conferring about the matters
128 themselves drew strong objections during the public comment period. The right focus, many
129 said, was on the matters themselves. Discussing an abstract number did not serve a productive
130 purpose. To the extent it might result in some sort of numerical limit, it would seem to
131 encourage broader descriptions so that the list of matters would be shorter. That seems out of
132 step with a requirement to confer designed in significant part to improve the focus of the listed
133 matters and ensure that the organization understands exactly what the noticing party is trying to
134 find out. The Subcommittee recommends removing "number of" from the conference
135 requirement.

136 The addition of the words "description of" seemed unnecessary; the basic objective ought
137 to be to confer about and refine the matters for examination.

138 With those changes, the Subcommittee brings forward the following proposed
139 amendment that the Committee can recommend to the Standing Committee for forwarding to the
140 Judicial Conference. This amendment will not effect earth-shattering change, but it also should
141 not do any harm. In some cases it should help avoid problems that have arisen. Obtaining

142 information from entities has been a perennial problem in litigation. Rule 30(b)(6) was added in
143 1970 to overcome corporate “bandying.” In the decades since, entities have come to feel abused
144 by unreasonable requests, as articulated many times in the comments submitted (unduly
145 burdensome matters listed; inadequate advance notice to prepare for the deposition; improper
146 questions about legal contentions; cross-examination of entity designees about individual, even
147 personal, matters; the absence of prescribed objection procedures). Noticing parties report that
148 too often they encounter underprepared witnesses. But they universally emphasize the great
149 importance of the 30(b)(6) deposition, and are very nervous about how any major changes would
150 affect these depositions. The intensity of the commentary, and the stakes at issue, counsel
151 cautious change. That is what Alternative 1 offers.

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153 **Rule 30. Depositions by Oral Examination**

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156 **(b) Notice of the Deposition; Other Formal Requirements**

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158 **(6) Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a
 159 party may name as the deponent a public or private corporation, a partnership, an
 160 association, a governmental agency, or other entity and must describe with
 161 reasonable particularity the matters for examination. The named organization
 162 must ~~then~~ designate one or more officers, directors, or managing agents, or
 163 designate other persons who consent to testify on its behalf; and it may set out the
 164 matters on which each person designated will testify. Before or promptly after the
 165 notice or subpoena is served, and continuing as necessary, the serving party and
 166 the organization must confer in good faith about the number and description of the
 167 matters for examination and the identity of each person the organization will
 168 designate to testify. A subpoena must advise a nonparty organization of its duty
 169 to make this designation and to confer with the serving party. The persons
 170 designated must testify about information known or reasonably available to the
 171 organization. This paragraph (6) does not preclude a deposition by any other
 172 procedure allowed by these rules.

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175

Draft Committee Note

176

176 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
 177 Particular concerns raised have included overlong or ambiguously worded lists of matters for
 178 examination and inadequately prepared witnesses. This amendment directs the serving party and
 179 the named organization to confer before or promptly after the notice or subpoena is served, ~~and~~
 180 ~~to continue conferring as necessary, regarding about the number and description of matters for~~
 181 ~~examination and the identity of persons who will testify. At the same time, it may be productive~~
 182 ~~to discuss other matters, such as having the serving party identify in advance of the deposition~~
 183 ~~the documents it intends to use during the deposition, thereby facilitating deposition preparation.~~
 184 The amendment also requires that a subpoena notify a nonparty organization of its duty to confer
 185 and to designate one or more witnesses to testify. It facilitates collaborative efforts to achieve the
 186 proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

187

187 Discussion of the matters for examination may avoid unnecessary burdens. Beyond that,
 188 candid exchanges about discovery goals and organizational information structure may reduce
 189 the difficulty of identifying the right person to testify and the materials needed to prepare that
 190 person. Discussion of the number and description of topics may avoid unnecessary burdens.
 191 Although the named organization ultimately has the right to select its designee, discussion about
 192 the identity of persons to be designated to testify may avoid later disputes. It may be productive
 193 also to discuss “process” issues, such as the timing and location of the deposition, the number of
 194 witnesses and matters on which each will testify, the documents the noticing party intends to use
 195 during the deposition, and any other issue that might facilitate the efficiency and productivity of
 196 the deposition.

197 The amended rule directs that the parties confer either before or promptly after the notice
198 or subpoena is served. If they begin to confer before service, the discussion may be more
199 productive if the serving party provides a draft of the proposed list of matters for examination,
200 which may then be refined as the parties confer. ~~The rule recognizes that the process of~~
201 ~~conferring will often be iterative, and that a single conference may not suffice. For example, the~~
202 ~~organization may be in a position to discuss the identity of the person or persons to testify only~~
203 ~~after the matters for examination have been delineated.~~ The obligation is to confer in good faith,
204 consistent with Rule 1, and the amendment does not require the parties to reach agreement. If
205 they reach an impasse, it may be desirable to seek guidance from the court. The duty to confer
206 continues if needed to fulfill the requirement of good faith. ~~But the conference process must be~~
207 ~~completed a reasonable time before the deposition is scheduled to occur.~~

208 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
209 conference may provide an occasion for beginning discussion of these topics. In appropriate
210 cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery
211 plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial
212 conference under Rule 16.

 Because a Rule 31 deposition relies on written questions rather than a description with
reasonable particularity of the matters for examination, the duty to confer about the matters for
examination does not apply when an organization is deposed under Rule 31(a)(4).

213

Introducing Alternative 2

214 Alternative 1 is, in the Subcommittee’s view, ready for submission to the Judicial
215 Conference. But as noted above, the question of requiring the organization to give advance
216 notice of the identity of the witness received much attention during the public comment period
217 even though it was not in the published preliminary draft. During the Phoenix hearing in
218 January, members of the Subcommittee brought up the alternative idea of requiring the
219 organization to identify the designee instead of requiring the organization to confer about witness
220 identity. One of the first witnesses, for example, reported that in the Texas state courts there was
221 such a rule regarding advance disclosure of the identity of the witness. Not surprisingly, word of
222 the Committee’s questioning in Phoenix seemed to have prompted some of the witnesses during
223 the Washington, D.C. hearing in February to be prepared to speak on this subject, and members
224 of the Subcommittee asked several about this alternative possibility. Those comments show that
225 there are pluses and minuses with adding this sort of provision to the rule.

226 Adding this requirement to the published preliminary draft seemed to require
227 republication for further public comment. Under the Judicial Conference’s procedures for the
228 Advisory Committees, § 440.20.50(b):

229 The advisory committee reviews the proposed changes in light of any comments and
230 testimony. If the advisory committee makes substantial changes, the proposed rule
231 should be republished for an additional period of public comment unless the advisory
232 committee determines that the republication would not be necessary to achieve
233 adequate public comment and would not assist the work of the rules committees.

234 The Subcommittee reached general consensus that switching from a requirement to confer about
235 witness identity to a requirement to disclose identity a specified period before the deposition
236 would be a “substantial change.” Partly due to the Committee’s prompting, during the public
237 comment period it heard from many witnesses about this idea. But that level of commentary may
238 not suffice to show that republication is unnecessary to provide a full appreciation of the issues
239 involved. For example, little comment has been received on the timing for either the notice of
240 the deposition or the identification of the witness. Formal publication of Alternative 2 would
241 bring forth full comment. That might turn out to be very similar to what came out during the
242 hearings on this proposal in response to the Committee’s questions, but there is no way at present
243 to be sure.

244 It is certainly true that there were numerous comments in favor of such a requirement and
245 against having such a requirement. Those in favor tended to emphasize that it was much more
246 efficient to know in advance who the witness would be. For one thing, if the designated witness
247 has previously testified as a 30(b)(6) witness on the same or a similar topic, that earlier testimony
248 could be reviewed and utilized. In cases with many documents, the questioner can then select
249 those that this witness would know about. True, the focus is on the organization’s knowledge,
250 not the knowledge of the person testifying, but witnesses said that the questioning could proceed
251 more expeditiously if the questioner could prepare questions for that specific person. In addition,
252 the questioner could do some homework before the deposition that could make many background
253 questions (how long have you worked for the company, and what positions have you held?)
254 unnecessary. Advance notice was particularly important when more than one witness would be
255 presented; it is particularly important for the questioner to know which witness will address
256 which topic. Finally, if the witness is one that the questioner would want to depose in his or her
257 individual status, knowing in advance could offer the prospect of a “hybrid” 30(b)(6)/30(b)(1)
258 deposition covering individual as well as organizational knowledge.

259 Those who usually represent organizational litigants raised serious questions about a
260 requirement of identifying the witness in advance. Too often, they said, this led to extensive

261 questioning personal to the witness and irrelevant to corporate knowledge. Sometimes social
262 media research has produced probing and embarrassing (or even semi-threatening) inquiries
263 during the deposition. The right focus of the deposition is on what the organization knows, not
264 the personal knowledge or experiences of the witness answering the questions. For this reason,
265 many said that the identity of the witness was “irrelevant.” The prospect of a “hybrid” deposition
266 might not be greeted with enthusiasm either. Recall that one proposal the Subcommittee did not
267 pursue was a rule provision prohibiting questioning beyond the listed matters even if the other
268 matters are within the witness’s personal knowledge and clearly relevant. Combining 30(b)(6)
269 and 30(b)(1) testimony in a single deposition could lead to undesirable blurring of the capacity in
270 which the witness was answering. Given the burden already imposed by Rule 30(b)(6) to prepare
271 the witness on all knowledge available to the organization, adding to that burden the need to
272 prepare the witness with regard to relevant matters within his or her personal knowledge but
273 beyond the 30(b)(6) list might be regarded as imposing an overload.

274 In light of these pros and cons, there is not a Subcommittee consensus in favor of adding
275 a witness-identification requirement to the rule. But it did seem that doing so would compel the
276 addition to the rule of a specific time period in advance of the deposition for identifying the
277 witness or witnesses. And that need demonstrated that there was also a need for a minimum
278 notice period with regard to this sort of deposition. In general, Rule 30 requires only “reasonable
279 written notice” for a deposition. But the rule does not impose for other depositions the sort of
280 witness preparation that is required for a 30(b)(6) deposition. And the amendment adds to that a
281 requirement to confer with the noticing party about the matters for examination. That may
282 significantly assist the organization in its preparation of the witness, but surely will take some
283 time even though the rule says the parties should confer “promptly.”

284 Although there were some references to the amount of time before the deposition a
285 noticing party would need to know the identity of the witness, those were rather few and far
286 between. And although another of the proposals for the rule that was urged in the submissions in
287 2016 was a minimum notice period, there was little or nothing about what that should be during
288 the 2018-19 public comment period. So it is not possible to say that a second round of public
289 comment would not aid the committee in evaluating this rule change.

290 Alternative 2 sets the notice period at 30 days. Rule 30 does not prescribe a notice period
291 for other depositions, but it also does not require that the parties confer before other depositions
292 or that the witness be prepared to answer the noticing party’s questions, on pain of sanctions if
293 the witness is not prepared. Thirty days is the time set for answering interrogatories under Rule
294 33, and for responding to Rule 34 requests and Rule 36 requests for admissions, so it seems a
295 good choice for a notice period in 30(b)(6).

296 The time before the deposition the identity of the witness must be provided could be set at
297 7, 5, or 3 days. Many witnesses urged that identifying the witness in advance would enable the
298 noticing party to hunt through the witness’s social media activities for materials to use in the
299 deposition that should not play a role in questioning the organization’s representative about the
300 organization’s knowledge. These concerns argue for a shorter time.

301 Noticing party lawyers have urged that they need to know who they will be questioning in
302 order to gather background information about the role of the witness in the organization, and in
303 order to bring exhibits that will be familiar to the witness. They particularly need to know which
304 matters will be addressed by which witness if more than one person has been designated. For
305 them, a longer period would be preferable.

306 Alternative 2 offers a choice of 3, 5, or 7 days in advance of the deposition for the
307 organization to identify the witness. In approaching this choice, one should have in mind the
308 provisions of Rule 6(a). Rule 6(a)(1)(B) says that when a period is stated in days one should

309 count every day, including Saturdays, Sundays, and legal holidays. Rule 6(a)(2)(C) says that if
310 the designated period ends on a Saturday, Sunday, or legal holiday, the period continues to run
311 until the next day that is not one of those. Finally, Rule 6(a)(5) says that when, as here, the
312 period is measured before an event, “next day” means the next day counting backward.

313 The contending considerations in selecting the number of days in Alternative 2 include
314 allowing the organization a reasonable time to select its designee. That may not be possible until
315 shortly before the deposition in some instances. Moreover, the longer in advance notice must be
316 given, the greater the likelihood that there will be a need to change the designation due to some
317 unforeseen circumstance. Draft Committee Note language tries to deal with that possibility, but
318 several witnesses said that a change could produce a controversy. From the noticing party’s
319 perspective, notice just before the deposition occurs may not be worth much, particularly if
320 counsel had to travel to the deposition site before learning the identity of the witness.

321 Finally, several witnesses attested to the difficulty confronting the noticing party when the
322 organization designates multiple witnesses, and each one is addressing only certain topics.
323 Preparation is greatly aided when the questioner knows in advance at least which matters will be
324 appropriately addressed by which witness. This concern could be addressed without requiring
325 that the identity of the persons be disclosed in advance; the organization could be required only
326 to notify the noticing party that more than one witness would be presented and to specify which
327 matters each witness (e.g., witness no. 1, witness no. 2, etc.) would address during the deposition.
328 That approach is illustrated by Alternative 2A. The suggestion is that if the Committee decides
329 to recommend publication of Alternative 2, it could propose that the invitation for comment also
330 invite comment on whether the more limited Alternative 2A would be a useful option in place of
331 the more demanding Alternative 2.

332 Putting all those things together yields the following alternative. The Subcommittee is
333 divided on whether it would be desirable to pursue this amendment, but recognizes that
334 republication would be necessary. The fact that republication would be necessary to make these
335 changes does not bear on whether to propose them; public comment is a welcome aid to the
336 Committee in evaluating rule changes.

337 During the April meeting, members of the Subcommittee will be able to offer their views
338 on these alternatives.

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*Alternative 2 – deleting conference about witness
identity but adding advance notice identifying witness*

341 **Rule 30. Depositions by Oral Examination**

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343 **(b) Notice of the Deposition; Other Formal Requirements**

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345 **(6) *Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a
346 party may name as the deponent a public or private corporation, a partnership, an
347 association, a governmental agency, or other entity, ~~and~~ must describe with
348 reasonable particularity the matters for examination, ~~and must give at least 30~~
349 days notice of the deposition. The named organization must ~~then~~ designate one or
350 more officers, directors, or managing agents, or designate other persons who
351 consent to testify on its behalf; ~~and it may set out the matters on which each~~
352 person designated will testify. Before or promptly after the notice or subpoena is
353 served, the serving party and the organization must confer in good faith about the
354 matters for examination. No fewer than [7] {5} [3] days before the deposition,
355 the organization must identify the person or persons it has designated by name
356 and, if it has designated more than one person, set out the matters on which each
357 person will testify. A subpoena must advise a nonparty organization of its duty to
358 make this designation and to confer with the serving party. The persons
359 designated must testify about information known or reasonably available to the
360 organization. This paragraph (6) does not preclude a deposition by any other
361 procedure allowed by these rules.

362 * * * * *

363 **Draft Committee Note**

364 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
365 Particular concerns raised have included overlong or ambiguously worded lists of matters for
366 examination and inadequately prepared witnesses. In addition, concerns have been raised that
367 organizations need time to prepare witnesses adequately, and that noticing parties need to know
368 the identity of the witness in advance and, when multiple witnesses will be designated to testify,
369 which one will address which matters.

370 This amendment provides for a minimum of 30 days notice for Rule 30(b)(6) depositions.
371 Unlike other depositions (for which “reasonable written notice” is required), under Rule 30(b)(6)
372 the organization bears a responsibility to identify and prepare a witness or witnesses to testify.

373 The amendment also directs the serving party and the named organization to confer
374 before or promptly after the notice or subpoena is served regarding the matters for examination.
375 The amendment requires that a subpoena notify a nonparty organization of its duty to confer and
376 to designate one or more witnesses to testify. It facilitates collaborative efforts to achieve the
377 proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

378 Discussion of the matters for examination may avoid unnecessary burdens. Beyond that,
379 candid exchanges about discovery goals and organizational information structure may reduce the
380 difficulty of identifying the right person to testify and the materials needed to prepare that person.

381 It may be productive also to discuss “process” issues, such as the timing and location of the
382 deposition, the documents the noticing party intends to use during the deposition, and any other
383 issue that might facilitate the efficiency and productivity of the deposition.

384 The amended rule directs that the parties confer either before or promptly after the notice
385 or subpoena is served. If they begin to confer before service, the discussion may be more
386 productive if the serving party provides a draft of the proposed list of matters for examination,
387 which may then be refined as the parties confer. The process of conferring will often be iterative,
388 and a single conference may not suffice. The obligation is to confer in good faith, consistent
389 with Rule 1, and the amendment does not require the parties to reach agreement. If they reach an
390 impasse, it may be desirable to seek guidance from the court. The duty to confer continues if
391 needed to fulfill the requirement of good faith.

392 The amendment also requires the organization to give advance notice regarding the
393 identity of the witness or witnesses who will be testifying. If it designates more than one
394 witness, the organization must also specify which witness will address which matters. This
395 notice is required [7] {5} [3] days before the deposition, by which time organizations ordinarily
396 have designated the person or persons to testify. Under unusual circumstances, an organization
397 may find it necessary to substitute a different person at the last moment. It should promptly
398 notify the noticing party of this change and identify the replacement witness. The fact there has
399 been such a change should not ordinarily produce discovery disputes.

400 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
401 conference may provide an occasion for beginning discussion of these topics. In appropriate
402 cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery
403 plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial
404 conference under Rule 16.

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*Alternative 2A – adding only a requirement
to specify which witness will testify on which
matters if more than one is designated*

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If it finds the Alternative 2 approach more desirable, the Committee might in the invitation for public comment include an invitation for comment on an alternative that would not call for identifying the witness in advance, but would require the organization that designates multiple witnesses to specify which witness will address which subject. Such an amendment might look like this:

413 **Rule 30. Depositions by Oral Examination**

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415 **(b) Notice of the Deposition; Other Formal Requirements**

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(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity, ~~and~~ must describe with reasonable particularity the matters for examination, and must give at least 30 days notice of the deposition. The named organization must ~~then~~ designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; ~~and it may set out the matters on which each person designated will testify.~~ Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. If the organization has designated more than one person to testify, no fewer than [7] {5} [3] days before the deposition it must also set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

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Alternative 2A is designed to provide the noticing party with useful information while avoiding some of the difficulties that might be created by Alternative 2. During the public comment period, some said that providing advance notice of the specific person who would be appearing could lead to wasteful, and even potentially abusive, questioning about personal matters. It might also blur the line between a 30(b)(6) deposition and a 30(b)(1) deposition. Under this alternative, the organization would not have to provide the identity of the witnesses in advance, but only state that there would be more than one witness (e.g., witness no. 1, witness no. 2, etc.) and the matters that each witness would address. For the noticing party, that should facilitate preparation and make the deposition more efficient. It could also avoid “beyond the scope” controversies if noticing counsel sought to question witness no. 1 on a matter on which witness no. 2 was designated to testify.

TAB 4B

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**Notes of Conference Call
Rule 30(b)(6) Subcommittee
February 22, 2019**

449 Participants in the call included Judge Jane Ericksen (Chair, Rule 30(b)(6)
450 Subcommittee); Judge John Bates (Chair, Advisory Committee); Judge Kent Jordan; Judge Brian
451 Morris; Virginia Seitz; Joseph Sellers; Rebecca Womeldorf (Rules Office); Julie Wilson (Rules
452 Office); Prof. Richard Marcus (Reporter, Rule 30(b)(6) Subcommittee).

453 The materials for the call offered four possible modes of proceeding:

454 (1) Decide that requiring a conference is not likely to improve practice and could
455 produce more conflict, and decide not to proceed with it.

456 (2) Decide to stick basically with the current proposal, with some modifications. These
457 could include removing the requirement to confer about the identity of the witness,
458 removing the “continuing as necessary” language, removing the “number and” language
459 so that the conference only looks to the matters and not also to some abstract numerical
460 issue. It might be that the Committee could conclude that we have heard enough about
461 changing to a requirement that the organization disclose the identity of the witness even
462 though that was not the published proposal. But that would leave open the question of
463 when that disclosure must occur and, probably, also the question of setting a minimum
464 period of notice for the deposition (in order to allow time for the conference about the
465 matters to occur, and then for the organization to determine who is to testify). This set of
466 rule changes would call for changes to the Committee Note, adapting it to the new rule
467 provisions.

468 (3) Alternatively, should a requirement to identify the witness in advance be deemed a
469 desirable idea, but also a “substantial” change calling for republication, a revised
470 preliminary draft containing that provision could be presented to the full Committee at
471 the April meeting, with a recommendation that it propose to the Standing Committee that
472 this revised amendment be published for comment.

473 (4) Finally, responding to the comments of many, mainly on the defense side, the
474 Subcommittee might conclude that it needs to study the matter further to consider
475 additional ideas that many have urged (and many others have opposed). Probably a
476 starting point of such an effort would be to return to the set of draft amendment ideas
477 presented to the Standing Committee at its January 2017 meeting. That effort was not
478 completed in early 2017, and pretty certainly could not be done by March 11.

479 The call opened with the question whether any favored option (1) – dropping the idea of
480 making any change to the rule. The public comments regularly emphasized that many lawyers,
481 perhaps almost all good lawyers, do something like what the amendment would require anyway.
482 And some commenters worry that requiring a formal conference in advance of every 30(b)(6)
483 deposition would simply delay discovery. Others objected that the requirement would be taken
484 in a “transactional” way – that the responding entity had some right to insist that the list of topics
485 be abbreviated in some way.

486 A reaction was that this question is hard to answer without knowing what the alternative
487 is. The materials for the call sketch a variety of alternatives. One could prefer doing nothing to
488 doing some of them, but it’s difficult to make a decision about whether to drop the amendment
489 idea altogether without knowing more about what would be the proposal instead of leaving the
490 rule unchanged.

491 The discussion turned to the variety of aspects drawn into question by the public
492 comment period. This listing included at least the following:

493 Requiring that the organization confer about the identity of the designated witness or
494 witnesses

495 “continuing as necessary” – the rule provision designed to emphasize the “iterative”
496 nature of the conference, particularly given the prospect that sometimes it will be
497 important for the organization to determine what exactly the noticing party wants to learn
498 about before choosing a person to answer questions about that subject

499 “number and” – The command to confer about the number of topics in addition to the
500 substance of the topics

501 Matters considered by the Subcommittee and not included in the published package – this
502 category included a variety of ideas urged on the Committee again during the comment
503 period even though the Subcommittee had decided against them after receiving
504 substantial input in response to its invitation for comment in mid 2017. These included
505 establishing an objection procedure, perhaps modeled on Rule 45; permitting or requiring
506 supplementation of testimony; forbidding contention questions; forbidding questions
507 beyond the topics listed in the notice; providing a limitation on the number of topics; and
508 prohibiting questions about the preparation of the witness for the deposition, particularly
509 with regard to inquiries about the documents reviewed in preparation for the deposition.
510 Addressing these sorts of ideas would probably call for starting over, as suggested in (4)
511 above.

512 Discussion of these ideas began with the observation that there were very strong and
513 persuasive arguments against requiring the organization to confer with the noticing party about
514 the identity of the witness to be designated. The goal was not to compel the organization to cede
515 authority over that choice to the noticing party, but many comments had raised the specter that
516 some noticing parties would use the opportunity to try to coerce the organization to pick a
517 witness that would be advantageous for them and, predictably, not for the organization.

518 There was limited counter-pressure during the public comment period about the
519 requirement to confer about the identity of the witness. Indeed, a number of witnesses one might
520 describe as plaintiff-side lawyers affirmatively said that they recognized and respected the right
521 of the organization to choose the witness. Many of these witnesses also emphasized, however,
522 that they really needed to know in advance of the deposition who would be designated.

523 There was consensus that the directive to confer about the identity of the witness should
524 be withdrawn. It was noted that the possibility of withdrawing this feature of the package was
525 discussed during the Standing Committee meeting in June 2018. The question whether a
526 requirement that the organization identify the witness before the deposition should be added
527 raised a separate issue, both about whether such an addition would be desirable and whether re-
528 publication would be necessary if it were added.

529 A second issue was whether to retain “number and” in the description of the mandated
530 conference about the matters for examination. The materials for the call included what was
531 described as Alternative 1, a revision of the published amendment proposal that would delete that
532 requirement. Alternative 1 was presented as a mode of proceeding that would not seem to
533 require re-publication:

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535 **Rule 30. Depositions by Oral Examination**

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537 **(b) Notice of the Deposition; Other Formal Requirements**

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539 **(6) *Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a
540 party may name as the deponent a public or private corporation, a partnership, an
541 association, a governmental agency, or other entity and must describe with
542 reasonable particularity the matters for examination. The named organization
543 must ~~then~~ designate one or more officers, directors, or managing agents, or
544 designate other persons who consent to testify on its behalf; and it may set out the
545 matters on which each person designated will testify. Before or promptly after the
546 notice or subpoena is served, and continuing as necessary, the serving party and
547 the organization must confer in good faith about the number and description of the
548 matters for examination and the identity of each person the organization will
549 designate to testify. A subpoena must advise a nonparty organization of its duty
550 to make this designation and to confer with the serving party. The persons
551 designated must testify about information known or reasonably available to the
552 organization. This paragraph (6) does not preclude a deposition by any other
553 procedure allowed by these rules.

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555 There was consensus that removing “number and” from the proposal was warranted. The
556 objective of the amendment is to direct the parties to address the substance of the proposed
557 topics, not to focus in the abstract on the number of topics. It was forcefully argued during the
558 public comment period that such a focus might prompt some lawyers to make their topic
559 descriptions more general, when the better objective is for the topics to be tightly focused.
560 Beside that, there was discussion during the public comment period about the value of
561 communication about what the noticing party wants to find out, something that could benefit
562 from a direct exchange during the conference and would not be preoccupied with sheer numbers.
563 An emphasis on numbers might invite differences about things that do not really matter.

564 Another suggestion was that the following two words – “description of” really did not
565 seem to add anything of value. It would be better to direct the parties to “confer in good faith
566 about the matters for examination,” and leave it at that. There was consensus that this change
567 was warranted.

568 Finally, the consensus was that – as set out in Alternative 1 – the words “and continuing
569 as necessary” would be removed since the identity of the witness had been removed from the
570 requirement to confer.

571 There was consensus that proceeding as outlined in Alternative 1 would not require re-
572 publication. This did not mean that avoiding republication was somehow important in deciding
573 what was the best amendment package to favor, but only that Alternative 1 could be proposed for
574 immediate recommendation to the Judicial Conference if it seemed the wiser choice.

575 At the same time, there remained the question whether proceeding with something as
576 limited as Alternative 1 would really produce benefits that justified making a rule change.
577 Whenever there is a rule change, there is a burden on the bench and bar to adapt to the new rule
578 provision. If something a lot like what Alternative 1 occurs regularly already without such a
579 requirement in the rules, it might be that adding the requirement could prompt disputes in cases
580 in which there would have been no been disputes without it. For example, there could be
581 disputes about whether conferral had been done in good faith.

582 The discussion shifted to an alternative approach to the question of witness identity that
583 had arisen during the public comment period – requiring the organization to provide advance
584 notice of what would be testifying. That would not suggest that the noticing party had any say in
585 who that person would be. But it would respond to a concern voiced by many on what one could
586 call the plaintiff side – being able to prepare much more effectively for the deposition when the
587 identity of the person to be testifying is known in advance. One approach to that idea was in
588 Alternative 2 in the materials for the call:

589 *Alternative 2 – deleting conference about witness*
590 *identity but adding advance notice identifying witness*

591 **Rule 30. Depositions by Oral Examination**

592 * * * * *

593 **(b) Notice of the Deposition; Other Formal Requirements**

594 * * * * *

595 **(6) *Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a
596 party may name as the deponent a public or private corporation, a partnership, an
597 association, a governmental agency, or other entity, ~~and~~ and must describe with
598 reasonable particularity the matters for examination, and must give at least X days
599 notice. The named organization must ~~then~~ designate one or more officers,
600 directors, or managing agents, or designate other persons who consent to testify on
601 its behalf; ~~and it may set out the matters on which each person designated will~~
602 testify. Before or promptly after the notice or subpoena is served, and continuing
603 as necessary, the serving party and the organization must confer in good faith
604 about the number and description of the matters for examination and the identity
605 of each person the organization will designate to testify. No fewer than Y days
606 before the deposition, the organization must identify the person or persons it has
607 designated. If it has designated more than one person, it must also set out the
608 matters on which each person designated will testify. A subpoena must advise a
609 nonparty organization of its duty to make this designation and to confer with the
610 serving party. The persons designated must testify about information known or
611 reasonably available to the organization. This paragraph (6) does not preclude a
612 deposition by any other procedure allowed by these rules.

613 * * * * *

614 This alternative builds on an idea that emerged during the public comment period. An
615 early witness reported that in Texas state courts the parallel provision on organizational
616 testimony calls for the organization to specify before the deposition which person or persons it
617 has designated to testify. Witnesses in Phoenix and in Washington addressed the values and
618 possible risks of requiring the organization to identify the witness in advance even if there were

619 no requirement to confer about who the witness would be.

620 The amount of discussion about the possibility of requiring the organization to identify
621 the witness in advance prompted discussion whether the Advisory Committee might recommend
622 to the Standing Committee that it adopt something like Alternative 2 without publishing it for a
623 new period of public comment. Under the Judicial Conference's procedures for the Advisory
624 Committees, § 440.20.50(b):

625 The advisory committee reviews the proposed changes in light of any comments and
626 testimony. If the advisory committee makes substantial changes, the proposed rule
627 should be republished for an additional period of public comment unless the advisory
628 committee determines that the republication would not be necessary to achieve adequate
629 public comment and would not assist the work of the rules committees.

630 There was consensus that shifting from the published proposal to confer about witness
631 identity to a requirement instead that the organization give advance notice of the identity of the
632 designated witness or witnesses would constitute a “substantial change.”

633 But it was not so clear that republication was required. In light of this standard, one view
634 was that the committee has been pretty fully informed by the hearings and written comments on
635 this subject. Many plaintiff-side lawyers said that they did not particularly care about conferring
636 about the identity of the designated witness, but that they did very much want to know in advance
637 of the deposition who would be appearing for the organization. It seems that the Committee has
638 heard a good deal about the advantages to the noticing party of knowing the identity of the
639 witness in advance.

640 For one thing, that would permit the noticing party to select documents to use that the
641 witness would recognize. True, the witness is providing the organization's information, not only
642 his or her own personal knowledge. Nonetheless, using exhibits the witness has seen before can
643 expedite things. For another, it might be that this person was one the noticing party would want
644 to examine using Rule 30(b)(1) as well; if so, combining that testimony with the testimony on
645 behalf of the organization would be efficient, particularly if travel were involved. In addition, if
646 this person has previously testified on behalf of the organization in related litigation, obtaining
647 the transcript of that earlier testimony would expedite the current deposition. Finally, when the
648 organization designated more than one person to testify, it could be extremely important to the
649 questioner to know in advance which witness (whether or not the specific identity of the person
650 was also disclosed) would address which topic. All these themes had been explored fairly
651 extensively during the hearings.

652 Other witnesses (mainly defense-side) had responded to these issues by urging that giving
653 advance notice of the identity of the witness could cause problems. Several urged that the
654 noticing party's counsel would often use social media and other sources to convert the deposition
655 from one focused on the organization to one focused on the person testifying on its behalf.

656 The “hybrid” 30(b)(1)/30(b)(6) deposition possibility could cause problems as well as
657 solve them. At a minimum, it blurs the line between individual testimony of the witness and
658 testimony on behalf of the organization. Because the individual witness has to be prepared to
659 answer on behalf of the organization whether or not he or she has personal knowledge of the
660 subject at hand, there is a risk that the witness will treat matters not within personal knowledge as
661 something he or she actually knows. Moreover, given the burdens of preparing this person to
662 provide all information available to the organization, preparing also for the individual deposition
663 is an additional, and often unwelcome, burden.

664 Another concern repeatedly raised was that sometimes it becomes necessary to change the
665 designee from the person originally intended to a different representative. Any such change
666 would likely prompt demands for details about the reason for the change, which would not be
667 likely to serve the purposes of at 30(b)(6) deposition but could intrude into work product.
668 Finally, several witnesses urged that they often could not be certain until shortly before the
669 deposition who would be designated to testify. This problem might be most serious with smaller
670 organizations.

671 For present purposes, this testimony during the hearings raised at least two questions for
672 the Subcommittee; (1) Would a requirement that the identity of the witness be disclosed in
673 advance be desirable?; and (2) Did the level of discussion of this possibility during the hearings
674 show that republication “would not be necessary to achieve adequate public comment and would
675 not assist with the work of the rules committees,” as specified in the committees’ own
676 regulations?

677 On the second question, one view was that we have already received sufficient feedback.
678 Many witnesses specifically addressed the question of requiring advance notice of the identity,
679 and to some extent witnesses responded to each other on these points. Many questions from
680 Committee members to the witnesses had probed these issues, with both those who favored
681 adding such a requirement and those who opposed adding it.

682 A reaction was that this is definitely in the “gray area.” It is not clear that the question
683 was even really raised until the Phoenix hearing in January, and then largely by members of the
684 Subcommittee. Certainly the published draft did not specify the possibility that the proposal
685 might be changed in this way. Even the directive to confer about the identity of the witness did
686 not require agreement on that subject or specify that, agreement or no, the organization had to
687 give advance notice who would be appearing on its behalf.

688 Another point was that to the extent we need to deal with the multiple designee issue
689 (notifying the questioner that witness no. 1 would address topics 1, 3, and 7, while witness no. 2
690 would address topics 2, 4, and 6) that would not necessarily require notice of who exactly either
691 of those people would be. Perhaps it would suffice to add something to the Committee Note to
692 something like Alternative 1 about specifying which topics the various witnesses would address
693 in connection with the conference about the matters for examination. That could be linked to the
694 provision already in the rule that the organization “may set out the matters on which each person
695 designated will testify.”

696 On the question of republication, a further note of caution was sounded: However much
697 we heard about the pros and cons of a requirement to designate the witness in advance, there has
698 been very little discussion about the timing issues. Alternative 2 provides a minimum notice
699 period and a minimum number of days before the deposition for the organization to specify what
700 person will show up. Even that alternative did not specify a number of days and instead said
701 there was a minimum period of *X* days and that the witness had be identified *Y* days before the
702 deposition. The need for public comment on those timing issues seems pretty substantial, and
703 the record of comment on those topics seems pretty thin.

704 Extensive discussion of the importance of requiring advance notice of the identity of the
705 witness or witnesses followed. Various members of the Subcommittee regarded different
706 concerns in different ways. The risk of use of social media and the like to support questioning
707 about the person rather than the organization was noted. Various members of the Subcommittee
708 expressed different views about the importance of this risk. There was also discussion of the
709 value of using materials that are familiar to the witness, which was stressed during the public
710 comment period as frequently important.

711 The fact that the identity of the witness is already disclosed in advance in many cases was
712 offered as a reason to be cautious about requiring it always. There likely is often a reason why
713 counsel choose not to disclose the identity when they don't do that, perhaps a bad experience with
714 this lawyer using the advance notice to convert the deposition into an ordeal for the person
715 designated. Some witnesses before the Committee said some 30(b)(6) witnesses were confronted
716 with something approaching "We know where you live and what your children's names are."
717 We should be cautious about requiring advance notice of the identity of the witness when counsel
718 would otherwise not disclose it.

719 On the question of timing and a minimum notice period, it was observed that adding
720 timing specifics might actually serve additional purposes. The conference requirement regarding
721 matters for examination assumes that clarification of the matters ordinarily should precede
722 witness designation. Then the organization, having received clarification about what the
723 questioner is seeking, can designate and prepare its witness or witnesses. All of that takes time.
724 True, for other depositions the rules only require "reasonable written notice," but those other
725 depositions do not have to follow this pre-deposition sequence, and they don't involve the
726 possibility of a motion for sanctions for failure to prepare the witness adequately.
727

728 It was noted that there may also be counter-pressures regarding timing. Many lawyers
729 who represent individual employment discrimination plaintiffs have informed the Subcommittee
730 that they regularly begin discovery with a 30(b)(6) deposition. And it often happens that courts
731 adopt a pretty brief discovery period in such cases – as little as 60 or 90 days. It may be that in
732 courts that use the discovery protocols for such cases that were hammered out under the
733 leadership of Judge Koeltl the disclosures required make initial 30(b)(6) depositions less
734 important. But the basic point is that it would be difficult to say that those lawyers had been
735 afforded a full opportunity to express their views on a 30-day notice requirement. For present
736 purposes, the basic point is that we have not heard from the bar about whether this really a
737 significant problem.

738 Another point was that the Subcommittee did extensive work in 2016 and 2017 and heard
739 from many, many people as it was examining ideas for possible 30(b)(6) amendments.
740 Throughout all that intense discussion, while many other possible amendments were identified,
741 nobody urged adopting a requirement in the rule that the witness be identified in advance.
742 Doesn't that say something about how important this is? Maybe we are making a mountain out
743 of a molehill.

744 Discussion returned to the question whether Alternative 1, as modified in light of this
745 call, would really make a change worth pursuing. Maybe we have labored long and hard and
746 brought forth a mouse. One could say that we have heard from both sides, and realize that the
747 rule is not working perfectly but also that there is no clear mandate for any major changes either.
748 One might even invoke Justice Jackson's opinion in *Michelson v. U.S.*, 335 U.S. 469, 486 (1948)
749 regarding the risks of altering any of the curious rules then surrounding the way "character"
750 evidence is handled:

751 To pull one misshapen stone out of the grotesque structure is more likely simply to
752 upset its present balance between adverse interests than establish a rational edifice.

753 This discussion brought the original purpose of 30(b)(6) into view. It was a response to a
754 serious problem encountered by those litigating against corporations and other organizational
755 parties. Too often, the corporate parties seemed to profit before 1970 from "bandying" when
756 successive employees each disclaimed information on relevant topics. Interrogatories,
757 meanwhile, often did not identify the right people to question, leaving the corporation's opponent
758 mired in ignorance about how to use deposition discovery to gather relevant evidence.

759 The solution adopted in 1970 was to require the corporation to select and present
760 somebody capable of answering questions about those relevant topics, so that the opposing party
761 could know which people it needed to question in depositions under Rule 30(b)(1) to gather
762 evidence for its case. Many, many witnesses had affirmed that this rule achieved that purpose,
763 and that it was often essential to successful litigation.

764 Witnesses and submissions during the public comment period also pointed, however, to
765 practices that have grown up since 1970 that probably go beyond what the original framers had in
766 mind. For example, objections to the Committee Note mention of the possibility that the
767 noticing party might tell the other side what documents would be used during the 30(b)(6)
768 deposition included the assertion that this would mean the deposition would be nothing more
769 than an oral version of interrogatories. That might have struck the original drafters as exactly
770 what they sought to provide – a method for the opposing party to get straight answers (with
771 follow up) on where in the organization the people with knowledge could be found.
772 Interrogatories had not worked for that purpose, so this new method of using a deposition was
773 added.

774 Another argument made about the value of the 30(b)(6) deposition during the public
775 comment period was that it provided an opportunity to cross-examine the corporation, and to nail
776 down its contentions. This also might seem somewhat afield from the seeming objection of the
777 1970 amendment adding this provision.

778 In addition, some had objected that plaintiffs had used 30(b)(6) depositions to provide an
779 end run around numerical limitations on depositions and interrogatories, partly contributing to
780 the desire that the rule impose a limit on the number of matters for examination and/or adopt
781 specifics on how the limits in number and time that the rules place on other depositions apply to
782 these depositions. That, of course, would not have been within the contemplation of the 1970s
783 rulesmakers since the numerical limitations themselves were not adopted until more than 20
784 years later.

785 The current proposal did not attempt to add specifics dealing with these issues (such as
786 limiting the number of topics) to the rule. So the question was put again: Is doing what
787 Alternative 1 does worth it? On that question, it's worth noting that the written submissions
788 from the Department of Justice and American College of Trial Lawyers both favor leaving the
789 rule unchanged.

790 A reaction was that, although modest, these changes could be quite important. Another
791 recurrent complaint heard during the public comment period was that too often when the noticing
792 party volunteered willingness to confer about the topic list (though not required presently by the
793 rule) the organization did not respond, or responded only at the last minute. Sometimes, instead,
794 what the noticing party's lawyer found was that objections to many of the topics were presented
795 as a *fait accompli* at the deposition itself. So by commanding both sides to confer "promptly"
796 after the notice is served, if not before, the rule would do something of value in such cases.

797 Even though the amendment would not prescribe a specific method for involving the
798 court, it would set the scene for the parties to seek the court's guidance. Moreover, the last
799 paragraph of the present Committee Note also invites the parties to use the 26(f)/16(b) process to
800 build some such process into the scheduling order.

801 Alternative 2, beyond that, would introduce the 30-day requirement for notice of the
802 deposition. For most cases, that probably is a very reasonable figure. As noted above, it may
803 present difficulties in some individual employment discrimination cases, but in those cases the
804 parties could ask the court via the Rule 26(f)/16(b) process to provide for a shorter notice period.
805 And in many cases it is likely that 30 days will be necessary for meaningful interaction about the

806 topic list, followed by selection and appropriate education of the designated witness. Though
807 some plaintiff-side lawyers said that they favored doing a 30(b)(6) deposition at the end of the
808 discovery period, they probably could accommodate a 30-day notice requirement with reasonable
809 advance planning.

810 The possibility of exploring a wider range of issues was raised; perhaps we could proceed
811 now with the limited change under discussion and expect in the near future to consider more
812 comprehensive changes to the rule. This was met with the view that there is real value to
813 respecting settled expectations. “Tell me what the rule is; don’t keep changing it.” If we want to
814 do more than Alternative 1, we should republish something like Alternative 2.

815 There was no support for going “back to the drawing board” (option (4) at the beginning
816 of these notes). Similarly, after considerable discussion outlined above, the Subcommittee
817 concluded that making no change at all to the rule (option (1) above) was not the best choice
818 given the many strong statements about problems coming not only from the “entity” side but also
819 from the perspective of the noticing party. Nonetheless, some Subcommittee members were
820 inclined to favor making no change over Alternative 2. Because the Subcommittee was divided
821 on how best to proceed from this point, it concluded that the best course was to put two choices
822 before the full Committee at its April meeting, with a full introduction about the pros and cons of
823 the various options:

824 (1) Go forward now with Alternative 1, recommending that the full Committee propose
825 to the Standing Committee that it forward such a change to the Judicial Conference this
826 year; or

827 (2) Republish with Alternative 2, providing an opportunity for full public comment on
828 both the idea of requiring advance notice of the identity of the witness, and the timing
829 issues that adding that would entail.

830 Given a March 11 due date for agenda materials, Prof. Marcus would try to circulate
831 something in the near future. Rather than attempt to convene another conference call, it seemed
832 more workable for Subcommittee members to exchange views by email.

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Summary of Comments
Rule 30(b)(6)
2018-19

The following summarizes the testimony and written comments received regarding the preliminary draft of amendments to Rule 30(b)(6) during 2018-19. Each of the written comments was assigned a designation beginning CV-2018-0003- followed by the number assigned to that particular comment. Since the only designation that is specific to a given comment is the number after the material quoted above, only that number is included with the comments below.

In May, 2017, the Rule 30(b)(6) Subcommittee invited public comment on a variety of rule-amendment ideas it had under discussion. More than 100 comments were received during that period. After that, the Subcommittee decided to pursue only some of the ideas originally under discussion. A number of the witnesses and a number of the written comments summarized below urge that topics included in the 2017 invitation for comment be revived. The summary of those 2017 comments can be found at pp. 217-95 of the agenda book for the Advisory Committee's November 7, 2017, meeting. The summary of current comments about the topics considered in 2017 are in the final section of this summary.

The summary of written comments below begins with no. 125, and includes several that were submitted after the Advisory Committee voted to submit its proposal to the Standing Committee but before the formal beginning of the public comment period. The comments are summarized in numerical order, starting with the earliest. Therefore, comments 125 to 128 are items received before the Standing Committee approved publication and before the formal public comment period began.

During the last week of the public comment period, over 1,000 comments were received. Some of these comments were extremely brief, expressing only support or (more often) opposition to change (sometimes to changes not actually in the proposal). These comments seemed often to repeat points already made in other comments. This summary does not summarize all of these comments, but attempts to provide a report on the frequency of various points in them. Very often repetitive comments are summarized only in the overall assessment category even though it could be said that they also bear on topics addressed in depth in later parts of this summary.

The following summary is divided into the following sections:

Overall assessment

Requiring a conference about the number and description of the matters for examination

Requiring a conference about the identity of the person designated to testify

Requiring that the conference continue "as necessary"

Committee Note mention of identifying documents to be used during the deposition

Reviving amendment topics not included in Preliminary Draft

Overall assessment

Washington, DC Hearing

[The following listing of witnesses at the DC hearing is in alphabetical order rather than the order in which the witnesses testified.]

Lauren Barnes (testimony and no. 187): “The changes proposed by the Committee articulate the routine (and common sense) set of negotiations by counsel that already occur. Discussions to clarify topics and advance identification of the Rule 30(b)(6) witness or witnesses by both sides happen almost without exception” in my cases. These cases usually involve claims of antitrust violations or anticompetitive conduct by pharmaceutical manufacturers. The defendants are typically corporations, and the cases often involve multiple 30(b)(6) depositions.

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): Our members have a loud and clear message -- the rule is broken and needs fixing to deal with unfair and over-reaching practices of noticing parties. But it seems that the Committee’s interest in proposing an amendment may be driven by the assertion by some plaintiff counsel that some witnesses show up not fully prepared. We do not share this perspective. If it really is a problem, however, the Committee’s prescription is not a cure. Identification of the witness before the deposition will not fix the alleged preparation problem. All a rule can usefully do is to provide a framework for a reasonable meet and confer as to the “number and description” of the matters for examination and specify a process for when that process breaks down. Meeting and conferring is widely practiced and often beneficial, but simply mandating a conference, without more, will not address the problems that led the Committee to take up the rule. The amendment does not adequately specify what is to be discussed, or how to determine when the good faith requirement has been satisfied.

Paul Bland (Public Justice) (testimony and no. 172): The preservation of 30(b)(6) is essential to public interest litigation. It provides invaluable discovery about materials within the exclusive control of defendants in such cases. In each of our cases, the power of the rule depends in part on good faith cooperation instead of one size fits all limits and procedures. “We’ve seen firsthand the role Rule 30(b)(6) depositions play in a diverse range of litigation contexts where an individual with limited resources is trying to hold a larger, more powerful organization -- be it a corporation, a government agency, or a school district -- accountable.

Sharon Caffrey (Duane Morris) (testimony and no. 203): This rule has generated a lot of litigation across the country, but this amendment package will not make things better. The proposed amendments will be both ineffective and harmful. What lawyers need is specific guidance on how such depositions should be handled, such as an objection procedure, how much notice is required, and how they count toward the limit on number of depositions. “The problem is that the Rule does not give enough guidance to practitioners, such that disagreements between counsel must be resolved by courts, which are often inconsistent in their decisions.”

Megan Cacace: We have a national practice representing plaintiffs in housing cases and employment cases. We favor the amendments. They will promote efficiency.

Andrew Cooke (testimony and no 165): “Rule 30(b)(6) is misused by many attorneys due to its unusual lack of structure or guidance and its overly broad terms. When coupled with a judicial inclination for liberal, rather than proportional, discovery, responding parties confront extraordinary and disproportionate burdens. The present proposed rule change does nothing to remedy the flaws in the rule as it provides no structure or guidance for the use of the rule.”

Philippa Ellis (testimony and no. 359): From 30 years of representing defendants in products cases, I express concern that the proposed amendments may have the unintended consequence of creating a complex web of discovery disputes and increased costs, as well as wasting judicial resources. The rule provides an adequate method for resolving issues about 30(b)(6) as presently written.

John Guttman (testimony and no. 173): I generally represent defendants, often in environmental and toxic tort cases. I find that 30(b)(6) depositions are routinely taken. “These depositions are very important and valuable to the parties. In many cases, Rule 30(b)(6) depositions streamline discovery.” But I think that the requirement that the parties discuss the identity of the person to testify will cause harm rather than help. And there should be a numerical limit on topics. Compare the ten-deposition limit. That has worked, and a limit here could work also. In general, in my practice the lawyers work things out. But there are some lawyers who go out of their way to create disputes. We need to focus our rules on the unreasonable attorneys. A limit of 25 depositions would be perfectly reasonable.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): The suggested rule change should, in the main, be helpful to all litigants by imposing the duty to meet and confer concerning the number and description of matters for examination. This should help all parties clarify the scope of the deposition and allow better preparation by each side. But there is no framework for the discussion included in the proposed amendment.

Jennifer Klar (testimony and no. 175): My firm represents plaintiffs in housing, lending, employment, and public accommodations cases. I take a 30(b)(6) deposition in almost every case. They are very effective, and serve the goal of deciding cases on their merits. Taking a 30(b)(6) deposition regularly enables me to reduce the number of depositions needed in the case. In addition, in many cases, it reduces the burden of Rule 34 discovery because I can use a 30(b)(6) deposition to learn about the defendant’s information organization methods, and then tailor further discovery in a way to get me the information I need in a manner that does not unduly burden the defendant. The required conference codifies what we already do in my practice. “In almost every case, after serving a 30(b)(6) notice, I have a discussion with opposing counsel regarding the meaning of 30(b)(6) topics and the amount of time needed for the defendant to prepare.”

Mark Kozieradski (testimony and no. 192): As a plaintiff lawyer in cases involving nursing home negligence, I find that 30(b)(6) depositions are the single most effective tool for efficiently discovering information held by institutions. Using these depositions, my firm is able to narrow which facts are actually in dispute and identify the positions of the parties early in the litigation. These depositions have eliminated countless hours of attorney time and unnecessary delays, avoiding unnecessary motions. The major recurrent problem I see is that some organizations do not adequately prepare their witnesses. But that is not due to a problem with the rule; instead, it results from attorneys’ ignorance of the obligation under the rule to prepare the witness.

Altom Maglio: In my personal injury practice representing plaintiffs, 30(b)(6) levels the playing field. The vast majority of the time, the identity of the witness is disclosed.

Brad Marsh: This amendment will inject uncertainty into the rules. That allows lawyers to take advantage.

Michael Neff (testimony and no. 184): In my view, the single most important tool that the plaintiff’s counsel has to pursue the truth in an efficient and economical manner is the 30(b)(6) deposition. In one case, we did only a 30(b)(6) deposition with regard to a factual basis for liability, and the only other discovery was expert depositions and damages witnesses. We

obtained a \$9 million verdict.

Michael Nelson (testimony and no. 164): These amendments do not address the real problems with the current rule. We see frequent designation of hopelessly overbroad topics, and of purely legal conclusions or contentions that no lay witness should be required to address. The problem is that the rule lacks necessary guidelines, and this amendment does not provide them.

Terry O'Neill (National Employment Lawyers Assoc.) (testimony and no.144): We commend the Committee on the process that led to the proposals to amend the rule, and on the substance of the proposed amendment. In particular, the Subcommittee's "road show," which permitted input from a wide range of perspectives, resulted in a proposal that is well balanced in addressing concerns. This rule works well in practice and achieves the efficiencies it was intended to achieve.

Thomas Pirtle: I represent plaintiffs in drug and medical device cases. 30(b)(6) is working. Meet and confer is an excellent idea. I can't remember a 30(b)(6) deposition when I didn't know the identity of the witness in advance. Seven days notice of the identity is sufficient.

Thomas Regan (testimony and no. 199): Few experienced practitioners would disagree with the need for amending this rule. As currently written, it is divisive and far less explicit than other civil rules. The sheer frequency with which it is used begs for amendment and clarity. But the proposed changes to the rule will lead to gamesmanship and cause more disagreements than currently arise. In particular, the focus on the process of choosing a corporate witness will cause problems.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): "The Firm opposes the proposed amendment to Fed. R. Civ. P. 30(b)(6) in its entirety and submits that if the Committee is to undertake the potentially disruptive step of amending the organizational deponent rule, it should do so in a manner that is scrupulously fair to plaintiffs and defendants, and addresses the very real problems the Rule raises, rather than creating new ones. The proposed amendment is a solution in search of a problem, and does nothing to address the real issues with the Rule." The rule has not been amended for almost 50 years, while other discovery rules have been clarified significantly. It is time for that sort of comprehensive process for this rule as well. The open-ended nature of the current rule has led to many difficulties and produced thousands of decisions that specifics could avoid.

Ira Rheingold (National Assoc. of Consumer Advocates) (testimony and no. 149): Rule 30(b)(6) is the most important part of discovery for my cases. It's really working well. The goal is to set up a system that gets people to work things out reasonably. The proposed amendment represents a reasonable change that will facilitate fact-finding and achieve efficiencies. The rule has proved effective and essential in consumer law cases since its adoption. There is a balance to be reached. The plaintiffs' bar complains that corporate representatives too frequently show up at depositions only to claim ignorance as to matters on the topic list. The defense bar complains that far-reaching deposition notices require too much preparation. The proposed amendment's conference requirement is well designed to reduce both these problems and be beneficial to both sides. A key problem in litigation of the sort we handle is information asymmetry. Usually, the corporation or government agency on the other side has sole knowledge of the events that give rise to the suit and its own practices in regard to such matters. That explains why plaintiffs' notices may at first be quite broad. By conferring, parties can home in on the most relevant areas. This will assist the company in preparing for the deposition and in choosing the person to designate. All in all, this amendment package would effect only a minor change in practice. In some jurisdictions, the amendment would simply codify existing practice. But it is nonetheless worth doing. Indeed, the success similar directives have had in many places provides strong assurance these amendment will work smoothly. We do think that a couple of small changes are

in order. First, we think it would be valuable to say affirmatively that the burden still rests on the company to seek judicial relief if agreement cannot be reached. This could be done as follows in the draft Committee Note:

The duty to confer as necessary continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur. If the conference process fails to produce agreement between the parties, the recipient of the notice may move the court for a protective order under Rule 26.

In addition, the rule itself should say that the parties must confer on which witness will address which matter. This could be done with the addition of three words:

Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify on each matter.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): Ford opposes this amendment package because it does not address the long-standing problems with the rule. Ford submitted detailed comments on July 31, 2017, but the proposals it endorsed there are not in this package. Ford is deeply disappointed that the proposed amendment does not address procedural gaps in the rule, such as the absence of a specified objection procedure, or a means for addressing topics on which the company has only documentary information. As an illustration of the current problems, she received a notice with 150 topics. One of them was “all information Ford has about steering mechanisms” or something equally broad. A conference requirement without any specifics about how to resolve issues is not useful.

Michael Slack (testimony and no. 170): Representing plaintiffs in actions against airlines and multi-national manufacturers, I find 30(b)(6) to be the most efficient discovery device. It imposes accountability on corporate defendants. Among other things, due to the existence of this form of discovery corporations are less likely to be evasive in response to other forms of discovery because they know that a 30(b)(6) notice can follow evasive responses. An “I don’t know” response by a 30(b)(6) witness can be fatal, while an “I don’t know” response from an individual witness can undermine the utility of an ordinary deposition. In addition, 30(b)(6) is immeasurably better at identifying the most relevant individuals to be the focus of individual depositions.

Andrew Trask (testimony and no. 176): I speak from 20 years’ experience and also on the basis of research done for a book I’ve written on litigation tactics that is to be published by Cambridge University Press. These rule changes are likely to promote gamesmanship. Already noticing counsel seek to question witnesses about topics beyond the notice. A few of these questions may be natural follow-ups to information disclosed about the specified topics during the deposition, but many are designed to elicit what appears to be a corporate admission on a matter of legal interpretation, or commit the corporation to a hypothetical course of action. Similarly, although questioning the witness briefly about his or her specific position with the company may provide valid background information, it will often move beyond simple background information and spread into factual matters not encompassed within the topics specified.

Julie Yap (Seyfarth Shaw) (testimony and no. 188): Although Seyfarth Shaw supported the Committee’s decision to take a close look at this rule, it opposes these changes. They will not remedy the serious problems with the current rule, and could produce more difficulties. In particular, the directive to confer about the identity of the witness will likely lead to noticing

parties claiming they have standing to influence that selection.

Hassan Zavareei (testimony and no. 191): In my public interest practice, I find that 30(b)(6) depositions are an essential tool for eliciting crucial information regarding organizations' structure, leadership, policies, and practices. This information can be the groundwork for all later discovery in a case. In class actions, it can be critical to resolution of class certification.

Phoenix Hearing

John Griffin (testimony and written statement): No other country has a rule like this one. Over the years, it has made many friends and a few enemies. Although in general I adhere to the maxim "If it ain't broke, don't fix it," I favor the Committee's proposed amendments. I have used Rule 30(b)(6) often to very good effect, particularly in representing disabled candidates for employment with federal protective agencies such as the U.S. Marshalls Service. Without the tool provided by Rule 30(b)(6), these clients would have had no way to obtain critical information about the policies of the agencies about employing disabled workers. The tweaks and adjustments the Committee has proposed can make the rule work better.

Lisa LaConte: Mandating this conference will not solve the problems I see in my practice representing asbestos defendants. The rule provides no means to address an impasse in the conference, which is going to happen when both sides hold their ground. The draft lacks objective features that could address those impasses. I often see lists of 50, 75, or even 100 categories, often delving into the distant past. The rule should provide a framework that will resolve issues; conferring alone will not do that.

John Sutherland: I do not think that this package of amendments should be adopted. Instead, the Committee should continue work and enact meaningful proposals. The current package will lead to more problems than it will solve, and it threatens to frustrate the very purpose of the rule. When adopted in 1970, the rule was designed to lessen the burden on organizational litigants that otherwise would have to produce many individuals to testify. The current amendment would eviscerate that purpose. It will also encourage gamesmanship by the requesting party. In addition, it will increase the likelihood that a responding organization will have to produce multiple witnesses. Changes are needed to ensure that the commitment to proportionality is met. The current proposal contains no specifics to resolve impasses in the conference.

Nieves Bolanos (NELA): For those who represent plaintiffs in employment litigation, Rule 30(b)(6) is very important. Individual plaintiffs are at a clear disadvantage in knowing about corporate structures, etc. Using this rule, they can find out about the company's payroll system, organization of data, etc. This amendment proposal adopts existing best practices in handling this essential vehicle for gathering information. The current rule is working well, and in our practice in the Seventh Circuit the parties regularly meet and confer regarding discovery issues, including those specified in the proposed amendment. This has proved useful.

John Sundahl (Defense Lawyers Assoc. of Wyoming): We oppose the amendments. The amendments will likely create more litigation and confusion. They will spark unnecessarily contentious discovery battles that will end up in court. We urge the Committee to address the concerns raised in the written comment from Lawyers for Civil Justice. This amendment will not produce positive change. Already, the parties confer as needed in advance of 30(b)(6) depositions.

Lee Mickus (testimony and no. 141): These depositions generate disagreements at a particularly high rate, but the proposed amendments will do little to prevent such disputes. And

many courts already require such conferences and most practitioners will undertake these efforts. Since pre-deposition conferences already occur frequently, building this requirement into the rule itself cannot be expected to yield significant improvements in practice.

William Rossbach (testimony and written statement): I begin with the goals of Rule 1. Rule 30(b)(6) may be the most important and most effective rule in achieving the goals of Rule 1. With carefully drafted and focused descriptions of subject matters for the deposition and well qualified and prepared witnesses, much of the maligned “fishing expeditions” that written discovery so often entails can be limited and reduced. Likewise, many of the expensive and time-consuming fishing expedition depositions can be avoided. In one of my first cases, a single 30(b)(6) deposition provided a basis for achieving a settlement. When I learned of the initial ABA proposal for radical changes to the rule, I was deeply concerned.

Bradley Peterson (testimony and no. 138): I have often done CLE programs on 30(b)(6) depositions. I begin them by saying that I love trying cases, but that the worst part of trying cases is having the other side play the deposition in some prior case in which my client’s designated witness was poorly prepared. “Rule 30(b)(6) can be a highly-efficient, highly-effective discovery device. It provides parties in multi-million-dollar, high exposure cases with a significant tool that can be used in program litigation for years and years. “Unfortunately, the Rule gets abused - - used as a weapon to create discovery disputes that already over-worked courts often do not spend enough time trying to understand and fairly resolve, thus leading to sanctions and a resolution based on something other than the true facts, and justice.”

Jennie Anderson (testimony and no. 148): A majority of the defendants in the lawsuits brought by my firm are corporations. We know little about the structure of these companies. 30(b)(6) depositions are an efficient and effective means of gathering corporate information to lay a foundation for discovery during the remainder of the litigation. In class actions, class certification may depend on information generated by these depositions.

Keith McDaniel: This amendment will not help. The real need is to provide specifics on other topics. My experience is that invariably you get the 30(b)(6) notice after the individual witness depositions and before the expert depositions. What we really need is a definite minimum time for notice, and an objection procedure modeled on Rule 45.

A.J. de Bartolomeo (testimony and written statement): The Committee carefully and thoughtfully considered the various comments received about its initial focus and produced a balanced and fair procedure with evenly imposed obligations on all parties. This is a textbook example of “best practices” in rulemaking.

Donald Myles: The rule should not be touched or it should be completely redone.

Written comments

Brian King (130): These amendments will create further delay with no gains in efficiency. Presently, as a matter of practice, counsel usually propose dates for the deposition and agree on them. They also confer or file motions regarding the scope of the topics to be covered. But the amendment seems to impose a meet and confer requirement in every case, even those where counsel would likely have agreed to the deposition without needing a conference. Given the difficulties of scheduling conferences of counsel, this addition will add more delay in an era of shrinking dockets and ever-tighter discovery deadlines. Moreover, the timing is vague - - before or promptly after the notice. I oppose this new requirement, but if it is imposed it should be before the notice is served. In addition, the new requirement that a subpoena on a nonparty organization advise it of the duty to confer is unnecessary. As a practical matter, a nonparty organization served with a subpoena will reach out to the lawyer who sent the subpoena and

confer without the advice that the amendment calls for.

Mackin Johnson (131): I support the proposed amendment. It reflects how the employment bar works in Mississippi. I represent management in employment suits. I often receive 30(b)(6) notices with more than 50 topics, many of which can't be reasonably responded to by the same witness. Before filing any motions, I get on the phone with plaintiff's counsel and try to work through the notice and proposed witnesses. It is rare that a lawyer will not cooperate, but it will be helpful to have a rule that requires such cooperation.

Scott Silbert (134): The proposed amendment makes perfect sense with a non-party deponent. But as to parties to the litigation it is unnecessary. There is already a very workable solution with regard to existing parties. In every district in which I practice, there is a local rule mandating a conference about discovery disputes. The 30(b)(6) deposition is critical to creating a sensible discovery plan for the rest of the case. Imposing the conference requirement creates a tool the defense can use to make the taking of the deposition more difficult, and will tend to create rather than avoid roadblocks. "I can see the defense bar applauding such an amendment as it creates a substantial billing opportunity."

Michael Neff (135): "Changes are not needed in FRCP 30(b)(6)."

John Branum (136): "Please do not make it more difficult to get information from corporations. It is already hard enough as it is."

Richard Cook (137): Requiring a pre-deposition conference will do more harm than good. As a practical matter, conferences already occur if there is an issue on the scope or number of topics since the rules already require such a conference before a discovery motion is filed. This amendment will encourage counsel to raise issues and objections that otherwise might not have been raised. "Attorneys naturally want to feel that they are important and are not potted plants. If required to speak on a topic they will."

Michael Rosman (140): Rules that parties must "confer" in "good faith" are generally difficult to enforce. The enforcement of the particular requirement in this amendment is even more problematic because there is no obvious means of enforcement. The court can become involved only if somebody makes a motion, and Rule 37 independently requires efforts to avoid the need for court action.

Federal Magistrate Judges' Association (142): We generally support the concept of directing counsel to confer on these matters. We have observed that Rule 30(b)(6) deposition practice has become a contentious subject. Our only hesitation is whether the proposed amendment goes far enough. Assuming the amendment is approved, we respectfully suggest that, after a period of time, the Committee consider whether further amendments -- such as, for example, one imposing a presumptive limit on the number of matters for examination -- are warranted.

Paul Godfrey (152): On behalf of the Minnesota State Bar Association, I write to support the proposed amendments. If these amendments are adopted for the federal rule, our Association stands ready to petition our state supreme court to adopt a conforming amendment to the Minnesota Rules of Civil Procedure.

Gregory Antollino (167): The proposed amendment is overbroad. If there are problems the responding organization should be given notice that it should immediately confer with counsel for the noticing party. The burden to confer should be on the responding organization, not on the noticing party.

Palmer Vance (and 25 other past, present, or future Chairs of the ABA Section of Litigation) (180): The proposed change is helpful in requiring that the parties communicate in advance of a 30(b)(6) deposition, but it does not go far enough. As we have before, we urge that it be strengthened with language along the following lines:

If the parties cannot resolve material disagreements, they are encouraged to request a conference with the Court to obtain an early resolution of the matters.

Carmen Caruso (194): The amendment is not needed. Counsel acting in good faith can and do meet and confer without being ordered to do so. Counsel acting in bad faith tend to abuse meet and confer requirements and turn them into make-work. On balance, this amendment will be counter-productive.

Jonathan Feigenbaum (no. 204): These amendments will lead to slower movement of cases and more motion practice. It will invite further abuses by organizations as part of their litigation strategy. I spend most of my time litigating ERISA cases. For me, 30(b)(6) is extremely important because it provides meaningful discovery.

Amar Raval (205): There is no rational reason to change Rule 30(b)(6) unless the goal is to slow movement of cases. I thought the whole point of the 2015 amendments was to avoid that. But these changes will cause a whole new category of discovery disputes. I litigate ERISA cases, and this rule provides meaningful discovery and fairness for the individual.

Paul Wood (207): The proposed changes will help reduce disputes and reduce the need for court intervention.

Nicholas Ortiz (208): The proposed changes are unfair and will limit a party's ability to obtain full and fair discovery. They will make it easier for corporations to hide the truth.

American Association for Justice (209): "AAJ thanks the Advisory Committee for its work on drafting the Proposed Amendments and recognizes that the Committee carefully crafted the Amendments with regard to fairness for both plaintiff and defense interests." The changes impose new obligations on all parties, which is essential to maintaining a balance.

Victoria Katz (211): We agree with the proposed amendment, which appears to be a reasonably calculated response to address the problem it was meant to address.

John Ireland (212): The rule is very efficient and effective. I agree that meet and confer is a good idea. I hope that the amendment will fix the defendants' frequent hide the ball tactics by requiring that the identity of the witness be disclosed in advance. Having the name provided 7 to 14 days in advance is a good idea.

Eric Stravitz (213): I support the proposed changes to the rule, and the minor tweaks suggested by Public Justice.

U.S. Chamber Institute for Legal Reform (214): The business community strongly believes that this rule is ripe for reform. It has become a major sticking point in civil litigation. But the proposed amendment threatens to spawn a new form of "bandying" -- exploiting discussions related to the identity of corporate representatives to make corporate depositions more burdensome. Conferring about these depositions, in general, holds promise to reduce some areas of dispute, but the provision about the identity of the witness will not do that.

Dan Kozma (215): I fully support Public Justice's comments on the proposed amendments and oppose any restrictions on the rule which would make it more difficult to obtain

necessary information from corporations.

138 companies joining in LCJ comments (217): On behalf of 138 companies, we join in the Lawyers for Civil Justice comments. We strongly oppose the required conference about the identity of the witness. Saying that the company “ultimately” can choose its own witness is not sufficient to prevent abuse. And even though there are pressing problems with 30(b)(6) depositions, the amendment does nothing to cure them. The proposed amendments should be rejected.

Pamela Smith (218): I support the proposed changes. This rule makes the discovery process smoother and more efficient. It requires the company to identify the individual most knowledgeable about the topics in the notice, which makes discovery more effective. This process dramatically reduces guesswork about which person at the company can speak about the relevant issues. When I represented minority employees who were making discrimination claims against a large university, by using this rule I was able to elicit testimony about discrimination against other employees by the individual defendant, and concealment of evidence about his behavior. Had it not been for this rule, I likely would not have obtained this information.

Edward Zebersky (219): 30(b)(6) is one of the only ways a plaintiff can obtain detailed information concerning a corporation’s actions. The rule is fair and balanced. I am very concerned that the rule may become too narrow. If a numerical limit were imposed on topics, that would be harmful. The existing rule provides sufficient protection against overbroad topic designation.

Jennifer Lipinsky (220): Many attorneys already confer, so the proposed amendment would change little except to codify good conduct and perhaps make difficult cases easier to manage. Disclosure of the identity of the witness should be helpful in preparing for the deposition and ascertaining whether the witness will be able to answer questions. Limiting the number of topics will further complicate the process.

Nick Verderame (221): The current rule is a good rule that is fair and balanced. Adding a numerical limit on topics would hinder individuals to fully question corporations. The addition of attention to the identity of the witness is desirable, for it will allow for efficiency and transparency in the entire process.

Mark Kitrick (223): The meet and confer idea is helpful. Many issues and conflicts are resolved or reduced when lawyers discuss matters prior to major discovery. There is no downside to requiring such a conference. Adding the identity of the person is important, as it forces the people to focus on who really has the information relevant to the discovery. This sort of exchange should take place early in the case, before any discovery.

Kevin Powers (224): I join the NELA comments. We represent plaintiffs in employment discrimination cases. Almost always there is a substantial imbalance between the plaintiff’s resources and the defendant’s resources. 30(b)(6) plays an important role in allowing parties to cut through a mass of documents and vague accounts and find out what actually took place and the reasons behind the actions at issue. The proposed amendments will, in most instances, make litigation more efficient and less subject to gamesmanship.

Bruce Braley (227): I support the changes. The amendment requires candid discussions before the deposition to ensure that the parties are on the same page as to their expectations of what will be the focus of the deposition. Most federal judges presented with disputes about these depositions will inquire about how the parties tried to avoid disputes. This amendment will foster that sort of discussion.

Gregory Cusimano (228): I always make an effort to meet and confer when dealing with good attorneys. We are generally successful. I think it's a solid idea to require this behavior. Identifying the witness will be helpful and likely shorten depositions.

Patrick Malone (29): This is a common sense change that should be adopted. It's a shame we need a rule to require attorneys to talk to each other. But too often I have found only after the deposition has begun that there were "misunderstandings" about what I thought were plain English topics set out in my notice. Alternatively, some corporations' counsel will go directly to motion practice without any communication with me about clarifying or narrowing the topics. It's time to end the hide and seek games.

Jason Fagnano (230): I support the proposal. It will help ensure the witness is knowledgeable and prepared.

Richard Frischer (231): I support this amendment. I find the comprehensive meet and confer requirements in federal court helpful because the aim to quell disputes. Often the witness appears but does not understand the categories requested. Sometimes it's simply the wrong person. Working out these issues ahead of time saves all parties costs and leads to more meaningful depositions.

Graham Owens (Nat. Ass'n of Manufacturers) (233): The NAM applauds the decision to focus on this rule. But the proposed amendment does not solve the problems with the rule. Instead, without clear parameters and a reasonable process for resolving disputes, the proposed meet and confer requirement will incentivize abusive behavior. We urge that the proposal be withdrawn so that it can draft a new amendment that will add clarity, not ambiguity, to the 30(b)(6) process. Presently, noticing parties regularly abuse the rule, by submitting lengthy and overbroad lists and then pursue questioning about yet other topics during the depositions. They also use these depositions to try to pin the witnesses down on legal contentions. These depositions trap the corporation in an unwinnable situation, and leave it on an uneven playing field that should be evened by rule amendments. But the actual proposals will introduce new avenues for abusive behavior. The real problems are (a) that adequate preparation is impossible when there are no boundaries to overbroad lists or questioning; (b) the rule has become a back door for discovering legal contentions; (c) parties regularly use the depositions to obtain binding admissions rather than useful information; and (d) plaintiffs try to use the rule to create "super witnesses" who are to synthesize all facts and issues in a setting in which the witness is likely to misspeak inadvertently. In the face of these problems, the Committee's proposal misses the mark. In particular, it does not establish concrete rules for addressing party disputes, and it will create even greater room for disputes. We agree with the statement submitted by the International Association of Defense Counsel, and urge the Committee to put forth proposals that deal with the real problems under the rule.

Michael Warshauer (234): The proposed changes make sense. There can't be a meaningful numerical limit on topics as the parties can't possibly know what they don't know until the deposition is taken. Requiring parties to identify the witness prior to the deposition will allow the deposition to be conducted more efficiently. The meet and confer requirement will require both sides to explain their respective positions consistent with the process now in place for discovery disputes.

Walt Cubberly (235): I largely support the proposed amendments, including the identification requirement and the fact that it doesn't limit the topics for examination. The only misgiving I have is about the Committee Note suggestion that the serving party identify in advance of the deposition the documents it plans on using during the deposition.

Jay Henderson (236): The primary problem with these depositions is the tension between

an overly broad notice and an overly detailed notice. When the parties are genuinely acting in good faith, a meet and confer provision is beneficial. Unfortunately, corporate entities frequently use the broad v. narrow dilemma to thwart the intent of the rule.

Erin Campbell (237): As a lawyer representing plaintiffs on a contingency fee basis, I support the proposed amendment. In my practice, 30(b)(6) depositions often require expensive travel, and efficiency is very important. This amendment will improve the efficiency of these depositions. I see little downside for this amendment. The corporation learns a bit more about the questions – but on balance this is not a bad thing for the deposing party because it has a bigger interest in getting the questions answered than in any surprise advantage. Rule 30(b)(6) depositions are too valuable to waste on personal capacity questions.

Geoff Hamby (238): The proposed amendment is unnecessary and would lead to a slowdown of the discovery process. There is no need for this mandatory conference in the vast majority of cases. I average about one 30(b)(6) deposition per month, and I have yet to run into a situation where I believe that a meet and confer requirement would have led to a productive outcome. So adding this only delays the process. When the parties disagree about one of these depositions, requiring them to meet and confer is extremely unlikely to lead to a compromise.

Russell Abney (239): Meet and confer is always desirable, as it often allows the parties to resolve issues without wasting the court's time. I think the conference should occur before the notice or subpoena is served.

Ruben Honik (240): The proposed amendment is fair and balanced. Preserving its fairness requires retaining the requirement about the identity of the witness. There should be no numerical limits on the topics.

Julie Bickis (241): The proposed change is not necessary and has significant potential to be abused. The organization should not have to negotiate who is chooses to be the witness.

Brenda Fulmer (242): I believe the current rule is fair and balanced, and that the proposed changes are unnecessary. I am concerned about any change that would permit a defendant to avoid disclosing the identity of the witness before the deposition.

Kenneth Haynes (243): I believe adding the meet and confer requirement would be a desirable change. Too often I don't find out who will be testifying until the night before the deposition, and too frequently it turns out that the witness is not prepared. I think the meet and confer should occur before the deposition is noticed.

Maria Diamond (244): This is a very important rule, and the Committee made a balanced proposal. But the words "number and" should not be included. It could lead to arbitrary limits on the number of topics.

Karen Menzies (245): The meet and confer is the most effective avenue for ensuring as narrow as possible a deposition. It can also be helpful to the court in focusing matters.

Joseph Condeni (246): The current use of this rule is reasonable as a way to make defendants provide evidence. If the goal of our judicial system is "blind justice," then the present proposal to limit the scope and breadth of these depositions should be dismissed.

Frank Bailey (247): "The current 30(b)(6) is perfect and does not need change which would limit the scope of information obtained."

Ryan Babcock (248): The proposed changes are consistent with the intend of the rules as

a whole and should aid in the fair and just determination of disputes. The meet and confer process should help ensure that corporate representatives show up to the deposition prepared.

Robert Edwards (249): The proposed changes will not create problems for parties who approach discovery in good faith. I would be opposed, however, to any presumptive limitation on the number of topics.

Edward Grossi (250): I favor the proposed amendment because it will make the discovery process more efficient. But I oppose the additional changes proposed by groups that seek to limit discovery.

E. Craig Naue (251): “Please do not limit the number of issues that can be covered by 30(b)(6) subpoena or notices.”

Kevin Haynes (252): I would like the amendments to ensure that (1) the organization will identify the witness; (2) there is no limit on the number of matters to be explored; and (3) the organization must raise any objections well in advance of the deposition. Right now, we often learn the identity of the witness only on the day of the deposition, or the evening before. This can result in an unproductive deposition.

Mark Napier (254): Please do not limit the number of topics. If the number is limited, then plaintiff attorneys will be forced to make the topics more broad.

Eric Romano (255): I generally support the proposed rule change, as I think that if lawyers meet and confer that prompts professionalism and helps avoid disputes. But there should be no numerical limit on topics.

Richard Thalheim (256): The rule should not be fashioned to allow respondents to squabble and nit-pick the scope as too broad and then complain that specific topic descriptions exceed some artificial number.

Todd Romano (257): There are already procedures in place for companies to object and seek a protective order. The meet and confer requirement seems to be well-intentioned, but it is likely to invite the deposing counsel to disclose work-product privileged information by telegraphing his or her planned examination. That would enable the defending counsel to gain an unfair advantage by fishing for information.

Frank Butler (258): This rule does not need a change. There is no problem that needs solving.

John Tiwald (259): I fear that the meet and confer requirement raises a presumption that a 30(b)(6) notice’s content must be conferred, no matter how proper. This will be used to mean that every item must be negotiated, leading to a transactional approach. Previously we saw bluff objections, but now the rule will say these bluffs must be taken seriously. This will make 30(b)(6) depositions more complicated.

Daniel Karon (260): The proposed amendment supports the parties’ mutual search for truth by encouraging both sides to talk. That is the only way we can understand each other’s needs. Our clients require and deserve this proposed amendment, and I can’t remember ever seeing a more balanced and thoughtful one.

Mark Samson (261): I oppose the proposed change. The requirement of a meet and confer will tempt defendants to limit the examination by not agreeing to certain topics. This is a poster child for a solution in search of a problem.

Lisa White (262): The proposed amendment is sensible and probably will reduce gamesmanship. Advance notice of the identity of the witness will reduce the likelihood that a person without knowledge will be named.

Norman Siegel (263): This amendment furthers the purposes of Rule 1. The disputes that arise generally result from lack of mutual understanding as to the expectations of the parties. The amendment addresses this issue by facilitating a meet and confer session.

Gerry Goldsholle (264): The proposed amendment seems highly sensible and fair and balanced. But adding a ten-topic limit would be counter-productive.

Anthony Leone (265): The proposal is a good amendment, but a numerical limit would be a bad idea.

David Rodibaugh (266): I support the proposed amendment. All too often, due to lack of communication, 30(b)(6) depositions are needlessly prolonged. A mandatory conference will help streamline the process.

Jeffrey Mansell (267): I have rarely encountered an instance in which attorneys and witnesses were not cooperative and professional. I think that the proposed conference requirement may be unnecessary in most cases, but that it could be helpful in the event the court has to resolve a dispute. But the rule should not be changed further, to impose a limit on the number of topics.

David Stradley (268): I support the proposed amendment. 30(b)(6) notices frequently draw motions for protective orders. Only then does the meet and confer process begin. That wastes time. Although the amendment puts the burden of initiating the conference on the noticing party, it will introduce efficiencies.

Bert Utsey (269): I oppose the proposed change. This rule is the best way to discover corporate knowledge. The proposed changes reflect an effort to frustrate the free exchange of information. There should be no arbitrary limits on use of this rule.

Lauren Ellerman (270): I am concerned that the rule change inherently favors corporations. Please do not change the rule to limit the areas of direct inquiry.

Jonathan Freidin (271): The changes to 30(b)(6) will create an arbitrary limit on the number of topics, and support more stonewalling.

Erik Heninger (272): While I support the general premise of the proposed amendment, I emphatically oppose any effort to place artificial numerical limits on the number of topics.

Miranda Soucie (273): Creating presumptive limits on areas of inquiry creates a very real risk that corporations will claim that every notice is overbroad. Providing greater detail in the notice gives the corporation greater clarity on what it must prepare to address.

Mike Stag (274): While I agree that discussion about the notice is helpful, in my experience parties do this voluntarily. What concerns me most is the attempt to create an arbitrary limit on the number of topics. Why would one object to specificity?

Reza Davani (275): I have grave concerns about the language “confer in good faith about the number” being used to limit the number of topics in a notice. More specific descriptions are valuable.

Greg Yaffa (276): Meeting and conferring makes sense because it should provide clarity. But limiting the number of topics would frustrate the purpose of the rule.

Michael Kittleson (277): The proposed changes will serve only to put obstacles in the way of obtaining the truth from a corporation.

George Wise (278): 30(b)(6) is the one discovery tool that singularly forces accountability and promotes efficiency over alternative discovery options. It is of great value to plaintiffs.

Laura Johnson (279): Making significant changes to this rule that limit topics will allow corporations to avoid responsibility for their actions.

Bruce Greenberg (280): Meeting and conferring in advance will streamline these depositions by bringing to the surface early, rather than at the deposition itself, any disputes.

Warren Christian (281): I oppose limiting the areas of inquiry in these depositions. There are no restrictions in areas of inquiry from a corporation to an individual plaintiff, so why should there be limits favoring the corporation?

Michael Dampier (282): I do not support the rule changes. The current rule works fine, and there are enough rules, procedures, and meet and confers in place to handle any issue. This is just attempted “tampering” with the rule for no compelling benefit.

Washington Legal Foundation (283): While the current rule has many defects in need of fixing, the proposed change addresses none of them. The most glaring defect in the proposal is the extraordinary mandate that the parties confer on the identity of the witness. The additional required conference about the number and description of the matters for examination provides no meaningful guidance or direction on what precisely is to be discussed.

Carmaletta Henson (284): I represent the frailest of our population -- elderly residents of nursing homes. This rule provides a mechanism for my clients to gain relevant knowledge. My strong concern is that the amendment will in effect impose a presumptive limit on the number of matters of inquiry. In order to draft a notice that is not overly broad, I need to be very specific about matters such as staffing. Our courts already require that notices be drafted with painstaking specificity.

Jason Downs (285): I am opposed to the proposed change. It will almost assuredly increase discovery disputes. Corporations will claim that every notice is overbroad.

Nicholas Panagakis (286): I do not support any rule changes. The current rule is clear and unambiguous. The proposed change will complicate things needlessly.

William Carr (288): This rule is effective and used by many to streamline discovery. There is no need to put an arbitrary cap on the number of topics.

Michael Dampier (289): The one proposed rule change that needs commenting on is the egregious limit on the topics for examination. This serves no purpose except to prejudice the party seeking corporate information.

Joseph Bryant (290): Any change to the current rule would impede the claimant’s absolute right to seek information clearly relevant to discovery. This is another attempt by industry to hide its bad conduct.

Clay Mitchell (291): Amending this rule as described will only serve to require more depositions to be taken and will unfairly limit the scope of the deposition.

Adrian Mendiondo (292): The proposed change would give organizations additional tools to obstruct and delay discovery.

Frank Kerney (293): The proposed changes will create a logistical nightmare and increased litigation across the board.

Christopher Hinckley (294): Creating presumptive limits on areas of inquiry creates a very real risk that responding organizations will claim every notice is overbroad.

Anonymous Anonymous (295): Limiting the number of topics limits a party's ability to conduct discovery on relevant issues.

Harold Velez (296): The proposed changes will fuel the ever increasing costs of litigation. Almost all responses will draw an objection. Providing greater detail in requests risks the increase of claims that the notice goes beyond the presumptive limit on the number of topics.

Michael Hanna (297): I do not support the proposed amendment. It will lead to unnecessary limitations and greater litigation to clarify the notice.

Joseph Kopacz (298): The rule is very important to make sure witnesses are prepared and bring all required information to the deposition.

W. Doug Martin (299): I am against limiting the number of areas of inquiry.

Marc Semago (301): Leave the rule as it is. The meet and confer requirement will turn every 30(b)(6) notice into a fight over whether it is broad and burdensome. There is a backdoor attempt to limit the scope of discoverable information.

Henry Watkins (302): I do not support limiting the number of topics.

Steve Thompson (303): The proposed amendment seems noble and is something that most good attorneys attempt to do anyway. 30(b)(6) depositions are the only real way to find out the facts instead of relying on the selective culling by defense counsel. It is necessary to obtain information from a giant corporation.

Schuyler Brown (304): I believe that the proposed 30(b)(6) rule should not be changed as to limit the number of topics that I can question on.

Richard Bates (305): The proposed rule has the effect of supporting presumptive limits on the number of topics. This will force the noticing lawyer to broaden the topics, and lead to "overbroad" objections.

Joseph Rugg (306): Any arbitrary limitation on the number of topics would be unfair and prejudicial.

Jill Bollwerk (307): Although I think it is worthwhile to require a good faith conference before depositions, any efforts in limiting the number of topics could be very dangerous.

Jamison Shekter (308): Any proposed change to 30(b)(6) should not include a limit on the number of topics.

Ariston Johnson (309): Many attorneys who represent corporations object to every discovery request, because the burden of conferring and filing a motion will dissuade opposing counsel from pursuing the discovery. Currently, if counsel receive an overly burdensome notice they can pick up the phone and seek clarification. A rule change that requires that call would be a bad thing.

John Doyle (310): I support the current proposed amendment to reduce litigious motions. I am adamantly against any attempts to set a limit on the number of topics.

Darrell Kropog (311): These changes are bad. They will have the effect of creating presumptive limits of areas of inquiry. Organizations will claim that every request is overbroad.

Sarah Foster (312): The rule should not propose a meet and confer on the number of topics. That should be left to the noticing party or, if at issue, the court.

Stefano Portigliatti (313): Although a meet and confer requirement makes good sense, the issues that are typically handled in the meet and confer requirements of a motion for a protective order are sufficient. Limiting the number of topics may see a good way to reduce the scope of ridiculously burdensome requests, but it would result in litigants simply using fewer but broader topics.

Jeffrey Constantinos (314): This proposed amendment must not be adopted. The benefit of requiring the attorneys to confer does not outweigh the increased litigation that will result. It invites litigation about what was and was not addressed in the conference.

Corey Friedman (315): I am concerned that the proposed amendments may deplete judicial economy and hamper productive litigation. It appears to be an effort by the defense bar to shift neutral rules. Arbitrary limits on the number of topics should not be adopted.

Michael Shiver (316): Although this amendment is well intentioned, I fear it will create yet another delay in obtaining necessary discovery. By placing presumptive restrictions on the number of categories which can be sought, the rule would place a restriction upon the requesting party and shift the burden of demonstrating relevance.

Marc Edelman (317): I am opposed to the amendment. Creating a conferral requirement about the number and topics will create presumptive limitations that will subvert effective discovery.

Kyle McClain (318): The meet and confer addition is a reasonable change. Any limit on the number of topics would be unworkable.

Navah Spero (319): This is a bad idea, as it would greatly prejudice the party seeking to take the deposition. There is a constant back and forth in litigation about whether the topics are overly broad. The solution to that problem is to increase the number and make them more specific.

David Moffett (320): What started as a good proposal to meet and confer has the potential of limiting access to relevant information and becoming a new cottage industry of litigation. By creating presumptive limits on areas of inquiry there is a risk that responding organizations will claim ever notice is overbroad.

Ryan Roberts (321): I do not support the proposed change because it creates a mandator conference when one may not be necessary. It will increase legal fees and court involvement where these things are not needed. I have found that very few of my requests cause concern, and

in all instances when they did opposing counsel has conferred with me. I have never had a discovery hearing in court about a 30(b)(6) deposition.

Emily Joselson (322): I lend my voice to those who seek to have the rule go forward as proposed. I urge the Committee to resist adding any further language to the rule. I emphatically oppose any attempt to put artificial numerical limits on the number of topics.

A Daniel Vazquez (323): I am concerned about the chilling effect limiting the scope of 30(b)(6) depositions would have on the process of justice.

Lesley Clement (324): Any time lawyers meet and confer it is an opportunity to promote professionalism. Therefore, I support the proposed amendment. I oppose the proposal to put artificial numerical limits on the number of topics, however.

Amy Ferrera (325): The committee should reject the request to limit the number of topics.

Kristi Schubert (326): I strongly oppose any rule which would limit the number of topics. The provisions for the corporation to seek a protective order provide an adequate mechanism for it to avoid burden. The proposed requirement that the attorneys meet and confer about the number of topics provides further assurance that the corporation will not be unduly burdened.

Richard Kennedy (327): This amendment will impose additional burdens on attorneys and give rise to disputes about the number of topics. They potentially deprive injured persons and their families of vital information that only the corporations know about.

Neil Alger (328): The meet and confer proposal simply codifies a practice that most attorneys already employ. 30(b)(6) is essential to litigation, and as technology develops it will become more essential. The Committee should worry about the realities of practice for attorneys who do not handle billion dollar cases. Every dollar counts in most of my cases, and adding requirements can make waste.

Chris Gill (330): The committee should reject the request to limit the scope and number of matters for examination. This would allow defending corporations to hide the ball.

Wesley Laird (331): As a Plaintiff lawyer, I support the proposed change to require a conference. But I do not support any limitation on the number of topics.

Andrew Burnett (332): I am opposed to any presumptive limit on the scope of 30(b)(6) depositions.

Matthew Hitt (333): "This is a horrible idea."

Matthew Christian (334): The proposed changes are appropriate and necessary. We already encounter significant delays with the current rule due to unprepared witnesses. Requiring advance identification of the person will help make the litigation more efficient.

Kurt Wolfram (335): "An artificial limit on the number of topics is a mistake. I urge amendment to exclude that portion of the proposed rule change."

Jay Vaughn (336): I support the proposed amendment. A good faith conference reduces unnecessary motion practice. But I oppose any limits on the number of topics.

Shayla Reed (337): I think any time lawyers meet and confer it is a good opportunity to

promote professionalism. Therefore, I support the proposed amendment. But I emphatically oppose any limit on the number of topics.

Fred Buck (American College of Trial Lawyers) (338): The College believes that this amendment is not desirable, as it said in prior submissions in 2017 and 2018. Our members find that most 30(b)(6) notices are not objectionable and that when objections are made they are resolved informally through the meet and confer provisions of rules 26(c)(1) and 37(a)(1). Adding a mandatory meet and confer provision would create unneeded burdens on the parties and inject delay and additional cost.

J.T.Borah (339): I support the proposed amendment. But I am very concerned about any attempt to limit the number of topics.

Daniel Purtell (340): Any limit on the number of topics would be counter to the pursuit of justice.

Jason Wesoky (341): The duty to confer on 30(b)(6) topics already exists. Often the responding organization objects, leading to a hearing in which the judge resolves the matter. But conferral on the “number” of topics is dangerous and silly. Setting a limit on topics would fundamentally undermine the rule.

Rachel Alexis Fuerst (342): I believe that the proposed changes are sensible. But there should not be a limit on the number of topics.

Tom Paris (343): Limiting the topics will not lessen the rancor but instead cause weeks of briefing on motions. Yes, the parties should confer, but limiting the number of topics provides a weapon for obstruction of discovery.

Kari Jones Dulin (344): “I support the proposed amendment as written and oppose any artificial presumptive limitation on topics.”

Katie Curry (345): I support the proposed amendment as drafted. I oppose any attempt to limit the number of topics.

Dino Tangredi (346): I am opposed to the proposed amendments. The rules already have provisions to address alleged abuse of discovery. The nature of the case defines what is reasonable. One size does not fit all.

Sean Dormer (347): I support the proposed changes. We already make a practice of conferring about 30(b)(6) topics before issuing our notice, and we are often met with silence from the other side. The practice of ignoring letters asking to confer needs to stop.

Tim Edwards (348): Bad idea. Does nothing to decrease litigation costs. In fact, the result could be the opposite. The defense would use the conference to fish for information to better prepare the client for the deposition.

Paul Williams (349): I support the proposed amendments. I oppose any artificial limit on topics.

Jacob Jagdfeld (350): I oppose changing the rule to limit the number of topics.

H. Phillip Grossman (351): While I am for the proposed changes, I am against any arbitrary limits on the number of topics.

Garrett Blanchfield (352): I oppose the defense bar proposal for a numerical limitation in the rule. Rather than pick an arbitrary limit, the more practical approach would be for the parties to meet and confer about the appropriate number of topics.

Michael Ace (354): This rule change could limit needed discovery by imposing a limit on the number of topics.

A. Evan Lloyd (355): If these amendment are adopted it will encourage gamesmanship. Creating presumptive limits on areas of inquiry will lead organizations to claim that every notice is overbroad.

Ben Yeroushalmi (356): While ensuring good faith meet and confer efforts is worthy of support, I am cautious about the unnecessary obstacles that are sure to arise from placing limits on the number of topics.

Randi McGinn (357): I write to oppose nay presumptive limitation of areas of inquiry. I support the proposed amendment as written, because meeting and conferring is never a bad idea.

Jeffrey Stowman (358): I support the proposal as written. The meet and confer requirement potentially will reduce inadequately prepared witnesses. But a presumptive limit on topics would hinder the discovery process

Michelle DeLong (360): I support the amendment as written. I oppose arbitrary limits on topics.

John Romano (361): The meet and confer provisions make sense, but I oppose artificial limits on topics.

Barton Keyes (362): The amendment is unnecessary. Parties already have meet and confer obligations under the rules. Adding this idea to this rule will suggest that it is somehow different. Any changes to this rule would actually lead to increased motion activity and delay.

Brian Hetner (363): I support the amendment as drafted, as it may facilitate definition of the matters for examination. But I oppose any limits on the number of topics.

Morgan Gaynor (364): The amendment is unnecessary at best, because there are already sufficient safeguards. Corporate representative depositions are essential to level the playing field. Limiting these depositions in the manner proposed will not make litigation more efficient. It would create additional incentives to hide the ball.

Alan Casper (365): I rely on this rule. I am therefore dismayed by the proposal to limit the number of topics that can be listed.

Patrick Murphy (366): Many of the changes suggested hold promise, but a presumptive limit on topics is arbitrary and will make other discovery more time consuming.

Robert Orant (367): Providing greater detail in a 30(b)(6) notice gives the organization greater clarity to prepare. If there is a presumptive limit on topics, they will have to be broader.

Gregory Wetzel (368): I favor the meet and confer idea. I oppose any sort of limitation on the number of topics.

Christian Gabroy (369): Requiring advance notice of witnesses makes formal what already occurs in most cases. But in general the same rules should apply in 30(b)(6) depositions

as in others.

Robert Ransom (370): It is already customary to confer with opposing counsel about the topics to be covered. It is also customary for opposing counsel to engage in seemingly unending objections to the notice. Frustratingly, defense counsel regularly refuse to comply rather than filing a motion for a protective order, saying that I have to file a motion to compel. In my experience, this is part of the overall strategy to make it as difficult as possible to obtain needed information. An amendment to the rule which makes it even harder to obtain information will be a step in the wrong direction.

William Compton (371): “I am opposed to any limit on the categories of inquiry that can be designated in a Rule 30(b)(6) deposition notice.”

Kurt Maahs (372): I support the meet and confer requirement. I do not support limiting the number of topics.

Bret Gainsford (373): The existing rule works fine. The proposed change will only add unnecessary delay and costs.

Andrew Hagensbush (374): I do not support the rule change. It would make it more difficult to obtain information from corporations by limiting the scope of questions and topics.

Scott Webre (375): I oppose the amendment. Revising the rule as proposed would substantially reduce the effectiveness of this tool in challenging corporate positions.

Sumeet Kaul (376): By creating presumptive limits on areas of inquiry there is a very real risk that responding organizations will claim every notice is overbroad. It is often difficult to get information from a corporation. This amendment will make it harder.

Mixcoatl Mierra-Rosette (377): I support the change. But I also oppose any restriction on the number of topics.

Michael Sievers (378): I urge that you adopt the amendment as written and reject calls to adopt numerical limits on the topics.

Joshua Molandes (379): I do not support the language which refers to the “number” of matters. The deposition is time-limited, which sufficiently protects the witness.

Michael Holoman (380): There should not be any limit on the number of topics. Lawyers are not abusing the rule.

Brian Wojtalewicz (381): The proposed change to meet and confer is fine, but an arbitrary limit on the number of matters is very dangerous.

Edmund Schmidt (382): The rule works well and requires no revision. We need it to gain information from wealthy corporations.

Carl Lopez (383): I oppose any limitation on the areas of inquiry. That will lead to an objection that every request is overbroad.

Chris Kuhlman (384): I oppose the amendment. Federal civil litigation is increasingly bogged down in paperwork. This promotes gamesmanship. With corporate defendants, scheduling discovery can turn into a prolonged game of cat and mouse. The meet and confer requirement will enable them to play the game even longer.

Maria Sperando (385): I support the proposed change because meeting and conferring will be useful for both sides. But I am strongly opposed to numerical limitations on the topics.

John Branum (386): “I do not believe that the rules should be changed with regard to corporate representative depositions. I oppose those changes.”

Justin May (387): I am opposed to putting any limit on the number of topics. Corporate defendants are upset that they have to spend money to produce relevant documents, but changing the rule to suit them is not fair to plaintiffs.

Fletcher Handley (388): I do not support any limitations on use of this important tool for individual litigants.

Daniel Talbot (389): I support the proposed change and oppose any other changes, especially placing a limit on the number of topics.

Virginia Buchanan (390): I oppose the amendment. It imposes additional constraints, which will hurt plaintiffs. Having to meet and confer will presumptively limit the areas of inquiry. Defendants will routinely interpose objections. The defense bar is well organized and can offer some horror stories, but the ordinary reality is that this rule is very effective.

Charles Watkins (391): I oppose the changes as unnecessary and potentially confusing to litigants. Rule 37 already has a sufficient requirement to meet and confer.

Scott Smith (392): I oppose the proposed amendments because they would limit access to relevant information and create more litigation through motion practice. By creating presumptive limits on areas of inquiry, the amendment will enable organizations to claim every notice is overbroad.

Matthew Winter (393): I oppose the proposals that would limit the number of topics. I support the change to identify the witness. This will help to ensure that the right individual will testify.

Scott Wolleson (394): I oppose any predetermined limitation on the number or scope of topics.

James Biggart (395): The proposed amendment to limit the number of topics will result in more depositions and greater expense for all parties. The meet and confer is a good idea.

Jim Buxton (396): I support the proposed amendment. But placing a limit on the number of topics will create a litigation nightmare.

James Neal (397): In theory conferring is a good idea. But in practice it will lead to more fictitious litigation. If you begin limiting the scope and breadth of these depositions, you will only provide greater opportunity for objections and obstruction.

William Tilton (398): I oppose further changes to this rule. There is no substitute for this rule. Please do not change it.

Karen Allen (399): The proposal is good as written; meeting and conferring promotes professionalism. But numerical limits would be a bad idea.

Quentin Urquhart (400): I strongly oppose a requirement that the corporation disclose the identity of the witness. The organization should have the sole right to pick its representative.

Jordan Lebovitz (401): I think meet and confer is a fantastic idea and is most practical. But there is no reason to limit the number of topics.

Rob Schenk (402): Limiting the number of matters would hinder the utility of this rule for my clients.

Brandon Baxter (403): Requiring a conference is a good idea. But imposing a limit on the number of topics is a bad idea.

Troy Chandler (404): I support the proposal. In particular, I support disclosure of the identity of the witness before the deposition. I oppose a limit on the number of topics.

Michael Sabbeth (405): The duty to confer on the topics already exists. The responding corporations regularly object to topics and that leads to a conference and sometimes a hearing before the judge. But conferring about the “number” of topics is dangerous and silly. Judges are already trapping lawyers with the bogus argument that a notice has “too many” topics. The committee cannot endorse this idea.

Randall Poerschke (406): If you are going to limit the topics for 30(b)(6) depositions, then you must also limit the number for all other depositions. The limit on the number of topics should be REJECTED.

Lee Cope (407): The meet and confer amendment is a good idea. But imposing a limit on the number of topics is a bad idea.

Ellen McCarthy (408): Adding a meet and confer requirement makes good sense. What does not make sense is limiting what can be accomplished in a deposition.

Daniel Inscore (409): I support the meet and confer requirement. I am opposed to any limitation on the number of topics.

Scott Link (410): I oppose the proposed change to limit the topics of inquiry. I am always open to meeting and conferring, but I do not want to have to show my hole cards.

George Gray (411): I do not support changing the rule to limit the number of topics.

Thomas Fuller (412): Our rules already have adequate provisions to protect against oppressive discovery. A limit on the number of topics is not needed.

JC Powell (413): If changes are made that limit the breadth of the rule, that will enable corporations to take advantage and defeat the purpose of discovery.

James Coogan (414): This rule is vital to parties litigating against corporations. The companies seek to conceal, confuse, and even destroy information. Please do not take any actions that will curtail the utility of this rule.

JoDee Nell (415): Identical with no. 405 (Michael Sabbeth).

Jeffrey Mehalic (416): This change will enable corporations to challenge every notice on the ground that it exceeds the permitted number of items. That would be harmful.

Smanatha Flores (417): There should be no numerical limit on topics. Identifying the witness is helpful to all. Identifying the documents to be used in advance of the deposition is harmful.

Madeleine Simmons (418): Limiting the number of topics will cut against precise topic descriptions and harm those suing corporations.

Blake Ringsmuth (419): The proposed amendments make discovery much more efficient. Knowing the identity of the witness allows preparation and questioning to be more concise and less costly. The same is true of the requirement to meet and confer.

Nancy Iler (420): Identical with no. 405 (Michael Sabbeth).

Robert Kerpsack (421): I favor adding a meet and confer requirement. I oppose any attempt to limit the number of topics.

Adam Russell (422): I support the amendment as proposed, but oppose any limitation on the number of topics.

Thomas Shlosman (423): Limiting the number of topics will limit the utility of the rule.

Christopher McKinner (424): I support the proposed change. I oppose any artificial limits on the number of topics.

Thomas Murphy (Massachusetts Academy of Trial Attorneys) (425): The Academy opposes these changes. Imposing a meet and confer requirement would be inefficient because, early on, the plaintiff has not had a chance to engage in meaningful discovery. This change will undermine the goals of Rule 1.

Danny Ellis (426): The proposed meet and confer will only bog the case down. There can be an unending back and forth trying to “work out” the differences. It allows a party inclined to delay a perfect way to do that.

Michael Chaloupka (427): I support the proposed meet and confer. I already do this. I am adamantly opposed to any limit on the number of topics.

Jessica Dean (428): This rule is important, and often corporations fight fiercely to avoid providing information.

M. Justin Lusko (429): I oppose any amendment that would limit the number of topics.

Peter Kraus (430): The suggestion that the rule be changes to remove the requirement to identify witnesses will gut the effectiveness of these depositions. I urge this committee not to make such a change.

Eric Penn (431): I favor the meet and confer requirement so long as it is clear that there is no presumptive limit on the number of topics. Greater specificity in topic descriptions is more important than the sheer number.

James O’Brien (432): The current rule has robust protections against abusive deposition practices. A numerical limit on the topics would add nothing to the existing protections. I encourage the committee to reject the proposed numerical limit on topics.

John Dady (433): I support the amendment proposal and oppose any limits on the number of topics. The best way for the witness to prepare is to have a detailed list of topics. If the number were limited, the topics necessarily would be described more generally.

Hans Leibensberger (434): Any time lawyers meet and confer it is an opportunity to

promote professionalism. But I strongly oppose numerical limits on the topics.

Scott Frost (435): Rule 30(b)(6) is the last tool plaintiffs have to fend off obstructionist corporate defendants and their counsel. The abuse of Rules 33 and 34 is so prevalent that the rules almost serve no purpose.

Matt Young (436): I oppose this change. It would only make depositions more burdensome and increase the costs of an already costly process.

Richard Eddington (437): I strongly oppose limiting the number of topics. That would lead to discovery abuse.

Rachel Leonard (438): The amendment as written serves the desired purpose. Any further limitation of topics thwarts the intention of this rule.

Neil Nazareth (439): The draft language about meeting and conferring is important so the parties communicate about the topics and potentially streamline the areas to be discussed at the deposition. In my practice, I routinely do this. The number of topics should not be limited.

Joseph Musso (440): I endorse the meet and confer idea. We do that already and it is a desirable practice. But I strongly oppose any limit on the number of topics. As a nursing home abuse attorney, I fight gamesmanship every day. Presumptive topic limits are a tool that will tip an already uneven playing field further against our nation's institutionalized elderly.

David Jostad (441): This rule is critical to obtain information from corporations and government. Modifying the rule in any way which limits access to relevant information (in particular limits on the number of topics) would inevitably be construed as establishing presumptive limits. I oppose that.

Jeff Paradowski (442): I favor the meet and confer requirement but not any presumptive limits on the number of topics.

Taylor Cunningham (443): I oppose the proposed amendment. It will not remedy any issues presented by the rule in its current form. Placing a presumptive limit on the topics is arbitrary, and could lead to the need for more depositions.

Casey Gartland (444): I oppose the proposed changes as they will likely lead to the necessity of taking more depositions and cost litigants more time and money.

Peter Everett (445): The rule should not be constricted in any way. In its absence, corporate parties can stonewall and obfuscate. I oppose the proposed meet and confer impediment, as it simply allows corporations to delay depositions. Under no circumstances should the number of topics be limited.

David Wiley (447): As a lawyer who represents individual workers in employment cases, I support this change. Identifying the witness can help, so this seems a good change to me. I strongly discourage any other modification because it invites satellite litigation and could undermine the original purpose of the rule.

Nathan Wittman (448): The proposed change is unlikely to yield the kind of results its proponents seem to expect. The meet and confer language is likely to be used to create a cottage industry of litigation activity designed to obfuscate, stall, and frustrate a litigant's access to the "voice" for the corporate entity.

Thomas Conlin (449): I write to oppose a limit on the number of topics. The right number varies widely.

Kevin Liles (450): I oppose the meet and confer impediment because we see enough stonewalling already, and this addition would enable parties to delay things even longer. Under no circumstances should the topics be limited numerically.

Joseph Fried (451): Because this amendment will make things worse, I must strongly oppose the amendment and the efforts to suggest even further limitations (e.g., arbitrary limitation on the number of requests).

Charles Murray (452): The meet and confer provision is important and worthwhile. Our experience is that it works. If the rule is changed to give corporate counsel more power to reduce the ability to use this tool, the corporate parties will have the upper hand in litigation.

Richard Hricik (453): The proposed amendment, as written, is a reasonable and sensible change. Arbitrarily limiting the number of topics would create needless obstacles.

Ingrid Evans (454): I represent elderly patients against nursing home corporations. We need this rule to work. Efficiency is served when the parties are transparent about identifying the witness and the topics to be covered in advance.

John Hickey (455): LIMITATIONS ON THE NUMBER OF DESIGNATIONS ARE A BAD IDEA.

Derek Larwick (456): Changing 30(b)(6) to limit the number of topics is ridiculous. This is just one more attempt by corporate defendants to avoid having to produce evidence.

Steven Goldberg (457): I oppose the onerous meet and confer requirement, as it is just another impediment to conducting discovery and another way corporate parties can delay depositions. Under no circumstances should the number of topics be limited.

Mike Milligan (458): The Committee should be mindful of the adverse effect upon small businesses that will result from the proposed limit on the number of topics.

John Harris (459): "I do not support limitations on their use, as the Judges already have the ability to control the number and scope of inquiry to those that are relevant to the issues of the case."

J. Antonio Tramontana (460): I oppose the proposed changes. They will enable corporations to "hide the ball."

Ralph Blasier (461): "The proposed amendment seem to impede plaintiffs' discovery in favor of defendants. Why do this?"

Matthew Saint (462): I support the proposed changes as written and oppose any presumptive limits on topics.

Timothy Hummel (463): I strongly oppose the proposed amendment. It offers nothing of value to increase the efficiency or fairness of the litigation process. Meet and confer is already a requirement before presenting a discovery dispute to the court. Putting arbitrary limits on the number of topics would be even worse.

Grant Kuvin (464): I oppose any changes to 30(b)(6). The proposed changes will only

increase the amount and cost of litigation and require multiple depositions. Creating more hurdles and red tape is a bad idea.

Sergio Rufo (465): This rule is the last tool for fending off obstructionist corporate defendants and their counsel. The mandatory meet and confer requirement would only benefit the defense by delaying the process.

Magali Sunderland (466): As currently written, the rule is neutral. To limit it in any way, even by adding a meet and confer, would largely favor only business interests and marginalize an individual's access to justice. The rule should not be amended. It should be implemented as written.

Shelly Greco (467): I concur with adding a conference on who will serve as corporate representative on each topic. I oppose any limitation on the number of topics.

Walt Auvil (448): I write to support the draft changes and to oppose suggestions that a numerical cap be placed on the number of topics. This rule is the most effective tool in the civil procedure tool kit, which allows parties to eliminate areas of controversy early in the litigation and focus discovery only on the areas that are disputed.

Robert Roe (469): I support the proposed rule change. Both sides in litigation benefit when the witness is knowledgeable and qualified to discuss the matters relevant to the case. Limits on the number of topics are unnecessary.

Beverly Carson (470): Amending this rule to limit the number of topics will result in undue delay and greater cost.

Mark Millen (471): These proposed changes are terrible. This will create satellite litigation around entity depositions. The defense bar is attempting to create more and more obstacles to basic discovery. The changes will allow corporations to play even more games in discovery.

Raymond Mullman (472): I am against the proposed changes, particularly limiting the number of topics. Corporations will claim every notice is vague and overly broad. Then, when given greater specificity, they will claim the numerical limit has been exceeded. Providing more detail in the notice gives the organization greater clarity for what needs to be prepared.

Nicholas Maxwell (474): I support the proposed rule changes as written and reject the notion that additional revision to the rule is necessary. The rule is now fair and balanced. There should be no limitation on the number of topics.

Pressley Henningsen (475): A rule that requires to talk through their disagreements before engaging the court makes sense in today's electronic age. But limiting the number of topics makes no sense.

Anthony Ellis (476): Meet and confer requirements, like the one in this amendment, are a good step towards managing this process. From the plaintiff's side, we often find it impossible to draft topics in a manner that is narrowly tailored without having access to some information about the organization. Good faith conferring can bridge this gap, to the advantage of both sides. However, any effort to limit the number of topics would ignore the complex realities of modern litigation.

Jed Nolan (477): What started as a good proposal to meet and confer about the notice has the potential of limiting access to relevant information and becoming a new cottage industry in

litigation. Imposing numerical limits on notices will invite corporations to object to every notice as overbroad.

Krzysztof Sobczak (479): I support the proposed changes as written and would make it even stronger, with presumptive sanctions to be issued if the deponent fails to appear prepared after having engaged in the conference. I oppose any other changes that would impose artificial or presumptive limits on the number of topics.

Jason DePauw (480): I see no need to change this rule. If there is a dispute about the number of scope of the items in the notice, the parties must meet and confer before a motion proceeding. These changes appear to create a new limit on the number of matters of inquiry and limit the scope of the matters of inquiry. But because the language is so vague, it is unclear what the limit is and it is likely that a court will read the language to impose a new artificial limit on the number of matters of inquiry. The requirement to confer about the identity of the person to be designated appears to change the requirement that the corporation must identify the person from mandatory to permissive. This is unacceptable because the deposing party must know the designee's identity in order to adequately prepare for the deposition and cut out needless background matters of inquiry.

Chase Brockstedt (481): I support this proposed rule change as written and oppose any other changes, especially those that would place artificial presumptive limitations on topics.

Kenneth LaBore (483): Corporations try to hide and obfuscate. A meet and confer requirement is welcome. But any arbitrary limit on the number of topics would impede needed discovery.

Todd Bialous (484): Limiting the number of topics in a 30(b)(6) deposition is impractical and can lead to obstructive abuses.

Andrew Horowitz (485): I support the proposed amendment as written and oppose other changes to this rule, especially any that would impose artificial presumptive limits on the number of topics or enable corporate deponents to hid the identity of their deponents until the day of the deposition.

Corey Walker (486): Imposing a limit on the number of topics would further allow corporations to dodge discovery. They could force plaintiffs to take several depositions to find out what now can be learned in a corporate deposition. Corporations do not have to limit the number of topics they can pursue in depositions of plaintiffs.

Russell Guest (487): I support the proposed amendments as drafted. The obligation to confer is of great significance when obstructionism is often the strategy. Naming the designee is clearly helpful in reducing the confusing of what designee will ultimately testify.

Conrad Meis (485): If the rule could be changed to effectively limit the number of issue created by a party to a suit, then it might make sense to similarly limit the number of topics subject to discovery. We can't, and it doesn't.

Robert Bruner (489): The amendment codifies the existing practice of good attorneys on both sides. Adding limitations on topics or areas as suggested by some will further close the door of the courthouse to individuals.

Andrew Delaney (490): Limits on the number of subjects are not supported by practice nor necessary. There are no such limitations for individual depositions.

Dustin Bergman (491): I oppose these amendments. This is an unnecessary change that will undoubtedly lead to additional discovery disputes and further delay.

Brendan Faulkner (492): “Rule 30(b)(6) is the great equalizer. It would be a travesty if it were limited or watered down as has been proposed. A trial is supposed to be a search for the truth, and should be decided by what facts are revealed, not which facts are concealed.”

Kent Winingham (493): It is critical that 30(b)(6) be maintained to serve the purpose it so efficiently serves -- allowing clarity in notices so that an appropriate designee may be identified. Limiting the number of topics will limit the ability to use the rule.

Robert Curran (494): I oppose the proposed rule change. It is impossible to determine a reasonable limit on every type of suit in a vacuum. Any such predetermined number would be an injustice in some cases. There is no need for an artificial limit on the number of topics.

Thomas Dillon (495): Limiting topics in 30(b)(6) depositions would result in a significant advantage to defendants and make litigation less fair to plaintiffs.

Ashley Hadler (496): I support the proposed rule change as written but adamantly oppose any further limitation on the scope or number of topics.

David O’Brien (497): I support the proposed meet and confer requirement, but oppose any change limiting the number of topics.

Sean Stokes (498): 30(b)(6) depositions are vital to the search for the truth. Cases calling for such practice are often complex. An arbitrary limit of the number of topics would unnecessarily hinder the ability of litigants to get to the core issues in a given case.

Kyle Kosleracki (499): While 30(b)(6) as now written is not broken, I find the proposed rule quite balanced, and believe that the identification of witnesses could streamline the process further. I oppose, however, any presumptive limit on the number of topics.

Chandrika Srinivasan (500): I support the proposed amendments as written. However, I oppose any presumptive limitation on the number of topics.

Requiring a conference about the number
and description of the matters for examination

Washington, DC Hearing

Keith Altman: The meet and confer idea is important. People are often wrong about what the other side actually wants. 30(b)(6) is a basic tool, and I need to use it to find out how the company is organized. If there has been an increase in the use of 30(b)(6) depositions, one reason for the last decade has been the impact of Twombly and Iqbal. Setting a numerical limit on topics is not a good idea. Any number would disregard some cases. The fact that there is a numerical limit for interrogatories is not significant. There's a big difference between interrogatories and these sorts of depositions. Setting the number at 10 would definitely limit me. A key problem is that some people are not reasonable. The right way to do this is to start thinking about it at the 26(f) conference.

Leslie Barnes (testimony and no.187): I think this amendment codifies best practices. I handle class actions in which often my clients are businesses, so I am on both sides of the 30(b)(6) depositions. We on the plaintiff side do not want to waste time in discovery. We try to tailor our topics to what we need, but that can mean that there are more of them than somebody who was vaguer would have. And counting them can be a difficulty. For example, a recent case had 26 topics, but one could say that because there were sub-topics there were really 49. The number of topics depends on the case.

Paul Bland (Public Justice) (testimony and no. 172): The duty to confer about the number of topics should be removed. Conferring about the substance of the topics, not the *number* of topics, is what should be required. Imposing a duty to confer about the number of topics suggests that the parties have to agree to a set number, somehow separate from what the topics are. That will generate disputes about how to count the topics as well as inviting broad topic definitions. Moreover, during a 30(b)(6) deposition, a party may learn about another topic that it needs to ask questions about. We worry, however, that organizations may employ the conference process as a delaying tactic. We think the Committee Note should clarify that the duty can be satisfied in some cases with a single conference or a series of discussions, and confirm that the duty to confer is not an excuse to slow down the discovery process and take more time to respond to a 30(b)(6) deposition notice.

Edward Blizzard (testimony and no. 179): I support disclosure of the identity of the witness. Conferring about that is not important to me in my plaintiff practice. Giving notice seven days before the deposition would be reasonable.

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and no. 190): Limiting the number of topics to be covered in a deposition would be unfair and lead to inefficiencies. But requiring 30 days notice of the deposition would not ordinarily be a problem.

Susannah Chester-Schindler (testimony and no. 186): The Committee Note about identifying the documents to be used during the deposition seems superfluous. The vast majority of attorneys on both sides bring courtesy copies of all documents to the deposition. A preliminary production seems unnecessary, and could be somewhat burdensome on smaller firms whose attorneys have limited "bandwidth," as it were. In general, the meet and confer requirement is in keeping with the rules. The 26(f) meeting is the time to create a framework for addressing issues as they arise in the case. But at that stage in the litigation it is rare to be able to get into the substantive issues involved because it's too early. To illustrate, we may need to start with a 30(b)(6) deposition regarding the defendant's information setup. Only after that can we frame further discovery, and that further discovery may show that we need a 30(b)(6) on other topics.

William Conroy: My overall experience with 30(b)(6) depositions in defense of catastrophic injury cases is positive. But sometimes things come off the tracks. Conferral is good. I want to avoid discovery motions.

Jennifer Klar (testimony and no. 175): In my plaintiff-side practice, what this rule requires is what we already do. I have conference with opposing counsel, and have often clarified topics, edited topics, or removed topics. These discussions also often lead to agreements to address different topics on different days.

Mark Kozieradski (testimony and no. 192): I oppose adding this requirement to the rules because the defense will use it as an occasion to delay discovery. “It creates an unwarranted presumption that the notice’s requests are defective, [which will] incentivize the responding entity and its attorney to treat valid matters for examination” as a focus for “transactional negotiation.” “Everything will be subjected to compromise. I am very concerned about anything that suggests that the number of topics is somehow to be limited.”

Chad Lieberman (testimony and no. 178): Lawyers always confer about the scope and timing of the 30(b)(6) deposition. But what is missing is more about how the matters to be discussed should be handled during this conference. Provisions regarding the notice required, etc., would be valuable. Rule 37 does not provide a suitable alternative; although it does have a meet and confer requirement, that requirement arises in a different context and has an overtone of discovery violations. Similarly, issues about the preparation of the witness are invariably post-deposition matters. “I have never encountered an issue regarding the adequacy of a 30(b)(6) witness’s preparation.”

Tobias Milrood (AAJ) (testimony and no. 185): AAJ opposes any proposal for a presumptive limit on the number of topics. The words “number and” should be removed from the rule’s directive that the parties confer. Having such a provision in the rule will lead to broad designations and multiple 30(b)(6) depositions. It may be that requiring a conference about the topics will provide a foundation for motions for sanctions when the witness is not prepared to address the topics. Otherwise, the company might be able to say “We did not know what the plaintiff wanted.”

Terry O’Neill (National Employment Lawyers Assoc.) (testimony and no. 144): Experienced counsel already confer about the topics to be covered when that is needed, but adding this to the rule is a good idea because making it an explicit requirement will ultimately reduce disputes and promote efficiency. In our experience, the “horror story” of a 100-topic deposition notice are a very rare exception. We have rarely encountered disputes about the number of topics listed. Imposition of a bright-line rule about number would only encourage counsel to make each topic broader.

Michael Neff (testimony and no. 184): I am opposed to any required conferral. There should be no limit on the number of topics. If necessary, topics problems can be worked out without a rule.

Bruce Parker (testimony and no. 145): As a practical matter, counsel currently confer on the matters for examination. Consequently, aside from generating more expense to a process that is already too expensive, current practice will not materially change under a mandate to meet and confer on this issue.

Jonathan Redgrave: Conferring about the topics is a good thing. But when there is a dispute, you need judicial input. So the rule should go further and provide a vehicle for that input.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): The meet and confer requirement duplicates existing federal dispute resolution mechanisms and provides no useful resolution process or remedy for the kinds of disputes that arise regarding 30(b)(6) depositions. The real difficulty is that the district courts disagree about how one is to present the court with issues that arise; some insist that the corporation file a motion for a protective order, while others require that the deposition go forward and then entertain motions to compel.

Greg Schuck: We do confer on the topics. The best way to do that is before the notice even goes out.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): This amendment will not produce meaningful change. This is already common practice. Ford voluntarily engages in such conferences, and also recognizes that many district courts direct that the parties must meet and confer before a 30(b)(6) dispute will become ripe for court attention. So adopting this requirement will not change or improve practice. There may be a small body of practitioners who do not know about these practices, but that small number do not make this addition to the rule worthwhile.

Patrick Seyferth (testimony and no. 182): I oppose the requirement to confer about the topics “in good faith.” True, that is sometimes done now, but this amendment will therefore affect only the cases in which it would not happen under the current rule. Requiring a meet and confer when it would not occur promotes disputes. If we are to be required to meet and confer, the rule should also provide a “mechanized” approach for bringing disagreements before the court.

Donald Slavik (testimony and no. 146): My standard practice is to confer in advance about the topics for examination. I would rather know up front what subjects I’ve listed that the producing party objects to, or if the party cannot provide a witness who has knowledge that is relevant. If there is a disagreement about the subjects for the deposition, I’d rather bring it to the attention of the judge before taking testimony so that we can prevent having to bring it up afterwards. I’ve had the experience of a witness declining to respond on a subject contained in the notice, with no forewarning by opposing counsel, resulting in the need for another deposition. The amendment should ensure that the parties are jointly responsible for communicating with each other in advance to avoid such problems. But a focus on the “number” of topics is fraught with problems. That really depends on the nature of the case. Every case is different. “I’ve had first-hand experience in this with automobile mass tort and class action litigation. Limiting or negotiating how many areas that can be asked about in deposition will lead to more, not fewer, discovery motions brought before the Court.”

Andrew Trask (testimony and no. 176): When we receive a 30(b)(6) notice I call opposing counsel and try to work things out. I describe what we can provide. In about 80% of the cases, that resolves things. After that is resolved, we decide who the witness or witnesses will be.

Palmer Vance (on behalf of around 20 past and present leaders of the ABA Section of Litigation, submitting views as individuals): The current proposal is an improvement. But it would be more of an improvement if it included a dispute resolution mechanism. For that reason, we think that the rule should say that if the parties cannot agree they are encouraged to seek a judicial resolution. Perhaps “encouraged” would be an odd word to use in a rule; perhaps the idea could be added to the Committee Note. Another idea worth considering would be to say in the rule that every seven hours of 30(b)(6) deposition could count as one deposition toward the limit of ten.

Christine Webber: The right time for the conference the proposed amendment seeks is when the amendment directs. Saying that this must be addressed at the 26(f) conference won't work.

Hassan Zavareei (testimony and no. 191): The requirement that the parties confer on the number of topics for the deposition will unnecessarily create conflict. The number should not be an abstract quantity, but depend on the specifics of the case. The right thing to talk about is the specific topics, not an abstract number. When there really are too many topics, defense counsel will make motions. And that leads to a conference under Rule 37(a).

Terrence Zic (testimony and no. 147): Typically we see 30 to 100 matters in the notice. Recently I got a notice with 177 matters listed. On that one we are still in the meet and confer process. In another case in Baltimore, at the end of the discovery period we got a 30(b)(6) notice with hundreds of items that went way beyond the products involved in the case. Yes, we do meet and confer regarding scope of the topics, but that can lead to an impasse.

Phoenix Hearing

John Griffin (testimony and written statement): I think advance communication about the topics to be covered is useful. I want to know in advance of the deposition if my opponent has concerns about the topics listed in the notice. Whether it is useful to include the number of topics in this discussion is not so clear. That is more granulated than the designation of the topics to be covered, and could invite bandying over something that would not otherwise provoke a fight.

Sandra Ezell: Representing corporate clients, I have handled hundreds of 30(b)(6) depositions. I support the concept of requiring advance discussion of the matters for examination. It would be valuable to have the documents that will be used during the deposition identified.

William Rossbach (testimony and written statement): This amendment attempts to find a solution to the one real problem with these depositions -- underprepared or unprepared witnesses. I recognize that lawyers often criticize meet and confer requirements. In my experience, the problem is not with the need to meet and confer, but with the lack of real diligence and good faith on the part of some counsel to make a meaningful effort to resolve any disputes. I think it would be good to add, either in the rule or the Note, that there could be a written report to the court when the meet and confer process did not resolve all differences, so that the court could then become involved.

Patrick Fowler: Having a conference in advance about the topics is a good idea. Particularly if there are a lot of topics, I usually do that. Even if the rule does not require discussion also of the identity of the witness, it will probably be important that the conference be iterative.

Bradley Peterson (testimony and no. 138): Meeting and conferring has long been a best practice that I advocate and follow when trying to understand the scope of the notice. I have seen notices that list as many as 149 separate topics. It is not unusual in "ordinary" cases to see a list of 20 to 60 topics. This is too much. If the company must proceed in the face of such notices, it must at least have unfettered latitude in selecting the person to represent it in the deposition.

Bina Ghanaat: The solution to unprepared witnesses is to ensure early discussion of the topics to be covered. It should be included in Rule 26(f) and Rule 16.

Phillip Willman (DRI): The amendment is laudable in requiring good faith conferring about the topic list.

A.J. de Bartolomeo (testimony and written statement): The rule should say that the conference ought to include the “number of” matters for examination. What the parties should be focused on is the description of the matters. Focusing instead on how many there are is not helpful. And mentioning it in the rule could give undue importance to this issue. In any event, it would be easy to manipulate the number of topics, encouraging the use of broad rather than rifle-shot topics.

Francis McDonald: I am not concerned about the meet and confer requirement. We do that already, with regard to the topics.

Michael Denton: Proportionality is the way to deal with the 140 topic notice. Sometimes plaintiff attorneys don’t know what to list in advance. And given the number of corporate transitions and takeovers, sometimes involving new names, a conference would be a valuable way to clear the air.

Written comments

Kenneth Reilly (126): There should be transparency and fairness in practice under Rule 30(b)(6). Certain benefits may result from the proposal that the parties be required to confer in good faith before the deposition occurs. The portion of the draft amendment that calls for conferring about the number and description of the matters for examination is progressive and may be widely supported by corporate litigants. Requiring the noticing party to identify topics for examination in a meet and confer in advance of the deposition will greatly streamline the process for corporate litigants to identify the most qualified witness. It will also help thwart needless and costly litigation about the number of topics for examination.

American Tort Reform Assoc. (128): The idea of requiring the parties to meet and confer in “good faith” when a party seeks to depose a corporation is a good one. It has the potential to avoid unnecessary burdens and reduce the difficulty of identifying the right person to testify. But (as set forth below) we strongly disagree with the requirement that the identity of the person to testify.

Richard Broussard (143): To avoid confusion, the mandated conference should take place after the notice or subpoena is served. That does not prevent pre-notice conferences, but where conferences are mandated there should be an objective document about which to confer. In addition, a more specific directive should be provided about when to confer, such as a number of days prior to the production of the witness or a number of days after the notice is served. This will reduce dilatory tactics.

Jonathan Hoffman (168): I cannot recall an occasion in the last 30 years in which a party noticed a deposition without first calling, emailing, or sending a letter proposing depositions and possible dates. If there is to be a required conferral process, it should be the same for all forms of discovery. And if conferring is required, why not include the other parties, not only the noticed company and the noticing party?

Brooks Kushman (171): Our firm is the largest intellectual property law firm in the state of Michigan. It has procured over 15,000 patents over the last 35 years. We oppose this proposal because it will undermine widespread efforts to control litigation costs for defendants in patent cases. Patent litigation is extremely expensive. As a consequence, many district courts have patent local rules that defer discovery until plaintiff regarding specifics of its claim. Only with this information can the infringement claim be evaluated, and only with this information can

the defendant determine how to respond to a 30(b)(6) deposition. But the rules permit plaintiff to serve a 30(b)(6) deposition notice as soon as the 26(f) conference has concluded. As the Advisory Committee has already recognized, the 26(f) conference usually happens too early in the litigation for there to be an effective discussion of 30(b)(6) depositions. Upsetting the carefully-designed sequence of litigation under the local patent rules of many districts is undesirable.

Federal Civil Procedure Section Council of the Illinois State Bar (193): We think that any agreements reached through the conference should be disclosed to all other parties to the litigation. In addition, we think that a time limit be added to the rule change, somewhat as follows:

Before or promptly after the notice or subpoena is served, but no later than [X] days prior to the date set for the deposition, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination.

Sam Cannon (195): The proposed requirement that the parties meet and confer regarding the matters for examination is a fine addition to the rule. Most experienced litigators already do this. My practice is to send a draft notice to opposing counsel and then discuss any modifications that need to be made. Once we have an agreement, we serve the notice formally. On the other hand, limiting the number of topics would be counterproductive. The conference process works best when the topics are as narrow as possible. Any limit on the number of topics will lead to broader topic descriptions.

Andrew Lucchetti (197): The conference requirement should call for early contact; otherwise attorneys may use it to delay matters. A numerical limitation on topics will prompt attorneys to use broader descriptions. The rule already requires reasonable particularity.

Dan Mordarski (198): I oppose any limitation on the number of topics. Rule 26 already directs that discovery be proportional. Given that, it would be inappropriate to place an arbitrary limit in Rule 30. In many cases, multiple 30(b)(6) depositions are required.

Mark Napier (201): This rule can be very useful, but a limit in the rule on the number of topics would be harmful.

John Hickey (202): I represent plaintiffs in personal injury cases. Placing a limit on the number of topics in the rule would be a bad idea. Corporate entities often complain that the designations are too broad and general. In order to avoid a broad and general designation of topics, and instead to be specific and narrow, one needs to list more topics.

Jonathan Feigenbaum (no. 204): When I notice a 30(b)(6) deposition, I confer with the recipient's attorney. We can work through issues that the recipient sometimes raises. I often take an early 30(b)(6) deposition about electronic storage systems. I find that organizations often proffer an underprepared deponent who can't answer my questions.

Mark Boyle (216): My firm tries to meet and confer about potential 30(b)(6) depositions during the parties' Rule 26(f) conference, or in an early Rule 16 pretrial conference. That allows for these issues to be considered early in the case and permits input and direction from the court. This approach allows the parties to establish appropriate expectations. But sometimes our adversaries are not willing to engage in this early planning. We often find that in those cases we encounter notices that include a burdensome number of topics or seek to duplicate topics already covered in depositions of individual witnesses. What we need is a clear mechanism for addressing faulty notices and obtaining a court ruling on them. This should be accompanied by

an express numerical limit on topics.

Jessica Ibert (226): In my practice, I typically meet and confer with opposing counsel when drafting a 30(b)(6) notice before it is finalized and served. This amendment would codify professional behavior that is already taking place, and perhaps make difficult cases easier to manage. I think it's best to have this conference before the notice is served.

Joseph Hunt (Department of Justice) (646): DOJ believes that the new mandatory meet and confer requirement is unnecessary given that Rule 26(c) and 37 already impose a meet and confer requirement before bringing a dispute concerning a Rule 30(b)(6) deposition to court. It is not apparent how imposing an additional meet and confer requirement would be beneficial. Moreover, there is no indication what are the consequences of failure to meet and confer. The proposed amendment would likely lead to additional collateral litigation.

Requiring a conference about the identity of
the person designated to testify

Washington, DC Hearing

Keith Altman: The identity of the witness is very important. It may be that this person has been deposed many times before. That's valuable information and it can also make the current deposition more efficient. It is very unusual for the company to designate somebody who independently has information about the topics listed, however.

Leslie Barnes (testimony and no. 187): When I am representing the company, I always disclose the identity of the witness. Sometimes the other side won't when I'm taking the deposition, however. That does not mean that I am keen on conferring about it; I don't get a say in who the other side designates. It can happen, however, that I will call up opposing counsel and ask why this witness was selected. For example, if the witness is mentioned in only 13 documents among the two million produced I am concerned.

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): Our members say that disclosing the identity of the person designated in advance will enable plaintiff attorneys to weaponize the rule. Disclosure of the identity of the person will not, however, solve alleged problems of poor preparation of witnesses. That is dependent on preparation, not on the identity of the witness. Although the Committee Note clarifies that the amendment is not meant to undercut the organization's right to choose its representative, even requiring conferral about the identity of the person is problematic. Instead of promoting cooperation, this proposal will lead to disagreements and increase litigation costs. Some plaintiff counsel will actually try to block the choice of witnesses known to be effective representatives of the organization, in hopes that weaker alternative witnesses will have to be used instead. And a substitute requirement that the organization identify the person selected in advance (without any requirement that it confer about that choice) is also problematic. That would be an improvement over the current proposed requirement of good faith conferring about the choice, for it would not suggest that the noticing party has a legitimate role in making that choice. But it would create its own set of problems. For one thing, some plaintiff counsel could "weaponize" the rule by conducting social media research to question the witness about his or her background and engage in personal attacks. Except for very basic background information, such inquiry is not appropriate in a 30(b)(6) deposition. "What comes next: the resume, CV, an attempt to learn the rationale as to why the person was selected?" There is good case law saying that the name of the witness is irrelevant because the organization is the actual witness. Requiring advance identification could shift the focus of the deposition to the individual rather than the organization. Moreover, if the organization has to switch witnesses for some reason, that switch could generate new discovery fights. "We appreciate that many defendants do identify their client's spokesperson in advance of a deposition. Our concern is with a rigid 'one size fits all' requirement. The decision to disclose the identity of the witness may depend on whether a particular plaintiffs' counsel has a reputation for cooperation or gamesmanship. The timing of any disclosure may vary for practical reasons."

Richard Benenson: Instructing the parties to confer about the identity of the witness will create more problems than it will solve. It is presently well understood that the noticing party has no say in the selection of the witness. Indeed, that's the only area regarding 30(b)(6) depositions in which I have never encountered disputes from the defense side. I have seen a barrage of personal questions result when the identity is disclosed in advance. Opposing counsel will work the database and find all documents mentioning the witness, whether or not they have anything to do with the listed topics.

Paul Bland (Public Justice) (testimony and no. 172): The duty to confer about the identity of the witness should stay in the rule. Under current practice, parties that receive a 30(b)(6) notice generally inform the noticing party about the identity of the witness. This common practice should be codified in the rule because it helps ensure the organization is choosing an appropriate witness. With this requirement, the parties can work together to ensure the organization provides a well-prepared witness.

Megan Cacace: Knowing in advance who the organization intends to designate to testify helps identify misunderstandings about what we are trying to learn. For example, suppose our objective is to do an early 30(b)(6) deposition to learn about the defendant's information systems. This is a way we can tailor our further discovery to avoid unnecessary burdens on the defendant. But for that purpose, we need to talk to a person familiar with the defendant's information systems. If we learn that the defendant intends instead to designate the regional manager of HR, we need to clarify what we're after. Making these things clear in the conference does not imply that we have some sort of "veto" over the organization's choice of a designee. But an important opportunity to avoid later complications is lost if we don't have a chance to clear things up before the deposition begins. In addition, when we know who will be testifying we can tailor our questioning to examples that bear on the experience of this person. Furthermore, advance notice serves efficiency interests when it turns out we will also want to do an individual deposition of the designated person; that enables us to "double up" and accomplish two objectives at once.

Sharon Caffrey (Duane Morris) (testimony and no. 203): This requirement should not be adopted. To the extent the amendment is intended to change the existing rule that the organization has the right to pick its representative, the amendment is grossly unfair. To the extent it leaves the organization's right intact, it makes no sense to require that the organization confer about something that is subject to its sole discretion. For example, in one recent product liability case plaintiffs sought to pierce the corporate veil. The corporation selected a corporate officer and in-house counsel to testify. Allowing plaintiff's counsel to press for a particular deponent, say a mid-level plant manager, would have made it impossible to prepare the witness adequately. Understanding the intricacies of the corporate structure and form of a multi-national corporation is outside the understanding of most lay witnesses. A recent deposition regarding a Rule 12(b)(2) personal jurisdiction motion illustrates the problems. We met with plaintiff's counsel before the deposition and he agreed not to ask about anything except the issues raised by our motion to dismiss. But as soon as the deposition started, the lawyer launched into unrelated topics. What we need is meaningful guidance about how to present these sorts of problems to the court. They can arise in ordinary depositions, but they are particularly difficult in 30(b)(6) depositions. In a regular deposition, the witness speaks from personal knowledge. In this sort of deposition, that's not enough. The problem is that, in cases like the recent personal jurisdiction deposition, we don't get an order implementing our agreement. And we can't readily instruct the witness not to answer questions that go beyond the topic list.

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and nos. 190 and 206): Disclosing the identity of the designated witness in advance of the deposition promotes efficiency and is consistent with the spirit of the rules. I have heard objections to the idea, but no good reason for refusing to identify the person in advance. With corporate websites, we can be much better aware of the role of this person in the organization and streamline the deposition. That could often save an hour of blind inductive questioning during a deposition. Conferring about the identity of the person is not as important as knowing who will appear in advance. Sometimes this can lead to a "hybrid" deposition, in which the person testifies in part on behalf of the corporation regarding the topics in the notice, and also testifies as an individual about matters within the witness's personal knowledge. It may be that this "individual" testimony will be admissible against the corporation over a hearsay objection if the subject matter is within the witness's scope of employment (see Fed. R. Evid. 801(d)(2)(D)), but that is not certain.

Susannah Chester-Schindler (testimony and no. 186): Knowing the identity of the witness is critical in conducting an efficient deposition. This is true in all types of cases. I usually get the identity of the witness as a result of the meet and confer about the 30(b)(6) deposition.

William Conroy: I do not identify the witness. I have had bad experiences and found that it leads to lots of mischief. I find that there is no clear line between testimony about the listed topics and other things that the witness may also know about. When the witness has already been deposed as a 30(b)(6) representative of the company, sometimes I will disclose that. Sometimes that can avoid the need for another deposition altogether. But I worry about other situations and a rule directive. It's not invariably a cause of mischief, but it can be.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): The radical mandate to confer about witness selection would upset well-settled law and spark contentious discovery battles for the courts to decide. The case law is now clear that the choice of the witness rests exclusively with the organization. Whether or not the Committee so intended, this amendment would inevitably be seen as an invitation to break with this well-settled law and require instead that there be a give-and-take exchange about who would testify. The Committee Note qualifies the entity's right with the qualifier "ultimately" and further invites this interpretation. The collateral litigation about this question will impose costs on the parties and the courts.

Philippa Ellis (testimony and no. 359): I oppose the provision about identity of the witness. The selection of the witness is difficult. The deposition can be an ordeal for the witness. I had one person actually quit the company to escape the obligation to testify as its 30(b)(6) witness. The number or identity of designated witnesses can also change up to the day of the deposition. The current rule works for addressing these challenges. What we need are 30 days' notice of the deposition so we can go about picking the person or persons in an orderly manner. Rather than providing that, these amendments call for prompt consultation with the other side, and thereby threaten to usurp the organization's right to pick its own representative. I'm not in favor of a requirement to identify the witness before the deposition. If I have to change the person, do we need to meet and confer again? Perhaps the rule should say "encourage" meeting and conferring rather than saying that the parties "must" confer.

John Guttman (testimony and no. 173): Meet and confer requirements are a good thing, particularly in regard to discovery. They frequently narrow and eliminate disputes. In this instance, however, a mandatory conference would have exactly the opposite effect. The party producing the witness is bound by that witness's testimony in a way that is not true of any other witness. "In every case, each party noticing a 30(b)(6) deposition would want the producing party to put forth witnesses who would offer testimony that helps the noticing party." Inevitably, this will lead to situations in which the noticing party will claim that the noticed party has not conferred in a meaningful way because it has not agreed to pick the person the noticing party wants.

Jill Jacobson (Husqvarna Prof. Prods, Inc.): Identifying the witness is superfluous. Providing that in advance leads to conflating the 30(b)(6) deposition with 30(b)(1) deposition issues. Providing the witness's identity in advance will be harmful because it will shift focus to the individual from the company. Even if there are multiple designees addressing different topics in the notice, the identity of each one and advance notice about which topics each will address is irrelevant.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): Though the requirement to discuss the topics is desirable, the requirement to discuss the identity of the witness is not. This is a new and unwarranted duty for the organization. Imposing it in every case is unwise. Once the scope of the actual subjects is known (due to the conference) the duty

to designate the right person is usually easily met and seldom of concern. After all, the designation is about the organization's knowledge, not the personal knowledge of the person designated. Compelling the organization to confer in good faith about the identity implies that the noticing party has some legitimate role in the selection of that person, which contradicts the rule's clear recognition that this is the organization's call. If the noticing party wants testimony from a specific person, it can notice a deposition of that person, but that is not a 30(b)(6) organizational deposition. Under the current rule, I sometimes disclose the identity of the witness in advance. That is a strategic choice. But I have found that doing so too often changes the scope of the deposition, which goes beyond the topic list for which we were preparing the witness. What we need is a comprehensive framework for resolving issues in regard to these depositions.

Jessica Kennedy (McDonald Toole Wiggins) (testimony and no. 133): It is settled law that the organization has sole responsibility for selecting the witness who will testify on its behalf. Shifting to a "shared responsibility" regime removes the clarity of established law and will expand collateral litigation. The Committee Note says that making this change will facilitate "identifying the right person to testify," implying that this decision no longer rests with entirely with the organization.

Sterling Kidd: I oppose a requirement that the company identify the witness in advance. Requiring the company to confer about who will speak for it is not just. The fact that the Committee Note says the company has the right to chose whoever it wants will not prevent the use of this requirement as a way of giving the noticing party a say in that choice. Practitioners do not read the Committee Notes, so they won't make a difference. Even telling the other side who will testify in advance implies that the other side gets a say in who that will be. Then the other side can made a motion for relief from the court to require the company to pick the person the noticing party wants designated. Moreover, with a small company it may be difficult or impossible to make a call until right before the deposition. Even two days before the deposition it still may be uncertain who will testify. My biggest concern is that plaintiff's counsel will do research on the individual and turn this into an individual deposition.

Mark Kozieradski (testimony and no. 192): I support a requirement that the organization disclose the identity of each person designated to testify. Knowing when an institution will produce multiple designees improves the organization of the questioning. Knowing who will testify about which topics enables the examiner to prepare and organize the documents and categories of questions into an efficient outline.

Craig Leslie: When I was a younger lawyer, I would identify the witness in advance. But I have seen a parade of horrors, such as inquiry into the witness's personal finances. In mass torts, when the witness has previously testified as a 30(b)(6) witness, I may share the transcript of the prior testimony with plaintiff counsel.

Chad Lieberman (testimony and no. 178): I find the identity of the corporate witness to be irrelevant because the witness is the company. But if the conference requirement means give and take, that implicitly chips away at the right of the organization to pick the witness.

Altom Maglio (testimony and no. 183): I represent individuals who often sue corporations. A recurrent problem for some is to show that the person "speaking for" the corporation can bind the corporation. "The only time when it is unequivocal that an employee is speaking on behalf of the corporation is with a 30(b)(6) deposition. Therefore, 30(b)(6) depositions are extremely important to obtaining justice in any litigation involving corporations." One of the most common problems I have encountered is that the designated person cannot or won't speak for the corporation, even on noticed topics. "Codifying in the rule the standard practice of identifying the designated witness in advance helps alert the noticing party when a

problematic representative selection is made and makes the meet and confer process more fruitful.”

Brad Marsh: This amendment will inject uncertainty about whether the organization has a free choice who is to represent it at the deposition. Presently the identity of the witness is never a matter of dispute, but this amendment will make it a new focus of dispute. Choosing the right person is a tough job for the defendant, and giving the plaintiff a say in that choice simply makes it tougher without producing good results. I do usually provide the name of the witness two or three days before the deposition. But what if the witness gets ill? Then changing the witness will produce more problems. Note language recognizing that the organization can change designees when necessary due to such developments will not solve the problems.

Tobias Milrood (AAJ) (testimony and no. 185): A fair and balanced rule must include attention to the identity of the witness who will be testifying. At least, that should provide for advance notice on the identity of the witness. This will ensure that the witness is properly prepared to testify on the designated topics. Retaining a provision regarding the identity of the witness is essential to avoid unfair treatment of plaintiffs, as compared with defendants. Without this provision, the amendment creates new burdens for plaintiffs while allowing corporations to further control litigation and the pretrial discovery process.

Michael Neff (testimony and no. 184): As a plaintiff lawyer, I see no reason to add a meeting regarding the identity of the witnesses. Instead, just require the defendant to identify the witnesses at least two weeks before the deposition. Requiring disclosure of the identity of the witnesses is important to give time for the plaintiff’s lawyer to do adequate preparation. I know that some defense counsel object this will lead to investigation of social media information about the witness. So what? The defense always does that with regard to the plaintiff. I also noted that Bradley Peterson, a witness in the Phoenix hearing, said that in selecting a witness for his corporate clients, he would focus on the witness’s qualifications, personal knowledge and experience, and prior experience testifying. Well, that’s important to me also in getting ready for the deposition. I should be able to do my own homework.

Michael Nelson (testimony and no. 164): Requiring advance notice by the corporation of its designee or conferring about that will not deal with the problems under the rule or avoid disputes. Instead, it will add another layer of potential disputes. If the witness is not adequately prepared, the organization will face sanctions, and it will also must live with the answers given by an unprepared witness. Usually the identity is provided, but we don’t need a rule for that. And often you think you have the right person, but then further preparation shows that somebody else should be designated.

Michael Neff (testimony and no. 184): From the plaintiff’s perspective, knowing the identity of the witness in advance is critical. It allows us to save time. As a plaintiff’s lawyer working on a contingency, that’s very important to me. We should have ten days to two weeks. Then we can check out individual documents in our database. We can use that to impeach the witness.

Mary Novachek (Bowman and Brooke) (testimony and no. 169): Requiring the parties to confer about the identity of the witness is contrary to settled law and would create confusion and burden, giving rise to new litigation issues for the courts to resolve. This amendment would work a sea change in the current law on these depositions. Noticing parties will claim that the amendment means that they have a role to play in selection of the witness. Mandating discursion about why a certain person is designated to represent the corporation simply adds to the already heavy burdens of preparing for these depositions. Without a doubt, noticing parties would use the amended rule to increase pressure on corporations to extract settlements. The current Committee Note language saying that the organization “ultimately” has the right to choose the

witness does not solve the problem. The word “ultimately” indicates that the requesting party will have some level of involvement in the choice. These problems are exacerbated by the requirement that the conference occur “promptly.” Often in the high stakes litigation we handle the 30(b)(6) notices are sent out months in advance of the eventual deposition. From the corporation’s standpoint, preparation of the initially selected witness may indicate that a different person would be a better choice. Does that require a new round of conferring? Even advance notice of the identity can raise problems. It’s important to appreciate the human toll that 30(b)(6) can inflict on the designated person. For example, in a case involving the location of the fuel tank in a vehicle, the witness was an engineer involved in the design of the vehicle. The engineer had been deposed again and again. The depositions became a war of endurance. Plaintiff attorneys repeatedly abused the witness. I’ve seen designated witnesses have heart attacks, leave the company to avoid having to testify, etc. This is stark evidence of this human toll. It’s particularly difficult in the 30(b)(6) context (compared to a 30(b)(1) deposition) because the witness can’t say “I don’t know.” It’s true that Rule 30 says I can instruct the witness not to answer in order to permit me to apply to the court for relief, but that is not sufficient protection against this abuse.

Terri O’Neill (National Employment Lawyers Assoc.) (testimony and no. 144): Requiring advance notice of the identity of the witness makes sense. It is not a “radical mandate,” as suggested by LCJ. Making the practice of giving notice mandatory will eliminate gamesmanship in situations where parties refuse to identify witnesses, hindering counsel’s ability to adequately prepare and making the deposition longer and more costly. Of course, the company will retain control over the witnesses provided. But advance discussion should help avoid later disputes.

Bruce Parker (testimony and no. 145): The selection of the witness is one area of practice that does not routinely cause disputes. It has been abundantly clear that the corporation has the sole right to select the witness. Indeed, the draft Committee Note acknowledges as much. Is the idea that the corporation does not really have sole authority to make this choice? As attorney for the company, I regard my choice to be a matter of work product, and my reasons are also. How can I discuss that with the other side “in good faith” without permitting the invasion of the attorney-client privilege or work product? Am I required to provide that information to the other side? Consider the following scenarios:

Scenario #1: Noticing counsel demands to know who was considered as designees. The rationale offered for this demand is that meaningful discussion can’t occur without this information. Of course, it’s true that the company’s lawyer has ordinarily developed a list of possible witnesses, and then given careful consideration to each of them. This is like the process that counsel goes through in deciding which expert witness to use. That is core work product. Should counsel nonetheless be required to answer questions about how the selection was made? The same sort of problem arises if noticing counsel asks why others under consideration were not selected to be the designated witness. If requesting party files a motion seeking to compel answers to these questions, the company’s lawyer may find himself or herself in front of a judge asking why one person was selected rather than another. This is not dependent on a showing that the person counsel designated is unprepared to answer questions on the designated topics.

Scenario #2: Assume that the other side has already taken the depositions of several company personnel involved in the matters at issue. In some depositions, the witnesses have demonstrated poor witness skills. So the company’s lawyer would not want to choose them for the 30(b)(6) deposition. But for much the same reason, noticing counsel will want these people acting as the company’s representative in the 30(b)(6) deposition. So noticing counsel will argue that this choice is improper,

pointing to the individual depositions to show that these witnesses are best qualified to testify and try to persuade the court to insist on their acting as the company's spokesperson at the 30(b)(6) deposition.

Disclosure of the identity of the witness is a different thing. I do a lot of work in MDL litigation, and often that sort of disclosure is required by the MDL judge. I will share the identity of the person if I know that opposing counsel is professional. But too often that will lead to a personal attack on the designee. Focus on the Committee Note to the 2010 amendments regarding communications between counsel and the retained expert witness; that shows the importance of guarding against intrusion into that sort of communication.

Virginia Bondurant Price: Practices vary on disclosing the identity of the witness in advance, and which topics each witness will address if there's more than one witness. A problem is that when there is a need to substitute a different person the identification issue can complicate things. If the notice requirement applied shortly before the deposition, say three days, that might be acceptable, particularly if there were also a recognition that sometimes things come up that require substitution of a different witness.

Thomas Regan (testimony and no. 199): Imposing this requirement is a radical mandate that can only lead to disagreement and gamesmanship. If the selection of the witness is, in the end, entirely up to defense counsel, what purpose is there in requiring that it be the subject of conference? That requirement will be leveraged by the noticing party. Even if there is an agreement due to the conference about the person to be designated, that will not prevent a later dispute about whether the selected person was adequately prepared for the deposition. Even a requirement that the witness be identified after unilateral choice by the corporation would create risks. In general, research into the background of a witness could validly be used to reveal bias. But in a 30(b)(6) deposition the person designated is there to answer questions on behalf of the company, so the particular witness selected is really not important if the witness is adequately prepared. Some suggest that the bad actors are outliers, but that is not my experience. Identifying the witness in advance does nothing more than trigger an inquiry into the person's past, such as the DWI arrest when he was a teenager, or where he lives. As a result, I will provide the identity only with lawyers I know to be of a high caliber. When there will be multiple witnesses, I've told the opposing lawyer which witness will address which topic, but not provided the personal identity of the various witnesses.

Jonathan Redgrave: Requiring a conference about the identity of the witness is the wrong way to go. It will not deal with whether the witness is adequately prepared. Whether it's a good idea to provide the witness's identity in advance is a mixed bag. Sometimes case management orders so require. Disclosure for efficiency is a good thing.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): The organization's right to pick the witness lies at the heart of this rule. Until now, this issue has not produced many disputes, while other issues have been litigated thousands of times. This amendment would introduce a new focus for dispute. The amendment would give the noticing party an unwarranted advantage.

Ira Rheingold (National Assoc. of Consumer Advocates) (testimony and no. 149): The identification requirement will help to reduce the frequency of bandying. By requiring open and frank discussion about the witness or witnesses the organization plans to designate, the proposed amendment undoubtedly will help ensure that the representatives ultimately designated will be "the right person to testify."

Sherry Rozell: The requirement to confer about the identity of the witness will diminish the right of the company to pick its represent. The identity of the witness is completely within

the company's purview. I sometimes do disclose, perhaps half the time. It really depends on the case. In my most recent 30(b)(6) deposition I did disclose a couple of days before. But we may not know who the witness will be until shortly before the deposition occurs. Making this the subject of a meet and confer discussion will produce disputes. I often have extensive exchanges with the plaintiff's counsel about the topics, but the identity of the witness has never come up at that point. We can't decide who we should designate until we are clear on the topics.

Greg Schuck: I often represent small companies. Requiring them to identify the witness in advance will be a burden. Often we don't know who it will be until shortly before the deposition. I've seen bad results from advance identification. Divorce records, pictures of the witness's house -- all sorts of things can come up. Telling the other side how many people will be showing up does not give me pause, however.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): This new discovery obligation should not be enacted. It will foster more disagreements between the parties. "[T]he propounding party often knows exactly whom they want to answer questions on behalf of the organization -- the weak link who cannot withstand the pressure of interrogation. The propounding party will fight for this deponent, citing prior testimony demonstrating subject matter knowledge and direct personal involvement with the matters at issue. For the noticing party, selection of the Rule 30(b)(6) witness is often not a search for information, but instead a search for a powerful sound bite that can impact the opening statement." The entire idea of requiring discussion of the identity of the witness should be rejected. A company should not be required to suffer interference from its litigation opponent in determining who will speak for it. Ford has already encountered intransigence on this subject. For example, in *Ash v. Ford Motor Co.*, 2008 WL 1745545 (N.D. Miss., April 11, 2008), plaintiff counsel unsuccessfully attempted to force Ford to designate the witness plaintiff counsel wanted instead of the one Ford selected. "In another recent matter, the requesting party's counsel outright refused to depose the individual being offered as Ford's 30(b)(6) witness without any meaningful explanations or rationale."

Patrick Seyferth (testimony and no. 182): This amendment is a solution in search of a problem. The problem if the unprepared witness is very rare. Implementing this meet and confer requirement will unfairly burden the corporation's practical ability to select its more capable witness. Doing that is no simple task, for it involves finding a person who can be both educated about the topics in issue and able to explain the company's position about those topics. The amendment's requirement that we discuss the selection with opposing counsel in effect gives opposing counsel as seat at the table, and that upsets the careful balance reflected in the current rule. The requirement in the amendment will lead to demands by noticing parties that the company explain how it decided on a given witness, and also that it hurry that choice. As a practical matter, these demands will undercut the company's long-established right to select the person it wants to speak for it. Actually, that selection has not in the past led to conflict. And a meet and confer requirement is usually limited to situations when there is an existing dispute. So this invites a dispute on a topic that has not previously produced disputes. Certainly it would be unfair for the company to be bound by the testimony of a person selected by the opposing party.

Donald Slavik (testimony and no. 146): Including the identity of the witness as a subject for the conference is a good idea. Requiring identification in advance permits me to determine whether this person is likely to have at least some first-hand knowledge of the subject matter. I can also find out whether the proposed witnesses have testified in the past in a similar matter and, if so, to attempt to collect the transcripts of that testimony. By reading those transcripts, I can better prepare to conduct the examination in the current case. I have not seen the sorts of personal attacks on the witness that others have described.

Michael Slack (testimony and no. 170): Usually we get the names of the witnesses about seven days before the deposition. Sometimes it turns out that we also want an individual

deposition of that person, and we try to fold that into the deposition for efficiency's sake.

Andrew Trask (testimony and no. 176): Ordinarily we do not identify the witness in advance. If there is a likelihood that the person will also be deposed as an individual, we often do disclose.

Christine Webber: Knowing who will be the witness saves time. For example, in my employment cases on the plaintiff side, there may be many, many different documents with the same basic content. Using one that this witness sent or received can speed up the deposition, but to do that I need to know in advance. I am told who the witness will be in 90% of my cases.

Julie Yap (testimony and no. 188): I oppose any requirement to confer about the identification of the witness. I do usually provide the name of the witness. But in one case opposing counsel spent hours on questions that went beyond the notice. It was difficult to instruct the witness not to answer. Despite this experience, I will still provide the identity in advance for efficiency.

Hassan Zavareei (testimony and no. 191): Requiring the disclosure of the identity of the witness or witnesses before the deposition is a good change. With this information, the noticing party may be able to simply confirm the witness's background, experience, and position before quickly moving on to more substantive topics. Relatedly, this information may enable the noticing party to limit its inquiry to the topics and documents that are most essential. This requirement would also blunt some tactics some corporations attempt. For one thing, the noticing party needs to know if multiple witnesses are designated so that it can direct its questions toward the person designated for specific topics. Corporations may often designate witnesses that lack knowledge of the relevant subject matter in order to cause delay and put financial pressure on under-resourced plaintiffs. The failure to disclose in advance leads to longer and less effective depositions. The opponents of this provision wrongly argue that noticing parties will use the amendment to block witnesses they perceive as particularly effective corporate representatives. That's not so; the amendment recognizes that the company has the right to choose its own representative. If the word "ultimately" in the Committee Note causes problems in this regard, we suggest that it be removed.

Terrence Zic (testimony and no. 147): Adding the requirement that the parties confer about the identity of the witness will increase the volume of discovery disputes and use up valuable judicial resources. These results will occur because noticing parties will claim that they have the right to request the witnesses they want, and companies will be unable to make sensible and careful choices on the spot during the conference. To say that the choice of the witness is "ultimately" the company's choice suggests that it is also a fit matter for the noticing party to influence. It would be inherently unfair to permit the opposing party to pick the person who officially speaks for the company, as a 30(b)(6) witness does. Moreover, given that this conference is simultaneously addressing the topics to be covered, the company will be required in essence to guess who would be a suitable witness on those topics. Some courts may construe the amendment as requiring that the company disclose the identity early in the conference, when these specifics remain uncertain. Even a requirement to identify the witness in advance will cause problems. I've only been asked to do that a couple of times. I surely can't choose a witness until I am clear on the topics to be addressed. What if the witness needs to be changed? That will produce additional disputes. And nobody can legitimately complain that my witnesses are not adequately prepared.

Phoenix Hearing

John Griffin (testimony and written comments): The rule would be improved by directing that the organization identify the person who will testify before the day of the

deposition. The Texas experience is informative. Rather than requiring a conference about the identity of the person or persons designated, Tex. Rule 119.2(b)(1) says that the organization must designate the witness a reasonable time before the deposition. In Texas, “designate” is interpreted as meaning that the organization must provide the noticing party with the name and title of the person who will testify. This Texas rule has worked all right in practice, so much so that there is only one Texas case even discussing the operation of the rule.

Sandra Ezell: The identity of the witness is irrelevant and should not be a mandated subject of discussion. Even if the designated person was copied on a document, that is not what the witness is there for. The organization does not have to take account of the job duties of the person designated in selecting the person to designate. Indeed, in representing corporate defendants I often find that there is nobody who knows about the topics the other side wants to explore. We never provide the name of the person designated in advance of the deposition. We don’t refuse to reveal the name, but nobody has ever asked for the identity of the person who will testify.

John Sutherland: This proposal will turn existing case law on its head. The case law is clear that the organization gets to choose the person who will testify. The requesting party has no role in making that choice. The party doing discovery can take the deposition of any person it wants under Rule 30(b)(1), so this amendment is confusing and cumulative of the existing rule. In my practice the identity of the person who will testify is not disclosed in advance. The identity of the witness is irrelevant. It won’t affect the documents to be used in the deposition. The identity of the person should not affect the preparation by the requesting party. Often I don’t know, even seven days before the deposition, who I will use. I may learn that I need to substitute somebody else, or add another person. Rule 30(b)(1) exists to permit the requesting party to follow up with any specific individuals it wants to depose.

Nieves Bolanos (NELA): Obtaining advance notice of the identity of the witness is a practical necessity. In our experience, responsible counsel provide this information as a matter of course. Making this practice mandatory would eliminate wasteful gamesmanship. Of course, the organization retains ultimate control over the choice of the witness, but advance discussion will avoid later disputes. Knowing who will testify in advance also assists counsel in assessing what personal knowledge the witness will have. If a 30(b)(6) witness is also a regular witness, the parties can discuss how to structure the examination to ensure that the witness will not be required to attend multiple depositions. We have been able to reach agreements in the past that avoid such duplicative depositions. But this amendment does not give the plaintiff control over who the defendant designates to testify; that is up to the defendant. If the company retracts its initial designation, we would not follow up with an individual notice of that person. And we do not think that the organization is obliged to disclose its tactical considerations in selecting the person it chooses.

Mark Kenney: Requiring the advance identification of witnesses is an existential question for organizational litigants. I do not provide advance notice of who I will present. Making us confer about that means that we have to have a robust discussion. I have a variety of important considerations in mind when I am choosing my witnesses. I should not have to disclose those to the other side. That invades my opinion work product at a very basic level. In addition, the other side will use the information to comb through social media and other sources to bring up during the deposition. This should be avoided. Just as a general matter, a 30(b)(6) deposition should not focus on the individual. It’s about the organization itself. True, the Note says the organization retains the power to choose, but making it a mandatory subject of “good faith” discussion undercuts the purpose of this rule. The concern with unprepared witnesses does not provide a reason for making this change to the rule. In any event, that is a de minimis problem. Judges come down with a hammer when the corporate witness is not prepared.

John Sundahl (Defense Lawyers Assoc. of Wyoming): This is a radical departure from established law. The rule on its face says that the organization is to designate the person to testify. “The need to preserve this absolute right is fundamental to jurisprudence because the person selected as the witness binds the organization. To allow the opponent to have input and dispute the name of the person(s) who will speak for the organization compromises the due process right of the organization to be heard with its own witnesses in a meaningful manner.” It will be taken as mandating a give-and-take with each party having the right to reject the choice of the other side. The draft Committee Note appears to encourage that result by asserting that the parties’ exchanges will facilitate “identifying the right person to testify.” Opening the door to negotiation about which witness is designated will invite tactical abuse. Aggressive lawyers will use the rule to block or challenge organizational witnesses perceived to be the most experienced, articulate and effective representatives for the organization. Does this amendment require the organization to designate the “most knowledgeable” person? It would help if the Committee Note were iron clad on the right of the organization to make its own choice. Sometimes the parties do talk about these matters already, but that shows that the rule is working fine as written now, and the proposed change could produce harmful consequences. Good lawyers are doing what they should now, and bad lawyers will abuse the additional provisions.

Lee Mickus (testimony and no. 141): This provision offers no meaningful benefit and will encourage more disputes. It imposes a new discovery obligation that has never before been recognized, and will create the opportunity for the litigants to disagree and make motions, in turn requiring that the court get involved. It may lead in some instances to a noticing party insisting that the rule now gives it a right to insist on designation of a particular person. It also can produce confusion about the capacity in which the witness is speaking because the person selected by the noticing party also has personal information. Even mandating only that the identity be disclosed in advance is not desirable because the noticing party is likely to use that information to its advantage. For example, it may prepare to ambush the witness who is prepared to address issues on the topics list, but instead faces questions about his or her personal knowledge on other topics instead. The organization cannot readily stop such questioning because some courts permit questioning on other relevant matters when the witness has such knowledge. It is highly unusual in my practice for the identity of the person to be disclosed before the deposition. On those occasion when that has occurred, the deposition has become confused. The noticing party will exploit social media and transcripts of prior testimony by the witness. So although disclosure does sometimes happen, that does not mean that the noticing party finds it more difficult to complain that the witness is not adequately prepared. Revealing the identity of the witness in advance will not meaningfully help with the problem of witness preparation. The way to do that is to introduce an objection procedure like the one in Rule 45 so that the overbroad topic lists can be narrowed. But this conference procedure would create new conflicts or generate more motions. Usually counsel can work things out when there are objections. The best idea is to work these topics into Rules 26(f) and 16(b).

Bradley Smith: Experience on the defense side shows that a requirement to discuss, or even only to reveal, the identity of the witness is a bad idea. One example is a case in which, two days before the deposition, he found that the witness was not appropriate. He had to get another person to drive to San Francisco to testify. He wanted to make sure that the questions in the deposition were answered. The identity of the witness is not important to that. He can count on the fingers of one hand the number of cases in which the plaintiff has cared who would show up. And where it is important, it may be because the plaintiff can misuse this information. In another case, shortly before the deposition he found that the chief engineer of his client would not be the right person to present. This new obligation would enable the other side to argue “He pulled the chief engineer the day before the deposition.” In another case, he provided the name of the witness, and plaintiff counsel said “I won’t take that deposition. I know what he’ll say.”

William Rossbach (testimony and written statement): I strongly urge the Committee to

maintain the requirement that the identity of the witness be a subject of conference. Identification of the witness or witnesses in advance facilitates the depositions and greatly reduces the time spent taking the deposition. Opponents of this requirement provide no good, principled reason why disclosing the name of the witness should not be required. That disclosure eliminates time wasted during the deposition that could be used instead to get at the substance of the matters at issue. It also helps assure that the witness designated is appropriate and qualified to testify on the particular matters. I can't recall a single 30(b)(6) deposition in which I've been involved in which the identity of the witness was unknown to the noticing party until the deposition began. I do not think this will blur the line between a 30(b)(1) deposition and a 30(b)(6) deposition. To the extent one can inquire into both organizational knowledge and the personal knowledge of the witness, that makes the deposition more efficient. When you are preparing for a deposition, the identity of the person testifying is hardly irrelevant. There may be hundreds of thousands of documents, and you can use that name to focus on the ones this person is familiar with.

Patrick Fowler: Adopting a requirement to discuss the identity of the witness will have unintended and undesirable consequences. We will end up with hybrid 30(b)(6)/30(b)(1) depositions. I will have to object repeatedly that questions are outside the scope of the notice and that any answer is not on behalf of the organization. In my experience, it is unusual for the plaintiff lawyer to ask the identity of the person designated in advance. But when it has come up, it has proved problematical in some cases. It is particularly difficult if there are 95 topics. On the other hand, with opposing counsel I've worked with before it has proved helpful to identify the witness in advance.

Gary Culbreath: Requiring discussion of the identity of the witness is a solution in search of a problem. For example, in a recent case involving a subpoena on a nonparty, the noticing attorney said "You're going to have Mr. Smith testify, aren't you?" Do I have to answer that? To do so might make me reveal my attorney work product. Why do I have to reveal why I do or do not want to designate Mr. Smith?

Michael Carey: Meeting and conferring in advance of the deposition may be the right idea, but including the identity of the witness among the mandatory subjects is flawed. Compare the expert designation requirements of Rule 26(a)(2). That is important because this is the person who will be testifying at trial, but there certainly is no requirement to discuss the choice of an expert with the other side. In the 30(b)(6) setting, we are not talking about somebody will be testifying before the jury. At a minimum, this will be read as requiring advance identification of the witness. And the preliminary draft even suggests that this should be discussed before the formal topic list is served. This will add costs in every case.

Bradley Peterson (testimony and no. 138): Adding the identity of the witness to the list of required topics is a mistake. That must be in the sole province of the company. In making the choice of a representative or representatives, the company and its attorney must consider a variety of factors. In part, that choice is affected by the hearsay provisions of Fed. R. Evid. 801 and 802. If the testimony is of a party, its officer, director, or managing agent, it is admissible under Rule 32. This means that the selection of the representative is a delicate task that must be the sole preserve of the company. To allow the noticing party to have any role in the choice of that person conflicts with the rule. That person will be the "face of the company." The company will have to live with that "face" in this litigation and, potentially, in future litigations. As a consequence, as the company's lawyer I must consider a wide variety of concerns, such as the witness's personal qualifications and knowledge of the matters in dispute, the witness's prior experience testifying, the witness's ability to be educated about topics beyond his or her personal knowledge, whether designating this person will be harmful to the company because the witness is needed to do other work due to his or her responsibilities at the company. Consider a situation in which the noticing party urges that a specific person be the designee. A requirement such as

the one in the draft amendment could raise many issues. Here are some illustrations:

Should the company have to publicly disclose its concerns about having this individual serve as its representative?

Will sharing information avoid having this employee deposed or simply invite more notices of deposition?

If the noticing party or court chooses the representative, but the witness fails to give knowledgeable testimony despite the company's best efforts to prepare the witness, will that deposition nevertheless be admissible against the company?

Will the company be sanctioned for not giving knowledgeable answers about the proper topics when the noticing party chose the witness?

The range of discovery disputes that could arise under this proposed amendment surely includes myriad other things, but even this list suggests the shoals in prospect.

Jennie Anderson (testimony and no. 148): It is efficient for the parties to be transparent about the witness or witnesses, and which topics will be addressed by which witness if there is more than one witness. In one case involving an international price fixing claim, candid communications with the company's counsel about who would testify about which topics vastly improved the process. Knowing the identity of the witnesses allowed for better preparation and planning. I was able to cover each witness's background and experience quickly and confirm the topics for inquiry with this witness, permitting me to move into those topics efficiently. Advance disclosure can also make scheduling easier, sometimes permitting scheduling more than one witness on a day. I always ask to be told in advance who will be testifying, and don't think opposing counsel has ever refused. I do expect that I can cross examine the witness about his or her personal knowledge even if that testimony is not in a representative capacity. I see no real downside to advance identification and discussion during the meet and confer session.

Bina Ghanaat: The "problem" with identifying the witness does not exist. The identity of the specific person to testify is irrelevant. I handle asbestos defense. If the designated person has previously testified on the topics scheduled for this deposition, I will offer the prior transcript as a substitute for new testimony in this case.

Keith McDaniel: One time I did identify the witness in advance. The result was that we wasted time on social media activities of this person. I have since been asked again. But I have refused to reveal the identity until the topics are worked out.

Phillip Willman (DRI): I oppose including the identity of the witness as a topic. For example, suppose I have to substitute somebody else two days before the deposition. How does advance notice then help?

A.J. de Bartolomeo (testimony and written statement): Conferring in good faith about the identity of the witness will facilitate efficiency and economy. It will help avoid disputes that too often arise when the witness cannot answer questions on the listed topics. I think it would be helpful for the rule or the Note to include the idea that the discussion of the identity includes the witness's qualifications to speak competently on the topics for testimony. Without this additional information, the discussion may be meaningless. At the same time, it may be best to remove the word "ultimate" from the Committee Note acknowledgement that the organization chooses the witness. Opponents argue that the amendment would undercut the organization's right to choose its representative. The including of "ultimately" in the Note may give some color to that argument. In fact, the proposed amendment does not do what the opponents say it will do. Taking out that word could make that clearer. I do not want to inject myself into the company's selection of the witness. But if it turns out that the person selected is a person I would want to depose individually as well, that can aid efficiency. If that happens, I can prepare differently.

Amir Nassihi: In California there is an objective standard (person most qualified) to determine who should testify for the company. 30(b)(6) does not prescribe such a standard. The California procedure does not lead to disputatious discussion of who will be designated, but the current federal proposal will create problems. If the person originally designated is withdrawn, that will immediately bring forth a notice for the individual deposition of that person. This change will inject a whole new source of conflict. In fact, I often do notify the other side who will be testifying. But there are at least two opposing counsel with whom I would not disclose based on prior experience with them. I also urge that the Committee look at the standing order of Judge Donato (N.D. Cal.) as a model.

Donald Myles: I will often reveal the identity of the witness. In smaller cases, we will identify the witness shortly before the deposition. In those cases, the plaintiff and defense bar cooperate. But making this mandatory will make this a game for a minority of lawyers.

Francis McDonald: Requiring discussion of the identity of the witness is more controversial than discussion of the topics. A lot of times I don't even get asked about this. Opposing counsel may not know about how 30(b)(6) works. If providing the identity were required by the rule, it would be problematical unless it were only 24 to 48 hours of notice. Otherwise, there would be a potential for misuse.

Michael Denton: I think it's important for me to know the identity of the witness. Often I can combine an individual deposition with the organizational one. The goal is to keep it to one trip for the deposition instead of two. "If they want to dig up information about Jim Bob, go ahead."

Written Comments

International Assoc. of Defense Counsel (125): We strongly urge the Standing Committee not to publish the preliminary draft amendment that the Advisory Committee approved. The requirement that the parties discuss the identity of the witness is highly problematic. It would direct an unprecedented and unfair role for the noticing party in selecting the organization's witness. If the identity of the witness must be identified, moreover, noticing counsel will use the information to gain a litigation advantage. For example, if the person selected has a reputation for connecting well with juries, the noticing counsel may seek to replace that person with a less effective deponent. In addition, the organization may be hampered in its right to replace the initially selected witness. All of this will lead to disputes and generate motion practice. Requiring that the matter be resolved at a meet and confer session would also place an unfair burden on the organization, which would not be able to fully vet the selection. This possibility results in part from the amendment's statement that the conference should "continue as necessary." A perceived delay in designating a witness might be characterized as violating the "good faith" requirement of the amendment.

Kenneth Reilly (126): Though the discussion of the topics may yield benefits, the addition of a requirement that the organization discuss the identity of the witness invites mischief and improperly imposes an affirmative new discovery obligation on corporate litigants. Should the parties' efforts at this newly required obligation fail because the noticing party disagrees with the corporate litigant's choice of a witness, motion practice will surely ensue. "I have litigated against counsel who will use this opportunity to litigate over witness choice and demand that the court give some sort of credence to the noticing party's position on who is the appropriate witness. Some will even argue that the amendment means that the noticing party is entitled to an equal voice in the choice. But established case law under the current rule shows that the organization has an absolute right to select its representative." Moreover, the timing is impossible because the amendment says that the witness must be identified during the conference. But the corporation must have a clear fix on the matters to be covered before

selecting the person to testify. That cannot happen simultaneously.

Victor Schwartz (127): I urge the Standing Committee not to publish the 30(b)(6) amendment proposal forwarded by the Advisory Committee. The requirement to discuss the identity of the witness will invite unfair and unprecedented participation by noticing counsel in the organization's selection of the witness that serves as its representative. Noticing counsel will likely contend that the amendment affords them some measure of input as to which person should be designated. If this argument were accepted by courts, it would undermine the organization's discretion to pick its own representative. Noticing counsel will be incentivized to use this opportunity to obtain a litigation advantage.

American Tort Reform Assoc. (128): We urge the Standing Committee not to publish the amendment proposal that the organization be required to confer in good faith about the identity of the witness. The requirement to discuss the identity of the witness creates a serious potential problem. It could be interpreted to require the corporation to identify each person who will testify on each matter during the conference when the specifics about the matters are first discussed. Making an "on the spot" decision about that issue is asking too much. The selection of the witness must wait until the topics for examination are fully understood. Insisting that this decision be made on the spot would deprive the corporation of its long-recognized right to make the choice in a deliberate manner. "[T]he experience of ATRA members is that some plaintiffs' counsel will work to urge courts to interpret the amended Rule 30(b)(6) language as requiring the organization to consider the plaintiff's proffered deponent within the organization as part of the parties' 'good faith' requirement."

Sean Domnick (139): Far too often, the corporation designates someone who is not knowledgeable about the topics to be discussed and has done little or no work to gain that knowledge. Thus, the timely disclosure of the identity of the designated witness will help the parties ensure that the right person with the right knowledge is presented. It allows for better preparation and results in a better use of time for all involved.

Michael Rosman (140): There is no rule that requires the responding party to disclose the identity of the witness or witnesses. So what precisely constitutes "good faith conferral" about this topic? Suppose the organization's attorney says "I have three people in mind for the depositions, but my choice will depend on their schedules that week." Is that a "good faith" conference? If not, why not? And if so, what good has this conference obligation done? The rule should either explicitly require the entity to disclose the person or skip the obligation to confer about the identity of the witness.

Richard Broussard (143): Frequently corporate defendants will designate witnesses who have little or no knowledge concerning the matter set out in the notice. Occasionally that designated witness will be an attorney specifically retained for the purpose of responding knowledgeable to the notice. This even occurs when there are corporate employees directly involved in handling the subject matters that are noticed. Requiring a conference concerning the identity of witnesses will allow deposing attorneys to call to the attention of the court obstructive activities before travelling to distant locations to be presented with obstruction and no discovery.

Robert Mullins (150): I oppose the proposed amendments. They will make Rule 30(b)(6) more vulnerable to abuse than it currently is. "In my experience, the adversaries of corporate defendants attempt to maximize recovery by finding ways to criticize a corporate defendant's handling of discovery." For example, in 30(b)(6) depositions the noticing attorney may keep asking the witness if anyone at the company is better equipped to discuss the listed matters than he or she is, but not get to asking the witness about the matters themselves. I would expect the conference requirement to work out the same way. I believe the choice of the person to testify for the company draws on my legal analysis, and that I should not be required to "meet

and confer” with the other side about that analytical process. This will lead to requests for the court to intervene in the selection before the designated witness has even testified and been tested on the topics listed.

Defense Lawyers Ass’n of Wyoming (160): We oppose the proposed amendment, which undercuts the right of the organization to designate its witness. This will be an invitation to tactical abuse by noticing parties. It will inflame tensions among the attorneys and add to the judicial workload.

Timothy Domin (161): Allowing an opposing party a say in who speaks for the company is unreasonable. If the company picks somebody who is ignorant, that will be detrimental to the company. If the opposing party wants to take the deposition of a specific witness, it can subpoena that witness.

Gordon Arnold (162): A corporation should be the sole party to choose its representative. Allowing the other side to have a say will expand collateral litigation.

Bryan Stevens (163): Allowing the noticing party a role in choosing the witness will be an invitation to break with the well-settled rule that the company can pick its witness.

John Lovett (166): If the noticing party has input into the selection of the witness, the company is no longer free to choose its own voice. The amendment will lead to efforts to obtain discovery of the reason a given witness was selected.

Federal Civil Procedure Section Council of the Illinois State Bar (193): This requirement to confer would interfere with the right of the organization to select its witness. On occasion, it is necessary to change the deponent on short notice because of the changing evidentiary needs of the case or because of the retirement, dismissal, death, or illness of the contemplated deponent. The organization needs flexibility to deal with such issues. In any event, this discussion is not useful to the noticing party, which is primarily interested in the number of witnesses and the topics each witness will address. So we propose that the amendment focus on the number of witnesses and the topics each will address.

Dan Mordarski (198): I support this change. For most ethical lawyers, this is not a problem, and it regularly is done. My experience is that when opposing counsel won’t disclose the identity of the witness in advance, it often turns out that the witness is not adequately prepared. There is no good reason for keeping the identity of the witness a secret.

John Hickey (202): I represent plaintiffs in personal injury cases. I take 30(b)(6) depositions in every case. This is a common sense requirement. The corporation knows who it will designate weeks in advance. It has sent that witness documents and its lawyers have had many conversations with that witness. It only makes sense that the party divulge early on the full name and title of the person or persons it is producing and to indicate on which designations that person will be testifying. As a practical matter, this information can speed up the deposition’s treatment of background material about the witness.

American Association for Justice (209): A rule change requiring that the identity of the witness be addressed in advance is likely to prevent a party from abusing the 30(b)(6) process. Disclosure of the identity who will testify must be included to achieve balance and fairness. In our experience, corporations wait until the last minute to disclose who their witnesses are, which prevents adequate preparation by the noticing party. Although the noticing party does not have a say in who the witness will be, it is helpful to be able to ascertain basic information about the deponent, such as the witness’s background and position in the company. Nothing in the amendment suggests that the noticing party has any authority to designate who will be the

witness. Unless the identity of the witness remains in the rule, AAJ believes that the rule would no longer be balanced. Instead, the amendments would tip the scale in favor of corporate defendants.

Michael Boorman (210): Requiring conferral about the identity of the representative would be a big step in the wrong direction. The rule focuses on the corporation's information, not the personal identity of the individual delivering that information. No legitimate needs will be served by allowing the deposing party to intrude on the choice of that representative. But adding a requirement to confer about that will increase wrangling, disputes, and motion practice.

U.S. Chamber Institute for Legal Reform (214): The required conference about the identity of the witness is a bad idea. It will lead to a new type of bandying, as the requesting party can manipulate discussions about the "identity" of the witness by adding deposition topics in an effort to obtain more depositions and -- by extension -- more deponents. This will effectively precipitate the kind of bandying that the rule was supposed to eliminate. The practical problems for corporations will be severe, as it takes time to pick a witness, after the question what the topics will be is cleared up. This requirement will produce more disputes. But the proposal says that the conference must occur "before or promptly after the notice or subpoena is served." That is unrealistic. It imposes a stringent time requirement that will not work.

Mark Boyle (216): The requirement to confer about the identity of the witness will produce problems for both plaintiffs and defendants. The noticing party has no right to reject the person selected by the company to represent it. But the amendment would embolden noticing lawyers to try to block or challenge selected organizational witnesses. This will be tempting when the witness is known to be experienced at testifying. Often the list of topics exceeds the limit on interrogatories, making the selection of a witness or witnesses very difficult. The change will also produce waste as the parties argue about the identity of the witness. We already have to hold multiple meet and confer sessions to clarify the topic list.

Nicholas Gerson (222): I represent personal injury plaintiffs. I strongly urge the committee to require the corporation to identify the corporate designee. Many times, corporations do not designate a witness for all areas of inquiry. We are then forced to re-notice a second deposition. Requiring q corporation to identify the witness prior to the deposition would eliminate this surprise tactic. We would know in advance who would be testifying and for what areas. Corporations are entitled to know the identity of all witnesses in advance. They should not be afforded a strategic advantage in regard to these depositions.

Vess Miller (225): We represent both individuals and businesses. We believe that identifying the witnesses in advance of 30(b)(6) depositions will promote efficiency. Knowing the identity of the proposed designee may prevent the unfortunate but common situation in which the chosen designees lacks the appropriate knowledge. The noticing party is often left in the position of having to repetitively ask the designee "Who would be the person most knowledgeable to testify regarding this topic?" This increases the expense for all parties. If the person is identified in advance, that will enable all parties to raise concerns. It can also reduce the number of depositions if the designated person will also be an individual witness.

Jessica Ibert (226): Requiring the organization to identify who will testify would be helpful. It would allow me to better prepare for the deposition, and make the deposition more efficient. I could better tailor my questions to the person actually before me.

Melissa Kruegel (232): The disclosure of the identity of the designee would be extremely helpful in the preparation of the deposition. Often, I do not know the name or position of the individual I am going to depose until only a few minutes before the start of the deposition. This is done to place me at a disadvantage.

Walt Cubberly (235): In my experience, the requirement to identify the witness merely makes explicit what is already implicit federal practice. Opposing counsel has always shared with me -- well in advance of the examination -- the identity of the person or persons to be presented and the topics each will address. Often they do this because the person will be testifying in two capacities, and they refuse to put him up twice. I have always accepted this arrangement without objection. It is always helpful to know in advance the person I am going to be deposing. It allows me to better prepare for the deposition, knowing which corporate documents the person had a part in either creating or receiving. It also allows me to do some preliminary background research, which makes things go faster at the deposition. I fully support the explicit requirement that the corporation identify whom it will be presenting.

Jay Henderson (236): Knowing the identity of the deponent would be helpful. That said, we must keep in mind that the 30(b)(6) witness's personal background and knowledge are technically irrelevant since the witness is really just a spokesperson for the entity.

Erin Campbell (237): "In my experience, resolving questions about the matters for examination and the corporation's representatives in advance reduces the length of the deposition, improves the quality of the answers, and greatly improves the likelihood that the witness will actually be prepared to answer questions on the noticed topics."

Russell Abney (239): Knowing which witness will be testifying on behalf of the corporation would allow a much more efficient preparation and execution of the deposition. With this information, I can use exhibits that the witness will recognize. There is no reason for the defendant not to be upfront about who the witness will be so that everyone can be informed and prepared. It also avoids situations where the designated witness is totally unfamiliar with the designated topics.

Maria Diamond (244): A good faith meet and confer requirement as to the identity of the witness will promote efficiency. Knowing the identity of the witness in advance is very helpful to proper preparation. Some have objected that this will intrude on the entity's choice of its witness. The proposal does no such thing. If the word "ultimately" in the Note is a basis for that concern, it could be removed.

Karen Menzies (245): Identification of the witness ahead of time helps focus the deposition preparation and lessens the risk that there will be a need for a supplemental deposition.

Ryan Babcock (248): Discussion regarding the identity of the witness should aid in the discovery process. While the ultimate responsibility of naming a representative will still rest with the corporation, disclosure of that person and requiring a good faith discussion regarding the proposed representative's ability to speak for the corporation is a reasonable requirement that will tend to encourage that the representative is prepared and knowledgeable.

Matthew Christ (253): Requiring the disclosure of the identity of the individual designated would assist in the preparation of the deposition. Too often, the opposing party does not provide the identity of the deponent until shortly before the deposition, which hinders adequate preparation for the deposition.

John Tiwald (259): The identity of the witness should be disclosed. But insisting that it be the subject of a conference creates problems. In our experience, identity is often disclosed voluntarily. That enables us to be better prepared for the deposition. Making identity the subject of transactional negotiation will not further the preparation process and could generate further disputes.

Joshua Kersey (287): Knowing the identity of the person to be deposed ahead of time would be helpful and would make the deposition more efficient.

Jonathan Kerr (300): Advance disclosure of the identity of the witness would help in preparing for the deposition and to ascertain that the person designated is able to answer questions.

Emily Jeffcott (329): The proposed change makes sense. It can eliminate disputes about the appropriateness of the person selected and allow all parties to be better prepared.

Fred Buck (American College of Trial Lawyers) (338): The College believes that this requirement suggests a significant and unnecessary change in the organization's obligations that will increase delay and expense with no enhancement of practice under this rule. Although the minutes of the Standing Committee's meeting and the Committee Note say that the choice is ultimately up to the organization, we view the inclusion of this language mandating discussion of the identity of the witnesses to be designated as a suggestion that the noticing party has a right to participate in selecting the designees. This poses the very real possibility of disagreements between the parties and involvement of the court on issues relating to the identity of the witness. Directing that the organization to confer in "good faith" about its choice is not a positive development.

Rachel Alexis Fuerst (342): Requiring advance notice of the identity of the witness would allow the deposition to be more efficient. Requiring that this be a subject of conference is reasonable also.

J. Michael Goldberg (353): Identifying the witness can only promote judicial economy and the policy goals of discovery. Defendants often designate witnesses with little knowledge of the matters or inquiry, wasting time and money. Requiring timely identification of the witnesses will minimize gamesmanship and abuse in discovery and allow the examining attorney to fine tune his or her examination and avoid wasting time.

Scott Frost (435): Not requiring that the witness be named allows defense counsel to play games and does not lead to advantage on either side. It is important to know who you are going to depose to properly prepare.

Neil Nazareth (439): Disclosure of the identity of the witness prior to the deposition is important because it causes both sides to consider the deponent's specialization within the corporation, and whether the witness will be able to adequately testify as to each and every topic.

Ingrid Evans (454): In many cases, a corporate defendant will designate different witnesses for different topics. Knowing who is going to testify allows plaintiff attorneys like us to move quickly through preliminary questions and into the substantive matters. With advance knowledge, we can schedule more efficiently. Sometimes we can schedule three witnesses on discreet topics in a single day. We applaud the Committee Note that recognizes that the company has sole authority in picking the witness. The goal is to reduce surprises.

Michael Bradley (473): Disclosing the identity of witnesses in advance of depositions promotes efficiency and is consistent with the letter and spirit of the rules. It imposes no significant burden on the entity. I suggest that the amendment be clarified to say that the identity of the witness must be disclosed reasonably in advance of the deposition.

Marc Weingarten (482): I support the proposed amendment to the rule. I oppose not requiring that the identity of the witness be disclosed in advance of the deposition. Such pre-deposition disclosure enables research to be conducted in advance of the deposition in order to

make the deposition itself more efficient and productive.

Sherman Joyce (American Tort Reform Ass'n) (503): ATRA opposes any requirement that parties confer about the identity of the persons to be designated to testify. The amendment implies that the noticing party has a legitimate say in which person the organization chooses. Plaintiff's counsel will urge courts to give them some say in the selection of the person. Moreover, that choice can't be made until the precise topics for testimony have been fleshed out. Plaintiff counsel will contend that the corporation is bound by the choice it suggested during the conference. ATRA also does not see any benefit from a requirement to identify the witnesses who will testify in advance. The identity of the witness is simply irrelevant because the focus is on the knowledge of the corporation, not the individual.

Joseph Hunt (Department of Justice) (646): DOJ believes that the requirement to confer about the identity of the witness will result in additional discovery disputes. The noticing party has no say in the designation and preparation of an organization's designee, so no useful function would be served by adding this requirement to the rule. Although it is true that in practice the organization often provides some notice about the identity of the designee before the deposition, any such notice usually occurs close in time to the deposition. The responding party in the course of diligent preparation efforts may not determine the appropriate designee until well into the process.

Requiring that the conference continue “as necessary”

Washington, DC Hearing

Mark Chalos (Tennessee Trial Lawyers Ass’n) (testimony and nos. 190 and 206): The explicit statement in the Committee Note that the parties have an ongoing obligation to meet and confer, but that the process must be completed in a reasonable time, promotes efficient resolution of disputes.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): Requiring a conference to be “continuing as necessary” will add new uncertainty to the rule and invite more gamesmanship. There will be one party who feels that more conferencing is necessary while the other side will be equally convinced that the obligation has been satisfied. Practitioners won’t know what is expected under the rule, and some will seek sanctions for the “unreasonable” behavior of the other side. This sort of outcome is especially likely in the context of a brand new duty like this conference requirement.

Philippa Ellis (testimony and no. 359): Adding the phrase “and continuing as necessary” does not resolve the concerns I have about intruding into the organization’s right to pick its own witness. The change in the rule is certain to produce protracted discovery disputes.

Tobias Milrood (AAJ) (testimony and no. 185): AAJ recommends that the “before or promptly after” phrase be moved to end of the sentence:

~~Before or promptly after the notice or subpoena is served, and continuing as necessary, t~~ The serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify on each matter before or after the notice or subpoena is served, and continue conferring as necessary.

Terri O’Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We agree that the amendment clarifies that the new meet and confer process will be ongoing, if necessary. As the Committee Note explains, that does not mean that the parties must reach agreement on any particular topic. But this directive is in keeping with the spirit of Rule 1.

Thomas Regan (testimony and no. 199): Having more than one conference may lead to a more efficient process. Choosing the witness ordinarily must await clarification of the topics, which should be the first order of business. Trying to resolve everything in one conference would usually not work. But the “continuing if necessary” language lacks any clear delineation of when the good faith duty to confer ceases, an issue that largely results from the new requirement to confer about the identity of the witness designation. This language could be leveraged by inexperienced or exploitive counsel to interfere with the process. We recommend that the language say that the requirement to confer continues until either agreement or an impasse is reached as to the categories of inquiry, or when the witness is selected by the corporation’s counsel, which should end the process of conferring.

Phoenix Hearing

Lisa LaConte: Mandating this meet and confer session is a new requirement that will create an infinite loop in asbestos defense litigation of the sort I handle on the defense side.

Nieves Bolanos (NELA): We agree with the proposal to adopt an ongoing duty to confer. This is in keeping with the spirit of the rules. Our experience is that the most serious and recurrent problem is with unprepared witnesses, and we think that the conference contemplated

by this amendment will give the parties an opportunity to ensure that the witness is an appropriate designee and thus that the preparation problem will be minimized.

John Sundahl (Defense Lawyers Assoc. of Wyoming): The proposal imposes a duty to confer as “continuing as necessary.” This additional requirement invites further disputes. Who decides when the additional duty to confer becomes “necessary”? If one of the parties is unhappy with the results of this conference, does it have a right to seek discovery sanctions for prematurely terminating the duty to confer?

Patrick Fowler: Having a conference in advance about the topics is a good idea. Particularly if there are a lot of topics, I usually do that. Even if the rule does not require discussion also of the identity of the witness, it will probably be important that it be iterative.

Written comments

Michael Bradley (473): The Committee Note saying that the parties have an ongoing obligation to meet and confer, but that the process must be completed within a reasonable time, promotes efficient resolution of disputes. I support this language in the Committee Note.

Committee Note mention of identifying documents
to be used during the deposition

Washington, DC Hearing

Jennifer Klar (testimony and no. 175): Requiring advance production of all exhibits would impose unnecessary work on both sides. The noticing party would feel it necessary to over-designate. Look at the length of lists of exhibits to be used at trial, as compared to the number actually offered in evidence.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We believe the Committee should consider removing the sentence in the Committee Note referring to providing documents to the company in advance. This will merely result in counsel over-disclosing exhibits and it “could effectively turn what should be a cross-examination into a mere live version of interrogatories.” This raises a risk of reading into the rule a requirement of providing such advance notice of exhibits that the Committee examined and discarded.

Phoenix hearing

Sandra Ezell: It would be valuable to have the documents that will be used during the deposition identified. The 30(b)(6) deposition should be used to locate information about discrete topics. This can be done without discussion of the identity of the witness because the identity of the person designated is irrelevant in this setting.

Nieves Bolanos (NELA): We believe the Committee should consider removing this comment about advance identification of documents. Such a requirement would cause counsel to over-disclose numerous possible exhibits out of an abundance of caution and worry that it “could effectively turn what should be a cross-examination into a mere live version of interrogatories.” As a practical matter, the reality is that documents are sometimes produced very near to, or even on the day of the deposition. Such a requirement would bar use of such documents when their relevance becomes clear only as the testimony proceeds. Putting this possibility into the Note raises the risk that the amendment will be read as requiring such advance notice.

William Rossbach (testimony and written statement): I try to notify the other side what documents I will be using. Talking about what documents will be used is a good idea. But it is critical to have flexibility. Unanticipated things come up that involve documents in a way not appreciated before the deposition.

Bradley Peterson (testimony and written comment no. 138): Sometimes the notice asks for production of the documents used to prepare the witness. When I receive one of those, in the meet and confer session we already do hold I ask the noticing attorney to provide any documents that may be used in the deposition. Often the opposing attorney refuses this request on the basis of work product, apparently hoping to “surprise” the witness. Yet the noticing party insists that I should provide the documents I used to prepare the witness. I think my selection of documents is work product. Some courts, however, have not upheld this objection, but some of them nonetheless enable the noticing attorney to employ surprise in this way. The protection of work product in this context should be recognized in the rule. In addition, given the purpose of the deposition to identify company information rather than surprise the witness, the rule should require identification of all such documents that will be used. Perhaps it would then be permissible to direct that the company also identify the documents used to prepare the witness.

Written comments

Walt Cubberly (235): I disagree with the comment in the Committee Note speculating that “the serving party [may need to] identify in advance of the deposition the documents it intends to use during the deposition.” The idea that the party would be required, in advance, to share with the other side what documents it was panning on using during the deposition would revolutionize deposition practice. It would hinder the ability of a party to impeach witnesses. It would allow counsel for the organization to help the organization craft testimony in a way that would be inimical to discovering the truth, and it would prohibit the party taking the deposition from following new leads developed during the course of the deposition. I strongly disagree with this offhand aside in the Note.

Jay Henderson (236): It would be worthwhile for the parties to confer, and the serving party may enhance this process by offering to disclose document it may use during the examination. But this disclosure should not be compulsory.

Reviving amendment topics not included
in Preliminary Draft

Washington, DC Hearing

Lauren Barnes (testimony and no. 187): “Arbitrary, one size fits all limitations on the number of topics, how they will be treated, and how and when notices must be service and negotiated serve no efficient purpose and may instead simply result in more trips to the court over issues that can and should be negotiated by counsel. What is appropriate in the [very large] cases I pursue may make no sense for many other cases.”

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): The Committee should adopt other ideas that are not included in the current amendment package: (1) set forth a clear notice requirement; (2) establish a clear objection procedure; (3) identify presumptive limits on the number of deposition topics; (4) clarify how 30(b)(6) depositions should be counted toward the ten-deposition limit and the one-day time limit; (5) permit a written response that an organization has no information on a given topic; and (6) prohibit contention questions; and (7) forbid inquiry into what materials the witness reviewed to prepare for the deposition. These may be said to constitute one size fits all solutions, but they fit enough cases to make them important. The absence of those limits has enabled some lawyers to weaponize the rule.

Paul Bland (Public Justice) (testimony and no. 172): We strongly oppose rule provisions imposing specific limits on 30(b)(6) depositions. In particular, we see no advantage and many drawbacks in (1) an objection procedure; (2) a uniform notice period; and (3) a limit on the number of topics.

Edward Blizzard (testimony and no. 179): I am here to respond to comments made by Tim Pratt, former general counsel of Boston Scientific, during the Phoenix hearing. Mr. Pratt made some assertions about the pelvic mesh litigation in which Boston Scientific was a defendant. I was on the Plaintiffs’ Steering Committee in that MDL litigation. That was a unique litigation, with more than 26,000 plaintiffs suing Boston Scientific in federal court, and many additional plaintiffs suing in state courts. The litigation involved 13 BSC products, and the court ordered 200 individual cases to complete discovery for trial. In that litigation, BSC moved to quash or for a protective order against our 30(b)(6) notices. Among other things, it urged that the deposition be limited as to products and that it be quashed as to topics on which individual BSC employees had testified. The magistrate judge’s ten-page order is attached to my submission. She denied BSC’s motion to quash and rejected its burden arguments. She also directed it to designate prior individual testimony that it would adopt as its own testimony with regard to matters it said had already been explored. The experience in MDL 2326 does not support Mr. Pratt’s contention that the Committee should impose specific limitations applicable in all cases. To the contrary, MDL 2326 illustrates the need for flexibility in determining what is appropriate in a given case.

Susannah Chester-Schindler (testimony and no. 186): “While the addition of a numerical limitation on the matters may seem efficient at first blush, in practice the limitation will necessarily be arbitrary and may trigger additional unnecessary motions practice.”

Andrew Cooke (testimony and no. 165): What is really needed is to add the following to the rule: (1) a right to object; (2) authority for a party that has already given ten or more depositions on the same subject to submit prior 30(b)(6) transcripts in lieu of further 30(b)(6) depositions; (3) limiting such depositions to seven hours; (4) limiting the number of topics; (5) including cost-shifting for depositions that seek extraordinary discovery beyond the primary structure of the rule; and (6) making clear the supplementation is allowed. As the rule is

currently structured, it imposes too much burden on the responding entity. In addition, there is a split among courts on whether one should raise these issues before the deposition with a protective-order motion or after the deposition with a motion to compel. The lack of structure in the current rule prevents meaningful conferences, and presumptive limits and an objection procedure would provide that structure. Numerical limits work with interrogatories, and they can work here also. This subject should be added to the Rule 16 list of topics to address in the scheduling order. Having a limit leads to more careful drafting of the discovery requests.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): These proposed amendments will not deal with the real problems the Committee has identified in 30(b)(6) practice. So we urge that the Committee return to the drawing board and draft meaningful amendments that will do the needed job. The basic problem is that the present rule does not provide a real framework for the lawyers to reach agreements on the questions that arise over and over. The needed amendments, therefore, are (1) a numerical limit on topics for discussion; (2) an objection procedure that permits the organization to prevent proceeding into improper areas without court supervision; (3) a clear minimum notice requirement; (4) clarification of the application of the existing limits on the number of depositions and the duration of a single deposition in the 30(b)(6) context; and (5) explicitly forbidding contention questions during a 30(b)(6) deposition. Numerical limits have worked well with other discovery devices such as interrogatories. “Unlimited” is the wrong limit, but it’s what we have right now. 25 might be best as a starting point. “Presumptive limits are a rulewriter’s tool.” They are not a penalty, but a guide. They serve the interests of proportionality.

Peter Fazio: I represent defendants in products cases. There are cases in which we need multiple depositions. I had a case against Donald Slavik (also testifying today) and it involved ten corporate deposition and 31 individual depositions. I think you should go back to the drawing board and reconsider a numerical limit. If you impose a numerical limit the lawyers will respond and deal with it. A starting point might be 25. Then the lawyers can confer and come up with a good system for the case. If the court will pay attention, this can work.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): In 2017, DRI identified additional measures that should be included in the rule. These include: (1) amendments to Rule 16 and 26(f) calling for early discussion of 30(b)(6) depositions; (2) amending Rule 26(e) to permit supplementation of testimony; (3) amending the rule to provide a mechanism for making and resolving objections; (4) providing a presumptive limit of ten topics; (5) an amendment permitting the organization to certify that it has no knowledge beyond what is in its documents, which would mean that no deposition is required; (6) an amendment directing that no deposition is required on topics on which have already been the subject of deposition testimony; and (7) an amendment prohibiting contention questions in 30(b)(6) depositions.

Jessica Kennedy (McDonald Toole Wiggins) (testimony and no. 133): What is really needed is that some specifics be added to the rule. The rule now requires that the corporate representative be adequately prepared, but that is possible only if there is a limitation in the rule on the number of topics. I suggest that the limit be eight topics. In addition, the topics should be consistent with the nature of discovery that has already occurred and not seek to interject new areas of inquiry that were not previously the subject of inquiry by less burdensome means. In addition, a 30(b)(6) deposition should not duplicate depositions of those with personal knowledge on the subject. The rule should also include a provision for objections to the topics on the noticing party’s list. The rule should also explicitly recognize that the organization is only required to provide information within its possession, custody, or control. It therefore should not be required to obtain information from non-party subsidiaries, parent companies, or foreign entities outside the subpoena power of the court. In addition, discovery about the preparation of the witness should be declared off limits on grounds of privilege. The limit on number of topics

should be ten. Even if these topics are defined broadly, the company will be better able to prepare the witness than in true now with many, many more topics. Such a limit should not necessarily lead to motions to expand in every case. We try to reach agreement at the Rule 26(f) meeting, and having a limit encourages conversation. To illustrate, I brought along examples of recent 30(b)(6) notices with as many as 263 topics. One simply asks that the company provide a witness to address every allegation in the complaint. The cases in which these depositions produce the most problems are product cases, as revealed by a Westlaw search.

Jennifer Klar (testimony and no. 175): The arguments for adding particulars to the rule should be rejected. The objection idea would lead to long delays in discovery, which would essentially be stayed until the court ruled on objections. The idea of a deadline for taking a 30(b)(6) deposition should not be adopted; sometimes it is appropriate to take a 30(b)(6) deposition at the end of discovery. A ban on contention questions would not be appropriate. It would treat corporations differently from other litigants. And since the corporation has the absolute right to select the person who testifies, one should expect the chosen witness to be the person best qualified to answer for its contentions.

Chad Lieberman (testimony and no. 178): What we need is a presumptive limit on the number of topics. 15 is a number that might work. Having that before them will help the parties focus. My experience indicates that 15 is a sufficient number. In larger class actions, the parties may need to go beyond. More generally, the problem is that the rule does not provide a framework for 30(b)(6) disputes. We need a baseline. Then the judge would have guidance on when to grant a protective order.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We believe that the public comment period should not be used to disinter proposals that the Committee has already considered and discarded for good reason. Nonetheless, some are urging that the Committee return to those ideas. But because these matters have arisen again, some comment is in order.

- (1) A formal objection procedure would be counter-productive. In discussing the topics for the deposition, the parties may tailor them in a way that makes the deposition more efficient. But as reported cases have noted, the rule does not include a formal objection procedure like the Rule 45 objection procedure. In part, that is because any issue that arises at a 30(b)(6) deposition about specific topics or questions is much easier for the court to evaluate in the context of the actual deposition rather than in the abstract.
- (2) A uniform 30-day notice requirement is too inflexible. There is no reason to wait 30 days after the mandated conference occurs. Professional counsel will always discuss depositions dates with opposing counsel and seek a mutually agreeable time for the deposition. To have a rigid 30-day rule for only one type of deposition is not warranted.
- (3) A strict numerical limitation on the number of topics is artificial and unproductive. There is no such limit on Rule 34 requests. Imposing one here will merely encourage use of broader topics. It is simply not true that it is “common” for a notice to include 60 or 100 topics.
- (4) The current rule that a 30(b)(6) deposition counts as one, but that fully seven hours are permitted as to each person designated, should be maintained. A corporation could game the system by designating many witnesses. Plaintiffs have no incentive to draw out the discovery process. As things stand now, witnesses with few topics can be finished in an hour or two. The noticing party should not have to accommodate the tactical decision by the company to designate a large number of witnesses.

(5) Contention questions should not be banned. Corporate defendants frequently ask plaintiffs in employment cases contention questions like “What support do you have for your claim that you suffered discrimination.” To say the plaintiff may not ask the same sort of questions of the person hand-picked by the company to testify is one-sided. Moreover, such a prohibition would lead to frequent disputes about what is a contention question.

Virginia Bondurant Price: A specific number in the rule would be a useful starting point for discussions with opposing counsel. It would not be a straightjacket. Presently I often get outlandish numbers of topics, and sometimes have to move for a protective order.

Patrick Regan: Presumptive limits are problematical since there are so many different types of cases. Sometimes ten would do, and in other cases fifty are needed. Having a specific limit will lead to motions in court. We should not legislate for the “lunatic fringes.”

Thomas Regan (testimony and no. 199): The rule needs changing, but not the changes proposed by the Committee. Instead, what are needed are: (1) a clear notice requirement; (2) clear specification of how the limits that apply to other depositions in terms of overall number of depositions and duration of deposition should apply in 30(b)(6) settings; (3) questions about the material reviewed in advance of the deposition should be forbidden; (4) there should be a procedure for the corporation to indicate that it lacks information on given topics, relieving it of the duty to produce a witness.

Terri Reiskin (testimony and no. 196): Having a number helps move the discussion with opposing counsel forward. For example, the rules now set a limit of ten depositions. At the start of the case, that provides a baseline for discussing what is appropriate to that case. As things stand now, 30(b)(6) depositions often are used as an end run around numerical limits on interrogatories. Another subject on which the rules should provide guidance is whether the one deposition per witness rule applies to the company. If there is one 30(b)(6) deposition, does that mean there cannot be another. Beyond that, the proper application of the ten-deposition and seven-hours limits in the 30(b)(6) context should be made clear. The present reality is terribly inefficient. I think that the 26(f) conference is the right time to start thinking about these issues, and discussing them. Maybe fairly specific guidance can be included in the Rule 16(b) scheduling order.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): The Committee should reconsider making substantial amendments that would provide guidance and address functional deficiencies in the current rule. That is what Ford proposed in July, 2017. But that is not what the Committee has done. In particular, there should be a defined procedure for objecting to the notice, and also for situations in which the company has only documentary information about a given topic.

Patrick Seyferth (testimony and no. 182): The real need is for an objection procedure. Presently, practitioners are confronted by diverging case law; some courts require a motion for a protective order before the depositions, while others insist that the matter be raised by a motion to compel after the deposition.

Michael Slack (testimony and no. 170): I do sometimes list over than 30 topics. I suppose I could come up with a sensible number for aviation cases, which are the kind of cases I do.

Michael Slavik (testimony and no. 146): A strict numerical limit would be counter-productive. For example, I recently noticed a deposition with 47 topics. But they were essentially 47 very specific questions. With them in hand, the witness was able to finish the

deposition very expeditiously.

Christine Webber: An across the board limit on the number of topics would not be helpful. For example, in a recent employment discrimination action I had ten to fifteen topics for each of a large number of plant locations.

Michael Weston: We need presumptive limits in the rules where they do not appear. For example, Rule 36 has no such limits, and I have seen cases with 200 to 300 such requests. What we need is a framework to resolve or avoid impasses. Setting a number sets an expectation. In complex cases, we agree to increase the number. A motion regarding the number of topics could happen before the deposition. In addition, it would be good to have a clear time limit. I get 50 to 60 topics in every one of my cases.

Julie Yap (Seyfarth Shaw) (testimony and no. 188): Instead of proceeding with the proposed amendments, the Committee should provide amendments that address the real problems under the current rule. There should be a minimum 30-day notice period. There should be a numerical limit on topics, no higher than ten. The rule should provide that the topics must be reasonable in scope and proportional to the case. These depositions should be subject to the seven-hour limit that applies to other depositions. There should be a recognized objection process. Having 70+ topics makes it almost impossible to prepare the witness on all of them.

Phoenix Hearing

Lisa LaConte: The rule should have an objection procedure that makes further responses unnecessary once an objection is served. It is true that Rule 30 does not authorize such an objection and failure to respond with other depositions, but the obligations and burden of a 30(b)(6) deposition are different.

James McCrystal (Defense Research Institute) (testimony and written testimony from Troya Kelley): This amendment package is deficient because it does not include specifics on the number of topics or on the length of the deposition. We have for years had specifics in the deposition and interrogatory rules about the number and duration of depositions and the number of interrogatories. Those specific limitations were positive improvements. But there is nothing in the current amendment package that corresponds to those beneficial specifics. The 2015 proportionality amendments call for such specifics. It is important to guide practice under Rule 30(b)(6) with specifics of that sort. Specifically, DRI favors the following

- Amending Rules 16 and 26(f) to include Rule 30(b)(6) in the 26(f) conference and submission to the court under Rule 16
- Amending Rule 30(b)(6) to allow supplementation of testimony at the deposition
- Amending Rule 30(b)(6) to provide a method of making and resolving objections to the notice before the deposition
- Amending Rule 30(b)(6) to permit an organization to certify that it possesses no knowledge beyond what is contained in documents and directing that in those circumstances no deposition is required
- Amending Rule 30(b)(6) to provide that a deposition of the organization is not required on topics that have been the subject of individual depositions already
- Amending Rule 30(b)(6) to forbid contention questions

Although some of these concerns are mentioned in the Committee Note, which is helpful, the better course would be to amend the rule to address these matters specifically. DRI also supports the positions in the written comment from Lawyers for Civil Justice (no. 129).

John Sutherland: Instead of pursuing the current package of amendments to the rule, the

Committee should adopt more practical solutions:

(1) The rule should provide a method for objecting. Because the rule does not now have such a procedure, it can be used as a sword as if it were a legitimate discovery tool. For example, it is not uncommon for a requesting party to unilaterally schedule a deposition on a date and time that is not available or does not allow sufficient time to properly prepare and present a witness. Because the rule lacks a reasonable objection procedure, the requesting party takes the position that the company must appear with a prepared witness or file a motion for a protective order. Rule 45 is a model for a solution. It provides that service of an objection within 14 days means that the deposition will not go forward until and unless the requesting party obtains a court order to proceed. Adopting this procedure will cause requesting parties to take more care in specifying topics for examination.

(2) The rule should contain a provision that protects attorney work product and attorney-client communications. The most troubling aspect of 30(b)(6) depositions is that the requesting party usually insists that the materials relied upon by the witness to prepare for the deposition or chosen by an attorney to prepare the witness be subject to disclosure. The lack of any discernible protection of this type of material is a glaring hole that must be filled in Rule 30(b)(6).

Nieves Bolanos (NELA): We commend the Committee for its careful consideration of a variety of perspectives on the rule before it announced its proposed amendments, and for not including some that had been proposed. Adding arbitrary numerical limits on use of this discovery device would be counterproductive. For example, a presumptive cap on the number of topics would encourage counsel to broaden the definition of each topic and make it more difficult to prepare for the deposition. We are aware that there have been notices with as many as 100 topics, but such examples are in our experience anomalous. Our firm recognizes that serving such a notice would prompt intractable disputes. We carefully tailor the number and description of topics, both because we do not want to engender costly disputes and because we expect judges to limit overly broad requests. Often we litigate against public entities, and it is then absolutely essential to learn about their systems.

William Rossbach (testimony and written statement): The proposals that were made by the ABA organization to limit the number of topics, make the testimony not binding, allowing after-the-fact changes and supplementation by counsel, and prohibiting contention questions, would have eviscerated the rule and made it effectively useless in achieving the goals of Rule 1. These proposals would not have addressed any significant problem with the rule and were entirely one-sided. The real problem is that too often the organization does not adequately prepare the witness. Though that may sometimes result from notices that fail to describe the matters with reasonable particularity, the changes proposed by the ABA group would not deal with that problem in a helpful way. The proposed amendment avoids the mistakes proposed by the ABA group.

Gary Culbreath: 30(b)(6) depositions can be a trap for the unwary. The current rule lacks specifics that should be added. This would provide procedural guidance. The current amendment, however, will invite more litigation rather than avoiding it. One important protection would be an objection feature like the one in Rule 45 for subpoenas. In the District of South Carolina, the judges usually won't allow the deposition to go forward on grounds objected to until the objection is resolved by the court. Having a meet and confer session should be optional with the attorneys. In South Carolina, some judges convene a meet and confer session with the court to address such matters.

Bradley Peterson (testimony and no. 138): Rather than pursue the current amendment proposal, it would be better instead to amend the rule to add the following: (1) a minimum notice period; (2) an objection procedure; (3) a presumptive limit on the number of topics; (4) a bar on questioning the representative on topics outside the list; and (5) specifics on duration of the deposition and counting towards the presumptive limit of ten depositions if more than one person is designated.

Jennie Anderson (testimony and no. 148): The Committee was right not to impose a specific limitation on the number of topics. Rigid limits like that would undermine some of the efficiency of this rule. It would lead to broader designations, complicating and delaying the depositions. The more specific the designating party can be, the more effective the deposition.

Tim Pratt (President of LCJ): The real need is for specifics in the rule. With Boston Scientific, he found that 30(b)(6) depositions might include 18 topics with 50 subparts. It has happened that a witness who testified for four days as a designated 30(b)(6) witness then had to testify two more days as an individual witness. The current proposal simply institutionalizes the existing practice without meaningful guidelines. There should be a clear limit on the number of topics. Judges say they can't determine what is a "reasonable" number of topics; we need a number. For example, if the presumptive limit is ten, you have a starting point. I don't believe there is really a problem with unprepared witnesses, separate from the problem of overbroad and overly numerous topics. But companies really don't want to go to the judge on such issues. And absent that there is no incentive for plaintiff lawyers to be reasonable.

Phillip Willman (DRI): What we really need is a clear minimum notice time, an objection process, and a requirement that 30(b)(6) be discussed in the 26(f) conference and covered in the 16(b) order. Only with a national rule will there be national uniformity on these matters.

A.J. de Bartolomeo (testimony and written testimony): I would not have a problem with a 30-day notice period for these depositions. But I do take strong issue with the inclusion of reference to the number of topics in the draft.

Written comments

Sean Domnick (139): Efforts to limit the number of 30(b)(6) depositions in a one size fits all sort of way will inhibit the ability of parties to gather information. Federal judges and magistrates are more than capable of addressing the particular needs of each case without arbitrary limitations being placed upon their discretion.

Federal Magistrate Judges' Association (142): We generally support the concept of directing counsel to confer on these matters. We have observed that Rule 30(b)(6) deposition practice has become a contentious subject. Our only hesitation is whether the proposed amendment goes far enough. Assuming the amendment is approved, we respectfully suggest that, after a period of time, the Committee consider whether further amendments -- such as, for example, one imposing a presumptive limit on the number of matters for examination -- are warranted.

Richard Broussard (143): There should be no numerical limit on the deposition topics. The differences among cases make such a limit counterproductive. Regarding other proposals made by LCJ, they are blatant strategic efforts to impede reasonable discovery. Prohibiting inquiry into what the witnesses have reviewed in preparation for testifying is only designed to prevent needed discovery. That is the way to determine whether the corporation complied with its duty to prepare the witness.

Jonathan Hoffman (168): These amendments do not deal with the real problems we encounter today. They do not offer a solution of the problem of a company without knowledge on specific topics. That is more likely now because statutes of limitations have been extended, and companies are more frequently acquired by other corporations. In addition, there are problems when the designated witness is also a fact witness, but that is not addressed.

Palmer Vance (and 25 other past, present, or future Chairs of the ABA Section of Litigation) (180): The rules should be amended to follow the New Jersey rule recently adopted (N.J. Rules of Court, Rule 4:104-3(a)(2)) for complex cases. That rule provides that every seven hours of testimony of an entity representative counts as one deposition toward the overall deposition limit. We have not researched the rules in other states' courts. This approach has the virtue of enabling the noticing attorney decide how much time to spend, so to avoid being "charged" with a second deposition.

Jonathan Feigenbaum (no. 204): Allowing supplementation of 30(b)(6) deposition answers will encourage sandbagging, which is already a problem with intransigent defense tactics. Prohibiting contention questions when the witness is an organization but not when it's an individual (like my clients) is an unfair idea. Making it easy to object and hamstringing the deposition will feed into defense delay strategies.

Amar Raval (205): Formalizing an objection process will simply lead to more motions being filed. Some insurance companies will stonewall everything as part of their litigation "strategy." This is perfectly designed for that tactic.

U.S. Chamber Institute for Legal Reform (214): The rule does not provide a formal procedure for objecting to a notice. Instead, the only mechanism is a motion for a protective order. Some courts require that the order be sought before the deposition occurs, but others are not willing to entertain the motions until after the deposition has occurred. A better approach can be built on the Rule 45 model -- that an objection halts the deposition until the court rules on the objection. The rule should also specify that 30(b)(6) testimony does not constitute a judicial admission.

MEMORANDUM

TO: Professor Richard Marcus
FROM: Lauren Lee
RE: Federal Rules of Civil Procedure Rule 30b6

I favor conferring but oppose numerical limits.

Patrick M. Regan (502)	Thomas Sims (605)
James Cook (510)	Jacob Lowenthal (606)
Michael Vogelsang (515)	Jennifer Lawrence (610)
Daniel Cragg (516)	Richard Plattner (611)
A John Arenz (518)	Michael McGlamry (612)
Daniel Cragg (516)	Michael Cruise (614)
Jeremy Flachs (519)	Ken Pearson (620)
Richard Allen (521)	Jeff Bouma (621)
Steven Zoni (523)	Matthew Fogelman (629)
Eric Iverson (524)	Nimish Desai (634)
Will Nefzger (526)	Anne Gilday Judge (640)
Paul Kelley (528)	Lindsay Lawrence (643)
Emily Thomas (530)	Emily Hubbard (644)
Kirk Laughlin (532)	Patrick Beirne (645)
Frank Piscitelli (539)	Robert Sparks (648)
John Fabry (544)	Alison Kennamer (649)
Joshua Geist (549)	Brian Sanford (652)
Justin Sanders (550)	Jon Hollan (657)
Anthony Irpino (551)	Taylor Sorrels (660)
Eugene Brooks (553)	Michael Shepard (661)
Gary Schaaf (557)	Rob Astorino Jr (662)
Beverly Bove (558)	Ben DuBose (664)
S. Burgess Williams (560)	Samuel Iola (667)
Teresa McClain (561)	Sharon Zinns (668)
Ben Lebsack (565)	Paul Stewart Abney (669)
Tony Colyer (566)	Jose Becerra (670)
Michael Schafer (574)	Jason Beale (671)
Richard Cornfeld (576)	Richard Kaudy (672)
Sean McDonough (582)	Stewart Matthews (674)
Patrick Yancey (584)	Matthew Donohue (676)
James Keim (588)	Erika O' Donnell (677)
Sam Badawi (592)	Jonathan Ruckdeschel (678)
Florence Murray (594)	Michael McCann (679)
Avery Halfon (596)	Matt McGill (681)
Gretchen Lipman (598)	Kurt Zaner (682)
Joshua Christian (600)	Michael Patronella (683)
Renee Rubish (602)	Caryn Papantonakis (685)
Stephen Tiger (603)	Jonathan Armour (687)

Darron Berquist (690)
Patrick Wigle (692)
Alina Gregory (693)
Jessica Schlatter (694)
Leslie Cronen (696)
Donald Blydenburgh (697)
Benjamin Flicker (698)
Jennifer Foote (699)
Charles Branham (700)
Kyla Cole (701)
Jerome Prather (702)
Galen Trine-McMahan (703)
Z. Stephen Horvat (704)
Dusti Harvey (705)
Roger Turgeon (706)
David Webster (708)
Tom Henson (709)
Benjamin Adams (710)
Scott Britton-Mehlich (712)
Kevin Paul (714)
Scott Armitage (715)
Christopher Placitella (716)
Marsha Kazarosian (719)
David Boohaker (723)
James Hetu (725)
Matthew McLeod (726)
Benjamin Schmickle (727)
William Zook (728)
Megan Roper (729)
Case Dam (730)
Steven Aroesty (734)
Evan Cole (737)
Stewart Davis (738)
Stephanie Gold (739)
Barrett Naman (743)
Kevin Berry (744)
M Cristina Sanchez (745)
David Cannella (747)
Nicholas Nighswander (749)
Mary-Ann Leon (754)
John Theil (757)
Nathaniel Mudd (758)
Patrick Malone (763)
Timothy Garvey (764)
Sarah Gilson (766)
Mark Bratt (771)
Travis Harper (772)
Andrew Cioffi (774)
Dan Stack (775)
Joseph Garrison (777)
Erin Hergenrother (778)
Robert McEvoy (779)
Lucas Garrett (780)
Katie McGregor (781)
Paul Gatto (782)
Sophie Zavaglia (783)
Seth Cardeli (785)
Stefan Feidler (788)
John Nowakowski (789)
D'Arcy Rapp (790)
Joseph Cirilano (792)
Daniel Wood (798)
Nathaniel Falda (799)
Christopher Bryant (800)
Nina Windsor (801)
Cara Wall (802)
Theile McVey (803)
Allison Aoki (804)
Lisa Conserve (806)
Richard Shallcross (808)
Amy Heins (810)
Paul Lees (831)
Thomas Howard (832)
Thomas Taylor (839)
Margaret Samadi (843)
Chad Alexander (848)
Michael Patrick (857)
Gabriel Zambrano (858)
Glenn McGovern (859)
Dennis Bottone (868)
Jude Bratman (875)
Mark (877)
Brian Mohs (879)
Daniel Henderson (885)
Jeffrey Williams (887)
David Larson (889)
Thomas Chumbley (891)
Shane Prince (892)
League Creech (898)
Austin Crosby (901)
Abby Resnick-Parigian (902)
Robert King (903)

Stephan Mashel (904)
John Taussig (907)
Steven Langer (908)
Katherine Barrett Wiik (909)
Michael Karst (912)
John Burke (919)
Marianne LeBlanc (921)
Adam Kehrli (925)
Regina Poserina (927)
Jill Kanatzar (929)
Lucas Baker (932)
Mark Prince (940)
Avi Kumin (946)
Thomas Meyers (948)
Michael Ryan (949)
Seth Bernanke (954)
Michael Scimone (957)
David Bolt (965)
Benjamin Folkman (967)
Grahame Holmes (968)
Brent Johnson (970)
Wesley Phillips (971)
Jonathan Halperin (972)
Jeffrey Marion (974)
Robert Haslam (978)
S Lee Patton (983)
George Garrow (985)
Jonathan Karon (988)
Elizabeth Cabraser (989)

Edward Airhart (990)
Nathan Berger (991)
Cheryl Trine (997)
Robert Beatty-Walters (1022)
Casey Brown (1025)
Joshua Davis (1042)
Lisa Barley (1060)
Marc Willick (1061)
David Sugerman (1063)
William Leonard (1087)
Lucas Watson (1131)
Michael Donahue (1139)
Virginia Hardwich (1154)
Frederick Longer (1161)
Michael Merrick (1177)
Ty Hyderally (1184)
Stephen DeNittis (1186)
Emanuel Turnbull (1193)
Seamus Culhane (1195)
Rebecca (1230)
Tim Stevenson (1255)
Paul Merry (1260)
Phillip Chupik (1264)
Joseph D'Aversa (1273)
Todd Matthews (1277)
James Fitzgerald (1285)
Margaret Strickland (1288 & 1295)

I am neutral on conferring (or does not mention about conferring)
but oppose numerical limits.

James Fitzsimmons (513)	Benno Ashrafi (733)
Jeff Warncke (525)	Matt Morris (735)
Rafael Velquez-Villares (529)	Timothy Scott (767)
Michal Shinnar (531)	Melanie Schmickle (776)
Zev Antell (534)	N Novack (791)
Eileen Kroll (536)	Frederick Rispoli (793)
Eashaan Vajpeyi (540)	Caela Baker (805)
Timothy Mcilwain (542)	W. Kelly Lundrigan (809)
Robert Lewis (543)	Matthew Turner (813)
Peter Whelan (554)	Jessica Mallett (837)
Thomas Strelka (562)	Camy Francis (838)
Blake Dickson (575)	Danial Laird (860)
Natalia Blaskovich (577)	Aaron Brown (866)
Henry Minitier (578)	Samuel Elswick (869)
Linda Strelka (579)	Kara Harp (874)
Matthew Nace (580)	Laura Castagna (883)
Marc Diller (583)	Gregory Whitley (888)
Kevin Kruse (586)	Ben miller (897)
Ray Gallo (591)	Mark Abramowitz (910)
Simina Vourlis (593)	Sarah Nason (930)
Thomas Pleasant (599)	Jonathan Meyers (952)
Chris Nidel (601)	Philip Miller (963)
Douglas Hartnett (607)	Raeann Warner (982)
William Lawson (619)	Josiah Corrigan (987)
Anthony Bribriescio (623)	Dan Talmadge (1003)
Shane Smith (637)	Shawn Miller (1008)
Richard Hay (638)	Zachariah Parry (1024)
Anthony Olson (654)	Thomas Henderson (1028)
David Rash (665)	Michael Jewell (1045)
Laura Browne (675)	Matthew Holycross (1052)
Kasie Braswell (680)	Joseph Lovretovich (1091)
Michael Bahr (688)	Peter Goldstein (1129)
Lindsey Cheek (717)	Jennifer Tobin (1155)
Kelly Parry (718)	Jennifer Vorih (1173)
Patrick DiBenedetto (720)	Corinne Cundiff (1223)
Lorraine Parker (721)	David Terry (1259)
Sarah London (722)	Robert Linton (1261)
John McCabe (731)	
Cody Roberson (732)	

I oppose a requirement to confer because the rule is good as it is/changes are unnecessary and oppose numerical limits.

Laura Schultes (501)
Martin Kardon (505)
Amanda Condon (506)
Bruce Whitman (507)
Karen Evans (511)
Michael Galpern (512)
George Chronic (514)
Ben Davis (520)
Paul Maxon (533)
Peter Grenier (535)
Caleb Rannow (537)
Daniel Clayton (541)
Terry Grimes (546)
Brian Butler (547)
Henry Queener (552)
Charles Williams (556)
Wesley Nakajima (569)
Ronald Livingston (571)
Michael Peacock (597)
Render Freeman (626)
John Leighton (659)
Feliz Rael (538)
H David Kelly (548)
Gary Poliakoff (555)
Lawrence S. Lapidus (559)
Martell Harris (563)
Dennis Currell (567)
Paul Ivie (568)
James Donovan (572)
Matt Schultz (581)
Allan Siegel (585)
Rebekah McKinney (587)
Joshua Mankoff (589)
Ilana Waxman (604)
Shana De Caro (613)
Joel Bryant (618)
David Woodruff (627)
Michael Ganson (635)
Joel Smith (655)
Douglas Cannon (684)
Robert Cowan (695)
John Morrissey (707)
Kenny Harrell (740)
Lindsay Cordes (741)
Saul Gruber (742)
David Hoey (746)
Michael Bonamarte (748)
John Steffan (750)
Peter Giglione (751)
Sanford Horowitz (755)
Brian Dretke (759)
Stephen Seach (765)
Thomas Henson Jr (773)
Stephen Held (784)
Michael Gianantonio (786)
Jeffrey Adams (787)
Karen Shanks (795)
Mark Hanson (797)
Laura Mullins (807)
Brad Stark (811)
Ronald Barczak (812)
Sean Gambogi (819)
Stacy Stennes (820)
Nicole Lundrigan (823)
Jason Whittemore (824)
Teresa Arnold-Simmons (825)
Richard Davis (826)
Henry Courtney (827)
Product Liability Advisory Council (828) **concurrs with limits**
Glenna Francis (830)
Heather Mullman (833)
Neil Anthony (834)
Alan Wagner (840)
Mark Bringardner (841)
Susan Ramsey (842)
Michael Mann (844)
Patrick Powers (845)
David Hollander (846)
Jon Moore (847)
John Leighton (849)
Heather Barnes (851)
Lyle Bosket (852)
Kim Valentine (853)
Allegra Carpenter (854)
David Diamond (855)

John Fischbach (856)
 Sara Courtney Baigorri (861)
 Winston Bouk (863)
 Matthew Creech (865)
 Carlin Phillips (867)
 Debra Nelson (871)
 Joseph Bilotta (872)
 Ray Brady (873)
 Ed Daniel (878)
 Jeff Helms (880)
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 Spencer Payne (886)
 Chester Tennyson (890)
 Elizabeth Beall (894)
 John Felder (895)
 Neil O'Donnell (896)
 Robery Langer (899)
 Michale Scinta (905)
 Neil O'Donnell (916)
 Thomas Foley Jr (917)
 Denise Jarman (918)
 Michael Van Berkom (920)
 Ruben Krisztal (922)
 Jeremiah Fues (923)
 James Morgan (924)
 Neil O'Donnell (928)
 Mitchell Chubb (931)
 Scott Voorhees (933)
 Scott Goldberg (934)
 Paul McCarten (935)
 Michael Foley (936)
 James Curry (941)
 Francis Dorrity (944)
 Margaret Farley (947)
 Thomas Thistle (950)
 Stephen Curtice (951)
 Brent Bigger (956)
 Angel Mae Webby-Zola (958)
 Michael A. Brusca (959)
 Shane Newlands (960)
 J Gregory Webb (964)
 Matthew Morgan (969)
 Christopher Bilecki (976)
 Jason Ohliger (980)
 J Steele Olmstead (981)
 Michael Warshaw (984)
 Steven Schepps (992)
 R Saitz (993)
 Lara Johnson (994)
 Warner Mendenhall (995)
 Ronald Wilcox (996)
 Glenn Katon (998)
 Patricia Willner (1000)
 Lawence Jones (1001)
 Gregg Neal (1002)
 Ingrid Halstrom (1004)
 Byron Warnken (1005)
 Rip Andrews (1007)
 Don Corson (1009)
 Lisa Carper (1010)
 Steve Seal (1011)
 Andreas Bodmeier (1012)
 Matthew Holland (1013)
 Robert Cartwright Jr (1014)
 Carla Aikens (1015)
 Shane Kadlec (1016)
 Eric Blank (1017)
 Brook Hammond (1018)
 Thomas Melville (1019)
 Charles Bracewell (1020)
 Jerald Block (1021)
 Michael Crew (1023)
 Stephen Norman (1026)
 Anthony Chiosso (1029)
 Marc Silverman (1030)
 Matthew Granda (1032)
 Rochelle Harding-Roed (1034)
 John Joyce (1036)
 Anthony Garza Vale (1037)
 Jennifer Miller (1039)
 Robert Ammons (1043)
 Jim Wilkerson (1044)
 Stan Johnson (1046)
 Quinn Kuranz (1047)
 Kara Rahimi (1048)
 Joseph Pierry (1049)
 Gordon Leech (1053)
 Quinton Spencer (1054)
 Cody Thornton (1055)
 Daniel Buttram (1056)
 Dylan Hooper (1057)
 R Michael Shickich (1059)

Eric Gillin (1062)
Ronnie Cromer (1064)
Richard Budden (1065)
Vernon Sumwalt (1066)
Lincoln Sieler (1067)
Tina Stupasky (1068)
Stephen Voorhees (1071)
Kevin Coluccio (1072)
Wayne Mitchell (1074)
Kristine Keala (1077)
Sharon Cousineau (1078)
Marcus Vaden (1081)
Joseph Gillespie (1082)
John Barton (1083)
Jon Friedman (1084)
Gabriel Harvis (1089)
Robert Weppner (1090)
Jared Anderson (1092)
Matthew Hale (1093)
Kyle Moore (1094)
Richard Watson (1095)
William Kaetz (1096)
Mark Englehart (1098)
Isabel Cole (1099)
Sarah Silberger (1101)
David White (1102)
James Conroy II (1104)
David Nauheim (1105)
Mary Pool (1107)
Spencer Pahlke (1108)
John Xydakis (1109)
Ryan Hamilton (1110)
Chris Bataille (1111)
Daniel Malis (1112)
Mark Larson (1113)
Carl Varady (1114)
Christopher Burk (1115)
Sara Peters (1116)
Catherine O'Donnell (1117)
Michael O'Donnell (1119)
John Camillus (1120)
Jeffrey Rubin (1121)
William Ritchey (1122)
James Sellers (1123)
Tobias Cole (1124)
Benjamin Hall (1125)

Michael Stevens (1126)
Rhett Fraser (1130)
Michael Guilford (1132)
Louie Cook (1133)
Steven Margolis (1134)
Shammara Henderson (1135)
Radi Dennis (1136)
Gregory Pascale (1138)
Austin Watts (1140)
Stephen Lewis (1141)
Douglas Patrick (1145)
Omar Malik (1146)
Daryl Christopher (1149)
Peter Riley (1150)
David Sheller (1151)
SaraEllen Hutchinson (1153)
David Crough (1156)
Karesa Rovnan (1157)
Jenny Marashi (1158)
Benjamin L Hall Jr (1163)
Remy Green (1164)
Brenton (1168)
Scott Lucas (1169)
Kenneth Hall (1170)
Stephen Shea (1171)
Nathan Anderson (1176)
Nathan Severson (1178)
Rhonda Hood (1179)
Daniel Goodwin (1180)
Christian Bagin (1183)
Joseph McClelland (1185)
Forrest Buffington (1187)
April Ferrebee (1188)
Ryan Ballard (1189)
Michael Carin (1190)
Carolyn Kubitschek (1194)
Koby Kirkland (1196)
Scott Murphy (1197)
Chris Hammons (1198)
Chelsea Edwards (1199)
Craig Marchiando (1200)
Paul Tershel (1202)
Mary Hashemi (1204)
Tad Thomas (1205)
Ralph Petty (1207)
Robert Quackenbush (1208)

Jane Clark (1209)
John Abaray (1210)
Kenneth Kinney (1211)
Seth Lehrman (1212)
Kevin Dillon (1214)
Ronald Burda (1215)
Gregory Milne (1216)
Timothy Lenahan (1217)
Yitzchak Zelman (1219)
Kevin Quinn (1220)
Bobby Martin (1221)
Michael Woerner (1222)
Chris Mills (1224)
William Marshall (1225)
Brock Duke (1226)
Whitney Judkins (1227)
Michael Mosher (1228)
Patrick Kang (1229)
Ruby Aliment (1234)
Michael Bardrick (1235)
Robert Landry (1237)
David B Rankin (1238)
Roy Comer (1239)
David Foster (1240)
Ryan Dreveskracht (1241)
Tariq Chaudhri (1242)
Marlena Grundy (1243)
John Powell (1244)
Andrew Brodie (1245)
George Quesada (1246)
Leonard Stephens (1247)
Jessica Scales (1248)
Anne Vankirk (1249)
Jeffrey Clause (1251)

Scott Wilson (1252)
Kay Teague (1262)
Bryan Johnson (1263)
Emily McCarty (1265)
Sarah Jane Hunt (1266)
Michael Walker (1267)
Dylan Kilpatric (1268)
Julie Celum Garrigue (1269)
Ann Deutscher (1270)
Scott Blair (1272)
Michael Mohlman (1274)
Jarrod Takah (1275)
Isaac Ruiz (1276)
Jeff Tuttle (1278)
John May (1279)
Daniel Cairns (1280)
Thomas Foley (1281)
Sam Elder (1282)
Egan Kilbane (1283)
Robert Bohm (1284)
Matthew Wurdeman (1286)
Richard Hitz (1287)
Elizabeth McLafferty (1289)
Joe Moore (1290)
Daniel McLafferty (1291)
Joel Hanson (1292)
Heather Cover (1294)
Ben Cox (1296)
Kate Denner (1297)
Thomas Domonoske (1298)
Devin Robinson (1299)
Charles Holliday (1300)

I oppose a requirement to confer because it will create more disputes and litigation/defendant will use it to stall and oppose numerical limits.

American Tort Reform Association (503)	Duggy Reagan (711)
Sergio Rufo (504)	Bart Baumstark (713)
Erin Jewell (508)	Todd Barnes (724)
William Harty (509)	Thomas Malone (736)
Jay Renneisen (517)	Joseph Tunstall (752)
Nicholas Woodfield (522)	Tara King (753)
Taylor Lacy (527)	Joel Franklin (756)
John Kirtley (545)	Andrew Wainwright (760)
Sarah Emery (564)	Juliet Keene (761)
Lawrence Knapp (570)	Natalie Sharp (762)
Lincoln Wright (573)	Thomas Murphy (768)
Michael S. Dampier (590)	Philip Mullins (769)
Nicholas Carlin (595)	Kelly Battley (770)
Kurt Holzer (608)	Paul Robinson (794)
Amy Woodward (609)	Turner Rouse (796)
Brett Powers (615)	Henry Lindler (814)
W. Whitney Seals (617)	Christopher Paulos (815)
Grant Lawson (622)	Rachael Gilmer (816)
Dennis Murray (624)	William Ruiz (817)
Kristin Karbowski (625)	Daniel Francis (821)
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William Robins (631)	Luke Dalton (835)
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Daniel Laurence (633)	Matthew Sullivan (850)
Peter Lynch (636)	Kenneth Levinson (862)
Soha Saiyed (639)	Margaret Battersby (864)
Victoria Schall (641)	Hugh McCormick (870)
David Wulff (642)	David Wendel (876)
DOJ (646)	Nathan Finch (881)
Nancy Winschel (650)	Michael Schwarz (884)
Jacques Williams (651)	Ronnie Crosby (893)
Kevin Weis (653)	Gary Marts (900)
Ann Wilson/ Motor & Equipment Manufacturers Association (656)	Eric Richardson (906)
Justin Owen (658)	David Tyler (911)
Aaron Whaley (663)	Andrew Nadzam (913)
Lindsay Lien Rinholen (666)	Christian Patno (915)
James Piel (673)	David Ybarra (926)
Robery Kisselburgh (686)	Scott Smith (937)
Spencer Reiss (689)	Sean FitzPatrick (938)
Jake Eisenstein (691)	Allyson Romani (939)
	John Henderson (942)
	Marc Berman (943)

Stephen Burg (945)
Olivia Kronenberg (953)
Jeffrey Pollack (955)
Henry Salas (961)
Clarke Sturge (962)
Douglas Fees (966)
William Jungbauer (973)
Craig Leslie (975)
Francisco Rodriguez (977)
Sherry Rozell (979)
Charles Haake (986)
Jeffrey Bakst (999)
Mark Baumkel (1006)
Tim Mott (1027)
Sam Boyd (1031)
William McGaha (1033)
John Whitaker (1035)
Kiernan McAlpine (1038)
Geoffrey Bryan (1040)
Wayne Parsons (1041)
Laura Ozak (1050)
Joshua Watson (1051)
David Chami (1058)
Allan Brain (1069)
Kevin Williams (1070)
Corey Suda (1073)
Harry McGrath (1075)
Molly Clark (1076)
Edward Ciarimboli (1079)
Gregory Fellerman (1080)
Michael Starkman (1085)
Kenneth Morris (1086)
Crystal Rutherford (1088)
Charles Pekor (1097)
Erin Christison (1100)
Julianne Germinder (1103)
Brad Evans (1106)
Mark Joseph Kenney (1118)

William Cummings (1127)
Michael Pence (1128)
Casey Lott (1137)
Steven Kantor (1142)
Timothy Kittle (1143)
Laura Yaeger (1144)
T David Apodaca (1147)
Landis Curry (1148)
Steve Conley (1152)
Andrew Clarke (1159)
Paul Schlemmer (1162)
Matt Stapleton (1165)
Scott Korenbaum (1166)
Robyn Buckley (1167)
Kevin Hinkle (1172)
John Roper (1174)
Joel Strauss (1175)
Peter Silva (1181)
Aaron Swift (1182)
Brian Crockett (1191)
Warren Astbury (1192)
Paul Klehm (1201)
John Shook (1203)
Bruce Stern (1206)
Thomas Vesper (1213)
John McCraw (1218)
Victoria Herring (1231)
Kevin Costello (1232)
Jamed Bartimus (1233)
Robert Hill (1236)
Michael Charbonneau (1250)
Kevin Jones (1253)
Kelsey Marquard (1254)
Christopher Finney (1256)
Lance Sears (1257)
Denise Bradshaw (1258)
Christopher Graver (1271)
TJ Massey (1293)

TAB 5

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TAB 5A

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833

5. MDL Subcommittee Report

834 Since the Committee's November meeting, the MDL Subcommittee has continued to
835 explore and gather information about the issues it has been considering. This report is designed
836 to prompt discussion from the full Committee in light of the Subcommittee's current thinking.
837 That thinking has moved beyond the point it had reached last November, but remains at a
838 relatively early stage. It is not yet clear that any rule change proposal merits serious study or
839 efforts to draft sketches of a new rule. But it is becoming a little clearer that certain possible
840 amendment ideas seem to have more promise than others. That very preliminary view does not
841 mean that no alternative measures warrant consideration, but does reflect the attitude that it
842 makes sense to identify those ideas that seem presently to have more promise.

843 Since the November meeting, there have been a number of developments that are
844 reflected in this agenda book and will be presented at the meeting in San Antonio. The first is
845 that the Judicial Panel on Multidistrict Litigation has continued to provide very valuable
846 information to the Subcommittee on various issues the Subcommittee has been studying. The
847 Panel has shared detailed information with the Subcommittee that shows, among other things,
848 some trend lines that are worth mentioning at the outset.

849 It is certainly true that the last decade has seen a considerable rise in the total number of
850 cases subject to an MDL transfer order. But that large number in recent years has been
851 principally due to there being, at any given time, about two dozen MDLs with 1,000 or more
852 cases. By way of comparison to those two dozen, more than twice as many MDLs have fewer
853 than 10 actions and more than half of all MDLs have fewer than 100 actions. This statistic bears
854 on what has been called the "scope" issue. If one thinks about rules of general application, it
855 may be difficult to characterize rules that only bear on the two dozen largest MDLs as fitting
856 readily in that category. But those MDLs have the great majority of individual cases subject to
857 an MDL transfer order – reportedly over 85%. *See, e.g.*, Oct. 26, 2018, report from Prof. Zachary
858 Clopton of Cornell Law School, included in this agenda book. (The report, posted on the A.O.
859 website as 18-CV-Y, was received too late for inclusion in the November 2018 agenda book.)

860 Another trend line seems to be that the number of MDL dockets has not been rising. To
861 the contrary, it has declined by about 50% since 2009. There have been fewer motions for
862 centralization before the Panel than a decade ago, and it has granted those motions at a lower rate
863 in recent years than was true a decade ago. That surely does not provide a basis to forecast future
864 developments, but does seem worth noting.

865 The Federal Judicial Center Research Division has also been providing valuable research
866 support, which is the subject of a report in this agenda book.

867 The Subcommittee itself has met three times by conference call, on December 10, 2018,
868 January 25, 2019, and February 20, 2019. Notes on the first of those conference calls are in this
869 agenda book. The second and third calls were largely focused on the scope of information-
870 gathering efforts and the initial results of the FJC work, as well as the information provided by
871 the Panel. One of the conclusions reached was that a survey of judges would probably be
872 valuable, but also that such a survey should be deferred until it is clearer what possible
873 amendment ideas seem most worthy of serious study.

874 The Subcommittee continues to attend events that focus on the issues it is studying.
875 Since the November meeting, these have included and are expected to include the following:

- 876 • State-Federal Conference, Emory University Institute for Complex Litigation and
877 Mass Claims, February 28-March 1, 2019, Newport Beach, CA.

- 878 • Lawyers for Civil Justice Membership Meeting, May 3, 2019, Washington, DC.
- 879
- 880 • MDL Roundtable, Emory University Institute for Complex Litigation and Mass
- 881 Claims, May 9-10, 2019, Boston, MA.
- 882
- 883 • American Association for Justice Convention, July 27-30, 2019, San Diego, CA.

884 Besides the notes of the December 10 conference call and the submission from Prof.
 885 Clopton, the agenda book also contains the following materials received since the November
 886 meeting:

- 887 • November 21, 2018, letter from John Beisner (18-CV-BB)
- 888 • January 31, 2019, letter from Bracket Denniston and 25 other general counsels
- 889 (19-CV-D)
- 890
- 891 • February 20, 2019, letter from Eric Binderman and two other representatives of
- 892 litigation funders (19-CV-E)
- 893
- 894 • February 20, 2019, letter from Christopher Bogart of Burford (19-CV-F)

895 The following discussion introduces the issues presently receiving the most attention in
 896 hopes of obtaining the views of the full Committee on the importance and challenges of possible
 897 rulemaking. As noted above, this listing does not mean that the Subcommittee is no longer
 898 considering other issues or that it regards one or more of these as promising subjects for
 899 rulemaking. But it does hope to focus the full Committee's attention on a more limited set of
 900 issues than were presented during the November meeting. In case they might prove helpful to
 901 discussion, the memo includes a series of underscored questions about proceeding from here.

902 The topics covered are:

- 903 (1) Screening claims using Plaintiff Fact Sheet (PFS) techniques
- 904 (2) Interlocutory appellate review
- 905 (3) Filing fees
- 906 (4) Master complaints and individual complaints in consolidated proceedings
- 907 (5) Settlement review/Appointment of lead counsel
- 908 (6) Third-party litigation funding (TPLF)

909 *(1) Screening claims using PFS techniques*

910 A concern has been the reported prevalence of groundless claims in larger MDL mass tort
 911 proceedings. It may be debated whether focusing on screening these cases out before focusing on
 912 other matters is a wise use of the MDL transferee judge's energy. This topic has received
 913 sustained attention from the Subcommittee.

914 As a starting point, it may be useful to consider the measure included in H.R. 985, the
 915 Fairness in Class Action Litigation Act of 2017, which was passed by the House in March 2017.
 916 With the new Congress, this bill is no longer before the Senate. It would have added a new
 917 subsection (I) of § 1407, the Multidistrict Litigation statute, providing:

918 In any coordinated or consolidated pretrial proceedings conducted pursuant to
 919 subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal
 920 injury whose civil action is assigned to or directly filed in the proceeding shall make
 921 a submission sufficient to demonstrate that there is evidentiary support (including but

922 not limited to medical records) for the factual contentions in plaintiff’s complaint
923 regarding the alleged injury, the exposure to the risk that allegedly caused the injury,
924 and the alleged cause of injury. The submission must be made within the first 45
925 days after the civil action is transferred to or directly filed in the proceedings. That
926 deadline shall not be extended. Within 30 days after the submission deadline the
927 judge or judges to whom the action is assigned shall enter an order determining
928 whether the submission is sufficient and shall dismiss the action without prejudice
929 if the submission is found to be insufficient. If a plaintiff in an action dismissed
930 without prejudice fails to tender a sufficient submission within the following 30 days,
931 the action shall be dismissed with prejudice.

932 Judges Campbell and Bates conveyed to the House a variety of misgivings about this
933 measure and other features of H.R. 985. Based on its study so far, the Subcommittee is not
934 presently focused on such an aggressive measure.

935 Instead, the Subcommittee has been gathering information about the widespread practice
936 of using a PFS in mass tort MDLs. FJC research focused on MDL product liability
937 centralizations indicates that among “mega” MDL products liability MDLs (with more than
938 1,000 actions) a PFS order was entered in 87% of the proceedings, and in those with more than
939 100 actions, it was entered in 81% of the MDL proceedings. This does not mean that these PFSs
940 were only or primarily used as screening devices, as opposed to being used to provide an
941 inventory of claims or to provide something of a “jump start” to discovery.

942 The actual experience with PFSs in MDL proceedings involves a longer timetable than
943 the statutory provision above. The FJC found that the average time from Panel centralization to
944 entry of a PFS order in the proceedings it studied was over 8 months, and the median time was
945 over 6 months. In about a third of the MDL product liability proceedings studied, moreover,
946 these initial PFS orders were later amended. In some MDL product liability proceedings a
947 plaintiff profile form (PPF) was ordered in addition to a PFS or in lieu of a PFS.

948 In addition, in nearly half the MDLs the FJC studied, the court also ordered a defendant
949 fact sheet (DFS) as well as a PFS. The MDLs with a larger number of actions involved DFS
950 orders more frequently than those with fewer actions. The average time from centralization to
951 entry of a DFS order was over 10 months, and the median time was 7 months. In some instances,
952 those orders seek information in defendants’ possession about plaintiffs. Presumably that is
953 sometimes information not available to plaintiffs. Whether any reliable prescription could be
954 made for the content of a DFS, or whether to require one, is not clear.

955 Could a rule prescribe content for PFS orders? Although detailed information is not yet
956 available, it seems that these PFS orders are not identical. Instead, as has been urged by many
957 attorneys during the Subcommittee’s study so far, these orders tend to be specific to the
958 circumstances of the litigation in which they are entered. The PFS orders identified by the FJC
959 are not “*Lone Pine*” orders (so named because they were introduced in the New Jersey state court
960 case *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. 1986)), requiring submission of
961 expert support for claims of causation. Instead, they generally focus on demonstrated or claimed
962 use of the product in issue and claimed injury of the sort assertedly caused by that exposure. For
963 the most part, this information appears likely to be within the control of plaintiffs.

964 The FJC reports that all the PFS forms it examined included certain information: (1)
965 health records; (2) personal identifying information; and (3) litigation history of the plaintiff.
966 Many also included categories of litigation-specific questions, and frequently also a requirement
967 for medical or other types of releases. It may be that some uniformity is emerging from practice,
968 but it is unclear whether that would be a sufficient basis for a rule listing required topics. To the
969 extent the scope of any rule included cases of other types, that challenge would be compounded.

970 Under these circumstances, it appears challenging to contemplate a rule that would
971 specify the exact contents of a required PFS in all actions covered by the rule. The possibility of
972 a DFS order could further complicate this picture.

973 What MDLs should be covered by a rule? The H.R. 985 provision above applies to
974 “personal injury” actions. Looking at product liability MDL proceedings (including some that
975 were not personal injury cases), the FJC found that they ranged in number of cases from three to
976 over 40,000. That may suggest that one could limit such a rule to MDLs with more than a certain
977 number of actions. But as suggested by the filing fee discussion below, the number of actions is
978 not the same thing as the number of claimants; there may be some actions that include many
979 individual plaintiffs suing together under the joinder provisions of Rule 20. And some MDLs
980 include class actions, further complicating this arrangement.

981 Looking to the FJC report, it seems that one could pick 1,000 cases as the cutoff, or
982 perhaps 100 cases. Alternatively, the cutoff could be set at a similar number of plaintiffs. Any
983 such number could be challenged as arbitrary, and there might also be uncertainty about counting
984 cases.

985 Determining what would constitute “personal injury” could prove challenging also. For
986 example, in data breach litigation involving medical records, if emotional distress damages were
987 allowed on such a claim would that be a “personal injury” MDL? Perhaps “physical or emotional
988 injury” would be better.

989 Should a rule be limited to MDLs? There have been cases that involved more than 1,000
990 claimants but were not subject to an MDL order. *See, e.g., Avila v. Willits Environmental*
991 *Remediation Trust*, 653 F.3d 828 (9th Cir. 2011) (claims on behalf of over 1,000 present and
992 former residents of town for health problems resulting from exposure to toxics from a chrome
993 plating facility on Main Street); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000)
994 (tortious injury claims by over 600 people allegedly resulting from uranium mining activity). In
995 both these cases, the district court imposed an order to provide details on individual plaintiffs as
996 a matter of case management. Using a standard looking to number of claimants might support
997 applying a PFS requirement to cases not subject to a Panel order. But since district courts appear
998 to have authority under Rule 16 to impose such a requirement, extending the rule beyond MDLs
999 seems unnecessary. To date, there has been no argument in favor of wider application.

1000 Who should draft the PFS? Assuming a rule could not itself prescribe the contents of a
1001 PFS, it might assign initial responsibility for preparing one. Ultimately, a court order would
1002 normally be required to implement the PFS requirement, but that does not mean the court should
1003 draft the PFS. Instead, it seems more reasonable that counsel should develop a proposed PFS.

1004 But it may be that serious drafting of a PFS could not begin until the court appoints lead
1005 counsel for the plaintiffs. That set of issues is partly addressed in topic (5) below.

1006 How soon should a rule direct that a PFS or DFS order be entered? The statutory
1007 proposal quoted above mandates submission of required information within 45 days of transfer to
1008 or direct filing within a covered MDL. As noted above, the actual experience to date has been
1009 that PFS orders were entered a considerably longer period after centralization occurred. One
1010 approach to a rule provision regarding timing might be to put the time limit beyond the longest
1011 time it has taken for entry of an order in any product liability MDL to date. Alternatively,
1012 perhaps, a rule could adopt the average or median, or direct the transferee court to set the time.

1013 How is the PFS scheme to be enforced/policed? The H.R. 985 provision imposes on the
1014 court a duty to review each submission within 30 days. It does not direct counsel (for
1015 defendants?) to challenge either the sufficiency of submissions or the failure of certain claimants

1016 to submit the required materials.

1017 The Subcommittee has not heard that an approach like the one in H.R. 985 the has
1018 actually been employed in the MDLs identified by the FJC as involving PFS or DFS
1019 requirements. Instead, it seems that the opposing party is ordinarily relied upon to challenge
1020 what it regards as inadequate submissions, with possible resort to the court if disputes remain. In
1021 some instances, particularly in cases in which some claimants have completely failed to make a
1022 submission, there may be a show-cause process in which the court can dismiss based on the
1023 failure of a claimant to comply. The FJC has found that the dockets in more than half the MDL
1024 proceedings with PFS requirements show evidence of activity to dismiss cases when substantially
1025 complete PFSs have not been filed. This activity seems to be supported by Rule 41(b) and
1026 Rule 37(b)(2) (to the extent the PFS order may be regarded as a discovery order). So it seems the
1027 rules already provide authority to dismiss where appropriate, and the remaining question is
1028 whether something more mandatory would warrant study.

1029 Should a rule modeled on Rule 26(f) be preferred? One idea that has emerged is that
1030 (assuming initial drafting of a PFS is to be done by counsel), a rule could be modeled on
1031 Rule 26(f), which commands the parties in all but a small category of excluded cases to confer
1032 and develop a discovery plan to submit to the court in connection with its entry of a scheduling
1033 order pursuant to Rule 16(b). Such an approach would offer more flexibility to tailor any PFS
1034 requirements to the specifics of the litigation. It also could include consideration of a
1035 requirement for a DFS, and the content of any such directive.

1036 Such a rule might adopt a timing model requiring the parties to meet and confer a certain
1037 number of days after entry of a Panel order centralizing covered cases. That might be more
1038 problematic if (as it appears sometimes happens) there are relatively few cases already pending at
1039 the time the Panel enters its initial centralization order. Thereafter, many more may be filed,
1040 increasing the size of the MDL docket past the trigger point. (This is a version of the “Field of
1041 Dreams” concern.) If the trigger for the new rule were the accumulation of a certain number of
1042 post-centralization cases, it may be a challenge to determine exactly when that happens. Should
1043 it be the responsibility of the Panel’s clerk’s office to notify the transferee judge? Tag-along
1044 cases probably produce a record with the clerk’s office of the Panel, but direct file cases likely do
1045 not. Perhaps the clerk of the transferee court could keep count.

1046 It may be that adopting such a rule requiring the parties to confer after the Panel acts is
1047 unnecessary. Probably most MDL transferee judges convene some sort of status or case
1048 management conference relatively promptly after centralization occurs. It may be that one of the
1049 early pieces of business then is appointment of a leadership team for the plaintiff side. That
1050 could also involve appointment of lead or liaison counsel on the defense side if there are
1051 numerous defendants. Particularly in the larger MDLs, it seems likely that something like what a
1052 rule of this sort might require is already happening. If so, it is unclear why a rule should
1053 command transferee judges or counsel to focus on a PFS in the small minority of large MDLs in
1054 which one is not used.

1055 Emory Institute effort: Reportedly, the Emory Institute that is putting on two of the
1056 events listed above also has a working group made up of plaintiff-side and defense-side lawyers
1057 working on a bipartisan approach to the unfounded claims issues. That may produce a useful
1058 model for the Subcommittee to consider.

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(2) *Interlocutory appellate review*

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H.R. 985 also included an addition of a new subsection to § 1407 providing as follows:

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The Court of Appeals having jurisdiction over the transferee district shall permit an appeal to be taken from any order issued on the conduct of coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b) provided that an immediate appeal from the order may materially advance the ultimate termination of the proceedings.

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Somewhat similar proposals have been made to the Committee.

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Is § 1292(b) a sufficient avenue for interlocutory review? Included in this agenda book is a report by John Beisner on research into use of § 1292(b) in MDL proceedings. It concludes that very few such appeals have occurred. That does not mean the decisions whether to allow interlocutory appeals in those cases were wrong under § 1292(b), but may mean that an additional avenue should be provided.

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It is not difficult to imagine situations in which there could be good reason to depart from the normal final judgment rule in some MDL proceedings. To take an extreme case, consider that an MDL proceeding made up of 10,000 claims involved a potentially dispositive question such as possible preemption of the claims asserted. There could be very strong reasons for favoring immediate review in such a case of a ruling on that issue even if there would be no urgency about such review in a single-plaintiff case.

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Whether those situations would satisfy § 1292(b)'s standards might be uncertain. The statute focuses on "a controlling question of law." But determining what is a "question of law" may sometimes be difficult. For example, is a decision that under Fed. R. Evid. 702 and *Daubert* certain expert testimony is inadmissible a "question of law"? Often it is said that a *Daubert* ruling is reviewed for an abuse of discretion, which does not sound like a question of law. Is a grant of summary judgment on one of the claims on the ground that plaintiff does not have sufficient evidence to warrant presenting the claim to the jury a "question of law"?

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Even after isolating questions of law, the statute also says that they must be "controlling." In a single-plaintiff case, it may often seem that a question is not controlling. The issue may go only to some evidence to be submitted, or the right instructions to give in regard to certain claims. Magnified thousand-fold in an MDL proceeding, such a question might seem more important but not more "controlling."

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Even such controlling questions of law are a ground for immediate review only if there is "substantial ground for difference of opinion." That may often seem not to be true of rulings of immense importance to MDL proceedings due to the dimensions of those cases.

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§ 1292(b) also says that immediate review should not be permitted unless it would "materially advance the ultimate termination of the litigation." How exactly that works in the large MDL could be debated. The length of time it would take to resolve the appeal may often seem to cut against this criterion. To the extent that granting immediate review might delay or defeat settlement efforts, a judge might conclude that such a development would not materially advance the ultimate termination of the litigation. Since the first decade of the Panel's operations, only a small percentage of cases transferred by the Panel have returned to the original forum. The reality has been that the litigations terminate in the transferee forum, and often by settlement.

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1102 Much of the foregoing is somewhat speculative, but the point is that there is reason to
1103 think that § 1292(b) is not ideally suited to deal with the specific question of immediate review in
1104 mega MDL proceedings.

1105 Should interlocutory review be mandatory? The proposal in H.R. 985 provided for
1106 mandatory review, albeit with the proviso that immediate review is required only if it “may
1107 materially advance the ultimate termination of the proceedings.” There have also been
1108 suggestions that a rule might give such review priority over other appellate matters. The
1109 Subcommittee is not aware of any receptivity to such a command in the rules. Given criminal
1110 appeals and “emergency” matters of various sorts, mandatory expedited review does not seem
1111 workable. To the extent a mandatory rule is attractive, that will mean that the criteria for review
1112 must be refined as much as possible.

1113 An alternative might be to adopt a discretionary rule like Rule 23(f) for class-certification
1114 orders. It may be possible that such discretionary authority over interlocutory review would be
1115 an acceptable method of introducing more flexibility without adding unnecessary delay or
1116 requiring highly precise criteria for review. Given the variety of experiences with MDL
1117 litigation, there is much to be said for flexibility.

1118 Should the district judge have first say, or any say? § 1292(b) gives the district court
1119 authority to “certify” an issue for immediate appellate review. If that certificate does not issue,
1120 the court of appeals cannot accept an immediate appeal under the statute. It might be that the
1121 uncertainty of applying the statute’s criteria set forth above would mean that a rule with a
1122 requirement that the district court certify but different criteria would be sufficient to facilitate
1123 needed review.

1124 Rule 23(f) does not require that the district court certify the order for review, and instead
1125 grants the court of appeals discretion to decide whether to allow the appeal. That could be a
1126 model for an MDL rule, but it is difficult to understand how the court of appeals would exercise
1127 that discretion without knowing the district judge’s attitude about the impact of immediate
1128 review on the conduct of the MDL proceedings.

1129 Giving the district judge an opportunity to opine on the desirability of immediate review
1130 rather than a veto could be done by requiring that the petition be filed in the district court and
1131 transmitted to the court of appeals, or that the court of appeals be authorized to invite the views
1132 of the district judge. That might entail proposing some time deadline for the district court to act.

1133 Should there be a time limit on petitioning for review? Rule 23(f) requires the petition to
1134 be filed within 14 days of the district court’s class-certification ruling. That might not be suitable
1135 in the MDL setting. For one thing, a series of rulings in separate cases might reach a crescendo
1136 showing that interlocutory review is of such moment to the MDL proceeding as to justify
1137 immediate review.

1138 Should immediate review be authorized only for certain sorts of orders? Rule 23(f) is
1139 limited to orders granting or denying certification of a class action. Submissions to this
1140 Committee have suggested that one might delimit a new authority for interlocutory review by
1141 permitting it only with regard to certain types of orders. Candidates have included preemption
1142 rulings, rulings on the admissibility of expert opinion evidence, and rulings on personal
1143 jurisdiction.

1144 The range of possibilities suggests the difficulty of limiting the authority to review by
1145 order type. Rule 23(f) deals with an order that routinely is among the most important, often the
1146 most important, in the course of pretrial proceedings. But the range of orders that might have
1147 such significance in MDL proceedings makes it difficult to predict with confidence which might

1148 have central importance in a given MDL.

1149 Can a rule usefully focus the decision whether to grant review without being limited to
1150 certain kinds of orders? One standard might be to limit interlocutory review to “dispositive”
1151 rulings. That resembles the “controlling question of law” standard in § 1292(b). Applying such
1152 a standard might prove quite troublesome. For illustration, see n. 8 in Mr. Beisner’s letter (in this
1153 agenda book).

1154 Instead, a more fruitful approach might be something like the “materially advance the
1155 ultimate termination of the litigation standard” in § 1292(b). As noted above, that does not seem
1156 to work in mega MDLs, however, where the ultimate termination of the litigation may involve
1157 thousands of individual cases. Ed Cooper suggests looking instead to a standard modeled on the
1158 one for direct appeals to the court of appeals in bankruptcy proceedings – “materially advance the
1159 progress of the case or proceeding.” 28 U.S.C. § 158(d)(2)(A)(iii). Something along those lines
1160 seems better adapted to the justification for considering this additional route to interlocutory
1161 review.

1162 One might object that this standard is too malleable, and might make the court of appeals
1163 too dependent on the district court’s view of what would further the goals of the MDL
1164 centralization. In that sense, it might seem to approach the district-court veto that § 1292(b)
1165 contains. But that flexibility also offers the virtue of being adapted to the circumstances of an
1166 individual MDL proceeding.

1167 *(3) Filing fees*

1168 Filing fees are governed by a statute, 28 U.S.C. § 1914(a): “The clerk of each district
1169 court shall require the parties instituting any civil action, suit or proceeding in such court,
1170 whether by original process, removal or otherwise, to pay a filing fee of \$350.” The Civil Rules
1171 do not address the question, except to the extent the party joinder provisions of Rule 20 affect
1172 filing fees by permitting multiple plaintiffs to join together in a single action and pay a single
1173 filing fee.

1174 Submissions to the Committee have suggested that requiring payment of individual filing
1175 fees might be a useful adjunct to other screening methods (see item (1) above), something of a
1176 “put your money where your mouth is” approach. To the extent the requirements of Rule 11(b)
1177 do not prompt lawyers who adhere to the alleged motto “Find a name, file a claim” to screen
1178 cases, having to pay individual filing fees for each plaintiff might cause them to be more careful
1179 about what they file.

1180 Since 2016, a new origin code has been added to the civil cover sheet that identifies direct
1181 filed cases in MDL proceedings. The FJC researchers identified direct filed cases, and found that
1182 in the cases identified the filing fee was paid 99% of the time. The 70,000 plus direct filed cases
1183 so identified included 90,000 plus plaintiffs. But in a large number of the multi-plaintiff cases
1184 the two plaintiffs share the same last name, which suggests that they involve two family members
1185 and include loss of consortium claims.

1186 It thus appears that filing fees are regularly being charged individually. Whether that has
1187 measurably reduced the frequency of unfounded claims is presently unknown. But current
1188 reports do not indicate that, if it has had such an effect, it has entirely removed such cases from
1189 the mix. Given the frequency of filing fee payment (at least in direct-filed cases), it is far from
1190 clear that any rulemaking on this front would promise significant improvement in screening out
1191 unfounded claims.

1192 Should the Subcommittee continue to focus on a filing-fee rule?

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(4) *Master complaints and individual complaints in consolidated proceedings*

1195 The Committee has received a suggestion that it add a reference in the rules to master
1196 complaints. Rule 7(a) says that only the pleadings listed there (not including “master
1197 complaints”) are allowable pleadings. The objection is that some district courts have assertedly
1198 said that master complaints are not subject to challenge under Rule 12 because “master
1199 complaints” are not listed in Rule 7(a). *See* Lawyers for Civil Justice, Request for Rulemaking
1200 (17-CV-RRRR) at 3-4.

1201 It does not seem that master complaints are unknown quantities. For example, in
1202 *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015), some 60 cases were centralized by the
1203 Panel. The transferee judge then granted defendants’ motions to dismiss in some of the cases; at
1204 least in this MDL proceeding there was no obstacle to challenging individual complaints.
1205 Plaintiffs appealed, and the court of appeals dismissed the appeals on the ground that judgment
1206 was not final in all the cases centralized by the Panel and, accordingly, that the appeal was
1207 premature.

1208 The Supreme Court reversed, holding that there was appellate jurisdiction because each
1209 case in that particular MDL proceeding remained a separate case because the original pleadings
1210 were not superseded by a master complaint. Justice Ginsburg explained (*id.* at 904 n.3):

1211 Parties may elect to file a “master complaint” and a corresponding “consolidated
1212 answer,” which supersede prior individual pleadings. In such a case, the transferee
1213 court may treat the master pleadings as merging the discrete actions for the duration
1214 of the MDL pretrial proceedings. *In re Refrigerant Compressors Antitrust Litigation*,
1215 731 F.3d 586, 590-92 (C.A. 6 2013). No merger occurs, however, when “the master
1216 complaint is not meant to be a pleading with legal effect but only as an administrative
1217 summary of the claims brought by all the plaintiffs.” *Id.* at 590.

1218 *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586 (6th Cir. 2013),
1219 involves somewhat the opposite situation, again addressing appellate jurisdiction. In that case,
1220 after transfer by the Panel the plaintiffs filed a consolidated complaint. The defendants moved to
1221 dismiss several claims in the consolidated complaint, and the district court granted the motion.
1222 That resulted in dismissal of all the claims asserted by the appealing plaintiffs, but left the claims
1223 of other plaintiffs still standing. The plaintiffs who suffered a dismissal appealed, urging that
1224 “they did not file a consolidated complaint but only an administrative document with no legal
1225 force.” *Id.* at 590.

1226 The court of appeals disagreed, dismissing the appeals on the ground there had not yet
1227 been a final judgment because other claims made in the consolidated complaint were still
1228 pending before the district court. Judge Sutton explained (*id.*):

1229 In many cases, the master complaint is not meant to be a pleading with legal effect
1230 but only an administrative summary of the claims brought by all the plaintiffs. When
1231 plaintiffs file a master complaint of this variety, each individual complaint retains its
1232 legal existence.

1233 But in other cases, the court and the parties go further. They treat the master
1234 complaint as an operative pleading that supersedes the individual complaints. The
1235 master complaint, not the individual complaints, is served on defendants. The master
1236 complaint is used to calculate deadlines for defendants to file their answers. And the
1237 master complaint is examined for insufficiency when the defendants file a motion to
1238 dismiss.

1239 Under this case law, then, the absence of references to master complaints in Rule 7(a)
1240 does not appear to prevent pleading challenges, though it may complicate the timing of appellate
1241 review. Instead, the main focus of the proposal to amend Rule 7(a) seems to be concerned with a
1242 management technique occasionally employed by MDL transferee judges. Thus, the submission
1243 raising the master complaint issue quotes a transferee judge:

1244 The Court cannot envision the task of adequately pleading the consolidated master
1245 complaint in a manner which would satisfy the Defendants, without completely
1246 removing the compromise and attempt at efficiency the Parties and I had in mind in
1247 allowing the filing of the Consolidated Master Complaint. At this stage of the
1248 litigation I prefer to assess the sufficiency of plaintiffs' claims with substantial
1249 leniency, especially when the information that may or may not support Plaintiffs'
1250 claims is largely within the control of the Defendants.

1251 LCJ submission (17-CV-RRRR) at 3 n.8, quoting *In re Trayslol Prods. Liabil. Litig.*, 2009 U.S.
1252 Dist. Lexis 65481 at *72-73 (S.D. Fla. 2009).

1253 It is not clear, then, that there is a problem because master complaints are not mentioned
1254 in Rule 7(a). The objection appears to focus principally on the administrative use of a
1255 consolidated or master complaint to expedite proceedings in the transferee court. In such
1256 instances, pleadings motions directed to individual plaintiffs or claims may seem a distraction.

1257 Perhaps Rule 7 (or another rule) could be amended to forbid such sequencing by the
1258 transferee court and compel judges to consider and decide motions to dismiss no matter what else
1259 appears more important in the MDL proceeding. Judges do wield such authority.

1260 For example, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 229
1261 F.R.D. 35 (D. Me. 2005), after spending a great deal of time and energy in these MDL
1262 proceedings on defendants' motions to dismiss (and certifying one ruling for immediate review
1263 under § 1292(b)), the transferee judge entered a scheduling order setting class certification as the
1264 next matter to be resolved. But then defendant General Motors filed a motion for summary
1265 judgment, taking the position that it had a right under Rule 56 to move for summary judgment.
1266 The judge disagreed: "I do not believe that General Motors has the right to file the motion when
1267 and how it chooses in the context of this litigation." *Id.* at 39.

1268 Instead, he stressed the court's authority under Rule 16 to take control of a case, adding
1269 that the court's authority under that rule "limits the parties' power over timing that might
1270 otherwise exist under Rule 56." *Id.* at 40. He added (*id.* at 39):

1271 This is true in the ordinary case; it is even more important in a multidistrict case,
1272 where there are a multitude of parties and lawyers, the issues are complex, the
1273 expenses are high, and the Court will likely be called upon to approve an attorney's
1274 fee request at the end of this case.

1275 He stayed proceedings on the motion for summary judgment, and almost dared General Motors
1276 to seek review of his order. *See id.* at 41 n.8 ("If General Motors truly believes it has the right to
1277 determine the schedule in this case, it can seek mandamus relief in the court of appeals.
1278 Otherwise, the scheduling of such motions will be on the agenda after class certification is
1279 resolved.").

1280 The Subcommittee has had limited opportunity to discuss the specific issue of master
1281 complaints. But absent a rule requiring that courts rule on Rule 12 motions before ruling on
1282 anything else, or more generally removing transferee judges' authority to sequence their
1283 decisions – and thus to refuse to entertain motions they regard as having low priority – it does not

1284 appear that adding references to “master” pleadings to Rule 7(a) is likely to produce significant
1285 results.

1286 The same submission urged that Rule 7(a) also be amended to add references to
1287 individual complaints in consolidated proceedings. On this score, it should be noted that the FJC
1288 examined “short form complaints” (SFCs) in the product liability MDLs it studied, and found
1289 that those were almost never used in product liability MDLs with fewer than 100 actions, that
1290 they were used in over 50% of the product liability MDLs with more than 100 actions, and that
1291 they were used in nearly two-thirds of the MDLs with 1,000 or more actions. These SFCs were
1292 required in direct-filed cases, and typically required party-identifying information, an invocation
1293 incorporating allegations of the master complaint, specific case facts regarding injuries of this
1294 plaintiff, and a prayer for relief. The FJC research did not investigate whether defendants were
1295 able to file Rule 12 motions challenging such complaints.

1296 Should the Subcommittee continue to focus on a rule amendment addressing master
1297 complaints or individual complaints in consolidated proceedings?

1298 (5) *Settlement review*

1299 The Committee has recently completed its extensive consideration of settlement-approval
1300 criteria for class actions, leading to the amendments to Rule 23(e) that went into effect on
1301 December 1, 2018. The relevance of that history for the current consideration of MDL
1302 proceedings is to recognize that when Rule 23 was amended in 1966 very little consideration was
1303 given to settlement review. Class action settlements began to loom large only after 1966, and the
1304 courts of appeals developed criteria for reviewing them to determine whether they were fair,
1305 reasonable, and adequate. Those words were written into the rule in the amendments that went
1306 into effect in 2003. The 2018 amendments further focus that review.

1307 Meanwhile, in its 1997 decision in *Amchem* the Supreme Court introduced a somewhat
1308 more demanding view of settlement-only certification that many say contributed to the rise in
1309 mass tort MDL proceedings. That may have contributed to the large increase in the proportion of
1310 the federal civil docket that is subject to an MDL transfer order. It is not clear that the framers of
1311 the MDL statute in the 1960s paid much more attention to settlement of MDL proceedings than
1312 the framers of amended Rule 23 during that same period were paying to class-action settlements.

1313 Settlement has certainly become a prominent feature of MDL practice. Often MDLs
1314 include class actions, so Rule 23(e) applies when those class actions are vehicles for achieving
1315 “global peace” and resolving the MDL proceedings.

1316 But there is no general authority for MDL transferee judges to scrutinize the terms of
1317 settlements in the proceedings before them. Persuasive voices have urged that judicial authority
1318 and responsibility ought to be explicitly extended to reviewing the terms of such settlement
1319 agreements. Whether that concern really warrants rulemaking is less clear, however. Most
1320 claimants in MDL proceedings have their own lawyers, and nobody is suggesting that transferee
1321 judges should be involved in reviewing the terms of individual settlements they (and their
1322 retained counsel) accept on a routine basis. (Indeed, settlement by individual unnamed class
1323 members in class actions are commonly regarded as akin to opt outs and are not reviewed under
1324 Rule 23(e).)

1325 More misgivings may attend “inventory settlements,” in which lawyers with a portfolio of
1326 cases in an MDL proceeding negotiate a settlement by which the defendants pay a lump sum to
1327 settle all the law firm’s cases, ordinarily in return for releases from each of the claimants. It is
1328 certainly possible to feel uneasy about whether the allocation of proceeds from such inventory
1329 settlements among the various clients of a given lawyer or firm is one the judge would endorse.

1330 But the Civil Rules do not generally authorize judicial review in such settings.

1331 One method of justifying review of the fairness of a proposed settlement in the MDL
1332 setting is the notion of a “quasi class action,” which some judges have adopted. There is much to
1333 be said for this attitude. The basic settlement terms may be worked out by counsel recognized
1334 (perhaps appointed) by the court as leading the litigation, and offered to the clients of many
1335 lawyers who did not participate in the negotiations. Like class action settlements, some MDL
1336 settlements come with features that put hydraulic pressure on individual lawyers and claimants to
1337 accept the overall package deal, sometimes with a schedule of benefits resembling the one before
1338 the Supreme Court in the *Amchem* case.

1339 The judicial role in assisting (or even promoting) such settlements in MDL proceedings
1340 may be likened to the role of the judge in regard to settlement of class actions. Should it be
1341 subject to some supervision by rule?

1342 A preliminary challenge to adopting such a rule is to recognize that the settlement-review
1343 role of the judge under Rule 23(e) stands out as an exception to the ordinary right of the parties to
1344 agree to a settlement on terms they find satisfactory. Judges cannot ordinarily forbid that. In
1345 class actions, the distinctive factor requiring judicial review of the merits of the settlement itself
1346 is that Rule 23(c) says that an approved settlement is binding on all class members. So that
1347 exercise of judicial power comes with responsibility for judicial review. The MDL statute
1348 provides no such authority to the MDL transferee judge.

1349 But it also seems that the judge is often deeply involved in making decisions that shape
1350 and support the development of settlements in MDL proceedings that, as a practical matter, affect
1351 the interests of claimants in those proceedings in a way that approaches the effect of class-action
1352 settlements on class members. This similarity to class actions is deepened when settlement terms
1353 are negotiated by lead counsel who effectively act (often pursuant to court order) for
1354 nonparticipating lawyers, and negotiate the terms that are offered to those lawyers’ clients.

1355 It may be that those activities could be regulated by rule in a way that introduces judicial
1356 authority and responsibility for scrutinizing proposed settlements in MDL proceedings. A
1357 recurrent feature of MDL proceedings is appointment of leadership committees, at least on the
1358 plaintiff side. The selection of lead and liaison counsel is addressed by §§ 10.221-224 of the
1359 Manual for Complex Litigation (4th). This is a judicial responsibility, as recognized in § 10.224:

1360 [T]he judge is advised to take an active part in the decision on the appointment of
1361 counsel. Deferring to proposals by counsel without independent examination, even
1362 those that seem to have the concurrence of a majority of those affected, invites
1363 problems down the road if designated counsel turn out to be unwilling or unable or
1364 if they incur excessive costs.

1365 Rule 23(g) was added in 2003 to emphasize and direct the responsibility of the court in
1366 appointment of class counsel. Perhaps a rule with similar criteria could be developed for MDL
1367 proceedings, or at least some of them. (Again, the question of the scope of such a rule might
1368 prove tricky.) With this oversight of the appointed counsel in the rules, there might well be room
1369 for the court to be granted authority in regard to its oversight of appointed counsel also to pay
1370 particular attention to the contents of proposed settlements. This is not the same as judicial
1371 authority to “approve” proposed settlements and thereby give them binding effect over even
1372 objecting claimants, but in operation it might not be too different.

1373 If this course were followed, however, it might require addressing some additional
1374 questions. Under the 2018 amendments to Rule 23(e), there are “frontloading” provisions and
1375 class action objector provisions that might be urged as desirable for MDL proceedings as well.

1376 But it is not so clear that these specifics would appropriately be applied in MDL proceedings.

1377 Should development of standards for judicial oversight of settlement in MDL proceedings
1378 continue on the Subcommittee’s agenda?

1379 *(6) Third-Party Litigation Funding*

1380 The Litigation Funding Transparency Act of 2019, S. 471 (introduced on February 13,
1381 2019), includes a proposed amendment to § 1407, adding a new subsection (g)(1) to § 1407 as
1382 follows:

1383 In any coordinated or consolidated pretrial proceedings conducted pursuant to
1384 this section, counsel for a party asserting a claim whose civil action is assigned to or
1385 directly filed in the proceedings shall –

1386 (A) disclose in writing to the court and all other parties the identity of
1387 any commercial enterprise, other than the named parties or counsel, that has a right to
1388 receive payment that is contingent on the receipt of monetary relief in the civil action
1389 by settlement, judgment, or otherwise; and

1390 (B) produce for inspecting and copying, except as otherwise stipulated
1391 or ordered by the court, any agreement creating the contingent right.

1392 The proposed legislation has a similar provision for disclosure of third-party litigation funding in
1393 “any class action,” perhaps not limited to class actions in federal court.

1394 The Committee has before it a proposal from the U.S. Chamber Institute for Legal
1395 Reform (17-CV-O), calling for the addition to Rule 26(a)(1)(A) of an additional disclosure
1396 requirement:

1397 (v) for inspection and copying as under Rule 34, any agreement under which any
1398 person, other than an attorney permitted to charge a contingent fee representing a
1399 party, has a right to receive compensation that is contingent on, and sourced from,
1400 any proceeds of the civil action by settlement, judgment or otherwise.

1401 A similar proposed amendment to Rule 26(a) was considered by the Committee and not acted
1402 upon in 2014.

1403 There are differences between the rule proposal and the proposed legislation. One is that
1404 the rule proposal is not limited to class actions or MDL proceedings. Another is that the
1405 legislation is not limited to compensation “sourced from” proceeds of the litigation. A third is
1406 that the legislation is limited to a “commercial enterprise,” while the rule proposal is broader
1407 (including, e.g., relatives of the plaintiff). A fourth is that the legislation explicitly states that the
1408 court may alter the requirement to produce the agreement (though that would seem implicit in the
1409 rule-amendment proposal).

1410 In this agenda book are three submissions recently received about these TPLF issues. The
1411 Subcommittee has gathered some information about TPLF. For example, the FJC researchers
1412 report that some PFSs include questions relating to the third-party litigation funding of plaintiff’s
1413 claims. Nonetheless, it seems that very few MDL transferee judges presently report that they are
1414 aware of TPLF in the proceedings before them. But at least some high-profile MDL proceedings
1415 have involved TPLF issues. Thus, in the NFL concussion litigation the judge entered an order
1416 regarding the enforceability of funding agreements signed by some class members, and in the
1417 opioid litigation the transferee judge entered an order requiring submission of information about

1418 third-party litigation funding for in camera inspection by the court.

1419 Meanwhile, it seems that litigation funding is growing by leaps and bounds, and in many
1420 different contexts. On the day after the Committee’s November meeting, George Washington
1421 University Law Center organized a very informative program about TPLF attended by most of
1422 the members of the Subcommittee. That program emphasized that there are at least two discrete
1423 sorts of such funding, which might be called the “consumer” and the “commercial” branches.
1424 The former may often involve loans to cover living expenses for plaintiffs awaiting resolution of
1425 their litigation. These sorts of loans ordinarily do not involve huge sums of money, though that
1426 money may be very important to the borrowers. The commercial lending category (e.g., for
1427 patent litigation) often involves much larger amounts of money (e.g., potentially millions of
1428 dollars).

1429 The Subcommittee does not have a clear picture of the current status or trajectory of
1430 TPLF. That activity may be assuming a much larger importance than even in the relatively recent
1431 past. *See, e.g.*, Greg McPolin, Legal Finance – From Necessity to Business Development Tool,
1432 Bloomberg Law News, Feb. 22, 2019 (article by managing director of a litigation funding firm
1433 about how using legal finance can enable law firms to manage litigation risk and better serve
1434 their clients); Holly Urban, Law Firm Clients Should Heed the Tech World, Consider
1435 Crowdfunding, Bloomberg Law News, Jan. 8, 2019 (“Crowdfunding as a means of litigation
1436 funding, or to pay for otherwise expensive legal work, should be understood in much the same
1437 way as traditional forms of funding.”).

1438 As research done for the Committee in the past has shown, many district courts and
1439 courts of appeals have some requirements for disclosure of litigation funding as it might bear on
1440 recusal. But that concern does not seem central to the issues before the Subcommittee.

1441 Given the rapid growth and evolution of TPLF, and the fact that most transferee judges
1442 do not report being aware of its use in MDL litigation before them, there may be reason for the
1443 Subcommittee not to proceed now to more serious study of a possible rulemaking response and
1444 instead to monitor developments with an eye to whether in the future some more general
1445 rulemaking response would be appropriate.

1446 Should the Subcommittee presently proceed to study a rule amendment to address TPLF?

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**DRAFT Notes of Conference Call
MDL Subcommittee
December 10, 2018**

1450 On December 10, 2018, the MDL Subcommittee of the Advisory Committee on Civil
1451 Rules held a conference call. Participating were Judge Robert Dow (Chair, Subcommittee),
1452 Judge John Bates (Chair, Advisory Committee), Judge Joan Ericksen, Judge Robin Rosenberg,
1453 Virginia Seitz, Ariana Tadler, Joseph Sellers, Helen Witt, Prof. Edward Cooper (Reporter,
1454 Advisory Committee), Prof. Richard Marcus (Reporter, MDL Subcommittee), Emery Lee (FJC),
1455 Margaret Williams (FJC), Jason Cantone (FJC), Rebecca Womeldorf (A.O.), and Julie Wilson
1456 (A.O.)

1457 Judge Dow introduced the call as largely a planning call to map out future activity. In
1458 particular, though the Subcommittee had learned a great deal over the past year from
1459 participating in many informative events, it also had identified many questions that called for
1460 further fact-gathering. Emery Lee and others from the FJC were on the call, and one primary
1461 goal was to explore what the FJC Research contingent could provide the Subcommittee.

1462 **Recap of November Developments**

1463 Various Subcommittee members had participated in three events between Oct. 31 and
1464 Nov. 2 – the MDL Transferee Judges’ Conference, the Advisory Committee meeting, and the
1465 George Washington University Conference on Third-Party Litigation Funding (TPLF).

1466 Advisory Committee meeting: All Subcommittee members had participated in the
1467 Advisory Committee meeting, and it was fully reflected in the minutes of that meeting. But some
1468 mention of the other two events seemed in order.

1469 One topic that came up was that there was some discussion during the Advisory
1470 Committee meeting of surveying lawyers about some issues under consideration. But this would
1471 be hard to do. In particular, it would be important to be certain before embarking on such a
1472 survey that the Subcommittee was agreed on the goals of the survey and what lawyers should be
1473 surveyed. Various groupings are possible – MDL lawyers, “mass tort” lawyers, class action
1474 lawyers, etc. The choice which group to target could affect the results. One would have to be
1475 very careful to ensure a good response rate and avoid confusing or relatively meaningless results.

1476 MDL Transferee Judges’ Conference: Both transferee judges who are members of the
1477 Subcommittee and also Judge Rosenberg attended the Florida conference, as did Judge Bates.
1478 The many discussions there were helpful and informative. One topic of considerable interest
1479 among the judges was TPLF. But TPLF is a “somewhat distinct” issue.

1480 Among the other issues the Subcommittee has discussed, there were varying attitudes
1481 among transferee judges, but at least some were not favorable towards adopting rules. With
1482 regard to winnowing unsupportable claims, for example, there was much emphasis on individual
1483 differences among MDL proceedings and the need for judicial flexibility. Although something
1484 like “best practices” might be useful, there was skepticism about a rule.

1485 On immediate appealability, there seemed to be considerable skepticism, perhaps
1486 opposition. One thought was that methods already exist to obtain needed appellate review.

1487 Regarding individual filing fees, there was more receptiveness about the possible value of
1488 this technique in some instances. At least one judge ruefully observed that it would have been
1489 helpful in one MDL.

1490 GW TPLF Conference on Nov. 2 (the day after the November Committee meeting): An
1491 observation about this conference was that though it did not offer much that was new, it did
1492 reinforce points already made in other conferences during the year. One reaction was that it was
1493 striking how many vehicles for such financing exist. An initial view might be to emphasize that
1494 we should be very clear on what we are trying to accomplish before embarking on any rule ideas
1495 in this area. Is the purpose of disclosure to enable judges to be attentive to needs for recusal? Is
1496 it a way to determine whether certain lawyers considered for leadership positions have the
1497 financial wherewithal to shoulder the burden? Are there other objectives?

1498 Further Research/Fact-Gathering

1499 Emery Lee, Margaret Williams, and Jason Cantone presented ideas for FJC Research
1500 empirical work and outlined ideas for research to the Subcommittee. They had already met with
1501 representatives of the Judicial Panel.

1502 A starting question was how this research might focus on appropriate MDL proceedings.
1503 An initial idea was to focus on product liability MDLs. That drew the question whether this was
1504 a category used by the Panel, and whether all of these could be considered “mass tort” MDLs.

1505 A response was that these were all tort cases, but that there were various theories
1506 presented in different MDLs. In general, they involved personal injury claims. But it might be
1507 that one could liken some others to these. For example, sales practices litigation might involve
1508 injurious products, as could other consumer claims. Similarly, data breach litigation might have
1509 similarities.

1510 Nonetheless, it seemed best to start with product liability cases. At least if one wants to
1511 look at fact sheet practices, it seems that most such examples are in product cases, even if they
1512 appear in other cases also.

1513 As to data breach and other suits, it was observed that sometimes early initial disclosure
1514 serves a purpose much like what we understand fact sheets to serve in some personal injury MDL
1515 proceedings.

1516 Plaintiff fact sheet practice: Against that background, it seemed that there were many
1517 topics on which information could be gathered, perhaps mainly or first from the Panel:

1518 Whether PFS practice is limited to product cases
1519 The percentage of those product MDLs in which there was a PFS practice
1520 Whether DFS (defense fact sheets) practices exist
1521 How PFS practice compares to plaintiffs’ “profile forms”
1522 Timing on PFS practice – how soon after Panel centralization do these documents
1523 appear?
1524 Are these documents revised over time (i.e., amended)?
1525 How do the documents come into being? Are they drafted by counsel or by the court?
1526 Are amendments proposed by counsel or the court? How long does this drafting
1527 process take?

1528 Master complaints: The discussion touched also on master complaints, both “short
1529 form,” and “long form.” Are these used instead of PFS practice? In addition to that practice?
1530 Before or after the PFS is submitted?

1531 Techniques for dismissing unfounded claims: It seems that one goal of PFS treatment is
1532 to have those claims that are unfounded dismissed. That could be due to something like a
1533 pleading motion, or something more like an order to show cause regarding failure to comply with

1534 the court's directive to supply the information sought by a PFS. A number of MDLs have a
1535 procedure for defendants to challenge individual PFSs, and perhaps to make a motion if their
1536 concerns are not satisfied. (H.R. 985, it could be noted, called for the court to undertake the
1537 analysis of the submissions required under that bill on its own initiative. It is not clear whether
1538 any actual MDL has such a procedure.)

1539 Individual filing fees: It would also be good to obtain information about the frequency
1540 and effect of requiring individual filing fees from each claimant. Perhaps the Panel's files would
1541 indicate (a) whether there were such a requirement in individual MDLs, and (b) whether it had
1542 any effect on the number of unsupportable claims in that MDL. One way of getting at this might
1543 be to look at local rules on the subject.

1544 Surveying judges: Some things might not be obtainable from the Panel's files, and it
1545 might be necessary to survey judges about those topics. If so, an initial topic would be whether
1546 to survey only MDL transferee judges or all judges. With regard to TPLF, at least, it would seem
1547 useful to obtain responses from all judges, not just MDL transferee judges. Who should be
1548 included among "all judges" might require thought. Magistrate judges might have more
1549 familiarity with TPLF arrangements than district judges.

1550 But it is not clear what should be asked. It might be desirable to ask whether TPLF
1551 disclosure is required in the recipients' courts, although a survey of local rules already done for
1552 the Advisory Committee by the Rules Law Clerk indicated that around a quarter of all districts
1553 and many courts of appeals have rules that may call for the disclosure of those with a "financial
1554 interest" in the outcome of pending suits. That might not be a very close match for what we are
1555 talking about, however. Another thing that might be asked is whether the judge has seen
1556 discovery disputes about TPLF issues. At the same time, any such survey should not ask
1557 respondent judges to opine on what rules the rules committee ought to be examining seriously.
1558 The Subcommittee is devoting a great deal of energy to making that determination, and
1559 individual judges responding to a survey cannot be expected to devote similar efforts to
1560 answering the questions asked.

1561 Another caution was that the FJC is very cautious about asking judges to take the time to
1562 respond to surveys, and for good reason. Judges already have too much to do, and some may
1563 regard answering surveys as remote from their primary judicial responsibilities.

1564 This discussion prompted a report that the FJC has recently posted a Special Topic on
1565 TPLF. The link to this item will be circulated after the conference call.

1566 Another caution was that we should give considerable attention to how to define TPLF.
1567 One idea is to see how the local rules define it, but the initial response was that it's pretty general
1568 – "has a financial interest" in the outcome of the suit. Almost certainly nobody would include a
1569 bank line of credit to a law firm within that definition. How to treat a loan to a plaintiff might be
1570 a little more difficult, but it is likely we would want to focus mainly on entities in the business of
1571 lending. We are not focusing on relatives who will loan living expenses to a plaintiff who is
1572 awaiting a verdict or settlement in a case pending in court.

1573 As this discussion proceeded, it was suggested that a smaller group should be initially
1574 charged with working with the FJC representatives. Judge Dow and Professor Marcus could be
1575 part of that smaller group. A goal for the group, in conjunction with the FJC people, would be to
1576 try to identify "low hanging fruit" readily accessible in the Panel's files that seems responsive to
1577 the Subcommittee's needs. Beyond that, the smaller group could refine the goals of the empirical
1578 work, and then circulate the ideas to the full Subcommittee for reactions.

1579 Surveying lawyers: The challenges of surveying lawyers emerged quickly. One question
1580 is whether to focus only on lawyers involved in MDL proceedings. If one is talking about TPLF,
1581 that seems too narrow. But with regard to all the Subcommittee’s other topics it seems that such
1582 a limit might be appropriate.

1583 Focusing on “MDL lawyers” might not be easy, however. To take a simplistic view, one
1584 could distinguish between leadership and individually represented plaintiffs’ lawyers (IRPAs).
1585 Should there be an effort to reach both or only leadership?

1586 Looking beyond leadership might create difficulties. For one thing, at least some of these
1587 lawyers may feel they have been wrongfully excluded from leadership. The Subcommittee has
1588 heard from transferee judges that they are earnestly trying to diversify the leadership groups. But
1589 the financial commitment (cf. TPLF issues) may be an obstacle to doing that.

1590 Another problem might be that the “average” lawyer in an MDL proceeding may have
1591 limited involvement in, or even awareness of, the overall progress of the litigation. One sensitive
1592 point is that non-leadership lawyers feel excluded from decision-making.

1593 But if one wishes to focus only on leadership, that may be a relatively smallish group.
1594 Indeed, one recent article listed lawyers who regularly appear in MDL litigation, on both the
1595 plaintiff and defense sides, and called them the “Social Network.”

1596 For the present, the conclusion was that it would be best to defer the idea of lawyer
1597 surveys. Choosing recipients would be very difficult, and the likelihood of useful responses is
1598 somewhat low.

1599 Initial Ranking of Potential Topics

1600 Before the call, Judge Dow had circulated a listing of topics the Subcommittee had
1601 discussed:

- 1602 a. Winnowing claims
- 1603 b. Immediate appealability
- 1604 c. Individual payment of filing fees
- 1605 d. Disclosure of TPLF
- 1606 e. Settlement review
- 1607 f. Trial issues/bellwethers
- 1608 g. PSC formation/attorneys’ fees

1609 Though the Subcommittee’s process remains at an early stage, it might be useful to begin
1610 considering which topics do not look promising as subjects for rulemaking. One possibility for
1611 current discussion purposes would be to draw a line after item e, and regard topics f and g as
1612 “back burner.”

1613 One reaction was about appealability. The submission from John Beisner was very
1614 informative, and showed a considerable amount of activity. At the same time, it appears that the
1615 transferee judges are distinctly unenthusiastic about the idea of adding avenues to appeal their
1616 interlocutory orders.

1617 Another reaction on appealability was that any mandatory appellate review does not seem
1618 realistic. But something along the model of Rule 23(f) could be attractive. At the same time, if
1619 the ordering above is from most plausible to least plausible, it’s not clear that appealability
1620 should be no. 2 on the list.

1621 One suggestion was that the ordering above might be taken to be in terms of present
1622 plausibility. Of course, topics initially assigned a “back burner” status need not remain there as
1623 discussions go forward. Indeed, with the Rule 23 Subcommittee several years ago, several topics
1624 considered “front burner” at first were eventually not on the list of topics actually addressed in
1625 the amendments that went into effect on Dec. 1, and other topics emerged that were included.

1626 Attention focused on topic e – settlement review. That surely would not involve
1627 emphasis on individual case settlement in MDL proceedings. Indeed, it was reported that several
1628 MDL transferee judges said they did not feel it appropriate to be involved in such individual case
1629 settlement efforts.

1630 At the same time, it may happen, perhaps in part with the involvement of the court, that a
1631 “global” settlement emerges with a settlement grid and other features sometimes seen in class
1632 action settlements. A problem with rulemaking at this level is that MDL proceedings are not
1633 comparable to class actions. This concern bears on topic e. Under Rule 23, a classwide
1634 settlement approved by the court is binding on all class members who have not opted out.

1635 In an MDL (at least if it does not include a class action), there seems not to be a rule-
1636 based ground for requiring judicial approval of settlements. Certainly individual settlements do
1637 not require such judicial approval. Even in the class action setting, the effect of an individual
1638 settlement by a class member is pretty much the same as an opt out.

1639 But it seems undeniable that the court can play a central role in an MDL settlement in
1640 confecting a settlement. In some, the settlement has come with relatively forceful inducements
1641 for most or all claimants to accept the settlement package. Other analogies to class action
1642 settlements (such as a required “participation point” for plaintiffs, absent which defendants may
1643 withdraw) exist.

1644 So in a realistic way, it may be that guidance for judges in regard to settlement might be
1645 helpful if the authority problem could be solved. It may be that the topics in category g – PSC
1646 formation and attorneys’ fees – provide something of a foundation for such authority. It seems
1647 that the court’s power to appoint leadership could be recognized in a rule, and that some criteria
1648 like Rule 23(g) could be included in that rule. Indeed, there are some indications that transferee
1649 judges are already using Rule 23(g) as a sort of measuring rod for leadership appointments.

1650 Besides managing the pretrial discovery and motions in MDL litigation, leadership
1651 counsel also manage settlement negotiations. Perhaps that role, coupled with the court’s role in
1652 selection of PSC and other leadership members, could be a basis for something useful about
1653 settlement.

1654 One suggestion was that it might be that the topics in item g above could be combined
1655 with item e. That would mean that, for purposes of current discussions, only the trial/bellwethers
1656 topic would be moved from the “front burner.”

1657 Planning for future activity

1658 As happens sometimes, the deeper one gets into a topic the more new questions arise.
1659 Certainly the Advisory Committee’s November meeting raised a number of important issues.
1660 And FJC Research had promptly and effectively moved to address those issues.

1661 Going forward, it seems that this Subcommittee should plan on relatively regular
1662 conference calls – perhaps once a month – in order to gather needed information and move
1663 further toward decisions about what to recommend pursuing at present. It was pointed out that
1664 having a list of possibly promising measures did not mean that all of them called for developing a

1665 rule proposal now. “We can do some but not others.”

1666 In terms of a realistic time frame, the consensus was that in light of the variety of
1667 unanswered questions it would not be possible at this moment to come up with anything like an
1668 exclusive list of rule-change topics. For one thing, the Standing Committee is meeting in January
1669 and Standing Committee members may have some thoughts about the current list of topics.
1670 There was limited time for discussion of MDL issues during the June 2018 meeting of the
1671 Standing Committee.

1672 At the same time, it will be important to come to the full Advisory Committee in April
1673 with something a good deal more advanced than the current situation. Ideally, by then the
1674 Subcommittee should be in a position to recommend specific ideas that seem suitable for
1675 rulemaking. Then by the Fall 2019 meeting it would likely be desirable to have sketches of rule-
1676 amendment ideas. Likely there are a variety of places in the rules where various of these topics
1677 might be addressed.

1678 Finally, the possibility of a mini conference was addressed. Those events have proved
1679 very helpful in the past. But often they are most useful only after fairly specific ideas about
1680 possible rule changes have been developed, often in the form of rule sketches. Those sketches
1681 lend concreteness to what otherwise might be a rather abstract discussion. But they are also
1682 sufficiently plastic so that they can evolve in response to comments. It is too early now to be
1683 specific on when such a mini conference would be most useful, but the prospect does hold
1684 promise.

1685 Judge Dow would try to arrange a convenient time for a conference call after the Standing
1686 Committee meeting and Advisory Committee hearing on January 3-4.

Plaintiff Fact Sheets in Multidistrict Litigation:
Products Liability Proceedings 2008–2018

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Margaret S. Williams, Emery G. Lee III, and Jason A. Cantone

Federal Judicial Center

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Executive Summary

The Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) is currently considering various proposals to amend the Federal Rules of Civil Procedure to address the management of multidistrict litigation (MDL) proceedings. To inform its deliberations, the Committee requested that the Federal Judicial Center conduct research regarding MDL transferee courts' use of plaintiff fact sheets (PFS) and related case management tools. This report summarizes results of that research as of February 2019. Key findings include:

- PFS were ordered in 57% of the MDL litigation proceedings covered by the study (N = 116)
- PFS were more commonly ordered in the larger proceedings covered by the study. PFS were ordered in 87% of proceedings with more than 1,000 actions.
- The average time from centralization date to the date of the PFS order was 8.2 months, and the median time was 6.1 months.
- In just over half of proceedings in which PFS were ordered, 55%, there was docket evidence of activity to dismiss actions for failure to file substantially complete PFS.
- Plaintiff profile forms were ordered in 18% of proceedings covered by the study, generally in proceedings with large number of actions.
- Defendant fact sheets were ordered in 42% of proceedings covered by the study, also generally in proceedings with large numbers of actions.
- Short-form complaints were ordered in 34% of proceedings covered by the study, almost always in proceedings with more than 100 actions.

Background

For purposes of this report, plaintiff fact sheets (PFS) are standardized questionnaires that serve the same function as interrogatories and requests for production. As outlined in this report, PFS are often ordered in multidistrict litigation (MDL) proceedings with large numbers of plaintiffs. The term “plaintiff fact sheet” itself is commonly used in MDL proceedings and is generally used to distinguish PFS from other case management tools available to transferee judges.

PFS should not be confused with *Lone Pine* orders. *Lone Pine* orders are a case-management tool requiring production by the plaintiff of an expert affidavit identifying case-specific evidence of causation.¹ They differ from PFS in that PFS do not require submission of case-specific, sworn expert evidence. PFS and *Lone Pine* orders are not mutually exclusive—a *Lone Pine* order may issue at a later stage of an MDL proceeding, for example, to assist in evaluating remaining plaintiff claims after a settlement of other claims.² But they are distinct tools that serve different purposes in managing cases.

This report does not provide information about the use of *Lone Pine* orders. The PFS covered by this report were examined to determine whether the forms required plaintiffs to submit sworn statements or expert testimony as part of the PFS process. The general information required in the PFS included:

- health records (*e.g.*, general health, health issues related to the product, names of doctors, pharmacies, and denial of health insurance);
- personal identifying information (*e.g.*, names, addresses, education, and employment); and
- litigation history (*e.g.*, prior tort litigation, past bankruptcy, social security claims, and workers’ compensation claims).

All the PFS required these types of information, and many of them included other categories of litigation-specific questions. They also frequently required medical or other types of releases. In addition, ten included questions regarding third-party litigation funding of plaintiff claims. None of the PFS covered in this report required expert testimony or sworn statements to be submitted as part of the PFS process. So, even though in some instances the line between a PFS order and a *Lone Pine* order may be indistinct, the orders discussed in this report do not represent such instances.

This report covers the incidence of PFS, plaintiff profile forms (PPF), defendant fact sheets (DFS), and short-form complaints (SFC) in a subset of MDL proceedings. The report also addresses the amendment of PFS and dismissal of cases for failure to submit substantially complete PFS.

¹ See, *e.g.*, *In re: Digitek Prods. Liab. Litig.*, 264 F.R.D. 249, 255 (S.D.W. Va. 2010).

² See *In re: Vioxx Prods. Liab. Litig.*, 388 Fed. Appx. 391, 397 (5th Cir. 2010).

Study Design

In its discussion of PFS, the Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) tends to focus on large MDL proceedings typically involving personal injury claims. For this reason, Federal Judicial Center (FJC) researchers collected data from proceedings centralized 2008–2018 (through October) categorized as products liability proceedings as well as two very large non-products liability proceedings (N=116).³ The number of studied proceedings centralized each year of the study period varied from 6 to 17. The average size of these proceedings (for closed proceedings, at the closing of the proceeding; for total actions in open proceedings, as of October 2018) was 2,640 actions. The largest proceeding as of October 2018 was 40,533 actions; the smallest, 3 actions.⁴ FJC researchers examined the case management orders in these proceedings for orders establishing a PFS process and related orders.

Plaintiff fact sheets and plaintiff profile forms

PFS were ordered in 66 (57%) of the 116 MDL proceedings examined. As anticipated, PFS were more commonly ordered in larger proceedings. PFS were ordered in 81% of proceedings with more than 100 actions (59 out of 73). The corresponding figure for proceedings with fewer than 100 actions was 16%. PFS were ordered in 87% of “mega” proceedings (more than 1,000 actions) (34 out of 39). (Moreover, PPF were ordered in 3 of the 5 mega proceedings without PFS orders.)

The average time from centralization date to the date of the PFS order was 241 days, or 8.0 months (N=65).⁵ The median time was 187 days, or 6.1 months.

PPF were ordered in 21 proceedings (18% of all proceedings). As the term is generally used in orders, “plaintiff profile forms” are questionnaires, less extensive than PFS, ordered by the court. PPF appear to be less common than PFS. PPF were ordered in addition to PFS in 14 proceedings and in lieu of PFS in 7 proceedings. All PPF orders were in proceedings with more than 100 actions, and two-thirds of them (14, or 67%) were in mega proceedings.

Defendant fact sheets

DFS were ordered in 49 of the proceedings examined, 42%, with one proceeding planning a DFS for the future. DFS are questionnaires ordered by the court to collect information about plaintiffs that is in the defendant’s possession or, in some instances, to collect information about defendants.

As with PFS, DFS were more commonly ordered in large proceedings. In proceedings with more than 100 actions (N=73), DFS were ordered in 47 proceedings, 64%. The corresponding figure

³ *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, and In re: E.I. Du Pont De Nemours & Co. C-8 Pers. Inj. Litig., MDL No. 2433.*

⁴ *In re: Ethicon, Inc., Pelvic Repair Syst. Prods. Liab. Litig., MDL No. 2652, and In re: Saturn L-Series Timing Chain Prod. Liab. Litig., MDL No. 1920, respectively.*

⁵ One PFS did not have a docket entry.

for proceedings with fewer than 100 actions was 5%, with one fact sheet expected in the future. DFS were ordered in 72% of mega proceedings (28 out of 39).

The average time from centralization date to DFS order date was 315 days, or 10.5 months (N=49). The median time was 222 days, or 7.4 months. In many proceedings, one case management order directs the filing of both PFS and DFS.

Questionnaire development and amendment

The process by which PFS, PPF, and DFS are developed varies from proceeding to proceeding. Typically, however, a questionnaire is negotiated by the parties and then submitted to the court for its approval.

PFS were amended by a subsequent order in 21 proceedings (32% of proceedings with PFS). In 10 proceedings, PFS orders were amended a second time (15%). These counts do not include orders merely extending the deadline for the filing of PFS but involve changes to the PFS or related release forms.

DFS amendments were less common. DFS were amended by subsequent order in 11 of the 49 proceedings with DFS, 22%.

Dismissals of cases based on PFS

The Committee's interest in PFS is, in part, motivated by the role PFS may play in winnowing unsupported claims in large MDL proceedings. The potential screening functions of PFS are beyond the scope of this report. However, of the 66 proceedings with a PFS process, a majority (36, or 55%) included evidence (including show cause orders) of activity to dismiss cases when substantially complete PFS had not been filed.

There is no shortage of legal authority for dismissal of individual actions for failure to submit substantially complete PFS in a timely manner. Motions to dismiss actions for failing to submit completed PFS can rely, for example, on Federal Rule of Civil Procedure 41(b) (dismissal for failure to prosecute or comply with court order) or Federal Rule of Civil Procedure 37(b)(2) (dismissal for failure to comply with a discovery order). Circuit law determines the factors that a district court considers in deciding whether to dismiss in these circumstances, and the factual circumstances in the cases vary. But transferee courts have, at times, dismissed individual actions with prejudice for failure to comply with PFS obligations imposed by court order.⁶

⁶ See, e.g., *In re: General Motors LLC Ignition Switch Litig.*, 2017 WL 9772106, at *1 (S.D.N.Y. June 16, 2017) (“[T]he Court finds that dismissal with prejudice is the appropriate sanction for Plaintiff’s continued failure to submit PFSs as required by [court order].”); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. and Prods. Liab. Litig.*, 2015 WL 12844447, at *2 (D.S.C. June 19, 2015) (“The information requested should be readily available to Plaintiffs and Plaintiffs bear the responsibility for their failure to adequately supply such information. Plaintiffs have failed to provide such information despite multiple warnings from the Court . . .”).

Short-form complaints

Short form complaints (SFC) are another case-management tool sometimes employed in large MDL proceedings in conjunction with PFS. Following the filing of a master complaint, SFC may be ordered for direct-file cases in the proceeding. SFC typically require party-identifying information, a statement that the short form complaint adopts and incorporates allegations from the master complaint, a statement of appropriate venue, a checklist of counts from the master complaint adopted by the plaintiff, specific case facts regarding injuries, a jury demand, and a prayer for relief.

SFC were ordered in 34% of proceedings (40). SFC were more commonly ordered in larger proceedings. In proceedings with more than 100 actions, SFC were ordered in 39 proceedings (53%). SFC were almost never ordered in proceedings with fewer than 100 actions. In mega proceedings, SFC were ordered in 25 proceedings (64%).

Table 1 shows how often PFS and SFC were ordered together for the proceedings in which information about both was available. PFS were ordered in a fair number of proceedings without a corresponding SFC, and in a plurality of proceedings, neither was ordered.

Table 1

		SFC		
		Yes	No	Total
PFS	Yes	35	29	64
	No	4	41	45
	Total	39	70	109

Information about both PFS and SFC was available for 70 proceedings with more than 100 actions (see Table 2). For these proceedings, PFS were ordered more than 80% of the time, and almost half of the time, the court ordered both PFS and SFC. To put this in slightly different terms, in proceedings with more than 100 actions, when courts ordered PFS, they ordered SFC 60% of the time.

Table 2

		SFC		
		Yes	No	Total
PFS	Yes	34	23	57
	No	4	9	13
	Total	38	32	70

Conclusion

In 116 products liability proceedings centralized between 2008 and October of 2018, PFS were ordered in 57% of all proceedings and in 87% of proceedings with more than 1,000 total actions. PFS are typically ordered within 8 months of centralization of the proceeding, requiring plaintiffs to submit information including medical history and medical and other releases. Information about third party litigation financing was required in 10 of the 66 PFS. DFS were required in 49 proceedings, always in conjunction with PFS or PPF. In 55% of proceedings in which PFS were ordered, there was some docket activity related to dismissal of cases for failure to submit substantially complete forms. SFC were typically ordered in large proceedings in conjunction with PFS.

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Cornell Law School

Zachary D. Clopton
Associate Professor of Law

110 Myron Taylor Hall
Ithaca, New York 14853-4901
607.254.6259 / 607.255.7193 (fax)
zclopton@cornell.edu

October 26, 2018

Dear Members of the Subcommittee,

I am writing to you regarding recent proposals for amendments to the Federal Rules of Civil Procedure to address multidistrict litigation (MDL). I am a law professor at Cornell Law School and my research focuses on issues of complex litigation, including MDL.

In short, I am writing to urge caution with respect to any MDL-specific rules. The current proposals call for specialized rules for a subset of federal cases, a departure from the norm that should not be made lightly.

Exacerbating this concern, the proposals for MDL-specific rules are premised on a view of “MDL” that, in fact, describes only a small class of very large MDLs. Even if the proposed rules were justified for the largest MDLs, they are inapposite for many of the smaller MDLs that would be swept into these proposed rules. This is the “scope” question identified by the Subcommittee. Moreover, because of the difficulty in identifying *ex ante* the cases for which special rules might be justified, I urge the Subcommittee to leave questions of case management to the district judge in the first instance.

Variation among MDLs

In April 2018, the JPML published the astounding statistic that MDLs accounted for 123,293 pending cases in federal district court.¹ At the start of 2018, there were approximately 340,000 pending civil cases in federal courts overall, meaning that MDLs likely comprised more than one third of the federal docket.

But there is more to the story than these few numbers. The 120,000 pending MDL cases have been consolidated across 227 MDLs. The largest pending MDL has more 20,000 pending cases. The next largest has more than 13,000. Nineteen “large MDLs” (with more than 1,000 cases each) account for more than 85% of the pending MDL cases. Meanwhile, 70 MDLs have ten or fewer pending cases.

¹ The data in this letter are drawn from reports published by the Judicial Panel on Multidistrict Litigation and the Administrative Office of U.S. Courts.

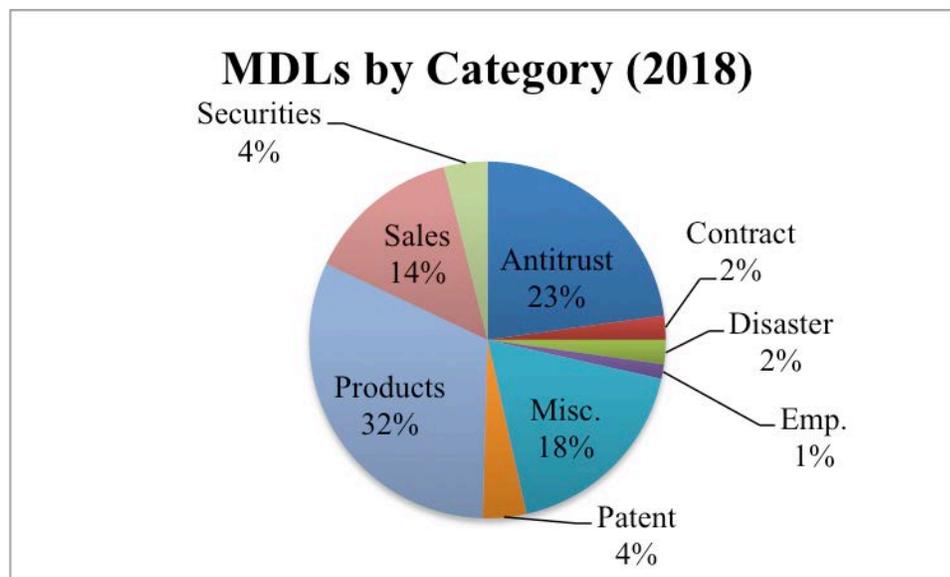


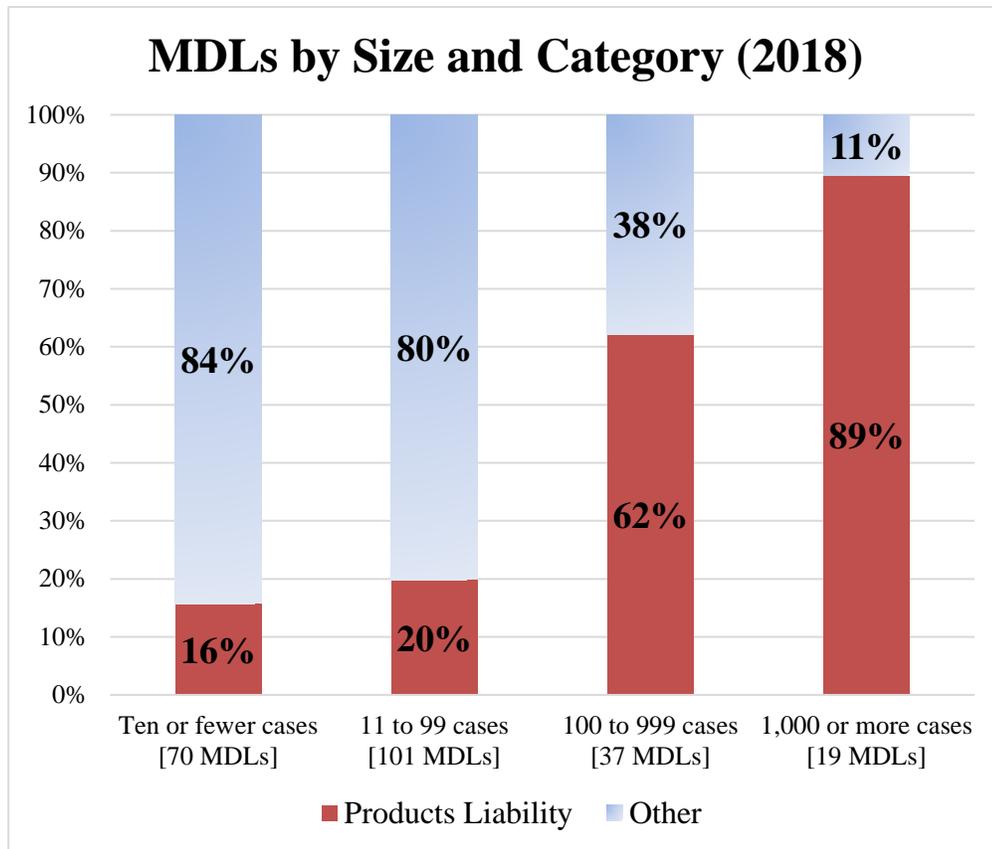
Notably, a small number of large MDLs receive most of the attention from the public and the academy, and thus this category dominates the narratives about MDL generally. Looking at the 19 large MDLs in my study, one would see familiar cases: the BP Oil Spill; Volkswagen “Clean Diesel”; Johnson & Johnson baby powder; and multiple MDLs involving pelvic mesh and hip replacements. Had I used data from July rather than April 2018, the opioid litigation would also have qualified as a large MDL.

While the large MDLs occupy public attention, they are not representative of MDL as a whole. As suggested above, large MDLs represent fewer than 10% of all pending MDLs, meaning that more than 90% of MDLs are not large MDLs.

In addition, the large MDLs have a different case-type profile from the rest. The 19 large MDLs include 17 cases categorized as products liability, one “common disaster” (BP Oil Spill), and one “miscellaneous” case that involves personal-injury litigation against a product manufacturer. In other words, we could easily categorize all 19 as “mass torts.”

Looking at the full set of 227 MDLs, fewer than one third are products-liability cases. The next largest categories are antitrust and sales practice litigation, with the remaining cases covering topics including contract, disasters, employment, intellectual property, and securities. The smallest MDLs are sometimes products-liability litigation. But they also often involve cases sounding in antitrust, data security, intellectual property, marketing and sales practice, and securities law.





Finally, my interviews with judges handling MDLs revealed a shared sense that many MDLs are essentially equivalent to other complex cases for which Section 1407 was not used. There may be a class of MDLs that judges treat specially, but those are few and far between.

MDL Variation and MDL-Specific Rules

The discussion of the variation among MDLs connects directly to the current proposals before the Subcommittee. Many of these proposals are premised on caricatures of MDL that, at best, describe the large MDLs, but likely do not describe the other 90% of MDLs.

Some proponents of MDL-specific rules seem to assume that MDLs are massive and unwieldy proceedings that need elevated judicial management. This might be true for the large MDLs, but it does not seem particularly persuasive for the scores of MDLs comprising a handful of consolidated cases. Others argue that MDLs need special rules because of the unprecedented powers of MDL judges. For one thing, there are no such special powers. For another, it may be that large and unwieldy cases demand something different from the judges handling them, but that is not a comment about MDL as a category.



Still others suggest that MDLs need special rules because they are “black holes” from which cases are never returned. It is indisputable that most MDL cases are resolved by settlement or dispositive motion in the transferee court. But it is not as if the trial rate in non-MDL litigation is substantial either. Policy interventions to increase trial rates, in other words, need not target MDLs. Much of the criticism of MDLs also assumes that the creation of an MDL is a magnet for bad cases. But this claim is hard to sustain for many smaller MDLs, especially for those in which very few (if any) cases are filed after the creation of the MDL.

There is also no reason to think that just being an MDL—rather than something about case size, importance, or facts—should make a suit more or less likely to attract litigation financing, more or less in need of increased interlocutory review, or more or less likely to have parallel state-court litigation. Yet these too are arguments made in favor of MDL-specific rules.

Perhaps extremely large or important cases, or cases addressing certain types of issues, require special rules. Congress apparently thought so when it adopted the Private Securities Litigation Reform Act, the Prison Litigation Reform Act, the Class Action Fairness Act, the Fair Labor Standards Act, and others. But MDL is the wrong category.

Costs of MDL-Specific Rules

Importantly, the MDL category error could come with significant costs. All procedural rules involve tradeoffs. It is possible that, for some procedural issues, the tradeoffs point in one direction for large cases and in another direction for small cases. Adopting rules to solve problems in one set of cases risks creating new problems for other cases.

Moreover, adopting special procedures for MDLs invites a new brand of forum shopping. If MDL-specific rules favored plaintiffs (or their attorneys), then plaintiffs might file cases in separate districts in hopes of convincing the Panel to consolidate them into an MDL applying those MDL-specific rules. Were those rules to favor defendants, then defendants might seek consolidation in order to obtain those benefits, rather than in service of convenience, justice, or efficiency. Either way, horizontal equity will be disrupted, opportunities for abuse will increase, and the usual course of federal civil litigation will be upset.

Specialized MDL rules also could magnify the “repeat player problem” in MDL. Critics of MDL have worried that a small set of attorneys dominate the process. My sense is that this objection, too, is targeted only at a subset of MDLs addressing mass torts. But if all MDLs applied a special set of procedures, then lawyers might develop expertise in MDL-specific work independent of the subject matter of the litigation.

For these reasons, therefore, I recommend that the Subcommittee decline to support special rules applicable to all MDL cases. The Federal Rules of Civil Procedure provide federal district judges with all of the tools they need to manage federal civil litigation.



* * *

Thank you for your time and attention. I intend to continue my research on MDL variation, and I plan to share those results with the Subcommittee when available. If there are particular topics for which more information would be useful, please do not hesitate to ask.

Sincerely,

A handwritten signature in black ink, appearing to read "Zachary D. Clopton". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

Zachary D. Clopton
Associate Professor of Law
Cornell Law School



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SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

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18-CV-BB

November 21, 2018

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Rules Amendments Regarding MDL Proceedings

Dear Ms. Womeldorf:

One proposal proffered to the MDL Subcommittee of the Advisory Committee on Civil Rules is a new Fed. R. Civ. P. 23.3 that would authorize an immediate interlocutory appeal from any order denying or granting a motion that, if successful, would be dispositive of a substantial number of claims in a mass tort MDL proceeding. (*See* Lawyers for Civil Justice submission to Advisory Committee on Civil Rules (dated Sept. 14, 2018), at 4-5;¹ Agenda Book, Advisory Committee on Civil Rules (“Agenda Book”), Nov. 1, 2018 meeting, at 149-53.) As examples of the orders to which the proposed rule would apply, the proponents have pointed to rulings on summary judgment motions seeking dismissal of large numbers of actions on preemption grounds, for time-bar reasons, or for lack of admissible general causation evidence. As noted in the MDL Committee’s recent report to the full Committee, some commenters have suggested that such a rule is unnecessary because 28 U.S.C. § 1292(b) provides an adequate avenue for interlocutory appeals. (Agenda Book at 150.) In response, the proponents have “urged that § 1292(b) certification is not granted sufficiently frequently in MDL proceedings.” (*Id.* at 150.) According to the Subcommittee report, however, “firm data” regarding that assertion “are as yet not available.” (*Id.*) This letter seeks to fill that void.

Working with Christopher Campbell and other personnel at the DLA Piper law firm, we have reviewed the dockets of 127 mass tort MDL proceedings to assess: (a) the frequency of section 1292(b) certification motions seeking appellate review of questions that, if ultimately resolved in the proponent’s favor, would be dispositive of large numbers of claims in the proceeding; and (b) the frequency with which such

¹ The text of the proposed Rule 23.3 set forth in the LCJ submission is not expressly limited to mass tort MDL proceedings, but the context indicates that parameter was intended.

motions are granted. In short, we searched for the types of situations contemplated by the proposed Rule 23.3. Our research has yielded two basic findings:

- *First*, motions seeking interlocutory appellate review of questions that may have broad dispositive effects on mass tort MDL cases appear to be relatively rare. Indeed, in the 127 dockets reviewed, we found only 15 instances in which such section 1292(b) certification requests were made. (As detailed below, 41 other section 1292(b) certification motions were located, but most did not satisfy the “broadly dispositive” criterion or were not related to mass tort claims.)
- *Second*, when defendants make such motions in mass tort MDL proceedings, they typically are not granted. In the dockets reviewed, we found *no* instance in which a defendant’s section 1292(b) request of the sort contemplated by proposed Rule 23.3 was approved. The only relevant section 1292(b) appeal certification we located was the grant of a *plaintiffs’* request for appellate review of an order concluding that large numbers of mass tort claims against certain defendants in an MDL proceeding were preempted by federal regulations. (*See p. 7, infra.*)

The methodology used in conducting our docket reviews and the findings of that research (including details on the section 1292(b) requests that we located) are set forth below.

I. METHODOLOGY

As noted above, we examined 127 mass tort MDL proceeding dockets to identify all section 1292(b) certification requests. More specifically, we reviewed the full PACER dockets of all 60 mass tort MDL proceedings pending as of mid-July 2018 (as listed on Exhibit 1)² and the 67 dockets of the mass tort MDL proceedings that were formally closed (according to postings on the MDL Panel website) during calendar years 2008 through 2018. (The 2018 review was limited to proceedings closed during January-August.) For purposes of this exercise, “mass tort MDL proceeding” was defined as any MDL proceeding in which the MDL Panel’s initial transfer order noted that personal injury claims would be a substantial component.³

² Some of these MDL proceedings were created relatively recently, so section 1292(b) certification requests in those dockets are unlikely. Nevertheless, for completeness, we checked all currently pending dockets.

³ Defined in this manner, mass tort MDL proceedings sometimes include non-personal injury claims related to the general subject matter of the proceeding, particularly actions pursuing alleged

To locate section 1292(b) certification requests, we searched each MDL proceeding PACER docket using several search terms: “1292,” “interlocutory,” “permission,” “leave,” “certif,” and “appealability.”⁴ When a request/motion was located through this query, we extracted from the PACER dockets the related briefing and ensuing orders to confirm that the motion/request did in fact seek a section 1292(b) certification and to assess whether the motion/request sought review of the sort of broad, dispositive questions contemplated by the interlocutory review rule proposal.

We concluded that most of the 56 section 1292(b) motions located in the searched dockets were irrelevant. Some presented issues unique to an individual case (or relevant only to a small number of cases). In other instances, the issues were not dispositive (e.g., questions regarding subject matter jurisdiction). In a few instances, the decision whether to include in our analysis a particular section 1292(b) motion was a “judgment call,” often requiring examination of additional background information from the record. In any event, in the discussion below, we have accounted for all section 1292(b) certification requests in each selected mass tort MDL proceeding, explaining in footnotes our reasons for any exclusions.

In identifying the rulings discussed below, we do not mean to suggest that any were wrongly decided under prevailing section 1292(b) certification standards. Our sole purpose was to respond to the Subcommittee’s expression of interest in data about the frequency and outcome of section 1292(b) motions on broadly applicable, potentially dispositive issues in mass tort MDL proceedings.

II. DOCKET REVIEW RESULTS

The results of our MDL proceeding docket reviews were as follows:

economic loss damages arising out of transactions. When we encountered section 1292(b) certification requests that did not pertain to mass tort claims, we excluded them from our analysis.

⁴ We acknowledge several limitations inherent in this search protocol. First, PACER is not an ideal tool for research of this sort, as searches are limited to the filing descriptions entered on the docket, which are not standardized. Further, section 1292(b) certifications can be made or proposed without formal motion, although we believe the PACER search terms likely would have captured evidence of such activity somewhere on the docket. Another potential limitation is that occasionally, motion activity may escape an MDL proceeding’s master docket (e.g., filings are listed only on an individual case docket). Finally, as indicated below, there were a few instances in which certain materials were not available on PACER because of the docket’s age.

A. Current Mass Tort MDL Proceedings

In the dockets of the 60 currently pending mass tort MDL proceedings (as of July 2018, as listed in Exhibit 1), we located three examples of efforts to obtain section 1292(b) certifications to pursue appeals of the sort contemplated by the proposed Rule 23.3:

- In MDL No. 1657 (*In re Vioxx Marketing, Sales Practices, and Products Liability Litigation*), the defendant moved for section 1292(b) certification of an order denying a preemption-based summary judgment motion that, if granted, would have been preclusive of more than 10,000 claims then pending in this MDL proceeding. (Docket No. 11658.)⁵ The certification motion was fully briefed and argued (Docket No. 12003), but while still pending, it was mooted by a global settlement.⁶
- In MDL No. 2545 (*In re Testosterone Replacement Therapy Products Liability Litigation*), a defendant sought section 1292(b) review of an order denying a preemption-based motion for summary judgment as to all failure-to-warn claims it was facing. In its moving papers, the defendant asserted that if successful, the preemption arguments would have been dispositive of claims against it in more than 4,200 actions pending in the proceeding. (Docket Nos. 1974, 2139.)⁷
- In MDL No. 2592 (*In re Xarelto Products Liability Litigation*), defendants moved for section 1292(b) certification of an order denying a preemption-

⁵ Although the summary judgment motion was directed at two individual bellwether cases, the section 1292(b) certification motion stressed that the requested preemption ruling ultimately would have foreclosed most other claims in the MDL proceeding.

⁶ In this MDL proceeding, the district court also denied a section 1292(b) certification motion with respect to a post-settlement attorneys' fee issue. (Docket No. 23870.) Since the issue presented was not dispositive of any claim, we have not included that motion in our analysis. The district court also denied a defendant's section 1292(b) certification request regarding an order permitting substitution of parties in an individual case. Because the question presented pertained only to a single case, we did not include it in our analysis.

⁷ The question whether proposed Rule 23.3 would apply to this motion may be debatable as defendant's briefing suggests that the challenged failure-to-warn claims were the crux of plaintiffs' cases. At other junctures, however, the defendant suggests that some aspects of plaintiffs' cases may have remained for trial. The court in this proceeding also denied another the section 1292 motion of a different defendant seeking appellate review of the partial denial of a motion to dismiss. (Docket Nos. 176, 180, 182.) Since that motion was made in a non-personal injury RICO action, it was not included in our analysis.

based summary judgment motion that would have precluded most (if not all) of the more than 23,000 claims in this MDL proceeding. (Document Nos. The motion was fully briefed, but it was later withdrawn without prejudice. (Docket No. 10125.)

- In MDL No. 2641 (*In re Bard IVC Filters Products Liability Litigation*), the district court denied defendant's motion for section 1292(b) certification of an order denying a preemption-based dismissal motion. (Docket No. 9415.) In seeking certification, defendant argued that if the proposed appeal were successful, "it could completely terminate the litigation of the 3,000 personal injury cases remaining in this MDL."⁸ (Docket No. 9244.)⁸

⁸ The bases for excluding from our analysis the section 1292(b) motions from several other pending mass tort MDL proceedings should be noted:

In MDL No. 1431 (*In re Baycol Products Liability Litigation*), the district court granted a plaintiffs' motion for section 1292(b) certification of an order excluding several plaintiffs' experts. (Docket Nos. 4229, 4230, 4238.) Since we observed no indication that exclusion of that expert evidence would have foreclosed any claims, we did not include this motion in our analysis. The court in this proceeding also denied a defendant's request for a section 1292(b) certification, but from the limited information available on PACER, it does not appear relevant to our analysis and therefore has been excluded.

In MDL No. 1871 (*In re Avandia Marketing, Sales Practices and Products Liability Litigation*), the court granted defendant's motion for section 1292(b) certification of an order denying a motion to dismiss a RICO action alleging economic losses brought on behalf of union health benefit funds. (Docket Nos. 3669, 3669-1, 3865.) Because this activity was unrelated to mass tort (personal injury) claims, we have not included it in our analysis. For the same reason, we have also excluded the district court's granting of a plaintiff's motion for section 1292(b) certification of an order denying a jurisdictional remand motion in a non-personal injury economic loss action brought by a California county. (Docket Nos. 4569, 5084, 5085.)

In MDL No. 1964 (*In re NuvaRing Products Liability Litigation*), the district court denied a defense motion for section 1292(b) certification of an order rejecting a motion to dismiss the "master complaint." In ruling on the motion, the court observed that the "master complaint" was intended to be only an "administrative tool," not a "substantive pleading" subject to Rule 12 motion practice. The court mooted the issue by striking the "master complaint." (Docket Nos. 236, 237, 368.) We therefore have not included this motion in our analysis.

In MDL No. 2151 (*In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*), the district court granted defendant's motion for section 1292(b) certification of an order denying a standing-based motion to dismiss economic loss class action claims. (Docket Nos. 1568, 1596, 1622.) The court also denied a plaintiffs' motion for certification of a choice-of-law issue addressed by the same order. (Docket No. 1680.) At another juncture, the court also denied a plaintiffs' motion for section 1292(b) certification of an order holding that under Florida and New York law, a manifested product defect is a prerequisite to an economic loss action. (Docket Nos. 2563, 2726.) Because none of this activity concerned the mass tort (personal injury) aspects of this MDL proceeding, we have not included these items in our analysis.

B. Mass Tort MDL Proceedings Closed in 2018

In the five mass tort MDL proceedings closed during the January-August 2018 time period, we located no motions seeking appeals of the sort contemplated by the proposed Rule 23.3. Those MDL proceedings were: MDL No. 1789 (*In re Fosamax Products Liability Litigation*),⁹ MDL No. 2004 (*In re Mentor Corp. ObTape Transobturator Sling Products Liability Litigation*), MDL No. 2299 (*In re Actos (Pioglitazone) Products Liability Litigation*), MDL No. 2342 (*In re Zolof (Sertaline Hydrochloride) Products Liability Litigation*), and MDL No. 2497 (*In re Air Crash at San Francisco, California on July 6, 2013*).

C. Mass Tort MDL Proceedings Closed in 2017

In the six mass tort MDL proceedings closed during 2017, no appeals of the sort contemplated by the proposed Rule 23.3 were found. Those MDL proceedings were: MDL No. 1842 (*In re Kugel Mesh Hernia Patch Products Liability Litigation*), MDL No. 1943 (*In re Levaquin Products Liability Litigation*), MDL No. 2395 (*In re*

In MDL No. 2158 (*In re Zimmer Durom Hip Cup Products Liability Litigation*), several plaintiffs sought section 1292(b) certification of an order specifying that all 48 cases in the proceeding would be tried in the transferee forum, even though *Lexecon* restrictions allegedly had not been waived. (Docket Nos. 793, 816.) There is no indication on the docket that the district court ruled on plaintiffs' motion. We excluded this motion in our analysis because it did not involve a dispositive issue.

Three section 1292(b) motions (all made by defendants) were denied in MDL No. 2419 (*In re New England Compounding Pharmacy, Inc. Products Liability Litigation*). (Docket Nos. 196, 197, 212, 213, 340, 2356, 2357, 2416, 2417, 2457, 2457-1, 2584.) However, since all pertained to non-dispositive issues and apparently did not implicate large numbers of claims, we have not included them in our analysis.

In MDL No. 2428 (*In re Fresenius Granuflow/Naturalyte Dialysate Products Liability Litigation*), the defendant made an "anticipatory" request that the court include a section 1292 certification in an expected ruling remanding a state attorney general's deceptive trade practices case to state court. The court declined to include the requested appeal certification in its remand order. (Docket Nos. 55, 846.) We excluded this motion from our analysis because it was not dispositive, did not implicate multiple cases, and did not involve personal injury claims.

⁹ In this MDL proceeding, the trial court granted a defendant's motion for section 1292(b) certification of a post-trial motion addressing several issues of Florida design defect law. (Docket Nos. 309, 1031.) In granting certification, the trial court noted that besides advancing resolution of the particular case in which the questions arose (which was headed for re-trial for other reasons), it might provide guidance regarding 100 or more other cases in the MDL proceeding governed by Florida law. However, because these issues did not appear potentially dispositive of any actions, we did not include this motion in our analysis.

Air Crash at Georgetown, Guyana on July 30, 2011),¹⁰ MDL No. 2502 (*In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation*), MDL No. 2511 (*In re Neomedic Pelvic Repair System Products Liability Litigation*), and MDL No. 2654 (*In re Amtrak Train Derailment in Philadelphia, Pennsylvania on May 12, 2005*).

D. Mass Tort MDL Proceedings Closed in 2016

In the eight mass tort MDL proceedings closed in 2016, we identified one proposed appeal of the sort contemplated by the proposed Rule 23.3:

- In MDL No. 2226 (*In re Darvocet, Darvon, and Propoxyphene Products Liability Litigation*), the trial court granted a motion to dismiss claims against certain generic drug manufacturers on preemption grounds. The court denied plaintiffs' request for section 1292(b) certification of that dismissal ruling, even though reversal on appeal would have restored the claims of hundreds of claims against the generic manufacturer defendants.¹¹ (Docket Nos. 1597, 1597-1, 1750.)

The other seven mass tort MDL proceedings closed in 2016 were: MDL No. 1203 (*In re Diet Drugs (Phentermine/ Fenfluramine/Dexfenfluramine) Products Liability Litigation*), MDL No. 1953 (*In re Heparin Products Liability Litigation*), MDL No. 2051 (*In re Denture Cream Products Liability Litigation*),¹² MDL No. 2404 (*In re Nexium (Esomeprazole) Products Liability Litigation*), MDL No. 2434 (*In re Mirena IUD Products Liability Litigation*), MDL No. 2454 (*In re Franck's Lab, Inc., Products Liability Litigation*), and MDL No. 2652 (*In re Ethicon, Inc., Power Morcellator Products Liability Litigation*).

¹⁰ In this MDL proceeding, the district court denied a motion for section 1292(b) certification of a subject matter jurisdiction ruling related to three actions. (Docket No. 50, 53.) Because the underlying issue was not dispositive and because the order at issue pertained to only a few cases, we did not include it in our analysis.

¹¹ Although the granted motion to dismiss was explicitly directed at 34 lawsuits, plaintiffs' section 1292(b) certification motion states an appeal ultimately would have affected approximately 200 other cases. (Docket No. 1597-1.) We have therefore included this ruling in our analysis.

The district court in this MDL proceeding granted defendants' request for section 1292(b) certification of an order addressing a subject matter jurisdiction issue related to six cases. (Docket Nos. 3064, 3064-1, 3075.) Because the underlying issue was not potentially dispositive of any claims and was potentially relevant to only a few cases, we have excluded it.

¹² We found in this docket a plaintiffs' section 1292(b) certification request that was denied by the district court. (Docket Nos. 1626, 1667.) We have not included it in our analysis since it involved a non-dispositive issue – a subject matter jurisdiction challenge – involving only a single case.

E. Mass Tort MDL Proceedings Closed in 2015

In the eight mass tort MDL proceedings closed during 2015, we found one request for a section 1292(b) appeal of the sort envisioned by the proposed Rule 23.3:

- In MDL No. 1629 (*In re Neurontin Marketing, Sales Practices, and Products Liability Litigation*), the trial court denied defendant Teva's request for section 1292(b) certification of an order rejecting a preemption motion that would have been dispositive of the hundreds of claims it faced in the MDL proceeding. (Docket No. 2245.)

The other seven mass tort MDLs closed in 2015 were: MDL No. 1507 (*In re Prempro Products Liability Litigation*), MDL No. 1626 (*In re Accutane (Isotretinoin) Products Liability Litigation*), MDL No. 1742 (*In re Ortho Evra Products Liability Litigation*), MDL No. 1909 (*In re Gadolinium Contrast Dyes Products Liability Litigation*),¹³ MDL No. 1928 (*In re Trasylol Products Liability Litigation*),¹⁴ MDL No. 2039 (*In re Chantix (Varenicline) Products Liability Litigation*), and MDL No. 2458 (*In re Effexor (Venlafaxine Hydrochloride) Products Liability Litigation*).

F. Mass Tort MDL Proceedings Closed in 2014

In the two mass tort MDL proceedings closed during 2014 (MDL No. 1760 (*In re Aredia and Zometa Products Liability Litigation*) and MDL No. 2372 (*In re Watson Fentanyl Patch Products Liability Litigation*)), no requests for appeals of the sort contemplated by the proposed Rule 23.3 were spotted.

¹³ The district court in this proceeding denied a defendant's request for section 1292(b) certification of an order excluding the opinions of certain experts. (Docket Nos. 796, 796-1, 823.) Since the appellate questions presented did not appear to be dispositive of any claims, we excluded that ruling from our analysis.

¹⁴ In this MDL proceeding, the district court denied plaintiffs' request for section 1292(b) certification of a ruling excluding one of plaintiffs' expert witnesses. (Docket Nos. 5792, 6274.) The court also denied a plaintiffs' motion to certify a related ruling excluding at trial all evidence, testimony and argument regarding certain issues. (Docket Nos. 5914, 6278.) We have not included those rulings in our analysis because they do not appear to concern matters potentially dispositive of any claims.

G. Mass Tort MDL Proceedings Closed in 2013

In the eleven mass tort MDLs closed in 2013, we located three section 1292(b) appeal efforts of the sort envisioned by the proposed Rule 23.3:

- In MDL No. 1535 (*In re Welding Fume Products Liability Litigation*), the court denied a section 1292(b) motion seeking appellate review of an order denying a motion to dismiss all claims against certain defendants, allowing thousands of claims against those defendants to continue. (Docket Nos. 1036, 1088.)
- In MDL No. 1873 (*In re FEMA Trailer Formaldehyde Products Liability Litigation*), the district court granted plaintiffs' motion for section 1292(b) certification of an order finding that claims against certain defendants in the proceeding were preempted by federal agency regulations and therefore subject to dismissal. (Docket Nos. 1813, 1813-1, 2122.) From what we can determine in the available record, it appears the dispositive question presented by the proposed appeal was broadly applicable to the claims against certain defendants in the MDL proceeding.
- In that same MDL proceeding, the district court denied a defendant's motion for section 1292(b) certification of what appears to be the rejection of a dispositive government contractor defense. (Docket Nos. 6082, 6082-2, 13163.) Although the motion was explicitly directed only to two actions (and the district court noted that as a basis for denying certification), other arguments and information in the docket indicated that success on the questions presented would have been dispositive of many other actions against the moving defendant and other government contractor defendants.¹⁵

The nine mass tort MDL proceedings closed in 2013 in which we did not locate relevant section 1292(b) motions were: MDL No. 986 (*In re "Factor VII or IX Concentrate Blood Products" Products Liability Litigation*),¹⁶ MDL No. 1355 (*In*

¹⁵ In this proceeding, the district court denied two other defendant motions for section 1292(b) certifications (Docket Nos. 749, 749-1, 900, 8566, 8566-2, 11209) and granted one other motion by plaintiffs (Docket Nos. 15976, 15976-1, 17325). However, since those requests concerned orders that apparently concerned non-dispositive questions and/or were relevant only to a small number of cases in the proceeding, we did not include them in our analysis.

¹⁶ We found in this MDL proceeding a decision denying section 1292(b) certification of an order overruling objections to the designation of certain expert witnesses. (Docket No. 709.) From what we could determine from the available portions of the record, the issues presented would not have been dispositive of any claims, and we have therefore not included this motion in our analysis.

re Propulsid Products Liability Litigation), MDL No. 1699 (*In re Bextra and Celebrex Marketing, Sales Practices, and Products Liability Litigation*), MDL No. 1736 (*In re Celexa and Lexapro Products Liability Litigation*), MDL No. 1769 (*In re Seroquel Products Liability Litigation*), MDL No. 1804 (*In re Stand N' Seal Products Liability Litigation*), MDL No. 2016 (*In re Yamaha Motor Corp. Rhino ATV Products Liability Litigation*), MDL No. 2053 (*In re Helicopter Crash Near Weaverville, California on August 5, 2008*),¹⁷ and MDL No. 2066 (*In re Oral Sodium Phosphate Solution-Based Products Liability Litigation*).

H. Mass Tort MDL Proceedings Closed in 2012

Among the eight mass tort MDL proceedings closed during 2012, one appeal of the sort described by the proposed Rule 23.3 was located:

- In MDL No. 1905 (*In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation*), the district court denied plaintiffs' motion for section 1292(b) certification of an order dismissing Plaintiffs' Master Consolidated Complaint on preemption grounds. That order apparently did not have the effect of actually dismissing all of the hundreds of individual personal injury claims in this MDL proceeding.

The other seven mass tort MDL proceedings closed during 2012 were: MDL No. 1596 (*In re Zyprexa Products Liability Litigation*),¹⁸ MDL No. 1708 (*In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*),¹⁹ MDL No. 1724 (*In re Viagra Products Liability Litigation*), MDL No. 1785 (*In re Bausch & Lomb Inc. Contact Lens Solution Products Liability Litigation*), MDL No. 1959 (*In re Panacryl Sutures Products Liability Litigation*), MDL No. 1968 (*In re Digitek Products Liability Litigation*), MDL No. 2120 (*In re Pamidronate Products Liability Litigation*), and MDL No. 2144 (*In re Air Crash Over the Mid-Atlantic on June 1, 2009*).

¹⁷ The district court in this proceeding denied a request by certain plaintiffs for section 1292(b) certification of a ruling on a state law damages cap issue. (Document No. 241.) Since this issue was not dispositive, this decision was excluded from our analysis.

¹⁸ In this MDL proceeding, the district court granted defendant's section 1292(b) motion to certify for appeal the denial of a summary judgment motion. However, since that motion was brought regarding civil RICO, fraud, and other economic loss claims (not mass tort (personal injury) claims), we have not included it in our analysis.

¹⁹ The district court in this MDL proceeding denied plaintiffs' motion for section 1292(b) certification of an order dismissing without prejudice the third-party payor economic loss claims of several union health fund plaintiffs. (Docket Nos. 2088, 2200, 2301, 2428, 2497.) Since no mass tort claims were involved in this motion, we have not included it in our analysis.

I. Mass Tort MDL Proceedings Closed in 2011

Section 1292(b) appeals of the sort contemplated by the proposed Rule 23.3 were sought in all three of the mass tort MDL proceedings closed in 2011:

- In MDL No. 1396 (*In re St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation*), the trial court denied defendant's request for section 1292(b) certification of an order denying a preemption-based motion for summary judgment applicable to all personal injury claims in the proceeding. (Docket No. 323.)
- In MDL No. 1748 (*In re Profiler Products Liability Litigation*), the defendant sought review of the denial of a statute of limitations motion that apparently would have foreclosed a substantial number of actions, and the motion was denied. (Docket Nos. 117, 118, 131.)²⁰
- In MDL No. 2096 (*In re Zicam Cold Remedy Marketing, Sales Practices, and Products Liability Litigation*), the court denied defendant's motion seeking review of the court's ruling on generic causation issues. In denying the certification motion, the district court acknowledged the impact of a potential appeal: "A determination that plaintiffs' failure to show the toxic dose entitles defendants to summary judgment on general causation could lead to the dismissal of the remaining cases in this MDL." (Docket Nos. 1473, 1497.)²¹

J. Mass Tort MDL Proceedings Closed in 2010

In the six mass tort MDL proceedings closed in 2010, we located no section 1292(b) certification motions pursuing an appeal of the sort described by the proposed Rule 23.3. The six MDL proceedings were: MDL No. 381 (*In re "Agent*

²⁰ We have included this motion in our analysis, but it is a close call due to some uncertainty about the breadth of the limitations motion's effect. The original motion appears to have been directed at the claims of only four plaintiffs. However, comments in one brief assert that the limitations question was potentially dispositive of 28 plaintiffs' claims, and elsewhere, there are suggestions that the number was higher.

²¹ The inclusion of this motion is another close call. Apparently, this dismissal motion activity began while numerous cases were pending in the MDL proceeding. However, by the time the court ruled on the section 1292 certification issue following completion of a settlement process, only 14 remained.

Orange” Products Liability Litigation),²² MDL No. 1014 (*In re Orthopedic Bone Screw Products Liability Litigation*),²³ MDL No. 1387 (*In re ProteGen Sling and Vesica System Products Liability Litigation*), MDL No. 1649 (*In re Helicopter Crash Near Wendle Creek, British Columbia on August 8, 2002*), MDL No. 1938 (*In re Vytorin/Zetia Marketing, Sales Practices and Products Liability Litigation*), and MDL No. 1985 (*In re Total Body Formula Products Liability Litigation*).

K. Mass Tort MDL Proceedings Closed in 2009

In the six mass tort MDL proceedings closed in 2009, we located two appeal efforts of the type envisioned by Rule 23.3:

- In MDL No. 1407 (*In re PPA Products Liability Litigation*), defendants sought appellate review of the district court’s denial of *Daubert* challenges seeking exclusion of proposed general causation evidence that would have been preclusive of the claims of many plaintiffs in the proceeding, particularly those alleging ischemic stroke or aneurysmal subarachnoid hemorrhages. The court denied the motion. (Docket Nos. 1897, 1909.)
- In MDL No. 1726 (*In re Medtronic, Inc. Implantable Defibrillators Products Liability Litigation*), defendant sought review of the denial of a broadly applicable preemption motion that, if successful, apparently would have precluded all of the numerous claims in the proceeding. The district court denied the motion. (Docket Nos. 310, 371.)

The other four mass tort MDL proceedings closed in 2009 were: MDL No. 1348 (*In re Rezulin Products Liability Litigation*),²⁴ MDL No. 1401 (*In re Sulzer Orthopedics Inc. Hip Prosthesis and Knee Prosthesis Products Liability Litigation*),

²² The docket indicates that a section 1292(b) certification request was denied in this MDL proceeding. But from what we can determine, it appears to have concerned a subject matter jurisdiction question and is therefore outside the scope of our analysis.

²³ Three section 1292(b) certification requests were denied in this MDL proceeding (Docket No. 150967), but based on what is available from this docket, it does not appear any were relevant to our analysis.

²⁴ Six section 1292(b) certification motions were made by plaintiffs in this MDL proceeding, but none appeared relevant to this analysis. We note that we had very limited access to the motion papers and orders in this docket, requiring us to rely more heavily on docket entries.

MDL No. 1574 (*In re Paxil Products Liability Litigation*), and MDL No. 1598 (*In re Ephedra Products Liability Litigation*).²⁵

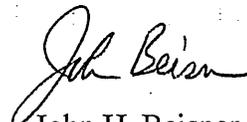
L. Mass Tort MDL Proceedings Closed in 2008

In 2008, four mass tort MDL proceedings were closed: MDL No. 1428 (*In re Ski Train Fire in Kaprun, Austria on November 13, 2000*),²⁶ MDL No. 1481 (*In re Meridia Products Liability Litigation*), MDL No. 1844 (*In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006*), and MDL No. 2008 (*In re Air Crash Near Kirksville, Missouri on October 19, 2004*). We did not locate in any of those proceedings section 1292(b) motions pursuing the sort of interlocutory appeal envisioned by the proposed Rule 23.3.

In sum, the foregoing data appear to indicate that in mass tort MDL proceedings, section 1292(b) does not in practice afford a viable path for securing appellate review of the types of broad, potentially dispositive questions contemplated by the proposed Rule 23.3. Further, the data suggest that types of appeals envisioned by the proposed rule arise relatively infrequently in mass tort MDL proceedings, such that the adoption of Rule 23.3 would not add substantial new burdens to our federal courts of appeals.

We appreciate the opportunity to submit these data to the Subcommittee. If there are any questions or interest in reviewing any of the materials we assembled, please let us know.

Sincerely,


John H. Beisner

²⁵ We found two section 1292(b) motions in this docket. Both concerned related bankruptcy proceedings, and we therefore deemed them irrelevant to our analysis.

²⁶ The PACER docket entries indicate a section 1292(b) motion was made in this case, but it does not appear to have been of the sort contemplated by the proposed Rule. We were not able to obtain on-line copies of the relevant papers, so we have been unable to confirm.

EXHIBIT 1

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
875	IN RE: Asbestos Products Liability Litigation (No. VI)	E.D. Pa. Robreno	Multiple defendants	Asbestos	30 (192,094)
1431	IN RE: Baycol Products Liability Litigation	D. Minn. Davis	Bayer	Baycol	2 (9,107)
1657	IN RE: Vioxx Marketing, Sales Practices and Products Liability Litigation	E.D. La. Fallon	Merck	Vioxx	1 (10,320)
1836	IN RE: Mirapex Products Liability Litigation	D. Minn. Davis	Boehringer Ingelheim	Mirapex	1 (441)
1871	IN RE: Avandia Marketing, Sales Practices and Products Liability Litigation	E.D. Pa. Rufe	GSK	Avandia	1 (5,299)
1964	IN RE: NuvaRing Products Liability Litigation	E.D. Mo. Sipple	Merck	NuvaRing	86 (1,991)
2100	IN RE: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation	S.D. Ill. Herndon	Bayer	Yasmin & Yaz	56 (11,680)
2151	IN RE: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation	C.D. Cal. Selna	Toyota	Motor vehicles	21 (456)
2158	IN RE: Zimmer Durom Hip Cup Products Liability Litigation	D.N.J. Wigenton	Zimmer	Durom hip cup	260 (728)
2187	IN RE: C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	C.R. Bard	Pelvic mesh	7,223 (15,690)
2197	IN RE: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation	N.D. Ohio Helmick	DePuy Orthopaedics, Inc.; DePuy Products, Inc.; Johnson & Johnson	ASR hip implant	1,707 (10,144)
2243	IN RE: Fosamax (Alendronate Sodium) Products Liability Litigation (No. II)	D.N.J. Wolfson	Merck	Fosamax	257 (1,250)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/EXPOSURE TYPE	PENDING CASES (cumulative total)
2244	IN RE: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation	N.D. Tex. Kinkeade	DePuy Orthopaedics, Inc.; DePuy Products, Inc.; DePuy International Limited; Johnson & Johnson; Johnson & Johnson Services, Inc.; Johnson & Johnson International	Pinnacle hip implant	9,605 (9,789)
2272	IN RE: Zimmer NexGen Knee Implant Products Liability Litigation	N.D. Ill. Pallmeyer	Zimmer	Knee implant components	283 (1,741)
2323	IN RE: National Football League Players' Concussion Litigation	E.D. Pa. Brody	NFL	Sports	334 (342)
2325	IN RE: American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	American Medical Systems	Pelvic mesh	3,766 (21,236)
2326	IN RE: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	Boston Scientific	Pelvic mesh	18,901 (25,633)
2327	IN RE: Ethicon, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	Ethicon, Inc.; Johnson & Johnson	Pelvic mesh	34,729 (40,321) ~
2329	IN RE: Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation	N.D. Ga. Duffey	Wright Medical	Hip implant components	206 (641)
2331	IN RE: Propecia (Finasteride) Products Liability Litigation	E.D.N.Y. Cogan	Merck	Propecia	884 (1,178)
2387	IN RE: Coloplast Corp. Pelvic Support Systems Products Liability Litigation	S.D. W. Va. Goodwin	Coloplast	Pelvic mesh	1,029 (2,671)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/EXPOSURE TYPE	PENDING CASES (cumulative total)
2391	IN RE: Biomet M2a Magnum Hip Implant Products Liability Litigation	N.D. Ind. Miller	Biomet	Hip implant	466 (2,811)
2418	IN RE: Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)	D.N.J. Wolfson	Bristol Myers Squibb	Plavix	42 (346)
2419	IN RE: New England Compounding Pharmacy, Inc., Products Liability Litigation	D. Mass. Zobel	Alaunus Pharmaceutical, LLC, New England Compounding Pharmacy, Inc.	Contaminated injectable steroid	357 (733)
2428	IN RE: Fresenius GranuFlo/Naturalyte Dialysate Products Liability Litigation	D. Mass. Woodlock	Fresenius Medical Care	GranuFlo and Naturalyte brand dialysates	3,133 (4,368)
2433	IN RE: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation	S.D. Ohio Sargus	Du Pont	Water contamination	3,467 (3,516)
2434	IN RE: Mirena IUD Product Liability Litigation	S.D.N.Y. Seibel	Bayer HealthCare	IUD	3 (1,776)
2436	IN RE: Tylenol (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation	E.D. Pa. Stengel	Johnson & Johnson, McNeil Consumer Healthcare	Tylenol	13 (233)
2440	IN RE: Cook Medical, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	Cook Medical	Pelvic mesh	68 (642)
2441	IN RE: Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation	D. Minn. Frank	Stryker	Hip implant components	1,242 (3,490)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/EXPOSURE TYPE	PENDING CASES (cumulative total)
2452	IN RE: Incretin-Based Therapies Products Liability Litigation	S.D. Cal. Battaglia	Amylin Pharmaceuticals; AstraZeneca; Boehringer Ingelheim; Bristol Myers Squibb; Eli Lilly; Merck; Novo Nordisk	Diabetes medicines	944 (978)
2492	IN RE: National Collegiate Athletic Assn. Student Athlete Concussion Injury Litigation	N.D. Ill. Lee	NCAA, various conferences, various schools	Sports	125 (126)
2543	IN RE: General Motors LLC Ignition Switch Litigation	S.D.N.Y. Furman	General Motors	Motor vehicles	535 (648)
2545	IN RE: Testosterone Replacement Therapy Products Liability Litigation	N.D. Ill. Kennelly	Solvay Pharmaceuticals; AbbVie; Abbott Labs; Actavis; Auxilium Pharmaceuticals; Eli Lilly; Endo Pharmaceuticals; GSK; Pfizer; Pharmacia; Watson Pharmaceuticals	Testosterone replacement	5,984 (7,776)
2551	IN RE: National Hockey League Players' Concussion Litigation	D. Minn. Nelson	NHL	Sports	21 (21)
2570	IN RE: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Products Liability Litigation	S.D. Ind. Young	Cook Medical	IVC filters	4,350 (4,568)
2592	IN RE: Xarelto (Rivaroxaban) Products Liability Litigation	E.D. La. Fallon	Bayer, Johnson & Johnson; Janssen	Xarelto	22,319 (23,698)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2599	IN RE: Takata Airbag Products Liability Litigation	S.D. Fla. Moreno	Takata, multiple auto companies	Motor vehicle airbags	285 (321)
2606	IN RE: Benicar (Olmesartan) Products Liability Litigation	D.N.J. Kugler	Daiichi Sankyo	Benicar	1,937 (2,308)
2641	IN RE: Bard IVC Filters Products Liability Litigation	D. Ariz. Campbell	Bard	IVC filters	4,165 (4,282)
2642	IN RE: Fluoroquinolone Products Liability Litigation	D. Minn. Tunheim	Bayer; Janssen; McKesson	Fluoroquinolone antibiotics – principally, Levaquin, Avelox, and Cipro	732 (1,187)
2657	IN RE: Zofran (Ondansetron) Products Liability Litigation	D. Mass. Saylor	GSK	Zofran	469 (617)
2666	IN RE: Bair Hugger Forced Air Warming Devices Products Liability Litigation	D. Minn. Ericksen	3M	Surgical heating devices	4,623 (5,028)
2691	IN RE: Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation	N.D. Cal. Seeborg	Pfizer	Viagra	740 (741)
2734	IN RE: Abilify (Aripiprazole) Products Liability Litigation	N.D. Fla. Rodgers	Bristol-Myers Squibb; Otsuka	Abilify	1,663 (1,681)
2738	IN RE: Johnson & Johnson Talcum Powder Marketing, Sales Practices, and Products Liability Litigation	D.N.J. Wolfson	Johnson & Johnson; Imerys	Powder products	8,205 (8,242)
2740	IN RE: Taxotere (Docetaxel) Products Liability Litigation	E.D. La. Milazzo	Sanofi	Taxotere	9,063 (9,357)
2741	IN RE: Roundup Products Liability Litigation	N.D. Cal. Chhabria	Monsanto	Herbicide product	470 (475)
2750	IN RE: Invokana (Canagliflozin) Product Liability Litigation	D.N.J. Martinotti	Janssen Pharmaceuticals, Inc.	Invokana	1,040 (1,114)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/EXPOSURE TYPE	PENDING CASES (cumulative total)
2753	IN RE: Atrium Medical Corp. C-QUR Mesh Products Liability Litigation	D.N.H. McCafferty	Atrium Medical Corp.; Maquet Cardiovascular US Sales, LLC; Gefinge AB	Surgical mesh products	471 (473)
2754	IN RE: Eliquis (Apixiban) Products Liability Litigation	S.D.N.Y. Cote	Bristol-Myers Squibb; Pfizer	Eliquis	28 (283)
2767	IN RE: Mirena IUS Levonorgestral-Related Products Liability Litigation (No. II)	S.D.N.Y. Engelmayr	Bayer	Birth control system	593 (595)
2768	IN RE: Stryker LFIT V40 Femoral Head Products Liability Litigation	D. Mass. Talwani	Stryker	Hip replacement component	327 (335)
2775	IN RE: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Litigation	D. Md. Blake	Smith & Nephew	Hip replacement components	387 (405)
2776	IN RE: Farxiga (Dapagliflozin) Products Liability Litigation	S.D.N.Y. Schofield	Bristol-Myers Squibb; AstraZeneca	Farxiga	50 (64)
2782	IN RE: Ethicon Physiomes Mesh Flexible Composite Hernia Mesh Products Liability Litigation	N.D. Ga. Storey	Ethicon; Johnson & Johnson	Hernia mesh product	1,279 (1,299)
2789	IN RE: Proton-Pump Inhibitor Product Liability Litigation (No. II)	D.N.J. Cecchi	AstraZeneca; Pfizer; Takeda; Procter & Gamble; Novartis	PPIs	4,618 (4,644)
2809	IN RE: Onglyza (Saxagliptin) and Kombiglyze XR (Saxagliptin and Metformin) Products Liability Litigation	E.D. Ky. Kentucky	Bristol-Myers Squibb; AstraZeneca; McKesson	Diabetes medicines	210 (210)
2816	IN RE: Sorin 3T Heater-Cooler System Products Liability Litigation	M.D. Pa. Jones	Sorin Group USA; related entities	Surgical heating-cooling system	61 (63)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/EXPOSURE TYPE	PENDING CASES (cumulative total)
2841	IN RE: Monat Hair Care Products Marketing, Sales Practices, and Products Liability Litigation	S.D. Fla. Gayles	Monat Global Corp.; Alcora Corp.	Hair care products	9 (9)
					TOTAL PENDING CASES: 163,876

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January 31, 2019

Ms. Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)

Dear Ms. Womeldorf:

As in-house counsel at major U.S. corporations, we write to voice support for the proposal to amend Fed. R. Civ. P. 26(a)(1)(A) to require in civil actions the disclosure of agreements giving a non-party or non-counsel the contingent right to receive compensation from proceeds of the litigation. *See* July 1, 2017 letter to Advisory Committee from 30 corporate and defense counsel organizations (proposing language for a new Fed. R. Civ. P. 26(a)(1)(A)(v)).

We believe the reasons for requiring full disclosure are strong and well documented in the record before the Advisory Committee. When litigation funders invest in a lawsuit, they buy a piece of the case; they effectively become real parties in interest. Defendants (and courts) have a right to know who has a stake in a lawsuit and to assess whether they are using illegal or unethical means to bring the action. Further, in assessing discovery proportionality and addressing settlement possibilities, both the court and the defendant need to know who is sitting on the other side of the table — is it an impecunious individual seeking recourse based on the merits of his/her case or is there also a multi-million dollar litigation funder driven by the need to satisfy investor expectations?

The proposal seeks only basic disclosure; it does not seek to prohibit or regulate litigation finance. No harm would flow from requiring such basic transparency about who has invested in a lawsuit and the terms of that investment, at least none that could not be protected by the court, as the proposal contemplates. We have heard the suggestions that any third-party litigation funding (“TPLF”) disclosures should be *in camera* only and/or should be limited to a few points (e.g., confirmation that funding is being used, identification of the funder) based on the premise that disclosure of the actual agreement documents will unveil sensitive strategic information about a party’s capacity to prosecute the litigation. But that is precisely the argument made 30 years ago in opposing demands for full disclosure of defendants’ insurance agreements, which some funders have described as a defense-side form of litigation funding. In 1970, the Advisory Committee rejected those arguments in adopting Fed. R. Civ. P. 26(a)(1)(A)(iv), which requires disclosure of all insurance agreements in civil cases.

If a TPLF agreement disclosure requirement is not adopted, our Federal Rules will retain their current inequity; defendants will still be required to disclose to opposing counsel their

contracts with insurers, but plaintiffs will be allowed to keep their funding arrangements under wraps. The practical effects of TPLF arrangements on pending litigation, including any ethical ramifications, should not be addressed through one-sided *ex parte* communications or on the basis of incomplete information. Such matters should be subject to the full transparency and scrutiny of the litigation process.

Finally, we note that some litigation funders have contended that major companies are generally indifferent or opposed to such a disclosure requirement because corporate use of TPLF is allegedly widespread. No evidence has been proffered to support that assertion. Nor is it consistent with our experience. But regardless of who uses litigation finance, that fact should not shield the fair disclosure of those arrangements.

Respectfully submitted,

Brackett B. Denniston, III
Former Senior Vice President and
General Counsel
General Electric

Susan L. Lees
Executive Vice President, Secretary and
General Counsel
The Allstate Corporation

David R. McAtee II
Senior Executive Vice President and
General Counsel
AT&T Inc.

Christopher M. Guth
Senior Counsel
Bayer U.S.

William J. Noble
General Counsel
BP America Inc.

David Garfield
Executive Vice President, General Counsel and
Corporate Secretary
The Charles Schwab Corporation

R. Hewitt Pate
Vice President and General Counsel
Chevron Corporation

Arthur R. Block
Executive Vice President, General Counsel and
Secretary
Comcast Corporation

Thomas M. Moriarty
Executive Vice President, Chief Policy and
External Affairs Officer, and
General Counsel
CVS Health

Michael J. Harrington
Senior Vice President and General Counsel
Eli Lilly and Company

Doug Lampe
Counsel
Ford Motor Company

John Nadas
Vice President, Litigation
General Electric

James Ford
Senior Vice President and General Counsel
GlaxoSmithKline LLC

Kent Walker
Senior Vice President of Global Affairs and
Chief Legal Officer
Google

Anne T. Madden
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Ms. Rebecca Womeldorf

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Zurich North America

February 20, 2019

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Ms. Womeldorf:

We write in response to the January 31, 2019 letter to the Advisory Committee submitted by Brackett Denniston III, Chair of the U.S. Chamber of Commerce's Institute for Legal Reform (the "ILR") and a member of the Chamber's Board of Directors and Executive Committee (collectively the "Chamber"), and various corporate in-house counsel in favor of forced disclosure of litigation funding arrangements in every federal civil case under Fed. R. Civ. P. 26(a)(1)(A) (the "Letter"). Though couched as a modest request for "basic disclosure," the Letter urges a considerable departure from the existing rules governing discovery. In so doing, it parrots the flawed and failed arguments of the ILR, disregards basic precepts of relevance and proportionality underlying Rule 26, offers no cogent or compelling policy rationale, and ignores well-developed jurisprudence on this important issue. We refer the Advisory Committee to previous submissions and only briefly address the substance of this latest communication.

To begin with, relevance forms the backbone of discoverability under the Federal Rules. See Fed. R. Civ. P. 26(b)(1). This basic tenet should be the starting point for examining whether an initial disclosure rule makes good sense. Yet the Letter makes no effort to address it. Nor could it: federal courts have routinely rejected litigation-finance-related discovery unless the party seeking it makes a specific showing of relevance. In fact, just last month, the U.S. District Court for the Northern District of California denied—as *irrelevant*—disclosure of the very information the proposed rule seeks to mandate in every case: the identity of the funder and the specific terms of the parties' agreement. See *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative).¹

The Northern District of California's conclusion follows a long line of cases recognizing the uncontroversial concept that relevance matters under Rule 26, including with respect to funding arrangements. See, e.g., *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into litigation funding arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL

¹ While the court's opinion does not specifically set forth the details of the discovery requests at issue, the discovery record makes clear that defendant sought disclosure of both the the identity of any third-party financier and the terms of any related funding agreement. Joint Discovery Dispute Letter Regarding Financial Interests in Asserted Patent at 1-3, *Micron* (Dkt. No. 259-5).

7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into litigation funding arrangements absent “some objective evidence that any of Zillow’s theories of relevance apply in this case”). The instances in which federal courts have permitted discovery into litigation funding arrangements are exceedingly rare; they arise only under unique circumstances where they are, in fact, germane to the claims and defenses of the parties. The call for blanket forced disclosure under Rule 26 flies in the face of these bedrock relevance principles, and thus, should be viewed with great skepticism by the Advisory Committee.

The advocates for a catch-all disclosure rule ignore a related fact: federal courts can easily handle discovery issues relating to litigation finance under existing Rule 26 and/or their own inherent authority. As the Advisory Committee appropriately observed in rejecting earlier calls for the same Rule 26 amendment, “judges currently have the power to obtain information about third-party funding when it is relevant in a particular case.” Hon. David G. Campbell, *Report of Advisory Committee on Civil Rules*, at 4 (Dec. 2, 2014), available at https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf (last visited Feb. 6, 2019). Judge Polster’s recent order in the pending opioid MDL in the U.S. District Court for the Northern District of Ohio is a perfect example. See *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering all counsel to submit a description of any third-party funding for *in camera* review, as well as affirmations that funding did not create conflicts or cede case control). Other federal courts have adopted this sensible approach, which balances the court’s need to inquire into funding arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties’ claims and defenses. See, e.g., *Micron*, 2019 WL 118595, at *2 (noting the court’s ability to “question potential jurors *in camera* regarding relationships to third party funders and potential conflicts of interest” if necessary at trial). The Letter offers no explanation why the federal courts’ current ability to obtain information about litigation funding arrangements is insufficient to address potential concerns that may arise every so often in a particular case. Boiled to its essence, the Letter is a push for forced disclosure of irrelevant information that one party is simply curious to know. That is not the standard for discovery under Rule 26. Nor would any corporate litigant support such a standard outside of the litigation finance context.²

The Letter repeats a handful of other halfhearted reasons for the proposal to amend Rule 26. These too lack any sound basis in law or policy. The first of these is that litigation funders “effectively become real parties in interest” to a lawsuit in which they provide financing. This argument was thoroughly considered and rejected in *Miller*, which follows the prevailing legal definition of real parties in interest under Rule 17(a)—that is, “the person

² For example, in support of the “proportionality” amendments to Rule 26, the U.S. Chamber urged the Advisory Committee to add “a requirement that the information not only be relevant, but also **material** to a party’s claim or defense.” U.S. Chamber Inst. for Legal Reform, *Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure*, at 7 (Nov. 7, 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf (last visited Feb. 6, 2019). By contrast, it asks the Advisory Committee to disregard relevance altogether when litigation finance is the subject.

holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.” 17 F. Supp. 3d at 728 (quoting *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990)). Litigation funders do not fall within this definition, and we are not aware of any federal court decision that has concluded otherwise. The simple fact is that there are often many parties with an economic interest in the outcome of a piece of litigation, and our system makes no effort to identify all of them or to have their interests disclosed; to do so would multiply exponentially the burden on courts and counsel. There is a sound policy reason behind our current limits on party disclosure.³

The Letter also draws an analogy between commercial litigation finance and liability insurance to justify forced disclosure. While it may seem superficially appealing to compare the required disclosure of liability insurance under Rule 26(a)(1)(A)(iv), the analogy is hopelessly flawed. Prior submissions to the Advisory Committee explain in detail the differences between the two, including disparities in the information disclosed. Suffice it to say, however, that the Advisory Committee’s rationale behind the 1970 amendment to Rule 26(a)(1)(A)(iv) alone undercuts any attempt to cast them as equivalents necessitating parallel disclosures. This includes the reasoning that “insurance is an asset created specifically to satisfy the claim” (funding in no way satisfies the claim); “the insurance company ordinarily controls the litigation” (funders exert no such control); and “disclosure does not involve a significant invasion of privacy” (funding terms convey the funded parties’ litigation budget and a roadmap of its litigation strategy). Fed. R. Civ. P. 26, Advisory Comm. Notes, Subdivision (b)(2)--Insurance Policies (1970). Indeed, as the *Miller* court noted after reviewing the relevant litigation funding agreements *in camera*: “there is nothing in those agreements that remotely supports Caterpillar’s attempt to equate Miller’s funding agreement to the relationship between an insured and its insurer.” *Miller*, 17 F. Supp. 3d at 729. After even a minimal level of scrutiny, the analogy simply does not work.

* * *

We work daily with corporate in-house lawyers—including at companies whose interests the Chamber purports to represent—to satisfy their need for capital to support meritorious claims. But this Letter is fundamentally a PR stunt by the Chamber (witness the Chamber’s simultaneous media campaign surrounding it) and once again calls into question the

³ The comments to the Federal Rules of Civil Procedure perfectly encapsulate the balancing test that the Judicial Conference took when adopting the rule for financial disclosure:

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Fed. R. Civ. P. 7.1 (2002 Committee Notes).

credibility of the ILR. It also highlights the Chamber's and the ILR's blatant hypocrisy in demanding the disclosure of private financial transactions while insisting that its own donor list remain anonymous. Regardless, the Letter adds nothing of substance to the debate about the fitness of a proposal that flouts the foundational principles of Rule 26. Nor does it provide any compelling policy rationale that would lead the Advisory Committee to ignore these important tenets in favor of a rule that would almost certainly bog down courts with additional burdens and delays.

We continue to urge the Advisory Committee to reject the proposed amendment to Rule 26(a)(1)(A).

Respectfully,

Eric H. Blinderman
Chief Executive Officer (U.S.)
Therium Capital Management

Allison K. Chock
Chief Investment Officer
Bentham IMF

Danielle Cutrona
Director, Global Public Policy
Burford Capital



February 20, 2019

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Ms. Womeldorf:

I write personally to supplement today's response by Burford and other litigation finance firms to the January 31, 2018 letter suborned by the U.S. Chamber Institute for Legal Reform.

I am the former Executive Vice President & General Counsel of Time Warner Inc. I am also the Chief Executive Officer and one of the founders of Burford Capital, the largest litigation finance company.

From personal knowledge and experience, I wanted to rebut the Chamber's suggestion that the business community doesn't use litigation financing. That is simply false.

When I was at Time Warner, like most general counsel I faced significant challenges around legal costs and budgets. We regularly sought alternatives to traditional hourly billing approaches and looked hard for ways to move legal costs off the balance sheet – including what is now called litigation funding. The simple fact is that most companies, regardless of their size or financial position, are simply not willing to allocate the capital necessary to enable their legal functions do all the things they can and should be doing.

When I co-founded Burford ten years ago, it was at the behest of law firms and corporate clients who were searching for external capital solutions to these very problems. Burford was a response to corporate demand, not an attempt to stimulate it. Indeed, our very first matters were to support corporate clients of firms like Latham & Watkins and Simpson Thacher & Bartlett.

Since then, we have gone on to provide billions of dollars of capital to a wide selection of corporate clients. In doing so we have worked with 90% of the AmLaw 100. We are a multi-billion dollar publicly traded company with audited financial statements; we aren't just making this stuff up.

Moreover, a number of the companies who signed the January 31 letter are clients of ours, and several signatories of the letter have personally discussed the use of litigation finance with me. A notable example is a lengthy and pleasant meeting I had in 2015 with Brackett Denniston when he was GE's General Counsel. Moreover, in the few weeks since the letter was sent to you, one of its signatories has in fact approached Burford seeking litigation financing.

Why, then, the apparent dissonance of corporate counsel signing the Chamber's letter while also using our capital? The simple answer is the bare-knuckled tactics of the Chamber, not merely in its political lobbying, but also in managing its members, for whom it is easier to sign on publicly rather than to refuse to go with the flow.

Having signed the letter, however, those members must then go back to running their businesses – many of which benefit from litigation finance. If one carefully parses the last paragraph of the January 31 letter, one notes that it is written cautiously and never says that the signatories do not use litigation finance.

Finally, on the substantive question of disclosure, companies don't want it when they are plaintiffs and they do want it when they are defendants. As plaintiffs, they value keeping their financial affairs private, and view litigation finance as no different than any other source of capital to manage legal expenses. But as defendants, they value distraction and delay, and imposing a disclosure regime provides another arrow in that quiver. There is nothing surprising in these positions; I would have taken the same position whenever I was a defendant. But that does not make it correct – nor does it alter the fact that no change is needed to the clear and robust litigation disclosure rules that have worked well in the United States for many decades.

Respectfully submitted,

/s/

Christopher P. Bogart
Chief Executive Officer

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6. Rule 73(b)(1): Consent to Magistrate Judge Trial

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Rule 73(b) establishes the procedure for consenting to hold proceedings before a magistrate judge. Two questions remain on the agenda: (1) securing consent while the case is still assigned to a district judge and (2) withholding consent if the case has been assigned to a magistrate judge without prior party consent. As discussed below, it is possible – and probably desirable – to address only the question of securing consent in a case that has not been automatically assigned to a magistrate judge. The problem of withholding consent might better be left to local practices in the districts that place magistrate judges “on the wheel” for random initial assignments.

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The Committee has already decided not to take on a third question that arises when a new party is added to an action after the original parties have all consented to a referral. That question does not seem to cause much difficulty in practice and it might prove difficult to draft a rule that adequately applies to the variety of circumstances that may arise.

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This initial draft addresses the question of joint consent before a referral:

Rule 73. Magistrate Judges; Trial by Consent; Appeal

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(a) **Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. § 636(c)(5).

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(b) **Consent Procedure.**

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(1) ***In General.*** When a magistrate judge has been designated to conduct civil actions or proceedings,¹ the clerk must give the parties written notice of their opportunity to consent [to a designation]² under 28 U.S.C. § 636(c). ~~To signify their consent, the parties must jointly or separately file a statement consenting to the referral. The parties may consent by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than all parties.] A district judge or magistrate judge may be informed of a party’s response to the clerk’s notice only if all parties~~

¹ No doubt it is better to stick with the language of the present rule describing the magistrate judge’s authority to “conduct a civil action or proceeding, including a jury or nonjury trial.” “[C]onduct” may seem a rather weak word. The magistrate judge is acting as the court, exercising the authority of a district judge. But “conduct” is the word used in § 636(c)(1) – “conduct any or all proceedings in a jury or nonjury civil matter.” Likely it is better to avoid new language, for example: “when authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, exercise the powers of a district judge in a civil action or proceeding * * *.”

² The choice of “designation” is provisional. It may be misleading because § 636(c)(1) uses “specially designated” to refer to the district court’s act of designating a magistrate judge to exercise jurisdiction to conduct any or all proceedings in a jury or nonjury civil action and order the entry of judgment in the case. The parties’ case-specific consent is not to designation in this sense, but to the magistrate judge’s “exercise of civil jurisdiction under paragraph (1).”

A wordier alternative might be “consent to the magistrate judge’s exercise of civil jurisdiction under 28 U.S.C. § 636.”

A simpler alternative might be consent to a referral. “Referral” is not used in § 636 or Rule 73(b)(1), but it seems to be in common use.

1714 ~~have consented to the referral.~~³

1715 * * * * *

1716 Rule 73(b) implements 28 U.S.C. § 636(c)(2), which provides that when a magistrate
1717 judge is designated to exercise civil jurisdiction:

1718 the clerk of court shall, at the time the action is filed, notify the parties of the
1719 availability of a magistrate judge to exercise such jurisdiction. The decision of the
1720 parties shall be communicated to the clerk of court. Thereafter, either the district
1721 court judge or the magistrate judge may again advise the parties of the availability of
1722 the magistrate judge, but in doing so, shall also advise the parties that they are free
1723 to withhold consent without adverse substantive consequences. *Rules of court for the*
1724 *reference of civil matters to magistrate judges shall include procedures to protect the*
1725 *voluntariness of the parties' consent.*

1726 * * * * *

1727 Rule 73(b) rests on the premise that anonymity is the most effective method of ensuring
1728 voluntary consent.

1729 The immediate occasion for revisiting Rule 73(b) is an uncontrollable quirk of the
1730 CM/ECF system. The rule now permits a party to file a separate consent. The system
1731 automatically sends the consent to the judge assigned to the case. The system is built to defy the
1732 command of Rule 73(b)(1) that the judge or magistrate judge may be informed of a party's
1733 response only if all parties have consented. It has been asserted repeatedly that this quirk cannot
1734 be fixed. The alternative of allowing each party to lodge a separate consent with the clerk, to be
1735 filed by the clerk only if all parties consent, meets resistance from clerks who anticipate that the
1736 burden of amassing and then filing will lead to inevitable mistakes.

1737 The CM/ECF problem could be addressed by simply deleting the provision for separate
1738 statements: "must jointly ~~or separately~~ file a statement * * *." Some style changes may be
1739 useful, however, as shown in the draft set out above. Discussion at the November 2018
1740 Committee meeting supported adding an explicit statement, reflected in the draft, that "no party
1741 may file a consent signed by fewer than all parties." This statement is calculated to provide clear
1742 guidance and to avert any occasional attempt to seek strategic advantage by filing an individual
1743 consent.

1744 The question posed by random initial assignments to magistrate judges is more sensitive.
1745 Many districts have adopted this practice to make good use of this important group of judges. In
1746 many cases all parties willingly accept the reference. But the statute, undergirded by Article III,
1747 requires consent by all parties. A rule providing an anonymous opportunity to withhold consent
1748 may defeat automatic initial assignments that would have survived more open means of inviting
1749 consent. Whether that would happen depends on the extent to which anonymity is effectively
1750 protected under local practices. Nor is concern for encouraging consent the only problem.

³ This sentence is overlined to raise the question whether it remains useful after withdrawing the opportunity to file individual consents. There may be a question whether the court is bound to make a referral if the rule does not provide for informing the judges and does not say whether the consents mandate referral. That question seems fanciful. If the rule were amended to provide for withholding consent after an initial automatic referral, contrary to the suggestion in text, the sentence would remain useful. The judge and magistrate judge should be promptly informed that at least one (anonymous) part has not consented.

1751 Beyond that, adopting provisions for withholding consent after a random initial referral would be
1752 read to imply approval of a practice that may remain controversial.

1753 A random initial referral to a magistrate judge to exercise civil jurisdiction still depends
1754 on the consent of all parties. Both the statute and Rule 73(b) require it. Present Rule 73(b)(1)
1755 applies to all cases – the clerk must notify the parties of their opportunity to consent, and the
1756 parties must consent. It would be difficult to draft a national rule to govern the method for
1757 establishing consent after a random initial referral. The most apparent difficulty is timing. All
1758 parties cannot consent until all parties have been served, and some reasonable period must be
1759 allowed after the last party is served. And the ranks of the parties may increase as the case
1760 progresses, posing the questions of late-added parties that the Committee has decided to forgo.
1761 Moreover, just as in cases without a random initial referral, events as a case progresses may
1762 persuade all parties that it would be useful to consent to a referral long after expiration of
1763 whatever initial period might be set. And there may be relevant variations in the methods
1764 districts employ in making random initial referrals to magistrate judges. On the other hand, there
1765 is no reason to fear that the requirement of party consent is ignored in districts that make random
1766 initial referrals.

1767 On balance, it seems better to bypass the questions raised by automatic initial referrals.

1768 If the proposed amendment is limited to requiring a joint statement signed by all parties,
1769 the proposal seems ripe for a recommendation to publish for comment.

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7. Rule 7.1 Disclosure

1771 Several different proposals have been made to expand the initial disclosure statements
1772 required by Rule 7.1. The most modest is to amend Rule 7.1 to conform to pending Appellate
1773 and Bankruptcy Rules amendments that require disclosure statements by a nongovernmental
1774 corporation that seeks to intervene. That proposal, like present Rule 7.1, seeks information
1775 relevant to recusal decisions. A second proposal seeks information about parties' citizenship for
1776 diversity jurisdiction, a purpose quite different from supporting recusal decisions. Finally,
1777 several proposals have been made for disclosure through an amended Rule 26(a) to provide
1778 information about third-party litigation financing arrangements.

1779 Adding nongovernmental corporate intervenors to Rule 7.1 is a step that could be taken
1780 by recommending publication of a simple amendment this summer. That step should be taken
1781 unless it seems desirable to pursue additional amendments that cannot be recommended with
1782 confidence now but likely can be recommended within a year. Publication of a single package
1783 may be better than back-to-back publications in 2019 and 2020.

1784 Broader proposals to support better-informed recusal decisions by increasing the range of
1785 interests that must be disclosed have been advanced for several years. A substantial number of
1786 local district and circuit rules require greater disclosure than Rule 7.1. The disclosures required
1787 by these local rules vary significantly from one to another. Local rules of this sort were
1788 considered when Rule 7.1 was initially adopted following study by a subcommittee comprised of
1789 representatives of all advisory committees. The decision then was to limit Rule 7.1 and the
1790 parallel provisions in other rules to nongovernmental corporate parties. Broader disclosure
1791 requirements were resisted in part because of the difficulty of sorting through all the possible
1792 grounds for recusal, in part because of a suspicion that most of the possible grounds for recusal
1793 seldom arise, and in part for fear that a general requirement to disclose anyone with a "financial
1794 interest" in the outcome would generate far more disclosures than could be justified. A party's
1795 dependent children, parents, siblings, spouse, or others, for example, could easily qualify as
1796 financially interested in the outcome. The sheer burden of compliance with expansive
1797 requirements also was weighed.

1798

Rule 7.1: Third-Party Litigation Funding

1799 The proposals for disclosure of TPLF arrangements are being considered by the MDL
1800 Subcommittee. *See supra* Tab 5. Third-party financing is found in many forms in many types of
1801 litigation other than MDL proceedings, but MDL proceedings have been the focus of the most
1802 detailed proposals. The MDL Subcommittee has found the subject complex, in part because of
1803 the rapid growth in TPLF and continuing shifts in financing arrangements. It has not determined
1804 whether to take up TPLF as part of any project that may be launched to develop rules for MDL
1805 proceedings, nor whether the subject should be pursued in general terms that look to all forms of
1806 litigation. The prospects are so indefinite that work on other disclosure proposals should not be
1807 deferred to allow the time required to grapple with disclosure of third-party financing.

1808

Rule 7.1: Intervenors

1809 Appellate Rule 26.1 and Bankruptcy Rule 8012(a) are being amended to require a
1810 disclosure statement by a nongovernmental corporation that seeks to intervene. Adopting the
1811 same provision in Rule 7.1 is desirable. Uniformity among the rules is important in itself. There
1812 is no apparent reason to distinguish civil actions from appeals or bankruptcy proceedings for this
1813 purpose. And disclosure may be useful to alert a judge of the need to recuse before ruling on the
1814 motion to intervene.

1815 The task of making Rule 7.1 parallel to the new Appellate Rule and proposed Bankruptcy
1816 Rule is easily accomplished:

1817 **Rule 7.1. Disclosure Statement**

1818 (a) **Who Must File.** A nongovernmental corporate party and a nongovernmental corporation
1819 that seeks to intervene must file [2 copies of]⁴ a disclosure statement that: * * *

1820 The Bankruptcy Rules Reporter has advised that there is no need to add to Rule 7.1 a
1821 provision similar to the Appellate Rule 26.1 provision for disclosure of debtors in bankruptcy
1822 cases. The Bankruptcy Rule will carry over to proceedings in the district court.

1823 It might be possible to proceed with this proposal as a technical or conforming
1824 amendment that simply picks up identical proposals that have been examined in two separate
1825 periods of publication and comment. Nonetheless, it seems better to follow the ordinary path of
1826 publication and comment. Something unexpected might yet appear. Beyond that possibility,
1827 there may not be any urgency about this proposal. If diversity disclosure is taken on but is not yet
1828 ready for a recommendation to publish, Rule 7.1 might be held back for inclusion in a package
1829 that includes diversity disclosure rather than publish proposed amendments only a year or two
1830 apart.

1831 *Diversity Jurisdiction: Members and Owners of LLCs, Trusts, and Entities*

1832 Judge Thomas Zilly has proposed a rule that would require “disclosure of the names and
1833 citizenship of any member or owner of an LLC, trust, or similar entity.” The proposal grows out
1834 of his experience in a case that went to judgment after a 10-day trial, only to be remanded on
1835 appeal for a determination of the citizenship of four LLC parties, including the plaintiff and three
1836 defendants.

1837
1838 Looking first to LLCs, Rule 8(a)(1) may not provide satisfactory assurances that diversity
1839 jurisdiction is accurately pleaded. An LLC takes the citizenship of each of its owners. If an
1840 owner is itself an LLC, all of its owners must also be counted. Still deeper layers of owners and
1841 citizenships are possible. A plaintiff LLC ordinarily should have a good idea of the citizenships
1842 attributed to it. But even if that is true, the plaintiff may not have access to comprehensive
1843 information about the citizenship of a defendant LLC. Ignorance may be bliss if a diversity-
1844 destroying citizenship is never uncovered, but it can lead to waste, and perhaps great waste, if it
1845 is uncovered – or revealed after a deliberate cover-up – after substantial proceedings have been
1846 had. Rather than impose the burden of defining jurisdiction on the uncertain foundation of
1847 Rule 8(a)(1), a disclosure requirement that requires each party to reveal its own citizenships may
1848 be more efficient.

1849 Since diversity jurisdiction is an issue in civil actions, it may be that a disclosure
1850 requirement would be lodged in the Civil Rules and perhaps in the Appellate Rules as well.

1851 The proposal extends beyond LLCs to a “trust or similar entity.” A wide variety of
1852 organizations take on the citizenship of their members for diversity purposes. It may prove
1853 difficult to develop a workable catalog, even if the purpose is confined to ensuring the basis for
1854 diversity jurisdiction. The Supreme Court has held, for example, that the trustees of a
1855 Massachusetts business trust can sue as the real parties in interest, establishing diversity

⁴ There has been some discussion of the need for two copies in an era of electronic filing. If clerks’ offices routinely convert the clerk’s copy into an electronic form that is available to the judge, we may not need “two copies” any longer.

1856 jurisdiction on their individual citizenships without considering the citizenships of the beneficial
1857 shareholders. *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980).

1858 Rather than attempt to catalog all of the familiar and exotic entities that take on the
1859 citizenships of their constituents, Rule 7.1 could be amended to require disclosure in diversity
1860 actions of every person whose citizenship is attributed to a party.

1861 *Rule 7.1: Diversity Disclosure*

1862 **Rule 7.1. Disclosure Statement**

1863 **(a) Who Must File; Contents.**

- 1864 (1) A nongovernmental corporate party and a nongovernmental corporation that seeks
1865 to intervene must file [2 copies of] a disclosure statement that:
1866 (1A) identifies any parent corporation and any publicly held corporation owning
1867 10% or more of its stock; or
1868 (2B) states that there is no such corporation.
1869 (2) A party to an action in which jurisdiction is based on diversity under 28 U.S.C.
1870 § 1332(a)⁵ must file ~~2 copies of~~ a disclosure statement that identifies the
1871 citizenship of every person whose citizenship is attributed to that party. * * *

1872 Committee Note

1873 Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation
1874 that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to
1875 Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

1876 Rule 7.1 is further amended to require a party to an action in which jurisdiction is based
1877 on diversity under 28 U.S.C. § 1332(a) to disclose the citizenship of every person whose
1878 citizenship is attributed to that party. Two examples of attributed citizenship are provided by
1879 § 1332(c)(1) and (2), addressing direct actions against liability insurers and legal representatives
1880 for a decedent, infant, or incompetent. Identifying citizenship in such actions is not likely to be
1881 difficult. But many examples of attributed citizenship arise from noncorporate entities that sue
1882 or are sued as an entity. A familiar example is a limited liability company, which takes on the
1883 citizenship of each of its owners. A party suing an LLC may not have all the information it needs
1884 to adequately plead the LLC's citizenship. The same difficulty may arise with respect to many
1885 other forms of noncorporate entities, some of them familiar – such as partnerships and limited
1886 partnerships – and some of them more exotic, such as “joint ventures.” Disclosure is necessary
1887 both to ensure that diversity jurisdiction exists and to protect against the waste that may occur
1888 upon belated discovery of a diversity-destroying citizenship.

⁵ This draft would include attributions of citizenship under § 1332(c)(1) and (2). Section 1332(c) establishes “deemed” citizenship for the purposes of § 1332. Under (c)(1), an insurer sued in a direct action that does not join the insured takes on the citizenship of every State and foreign state of which the insured is a citizen. Under (c)(2), the legal representative of an estate, an infant, or an incompetent is a citizen only of the same state as the decedent, infant, or incompetent. The plaintiff is required to plead these citizenships under Rule 8(a)(1), and there may be less obscurity than shrouds LLCs and other entities, but it may not be worth the effort to draft out § 1332(c). The burden of disclosure is not likely to be great, and might at times be useful, particularly if the insured is itself a corporation or other entity. Section 1332(d) establishes minimum diversity jurisdiction for actions under the Class Actions Fairness Act; attribution is not likely to defeat jurisdiction in the way it does for actions governed by the complete diversity requirement. Disclosure as to all parties, moreover, could impose heavy burdens even though class members' citizenships are not considered in measuring diversity.

1889

Rule 7.1: Recusal

1890 Developing a catalog of noncorporate entities might take on a different color if the
1891 purpose is to support better-informed recusal decisions. Local rules have included partnerships,
1892 limited partnerships, joint ventures, business trusts, and on through occasionally exotic entities.
1893 The challenge of identifying suitable subjects for disclosure statements may not be easily met.
1894 Lengthy itemization might generate substantial volumes of essentially irrelevant information.
1895 And as noted above, reliance on something as open-ended as “financial interest in the outcome”
1896 could lead to more disclosure than anyone wants or needs, and pose awkward questions for those
1897 who are not familiar with recusal standards.

1898 Whether disclosure for purposes of informing recusal decisions should be reexamined
1899 may depend on experience in the courts. Is there any sense that, without expanded disclosure
1900 statements, judges will often fail to recognize grounds for recusal? It might be argued that there
1901 is little need for disclosure so long as the judge is unaware of the interests that may support
1902 recusal, but the problem of appearances remains.

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8. Social Security Review Subcommittee

1904 The Social Security Review Subcommittee has continued to refine drafts to govern
1905 review of social security disability and related decisions. Considerable progress has been made
1906 by the Subcommittee, assisted by a working group that devoted substantial time to working
1907 through detailed drafting issues. Notes on Subcommittee and working group meetings are
1908 attached.

1909 The current draft includes all review provisions in a single Civil Rule, tentatively
1910 designated as Rule 71.2. The most recent draft is attached.

1911 The Subcommittee plans to use the current draft, perhaps with a few more edits, as the
1912 basis for review by the Social Security Administration and the groups of claimants'
1913 representatives that have provided useful guidance as the work has progressed. Federal
1914 magistrate judges also will be asked for their views. If additional groups can be identified, they
1915 too will be consulted. These groups may be consulted separately, but it would be useful to gather
1916 them all in a single meeting if that can be arranged.

1917 Completion of the next round of consultation should provide a firm foundation for the
1918 next major step. The Subcommittee will recommend whether to carry forward with this work. If
1919 the work continues, the aim will be to produce a proposed rule to be published for comment. But
1920 nothing further will be done if the best draft that can be produced after diligent effort does not
1921 promise sufficient benefit to warrant continuing the effort. The recommendation may be
1922 provided in time for the October meeting, and if not then for the spring 2020 meeting.

1924 **Rule 71.2. Review of Social Security Decisions [Under 42 U.S.C.A. § 405(g)]**

1925 **(a) Applicability of Other Rules.** These rules govern an action for review on the
 1926 [administrative] record of a final decision of the Commissioner of Social Security under
 1927 42 U.S.C. § 405(g), except that this rule governs [applies in] an action in which the only
 1928 claim is made by an individual.⁷

1929 **(b) Initiating the Action; Complaint; Service; Answer.** The complaint in an action
 1930 governed by this rule must:⁸
 1931 (1) State that the action is brought under § 405(g) and identify the final decision to be
 1932 reviewed;
 1933 (2) State the name, county of residence, and the last four digits of the social security
 1934 number of the person on whose behalf—or on whose wage record—the plaintiff
 1935 brings the action;⁹
 1936 (3) Identify the titles of the Social Security Act under which the claims are brought;
 1937 (4) Name the Commissioner of Social Security as the defendant;
 1938 [(5)¹⁰ State that the final administrative decision is not supported by substantial

⁶ A single rule also could be numbered as 74. Both 71.2 and 74 would be part of Title IX, Special Proceedings. Former rules 74-76 governed the abandoned provisions for appeal from a magistrate judge to the district court, with review available in a circuit court only as a matter of discretion. *See* 12 Wright, Miller & Marcus, Fed. Prac. & Proc. §§ 3074-3076 (3d ed. 2014). They followed naturally the magistrate-judge provisions in Rules 72 and 73. It seems fitting to maintain the block of abrogated rules as a block, available for potential future use.

⁷ “[c]laim * * * made by an individual” is intended to cover claims by a representative, and also claims that derive from injury to the worker. *See* Rule 71.2(b)(2).

Although recent discussions have decided to abandon “for review on the record,” it still seems useful to draw as clear a line as can be to identify the cases governed by Rule 71.2.

⁸ A plaintiff is not required to plead more than the formulaic elements required by paragraphs (1) through (6), or however many of them remain after further consideration of the question whether to delete (5) and (6).

This version is intended to permit the plaintiff to plead more than these formulaic elements. Subdivision (d)(1)(A) provides that the duty to answer under Rule 8(b) does not apply. That leaves the question whether anything is gained by permitting allegations that are not brought to closure by an answer. The potential values include: (1) defusing a trap for unwary plaintiffs, particularly pro se plaintiffs, who disobey a command to plead no more; (2) informing SSA of issues that might be usefully considered before receiving the plaintiff’s brief; (3) enabling SSA to respond in the answer if it wishes, or to respond by informal means.

⁹ “[T]he person on whose behalf * * * the action is brought” is the plaintiff in the ordinary action brought for review by the person claiming a right to benefits. Along with “or on whose wage record” it also covers representative actions naming someone else as plaintiff. There is no apparent need to include the last four digits of a representative plaintiff’s social security number.

¹⁰ Paragraphs (5) and (6) are enclosed by brackets to carry forward the question whether they should be retained. Arguments for deleting them rest on analogy to a notice of appeal. The elements required by (1) through (4) suffice to tell the court and the Commissioner what to expect: a straightforward action for individual review of an identified final decision brought by an identified plaintiff in an appropriate court. Arguments for retaining them are in part a desire to maintain the basic framework of Rule 8(a),

1939 evidence or must be reversed for errors of law;] and
1940 [(6) State the relief requested].

1941 (c) **Serving the Complaint.** The court must notify the Commissioner of the commencement
1942 of the action by transmitting a Notice of Electronic Filing to the [appropriate]¹¹ regional
1943 office of the Social Security Administration¹² and to the United States Attorney for the
1944 district. The plaintiff need not serve a summons and complaint under Rule 4.

1945
1946 (d) **Answer; Motions; Remand; Time.**

1947 (1) (A) The answer must include a certified copy of the administrative record and
1948 any affirmative defenses under Rule 8(c). Rule 8(b) does not apply.¹³

1949 (B) The answer must be served on the plaintiff within 60 days after notice of
1950 the action is given under Rule 71.2(c) unless a later time is provided by
1951 Rule 71.2(d)(2)(c).

1952 (2) (A) A motion under Rule 12 must be made within 60 days after notice of the
1953 action is given under Rule 71.2(c).

1954 (B) The Commissioner may, before filing an answer, move to remand the case
1955 for further action by the Commissioner. The plaintiff or the Commissioner
1956 may move at any time to remand the case to hear new evidence or for

abbreviating in (5) the statement of the claim for relief, and abbreviating in (6) the demand for relief. Beyond that, it may be useful to identify the action as one that raises only questions of fact, only questions of law, or both. And the request for relief may assist SSA in determining how to respond, including whether to make or join in a motion to remand.

¹¹ So long as every district lies entirely within a single SSA region, “appropriate” may be unnecessary. “The” does not imply “a” regional office, authorizing the court to send notice to a different region. One suggestion has been to tie the regional office to the district in rule text. In long form, this would be “to the regional office * * * for the district.” In shorter but less precise form it could be “to the regional office * * * and the United States Attorney for the district.” “For” might be questioned on the ground that every regional office apparently embraces more than one district, so is not a regional office simply for that district. Perhaps “appropriate” does no harm and might be retained. SSA should advise us on this question.

¹² SSA’s responses refer to “the appropriate office within the agency’s Office of the General Counsel.” Should this be something like “the appropriate regional office within the [Commission’s] Office of the General Counsel”? SSA should help us answer these questions.

¹³ Footnote 8 above discusses the question whether the plaintiff should be allowed to plead more than the formulaic elements prescribed by Rule 71.2(b) and whether the Commissioner should be required to respond beyond filing the administrative record and asserting affirmative defenses. This draft leaves the plaintiff free to plead more. Even if the plaintiff is not allowed to plead more, ousting Rule 8(b) would ensure that the Commissioner need not answer the formulaic elements in the complaint.

Either approach recognizes the appeal-like nature of these civil actions. A notice of appeal does not include allegations on the merits, nor does a petition to a court of appeals for review of administrative action. Much less are opposing parties required to plead in response.

The incorporation of Rule 8(c) avoids any need to decide what is an affirmative defense. For example, it need not be decided whether failure to exhaust administrative remedies is an affirmative defense, simply an aspect of the requirement that there be a final administrative decision, or something else.

1957 rehearing.¹⁴
1958 (c) Unless the court sets a different time or a later time is provided by Rule
1959 71.2(d)(1)(B), serving a motion under Rule 71.2(d)(2)(A) or (B) alters the
1960 time to answer as provided by Rule 12(a)(4).¹⁵

1961 (e) **Motion for Relief; Briefing.**
1962 (1) *Plaintiff's Motion for Relief and Brief.* The plaintiff must serve on the

¹⁴ This draft is a first attempt to come to grips with the provisions of § 405(g). Advice from those who work in this field will be important.

Section 405(g) includes three provisions for sending an action back to the Commissioner. Sentence Four vests the court with power to “enter * * * a judgment affirming, modifying, or reversing the decision of the Commissioner, with or without remanding the cause for a rehearing.”

The first part of Sentence Six provides: “The court may, on motion of the Commissioner * * * made for good cause shown before the Commissioner files the Commissioner’s answer, remand the case to the Commissioner * * * for further action by the Commissioner.”

The next part of Sentence Six provides that the court “may at any time order additional evidence to be taken before the Commissioner,” so long as there is material new evidence and good cause for failing to incorporate it into the record in a prior proceeding.”

The requirement in the first part of Sentence Six that the Commissioner move for remand before filing the answer lies in some tension with the other remand provisions. The second part of Sentence Six should be read to allow the Commissioner to move “at any time” to remand to take new evidence. The court’s Sentence Four authority to enter a judgment remanding the cause for rehearing likewise should support a motion by the Commissioner even after filing the answer, although the grounds might be different from the grounds for seeking remand under the first part of Sentence Six. An example of the potential ambiguities is presented when the plaintiff and Commissioner file a joint motion to remand because it has not proved possible to generate a complete administrative record. That problem might emerge only after the record and answer have been filed.

Further advice on actual practice will be important.

¹⁵ Rule 12(a)(4) calls for a responsive pleading within 14 days after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. Rule 71.2(d)(1)(B) means that there will be at least 60 days from notice of the action to answer even if the Rule 12 motion is made and the court rules in 46 days or less. It may not be appropriate to subject social security plaintiffs to delays greater than plaintiffs in other actions.

But SSA argues that it needs more time, and is willing to compromise on 30 days. Its practice is to move to dismiss before the administrative record is prepared, providing the information that supports dismissal by declaration. 14 days is not time enough to prepare the record if dismissal is denied. Their edited version omits the provision that would provide more than 30 days after the motion is denied if the motion is made and denied less than 30 days after notice of the action is given. That possibility may address an extremely unlikely event, and in any event seems unnecessary if SSA is happy with 30 days after the motion is denied:

If the court denies a motion under Rule 71.2(d)(2)(A) or (B), or postpones its disposition until briefing under Rule 71.2(e), the answer must be served on the plaintiff within 30 days after notice of the court’s action.

(This version should be revised for style.)

1963 Commissioner a motion for the relief requested¹⁶ in the complaint and a
1964 [supporting] brief within 30¹⁷ days after the answer is filed or 30 days after the
1965 court disposes of all motions filed under Rule 71.2(d)(2)(A) or (B), whichever is
1966 later. The brief must support arguments of fact by citations to the [parts of the]
1967 record [on which the plaintiff relies].¹⁸
1968 (2) **Defendant's [Response] Brief.** The defendant must serve a [response]
1969 brief on the plaintiff within 30 days after service of the plaintiff's motion
1970 and brief. The brief must support arguments of fact by citations to the
1971 [parts of the] record [on which the defendant relies].
1972 (3) **Reply Brief.** The plaintiff may, within 14 days of service of the defendant's brief,
1973 serve a reply brief on the defendant.

1974 Committee Note

1975 Actions to review a final decision of the Commissioner of Social Security under 42
1976 U.S.C. § 405(g) are generally governed by the Civil Rules. This new Rule 71.2, however,
1977 establishes a simplified procedure that recognizes the essentially appellate character of actions
1978 that seek only review of claims¹⁹ of an individual worker on a single administrative record. An
1979 action is brought under § 405(g) for this purpose if it is brought under another statute that
1980 explicitly provides for review under § 405(g). *See*, *e.g.*, 42 U.S.C. §§ 1009(b), 1383(c)(3), and
1981 1395w-114(a)(3)(B)(iv)(III). ~~The action remains one for review on the administrative record~~
1982 ~~even if the court remands for adding new evidence to the administrative record.~~²⁰

1983 Most actions under § 405(g) are brought by an individual worker. But the plaintiff may
1984 be a representative or someone whose claim derives from the worker. What counts is that the
1985 action seek review on a single administrative record based on a single worker's entitlement. This
1986 rule governs only these actions, although separate actions involving review of the same
1987 administrative record might properly be heard together under Rule 42, as might separate actions
1988 involving a common question of law on review of different administrative records.

¹⁶ The requirement that the plaintiff file a motion for requested relief to support the brief has spurred disagreement from the beginning. Proponents urge that the motion provides a clear means to bring the court's attention to the need for prompt action. Opponents, reflecting experience in courts that do not require such a motion, urge that the motion, even if brief, is useless makework. The working group was inclined to delete the motion requirement, but decided to present the question to the Subcommittee for further discussion and consultation with practitioners and judges.

¹⁷ There is broad support for setting 60 days for the plaintiff's brief, 60 days for the Commissioner's brief, and 21 days for any reply brief. The countervailing concern is that prompt judicial action is important, in part because of the lengthy delays that occur at the administrative stage.

¹⁸ The phrases in brackets are lifted from Appellate Rule 28(a)(8)(A). They do not seem necessary, but do serve the cause of parallelism between rule sets.

¹⁹ Earlier drafts referred to "disability." But § 405(g) applies to all claims under a subchapter that includes other entitlements. All of our attention so far has focused on claims for disability and supplemental insurance benefits. We should check, initially with SSA, to make sure that these other claims brought under § 405(a) are treated appropriately by the scope language in Rule 71.2(a).

²⁰ This sentence was added to address SSA's concern that an action might lose its status as one "for review on the administrative record" if the case is remanded to add new evidence to the administrative record. That concern seems overdrawn. But the sentence could be restored if "administrative" is retained in Rule 71.2(a).

1989 All actions for review under § 405(g) are governed by all the Civil Rules, except as
1990 Rule 71.2 provides otherwise in subdivisions (b), (c), (d), and (e). Rule 71.2(b) through (e)
1991 establish a uniform procedure for pleading and serving the complaint in an action to which they
1992 apply; for answering and making motions under Rule 12(b) or to remand;²¹ and for presenting the
1993 action for decision by briefs rather than moving for summary judgment [or by such devices as a
1994 joint statement of facts].²²

1995 Some [– apparently very few –] actions may plead a claim for review under § 405(g)
1996 but also join more than one plaintiff, or add a claim or defendant for relief beyond review on the
1997 administrative record. Such actions fall outside Rule 71.2 and are governed by the other Civil
1998 Rules alone. [But in such an action pleading a claim that seeks review on the record of an
1999 individual worker’s disability may properly rely on the model provided by Rule 71.2(b) and (d).]

2000 Section 405(g) provides for review of a final decision “by a civil action.” Rule 3 directs
2001 that a civil action be commenced by filing a complaint. In an action that seeks only review on
2002 the administrative record, however, the complaint is similar to a notice of appeal. The elements
2003 specified in Rule 71.2(b) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as
2004 one brought under § 405(g). [A bare assertion that the Commissioner’s decision is not supported
2005 by substantial evidence suffices to state a claim – the facts are developed in the administrative
2006 record and, along with the law, are known to the Commissioner.] [Stating the relief requested
2007 provides the proper focus.] Failure to plead all the matters described in Rule 71.2(b) should be
2008 cured by amendment, not dismissal. [But a court might dismiss the action under Rule 41(b) if a
2009 plaintiff {repeatedly} fails to obey an order to amend.] [A plaintiff who wishes to plead more
2010 than Rule 71.2(b) requires is free to do so.]

2011 Rule 71.2 (c) provides a means for giving notice of the action that supersedes
2012 Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices, so long as it provides a
2013 means of electronic access to the complaint. Notice to the Commissioner is sent to the
2014 [appropriate] regional office [that will represent the Commissioner in the action]. The plaintiff
2015 need not serve a summons and complaint under Rule 4.

2016 Rule 71.2(d)(1)(A) builds from this part of § 405(g): “As part of the Commissioner’s
2017 answer the Commissioner of Social Security shall file a certified copy of the transcript of the
2018 record including the evidence upon which the findings and decision complained of are made.” In
2019 addition to filing the record, the Commissioner must plead any affirmative defenses under Rule
2020 8(c). Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the
2021 Commissioner may wish to address in the pleadings.

2022 The time to answer is set at 60 days after notice of the action is given under Rule 71.2(c)
2023 unless a later time is provided under Rule 71.2(d)(2)(c). The time to file a motion under Rule 12
2024 is set at 60 days after notice of the action is given under Rule 71.2(c). If a timely motion is made
2025 under Rule 12, the time to answer is governed by Rule 12(a)(4) unless the court sets a different

²¹ Need the Note observe that Rule 71.2(d)(1)(A) corresponds to Rule 8, and does not address other aspects of an answer such as pleading fraud, captions, Rule 11, counterclaims, third-party claims (is that conceivable?), and amending?

²² Discussion of the joint statement of facts approach emerged in working group sessions. The purpose may be to protect against shifting the obligation of clear presentation from the parties to the court. Some judges have found that the parties do not, on their own, have the discipline to focus the briefs on the issues that guide appraisal of the fact evidence and understanding of the legal issues as related to the facts. There also has been substantial opposition to this approach.

2026 time.²³

2027 Rule 71.2(d)(2)(B) addresses three types of remands contemplated by § 405(g). The
2028 Commissioner may move to remand “for further action by the commissioner” before filing an
2029 answer. Either the plaintiff or the Commissioner may move at any time to remand to hear new
2030 evidence or for rehearing on the original record. Serving a motion under Rule 71.2(d)(2)(B)
2031 alters the time to answer as provided by Rule 12(a)(4).

2032 Rule 71.2(e) addresses the procedure for bringing on for decision a § 405(g) review
2033 action that is governed by Rule 71.2. The plaintiff serves a motion for the relief requested in the
2034 complaint or any amended complaint. The motion need not be lengthy; it is supported by a brief
2035 that is similar to an appellate brief, citing to the parts of the administrative record that support the
2036 argument that the final decision is not supported by substantial evidence. The Commissioner
2037 responds in like form. A reply brief is allowed. The times set for these briefs may be revised by
2038 the court when appropriate.

2039 [The Rule 71.2(e) briefing procedure is the means of presenting the action for decision on
2040 the administrative record. It supersedes Rule 56 summary judgment and such local practices as
2041 those that have required the parties to enter joint statements of facts or on the merits.]²⁴

²³ This sentence will be revised if the rule text is changed to adopt the SSA version providing 30 days after the motion is denied. *See supra* n.15.

²⁴ This paragraph is an alternative to the similar statement in the third paragraph of the Committee Note. The third paragraph seems a better place.

2043 **Rule 71.2. Review of Social Security Decisions [Under 42 U.S.C.A. § 405(g)]**

2044 **(a) Applicability of Other Rules.** These rules govern an action for review on the
 2045 [administrative] record of a final decision of the Commissioner of Social Security under
 2046 42 U.S.C. § 405(g), except that this rule governs [applies in] an action in which the only
 2047 claim is made by an individual.

2048 **(b) Initiating the Action; Complaint; Service; Answer.** The complaint in an action
 2049 governed by this rule must:

- 2050 (1) State that the action is brought under § 405(g) and identify the final decision to be
 2051 reviewed;
- 2052 (2) State the name, county of residence, and the last four digits of the social security
 2053 number of the person on whose behalf—or on whose wage record—the plaintiff
 2054 brings the action;
- 2055 (3) Identify the titles of the Social Security Act under which the claims are brought;
- 2056 (4) Name the Commissioner of Social Security as the defendant;
- 2057 [(5) State that the final administrative decision is not supported by substantial
 2058 evidence or must be reversed for errors of law;] and
 2059 [(6) State the relief requested].

2060 **(c) Serving the Complaint.** The court must notify the Commissioner of the commencement
 2061 of the action by transmitting a Notice of Electronic Filing to the [appropriate] regional
 2062 office of the Social Security Administration and to the United States Attorney for the
 2063 district. The plaintiff need not serve a summons and complaint under Rule 4.
 2064

2065 **(d) Answer; Motions; Remand; Time.**

- 2066 (1) (A) The answer must include a certified copy of the administrative record and
 2067 any affirmative defenses under Rule 8(c). Rule 8(b) does not apply.
 2068 (B) The answer must be served on the plaintiff within 60 days after notice of
 2069 the action is given under Rule 71.2(c) unless a later time is provided by
 2070 Rule 71.2(d)(2)(c).
- 2071 (2) (A) A motion under Rule 12 must be made within 60 days after notice of the
 2072 action is given under Rule 71.2(c).
 2073 (B) The Commissioner may, before filing an answer, move to remand the case
 2074 for further action by the Commissioner. The plaintiff or the Commissioner
 2075 may move at any time to remand the case to hear new evidence or for
 2076 rehearing.
 2077 (c) Unless the court sets a different time or a later time is provided by
 2078 Rule 71.2(d)(1)(B), serving a motion under Rule 71.2(d)(2)(A) or (B)
 2079 alters the time to answer as provided by Rule 12(a)(4).

2080 **(e) Motion for Relief; Briefing.**

2081 **(1) Plaintiff's Motion for Relief and Brief.** The plaintiff must serve on the
 2082 Commissioner a motion for the relief requested in the complaint and a
 2083 [supporting] brief within 30 days after the answer is filed or 30 days after the
 2084 court disposes of all motions filed under Rule 71.2(d)(2)(A) or (B), whichever is
 2085 later. The brief must support arguments of fact by citations to the [parts of the]

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record [on which the plaintiff relies].

- (2) ***Defendant's [Response] Brief.*** The defendant must serve a [response] brief on the plaintiff within 30 days after service of the plaintiff's motion and brief. The brief must support arguments of fact by citations to the [parts of the] record [on which the defendant relies].
- (3) ***Reply Brief.*** The plaintiff may, within 14 days of service of the defendant's brief, serve a reply brief on the defendant.

2093

SSA Rule 76a: § 406(b) Fee Petitions

2094 This most recent and much-simplified SSA draft rule on § 406(b) fee petitions is retained
2095 as an illustration of a set of issues the Subcommittee has decided not to address by rule.

2096 **Rule 76a Petitions for Attorney’s Fees Under 42 U.S.C. §§ 406(b) and 1383(d)(2)**

2097 **(a) Timing and Contents of Petition.** Plaintiff’s counsel may file a petition for attorney’s
2098 fees under 42 U.S.C. §§ 406(b) and 1383(d)(2) no later than 60 days after the date of the
2099 final notice of award sent by Defendant to Plaintiff’s counsel stating the amount withheld
2100 for attorney’s fees. The petition must include a copy of the final notice of award, an
2101 itemization of the time expended by counsel in Federal court, and any other information
2102 the court would reasonably need to assess the petition.

2103 **(b) Service of Petition.** Plaintiff’s counsel must serve the petition on Defendant and must
2104 attest that counsel has informed Plaintiff of the request.

2105 **(c) Response.** Defendant may file a response within 30 days of service of the petition, but
2106 such response is not required.

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**Notes of Conference Call
Social Security Review Subcommittee
January 29, 2019**

2110 The Social Security Subcommittee met by conference call on Tuesday, January 29, 2019.
2111 Participants included Judge Sara Lioi, Subcommittee Chair; Judge Jennifer Boal; Laura A.
2112 Briggs, Clerk Liaison; Ariana J. Tadler, Esq.; and Professor A. Benjamin Spencer. Rebecca A.
2113 Womeldorf, Esq., and Julie Wilson, Esq. represented the Rules Committee Staff. Dr. Emery Lee
2114 participated for the Federal Judicial Center. Professors Edward H. Cooper and Richard L.
2115 Marcus participated as Reporters.

2116 Judge Lioi opened the meeting with a reminder that the present task of the Subcommittee
2117 is to work toward a recommendation whether to develop a set of draft rules that might be
2118 recommended for publication. The immediate question is how best to advance that task.

2119 Representatives of AAJ, NOSSCR, and SSA attended the November Civil Rules
2120 Committee meeting. They have all provided post-meeting comments on the drafts considered at
2121 the meeting and on the Committee's deliberations. Professor Alan Morrison has provided a
2122 separate comment on the project, suggesting that it should be pursued.

2123 The Subcommittee already has learned a great deal by frequent exchanges with AAJ,
2124 NOSSCR, and SSA. Perhaps the next step should be to ask a few Subcommittee members to
2125 undertake a close technical review of a further revised set of draft rules and to make
2126 recommendations to the full Subcommittee. When the Subcommittee believes the draft has
2127 advanced as far as possible without further outside review, it may be time to seek in-person
2128 consultation with the same three groups and perhaps others that may be able to provide help. A
2129 "face-to-face" may prove valuable in determining whether to recommend further developing the
2130 draft rules for the purpose of publication for comment.

2131 The framework for another meeting with groups of social security experts remains to be
2132 settled. It might be useful to duplicate the first meeting, more than a year ago, that brought
2133 together representatives of AAJ, NOSSCR, SSA, and the Department of Justice. It may be that
2134 one or more of those groups will have their own scheduled meetings that could become occasions
2135 for meeting with the Subcommittee. If separate meetings are arranged, it will be desirable to
2136 arrange to meet with groups that represent as many different positions as possible. In addition to
2137 the familiar groups, it may be possible to consult with still others. Legal Service lawyers, for
2138 example, may have useful perspectives.

2139 The Subcommittee agreed that it would be premature to attempt to reach a
2140 recommendation whether to pursue new rules through the formal publication process in time for
2141 the April Committee meeting. The spring meeting in 2020 is the earliest target that might be set.

2142 Reactions were offered on the comments received after the November 2018 meeting.

2143 One reaction was that it was striking that the three groups have not agreed whether it is
2144 desirable to pursue national rules. At least some claimants' representatives seem to believe that
2145 the project is calculated to benefit the special interests of SSA more than claimants' interests.
2146 They doubt whether uniform national rules would be useful.

2147 Another Subcommittee member agreed that "there is not a straight line to keep us moving
2148 forward." If the Subcommittee wants to engage further with outside groups, more time will be
2149 needed to develop the next stage of draft rules to support their review.

2150 Still another member agreed that there is reason to pause if only SSA favors uniform
2151 rules. One example is provided by the practice in some courts that requires the parties to prepare
2152 a joint statement of facts. Courts that follow this practice like it. SSA finds it anathema, to the
2153 point of earnestly recommending express preemption in national rule text. It will be hard to deal
2154 with such different practices.

2155 A fourth member remained still unsure whether the project should be pursued further.

2156 A rather different view also was expressed. On this take, the most recent round of
2157 comments “suggests a hardening of positions.” Some of the reactions seem to reflect a wish to
2158 “protect my practice.” The comfort and advantages of familiarity with whatever local practice
2159 has been mastered are influential. So for the “agreed-facts” practice: lawyers on all sides seem
2160 to hate them, but some courts require them. It may prove possible to address such practices by
2161 Committee Note language based on the rule text that defines the scope of § 405(g) review rules.

2162 This view was amplified. The comments do not seem to reflect fundamental weaknesses
2163 in the draft rules. NOSSCR, after expressing reservations about the project, proceeds to offer
2164 rule-specific comments that aim at detailed improvements. AAJ’s comments are openly
2165 ambivalent, suggesting that some members prefer the advantages they enjoy from mastery of
2166 local practices while uniform national rules are more attractive to other members who practice
2167 across district lines. Part of what we are experiencing may be little more than the familiar
2168 resistance that arises from many segments of the bar whenever procedural reform is suggested.
2169 Although SSA remains eager to have uniform national rules, it should be remembered that
2170 evolving drafts have successively abandoned many positions firmly supported by SSA. On this
2171 view, it may be useful to frame one more draft.

2172 It remains important to develop as sturdy a draft as possible before deciding whether
2173 national rules can be made good enough to warrant pursuing publication for comment. The most
2174 important issue that remains to be worked out is whether to leave the plaintiff free to plead more
2175 than generic “no substantial evidence” and “erroneous as a matter of law” elements. If the
2176 plaintiff can plead more, then it must be decided whether SSA can be left free, as it prefers, to
2177 answer with only the administrative record and no obligation to respond to any details pleaded by
2178 the plaintiff.

2179 Beyond this one fundamental issue, many other technical issues may remain. The
2180 unfamiliar task of attempting to draft rules for a specific substantive area makes it important to
2181 get as much help as possible from those who are experts on such issues. Another round of
2182 consultation will be important.

2183 The value of further consultation was repeated from another perspective. Patrick Tighe
2184 provided a survey of local rules that shows that social security review cases are indeed different
2185 from the general district-court docket. Courts recognize that the general Civil Rules need to be
2186 adapted to these cases. They are appeals. Many local rules treat them as appeals. They seem to
2187 work well. That is the approach of the draft rules. These cases occupy 7% to 8% of the national
2188 district-court docket, and a still greater share in some courts. Good procedure for them is
2189 important.

2190 The value of appeal-like local rules was recognized by another member. They work well,
2191 both from the court’s perspective and from the perspective of representing SSA. They seem to
2192 work well for claimants as well.

2193 The call concluded by agreeing that the draft rules should be revised yet again for
2194 submission to a group of three Subcommittee members. They will be responsible for a close
2195 examination of the many technical questions that deserve further consideration, and also for

2196 attempting to recommend resolution of any larger questions that remain. Their recommendations
2197 will be submitted to the Subcommittee as soon as can be managed, so as to prepare the way for
2198 settling on a draft that can be submitted for consultation with AAJ, NOSSCR, SSA, and any
2199 other groups that may be found.

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Notes
Social Security Review Working Group
February 6, 2019

2203 The working group of the Social Security Review Subcommittee for drafting met by
2204 conference call on February 6, 2019. Participants included Judge Sara Lioi, Subcommittee
2205 Chair, and Subcommittee members Judge Jennifer C. Boal and Laura A. Briggs, Clerk Liaison.
2206 Julie Wilson, Esq., represented the Rules Committee Staff. Professors Edward H. Cooper and
2207 Richard L. Marcus participated as Reporters.

2208 Judge Lioi opened the meeting with a reminder that the objective is to develop the best
2209 rules form that can be achieved, given the information we now have. Review of the improved
2210 draft will be sought from the groups that have provided helpful advice in the past – AAJ,
2211 NOSSCR, SSA – and from the Federal Magistrate Judges Association Rules Committee.
2212 Judge Boal reported that the magistrate judges’ rules committee will be pleased to help with the
2213 review. Judge Lioi continued by noting that the Subcommittee still needs to focus on the central
2214 question whether the prospect of generating a useful rule warrants further work toward proposing
2215 a rule for publication.

2216 Beginning with the first footnote of the current draft, Judge Lioi suggested that it may be
2217 best to frame review provisions as a single rule within the Civil Rules. A single rule will look
2218 longer than three separate rules, but in fact will be the same word count, broken down by smaller
2219 sub-parts. The next draft will be cast as a single rule. The number will be left open. It might be
2220 rule 74, replacing one of the rules that were abrogated in 1997. Or it might be Rule 71.2,
2221 following the Rule 71.1 special procedures for condemnation proceedings. Designation as
2222 Rule 71.2 was supported by observing that this would group together the special rules for special
2223 proceedings. In addition, it may be useful to retain the full block of abrogated Rules, 74-76, for
2224 possible future use. The choice remains open.

2225 The choice to frame the new provision as a single rule within the Civil Rules makes it
2226 possible to delete the provision for integration with the Civil Rules in draft Rule 74(b). The new
2227 rule will adopt the formula in Rule 71.1(a): the Civil Rules govern, “except as this rule provides
2228 otherwise.” That formula will support Committee Note observations about the effects of the new
2229 rule on other rules, particularly the effect of the method of submitting the case for decision on the
2230 briefs.

2231 Turning to rule text, the first question was whether “or personal representative” is needed
2232 in the scope provision. Section 405(g) refers only to an action for review by “any individual.”
2233 Courts have managed all these years to accommodate actions brought by a representative when
2234 that is appropriate. “Individual” is more consistent with the statute. The reference to a personal
2235 representative will be deleted.

2236 The next question was whether to delete the scope provision for review “on the
2237 administrative record.” This provision was originally included to emphasize that the new rule
2238 does not apply to an action that, even if it seeks review on the administrative record, also makes
2239 additional claims. SSA has opposed this phrase for fear it may cause confusion when a case is
2240 remanded to take new evidence, taking the return trip to the district court outside review on the
2241 original administrative record. The phrase also departs from the language of § 405(g), which
2242 requires the Commissioner to file “a certified copy of the transcript of the record including the
2243 evidence upon which the findings and decision complained of are based.” The phrase will be
2244 deleted from rule text.

2245 Brief related discussion noted that § 405(g) refers to submitting “a certified copy of the
2246 transcript of the record,” but agreed that it is appropriate to refer to the administrative record in

2247 the Committee Note if that is convenient. The complete administrative record usually includes
2248 material in addition to the evidence on which the findings are based. But the sentence in the
2249 Committee Note that provoked this question may well be deleted. It says that the action remains
2250 one for review on the administrative record even if the court remands to add new evidence to the
2251 administrative record. This sentence was intended to address the concern about referring to the
2252 administrative record in rule text, and does not seem useful after removing the phrase from rule
2253 text.

2254 The discussion detoured briefly to the requirement that the complaint state the relief
2255 requested. This is fine for the complaint. But it underscores, to one participant, the lack of any
2256 need to introduce the plaintiff's brief by making a separate motion for the relief requested. The
2257 procedure is an appeal. The request for relief properly appears at the conclusion of the brief.
2258 This provision in draft Rule 76 (a) will be discussed further in the next meeting.

2259 The Committee Note for draft Rule 74 says that in unusual circumstances Rule 16
2260 procedures or discovery may be invoked. A participant asked whether this means that discovery
2261 can be had only if a judge approves? What might be the purpose of discovery when the action is
2262 for review on the administrative record? Judges who hear many of these cases report no
2263 occasions for discovery. This provision was included to recognize that even when the action
2264 falls within the scope of the rule – it seeks only review on a single administrative record of
2265 benefits based on the disability of a single individual – there may be unusual challenges that
2266 warrant discovery. Ex parte contacts with the administrative law judge would be an example.
2267 Another example is provided by a notorious situation in which a particular administrative law
2268 judge accepted bribes from a lawyer in return for favorable rulings in a great number of cases.
2269 Although such events are exceedingly rare, the rule should not close off discovery. The reference
2270 to discovery also may help as a reminder that the full sweep of the rules applies as soon as the
2271 case extends beyond the rule's defined scope.

2272 The reference to Rule 16 was also supported. We have heard that it may be useful in one
2273 case in one thousand. But the judge should know that Rule 16 can be invoked when it seems
2274 useful. It will not often be invoked, and it is good to dispel any doubt.

2275 In the same vein, it was noted that referring to Rule 16 will cause some anxiety. But it
2276 seems useful to retain this reference in the Committee Note to dispel any doubts whether it is
2277 available in cases that present unusual problems.

2278 This draft Committee Note has newly added language stating that the rule establishes a
2279 uniform procedure for presenting the case for decision by briefs rather than summary judgment or
2280 a joint statement of facts. SSA adamantly opposes the joint statement procedure employed by
2281 some judges, arguing that it is a time-consuming waste. Many plaintiffs' representatives appear
2282 to share this view. The purpose of the rule is to establish a procedure that mimics review on
2283 appeal or petition to a court of appeals. But the rules do not often explicitly forbid specific action
2284 by courts. Rule 6(b)(2) is an example of a rule that specifically prohibits extensions of the times
2285 set by Rules 50, 52, 59, and 60. For the most part, however, prohibitions are inferred from rule
2286 text: a court cannot extend the particular pleading requirements of Rule 9(b) to general pleading
2287 practices under Rule 8(a)(2), for example. An explicit statement rejecting joint statements,
2288 moreover, might seem to cater to the special interests of SSA.

2289 The discussion of joint statements expanded to ask why it is that some judges demand
2290 them. The procedure consumes a lot of the attorneys' time. The judge has to review the entire
2291 record in any event. The review is not to make independent findings of fact, but only to
2292 determine whether there is substantial record evidence to support the administrative findings.
2293 This is an appeal. Joint statements do not fit. So what is the benefit? A participant reported that
2294 some judges require joint statements because some plaintiffs discuss nondispositive facts in their

2295 briefs. It helps the court to weed out extraneous facts, even with page limits that might provide
2296 an incentive to better focus on the operative facts. The problem is akin to the experience that led
2297 some courts to adopt, and then to abandon, “point-counterpoint” rules for summary judgment.
2298 Somehow the very rule seemed to encourage unnecessarily long statements of undisputed facts.

2299 The decision was to leave in the Committee Note the statement that requiring a joint
2300 statement of facts is inconsistent with the rule procedure for presenting the case in the briefs. We
2301 may learn from reactions to the draft.

2302 The Committee Note statement that summary judgment is not an appropriate procedure to
2303 bring the action on for decision found support by several members.

2304 The rule provisions addressing what the complaint must contain were addressed next.

2305 The draft adds a new requirement that the complaint state that the action is brought under
2306 § 405(g). This may not be necessary – the requirement might be implied from the introducing
2307 phrase that the complaint in an action for review under § 405(g) must contain other specified
2308 elements. But it may be helpful as a reminder, particularly for pro se plaintiffs. It also provides a
2309 simple alternative to Rule 8(a)(1). It will be retained for present purposes.

2310 The provision requiring the plaintiff to plead an address has been challenged as a
2311 potential invasion of privacy. But it is important to establish venue. Section 405(g) provides for
2312 filing in “the judicial district in which the plaintiff resides, or has his principal place of business,
2313 or, if he does not reside or have his principal place within any such judicial district, in the United
2314 States District Court for the District of Columbia.” Rule 11 requires that a pleading be signed
2315 and include the signer’s address. The address, however, will be the attorney’s address if the
2316 plaintiff is represented. Present practice seems to vary – the plaintiff’s address may be provided
2317 on the cover sheet, or in the complaint. If it is not provided and the Commissioner has any
2318 doubt, however, the Commissioner likely can find the address by calling the plaintiff’s lawyer. A
2319 pro se plaintiff should provide an address on the complaint, but may overlook the requirement in
2320 Rule 11 and might be guided by an explicit requirement in the § 405(g) review rule. Keeping
2321 some requirement in the rule may be useful. But a street address is not necessary to establish
2322 venue. District lines are defined by counties. The rule text will be revised to require that the
2323 plaintiff identify the plaintiff’s “county of residence.”

2324 The provision requiring the last four digits of the social security number of the plaintiff or
2325 the person on whose behalf – or on whose wage record – the plaintiff brings the action has been
2326 criticized repeatedly. Critics fear the potential invasion of privacy and digital security. SSA
2327 argues that it needs this information to ensure that it has correctly identified the administrative
2328 proceeding and record. It decides so many disability claims that two or more decisions involving
2329 persons with the same names may be made on the same day. The response has been that when
2330 this difficulty occurs now, the SSA lawyers call the plaintiff’s lawyer and get the information
2331 they need. It is unclear how well that works when the plaintiff appears pro se and may be
2332 suspicious of the request. Still, the lack of the last four digits is rarely a problem. But these
2333 reflections miss a more important point. The full number appears repeatedly throughout the
2334 transcript, and is not redacted. No appreciable added risk would result from including the last
2335 four digits in the complaint, which is subject to the same restrictions on remote access as the
2336 record. This provision will remain in the draft.

2337 The next provision requires the plaintiff to identify the titles of the Social Security Act
2338 under which the claims are brought. It has been questioned – why is it not enough to identify the
2339 action as one under § 405(g)? But it may be useful. The more common of the arguments for
2340 identifying the title is that the claimant may rely on two titles in the administrative proceeding,
2341 and rely on only one in seeking review. Practitioners seem to understand the reference to “titles.”

2342 This provision will be retained in the draft.

2343 The draft equivalent of stating a claim reads like this:

2344 State [generally {and without reference to the record}] that the final administrative
2345 decision is not supported by substantial evidence [or must be reversed for errors of
2346 law];

2347 The first bracketed phrase was included to limit the complaint, excluding additional
2348 pleading of detailed reasons why the record does not support the fact findings. Complaints now
2349 typically are simple, alleging a hearing, a decision, and an administrative appeal. The complaint
2350 is essentially a notice of appeal. But this phrase will be deleted to reflect the decision to permit a
2351 plaintiff to go beyond a bare statement that the decision is not supported by substantial evidence.
2352 The bracketed phrase allowing a claim that the decision must be reversed for errors of law,
2353 however, should be retained. It can be useful. At the same time, alternative wording may be
2354 considered: “identify whether the basis for review is that the final administrative decision is not
2355 supported by substantial evidence, or must be reversed for errors of law, or both.”

2356 Finally, the provision requiring the plaintiff to state the relief requested was approved.

2357 Discussion turned to the value of form complaints. The Administrative Office has made
2358 a form complaint available. Some courts have form complaints – the form adopted by the
2359 Southern District of Indiana is very close to the form that has emerged in stages over the course
2360 of the Subcommittee’s work. SSA has provided a form for the Subcommittee’s consideration. If
2361 a new rule emerges, it may be useful to revise the Administrative Office form. Or, if the
2362 Committees eventually decide not to pursue adoption of a national court rule, it might be useful
2363 to urge another Judicial Conference Committee to promulgate a model form. A similar strategy
2364 might be to draft a model local rule and tender it as a recommendation to the appropriate Judicial
2365 Conference Committee. That course could provide useful information about the value of the
2366 kind of rule being developed by the Subcommittee and Committee.

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**Notes of Conference Call
Social Security Review Working Group
February 12, 2019**

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The working group of the Social Security Review Subcommittee for drafting met by conference call on February 12, 2019. Participants included Judge Sara Lioi, Subcommittee Chair, and Subcommittee members Judge Jennifer C. Boal and Laura A. Briggs, Clerk Liaison. Julie M. Wilson, Esq., represented the Rules Committee Staff. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

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Judge Lioi opened the meeting by observing that good progress was made in the February 6 call. This call too will work from the three-rule draft prepared on January 30, recognizing that the next draft will be recast as a single rule with conforming changes in the draft Committee Note.

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Discussion left off with draft Rule 75(b). This provision for serving the complaint by transmitting a notice of electronic filing has met with approval on all sides. Service under Rule 4 is not required. The only questions involve style and technical issues to get it right.

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It was readily agreed that it is enough to direct that the court notify the Commissioner, without the superfluous direction that notice be made through the court's case management and electronic case files system. So too, it is proper to designate the Commissioner simply as the Commissioner, without adding "of Social Security." The context of the rule makes the meaning plain. There was more discussion of the direction that notice be made "by transmitting a Notice of Electronic Filing [with a link to the complaint.]" Incorporating current terminology in rule text runs the risk that although the long-pending "next gen" CM/ECF system retains this term, the next next-gen version may not. The rule text might be changed to say "notice of the electronic filing." That version, however, would likely require retaining "with a link to the complaint," because it would not specifically adopt the formal Notice practice of the CM/ECF system. If "Notice of Electronic Filing" is retained, the Notice automatically includes means to get to the complaint. The bracketed reference to a link can be deleted. The choice was to recommend "by transmitting a Notice of Electronic Filing to * * *." A sentence might be added to the Committee Note to explain that the rule contemplates a notice that includes electronic access to the complaint.

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The draft rule directs notice to the Commissioner by sending the Notice to "the [appropriate] regional office of the Social Security Administration and to the United States Attorney for the district." Omitting a third address, direct to the Commissioner, was accepted. The important recipients are the regional office and the local United States Attorney. Greater uncertainty was encountered in discussing "appropriate." In practice, there never seems to be any doubt about the proper targets for service. Courts readily identify the local United States Attorney, and know – or can learn from the United States Attorney – the proper regional office. But there may be a risk in referring to the regional office for the district – that depends on whether a single district may be served by more than one regional office. The next draft will retain "appropriate" in brackets, with a footnote that invites comments, particularly from SSA, and that also asks whether "regional office" is a sufficient formal designation.

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Draft Rule 75(c) suggests an answer to a frequently debated question. It would delete "complete" from the requirement that the Commissioner file "the complete administrative record" as part of the answer. Although plaintiffs' lawyers complain that incomplete records are filed at times, the Commissioner understands the obligation to file a complete record without being reminded by superfluous rule text.

2413 The relationship between complaint and answer came back for further discussion,
2414 focusing on draft Rule 75(c)(1)(A): “The answer must include a certified copy of the
2415 administrative record.” The question ties to the draft rule for the complaint, which specifies
2416 mandatory elements for the complaint but does not prohibit including additional detail. The
2417 decision on February 6 to emulate Rule 71.1(a) means that the Social Security Rule will begin:
2418 “These rules govern * * *, except as this rule provides otherwise.” The mandated elements of the
2419 complaint suffice to defeat an argument that Rule 8(a) requires more, but do not prohibit
2420 pleading more. If the plaintiff is free to plead more, must the Commissioner answer the proper
2421 but unnecessary allegations? The draft Committee Note explains that Rule 8 applies to the
2422 answer generally, so that the Commissioner must answer all allegations in the complaint under
2423 Rule 8(b) and must plead affirmative defenses under Rule 8(c). The draft takes this approach
2424 because earlier discussions in Subcommittee and Committee have included several observations
2425 that it seems somehow “odd” to allow allegations in a complaint that the defendant can answer,
2426 or not answer, as the defendant pleases.

2427 Discussion led to prompt agreement that the Commissioner should be required to plead
2428 affirmative defenses. The plaintiff has a strong interest in learning of them at the outset of any of
2429 the quite small number of cases that might involve an affirmative defense. But the
2430 Commissioner has long argued that the answer should be no more than the administrative record
2431 and any affirmative defenses. The burden of combing through the record twice, first at the
2432 pleading stage and again in briefing, is too great to repay any small value it might provide. The
2433 action is essentially an appeal. We do not expect a notice of appeal to include even as many
2434 elements as the draft requires for the complaint, nor is as much required in the Appellate Rules
2435 for review of an agency decision by petition. Unless the agency files a cross-application to
2436 enforce an order, the response to the petition is essentially the record. In social security disability
2437 review actions, some district courts do not require an answer beyond filing the administrative
2438 record. So why require the Commissioner to respond to permissible but gratuitous allegations in
2439 the complaint?

2440 Discussion of the alternative versions set out in footnote 19 of the January 30 draft, pp. 6-
2441 7, coalesced on Alternative 1, minus the bracketed language: “The answer must include a
2442 certified copy of the administrative record and any affirmative defenses under Rule 8(c).
2443 Rule 8(b) does not apply [– the answer may, but need not, respond to the allegations of the
2444 complaint].” The bracketed language, however, seems unnecessary. It will be removed from
2445 rule text, but the Committee Note will reinforce the rule that the Commissioner is not required to
2446 respond to allegations in the complaint.

2447 One additional aspect of the complaint-and-answer provisions was noted. The draft
2448 Committee Note says that “[f]ailure to plead all the matters described in Rule 75(a) should be
2449 cured by amendment, not dismissal.” It was suggested that a caution should be added, observing
2450 that repeated failure to comply with an order to amend may justify dismissal under Rule 41(b), at
2451 least if that seems necessary to support effective review.

2452 The draft provisions setting the time to answer and to move under Rule 12 were accepted
2453 without further discussion.

2454 The version of Rule 75(c)(2)(B) presented in the January 30 draft is new. It responds to
2455 belated review of the provisions for remand in § 405(g). The statute contemplates at least three
2456 occasions for remand. Sentence 4 vests the court with power to “enter * * * a judgment
2457 affirming, modifying, or reversing the decision of the Commissioner * * *, with or without
2458 remanding the cause for a rehearing.” This sentence should support a motion for remand by the
2459 plaintiff who argues for a rehearing. On its face, it also could support a motion for remand by the
2460 Commissioner for a rehearing. That reading might encounter some tension with the first of two
2461 occasions for remand recognized in Sentence 6. This part reads: “[t]he court may, on motion of

2462 the Commissioner * * * made for good cause shown before the Commissioner files the
2463 Commissioner's answer, remand the case to the Commissioner * * * for further action by the
2464 Commissioner * * *." This is the familiar "voluntary remand" provision. The draft rule text
2465 tracks the statute: "The Commissioner may, before filing an answer, move to remand for further
2466 consideration." ("for further consideration" will be revised to track the statute – "for further
2467 action by the Commissioner.") Should the statute's requirement that a remand for further action
2468 be sought before filing the answer preclude a later motion by the Commissioner? In part, the
2469 answer seems plain. The next part of Sentence 6 provides that the court "may at any time order
2470 additional evidence to be taken before the Commissioner," so long as there is material new
2471 evidence and good cause for failing to incorporate it into the record in a prior proceeding. This
2472 provision should authorize the Commissioner to move to remand to take new evidence "at any
2473 time." The Commissioner, for example, may discover hidden defects in the claimant's evidence,
2474 or might conceivably argue that the administrative law judge failed to ensure an adequate
2475 evidentiary record. And of course the claimant should be free to seek a new-evidence remand at
2476 any time.

2477 The remaining drafting question, then, depends on the meaning of the statute. Should it,
2478 as it does, allow the Commissioner to move for reconsideration at any time, drawing not from
2479 either part of Sentence 6 but from the implications of Sentence 4 and a generally sensible
2480 approach to review on an administrative record? Discussion suggested that parties move to
2481 remand after the record is filed "all the time." There is no need to become caught up in the
2482 distinction that a Sentence 4 remand closes the case in the district court, so that a new action
2483 must be filed – and a new filing fee paid – if the claimant again seeks review after the decision
2484 on remand. Nor need the rule reflect the related distinctions of appealable finality.

2485 Further consideration of the remand provision will be illuminated by getting additional
2486 information from SSA and from groups that represent plaintiffs. The provision will be carried
2487 forward as drafted, but with a footnote asking whether it is consistent with Sentence 4,
2488 Sentence 6 part one, and Sentence 6 part two.

2489 Draft Rule 75(c)(2)(c) provides that serving a Rule 12 motion to dismiss or a motion to
2490 remand alters the time to answer as provided by Rule 12(a)(4). Discussion did not reach the
2491 question, raised by SSA, whether the 14 days provided by Rule 12(a)(4) is adequate. But it did
2492 agree that otherwise the draft makes sense. It would extend the time to answer even if it is the
2493 plaintiff who makes a motion to remand; it is not likely that a plaintiff will move to remand
2494 before the answer is filed, but a pre-answer motion should extend the time to answer.

2495 Rule 76 on briefing the action begins by requiring the plaintiff to make a motion for the
2496 relief requested in the complaint. This requirement has encountered vigorous opposition and
2497 vigorous support. It was noted briefly in the February 6 discussion, and put off. The arguments
2498 on both sides are familiar; the question can be resurrected in the Subcommittee without need for
2499 further discussion in the working group.

2500 The times set by the briefing schedule were the last matter discussed. The draft sets 30
2501 days after answer or disposition of motions, whichever is later, for the plaintiff's brief, but offers
2502 a bracketed alternative of 60 days. The Commissioner's brief is due 30 or [60] days after that.
2503 The time for a reply brief is 14 (possibly 21 days) after the Commissioner's brief. The
2504 Commissioner vigorously urges that the initial periods should be 60 days each. Plaintiffs'
2505 lawyers' organizations seem to agree. But the 30-day period has been championed on the ground
2506 that it is urgent to provide prompt payment of disability payments to those who are entitled to
2507 them, particularly in light of the massive delays encountered in the administrative process.

2508 The time for briefing also may be illuminated by the views implicit in the six-month
2509 reporting rule. A social security appeal is considered "pending" 120 days following the later of

2510 two events: the filing of the transcript (where the transcript is served upon a party before it is
2511 filed with the court), or the filing of a supplement transcript. The implication is that considered
2512 action depends on filing the transcript, and that an additional grace period should be built in –
2513 effectively an added four months. If 131 days are devoted to briefing (60 + 60 + 21), that still
2514 leaves approximately 170 days for consideration, or for review by a magistrate judge and then
2515 review by the district judge if the time to brief is not postponed by motions that remain pending
2516 when the record is filed. The sufficiency of that period is the general question. The shorter
2517 period that will result from the time taken to decide pending motions cannot be measured in
2518 general terms, but should be taken into account.

2519 The local rule in the District of Massachusetts sets 42 days for the plaintiff's brief, and
2520 then 42 for the Commissioner's brief. That extends counting in weekly units beyond the
2521 convention in the Civil Rules, but it should be considered as a nice compromise.

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Notes
Social Security Review Working Group
February 15, 2019

2525 The working group of the Social Security Review Subcommittee for drafting met by
2526 conference call on February 15, 2019. Participants included Judge Sara Lioi, Subcommittee
2527 Chair, Judge John D. Bates, Committee Chair, and Subcommittee members Judge Jennifer C.
2528 Boal and Laura A. Briggs, Clerk Liaison. Julie M. Wilson, Esq., represented the Rules
2529 Committee Staff. Professors Edward H. Cooper and Richard L. Marcus participated as
2530 Reporters.

2531 Judge Lioi opened the discussion on a point raised by Judge Bates in commenting on the
2532 February 13 draft. Draft Rule 71.2(a) seeks to define the scope and role of the new rule, but is
2533 difficult to track. Two major propositions must be brought together and expressed in a way that
2534 is easy to follow. One proposition is that Rule 71.2 is not intended to apply to all actions brought
2535 for review under § 405(g). It is limited to actions brought by an individual claimant who seeks
2536 only review of the Commissioner’s final decision on a single administrative record. Such actions
2537 constitute the great majority of § 405(g) actions. But they are not all. Other actions also fall
2538 under § 405(g). Those other actions must be clearly excluded from Rule 71.2. At the same time,
2539 Rule 71.2 must operate within the full framework of the Civil Rules. All of the other Civil
2540 Rules, and only those rules, govern § 405(g) actions that encompass something different than
2541 review of claims of an individual claimant on a single administrative record. And even an action
2542 based on an individual claimant’s circumstances may profit from application of other rules.

2543 The February 13 draft attempted to address these questions by Rule 71.2(a):

2544 (a) Scope. These rules govern an action for review on a final decision of the
2545 Commissioner of Social Security under 42 U.S.C. § 405(g), except that this rule
2546 governs [pleading, service, and presenting the claim for decision in] an action in
2547 which the only claim is made by an individual for review on the record.

2548 This version succeeded a version that simply tracked Rule 71.1(a) verbatim: “These rules
2549 govern an action * * * except as this rule provides otherwise.” That simpler form seemed
2550 inadequate to the needs of a § 405(g) rule because Rule 71.1 applies to all condemnation
2551 proceedings, while Rule 71.2 applies to only some, not all, § 405(g) actions.

2552 The intent of the February 13 draft was underscored by the bracketed words that focused
2553 its preemptive effect on pleading, service of process, and presenting the claim on the merits in
2554 the briefs. The concluding words define the scope of preemptive effect by limiting Rule 71.2 to
2555 actions in which the only claim is made by an individual for review on the record.

2556 A first suggestion was that the tag for 71.2(a) should be “applicability,” not scope.

2557 Discussion continued by reflecting on the events that might make it useful to invoke other
2558 Civil Rules in an action that seeks only review of an individual’s claims based on review of a
2559 single administrative record. Exotic and likely rare illustrations have been ex parte contacts with
2560 the administrative law judge, or an even more rare illustration of bribery. Or a claimant may
2561 assert that the record filed by the Commissioner is incomplete, and may need discovery. Those
2562 and other examples may make it useful to hold pretrial conferences under Rule 16. And general
2563 housekeeping provisions remain important – counting days, captions, service of papers after the
2564 complaint, motions, entering judgment, maintaining the docket, and so on. The draft Committee
2565 Note offers the specific example of invoking Rule 42 to consolidate separate actions by separate
2566 claimants that involve common questions. For that matter, successive drafts have expressly
2567 addressed the effect of motions under Rule 12(b), on the understanding that finality, timeliness,

2568 and venue are all open to question. Reinventing Rule 12(b) for Rule 71.2 would be inefficient
2569 and potentially confusing.

2570 Other actions must be governed by the general Civil Rules because they fall outside the
2571 defined scope of Rule 71.2. Class actions have been brought under § 405(g). Two or more
2572 claimants may join in a single action to present the same legal issue. Although a challenge to a
2573 substantive or procedural administrative rule that was applied in a single proceeding might be
2574 framed as an error of law on review of a single claimant’s award, a claimant might find it
2575 desirable to frame the question in an independent action.

2576 Discussion led toward a tentative conclusion that rule text should attempt to define the
2577 extent to which Rule 71.2 preempts other Civil Rules. It remains necessary, for this purpose and
2578 generally, to define the actions that are governed by Rule 71.2. One possibility would be to
2579 revert to tracking the language of Rule 71.1(a), but “provides otherwise” puts a heavy burden on
2580 the words used to describe the scope of Rule 71.2.

2581 A variety of formulas have been adopted in earlier drafts. When the drafts were framed
2582 as a set of supplemental rules, the formula was borrowed from Supplemental Admiralty Rule
2583 A(2): “The Federal Rules of Civil Procedure also apply to a proceeding under these Rules,
2584 except to the extent that they are inconsistent with these [Supplemental] Rules.”

2585 A different approach would be to begin Rule 71.2(a) with a statement of the proceedings
2586 that it does govern, to be followed by a general invocation of all Civil Rules that are consistent
2587 with Rule 71.2. This approach could track § 405(g) by focusing on an action brought by an
2588 individual for review of the Commissioner’s final order on an individual claim.

2589 These questions were not resolved. Alternative drafts will be prepared to support further
2590 consideration and e-mail messages before the next Working Group conference call.

2591 Discussion turned to an oft-visited point. The February 13 draft Rule 71.2(b)(1) begins
2592 with optional language that would prohibit the plaintiff from pleading more than the formulaic
2593 elements spelled out in subparagraphs (A) through (F): “The complaint * * * must[, without
2594 pleading more,]” state, identify, name, and so on. The immediate question is whether a plaintiff
2595 should be free to plead more than what is required and sufficient to frame the action as one to
2596 review for substantial evidence on the administrative record and for legal error. Pleading beyond
2597 this bare formula can be useful, even before briefing, to inform court and parties of the issues that
2598 will be raised. On the other hand, pleading more may seem to belie the character of the action as
2599 an appeal by going well beyond the minimum contents of a notice of appeal. And a rule that
2600 forbids pleading more will often be disregarded by pro se plaintiffs. That might open the
2601 prospect of waste motions to strike by SSA. SSA continues to urge that its answer should be
2602 confined to a copy of the administrative record and any affirmative defenses. Draft Rule
2603 71.2(d)(1)(A) provides the counterpoint to the (b)(1) draft by providing – with no brackets – that
2604 “Rule 8(b) does not apply.”

2605 Past discussions have explored a combination of provisions that gives the plaintiff
2606 freedom to plead ad lib. beyond the required formula, but frees the Commissioner from any
2607 obligation to respond. Rule 8(b) is expressly ousted to protect against the risk of forfeiting the
2608 opportunity to deny after a non-responsive answer. Some participants have thought this an “odd”
2609 combination: if the plaintiff is free to plead, why not require the Commissioner to answer? An
2610 answer will give the plaintiff useful guidance in framing the brief.

2611 Further discussion suggested that there is little practical risk that the Commissioner will
2612 waste scarce litigation resources by moving to strike portions of a complaint – most likely a pro
2613 se complaint – that violate a version of Rule 71.2 that would prohibit more than the formulaic

2614 recitations. The Commissioner and court would remain free to require amendment of a prolix
2615 complaint, but there would be little point so long as the complaint supports treating the case as
2616 one within the scope of Rule 71.2. Perhaps the Committee Note should observe that prohibited
2617 allegations should be ignored, rather than struck.

2618 These questions of freedom to plead beyond the formula of (b)(1)'s subparagraphs and
2619 any obligation to respond in the answer might be illuminated by a revised Rule 71.2(a) on scope
2620 and preemption. Or not. Two participants suggested that the outcome should be to allow the
2621 plaintiff to plead more than the formula, striking "without pleading more" from the first lines of
2622 (b)(1), but to retain in (d)(1)(A) the express statement that "Rule 8(b) does not apply."

2623 Further discussion of (b)(1) addressed subparagraphs (E) and (F). (E) requires a statement
2624 that the final administrative decision is not supported by substantial evidence or must be reversed
2625 for errors of law. It corresponds to Rule 8(a)(2), substituting a terse statement of the statutory
2626 standard for more elaborate pleading. (F) requires a demand for the relief requested, substituting
2627 for Rule 8(a)(3). Even these minimal requirements go beyond what appears in a notice of appeal.
2628 They were opposed on that ground. It should suffice to identify the action as one brought under
2629 § 405(g) to review the specified final decision. The conclusion was that (E) and (F) should be set
2630 off by brackets, with a footnote asking whether they should be deleted.

2631 Rule 71.2(c) calls for "transmitting a Notice of Electronic Filing to the [appropriate]
2632 regional office of the Social Security Administration and to the United States Attorney for the
2633 district." The role of "appropriate" has been discussed in the past. The SSA can readily provide
2634 information on the congruence of its regional structure with district lines. If no district falls into
2635 more than one region, "appropriate" might be deleted as unnecessary. At the same time, it is not
2636 incorrect; at worst, it is unnecessary. Or, if "the regional office" might seem open-ended, striking
2637 the second "to" might tie "for the district" to "regional office": "to the regional office * * * and
2638 to the United States Attorney for the district." It might be objected that "for" seems awkward
2639 when applied to a regional office that covers more than one district, however; this revision may
2640 not be adopted. For the next draft, "appropriate" will continue to be confined by brackets,
2641 without further changes.

2642 Draft Rule 71.2(d) came up next. The only questions were raised during the discussion of
2643 Rule 71.2(e) on briefing. Rule 71.2(d)(2)(B) allows some motions to remand to be made at any
2644 time. If we require a motion for the requested relief as a foundation for the brief, how do the
2645 provisions for the effect of motions on the time for briefing play out? If any party, including the
2646 plaintiff, moves for remand before the deadline for filing a brief, the time for filing the brief is
2647 reset to run from the order denying or postponing decision of the motion. If for some reason the
2648 motion is made after filing the brief, the question is moot. There might be an awkward question
2649 if the motion is made after the time to brief has begun to run, but on the face of the rule the
2650 motion suspends the time to brief and resets it upon denial or postponement.

2651 These rule text questions about the brief timing provisions moved the discussion toward
2652 the familiar question whether Rule 71.2(e) should require a motion for the requested relief to
2653 serve as a foundation for the plaintiff's brief. Experience with such motions in the District of
2654 Massachusetts shows no problems. Such motions are not made in the Southern District of
2655 Indiana. A motion would appear separately on the motions report, and the report would serve to
2656 remind the court of the need for prompt action. The CJRA reporting requirements, however, are
2657 geared to start 120 days after the administrative record is filed, not the time of such motions. The
2658 conclusion was that note 14 in the February 13 draft should be revised to report that the Working
2659 Group recommends that the motion requirement be deleted as unnecessary, but that the
2660 Committee Note could observe that Rule 71.2 does not prohibit local procedures that require a
2661 motion.

2662 The schedule for further Subcommittee work also was discussed. The all-important
2663 question whether to recommend that the project carry forward for the purpose of refining a rule
2664 to be published for comment remains open. The plan is to develop as good a draft as can be
2665 framed, and then seek one more review by plaintiffs' groups and SSA. Review might be
2666 accomplished in separate meetings – NOSSCR has events in June and September that could
2667 provide a convenient opportunity – or a single meeting might be arranged in Washington to bring
2668 all groups together for joint consideration. However that works out, the Subcommittee is not
2669 likely to be ready at the April Committee meeting to make a recommendation whether to pursue
2670 development of a draft for publication.

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**Notes of Conference Call
Social Security Review Subcommittee
March 7, 2019**

2674 The Social Security Subcommittee met by conference call on Thursday, March 7, 2019.
2675 Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee
2676 Chair; Judge Jennifer Boal; Laura A. Briggs, Clerk Liaison; Ariana J. Tadler, Esq.; and Professor
2677 A. Benjamin Spencer. Rebecca A. Womeldorf, Esq., and Julie Wilson, Esq. represented the
2678 Rules Committee Staff. Professors Edward H. Cooper and Richard L. Marcus participated as
2679 Reporters.

2680 Judge Lioi opened the meeting by stating that the working group had made substantial
2681 progress in revising earlier rule drafts. Several questions remain open, but the working group has
2682 earned the Subcommittee’s thanks. The plan continues to be to develop the best draft rule that
2683 can be framed without further outside advice, and then to seek review by at least such groups as
2684 the Social Security Administration, NOSSCR, AAJ, and Federal Magistrate Judges.

2685 Discussion began with draft Rule 71.2(a), the subdivision that defines the scope of the
2686 special review rules. At its most recent meeting the working group reviewed a draft drawn
2687 directly from Rule 71.1(a), which defines the application of “other rules” – all the rest of the
2688 Civil Rules – in tandem with the special provisions for condemnation actions in Rule 71.1. The
2689 working group found the draft somewhat puzzling, perhaps too compact. Three alternative
2690 versions were prepared, and then a fourth that began as a revision of one of the alternatives but
2691 almost automatically came out very close to the original version.

2692 The task for the scope provision is to establish two propositions. All of the Civil Rules
2693 apply to social security review proceedings, with one limitation. The special Rule 71.2(b) - (e)
2694 provisions for complaint, service, answer, motions under Rule 12(b) or for remand, and for
2695 presenting the case on the merits through the briefs, supersede the general rules, but only in
2696 actions that present nothing more than a claim for review on the administrative record with
2697 respect to a single worker. The goal is clear. Finding suitable rule language is the challenge.

2698 Support was voiced for the first numbered alternative, which tracked Rule 71.1(a) but
2699 broke it into two paragraphs:

- 2700 (a) (1) These rules govern proceedings in an action for review of a final decision
2701 of the Commissioner of Social Security under 42 U.S.C. § 405(g), except as
2702 this rule provides otherwise.
2703 (2) Rule 71.2(c), (d), (e), and (f) apply in an action in which the only
2704 claim is made by an individual for review on the [administrative]
2705 record.
2706

2707 The tag for this version might be taken straight from Rule 71.1(a): “Applicability of
2708 Other Rules.”

2709 Qualified support for this version agreed that it is close to Rule 71.1(a), but seems
2710 awkward. Alternative 2 seemed clearer. The general value of consistency between rules that
2711 express similar thoughts might pull back toward Alternative 1, or the original proposal. But the
2712 special provisions in Rules 71.2(b) through (e) are much simpler than the elaborate provisions for
2713 condemnation actions in Rule 71.1(a). This difference could support departure from Rule 71.1(a)
2714 if a different formula works better in this context. Among other differences from Rule 71.1,
2715 Rule 71.2(d)(1)(A) provides that Rule 8(b) does not apply; Rule 71.1(e)(2) and (3) are quite
2716 different.

2717 The third alternative carefully spelled out what each of subdivisions (b) through (e)
2718 govern, displacing the general rules: complaint; answer and motions under Rule 12(b) or for
2719 remand; answer; and presenting the case for decision on the briefs. This approach was criticized
2720 as “too gummy.” It was abandoned without further discussion.

2721 The “too gummy” criticism also was addressed to the original version, which included,
2722 albeit in brackets to indicate that the drafting was questionable, these words: “this rule governs
2723 [pleading, service of the complaint, and presenting the claim for decision]” in a covered action.
2724 It was thought “messy to spell out what the rule covers.” But if these words are deleted, the
2725 original version might be cleaned up to do the job. Alternative 2 flips the order of the provisions,
2726 stating first what specifics are governed by Rule 71.2 for actions within its scope, and then
2727 invoking the general rules for everything else. Little reason was found for this rearrangement.

2728 The conclusion was to revise the original draft:

2729 **(a) Applicability of Other Rules.** These rules govern an action for review on
2730 the [administrative] record of a final decision of the Commissioner of Social
2731 Security under 42 U.S.C. § 405(g), except that this rule governs [applies in]
2732 an action in which the only claim is made by an individual.

2733 Draft Rule 71.2(b)(1) included an optional provision that would prohibit expanding a
2734 complaint to plead more than the formulaic elements prescribed in subparagraphs (A) through
2735 (F):

2736 **(b)(1) The Complaint.** The complaint in an action governed by this rule must
2737 [, without pleading more,]: * * *

2738 A drafting question was asked: generally the rules say what a complaint must “state,” not
2739 what it must plead. But Rule 9(c), (d), and (e) all say “in pleading * * *.” And perhaps
2740 “pleading” is less clunky than “stating.”²⁵ This question was put aside, however, because it was
2741 agreed that the rule should not prohibit pleading more than the bare formula. One concern was
2742 that pro se plaintiffs will almost inevitably plead more, and might face challenges based on
2743 defiance of the rule. The draft Committee Note offered language that would bar dismissal, or
2744 striking the forbidden parts of the complaint. It also suggested that a complaint might be stricken
2745 if so prolix that the Commissioner really could not determine whether it was an action seeking
2746 review in an identifiable case. Beyond that particular concern, however, it is possible that in
2747 some cases something might be gained by allowing an expanded pleading that directs the
2748 Commissioner’s attention to specific issues that might lead to early resolution or a motion to
2749 remand.

2750 The next topic focused on the incomplete structure of draft Rule 71.2(b)(1)(B). It left
2751 some confusion as to whose social security number, name, and county of residence are to be
2752 provided in an action brought by a representative. Discussion led to this revision:

2753 **(B)** State the name, county of residence, and the last four digits of the social security
2754 number of the person on whose behalf – or on whose wage record – the plaintiff
2755 brings the action.

2756 The understanding is that when a single plaintiffs sues for a personal recovery, the plaintiff is the
2757 person on whose behalf the action is brought. There may be room for some further revision. But

²⁵ “State” might, however, be used by reframing all of the subparagraphs to follow “state”: “The complaint * * * must, without stating more, state: * * *.”

2758 one possible concern seems to be addressed by Rule 10 – the name of a representative plaintiff,
2759 although not required by this draft, will appear in the caption.

2760 Subparagraphs (E) and (F) of draft Rule 71.2(b)(1) direct that the complaint state that the
2761 final administrative decision is not supported by substantial evidence or must be reversed for
2762 errors of law, and that it state the relief requested. These elements substitute for the Rule 8(a)(2)
2763 statement of the claim and the 8(a)(3) demand for relief. But the working group suggested at its
2764 most recent meeting that these elements are not necessary. A notice of appeal does not include
2765 them. Why should the complaint in an action that is essentially an appeal?

2766 One small drafting feature was noted. The current version of Rule 71.2(e)(1) directs that
2767 the plaintiff’s brief must be accompanied by a motion for the relief requested in the complaint.
2768 This language will have to be revised if (F) is deleted. But that task is easy: “a motion for the
2769 relief requested” does the job.

2770 (E) was questioned as useless. Rule 8(a)(2) requires some measure of elaboration that
2771 shows the plaintiff is entitled to relief. (E) is simple boilerplate. The suggestion that a plaintiff
2772 might choose to claim only insufficiency of the evidence, or instead challenge only the rule of
2773 law applied to uncontested fact findings, was rebuffed. All plaintiffs will simply copy the
2774 boilerplate in their complaints.

2775 A separate concern was expressed. Rule 71.2(d)(2)(A) provides for motions under
2776 Rule 12(b). That includes 12(b)(6). But when will a motion to dismiss for failure to state a claim
2777 be appropriate in these cases? Probably never. Motions to dismiss commonly address finality or
2778 exhaustion, timeliness, and venue. Subparagraph (E) does not seem to cause problems on this
2779 score.

2780 Turning to (F), the request for relief, related questions arose. First, what happens if the
2781 plaintiff requests different relief in the brief? And how is the plaintiff to know what relief to
2782 request until the answer and record are filed? For that matter, how often will the request for
2783 relief ask for something other than a remand? Section 405(g) Sentence Four recognizes that the
2784 court may enter judgment without remanding, and this happens.

2785 It also was suggested that (F) may be useful in cases that involve issues such as
2786 overpayment of benefits, arguments based on different showings of disability for different years,
2787 or successive claims.

2788 The conclusion was to retain (E) and (F) in brackets. Further advice will be sought from
2789 the stakeholders.

2790 Draft Rule 71.2(c) carries forward the provision that substitutes a Notice of Electronic
2791 Filing for service of process under Rule 4. The Social Security Administration will be asked for
2792 further advice on proper rule language to identify the regional office to be addressed.

2793 Draft Rule 71.2(d)(1)(A) states that the answer must include a certified copy of the
2794 administrative record and any affirmative defenses. It concludes: “Rule 8(b) does not apply.”
2795 The exclusion of Rule 8(b) is designed to relieve the Commissioner of the burden of responding
2796 to even the formulaic elements of the complaint, and more importantly the burden of responding
2797 to any additional allegations the plaintiff may include. Some participants have thought it
2798 incongruous to establish a system in which the plaintiff is free to plead matters that are not
2799 brought to a point by admission, denial, or avoidance, but this combination may prove workable
2800 in an appeal-like procedure that depends on the briefs to frame the issues. All agreed to carry
2801 this provision forward.

2802 Draft Rule 71.2(d)(2)(B) refers to motions to remand on three different grounds that
2803 correspond to § 405(g) Sentence 4, the first part of Sentence 6, and the second part of Sentence 6.
2804 There is little difficulty with the provisions that allow any party – or both – to move at any time
2805 to remand for rehearing or to take new evidence. But § 405(g) provides that the Commissioner
2806 may move to remand for further action by the Commissioner “before the Commissioner files the
2807 Commissioner’s answer.” The draft incorporates the statutory time limit for the Commissioner’s
2808 motion. It is not clear whether this time limit is always observed in practice. It may be that a
2809 motion untimely under this part of Sentence 6 may instead be framed as a motion to remand for
2810 rehearing under Sentence 4. Whatever the answers to these questions are, the Subcommittee is
2811 reluctant to suggest drafting a rule that would supersede the statutory time provision. The
2812 authority to recommend superseding a statute should be exercised with great care and restraint.
2813 This does not seem an appropriate occasion for supersession. The question of actual practice,
2814 and the best way to frame the rule, is another question to be addressed to the Social Security
2815 Administration and other practice organizations.

2816 The provision in draft Rule 71.2(e)(1) calling for the plaintiff to file both a brief and a
2817 motion for the relief requested in the complaint has been controversial throughout Subcommittee
2818 and working group discussions. The Subcommittee agreed to carry it forward for further
2819 discussion.

2820 The time periods provided in the draft rule were questioned. The 60-day time to answer
2821 seems inescapable. That is the general time to answer in an action against a United States agency
2822 or officer. But the 30-day periods set in the draft for the plaintiff’s brief and the defendant’s brief
2823 are juxtaposed with bracketed alternatives that would allow 60 days. The 14-day period for a
2824 reply brief is juxtaposed with a bracketed alternative of 21 days. All of those days add up,
2825 conducing to further delay in determining the benefits due a claimant after what is typically a
2826 years-long administrative process. The 60-day periods have been defended on the ground that
2827 practical experience shows that 30-day periods set by many courts ordinarily lead to requests for
2828 extensions. The requests ordinarily are granted. But maintaining 30-day periods in the rule will
2829 set a desirable standard. It may be met in some cases, and perhaps experience will lead to
2830 meeting it in more cases. And a 60-day period could easily degenerate into requests for
2831 extension; even if a 30-day period in the rule often turns into 60 days in practice, that is better
2832 than a 60-day rule period that turns into still longer times.

2833 Discussion turned to the next steps to gather further information. A revised draft rule will
2834 be prepared. It may be subject to one further round of polishing, or it may not. But it will
2835 become the basis for seeking advice from SSA, lawyer organizations, and magistrate judges.

2836 One mode of getting review would be to solicit advice, either in person or by conference
2837 calls, with each group separately. But if it can be arranged, it might be better to get everyone
2838 together in a day-long meeting. The combined meeting held at the beginning of the
2839 Subcommittee’s work provided an interesting dialogue dynamic. Having lawyers on all sides
2840 respond directly to each other is likely to provide greater detail and clarity than a series of round-
2841 robin sessions that lack this level of expert interplay.

2842 It will be important to attempt to schedule a meeting in early summer, if possible. The
2843 Subcommittee should aim to make a recommendation at the October Committee meeting
2844 whether to pursue this project into development of a draft rule for publication. Further work will
2845 be required to revise whatever draft is submitted for discussion.

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9. Other Matters

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A. Appeal Finality After Consolidation

2848 In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Court ruled that cases consolidated under
2849 Rule 42(a) retain their separate identities for purposes of finality, no matter how complete the
2850 consolidation. A judgment that disposes of all claims among all parties in what began as a
2851 separate action is a final decision that establishes the right to appeal under 28 U.S.C. § 1291.

2852 The question whether a different approach to finality may be useful was discussed at the
2853 November meeting of this Committee and at the January meeting of the Standing Committee. A
2854 subcommittee of Civil Rules Committee and Appellate Rules Committee members has been
2855 designated to study this question. A report and recommendations may be available by the time
2856 the two committees meet next fall.

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B. Rule 5.2(c): Railroad Retirement Act (Suggestion 18-CV-EE)

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Ana M. Kocur, General Counsel of the United States Railroad Retirement Board, suggests that Rule 5.2(c) “be revised to include actions for benefits under the Railroad Retirement Act in the types of cases limiting remote access to electronic files.” As will be seen, this proposal seems better addressed to the Appellate Rules Committee, which has added it to the agenda for the spring meeting.

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Rule 5.2(c) limits remote access to an electronic case file in an action for benefits under the Social Security Act as well as a variety of immigration actions or proceedings. Parties and their attorneys have “remote electronic access to any part of the case file, including the administrative record.” Any other person has “electronic access to the full record at the courthouse, but may have remote electronic access only to” the court docket and the court’s opinion, order, judgment, or other disposition.

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Remote electronic access by nonparties is limited because these cases involve much sensitive personal information. Social Security and immigration officials maintain that it is not feasible to redact their administrative records for filing in court. Papers generated for the court proceedings also include personal information needed to decide the case. The Committee Note for Rule 5.2(c) states that these actions “are entitled to special treatment due to the prevalence of sensitive information and the volume of filings.”

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General Counsel Kocur writes that proceedings for benefits under the Railroad Retirement Act involve sensitive personal information in much the same way as Social Security review actions. Social Security law and regulations, indeed, are frequently consulted in applying the Railroad Retirement Act. The argument for protecting judicial review files in the same way as actions for review in Social Security cases seems persuasive.

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The proposal, however, goes on to note that the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), provides for review in the courts of appeals. “[T]he Board does not generally litigate cases in the federal district courts.” The proposal to amend Civil Rule 5.2(c) rests on the incorporation of Rule 5.2(c) in Appellate Rule 25(a)(5), which provides that Rule 5.2(c) applies in an appeal “in a case whose privacy protection was governed” by Rule 5.2(c). It further provides that: “In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2,” except for proceedings for an extraordinary writ in a criminal case.

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Rule 5.2(c) could easily be amended to include the Railroad Retirement Act:

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Unless the court orders otherwise, in an action for benefits under the Social Security Act or the Railroad Retirement Act, and in * * *

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This amendment would apply to Railroad Retirement Act review proceedings in the courts of appeals through Appellate Rule 25(a)(5). And it is likely easier to draft this approach than to work the Railroad Retirement Act directly into the text of Rule 25(a)(5).

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The difficulty with amending Rule 5.2 at all arises from the statement that “the Board does not generally litigate cases in the federal district courts.” Rule 5.2(c) governs only actions and proceedings in the district courts. It is not clear whether any of the proceedings that bring the Board to district court involve review of individual benefit claims. The doctrines that on rare occasions permit a district court to act in a case ordinarily within the exclusive jurisdiction of a court of appeals might yield a small number of such cases. But even if that happens now and then, the situation is far from the “volume of filings” in Social Security cases – the Committee’s work on Social Security review cases shows that some 17,000 to 18,000 Social Security review cases come to the district courts every year. Case-specific orders for redaction or limiting remote

2902 electronic access can be entered under Rule 5.2(e). The Board should find it easy to move for
2903 appropriate protection if indeed it becomes involved in only a small number of district-court
2904 proceedings that raise privacy concerns.

2905 The proposal was stimulated by another matter on the Committee docket. The
2906 Committee has considered and carried forward a recommendation by the Committee on Court
2907 Administration and Case Management that Rule 5.2(c) be amended to direct that court opinions
2908 in Social Security review cases identify the claimant only by first name and last initial. This
2909 question is distinct from the question whether to include proceedings under the Railroad
2910 Retirement Act in Rule 5.2(c). It seems appropriate to address the Railroad Retirement Act
2911 question now, even if action on a proposed amendment might be deferred to coordinate with a
2912 possible further amendment addressed to names in opinions.

2913 The Appellate Rules Committee has accepted the lead on this proposal. Its
2914 recommendation will show whether there is any occasion for further action on the Civil Rules.



UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
 844 NORTH RUSH STREET
 CHICAGO, ILLINOIS 60611-1275

GENERAL COUNSEL

MEMORANDUM

TO: The Hon. David G. Campbell, Chair
 Prof. Daniel R. Coquillette, Reporter
 Standing Committee on Rules of Practice and Procedure
 Judicial Conference of the United States

FROM: Ana M. Kocur *Ana M. Kocur*
 General Counsel
 U.S. Railroad Retirement Board

RE: Federal Rule of Civil Procedure 5.2(c) and Privacy Protections in Railroad Retirement Benefit Cases

DATE: December 18, 2018

I understand from the May 1, 2018 memorandum of the Committee on Court Administration and Case Management of the Judicial Conference of the United States that the Standing Committee has been asked to consider whether any changes to Fed. R. Civ. P. 5.2(c) or related rules are needed to protect personal and sensitive information of individuals in social security and immigration cases. I am writing to propose that Fed. R. Civ. P. 5.2(c) be revised to include actions for benefits under the Railroad Retirement Act in the types of cases limiting remote access to electronic files.

The Railroad Retirement Act (RRA), 45 U.S.C. § 231 *et seq.*, replaces the Social Security Act with respect to employment in the railroad industry and provides monthly annuities for employees who meet certain age and service requirements, including annuities based on disability. Many family relationships in the RRA are defined by reference to the Social Security Act.¹ Courts have also consistently recognized the similarities between benefits

¹ Section 2(c)(4) of the RRA, 45 U.S.C. § 231a(c)(4) (defining “divorced wife” by reference to section 216(d) of the Social Security Act); section 2(d)(1) of the RRA, 45 U.S.C. § 231a(d)(1) (defining “widow”, “widower”, “child”, “parent”, “surviving divorced wife”, and “surviving divorced mother” by reference to sections 216(c), 216(g),

under the Social Security Act and the RRA, and have referred to social security case law in evaluating railroad retirement cases.² Much like claim files in Social Security benefit cases, claim files in Board cases contain substantial personal and medical information which is difficult to fully redact in a public court filing. Since the Advisory Committee on Civil Rules noted in 2007 that actions for benefits under the Social Security Act are entitled to special treatment due to the prevalence of sensitive information and the volume of filings, I believe it is appropriate to extend this recognition and privacy protection to actions for benefits under the RRA.

Section 8 of the RRA provides that decisions of the Board determining the rights or liabilities of any person under the Act shall be subject to judicial review in the same manner and subject to the same limitations as a decision under the Railroad Unemployment Insurance Act, except that the statute of limitations for requesting review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit must be commenced within one year of the Board's decision. 45 U.S.C. § 231g. In turn, section 5(f) of the Railroad Unemployment Insurance Act provides for review of a final decision of the Board by filing a petition for review in one of three United States courts of appeals:

- 1) The United States court of appeals for the circuit in which the claimant or other party resides or has its principal place of business or principal executive office;
- 2) The United States Court of Appeals for the Seventh Circuit; or
- 3) The United States Court of Appeals for the District of Columbia Circuit.

45 U.S.C. § 355(f). Under an agreement with the Department of Justice in place since September 1937, the legal staff of the Board handles litigation of benefits cases in the circuit courts of appeals. Although the Board does not generally litigate cases in the federal district courts, Fed. R. App. P. 25(a)(5) provides that privacy protection in proceedings such as appeals of final Board decisions is governed by Fed. R. Civ. P. 5.2. Because the Board may be called to litigate these types of cases across the country in any

216(e), 202(h)(3), 216(d), and 216(d) of the Social Security Act respectively); section 2(d)(4) of the RRA, 45 U.S.C. § 231a(d)(4) (applying rules in section 216(h) of the Social Security Act when determining whether an applicant under the Railroad Retirement Act is a wife, husband, widow, widower, child, or parent of a deceased railroad employee).

² See *Bowers v. Railroad Retirement Board*, 977 F.2d 1485, 1488 (D.C. Cir. 1992) (“The standard for granting annuities under [section 2(a)(1)(v) of the Railroad Retirement Act] closely resembles that for making disability determinations under the Social Security Act.”); *Burleson v. Railroad Retirement Board*, 711 F.2d 861, 862 (8th Cir. 1983) (“The standards and rules for determining disability under the Railroad Retirement Act are identical to those under the more frequently litigated Social Security Act, and it is the accepted practice to use social security cases as precedent for railroad retirement cases.”); *Soger v. Railroad Retirement Board*, 974 F.2d 90, 92 (8th Cir. 1992) (“The regulations governing social security disability cases, 20 C.F.R. §§ 404.1501 *et seq.*, may be used by the Board in evaluating disability under the Railroad Retirement Act.”).

geographic circuit, a uniform rule applicable to all actions for benefits under the RRA would be beneficial to both the Board and individual claimants who are seeking review of the Board's decisions and place railroad retirement beneficiaries in the same position as beneficiaries under the Social Security Act for privacy protection purposes.

Regarding the text of Fed. R. Civ. P. 5.2(c), this proposed change may be effectuated simply by inserting the phrase "or Railroad Retirement Act" in the first sentence of the rule, after "in an action for benefits under the Social Security Act". Thank you for your consideration. Please let me know if I can provide any additional information to help you evaluate this proposed change.

cc: Committee on Court Administration and Case Management

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C. Rule 4(c)(3) (Suggestion 19-CV-A)

2916 Judge Jesse Furman has proposed consideration of two possible questions addressed to
2917 service of process by a United States Marshal on behalf of a plaintiff authorized to proceed in
2918 forma pauperis or as a seaman. The two questions are among several issues raised in a
2919 memorandum to Judge Furman from Maggie Malloy, Office of Pro Se Litigation in the Southern
2920 District of New York. Judge Furman’s proposal, 19-CV-A, and Ms. Malloy’s memorandum, are
2921 attached.

2922 Although the two questions are described below, any recommendation would be
2923 premature. Information must be obtained from the Marshals Service, and perhaps also from
2924 groups experienced with the needs of i.f.p. plaintiffs. Detailed knowledge of any problems in
2925 practice is needed to support any practical proposals.

2926 The starting point is 28 U.S.C. § 1915(d): When a plaintiff is authorized to proceed in
2927 forma pauperis, “[t]he officers of the court shall issue and serve all process, and perform all
2928 duties in such cases.”

2929 The command of the statute seems unambiguous. But the present text of Rule 4(c)(3), as
2930 well as earlier versions, may contain an ambiguity:

2931 (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff’s request, the
2932 court may order that service be made by a United States marshal or deputy marshal
2933 or by a person specially appointed by the court. The court *must so order* if the
2934 plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a
2935 seaman under 28 U.S.C. § 1916.²⁶

2936 Ms. Malloy’s memorandum describes the potential ambiguity and cases that resolve it in
2937 different ways. The question is whether “must so order” applies only if an i.f.p. plaintiff requests
2938 an order that the marshal serve process, or instead applies independently even without a request
2939 by the plaintiff. The unambiguous command of § 1915(d) might well resolve this ambiguity –
2940 the marshal, as an officer of the court, must serve process without needing even a court order.
2941 But this resolution does not appear to have commanded universal acceptance.

2942 A second question is whether the provision for serving process authorizes or requires the
2943 marshal to request a waiver of service under Rule 4(d). The Marshals Service reportedly takes
2944 the position that the statute and Rule 4(c)(3) do not authorize it to request a waiver. That
2945 position might reflect an unhappy acquiescence in the perceived limits of statutory and rule-based
2946 authority, despite a preference for the convenience of requesting a waiver. Or it might reflect a
2947 strong aversion to requesting waiver, for reasons that for now can only be guessed at.

2948 It will not be difficult to draft rules amendments that address both of these questions if
2949 they are taken up. But it would be difficult to know what an amended rule should say until the
2950 Committee gains additional information.

2951 Some other provisions of Rule 4 may become so entangled with these two questions as to
2952 require additional work.

2953 Rule 4(b) provides: “the plaintiff may present a summons to the clerk for signature and
2954 seal.” Rule 4(c)(1) provides that “[t]he plaintiff is responsible for having the summons and
2955 complaint served within the time allowed by Rule 4(m).” The most immediate question is

²⁶ Section 1916 does not contain any provision similar to the service provision in § 1915(d).

2956 whether Rule 4(c)(1) bears on interpreting Rule 4(c)(3) – it might imply that the plaintiff is, after
2957 all, responsible for requesting an order that the marshal serve process. That reading is not flatly
2958 inconsistent with § 1915(d), but is in some tension with it.

2959 A related question is how much information the plaintiff is required to provide the
2960 marshal to assist in making service. The complaint must identify the defendant. Can the marshal
2961 demand that the plaintiff also provide a good current address or other information that will
2962 enable service? This, and related inquiries, are not covered by Judge Furman’s questions and
2963 may well be put aside.

2964 Another question is posed by the provision in Rule 4(c)(1) that the plaintiff is responsible
2965 for having the summons and complaint served within the time allowed by Rule 4(m). On its
2966 face, Rule 4(m) sets the presumptive time for service at 90 days from filing the complaint. But it
2967 may take more than 90 days even to decide whether to recognize i.f.p. status, and in any event the
2968 marshal may find it difficult to make service within 90 days. Courts are likely to come to
2969 common-sense resolution of these potential problems under the Rule 4(m) authority to extend the
2970 time for service. It does not seem likely that rules amendments should be proposed on this score.

From: Jesse M Furman [REDACTED]
 To: David Campbell [REDACTED], John D. Bates [REDACTED]
 Date: 01/03/2019 02:31 PM
 Subject: Two thoughts regarding Fed R Civ P 4

John and Dave:

I hope this finds you well. I'm writing with two thoughts about Rule 4 prompted by our Chief of Pro Se Litigation, Maggie Malloy.

She has tried in various ways to make service more efficient (e.g., by negotiating e-service agreements with repeat defendants, etc.) and, to that end, has worked closely with the USMS. In doing so, she came across a slightly weird anomaly in Rule 4 (perhaps a product of when the Rules were changed so that the Marshals were not required to serve in all cases). Specifically, while a plaintiff can request a waiver of service under 4(d), the court is required to order the Marshals to serve the complaint in IFP cases. See 28 USC 1915(d); FRCP 4(c)(3).

Interestingly, the USMS apparently takes the position that courts cannot order them to request a waiver - they can only require them to serve. See <https://www.usmarshals.gov/process/pauper-seaman.htm> ("Although the U.S. Marshal is required to serve a summons and complaint on behalf of paupers and seamen, waiver of service is not actual service of summons and complaint. Consequently, the U.S. Marshal may not be required to prepare and send the notice of lawsuit and request for waiver forms, along with the complaint, to the defendant. This may be done by the pauper and seaman plaintiff or the clerk of court. The waiver, however, is optional for a plaintiff; thus, the pauper or seaman plaintiff cannot be compelled to initiate the waiver process.").

Perhaps there is a good reason for that difference. But I think it would be worthwhile to consider whether Rule 4(d) should be amended to allow the court or the USMS to ask a defendant to waive service in IFP cases. I suspect it could save a lot of time and money across the country.

Maggie raises one other Rule 4 issue that may be worth considering, concerning Rule 4(c)(3), which reads as follows:

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

I gather that the majority of courts of appeals interpret this language to require courts to order the Marshals to serve whenever the plaintiff is authorized to proceed IFP. The first sentence allows courts, upon the plaintiff's request, to order the Marshals to serve in non-IFP cases (but does not authorize waiver of the service fee; the Marshals will sometimes send things back when a judge orders them to serve in a non-IFP case). I gather, however, that the Second Circuit - unlike some other Circuits - has read the "request" language to apply as well to the second sentence. *Compare, e.g., Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007) (per curiam) ("Absent a request from the plaintiff, nothing in the text of Rule 4 requires the district court to appoint the Marshals to effect service after granting pauperis status to the plaintiff."), *with Laurence v. Wall*, 551 F.3d 92, 94 (1st Cir. 2008) (per curiam) ("To the extent that some of our sister circuits suggest that the IFP plaintiff must request service of process by the United States Marshal or take other affirmative action to ensure that service is effectuated, e.g., *Romandette v. Weetabix Co., Inc.*, 807 F.2d 309, 311 (2d Cir. 1986), we believe that under the plain language of section 1915(d) and Rule 4(c)(3), it is not necessary for the IFP plaintiff to request service of process by the United States Marshal."). In other words, at least in the Second Circuit, courts can – and sometimes do - dismiss for failure to prosecute if a pro se plaintiff never "requests" that the court order the Marshals to

serve (e.g., if the plaintiff names a new defendant in an amended complaint and has no idea what is supposed to happen next). It's not clear to me that that is a correct reading of the Rule and, in any event, there is some virtue in the Rule being consistently applied across Circuits.

I'm attaching a memo that Maggie wrote to me that summarizes some of the relevant cases in this area in case it is helpful.

Let me know if you want to discuss or have any questions. Otherwise, thanks for considering these thoughts.

Yours,
Jesse



Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York



****PLEASE CONSIDER THE ENVIRONMENT BEFORE PRINTING THIS E-MAIL****

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D. Rules 25, 35 (Suggestion 18-CV-Z)

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This proposal seems to rest on a nonlawyer’s misreading of Rules 25 and 35.

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Rule 25 is criticized because, by allowing substitution of parties, it could defeat a citizen’s right of self-representation and allow an action to be taken over by another person who “could easily use fraud and deception to dismiss the lawsuit * * *.”

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Rule 35(a)(1) is criticized because “in the mental health review process it states that a person could be put under scrutiny because of their blood. That statement is outright prejudice.”

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These misperceptions do not require further action by the Committee.

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November 9, 2018

P.O. Box 85
Vermilion, Ohio

Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States of America
ATT: Secretary
Washington, DC 20544

To the Committee on Rules of Practice & Procedure of the Judicial Conference of the United States of America, and To Whom It May Concern:

Thank you for your time, and for reading this document/correspondence. And thank you in advance for the work and efforts put forth to improve our United States of America's court/judicial system.

These suggestions for the federal civil rules of procedure are actually a very simple ones; however, not always easy. Again, thank you for your time.

1. Please make sure the rules actually abide by and support the United States of America's Constitution.
2. The rules may need to reiterate the basics of the procedures of our judicial system as they were stated and establish by our 'founding fathers'. And within the 'spirit' of the law, etc.
3. Lines of communications should be again made explicit to not discriminate against or bias court judges' decisions, especially before trial or court appearance. Under the premise of 'innocent until proven guilty'.
4. Attached is a communication of an example that has been made to others in government in order for them to assist in the support of our individual or civil rights.

Please view attached. With great respect for the judicial system, our nation's respectful and respected people are what can make our country to awesome.

Yours Truly and Sincerely,

Mary Novotny Pena 11-9-2018

Ms. Mary Novotny Pena

Independent Journalism-Public Relations Professional, and Mom/Parent/etc.

Enclosure: 1 (2 pages)

November 6, 2018

P.O. Box 85
Vermilion, Ohio 44089

Mailing To:

Senator Chuck Grassley of Iowa
Chairman of Judiciary Review Committee
135 Hart Senate Office Building
Washington, DC 20510

Senator Dianne Feinstein of California
Ranking Member of Judicial Review Committee
33 Hart Senate Office Building
Washington, DC 20510

Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

To United States of America's Judiciary Review Committee Members, Department of Justice
and To Whom It May Concern:

After reading just parts of the federal civil rules of December, 2017 that I downloaded off the internet, there are conditions and stipulations that are not acceptable in the United States of America. At this point, I am requesting/purchasing a written copy of those federal civil rules.

However, the indications of viewing the actions stated within the civil rules as predominant activity through the court system or within society would destroy the American Dream of a person/individual/citizen being able to achieve, be recognized and be rewarded by their merits within the parameters of our United States of America's laws, Constitution, and other legal governances. Many of these stated actions/rules are in a position to infuse corruption and fraud in our judicial system; it has happened in our nation's criminal court, civil court, and judicial system at local, state and federal levels.

Stated are just two of several examples of rules that are at minimum inappropriate; however, would not be promoted by the statements of the United States of America's Constitution.

For example: 1) On page 56, Rule 35, and specifically 35.(a)(1) in the mental health review process it states that a person could be put under scrutiny because of their blood. That statement is out-right prejudice.

2) Rule 25. Substitution of parties on page 35, Rule 25. (b) and (c); those statements could be prejudicial in the type of lawsuit/court action that I filed in federal court in the Northern District of Ohio, and many others. According our citizen's rights afforded by the United States of America's Constitution, an individual has the right to represent themselves and their own interests in an honest, factual and accurate manner; in the statements of Rule 25 entities or parties of a court action could easily use fraud and deception to dismiss the lawsuit and the pursuit of justice. It did happen. A substitution would allow a person or entity used as the substitute to actually be more representative of opposing viewpoints and interests; therefore, the pursuit of justice would not be able to occur with both sides of the viewpoints, opinions and evidence being presented.

Why am I writing this? I would like to bring awareness to the issues within the legal system that are standing in the way of the pursuit of justice. I am an independent journalism-public relations professional. Historically, it was the journalist and active participants in the judicial system that did shine light on these types of issues, and work toward forwarding the continued actions of abiding by the United States Constitution and laws, etc., and pursuit of justice in the United States of America. Writing, photography and communications is the type of work that I do, and that I trained to do; and at sometime in the future I hope to gain paid work/employment at the federal level.

My primary interest is in the agricultural industry, more specifically food and nutrition; however, pursuing the promoting of appropriate food, nutrition, diet and exercise has caused me to be aware of issues within the judicial system also. (At the beginning of my situation of having been put through the courts over this, I was just a stay-at-home mom.) One political issue can have an a/effect on another.

Since the Plain Writing Act of October, 2010, I am grateful that our laws, etc. are more clearly readable and I do hope that they continue to be more readily accessible.

Thank you for your time and attention to these matters. And I thank you for taking the time to read this document/correspondence. Please feel free to contact me at your convenience at the above address or phone number listed below; I generally do work very transparently (so to speak).

Yours Truly and Sincerely,

Was signed & Mailed

Ms. Mary Novotny Pena

Independent Journalism-Public Relations Professional and Parent
(419) 370-1988

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E. IAALS Initial Discovery Protocols: Insurance Claims

2981 IAALS has generated a third set of initial discovery protocols, following its protocols for
2982 Employment Cases Alleging Adverse Action and for FLSA cases. This set is for First-Party
2983 Insurance Property Damage Cases Arising from Disasters.

2984 The insurance protocols are attached.

2985 There is no proposal that the Committee take official action to approve the protocols,
2986 much less to adopt them. The only request is that they be included in the agenda as an
2987 information item.

2988 Both this Committee and the Standing Committee recognize the limited role that they
2989 may play in calling attention to worthy projects of this sort. Past practice suggests that it is
2990 appropriate, if the protocols seem worthy, to call attention to them without any affirmative
2991 endorsement.

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February 26, 2019

Hon. John D. Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W., Room 4114
Washington, DC 20001

RE: Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters

Dear Judge Bates:

On behalf of the Disasters Protocols Committee (Committee), IAALS, the Institute for the Advancement of the American Legal System, presents the attached Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters. We request that the Civil Rules Advisory Committee consider adding the Protocols as an informational item to the agenda for the upcoming Civil Rules Committee meeting on April 2, 2019.

Inspired by the Initial Discovery Protocols For Employment Cases Alleging Adverse Action and the Initial Discovery Protocols for FLSA Cases Not Pleaded as Collective Actions, IAALS formed the Committee with the goal of replicating the successes of the prior Protocols for another case type that is both prevalent in our federal district courts and lends itself well to pattern initial discovery.

By design, the committee was comprised of a balanced group of highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in insurance property damage matters, in addition to attorneys from the Federal Emergency Management Agency and the U.S. Attorney's Office, Southern District of Texas. Judge Lee Rosenthal, Chief Judge of the United States District Court of the Southern District of Texas, and Judge Jennifer Bailey, Administrative Judge, 11th Judicial Circuit of Florida, both played an instrumental role in this effort, helping to facilitate our committee meetings and providing important guidance and support. As with the prior Protocols, IAALS supported and facilitated the effort throughout and plans to continue its efforts to support education and implementation of the protocols. The American College of Trial Lawyers Foundation has played an important role as well, providing funding to support IAALS' work and the in-person meetings of the Committee.

The Committee has worked diligently over the last year, meeting two times in person and holding numerous conference calls. As with the prior Protocols, the Committee's final product is the result of rigorous debate and compromise on both sides, inspired by the ultimate goal of improving the pretrial process in Disasters cases nationwide. The Committee has now finalized the attached set of pattern

initial discovery requests for First-Party Insurance Property Damage Cases, along with a corresponding Model Standing Order and Interim Protective Order.

It is our hope that district courts and individual judges will utilize the protocols in disaster cases of all types. As described in the Protocols, their intent is to “make it easier and faster for the parties and their counsel to: (1) exchange important information and documents early in the case; (2) frame the issues to be resolved; (3) value the claims for possible early resolution; and (4) plan for more efficient and targeted subsequent formal discovery, if needed.”

Disaster relief cases arise out of arduous circumstances, and for the litigants on both sides, the resolution process itself can also be arduous. For the increasing numbers of those victims who end up in court in an effort to recover damages, the process can be protracted and complex. The Committee believes that this pattern discovery has the potential to improve this process for all involved.

The Disasters Protocols Committee appreciates the Advisory Committee’s review and consideration of the attached protocols for inclusion as an informational item on the agenda for the April 2, 2019 Civil Rules Committee meeting. I will be in attendance at that meeting on behalf of IAALS, and I look forward to answering any questions the Committee may have.

Best regards,



Brittany K.T. Kauffman
Senior Director

cc: Hon. David G. Campbell
Professor Edward H. Cooper
Professor Richard L. Marcus

attachments:

Initial Discovery Protocols for First-Party Insurance Property Damage Cases

INITIAL DISCOVERY PROTOCOLS for First-Party Insurance Property Damage Cases — Arising from Disasters —



INSTITUTE *for the* ADVANCEMENT of the
AMERICAN LEGAL SYSTEM





INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



IAALS—Institute for the Advancement of the American Legal System

John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208

Phone: 303-871-6600

<http://iaals.du.edu>

IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

Rebecca Love Kourlis	Executive Director
Brittany K.T. Kauffman	Senior Director
Janet Drobinske	Senior Legal Assistant

With special thanks to The Foundation of the American College of Trial Lawyers for its generous support of this project.



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Introduction

Disaster relief cases arise out of arduous circumstances, and for the litigants on both sides, the resolution process itself can also be arduous. For the increasing numbers of those victims who end up in court in an effort to recover damages, the process can be protracted and complex. Courts are quickly overwhelmed by the volume and complexity of the cases, and these challenges quickly frustrate the litigants before the court on both sides. Through the following Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters (Disaster Protocols), IAALS, the Institute for the Advancement of the American Legal System, is trying to expedite this recovery process for everyone involved—the victims seeking recovery, the insurance industry, and the legal system.

The Disaster Protocols provide a new pretrial procedure for cases involving first-party insurance property damage claims arising from man-made or natural disasters. They are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts. As described in the Disaster Protocols, their intent is to “make it easier and faster for the parties and their counsel to: (1) exchange important information and documents early in the case; (2) frame the issues to be resolved; (3) value the claims for possible early resolution; and (4) plan for more efficient and targeted subsequent formal discovery, if needed.”

The Initial Discovery Protocols are the third set of case-specific discovery protocols that IAALS has facilitated. The first set of protocols, the Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Employment Protocols), was published as a pilot project by the FJC in November 2011.¹ The Employment Protocols project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules. During the conference, a wide range of attendees expressed support for the idea of case-type-specific “pattern discovery” as a possible solution to the problems of unnecessary cost and delay in the litigation process.

The Employment Protocols were developed by a nationwide committee of attorneys with expertise in employment matters, and have since been adopted by over 75 federal judges and on a district-wide basis in multiple jurisdictions around the country, including the District of Connecticut and the District of Oregon. The FJC has issued multiple reports evaluating the pilot project.² The reports reflect that discovery motions are less common in pilot cases than comparison cases.

¹ FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011).

² JASON A. CANTONE AND EMERY G. LEE, III, FED. JUDICIAL CTR., INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION: REPORT ON A PILOT PROJECT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (2018); EMERY G. LEE, III AND JASON A. CANTONE, FED. JUDICIAL CTR., REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2015). *See also* Memorandum from Emery G. Lee, III and Jason A. Cantone to the Judicial Conference Advisory Committee on Civil Rules (Oct. 26, 2016).

Following the successes of the Employment Protocols, IAALS facilitated a second set of Initial Discovery Protocols, in this instance for Fair Labor Standards Act Cases Not Pleaded as Collective Actions (FLSA Protocols).³ Once again, IAALS brought together a balanced committee of attorneys from across the country who regularly represent plaintiffs or defendants in FLSA matters. Both the Employment and FLSA Committees benefited from the leadership of Joseph Garrison and Chris Kitchel, as well as the support of and facilitation by Judge Lee Rosenthal, Chief Judge of the United States District Court of the Southern District of Texas, Houston Division, and Judge John Koeltl, District Judge of the United States District Court of the Southern District of New York.

Inspired by the results of the above protocols, and at the encouragement of Judge Lee Rosenthal to consider a set of protocols for disaster cases, IAALS took up this effort with support from The Foundation of the American College of Trial Lawyers. Given the nature of disaster cases, and their impact on our state and federal courts, IAALS broadened its scope with this project and the committee. IAALS once again pulled together nationally renowned attorneys from all perspectives, including plaintiff and defense, FEMA, the Texas U.S. Attorney's office, and state and federal judges. The goal was to ensure the expertise around the table to identify the information and documents to be produced by the Insured and Insurer in first-party insurance cases arising from disasters—in both state and federal courts.

The Committee worked diligently over the course of the project, meeting twice in person and holding numerous conference calls. As with the prior protocols, the final product is the result of rigorous debate and compromise on both sides, inspired by the ultimate goal of improving the pretrial process in disaster cases nationwide.

The Disaster Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to disaster cases. This discovery is provided automatically by both sides within 45 days of the Insurer's responsive pleading or motion. While the parties' subsequent right to discovery under the Federal Rules of Civil Procedure 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 Initial Discovery Protocols are accompanied by a Standing Order for their implementation by individual judges, as well as an Interim Protective Order that the court and parties can use as a template for discussion.

Natural disasters continue to increase in both number and severity, and their financial costs are increasing exponentially as well. While the parties and the court each come with a different perspective, everyone involved has the shared goal of an accessible, fair, and efficient process. The protocols that follow seek to achieve these goals for all.

³ FED. JUDICIAL CTR., INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS (2018).

Disaster Protocols Committee Roster

Steven J. Badger
Zelle LLP
Dallas, TX

Theodore I. Brenner
Freeborn & Peters LLP
Richmond, VA

Jordan Fried
Federal Emergency Management Agency
Washington, DC

Randy W. Gimple
Carlson, Calladine & Peterson LLP
San Francisco, CA

Daniel Hu
U.S. Attorney's Office, S. Dist. of Texas
Houston, TX

Chris Kitchel
Stoel Rives
Portland, OR

August J. Matteis, Jr.
Weisbrod Matteis & Copley
Washington, DC

Rajan Pandit
Pandit Law
New Orleans, LA

J. Michael Pennekamp
Fowler White Burnett, P.A.
Miami, FL

Douglas J. Pepe
Joseph Hage Aaronson LLC
New York, NY

Amanda L. Riddle
Corey, Luzaich, de Ghetaldi & Riddle LLP
Millbrae, CA

René M. Sigman
Merlin Law Group
Houston, TX

Judicial Facilitator:

Hon. Lee H. Rosenthal, *Chief Judge*
U.S. District Court, Southern Dist. of Texas, Houston Division

State Judicial Liaison:

Hon. Jennifer D. Bailey
11th Jud. Circuit, Miami-Dade County, FL

**INITIAL DISCOVERY PROTOCOLS FOR FIRST-PARTY INSURANCE
PROPERTY DAMAGE CASES ARISING FROM DISASTERS**

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

- a. These Disaster Litigation Initial Discovery Protocols (“Disaster Protocols”) apply to cases involving first-party insurance property damage claims arising from man-made or natural disasters (“Disaster Cases”). The Disaster Protocols are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts. The Disaster Protocols make it easier and faster for the parties and their counsel to: (1) exchange important information and documents early in the case; (2) frame the issues to be resolved; (3) value the claims for possible early resolution; and (4) plan for more efficient and targeted subsequent formal discovery, if needed.
- b. Participating courts may implement the Disaster Protocols by local rule or by standing, general, or individual-case orders. Although the Disaster Protocols are designed for the full range of case size and complexity, if any party believes that there is good cause why a case should be exempted, in whole or in part, from the Disaster Protocols, that party may raise the issue with the court.
- c. The Federal Rules of Civil Procedure (“FRCP”) referred to in the Disaster Protocols apply to Disaster Cases in federal court. The state-law counterparts to the FRCP referred to in the Disaster Protocols apply to cases in state court, unless the court orders otherwise.
- d. The Disaster Protocols are intended to supersede the parties’ obligations to make initial disclosures under FRCP 26(a)(1), or under the applicable state disclosure rules, for Disaster Cases. The Disaster Protocols are not intended to preclude or modify any party’s rights to formal discovery as provided by those rules, other applicable local federal rules, or state rules. Responses to the Disaster Protocols do not waive or foreclose a party’s right to seek additional discovery under the applicable rules.
- e. The Disaster Protocols were prepared by a balanced group of highly experienced attorneys from across the country with expertise in Disaster Cases. The Disaster Protocols require parties to exchange information and documents routinely requested in every Disaster Case (“Initial Discovery”). This Initial Discovery is unlike initial disclosures under FRCP 26(a)(1) because it includes favorable as well as unfavorable information and documents, is limited to information and documents that are not subject to objection, and is limited to the information and

documents most likely to be important and useful in facilitating early settlement discussion and resolving or narrowing the issues requiring further litigation.

(2) Definitions. The following definitions apply to cases under the Disaster Protocols.

- a. **Claimed Loss.** “Claimed Loss” means the loss or damage that the Insured seeks to recover from the Insurer in the litigation.
- b. **Document.** “Document” and “documents” are defined to be synonymous in meaning and equal in scope to the phrase “documents or electronically stored information” in FRCP 34(a)(1)(A). A draft of a document or a nonidentical copy is a separate document.
- c. **Event.** “Event” means the disaster alleged to have caused the Insured’s Claimed Loss.
- d. **Identify (Documents).** When referring to documents, to “identify” means to describe, to the extent known: (i) the type of document; (ii) the general subject matter; (iii) the date; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent. Alternatively, to “identify” a document means to produce a copy.
- e. **Identify (Natural Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) email address; (iv) present or last known place of employment; (v) present or last known job title; and (vi) relationship, if any, to the parties. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent requests to identify that person.
- f. **Identify (Non-Natural Persons or Entities).** When referring to a corporate entity, partnership, or other unincorporated association, to “identify” means to give the: (i) corporate or entity name and, if known, the trade or other names under which it has done business during the relevant time period; (ii) state of incorporation or registration; (iii) address of its principal place of business; (iv) primary phone number; and (v) internet address. Once a corporate or other business entity has been identified in accordance with this subparagraph, only the name of that entity needs to be listed in response to subsequent requests to identify that entity.
- g. **Insurer.** “Insurer” means any person or entity alleged to have insured the Property that is the subject of the operative complaint, unless otherwise specified.

- h. **Insured.** “Insured” means any named individual(s), corporate entity(ies), partnership(s), or other unincorporated association(s) alleging property damage as an Insured in the litigation, or asserting a claim under an assignment.
- i. **Loss.** “Loss” means damage to the Property caused by the Event.
- j. **NFIP Claim.** “NFIP Claim” means a claim the Insured asserts in the litigation for coverage under a National Flood Insurance Program insurance policy.
- k. **Other Insurance.** “Other Insurance” means any insurance policy, other than the Policy in force on the date of the Event, that covers or potentially covers the Property or the Claimed Loss.
- l. **Policy.** “Policy” means the insurance policy alleged to cover some or all of Insured’s Claimed Loss that is the subject of the Insured’s claim in the litigation.
- m. **Property.** “Property” means the property (building or contents) that the Insured claims coverage for under the Policy in the litigation.
- n. **Relating to.** “Relating to” means concerning, referring, describing, evidencing, or constituting.

(3) Instructions.

- a. The relevant time period for this Initial Discovery begins on the date immediately before the Event and ends on the date the lawsuit is filed for the Claimed Loss, unless a different time period is indicated with respect to a specific production obligation as set out in Part 2 or Part 3 below.
- b. This Initial Discovery is presumptively not subject to any objections except for attorney-client privilege or work-product protection, including a joint defense agreement. Documents withheld based on a privilege or work-product protection claim are subject to FRCP 26(b)(5) or applicable state rules. A detailed privilege log is not required. Instead, documents withheld as privileged or work-product protected communications may be described briefly by category or type. Withholding documents on this basis does not alleviate any obligation to produce the withheld documents or additional information about them at a later date, if the court orders or the applicable rules require.
- c. If a partial or incomplete or “unknown at this time” answer or production is given to any disclosure requirement in these Disaster Protocols, the responding party must state the reason that the answer or production is partial, incomplete, or unknown and when supplemental information or documents providing a complete response will be produced.

- d. For this Initial Discovery, a party must disclose information and documents that the disclosing party has in its possession, custody, or control and that are reasonably available. This Initial Discovery is subject to FRCP 26(e) on supplementation, to FRCP 26(g) on certification of responses, and to similar applicable state rules. This Initial Discovery does not preclude either party from seeking additional discovery under the rules at a later date.
- e. This Initial Discovery is subject to FRCP 34(b)(2)(E) or applicable state rules on the form of production.
- f. This Initial Discovery is subject to the attached Interim Protective Order unless the parties agree or the court orders otherwise. The Interim Protective Order will remain in place until and unless the parties agree on, or the court orders, a different protective order. Absent party agreement or court order, the Interim Protective Order does not apply to subsequent discovery.
- g. Within 14 days after the entry of this Order, the Parties will meet and confer on the format (e.g., TIFF/text, searchable pdf, or Excel) for the production of documents under these Disaster Protocols. This will not delay the timeframes for Initial Discovery, absent court order. Nor will production in one format preclude requesting production in another format, if applicable rules of discovery allow.

PART 2: INFORMATION AND DOCUMENTS TO BE PRODUCED BY THE INSURED.

(1) Timing.

The Insured's Initial Discovery responses must be provided within 45 days after the Insurer has submitted a responsive pleading or motion, unless the court orders otherwise.

(2) Information to be produced by the Insured:

- a. A description of the Insured's ownership or other interest in the Property.
- b. The address of the Property (or location of movable Property) on the date of the Event.
- c. The name of each Insurer and all policy numbers for each Policy or Other Insurance held by or potentially benefitting the Insured or the Property on the date of the loss, including relevant policy and claim numbers for any claims.
- d. Identify any current mortgagee or other known lien holder.

- e. A computation of each item or type of Claimed Loss, including content claims if in dispute. When the Policy requires, the computation should reasonably identify or itemize price and quantity of materials.
- f. Identify any payments received under the Policy relating to the Event.
- g. Identify the source and amount of any payments received after the Event from Other Insurance, or any other source, for all or any part of the Loss.
- h. Identify any grant or other similar program that the Insured applied for after the Event, including a Small Business Administration loan, seeking payment for all or any part of the Loss.
- i. Identify the public or other adjusters, estimators, inspectors, contractors, engineers, or other persons engaged by or on behalf of the Insured relating to the Claimed Loss.
- j. With respect to any Other Insurance, all policy numbers, the name of each insurer, and claim and docket numbers for any claims made for coverage by the Insured on the same Property at issue in this litigation.
- k. A general description, including the court and docket number, of any other lawsuits arising from the Event relating to the Property.
- l. A general description of any known preexisting damage to the Property relating to the Claimed Loss.
- m. A general description of any claims for property damage or lawsuits resulting from property damage in the past ten years relating to the Property.
- n. Identify any sale, transfer, or foreclosure of the Property after the Event.

(3) Documents to be produced by the Insured:

- a. Documents relating to the Claimed Loss, including: loss estimates; adjuster's reports; engineering reports; contractor's reports; estimates, bids, plans, or specifications regarding repair work (whether planned, in progress, or completed); photographs; videos; or other materials relating to the Claimed Loss, along with any receipts, invoices, and other records of actual costs to repair or replace the Claimed Loss.
- b. Proofs of loss for the Claimed Loss.

- c. Documents relied on by the Insured in generating any proof of loss required or provided under the Policy.
- d. Written communications exchanged between the Insured and Insurer that refer or relate to Insured's Claimed Loss, the Property, or damages, or otherwise relating to the Insured's claim.
- e. Photographs and videos of the Property taken for the purpose of documenting the condition of the Property, including photographs and videos of the Loss.
- f. Written communications, photographs, or estimates of damages sought from or paid by any other insurer related to the Event.
- g. The insurance policy with respect to any Other Insurance, and the claim numbers for claims made to recover Loss to the Property relating to the Event.
- h. Appraisals or surveys of the Property condition within five years before, or any time after, the Event.
- i. If there has been an appraisal under the Policy, documents relating to the appraisal process.
- j. **For NFIP Claims**, communications to and from FEMA, the Insurer, and the Insured relating to the Claimed Loss or the Property before the litigation was filed.
- k. **For NFIP Claims**, documents relating to an administrative appeal under 44 C.F.R. § 62.20.
- l. Any other document(s) on which the Insured relies to support the Claimed Loss.

PART 3: INFORMATION AND DOCUMENTS TO BE PRODUCED BY THE INSURER.

(1) Timing.

The Insurer's Initial Discovery responses must be provided within 45 days after the Insurer has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Information to be produced by the Insurer:

- a. **If there is a dispute over coverage**, in whole or in part, an explanation of the Insurer's reason for the denial of coverage, including:
 - i. Any exclusions or exceptions, or other coverage or legal defenses;

- ii. The factual basis for any exclusion, limitation, exception, or condition-based dispute or defense;
 - iii. Whether there is also a dispute as to the value or amount of the Claimed Loss;
 - iv. Any other basis on which coverage was denied.
- b. **If there is a dispute over all or part of the valuation**, an explanation of the Insurer's basis for disputing the value or amount of the Claimed Loss, including:
 - i. The Insurer's understanding of the nature of the dispute;
 - ii. The amount the Insurer disputes and the basis for that dispute, including any applicable Policy provisions that the Insurer alleges or believes are relevant to the dispute; and
 - iii. The amount the Insurer agrees to pay, if any, with respect to any undisputed part of the Claimed Loss.
- c. Any Policy terms or conditions that the Insurer alleges the Insured failed to comply with, including conditions precedent or other terms.
- d. Any payments previously made under the Policy relating to the Event.
- e. A general description of any other basis for nonpayment of the Claimed Loss, in whole or in part.
- f. Any other Event-related lawsuits filed for the Property or the Insured.
- g. Identify the adjuster(s) who handled the claim.
- h. Identify the individual(s) who recommended, made, approved, or rejected the claim decision.
- i. Identify the estimators, inspectors, contractors, engineers, or other persons who participated in the claims process or on whom the Insurer relied in making its claim decision.
- j. If preexisting damage is at issue in the litigation, a general description of any prior claims in the past ten years for the Property.

(3) Documents to be produced by the Insurer:

- a. The claim file maintained by the Insurer.
- b. The complete Policy in effect at the time of the Event.

- c. Assessments of the Claimed Loss, including: loss reports, expert reports that contain any description or analysis of the scope of loss or any defenses under the Policy, damage assessments, adjuster's reports, engineering reports, contractor's reports, and estimates of repair or replacement.
- d. Photographs and videos of the Property taken for the purpose of documenting the condition of the Property, including photographs and videos of the Claimed Loss.
- e. Any other evaluations of the Claimed Loss.
- f. Documents containing recordings, transcripts, or notes of statements, conversations, or communications by or between the Insurer and the Insured relating to the Event.
- g. Any claim log, journal, or diary maintained by the Insurer relating to the Claimed Loss.
- h. The complete underwriting file maintained by the Insurer relating to the Property, its condition, or coverage.
- i. Proofs of loss for the Claimed Loss.
- j. If there has been an appraisal under the Policy documents relating to the appraisal process.
- k. **For non-NFIP Claims**, written communications exchanged between the Insured and Insurer that refer or relate to Insured's Claimed Loss, Property, or damages, or otherwise relating to the Insured's claim.
- l. **For NFIP Write Your Own Claims**, communications to and from FEMA, the Insurer, and the Insured relating to the Claimed Loss or the Property before the litigation was filed.
- m. **For NFIP Direct Claims**, written communications exchanged between the Insured and FEMA claims-handling personnel referring to the Insured's Claimed Loss, Property, or damages, or otherwise relating to the Insured's claim.
- n. **For all NFIP Claims**, documents relating to the administrative appeal under 44 C.F.R. § 62.20.
- o. Any other document(s) on which the Insurer relies to support its defenses.

COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION

)	
)	
Plaintiff,)	
)	
vs.)	Case No. _____
)	
)	Judge _____
)	
Defendant.)	

**STANDING ORDER FOR FIRST-PARTY INSURANCE
 PROPERTY DAMAGE CASES ARISING FROM DISASTERS**

This court is implementing the **INITIAL DISCOVERY PROTOCOLS FOR FIRST-PARTY INSURANCE PROPERTY DAMAGE CASES ARISING FROM DISASTERS**. These Disaster Litigation Initial Discovery Protocols (“Disaster Protocols”) apply to cases involving first-party insurance property damage claims arising from man-made or natural disasters (“Disaster Cases”).

Parties and counsel must comply with the Disaster Protocols attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Disaster Protocols, in whole or in part, that party may raise the issue with the court.

Within 45 days after the defendant’s submission of a responsive pleading or motion, the parties must provide to one another the documents and information described in the Disaster Protocols for the relevant time period. This obligation supersedes the parties’ obligations to provide initial disclosures under FRCP 26(a)(1), or under the applicable state disclosure rules.

The parties must use the documents and information exchanged under the Disaster Protocols to prepare the FRCP 26(f) discovery plan or to comply with a similar state-court rule.

The parties' responses to the Disaster Protocols must comply with FRCP 26(e) on supplementation, with FRCP 26(g) on certification of responses, and to similar applicable state rules. As stated in the Protocols, this Initial Discovery is not subject to objections, except on the grounds of attorney-client privilege or work-product protection, including a joint defense agreement. Documents or information withheld based on an attorney-client privilege or work-product protection claim are subject to FRCP 26(b)(5) or similar applicable state rules.

SIGNED on _____, at _____.

[Name]

[Title] Judge

The Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters are designed to achieve more efficient and targeted discovery. Prompt entry of a protective order will allow the parties to begin exchanging documents and information without delay. The Disaster Protocols Committee offers the following Interim Protective Order. The Interim Protective Order will remain in place until the parties agree to, or the court orders, a different protective order, but absent agreement or court order, the Interim Protective Order will not apply to subsequent discovery. The parties may agree to use the Interim Protective Order throughout litigation.

Recognizing that whether to enter a protective order and its terms is within the court's discretion and is subject to local practice, courts might use an approach along the following lines:

INTERIM PROTECTIVE ORDER

The Court orders that the following restrictions and procedures apply to certain information, documents, and excerpts from documents and information the parties exchange in response to the Disaster Protocols:

1. Any party may designate as "Confidential" any document, or information contained in or revealed in a document, provided in response to these Disaster Protocols or, if applicable, in subsequent discovery, if the party determines, in good faith, that the designation is necessary to protect the party's interests. Information and documents a party designates as confidential will be stamped "CONFIDENTIAL." Confidential information or documents are referred to collectively as "Confidential Information."
2. Unless the Court orders otherwise, the Confidential Information disclosed will be held and may be used by any person receiving the information solely in this litigation.
3. If a party challenges another party's Confidential Information designation, counsel must make a good-faith effort to resolve the dispute. If that is unsuccessful, the challenging party may seek resolution by the Court. Nothing in this Interim Protective Order is an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and court rules.
4. "Confidential Information" must not be disclosed to any person, except:
 - a. the requesting party and counsel, including in-house or agency counsel;
 - b. employees of counsel assigned to and necessary to assist in the litigation;
 - c. consultants or experts assisting in the prosecution or defense of the litigation, to the extent deemed necessary by counsel;

- d. any person from whom testimony is taken or is to be taken in this litigation, but that person may be shown the Confidential Information only in preparation for, and during, the testimony and may not retain the Confidential Information; and
 - e. The judge and court staff, including the clerk, case manager, and court reporter, or other person with access to Confidential Information by virtue of his or her position with the court or the jury.
5. Before disclosing or displaying Confidential Information to any person, a party must:
- a. inform the person of the confidential nature of the information and documents; and
 - b. inform the person that the Court has enjoined the use of the information or documents for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.
6. Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that before any such display or discussion, each person must be asked to sign an agreement to be bound by this Order in the form attached as Exhibit A. If the person refuses to sign an agreement in the form attached, the party seeking to disclose the Confidential Information may seek relief from the Court.
7. The disclosure of a document or information without designating it as “Confidential Information” does not waive the right to designate the document or information as “Confidential Information” under this Order. If designated, the document or information will be treated as Confidential Information subject to this Order.
8. Documents or information filed with the Court that is subject to confidential treatment under this Order, and any pleadings, motions, or other papers filed with the Court disclosing any Confidential Information must be filed under seal to the extent permitted by the law, rules, or court orders, and must be kept under seal until the Court orders otherwise. To the extent the Court requires any further act by the parties as a precondition to filing the documents or information under seal, the filing party is responsible for satisfying the requirements. If possible, only the confidential parts of documents of information filed with the Court will be filed under seal.
9. At the conclusion of this litigation, Confidential Information and any copies must be promptly (and in no event later than 60 days after entry of final judgment no longer subject to appeal) returned to the producing party or certified as destroyed,

except that the parties' counsel may retain their working files on the condition that those files will remain confidential. Materials filed in the Court will remain in the file unless the Court orders their return.

10. Producing documents or information, including Confidential Information, in this litigation does not waive attorney-client privilege or work-product protection for the documents or information, under FRE 502(d) or similar applicable state laws.

This Order does not diminish the right of any party to apply to the Court for a different or additional Protective Order relating to Confidential Information, to object to the production of documents or information, to apply to the court for an order compelling production of documents or information, or to modify this Order. Any party may seek enforcement of this Order and the Court may sanction violations.

EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled _____ have been designated as confidential. I have been informed that any of the documents or information labeled “CONFIDENTIAL” are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in the documents to any other person. I further agree not to use this information for any purpose other than this litigation.

_____ DATED: _____

Signed in the presence of:

(Attorney)