

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Palm Beach, FL
April 14-15, 2016**

TABLE OF CONTENTS

AGENDA7

TAB 1 OPENING BUSINESS

A. Information Item: Status of Proposed Amendments to Civil Rules 4, 6, and 82 Approved by the Judicial Conference and Transmitted to the Supreme Court.....21

B. Information Item: Draft Minutes of the January 2016 Meeting of the Committee on Rules of Practice and Procedure25

TAB 2 ACTION ITEM: APPROVAL OF MINUTES

Draft Minutes of the November 2015 Meeting of the Advisory Committee on Civil Rules41

TAB 3 LEGISLATIVE ACTIVITY87

TAB 4 ACTION ITEMS: RULES FOR PUBLICATION

A. RULE 23

A.1 Subcommittee Report.....95

 • **Proposed Amendments to Rule 23.....96**

A.2 Additional Materials

 • **Notes of February 10, 2016 Conference Call.....115**

 • **Notes of February 5, 2016 Conference Call.....127**

 • **Notes of January 29, 2016 Conference Call.....133**

 • **Notes of January 19, 2016 Conference Call.....151**

 • **Notes of November 23, 2015 Conference Call157**

 • **Notes of November 16, 2015 Conference Call167**

B. RULE 62

Reporter’s Memorandum181

 • **Proposed Amendments to Rule 62.....182**

C. RULE 5

Reporter’s Memorandum193

- Proposed Amendments to Rule 5(d)(3)195
- Proposed Amendments to Rule 5(b).....198
- Proposed Amendments to Rule 5(d)(1)201

TAB 5 NEW AND CARRY-OVER PROPOSALS FOR STUDY

A. Rule 5.2: Reporter’s Memorandum207

B. Rule 30(b)(6): Reporter’s Memorandum (with Attachments) and Suggestion 16-CV-A.....215

C. Jury Demand on Removal, Rule 81(c)(3)(A): Reporter’s Memorandum and Suggestion 15-CV-A.....309

D. Pro Se Filing: Reporter’s Memorandum and Suggestion 15-CV-EE ...347

E. Pleading Rules and Forms: Reporter’s Memorandum and Suggestion 15-CV-GG355

F. Rule 6(d): Reporter’s Memorandum and Suggestion 15-CV-HH.....361

G. Pro Se Electronic Filing: Reporter’s Memorandum and Suggestion 15-CV-JJ.....367

H. Third Party Litigation Financing: Reporter’s Memorandum and Suggestion 15-CV-KK373

I. Rule 4(e)(2) Service on U.S. Employees as Individuals: Reporter’s Memorandum and Suggestion 15-CV-LL415

J. Mini-Discovery and Prompt Trial: Reporter’s Memorandum and Suggestion 15-CV-NN.....421

K. Time Stamps, Seals, Access for Visually Impaired: Reporter’s Memorandum and Suggestion 15-CV-OO429

L. Civil Rule 58: Reporter’s Memorandum435

TAB 6 PILOT PROJECT SUBCOMMITTEE

Subcommittee Report (with Exhibits).....441

- *Exhibit 1: Email Regarding Discussion with Colorado Lawyers (February 24, 2016)453*
- *Exhibit 2: Summary of Call with Arizona Judges and Lawyers Regarding Rule 26.1 (March 1, 2016).....459*
- *Exhibit 3: Proposed Revision to Ariz. R. Civ. P. 26.1469*

- ***Exhibit 4: Excerpt from Joint Project by IAALS and the American College of Trial Lawyers Recommending More Robust Initial Disclosures.....477***
- ***Exhibit 5: Memorandum to Hon. David Campbell from Derek Webb Regarding Rule 26(a) Disclosure Reform History (February 10, 2016).....483***
- ***Exhibit 6: Memorandum to the Pilot Project Subcommittee from Hon. Paul W. Grimm Regarding Surveys on Initial Disclosures and Articles from 1997 Boston College Discovery Meeting.....501***
- ***Exhibit 7: Memorandum to Hon. David Campbell from Amelia Yowell Regarding State Initial Disclosure Models (December 13, 2015).....509***
- ***Exhibit 8: Donna Stienstra, Fed. Judicial Ctr., A Study of Civil Case Disposition Time in U.S. District Courts (May 2015)641***

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AGENDA

Meeting of the Advisory Committee on Civil Rules
April 14-15, 2016

1. Opening Business
 - a. Status of Proposed Amendments to Civil Rules 4, 6, and 82 Approved by the Judicial Conference and Transmitted to the Supreme Court
 - b. Report on the January 2016 Meeting of the Committee on Rules of Practice and Procedure
2. ACTION ITEM: Approve Minutes of the November 2015 Meeting of the Advisory Committee on Civil Rules
3. Legislative Activity
4. ACTION ITEMS: Rules Proposed for Publication
 - a. Rule 23
 - b. Rule 62
 - c. Rule 5
5. ACTION ITEMS: New and Carry-Over Proposals for Study
 - a. Rule 5.2: Redact Filed Documents (Bankruptcy Rules)
 - b. 16-CV-A: Rule 30(b)(6)
 - c. 15-CV-A: Jury Demand on Removal, Rule 81(c)(3)(A)
 - d. 15-CV-EE: Pro-se Filing and More
 - e. 15-CV-GG: Pleading Rules and Forms
 - f. 15-CV-HH: Rule 6(d): "Making" Disclosures
 - g. 15-CV-JJ: Pro-se e-Filing
 - h. 15-CV-KK: Third Party Litigation Financing
 - i. 15-CV-LL: Rule 4(e)(2) Service on U.S. Employees as Individuals
 - j. 15-CV-NN: Mini-Discovery and Prompt Trial
 - k. 15-CV-OO: Time Stamps, Seals, Access for Visually Impaired
 - l. Civil Rule 58: Judge Pratter
6. ACTION ITEM: Pilot Projects Subcommittee Report

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John M. Barkett	ESQ	Florida	2012	2017
Elizabeth J. Cabraser	ESQ	California	2010	2016
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2016
Joan N. Ericksen	D	Minnesota	2015	2018
Parker C. Folse	ESQ	Washington	2012	2018
Robert Klonoff	ACAD	Oregon	2011	2017
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2018
Benjamin C. Mizer	DOJ	Washington, DC	NA	NA
Brian Morris	D	Montana	2015	2018
David E. Nahmias	CJUST	Georgia	2012	2018
Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2017
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2010	2016
Virginia A. Seitz	ESQ	District of Columbia	2014	2017
Craig B. Shaffer	M	Colorado	2014	2017
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
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Liaison for the Advisory Committee on Civil Rules	Judge Arthur I. Harris <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Civil Rules	Judge Neil M. Gorsuch <i>(Standing)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge James C. Dever III <i>(Criminal)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge Solomon Oliver, Jr. <i>(Civil)</i>
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TAB 1

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TAB 1A

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Status of Proposed Amendments to Civil Rules 4, 6, and 82

Item 1A will be an oral report.

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TAB 1B

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

TABLE OF CONTENTS

Attendance	1
Introductory Remarks	2
Approval of the Minutes of the Last Meeting.....	3
Inter-Committee Work.....	3
Report of the Advisory Committee on Criminal Rules	3
Report of the Advisory Committee on Appellate Rules	5
Report of the Advisory Committee on Evidence Rules.....	6
Report of the Advisory Committee on Bankruptcy Rules	8
Report of the Advisory Committee on Civil Rules.....	11
Report of the Administrative Office	14
Concluding Remarks.....	14

ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair	Judge Susan P. Graber
Associate Justice Brent E. Dickson	Professor William K. Kelley
Roy T. Englert, Esq.	Judge Patrick J. Schiltz
Gregory G. Garre, Esq.	Judge Amy St. Eve
Daniel C. Girard, Esq.	Judge Richard C. Wesley
Judge Neil M. Gorsuch	Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules – Judge Steven M. Colloton, Chair Professor Gregory E. Maggs, Reporter	Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter Professor Nancy J. King, Reporter
Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair Professor S. Elizabeth Gibson, Reporter (by teleconference) Professor Michelle M. Harner, Reporter	Advisory Committee on Evidence Rules – Judge William K. Sessions III, Chair Professor Daniel J. Capra, Reporter
Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Reporter	

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee (“CACM”); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf (by teleconference)	Secretary, Standing Committee
Julie Wilson (by teleconference)	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy (by teleconference)	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell (by teleconference)	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O’Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the “*Stern Amendments*”).

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the “privacy rules” adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made “in the manner provided for a civil action.” The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as “parties” all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill “gaps” in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate “by order” and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting “only” in front of “by order” but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can “in extraordinary circumstances” stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: “Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.” The proposed amendment adds to that sentence “except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge.”

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten “the disqualification of a judge” to “a judge’s disqualification.” Judge Sutton recommended omitting the phrase “by local rule,” which received support from the members. Others raised stylistic concerns with the “except that” phrase as a whole, preferring to start a new sentence beginning with “But” or “A court of appeals may,” or breaking up the sentence with a semicolon and beginning the second clause with “provided however that.” Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase “prohibit the filing,” asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to “remand” the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee’s brief. This amendment comes in anticipation of the elimination of the “three day rule,” which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase “the committee concluded that” will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a “trap for an incompetent lawyer” and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only “criticism” made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word “spouses” for “husband and wife” in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word “send” for “mail” in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not “include...any amounts previously...ruled on by the bankruptcy court.” The Advisory Committee proposed deleting the form’s inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court’s decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court’s decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee’s appreciation of the Standing Committee’s quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee’s plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this “opt-out” proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee’s ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor’s claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court’s decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM’s recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee’s spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. “Frontloading” in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be “by United States mail, electronic means or other appropriate means.”
5. Addressing issues raised by “bad faith” class action objectors. Finding a way to deter objectors from holding settlements “hostage” while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the “fair, reasonable, and adequate” standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the “bad faith” objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. “Pick-off” offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court’s inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 5, 2015

1 The Civil Rules Advisory Committee met at S.J. Quinney College
2 of the Law at the University of Utah on November 5, 2015. (The
3 meeting was scheduled to carry over to November 6, but all business
4 was concluded by the end of the day on November 5.) Participants
5 included Judge John D. Bates, Committee Chair, and Committee
6 members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge
7 Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H.
8 Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer;
9 Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver,
10 Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by
11 telephone); and Judge Craig B. Shaffer. Former Committee Chair
12 Judge David G. Campbell and former member Judge Paul W. Grimm also
13 attended. Professor Edward H. Cooper participated as Reporter, and
14 Professor Richard L. Marcus participated as Associate Reporter.
15 Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison,
16 Judge Amy J. St. Eve (by telephone), and (also by telephone)
17 Professor Daniel R. Coquillette, Reporter, represented the Standing
18 Committee. Judge Arthur I. Harris participated as liaison from the
19 Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk
20 representative, also participated. The Department of Justice was
21 further represented by Theodore Hirt, Esq.. Rebecca A. Womeldorf,
22 Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the
23 Administrative Office. Emery G. Lee, III, attended for the Federal
24 Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC);
25 Joseph D. Garrison, Esq. (National Employment Lawyers Association);
26 Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron,
27 Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail,
28 Esq.; Valerie M. Nannery, Esq. (Center for Constitutional
29 Litigation); and Ariana Tadler, Esq..

30 Judge Bates opened the meeting by greeting new members, Judge
31 Ericksen and Judge Morris.

32 Judge Bates also noted the presence of former Committee member
33 Judge Grimm and former Committee Chair Judge Campbell. They, and
34 Judge Diamond who rotated off the Committee at the same time,
35 contributed in many and invaluable ways to the Committee's work.
36 Looking to the package of rules amendments that are pending in
37 Congress now, Judge Grimm chaired the Discovery Subcommittee and
38 was a member of the Subcommittee chaired by Judge Koeltl that
39 worked through proposals generated by the Committee's 2010
40 Conference on reforming the rules. Judge Campbell has devoted a
41 decade to Committee work, and continues with the work on pilot
42 projects and on educating bench and bar in what we hope will, on
43 December 1, become the 2015 amendments. The Reporters also
44 described the many lessons in drafting, practice, and wisdom they
45 had learned in working closely with Judge Campbell as chair of the
46 Discovery Subcommittee and then Committee Chair.

47 Judge Bates concluded these remarks by observing that the new
48 members would soon witness the Committee's determination to work
49 toward consensus in its deliberations. The package of amendments
50 now pending in Congress emerged from a remarkable level of
51 agreement even on the details. Judge Campbell's strong and tireless
52 leadership was demonstrated at every turn. Professor Coquillet
53 "seconded" all of this high praise.

54 Judge Campbell expressed appreciation for the "overly kind
55 comments." He noted that special praise is due to Judge Grimm for
56 contributions "as substantial as anyone," especially in chairing
57 the Discovery Subcommittee. He emphasized that the Committee is
58 indeed a collaborative group. It is the profession's best example
59 of collective thinking, good-faith effort, and agenda-less work.
60 Every member who moves into alumnus standing has expressed this
61 view. The Reporters provide excellent support. Judge Bates and
62 Judge Sutton will carry the work forward in outstanding fashion.

63 Judge Campbell also noted that in 1850 his great-great
64 grandparents came to the valley where the Committee is meeting as
65 Mormon pioneers. Robert Lang Campbell became the first Commissioner
66 of Public Education and was a regent of the University of Deseret,
67 a progenitor of the University of Utah. "The University is home to
68 me and my family."

69 Dean Robert W. Adler welcomed the Committee to the Law School
70 and its new building. The new building is designed both to improve
71 the learning experience and to advance the Law School's involvement
72 with the community. He noted that as a professor of civil procedure
73 he always demands that his students read the Committee Notes as
74 they study each rule. "You can see the lights going off in their
75 heads" as they read the Notes and come to understand that there is
76 more in the rule texts than may appear on first reading.

77 *April 2015 Minutes*

78 The draft minutes of the April 2015 Committee meeting were
79 approved without dissent, subject to correction of typographical
80 and similar errors.

81 *Standing Committee and Judicial Conference*

82 Judge Campbell reported on the May meeting of the Standing
83 Committee and the September meeting of the Judicial Conference.

84 The Standing Committee meeting went well. There was a good
85 discussion of pilot projects.

January 11, 2016 draft

86 At the Judicial Conference, the Chief Justice invited Judge
87 Sutton and Judge Campbell to present a summary of the amendments
88 now pending in Congress. They urged the Chief Judges to offer
89 programs to explain to judges and lawyers the nature and importance
90 of these amendments in the hoped-for event that they emerge from
91 Congress.

92 The Judicial Conference approved and sent to the Supreme Court
93 amendments to Rule 4(m) dealing with service on corporations and
94 other entities outside the United States; Rule 6(d), clarifying
95 that the "3-added-days" provision applies to time periods measured
96 after "being served," and eliminating from the 3-added days service
97 by electronic means; and Rule 82, synchronizing it with recent
98 amendments of the venue statutes as they affect admiralty and
99 maritime cases.

100 *Legislative Report*

101 Rebecca Womeldorf provided the legislative report for the
102 Administrative Office. Two familiar sets of bills have been
103 introduced in this Congress.

104 The Lawsuit Abuse Reduction Act of 2015 (LARA) has passed in
105 the House. It would amend Rule 11 by reinstating the essential
106 aspects of the Rule as it was before the 1993 amendments. Sanctions
107 would be mandatory. The safe harbor would be removed. This bill has
108 been introduced regularly over the years. In 2013 Judge Sutton and
109 Judge Campbell submitted a letter urging respect for the Rules
110 Enabling Act process, rather than undertake to amend a Civil Rule
111 directly. The prospects for enactment remain uncertain.

112 H.R. 9, the Innovation Act, embodies patent reform measures
113 like those in the bill that passed in the House last year. There
114 are many provisions that affect the Civil Rules. Parallel bills
115 have been introduced in the Senate, or are likely to be introduced.
116 The earlier strong support for some form of action seems to have
117 diminished for the moment.

118 A proposed Fairness in Class Action Litigation Act would
119 directly amend Rule 23. A central feature is a requirement that
120 each proposed class member suffer an injury of the same type and
121 scope as every other class member. The ABA opposes this bill.

122 *Publicizing the Anticipated 2015 Amendments*

123 Judge Grimm described the work of the Subcommittee that is
124 seeking to support programs that will educate members of the bench
125 and bar in the package of rules that will become law on December 1
126 unless Congress acts to modify, suspend, or reject them.

January 11, 2016 draft

127 The 2010 Conference emphasized themes that have persisted
128 through the ensuing work to craft these amendments. Substantial
129 reductions in cost and delay can be achieved by proportionality in
130 discovery and all procedure, cooperation of counsel and parties,
131 and early and active case management. These concepts have been
132 reflected in the rules since 1983. They have been the animating
133 spirit of succeeding sets of rules amendments. The need for yet
134 another round of amendments has suggested that amending the rules
135 is not always enough to get the job done. So it was decided that
136 the amendments should be advanced by promoting efforts to bring
137 them home to members of the bench and bar by focused education
138 programs. Work on the programs is progressing.

139 Five videotapes are being prepared. They will be structured in
140 segments, facilitating a choice between a single viewing and
141 viewing at intervals. Judge Fogel and the FJC have been a wonderful
142 resource. Tapes by Judge Koeltl and Judge Grimm have been made. The
143 remaining tapes will be made on November 6.

144 Letters from Judge Sutton and Judge Bates will alert district
145 judges to the new rules. A powerpoint presentation is being
146 prepared.

147 Bar organizations have been encouraged to prepare programs.
148 The ABA has done one, and will do more; John Barkett is
149 participating. The American College of Trial Lawyers has planned a
150 program. The Fifth Circuit and Eighth Circuit will have programs;
151 it is hoped that other circuits will as well.

152 Many articles are being written. Judge Campbell has prepared
153 one for Judicature. Professor Gensler, a former Committee member,
154 has prepared a very good pamphlet.

155 One indication of the value of educational efforts is provided
156 by a poll Judge Grimm undertook. He asked 110 judges – 68
157 Magistrate Judges and 42 District Judges – whether they actively
158 manage discovery from the beginning of an action or, instead, wait
159 for the parties to bring disputes to them. More than 80% replied
160 that they wait for disputes to emerge. "We hope to educate them
161 that early management reduces their work."

162 One caution was noted. The Duke Center for Judicial Studies
163 has convened a group of 30 lawyers, evenly divided between 15 who
164 regularly represent plaintiffs and 15 who regularly represent
165 defendants, to prepare a set of Guidelines on proportionality. Some
166 present and former Committee members reviewed drafts. These
167 guidelines will be used in 13 conferences planned by the ABA and
168 the Duke Center that aim to advance the practice of
169 proportionality. The first conference will be held next week, a few

January 11, 2016 draft

170 weeks before we can know that the proposed amendments will in fact
171 take hold. Professor Suja Thomas has expressed concern that these
172 guidelines will be used to "train" judges, and to be presented in
173 a way that casts an aura of official endorsement. In response to
174 this concern, Judges Sutton, Bates, and Campbell have sent out a
175 letter to federal judges making it clear that the guidelines are
176 not endorsed by the rules committees. The letter also notes that
177 these conferences are not being used to "train" judges.

178 Judge Sutton noted that December 1 has not yet arrived. "We
179 must be very careful to show that we are not presuming Congress
180 will approve the amendments." It is appropriate to anticipate the
181 expected birth of the amendments by preparing to encourage
182 implementation from and after December 1. And it is appropriate to
183 participate in programs that are presented before December 1 if it
184 is made clear that the amendments remain pending in Congress and
185 will become law only if Congress does not intervene by December 1.
186 It is proper for Committee members and former Committee members to
187 participate in these educational programs, but it is important to
188 continue the tradition that no favoritism should be shown among the
189 outside groups that organize the programs. An invitation should be
190 accepted only if the same invitation would be accepted had it been
191 extended by a different organization. And, as always, it is
192 important to emphasize both in opening and in closing that no
193 member speaks for the Committee.

194 Judge Campbell noted that the Duke Center has invested great
195 effort in promoting the new rules. "We should be grateful." It is
196 unfortunate that Professor Thomas has become concerned that the
197 Center is too closely connected to the Committee. It continues to
198 be important that all branches of the profession, teaching,
199 practicing, and judging, understand that the Committee is in fact
200 independent of all outside groups. The letter to federal judges is
201 designed to provide reassurance.

202 Judge Bates echoed this appreciation of the Duke Center's
203 efforts.

204 John Rabiej noted that the Duke Center says, explicitly and
205 repeatedly, that the Guidelines are not binding. They are only
206 suggestions. And they emerged from a working group evenly divided
207 between plaintiff interests and defense interests.

208 A Committee member noted that she observed e-mail traffic,
209 including messages focused on the Duke Center's involvement, that
210 reflects a widespread perception that the rules result from an
211 adversary process in which "someone wins and someone loses." That
212 wrong impression is unfortunate. "The rules are for everyone." As
213 a private person, she tells people that the best course is to read

January 11, 2016 draft

214 the rules and Committee Notes. Practicing lawyers may be forgiven
215 for misperceiving the process because they are largely unaware of
216 it. But it is difficult to forgive similar ignorance when it is
217 shown by academics – within the last few weeks she had occasion to
218 ask a civil procedure teacher what he thought of the pending
219 amendments and he asked "what amendments"?

220 Another Committee member observed that it is a good process.
221 The 2010 Conference contributed a lot. But it remains important to
222 stress, without overdoing it, that the Duke guidelines are not
223 ours.

224 Another Committee member underscored the importance of making
225 it clear that members do not speak for the Committee. "I always do
226 it." But it also is important to emphasize that the Committee is
227 seeking to achieve the effective administration of justice.

228 Yet another member noted that at least some judges are
229 uncertain whether it is appropriate to attend the ABA-Duke Center
230 presentations. Reassurances would be helpful.

231 *Rule 23*

232 Judge Bates introduced the Rule 23 proposals by noting that
233 the Class-action Subcommittee has been working with extraordinary
234 intensity. Over the course of the summer he participated in 10
235 Subcommittee conference calls working on the substance of the
236 proposals, and there was much other traffic by messages and calls
237 on incidental matters. Judge Dow and Professor Marcus deserve much
238 credit for pushing things along.

239 For today, the goal is to form a good idea of which proposals
240 should move forward. It may be possible to work on some specifics,
241 but "this is not the final round." The Committee will report to the
242 Standing Committee in January. By this Committee's meeting next
243 April we may be in a position to make formal recommendations for
244 publication in 2016. For today, we can view the package as a whole.
245 Much of it deals with settlements.

246 Judge Dow introduced the Subcommittee report by noting that it
247 presents 11 items for discussion, generally with illustrative rule
248 text and committee notes.

249 Six topics are recommended for continuing work: "frontloading"
250 the initial presentation of a proposed settlement; adding a
251 provision to Rule 23(f) to ensure that appeal by permission is not
252 available from an order approving notice of a proposed settlement;
253 amending Rule 23(c)(1) to make it clear that the notice of a
254 proposed settlement triggers the opt-out and objection process,

January 11, 2016 draft

255 even though the class has not yet been certified; emphasizing
256 opportunities for flexible choice among the means of notice;
257 establishing a requirement that a court approve any payment to be
258 made in connection with withdrawing an objection to a settlement or
259 withdrawing an appeal from denial of an objection, along with
260 provisions coordinating the roles of district courts and circuit
261 courts of appeals when dismissal of an appeal is involved; and
262 expanding the rule text criteria for approving a proposed
263 settlement.

264 One topic, adoption of a separate provision for certifying a
265 settlement class, is presented for discussion, although the
266 Subcommittee is not inclined to move toward adopting such a
267 provision.

268 Two other topics are on hold. Each awaits further development
269 in the courts. One is "ascertainability," a set of questions that
270 are percolating in the circuits. The other is the use of Rule 68
271 offers of judgment or other settlement offers as a means of
272 attempting to moot a class action by "picking off" all class
273 representatives; this question has been argued in the Supreme
274 Court, and any further consideration should await the decision.

275 Finally, the Subcommittee recommends that two other topics be
276 removed from present work. One is "cy pres" awards in settlements.
277 The other is any attempt to address the role of "issue" classes.
278 The reasons for setting these topics aside will be developed in the
279 later discussion.

280 Frontloading: Draft Rule 23(e) (1) tells the court to direct notice
281 of a proposed class settlement if the parties have provided
282 sufficient information to support a determination that giving
283 notice is justified by the prospect of class certification and
284 approval of the settlement. The basic idea was developed in
285 response to discussion at the George Washington conference
286 described in the Minutes for the April meeting, and with help from
287 an article by Judge Bucklo about the things judges need to know
288 about a proposed class settlement but often do not know. The
289 information will enable the judge to determine whether notice to
290 the class is justified. If the class has not already been
291 certified, the notice will be in the form required by Rule 23(c) (2)
292 – for a (b) (3) class, it will trigger the opportunity to request
293 exclusion, and for all classes it will provide a basis for
294 appearing and for objecting to the proposed settlement. These
295 purposes are best served by detailed notice of the terms of
296 settlement. Many courts follow essentially this practice now, but
297 express rule text will advance the best practice for all cases.

298 This proposal begins by adding language to the initial part of

January 11, 2016 draft

299 Rule 23(e)(1), making it clear that court approval is required to
300 settle the claims not only of a certified class but also of a class
301 that is proposed for certification at the same time as the
302 settlement is approved.

303 The frontloading concept was presented to the September
304 miniconference in the form of rule text that listed 14 kinds of
305 information the parties should provide. This "laundry list"
306 approach met a lot of resistance. There is constant fear that an
307 official list of factors will be diluted in practice to become a
308 simple check-list that routinely checks off each factor without
309 distinguishing those that are important to the specific case from
310 those that are not. The present draft channels all these factors
311 into an open-ended behest that the parties provide "relevant" or
312 "sufficient" information. Perhaps some other descriptive word
313 should be found to emphasize the purpose to provide as much as
314 possible of the information that will be presented on the motion
315 for final approval. This approach, leaving it to the court and
316 parties to identify and focus on the considerations that bear on a
317 particular proposed settlement, seemed to win support at the
318 miniconference. The Committee Note can go a long way toward calling
319 attention to the multiple factors that appeared in the "laundry
320 list" draft.

321 Judge Dow noted that the sophisticated lawyers who bring class
322 actions in his court commonly provide the kinds of information
323 required by the proposal. But not all lawyers do it. "The less
324 sophisticated practitioners need" more guidance in the rule.

325 Judge Dow further noted that the proposed rule text does not
326 address the question of what to do with the residue of the relief
327 a class defendant agreed to when not all class members make claims.
328 It would be possible to say something on this score, and to support
329 the rule text with a Committee Note that identifies the factors
330 included in the original laundry list rule draft. Professor Marcus
331 added that the Note attempts "to identify, advocate, convey." It
332 does not say that all 14 factors need be checked off every time.

333 A Committee member said that the draft rule reflects what has
334 become "procedural common law." Judges created this procedure. The
335 Manual for Complex Litigation adopts it. When the parties present
336 a proposed settlement for approval in an action that has not
337 already been certified as a class, the practice calls for
338 "preliminary approval" of certification and settlement, notice to
339 the class with opportunity to opt out or object, and final
340 approval. Many experienced lawyers and judges believe that Rule 23
341 says this. "The proposal is to have the rule say what many think it
342 says now." But too often, in the hands of those who are not
343 familiar with Rule 23 practice, the important information comes out

January 11, 2016 draft

344 too late. Yet the draft is ambiguous in calling for relevant
345 information about the proposed settlement – is this information
346 about the quality of the settlement, or does it include information
347 about the reasons for certifying any class and about proper class
348 definition? The response was to point to the statement in the draft
349 Committee Note that "[o]ne key element is class certification." But
350 perhaps more could be said in the rule text.

351 A drafting question was raised: would it be better to begin in
352 this form: "The court must direct notice," etc., if the parties
353 have provided the required information and if the court determines
354 that giving notice is justified, etc.? And is either of the
355 alternative words used the best that can be found to describe the
356 quantity and quality of information that must be provided?
357 "'Relevant' calls to mind the scope-of-discovery provision in rule
358 26(b)(1)." The answer was recognition that work will continue on
359 the drafting. The earlier draft that set out 14 factors was
360 troubling because in many cases several of the 14 "do not matter."
361 But drafting a more open-ended approach is a work in progress.

362 This answer prompted the reflection that "the information
363 relevant is quite different from one type of action to another." A
364 complex antitrust action may call for quite different types of
365 information than will be called for in an action involving a single
366 form of consumer deception.

367 A similar style suggestion was offered: "I like better rules
368 that tell the parties to do things," rather than "rules that tell
369 the court to do things." The purpose of this rule is to tell the
370 parties to provide more information. Such was the approach taken in
371 the 14-factor draft, set out at p. 189 in the agenda materials:
372 when seeking approval, "the settling parties must present to the
373 court" all of the various described items of information.

374 A finer-grained drafting comment also was made. The draft
375 simply grafts a reference to a proposed settlement class into the
376 present text of subdivision (e)(1):

377 The claims, issues, or defenses of a certified class, or
378 a class proposed to be certified as part of a settlement,
379 may be settled, voluntarily dismissed, or compromised
380 only with the court's approval. * * *

381 There is a miscue – the proposal described in the new operative
382 text is only to settle, not to voluntarily dismiss or compromise
383 the action. The broader sweep that includes voluntary dismissal or
384 compromise fits better with the class that has already been
385 certified. It would be better to separate this into separate parts:
386 "The claims, issues, or defenses of a certified class may be

January 11, 2016 draft

387 settled, voluntarily dismissed, or compromised only with the
388 court's approval; the claims, issues, or defenses of a class
389 proposed to be certified as part of a settlement may be settled
390 only with the court's approval. The following procedures apply in
391 seeking approval: * * *.

392 Judge Dow concluded the discussion by observing that the
393 Committee agrees that the frontloading proposal should be pursued
394 further, with work to refine the drafting. The rule will speak to
395 the parties' duty to provide information, and other improvements
396 will be made.

397 Rule 23(f): This proposal would add a new sentence to the Rule
398 23(f) provision for appeal by permission "from an order granting or
399 denying class-action certification": "An order under Rule 23(e) (1)
400 may not be appealed under Rule 23(f)." The concern arises from the
401 common practice that refers to "preliminary certification" of a
402 class when the court approves notice to the class. An appeal was
403 attempted at this stage in the NFL concussion litigation; the Third
404 Circuit decided not to accept the appeal. But the possibility
405 remains that appeals will be sought in other cases. And the sense
406 is that there should be only one opportunity for appeal, at least
407 as to a single grant of certification.

408 This introduction generated no further discussion. It was
409 noted later, however, that the Department of Justice continues to
410 study a proposal to expand the time available to ask permission to
411 appeal under Rule 23(f) when the request is made in actions
412 involving the United States or its officers or employees. The
413 Department expects to have a concrete proposal ready fairly soon.

414 Rule 23(c) (2) (B): This proposal is intended to solidify the
415 practice of sending out notice to the class before actual
416 certification when a proposed settlement seems likely to be
417 approved:

418 For any class certified under Rule 23(b) (3), or upon
419 ordering notice under Rule 23(e) (1) to a class proposed
420 to be certified [for settlement] under Rule 23(b) (3), the
421 court must direct to class members the best notice
422 practicable under the circumstances * * *.

423 Judge Dow noted that sending out notice before certification
424 and approval of the settlement is intended to accomplish the
425 purposes of notice in a (b) (3) class, including establishing the
426 deadline to request exclusion and affording the opportunities to
427 enter an appearance and to object. This is consistent with present
428 practice. And it is mutually reinforcing with the frontloading
429 proposal: frontloading will support notice that provides more

January 11, 2016 draft

430 comprehensive information, enabling better-informed decisions
431 whether to opt out or to object. The opt-out rate and objections in
432 turn will support further evaluation of the proposed settlement at
433 the final-approval stage. An important further benefit will be to
434 reduce the risk that a second round of notice will be required
435 because the initial notice is made defective by the parties'
436 failure to provide adequate information to the court and objections
437 show the need for better notice or demonstrate the inadequacy of
438 the proposed settlement.

439 Professor Marcus added that this proposal is useful to respond
440 to an argument forcefully advanced by at least one participant in
441 the miniconference. The common practice, carried forward in this
442 package of proposals, is that actual certification of the class is
443 made only at the same time as approval of the settlement. As Rule
444 23(c)(2)(B) stands now, its text literally directs that notice
445 satisfying all the requirements of (B) be sent out then, never mind
446 that the notice of proposed settlement sent out under (e)(1) has
447 already triggered an opt-out period and so on. It is better to make
448 it clear that class members can be required to decide whether to
449 opt out, to appear, or to object before the class is formally
450 certified.

451 A committee member observed that courts believe now that the
452 notice of a proposed settlement discharges the function of
453 (c)(2)(B). Characterizing the court's initial action as preliminary
454 certification and approval brings it within the rule language. But,
455 in turn, that triggers the prospect that a Rule 23(f) appeal can be
456 taken at that stage, a disruptive prospect that is so unlikely to
457 prove justified by a grossly defective proposal that it should
458 never be available. This revision of (c)(2)(B) helps in all these
459 dimensions.

460 General Notice Provisions. Discussion turned to the draft that
461 would introduce added flexibility to the description of notice in
462 Rule 23(c)(2)(B):

463 For any class certified under Rule 23(b)(3), the court
464 must direct to class members the best notice that is
465 practicable under the circumstances, including individual
466 notice [by the most appropriate means, including first-
467 class mail, electronic, or other means] {by first-class
468 mail, electronic mail, or other appropriate means} to all
469 members who can be identified through reasonable effort
470 * * *.

471 Judge Dow noted that this proposal would "bring notice into
472 the 21st Century." First-class mail may not be the best means of
473 informing class members of their rights, but it seems to be settled

January 11, 2016 draft

474 into general practice. The proposal is designed to establish the
475 flexibility required to provide notice by the most effective means.
476 The objective is the same as before – to provide the best notice
477 possible to the greatest number of class members. The alternative
478 presented in the first bracketed alternative, focusing on "the most
479 appropriate means," emphasizes the importance of the choice.
480 Whatever choice is made for rule text, it is important to have text
481 that supports the examples that may be useful in the Committee
482 Note.

483 The first suggestion, made and seconded, was that it might be
484 better to simplify the rule text by referring only to "the most
485 appropriate means." Amplification could be left to the Committee
486 Note. The response was that it may be important to add examples to
487 rule text to make it clear that the choice of means is technology-
488 neutral. The ingrained reliance on first-class mail may make it
489 important to make it clear that other means may be as good or
490 better. This response was elaborated by suggesting the advantages
491 of the first alternative, calling for the most appropriate means
492 and referring to "electronic means" rather than "electronic mail."
493 It may be, particularly in the not-so-distant future, that
494 appropriate means of electronic communication will evolve that
495 cannot be fairly described as part of the familiar "e-mail"
496 practices we know today.

497 Further discussion suggested that limiting the rule text to
498 "the most appropriate means" would avoid an implication that first-
499 class mail or e-mail are always appropriate.

500 A separate question was addressed to the parts of the draft
501 Note that discuss the format and content of class notice: is it
502 appropriate to address these topics when the amended rule text does
503 not directly bear on them? The only response was that any amendment
504 addressing effective means of notice will support discussion of the
505 importance of making sure that the notice conveyed by appropriate
506 means is itself appropriately informative. Merely reaching class
507 members does little good if the notice itself is inadequate.

508 Objectors: Judge Dow began by observing that the Subcommittee has
509 repeatedly been reminded that there are both "good" and "bad"
510 objectors. Class-member objections play an important role in class-
511 action settlements. As a matter of theory, the opportunity to
512 object is a necessary check on adequate representation. As a
513 practical matter, objectors have shown the need to modify or reject
514 settlements that should not be approved as initially proposed. But
515 there are also objectors who seek to enrich themselves – that is,
516 commonly to enrich counsel – rather than to improve the settlement
517 for the class. The advice received at several of the meetings the
518 Subcommittee has attended, and at the miniconference, is that bad-

January 11, 2016 draft

519 faith objections can be dealt with successfully in the trial court.
520 The problem that persists is appeals or threats to appeal a
521 judgment based on an approved settlement. An appeal can delay
522 implementation of the judgment by a year or more. That means that
523 class members cannot secure relief, in some cases relief that is
524 important to their ongoing lives. The objector offers not to
525 appeal, or to dismiss the appeal, in return for a payment that goes
526 only to the objector's counsel, or perhaps in part to the objector
527 as well. Too often, class counsel are unwilling to submit the class
528 to the delay of an appeal and agree to buy off the objector.

529 Starting in 2010, the Appellate Rules Committee has been
530 considering rules to regulate dismissal of objector appeals. The
531 Subcommittee has been working in coordination with them.

532 The first step in addressing objectors is a draft that
533 requires some measure of detail in making an objection. This draft
534 responds to suggestions that some "professional objectors" simply
535 file routine, boilerplate objections in every case, do nothing to
536 explain or support them, fail to appear at a hearing on objections,
537 and then seek to appeal the judgment approving the settlement. The
538 draft adds detail to the present provision that authorizes
539 objections:

540 (A) Any class member may object to the proposal if it
541 requires court approval under this subdivision (e)7. The
542 objection must [state whether the objection applies only
543 to the objector or to the entire class, and] state [with
544 specificity] the grounds for the objection. [Failure to
545 state the grounds for the objection is a ground for
546 rejecting the objection.]

547 The first comment was that "this is the most oft-repeated
548 topic at all the conferences." The materials submitted for
549 discussion at the miniconference included a lengthy list of
550 information an objector must provide in making an objection. "It
551 seemed too much."

552 Later discussion provided a reminder that the Subcommittee
553 will continue to consider whether to retain the bracketed words
554 stating that failure to state the grounds for the objection is a
555 ground for rejecting the objection.

556 The draft in the agenda materials addresses the question of
557 payment by adding to present Rule 23(e) (5) a new subparagraph:

558 (B) Tthe objection, or an appeal from an order denying an
559 objection, may be withdrawn only with the court's
560 approval. If [a proposed payment in relation to] a motion

January 11, 2016 draft

561 to withdraw an appeal was referred to the court under
562 Rule 42(c) of the Federal Rules of Appellate Procedure,
563 the court must inform the court of appeals of its action.

564 This draft is supplemented by alternative versions of a new
565 subparagraph (C) that require court approval of any payment for
566 withdrawing an objection or an appeal from denial of an objection.
567 The overall structure is built on the premise that payment to an
568 objector may be appropriate in some circumstances. Rather than
569 prohibit payment, approval is required. It may be that the district
570 court finds it appropriate to compensate the costs of making an
571 objection that, although it did not result in any changes in the
572 settlement, played an important role in assuring the court that the
573 settlement had been well tested and does merit approval. That
574 prospect, however, is not likely to extend to payment for
575 withdrawing an appeal.

576 Recognizing that the Appellate Rules Committee has primary
577 responsibility for shaping a corresponding Appellate Rule, a sketch
578 of a possible Appellate Rule is included. The Appellate Rules
579 Committee met a week before this meeting. Their deliberations have
580 suggested some revisions in the package.

581 One question is how the court of appeals will know the problem
582 exists. A new sketch of a possible Appellate Rule 42(c) would
583 direct that a motion to dismiss an appeal from an order denying an
584 objection to a class-action settlement must disclose whether any
585 payment to the objector or objector's counsel is contemplated in
586 connection with the proposed dismissal. Then a possible Rule 42(d)
587 would provide that if payment is contemplated, the court of appeals
588 may refer the question of approval to the district court. The court
589 of appeals would retain jurisdiction of the appeal, pending final
590 action after the district court reports its ruling to the court of
591 appeals. The court of appeals can instead choose to rule on the
592 payment without seeking a report from the district court. Finally,
593 a new Civil Rule 23(e)(5)(D) would direct the district court to
594 inform the court of appeals of the district court's action if the
595 motion to withdraw was referred to the district court.

596 One initial question is whether there should be any provision
597 regulating withdrawal of an objector's appeal when there is no
598 payment. As a matter of theory, it may be wondered whether other
599 objectors may have relied on this appeal to forgo taking their own
600 appeals. But that theory may bear little relation to reality. It
601 was not developed further in the discussion.

602 The focus of the new structure is to provide the court of
603 appeals a clear procedure for getting advice from the district
604 court. The district court is familiar with the case and often will

January 11, 2016 draft

605 be in a better position to know whether payment is appropriate. The
606 Appellate Rules Committee is anxious to retain jurisdiction in the
607 court of appeals. That can be done whether the action by the
608 district court is simply a recommended ruling or is a ruling by the
609 district court subject to review by the ordinary standards that
610 govern the elements of fact and the elements of discretion.

611 The first question was what happens when the district court
612 refuses to approve a payment and the objector wants to appeal. The
613 response was that the draft retains jurisdiction in the court of
614 appeals. The objector can address his grievance to the court of
615 appeals, whether the question be one of independent decision by the
616 court of appeals as informed by the district court's
617 recommendation, or be one of reviewing a ruling by the district
618 court.

619 An analogy was offered: Appellate Rule 24(a) directs that a
620 party who desires to appeal in forma pauperis must file a motion in
621 the district court. If the district court denies the motion, the
622 party can file a motion in the court of appeals, in effect renewing
623 the motion. Here, the motion to dismiss the appeal is made in the
624 court of appeals, disclosing whether any payment is contemplated.
625 But what happens if the court of appeals simply dismisses the
626 appeal without deciding whether to approve the payment? The draft
627 prohibits payment without court approval, so the objector would
628 have to seek approval from the district court. The district court's
629 action would itself be a final judgment, subject to appeal.

630 Another analogy also is available. There are many
631 circumstances in which a court of appeals finds it useful to retain
632 jurisdiction of an appeal, while asking the district court to take
633 specific action or to offer advice on a specific question. The
634 court of appeals can manage its own proceedings as it wishes, but
635 is most likely to defer further proceedings until the district
636 court reports what it has done in response to the appellate court's
637 request. There is a further analogy in the "indicative rulings"
638 provisions of Civil Rule 62.1 and Appellate Rule 12.1 – one of the
639 paths open under those rules is for the court of appeals to remand
640 to the district court for the purpose of ruling on a motion that
641 the district court otherwise could not consider because of a
642 pending appeal. The court of appeals retains jurisdiction unless it
643 expressly dismisses the appeal.

644 Further discussion suggested that at least one participant
645 thought it better to think of this process as a "remand," because
646 a "referral" does not seem to contemplate factfinding in the
647 district court.

648 A member expressed a skeptical view about the value of this

January 11, 2016 draft

649 process. The hope is for an in terrorem effect that will deter
650 payments by the threat of exposure and the prospect that courts
651 will never approve a payment that is not supported by a compelling
652 reason. But the problem is delay in implementing the judgment; the
653 more elaborate the process for withdrawing an appeal, the greater
654 the delay.

655 This view was countered. "The use of delay as leverage for a
656 payoff is the problem. If we say no payoff without court approval,
657 we do a lot. The bad-faith objector wants delay not for its own
658 sake, but for leverage." A legitimate objector will not be affected
659 by the need for approval of any payment.

660 A different doubt was expressed: the incentive is to get rid
661 of objectors, but will this process simply encourage objectors to
662 pad their bills? The response was that the objector's lawyer does
663 not get paid unless there is a benefit to the class. But the doubt
664 was renewed: that can be met by a stipulation of the objector and
665 counsel that there was a benefit to the class. The response in turn
666 was that this procedure will eliminate the incentive for delay.
667 Bad-faith objectors self-identify before taking an appeal, or after
668 filing the notice of appeal. They do not appear at the hearing on
669 approval, they often do no more than file form objections. And the
670 good-faith objectors articulate their objections in the district
671 court. They appeal for the purpose of defeating what they view as
672 an inadequate settlement, not for the purpose of delay or coercing
673 payment for abandoning their objections.

674 This view was supported by noting that a good-faith objector
675 who participated in the miniconference reported that the business
676 model of bad-faith objectors does not support actual work on an
677 appeal. But why not let the district court be the one that decides
678 whether to approve payment? The court of appeals can grant the
679 motion to dismiss the appeal, and remand to the district court to
680 decide on payment. The district-court ruling can be appealed. This
681 view was supported by noting that once the district court has
682 ruled, "there is something to review."

683 General support for the proposed approach was offered by
684 noting that "rulemaking cannot resolve every problem." But we can
685 accomplish the modest goal of insisting on sunlight, and creating
686 a mechanism for courts to address the issues as promptly as
687 possible.

688 A wish for simplicity was expressed by suggesting that it may
689 be enough to provide in Rule 23(e)(5)(B) that court approval is
690 required to withdraw an objection or an appeal from denial of an
691 objection, and to limit new provisions in Appellate Rule 42 to a
692 direction that any payment for dismissing the appeal be disclosed

January 11, 2016 draft

693 to the court of appeals. The court of appeals then "does what it
694 does." It may choose to decide the appeal. Or it can simply dismiss
695 the appeal; the case is over. But an objector who wants payment
696 must apply to the district court. The key is disclosure to the
697 court of appeals. Appellate Rule 12.1 and Civil Rule 62.1 already
698 provide the opportunity to seek an indicative ruling if a motion to
699 approve payment is made in the district court while the appeal
700 remains pending. The full set of draft provisions is "too much
701 process."

702 A different vision of simplicity was suggested: the rules
703 should leave it open to the court of appeals to choose between
704 acting itself, referring to the district court, making a limited
705 remand, or adopting whatever approach seems to work best for a
706 particular case.

707 The next question was whether it might be possible to provide
708 some guidance in rule text on the circumstances that justify
709 payment for withdrawing an objection or appeal? Apart from that,
710 should we be concerned that there may be means of compensation that
711 are not obviously "payment"? One possibility may be to accord some
712 form of benefit in collateral litigation – the objector may
713 represent clients who are not in the class, or it might be agreed
714 to acquiesce in an objection made in a different class action.

715 These questions were addressed by the observation that the
716 only familiar demands are for payments to lawyers, or to clients
717 who want more than the judgment gives them. But it is possible to
718 imagine a threat of objections in all future cases, or a promise to
719 withdraw objections in other cases. So the sketch of a possible
720 Appellate Rule 42(c) on p. 102 of the agenda materials refers to
721 "payment or consideration."

722 The discussion concluded by noting the paths to be tested by
723 further drafting. It will be good to achieve as much simplicity as
724 possible. Full disclosure should be required of any payments (or
725 consideration) for withdrawing an objection or appeal from denial
726 of an objection. The district court should be the place for
727 determining whether to approve any payment. Beyond that, this
728 structure can be effective if lawyers for the plaintiff class do
729 their part in resisting requests for payment.

730 Settlement Approval: Judge Dow introduced the draft criteria for
731 approving a class-action settlement by noting that the draft is
732 inspired in part by the approach taken in the ALI Principles of
733 Aggregate Litigation. The ALI approach was shaped by the same
734 concerns that the Subcommittee has encountered. There are as many
735 dialects as there are circuits; each circuit has its own
736 differently articulated list of factors to be applied in

January 11, 2016 draft

737 determining whether a settlement is "fair, reasonable, and
738 adequate." The draft is an effort to capture the most important
739 procedural and substantive elements that should guide the review
740 and approval process. In its present form, it seeks to capture the
741 most important elements in four provisions that might be viewed as
742 "factors," or instead as the core concerns. The first question is
743 whether this focus will support meaningful improvement in current
744 practices.

745 Professor Marcus supplemented this introduction by identifying
746 two basic questions: Will the draft, or something like it, prove
747 helpful to judges and lawyers? The purpose begins with helping the
748 parties to shape the information they submit in seeking approval.
749 Every circuit now has a list of multiple factors. The draft
750 presented to the Committee last April included a catch-all
751 "whatever else" provision. Discussion then suggested that the
752 provision was not helpful. It was dropped during later drafting
753 efforts, but has found renewed support and is included in the
754 agenda drafts for further discussion. It takes different forms in
755 the two alternative structures. In alternative 1, the court "may
756 disapprove * * * on any ground the court deems pertinent, * * *
757 considering whether." That is less restrictive than alternative 2,
758 which directs that the court "may approve" "only * * * on finding"
759 the four core criteria are met and also that "approval is warranted
760 in light of any other matter that the court deems pertinent." The
761 choice here is whether to suggest the relevance of considerations
762 in addition to the four core showings that are explicitly
763 described, and whether to be more or less restrictive.

764 The second question is related: what prominence should be
765 given to the present rule formula, which was drawn from well-
766 developed case law, looking to whether the settlement is "fair,
767 reasonable, and adequate"? These words support consideration of
768 every factor that has been identified by any circuit. Should the
769 process remain that open?

770 The first comment was that both alternatives are open-ended.
771 A "ground" or "matter" that "the court deems pertinent" is not a
772 legal standard.

773 The next comment was that the second alternative displaces the
774 present "fair, reasonable, and adequate" standard from its present
775 primacy, demoting it to a role as part of the factor that asks
776 whether the relief awarded to the class is fair, reasonable, and
777 adequate, taking into account the costs, risks, probability of
778 success, and delays of trial and appeal. The fair, reasonable, and
779 adequate standard is the over-arching concern. Another member
780 agreed - this is an argument for alternative 1, which allows
781 approval "[only] on finding it is fair, reasonable, and adequate."

January 11, 2016 draft

782 The brackets would be removed, allowing approval only on making
783 this finding.

784 Alternative 2 is "more focused." It allows approval only on
785 finding that all four factors are satisfied, compared to
786 Alternative 1 that allows a finding that the settlement is fair,
787 reasonable, and adequate, after simply "considering" the four.
788 Alternative 1 is less rigorous.

789 Turning to one of the four core elements, it was asked how a
790 court is to determine whether a settlement "was negotiated at arm's
791 length and was not the product of collusion." Why is that not
792 implicit in finding the settlement is fair, reasonable, and
793 adequate?

794 This question was addressed by observing that a number of
795 circuits distinguish between procedural and substantive fairness.
796 The parties must show that the process was free of collusion. This
797 showing is made by describing the process, or by having a special
798 master or mediator participate and report. Account is taken of how
799 long the negotiations endured, and whether there was actual
800 negotiation.

801 The open-endedness of "considering whether" in Alternative 1
802 provoked the suggestion that, taken literally, it overrides a lot
803 of circuit law. It would allow a court to find a settlement is
804 fair, reasonable, and adequate, even though it was not negotiated
805 at arm's-length and was the product of collusion. But then perhaps
806 the intention is to overrule the various laundry lists of factors
807 found across the circuits?

808 A Subcommittee member responded that the purpose is not to
809 overrule existing circuit factors. In all but two circuits, these
810 factors were developed in the 1970s and 1980s. Any of these factors
811 may, at some time with respect to some proposed settlement, prove
812 relevant. But the purpose of identifying the core concerns is to
813 encourage the court to look closely at the settlement rather than
814 move unthinkingly down a check list of factors, none of them
815 clearly developed by the parties and many of them not relevant to
816 the particular settlement. Part of the purpose is to respond to the
817 increasing cynicism found in public views of class actions. Many
818 people view settlements in consumer-class actions as devices that
819 provide no meaningful value to consumers and provide undeserved
820 awards to class counsel.

821 In a similar vein, it was observed that the purpose of
822 focusing on four core concerns seems to be to simplify and codify
823 the purposes and best elements of present practice. But we should
824 consider whether the "considering whether" formula in alternative

January 11, 2016 draft

825 1 might be seen as overruling the circuit factors. "Would any
826 circuit think we're changing what it can do"?

827 A response was that the ALI concern was that the lengthy lists
828 of factors distract attention from the central elements. A related
829 concern was that there is a tendency to view the various "factors"
830 as things to be weighed in a balancing process, albeit without any
831 direction as to how any one is to be weighed. It is better to adopt
832 the approach of Alternative 2: the court may approve "only on
833 finding." This will redirect attention to the essential elements of
834 approval.

835 But it was noted that the four subparagraphs attached to both
836 alternative 1 and alternative 2 are conjunctive: the court must
837 consider, or find, all of them. The rule is written not for the
838 experts, who understand this now. It focuses everyone on the key
839 factors in a way that is not always understood.

840 The fifth element, "any other matter" or "any ground" the
841 court deems pertinent, was questioned: what does it add? What is
842 there that could not be read into the four central elements
843 identified in the first four subparagraphs? The response was that
844 "there still will be X factors." The four factors focus on what is
845 important, and focus the parties on what to present to the court,
846 and on what to present in the notice to the class. But the
847 rejoinder asked again: what else is relevant if all four are
848 satisfied - there is adequate representation, not tainted by
849 collusion, adequate relief, and equitable treatment of class
850 members relative to each other? Should it be made clear that the
851 burden is on the objector to show reasons to reject a settlement
852 when all of these elements are present?

853 It was noted that the alternative 2 formulation, "may approve
854 only * * * on finding" the four elements leaves discretion to
855 refuse approval even if all four are found. And it implies that the
856 standard of review should be abuse of discretion. So the court can
857 draw on any factor that has been identified in any circuit that
858 seems relevant to evaluating the settlement. "There are any number
859 of things that cannot be captured in factors." As one example: the
860 settlement is negotiated while the defendant is teetering on the
861 brink of insolvency. By the time of the hearing on objections, the
862 defendant has been restored to a financial position that would
863 support more adequate relief. How do you write a specific factor
864 for that? Still, it was suggested that alternative 1, "considering
865 whether," provides a more emphatic statement of discretion.

866 A more particular question was asked: what happens if a lawyer
867 who initially supported a proposed settlement changes position to
868 challenge the proposal? No answer was attempted.

January 11, 2016 draft

869 The summary of this discussion began by observing that the
870 really good lawyers the Subcommittee has been meeting in its
871 travels do all these good things now. But not all lawyers do.
872 "These four factors are aimed at the lowest common denominator" of
873 lawyers who bring class actions without much experience or
874 background learning. They are not intended to displace the factors
875 identified in the many appellate opinions that have been written
876 over nearly a half-century of review. The intent instead is to
877 focus attention on the important core. The plan is to displace the
878 process in which parties and court are distracted by routine,
879 uninformative submissions that simply run through the local check-
880 list of factors, some important to the particular case, some not
881 important, and some irrelevant.

882 All of this pointed toward a synthesis of alternative 1 and
883 alternative 2. "fair, reasonable, and adequate" will be retained as
884 the entry point. The court may approve a settlement only on making
885 the four core findings. And "fair, reasonable, and adequate" will
886 be removed from the third core:

887 If the proposal would bind class members, the court may
888 approve it only after a hearing and only on finding that
889 it is fair, reasonable, and adequate because: * * *

890 (C) the relief awarded to the class * * * is ~~fair,~~
891 ~~reasonable,~~ and adequate, given the costs, risks *
892 * * .

893 Settlement Classes: Judge Dow introduced this topic by asking
894 whether it would be useful, or perhaps necessary, to adopt a
895 separate provision for settlement classes. The underlying question
896 arises from uncertainty in applying the "predominance" requirement
897 of Rule 23(b)(3) to settlements. The Subcommittee has reached a
898 tentative view that it should table this question, but is not
899 prepared to recommend that course without guidance from the
900 Committee.

901 The dilemma can be framed by asking what might be gained by
902 adopting an express settlement-class provision, and what are the
903 "unnerving things that might happen" if one were adopted.

904 The first question was whether settlements have failed because
905 a class could or would not be certified? The answer was that this
906 in fact has happened. And there is a concern that people are
907 deterred from even attempting settlements by the obscurity of the
908 predominance requirement as applied to settlement.

909 The most common illustration of the value of subordinating
910 predominance is choice-of-law concerns. A class that spans several

January 11, 2016 draft

911 states may present thorny choice-of-law questions, and present the
912 prospect that different laws will be chosen for different groups
913 within the class, forestalling predominance in litigation. These
914 problems can be readily resolved, however, by settlement. At least
915 the Second and Third Circuits have approved settlements despite
916 choice-of-law predominance concerns. Beyond that, a number of
917 lawyers believe that courts are pretty much ignoring the statements
918 in the Amchem opinion that predominance is required in certifying
919 a class for settlement.

920 This comment was amplified by the observation that the role of
921 predominance in settlement classes has generated many objections by
922 "those who take Amchem literally." But courts have developed a
923 gloss on Amchem that takes the fact and value of settlement into
924 account in finding that (b) (3) criteria have been satisfied. Still,
925 the objections come in – often from "serial objectors." Adopting a
926 settlement-class rule would clarify the law, restating where it is
927 in practice today, helping to identify how account should be taken
928 of settlement in determining whether to certify a class. But as for
929 the empirical question, "I do not know how many settlements are
930 disapproved, or not attempted," for want of a clear rule.

931 But, it was asked, why not require predominance? An immediate
932 response was that Amchem would require the laws of 50 states to
933 apply at trial; on settlement, there is no need to worry about that
934 – "everyone gets the same." But it was objected that giving
935 everyone "the same" may not be right if different sets of laws
936 would prescribe differences in the awards. The rejoinder was that
937 choice-of-law questions can be resolved in settlement, perhaps
938 choosing different laws and relief for different subclasses. And if
939 the case comes to be tried, the court may chose a single state's
940 law to govern, or may choose the law of a few states to govern,
941 grouping subclasses around the similarities in the chosen separate
942 laws. So long as the class is given notice of a proposed settlement
943 – everyone gets to see what is proposed and can object – why force
944 it to trial?

945 A further response was that predominance addresses the
946 efficiencies of trial on class claims. It does not address the
947 fairness of settlement. The Court in Amchem recognized that
948 manageability is not a concern on settlement, despite the inclusion
949 of difficulties in managing a class action among the matters
950 pertinent to finding predominance and superiority. The same can be
951 true of predominance.

952 In the same vein, it was noted that in 1993 the Third Circuit
953 said that a class action cannot be certified for settlement unless
954 the same class could be certified for trial. Amchem has superseded
955 that. Amchem led the Committee to stop work on its pre-Amchem

January 11, 2016 draft

956 proposal to add a settlement-class provision as a new Rule
957 23(b)(4). The current draft (b)(4), however, is different from the
958 1996 version.

959 A Subcommittee member said he was impressed by how little
960 reaction was provoked by the draft of a settlement-class rule.
961 People did not even seem to be worried about the prospect that
962 representations made in promoting a proposed settlement might be
963 used against them if the settlement falls through and a request is
964 then made to certify a class for trial.

965 A different perspective was suggested by the observation that
966 settlement generally is in the interests of the immediate parties.
967 But that does not ensure fairness to absent class members.
968 Settlement does avoid the risks of class adjudication, and that may
969 justify some dilution of the predominance requirement. But does it
970 justify abandoning any shadow of predominance?

971 It was suggested that the evolution that has followed Amchem
972 shows a reduced emphasis on predominance in reviewing proposed
973 class settlements.

974 Beyond that, an alternative approach that incorporates
975 settlement classes into Rule 23(b)(3) itself is also sketched in
976 the agenda materials from p. 130 to p. 132. This approach would
977 allow certification on finding "that the questions of law or fact
978 common to class members, or interests in settlement, predominate *
979 * *." (The parallel structure could be tightened further by looking
980 to "common interests in settlement.")

981 Still another approach was suggested. The role of predominance
982 could be diminished by a rule provision that the court can consider
983 whether settlement obviates problems that would arise at trial.

984 But it also was recognized that the defense bar is concerned
985 that reducing the role of predominance in settlement classes will
986 unleash still more class actions. And on the other side, there is
987 concern that the bargaining position of class representatives will
988 be eroded if they cannot make a plausible threat of certification
989 for trial.

990 It was noted again that the interest in doing anything to add
991 a separate provision for settlement classes diminished steadily as
992 the Subcommittee made the rounds of many outside groups. There was
993 substantial enthusiasm for doing something several years ago,
994 prompting the ALI to address the question in the Principles of
995 Aggregate Litigation. But that has faded.

996 The conclusion was to not go further with the settlement-class

January 11, 2016 draft

997 proposal.

998 Ascertainability: The question of criteria for the
999 "ascertainability" of class membership has come to the fore
1000 recently. The most demanding approach is reflected in a series of
1001 Third Circuit decisions, many of them in consumer actions. The
1002 Seventh Circuit has expressly rejected the Third Circuit approach.
1003 Other circuits come close to one side or the other. This is an
1004 important topic, and it continues to be developed in the lower
1005 courts. There is some prospect that the Supreme Court may address
1006 it soon. And it is difficult to be confident about drafting rule
1007 language that would give effective guidance. The Subcommittee has
1008 put this topic on "hold," keeping it in the current cycle but
1009 without anticipating a recommendation for publication over the next
1010 several months. The Committee approved this approach.

1011 Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee
1012 looked at the use of Rule 68 offers of judgment in an attempt to
1013 moot class actions because of the Seventh Circuit decision in the
1014 Damasco case. Under that approach, an offer of complete relief to
1015 the representative plaintiffs before class certification moots
1016 their individual claims and defeats certification. Plaintiffs
1017 commonly worked around this rule by moving for certification when
1018 they filed, but also by requesting that consideration of the motion
1019 be deferred until the case had progressed to a point that would
1020 support a well-informed certification ruling. The Seventh Circuit
1021 recently overruled its mootness rule. Most circuits now refuse to
1022 allow a defendant to defeat class certification by offers that
1023 attempt to moot the individual claims of any representative
1024 plaintiffs who may appear. More importantly, this question has been
1025 argued in the Supreme Court. The Subcommittee has deferred further
1026 work pending the Court's decision. The Committee agreed this course
1027 is wise.

1028 Separately, it was noted that the Committee is committed to
1029 further study of Rule 68 in response to regularly repeated
1030 suggestions for revision. The timing will depend on the allocation
1031 of available resources between this and other projects that may
1032 seem more pressing.

1033 Cy pres: For some time, the Subcommittee carried forward a proposal
1034 to address cy pres awards. The proposal was based, at least for
1035 purposes of illustration, on the model adopted by the ALI. This
1036 model attempts to achieve the maximum feasible distribution of
1037 settlement funds to class members. Only when it is not feasible to
1038 make further distributions could the court approve distribution of
1039 remaining settlement funds – and even then, the first effort must
1040 be to identify a beneficiary that would use the funds in ways that
1041 would benefit the class.

January 11, 2016 draft

1042 It seems to be generally agreed that many classes are defined
1043 in terms that make it impracticable to identify every class member
1044 and achieve complete distribution to class members. Some
1045 undistributed residue will remain. The ALI proposal would confine
1046 cy pres awards to those circumstances. That set of issues seems to
1047 fall comfortably within the scope of the Rules Enabling Act. But
1048 these are not the only circumstances that characterize cy pres
1049 awards in present practice. More creative awards are structured,
1050 often in cases involving small injuries to large numbers of
1051 consumers, most of whom cannot be easily identified. Attempting to
1052 address cy pres awards of this sort would present tricky questions
1053 about affecting substantive rights.

1054 Cy pres awards have evolved in practice and have been accepted
1055 in many judgments. Some states have statutes addressing them. Given
1056 the difficulty of knowing how to craft a good rule, the
1057 Subcommittee recommended that further work on these questions be
1058 suspended. The Committee accepted this recommendation.

1059 Issue Classes: Judge Dow introduced the question of issue classes
1060 by noting that the subject was taken up because of a perceived
1061 split between the Fifth Circuit and other circuits on the extent to
1062 which the predominance requirement of Rule 23(b)(3) limits the use
1063 of an issue class to circumstances in which the issue certified for
1064 class treatment predominates over all other issues in the
1065 litigation. More recent Fifth Circuit decisions, however, seem to
1066 belie the initial impression. "Dissonance in the courts has
1067 subsided." There seems little need to undertake work to clarify the
1068 law. And any attempt might well create new complications.

1069 A Subcommittee member said that the Subcommittee has learned
1070 that courts address issue-class questions in case-specific ways.
1071 Difficult questions of appealability would be raised by any
1072 distinctive changes in the issue-class provisions in Rule 23(c)(4)
1073 so as to focus on final decision of a discrete issue without
1074 undertaking to resolve all remaining questions within the framework
1075 of the same action. The problems could be similar to those that
1076 arise after separate-issue trials under Rule 42.

1077 The Committee agreed with the Subcommittee recommendation that
1078 further work on these questions be suspended.

1079 Judge Bates concluded the class-action discussion by stating
1080 that the Committee had done good work. Thanks are due to both the
1081 Subcommittee and the Committee.

1082 *Requester Pays for Discovery*

1083 For some time the Committee and the Discovery Subcommittee

January 11, 2016 draft

1084 have deliberated the questions raised by periodic suggestions that
1085 the discovery rules should be revised to transfer to the requesting
1086 party more of the costs incurred in responding to discovery
1087 requests. Many different approaches could be taken. Many
1088 suggestions cluster around a middle ground that would leave the
1089 costs of responding where they lie as to some "core" discovery, but
1090 require the requesting party to pay – or perhaps to justify not
1091 paying – for the costs of responding to requests outside the core.
1092 Those suggestions present obvious challenges in the task of
1093 defining core discovery in terms that apply across different
1094 subjects of litigation.

1095 Beyond these questions, the assumption that the responding
1096 party bears the costs of responding is well-entrenched. Hundreds of
1097 comments addressed to the package of discovery amendments that is
1098 pending in Congress emphasize the role of discovery in supporting
1099 enforcement of public policies that provide important protection
1100 for public interests beyond the disposition of the particular
1101 action. Great difficulty would be encountered in attempting to
1102 devise a wise rebalancing of the competing interests.

1103 Additional reasons for diffidence about requester-pays
1104 proposals arise from the pending discovery amendments. They are
1105 designed in many ways to reduce the costs of discovery. The renewed
1106 emphasis on proportionality, coupled with the strong encouragement
1107 of early and active case management, and perhaps supported by the
1108 encouragement of party cooperation, may achieve substantial
1109 reductions in the cost and delay that occasionally result from
1110 searching discovery. Beyond that, if the amendments take effect the
1111 Rule 26(c) protective-order provisions will be modified to
1112 recognize expressly the court's authority to allocate the costs of
1113 responding in a particular case. This provision is not designed to
1114 inaugurate any general practice of shifting response costs, but it
1115 can be used to address specific needs in particular cases.

1116 In all, it was agreed that further work on requester-pays
1117 proposals would be premature. One or another aspect of discovery is
1118 usually on, or close to, the active agenda. Requester-pays issues
1119 will remain in the background, to be taken up again when it may
1120 seem appropriate.

1121 *Rule 62: Stays of Execution*

1122 Rule 62 came on for study in response to separate suggestions
1123 made to the Civil Rules Committee and to the Appellate Rules
1124 Committee. The work has been pursued through a joint subcommittee
1125 chaired by Judge Matheson. The materials in the agenda book were
1126 also on the agenda of the Appellate Rules Committee, which
1127 considered them last week.

January 11, 2016 draft

1128 Judge Matheson opened the Subcommittee Report by reminding the
1129 Committee that these questions were discussed in a preliminary way
1130 last April. The Appellate Rules Committee also took up the topic
1131 then, and both Committees agreed that it makes sense to carry the
1132 work forward. At the same time, no one identified any actual
1133 difficulties that have emerged in practice under the current rule,
1134 apart from the specific questions that prompted the project from
1135 the beginning. The Subcommittee worked through the summer and fall
1136 to simplify and improve the draft revision. The current version
1137 appears in the agenda materials at p. 342.

1138 The draft reorganizes the allocation of subjects among present
1139 subdivisions (a) through (d), and changes the provisions for
1140 judgments that do not involve an injunction, an accounting in an
1141 action for patent infringement, or a receivership.

1142 Draft Rule 62(a) addresses three kinds of stays: (1) the
1143 automatic stay; (2) a stay obtained by posting a bond; and (3) a
1144 stay ordered by the court. These provisions address all forms of
1145 judgment, whether the relief be an award of money or some other
1146 form of relief such as foreclosing a lien or a decree quieting
1147 title.

1148 Several changes are made over the current rule.

1149 The automatic stay is extended from 14 days to 30 days. This
1150 eliminates the "gap" in present Rule 62(b), which recognizes the
1151 court's authority to order a stay "pending disposition" of post-
1152 judgment motions that may be made up to 28 days after entry of
1153 judgment. This revision addresses one of the two questions that
1154 prompted the Committees to take up Rule 62. The draft also
1155 expressly recognizes the court's authority to "order otherwise,"
1156 denying or terminating an automatic stay. (In response to a later
1157 question, it was explained that the stay was extended to 30 days to
1158 allow an orderly opportunity to begin to prepare for a further stay
1159 when expiration of the 28-day period shows there will be no post-
1160 judgment motion and while a brief period remains before expiration
1161 of the 30-day appeal time that governs most civil actions.)

1162 The draft revises the supersedeas bond provisions of present
1163 Rule 62(d) in various respects. It allows the bond to be posted at
1164 any time after judgment is entered, rather than "upon or after
1165 filing the notice of appeal." It allows "other security," not only
1166 a bond. These provisions address the questions that prompted the
1167 Appellate Rules Committee to study Rule 62 by enabling a party to
1168 post a single bond or other security that runs from entry of
1169 judgment through completion of any appeal. It also expressly
1170 recognizes the opportunity to rely on security other than a bond -
1171 one example might be a letter of credit, or establishment of an

January 11, 2016 draft

1172 escrow fund.

1173 Draft Rule 62(a)(3) allows the court to order a stay at any
1174 time. This authority could, for example, be used to substitute a
1175 stay with security for the automatic stay.

1176 Draft Rule 62(b) authorizes a court, for good cause, to refuse
1177 a stay sought by posting security under draft 62(a)(2), or to
1178 dissolve or modify a stay. This is new.

1179 Draft Rule 62(c), also new, authorizes the court to set
1180 appropriate terms for security, or to deny security, both on
1181 entering a stay and on refusing or dissolving a stay. One example
1182 could be an order denying a stay only on condition that the
1183 judgment creditor post security to protect the judgment debtor
1184 against the injury caused by execution in case the judgment is
1185 reversed on appeal.

1186 Proposed Rule 62(d) does little more than consolidate the
1187 provisions in present subdivisions (a) and (c) for injunctions,
1188 receiverships, and accountings in actions for patent infringement.
1189 It does bring into rule text the complete array of actions that
1190 support appeal from an interlocutory order with respect to an
1191 injunction.

1192 Some attention was paid to the possibility of revising present
1193 subdivisions (e) and (f), but it was decided that no changes are
1194 needed. Subdivisions (g) and (h) were addressed in extensive
1195 memoranda prepared by Professor Struve as Reporter for the
1196 Appellate Rules Committee, but no action has been recommended as to
1197 them.

1198 The discussion by the Appellate Rules Committee led to
1199 agreement on extending the automatic stay to 30 days, closing the
1200 gap; to supporting the opportunity to post a single bond; and to
1201 recognizing alternative forms of security.

1202 The practitioner members of the Appellate Rules Committee,
1203 however, expressed concern about the features of the draft that
1204 would authorize the court to deny a stay even when the judgment
1205 debtor offers adequate security in the form of a bond or another
1206 form. They believe that the present rule recognizes a nearly
1207 absolute right to a stay on posting adequate security, and that
1208 allowing a court to deny a stay, even for "good cause," would be a
1209 dangerous departure. This question must be taken seriously.

1210 This introduction was followed by a reminder that there seems
1211 to be general agreement on the answers to the questions that
1212 launched this work. The automatic stay should be extended to 30

January 11, 2016 draft

1213 days, closing the potential gap between its expiration on the 14th
1214 day and the time when the court is authorized to order a stay
1215 pending disposition of a motion that may not be made until 28 days
1216 after judgment is entered. A judgment debtor should be able to post
1217 security in a form other than a bond, and should be allowed to post
1218 a single security that covers both post-judgment proceedings in the
1219 district court and all proceedings on appeal.

1220 The questions that go beyond the initial concerns arose in a
1221 familiar way. Studying Rule 62 suggested ways in which it might be
1222 made more flexible, for the most part by provisions that would
1223 expressly recognize steps a court might well be prompted to take to
1224 protect the judgment or the parties even without explicit rule
1225 provisions. This approach often leads to the common dilemma: many
1226 ideas look good in the abstract. But there may be unforeseen
1227 problems that show both abstract and practical defects, and further
1228 difficulties may arise from the attempt to translate even good
1229 ideas into specific rule language. The wisdom of restraining
1230 ambition is underscored by the responses in the Standing Committee
1231 and both advisory committees that there have been no general
1232 complaints about Rule 62 in practice.

1233 Turning more pointedly to the concerns raised in the Appellate
1234 Rules Committee, the Subcommittee discussed repeatedly, and in
1235 depth, the question whether there should be a nearly absolute right
1236 to a stay on posting adequate security. There does seem to be a
1237 general belief in this right. And it might be seen as an integral
1238 part of the system that assures one appeal as a matter of right
1239 from a final judgment. The purpose of appeal is to provide an
1240 opportunity for reversal, even if the standards of review narrow
1241 the opportunity with respect to matters of fact or discretion.

1242 Counter considerations persuaded the Subcommittee to recognize
1243 authority to deny a stay. There may be cases in which the district
1244 court can accurately predict that there is little prospect of
1245 reversal, while also recognizing the risk of injuries that cannot
1246 be compensated even by assurance that the amount of a money
1247 judgment can be collected after affirmance. The judgment creditor
1248 may have immediate needs for money that cannot be addressed by
1249 collection of money after the delay of an appeal. For example, it
1250 may be possible to revive a damaged business by immediate action,
1251 while it may fail irretrievably pending appeal. A judgment for some
1252 other form of relief may pose comparable problems. A decree
1253 quieting title, for example, may open an opportunity for an
1254 immediate transaction that will be lost by delay. The "good cause"
1255 standard was thought to be sufficient protection of the judgment
1256 debtor's interests, particularly when coupled with the court's
1257 further authority to require security for the judgment debtor as a
1258 condition of denying a stay.

January 11, 2016 draft

1259 Discussion began in two directions. One question was whether
1260 there truly is a right to a stay on posting security. The other
1261 went in the other direction: why should the rule allow the court to
1262 order a stay without any security, as the draft clearly
1263 contemplates? Is the judgment itself not assurance enough of the
1264 judgment creditor's probable right to require that the judgment be
1265 protected against defeat by delay - with the potential for
1266 concealing or dissipating assets - by requiring security?

1267 The question of absolute right turned into discussion of
1268 present Rule 62(d). It says that an appellant "may obtain a stay by
1269 supersedeas bond." Does "may obtain" imply discretion, so that the
1270 court may refuse the stay even though the bond is otherwise
1271 satisfactory in its amount, terms, and guarantor? That possible
1272 reading may be thwarted by the reading of parallel language in Rule
1273 23(b), which begins: "A class action may be maintained if Rule
1274 23(a) is satisfied and if" the requirements of paragraphs (1), (2),
1275 or (3) are satisfied. In *Shady Grove Orthopedic Associates, P.A. v.*
1276 *Allstate Ins. Co.*, 130 S.Ct. 1431, 1437, 1438 (2010), the Court
1277 read "may be maintained" to entitle the plaintiff to maintain a
1278 class action on satisfying Rule 23(a) and one paragraph of Rule
1279 23(b). Rule 23 says not that the court may permit a class action,
1280 but that the class action may be maintained. "The Federal Rules
1281 regularly use 'may' to confer categorical permission." "The
1282 discretion suggested by Rule 23's 'may' is discretion residing in
1283 the plaintiff: He may bring his claim in a class action if he
1284 wishes." Parallel interpretation of present Rule 62(d) would read
1285 it to mean that all discretion resides in the judgment debtor, who
1286 has categorical permission to obtain a stay on posting suitable
1287 security.

1288 It was noted that Appellate Rule 8(a)(1) directs that a party
1289 must ordinarily move first in the district court for a stay pending
1290 appeal or approval of a supersedeas bond. But Rule 8(a)(2)
1291 authorizes a motion in the court of appeals if it is impracticable
1292 to move first in the district court, or if the district court
1293 denied the motion or failed to afford the relief requested. Rule
1294 8(a)(2)(E) says blandly that the court of appeals "may condition
1295 relief on a party's filing a bond or other appropriate security."
1296 This locution clearly recognizes appellate discretion to deny any
1297 stay - as seems almost inevitable if application has been made to
1298 the district court and denied - and to grant a stay without
1299 security.

1300 It was suggested that district courts have authority now to
1301 order a stay without any security, but that it may be unwise to
1302 emphasize that authority by explicit rule text.

1303 A tentative solution was suggested: the draft should be

January 11, 2016 draft

1304 shortened by deleting subdivisions (b) and (c). Subdivision (b)
1305 reads: "The court may, for good cause, refuse a stay under Rule
1306 62(a)(2) or dissolve a stay or modify its terms." Subdivision (c)
1307 reads: "The court may, on entering a stay or on refusing or
1308 dissolving a stay, require and set appropriate terms for security
1309 or deny security." The final words of (c) would be transferred to
1310 paragraph (a)(3): "The court may at any time order a stay that
1311 remains in effect until a time designated by the court[, which may
1312 be as late as issuance of the mandate on appeal,] and set
1313 appropriate terms for security or deny security.

1314 A separate issue was raised. The draft rule does not describe
1315 the appeal bond as a "supersedeas" bond. It was agreed that it
1316 would be better to move away from that antique-sounding word. But
1317 "supersedeas" appears in Appellate Rule 8(a)(1)(B), most likely
1318 because it directs that application for a stay be made first to the
1319 district court. (Appellate Rule 8(a)(2)(E) is simpler – it refers
1320 only to conditioning a stay on "a bond or other appropriate
1321 security.") The Bankruptcy Rules also refer to a supersedeas bond.
1322 It would be good to strike the word from each set of rules.

1323 Discussion concluded with the suggestion that the proposed
1324 rule should be simplified along the lines indicated above. The
1325 practicing lawyers on the Appellate Rules Committee believe there
1326 is a nearly absolute right to a stay on posting an adequate bond or
1327 other security. No one is pressing for revision. If the rule is
1328 amended to authorize the court to deny a stay by posting bond, even
1329 if the court must find good cause to deny the stay, there will be
1330 an increase in arguments seeking immediate execution. And it will
1331 be difficult to implement the good-cause concept. Imagine one
1332 simple argument: The judgment creditor is 85 years old and wants
1333 the chance to enjoy the fruits of judgment in this life time.

1334 Judge Matheson agreed that the Subcommittee will reconsider
1335 these problems in light of the discussion here and in the Appellate
1336 Rules Committee.

1337 *e-Rules*

1338 The Committee was reminded of the recent history of work on
1339 the rules for electronic filing, electronic service, and use of the
1340 Notice of Electronic Filing as a certificate of service. Last
1341 April, this Committee voted to recommend publication of a set of
1342 rules amendments addressing these topics. The Criminal Rules
1343 Committee, however, decided at the same time that the time has come
1344 to write independent provisions for these topics into Criminal Rule
1345 49. Rule 49 currently incorporates the practice of the civil rules
1346 for filing and service. Their project is designed to avoid
1347 cumbersome cross-references between different sets of rules, and

January 11, 2016 draft

1348 also to determine whether differences in the circumstances of
1349 criminal prosecutions justify differences in the filing and service
1350 provisions. Brief discussions led to modifications in the Civil
1351 Rules provisions that were presented to the Standing Committee for
1352 discussion. The revised provisions are included in the agenda
1353 materials for this meeting. This Committee did not recommend
1354 publication at the May Standing Committee meeting. The Criminal
1355 Rules Committee continues to work on its new Rule 49. A conference
1356 call of the Criminal Rules Subcommittee will be held on November
1357 13; representatives of this Committee will participate.

1358 The goal of this undertaking is to work toward common
1359 proposals on all topics that merit uniform treatment across the
1360 different sets of rules. That goal leaves the way open to different
1361 treatment of topics that warrant different treatment in light of
1362 differences in the circumstances that confront the different sets
1363 of rules. The parallel proposals for the Appellate Rules already
1364 include some variations that integrate these subjects with the
1365 structure of the Appellate Rules. So it may be that the Criminal
1366 Rules Committee will find that criminal prosecutions deserve
1367 different treatment of some aspects of electronic filing and
1368 service.

1369 One of the topics that has been discussed is access to
1370 electronic filing and service by pro se litigants. The Civil Rules
1371 proposals reflect a belief that a pro se litigant, the court, and
1372 all other parties may benefit from allowing electronic filing and
1373 service by a pro se litigant. The question is how to manage this
1374 practice. It may be that uniform provisions are suitable for all
1375 sets of rules. It may be that different approaches are desirable.
1376 These questions will be addressed as all committees work toward
1377 final proposals for publication. One committee member noted that
1378 her court has had difficulty with local rules that track each other
1379 for pro se litigants in criminal and civil proceedings – the
1380 problems really are different.

1381 Once decisions are reached as to the appropriate level of
1382 substantive uniformity, style questions will remain. It will be
1383 important to work out style questions with the help of the style
1384 consultants so as to avoid any occasion for asking the Standing
1385 Committee to resolve any differences.

1386 *Pilot Projects*

1387 Judge Bates opened the discussion of pilot projects by asking
1388 Judge Campbell, who has chaired the pilot projects committee, to
1389 report on the committee's work.

1390 Judge Campbell began by noting that many people have worked in

January 11, 2016 draft

1391 the effort to advance consideration of pilot project proposals.

1392 The interest in pilot projects was stimulated by experience in
1393 attempting to translate the lessons offered at the 2010 Conference
1394 into specific rules proposals. There are limits to what can be
1395 accomplished by rules. If a page of history is worth a volume of
1396 logic, the purpose of pilot projects may be to create pages of
1397 history by actual experience in testing new approaches. One result
1398 may be rules amendments. But pilot projects may provide valuable
1399 lessons that are implemented in other ways. The Committee on Court
1400 Administration and Case Management may find valuable practices that
1401 it can foster through its work. The Judicial Conference may gain
1402 similar benefits. It may be that approaches that have been tested
1403 and found valuable will be adopted by emulation without the need
1404 for formal action by any committee.

1405 For the rules committees, the immediate plan is to prepare
1406 concrete proposals for possible pilot projects that can be
1407 discussed with the Committee on Court Administration and Case
1408 Management and with the Standing Committee this coming spring. The
1409 goal will be to identify one or more projects that could be
1410 implemented late in 2016.

1411 One informal pilot project, the protocols for initial
1412 discovery in individual employment actions, is already being
1413 studied. Emery Lee at the FJC has been tracking experience.

1414 Emery Lee reported that the first thing he learned was that
1415 the employment protocols are being used by more judges than he had
1416 thought. He has identified 70 judges that are using them. Drawing
1417 on cases that have concluded since 2011, he identified some 500
1418 terminated cases. He drew a random sample of cases that did not use
1419 the protocols during the same period. Overall, he studied data on
1420 1,150 cases.

1421 The positive lesson is that there are fewer discovery motions
1422 in protocol cases: motions were made in 12% of these cases, as
1423 compared to 21% of the comparison cases. The average number of
1424 motions made was half as many in the protocol cases. "That is a big
1425 number." The number suggests that the protocols made an important
1426 difference. But it is not possible to draw firm conclusions because
1427 the judges who choose to adopt the protocols may be judges who are
1428 actively engaged in managing discovery in any event.

1429 The negative lesson is that the time to disposition appears to
1430 be essentially identical in protocol cases and in non-protocol
1431 cases. The essential identity held true for the time taken to reach
1432 disposition by different methods – by motion to dismiss or by
1433 summary judgment. The time to settlement, however, appears to be

January 11, 2016 draft

1434 different. The identity of times to disposition is puzzling.

1435 The first comment was made by a judge who requires a request
1436 for a conference before a motion can be made. That may be happening
1437 in the employment cases – the same number of discovery disputes
1438 arise, but many of them are resolved at the pre-motion conference,
1439 reducing the number of motions.

1440 A second comment was that the times to disposition may track
1441 closely if courts set the same discovery cut-off time in protocol
1442 cases as in non-protocol cases. The timing of dispositive motions
1443 tends to feed off the discovery cut-off.

1444 Another judge offered a guess that protocol judges are likely
1445 to be "more progressive – to require a conference before a
1446 discovery motion can be made." But he uses the protocols, and
1447 thinks he is seeing fewer discovery disputes. "They don't fight
1448 over things they used to fight over because of automatic
1449 disclosures." As one example: confronted with a request to identify
1450 the person who made the decision to terminate a plaintiff,
1451 defendants used to argue that the information was protected by work
1452 product. It is not protected, but the argument had to be resolved.
1453 Now the information is automatically disclosed and there is no
1454 dispute.

1455 Yet another judge said that lawyers use the protocols and
1456 "play nicely together." The similarity in times to disposition is
1457 probably because the case schedules are not changed.

1458 Discussion turned to pilot projects in general. Various pilot
1459 projects aimed at reducing cost and delay have been identified in
1460 eleven states. Before that, the Civil Justice Reform Act stimulated
1461 a massive set of local experiments. The Conference of Chief
1462 Justices is working on a Civil Justice Improvement Project. The
1463 Institute for the Advancement of the American Legal System has
1464 studied several pilot projects, and recommended principles to
1465 improve civil litigation. The National Center for State Courts has
1466 evaluated some projects. Projects are upcoming in Texas and
1467 Minnesota. New York State is developing a program that is aimed at
1468 trading early trial dates for curtailed pretrial procedure.

1469 One possible pilot project that has drawn attention is the one
1470 that would involve some form of expanded initial discovery, perhaps
1471 moving beyond the form embodied by Civil Rule 26(a) (1) between 1993
1472 and 2000 to a model drawn from the Arizona rule.

1473 Other possibilities focus on assigning cases to different
1474 tracks that embody different levels of pretrial procedure, as many
1475 of the CJRA plans attempted. One problem that has confronted these

January 11, 2016 draft

1476 programs has been identification of criteria for assigning cases to
1477 the different tracks. When dollar limits are set, lawyers tend to
1478 plead around them. Other criteria become difficult to manage.

1479 A quite different approach would forgo formal experiments with
1480 new procedures to focus on training. The FJC study of the CJRA
1481 experiments confirmed that time to disposition can be reduced by a
1482 combination that includes early judicial case management, shorter
1483 discovery cut-offs, and early setting of a firm trial date. This
1484 learning could be demonstrated by a quasi-pilot project that trains
1485 judges in a district, gathers statistics, measures the progress of
1486 judges in reducing times to disposition, and seeks to persuade
1487 other judges of the value of these practices. Emery Lee noted that
1488 gathering information on individual judge performance can be
1489 sensitive. But the RAND study shows that there is real value. We
1490 know it is there.

1491 A Committee member noted that he does a lot of arbitrations as
1492 an arbitrator, usually as a neutral member. "There is a convergence
1493 of what happens in arbitration with civil litigation." In
1494 arbitration, you get only the discovery the arbitrator orders. So
1495 a lawyer may request 10 depositions; the order is to come back
1496 after talking with the client about the cost. The next request is
1497 for one deposition. "People sign up for this." "At the Rule 16
1498 conference you quickly learn what the case is about." The idea of
1499 training judges is terrific. But we have to be able to distinguish
1500 cases for tracking purposes – small cases have to be dealt with
1501 differently. And they must be identified early. Tracking can work.
1502 Arbitration hearing dates tend to be quite firm because they must
1503 coordinate the schedules of 8, 9, 10 different people – a missed
1504 date may push the next hearing back by half a year.

1505 A judge noted that before he became a judge he was a member of
1506 the CJRA committee for his district. "We're still doing tracking."
1507 But "I can't say whether it's good or bad." Lawyers are required to
1508 address tracking in their Rule 26(f) conference. Then they discuss
1509 it with the judge. There are five tracks: expedited, standard,
1510 complex, mass tort, and administrative.

1511 Another judge reported that "tracking works." For example, he
1512 reduces the time for discovery in FDCA cases and reduces the number
1513 of discovery events.

1514 The same judge then asked how does the Arizona initial
1515 disclosure of legal theories relate to practice on motions to
1516 dismiss for failure to state a claim? Judge Campbell suggested that
1517 it does not seem to have made a significant change.

1518 A broader perspective was suggested. The RAND study of CJRA

January 11, 2016 draft

1519 experience was expensive. We should focus on what we can try to do,
1520 and on what resources are available. Comparing pilot projects in
1521 some districts with others can be interesting, but "we do not have
1522 a lot of resources for data-driven projects." Pilot projects,
1523 however, "can be about norm changing." None of the suggested
1524 projects embodies an idea that is strong enough to be adopted
1525 without testing in a national rule that binds all 94 districts.
1526 Instead, we can find 5 or 10 districts to implement known good
1527 ideas. The hope will be that they will like the experience, carry
1528 on with it, and perhaps encourage other districts to emulate their
1529 experience. A similar comment suggested that it may be more
1530 effective to develop ideas, label them as best practices or
1531 innovations, and then draw attention to successful adoptions. But
1532 another judge expressed doubt whether "it catches on that way among
1533 judges." A different judge, however, thought that judges will be
1534 willing to adopt a practice when they become convinced that it will
1535 help move cases effectively. The question "is how to get people off
1536 the mark." A more specific suggestion was that "we can convince
1537 people to have a pre-motion telephone conference."

1538 Federal Judicial Center training of all judges may be another
1539 means of fostering ideas that have proved out in one or a few
1540 districts.

1541 A judge suggested that the idea of pilots is to test ideas,
1542 such as initial disclosure. Initial disclosure can be tested to see
1543 how it affects the number of motions, the time to disposition, and
1544 other variables. The Committee on Court Administration and Case
1545 Management will meet to discuss these same pilot-project ideas in
1546 December. They support work on this. It was agreed that involving
1547 "CACM" is essential. If they identify districts that have long
1548 times to disposition, they can help to focus enhanced training
1549 there. And it may be possible to measure the results.

1550 A suggestion from an absent member was relayed: "Why are we
1551 thinking of small cases"? We need fact pleading, short discovery,
1552 and firm trial dates in all cases. "Do we need two rounds of
1553 pleading in every case"? Unlimited discovery? State courts working
1554 along these lines are achieving cheaper, faster resolutions. "We
1555 should be driving toward pretty radical rule change."

1556 Another judge noted that it is difficult to measure
1557 achievement of the "just" aspiration expressed in Rule 1. But it is
1558 possible to measure satisfaction of the parties, and that may be a
1559 good thing to study.

1560 The initial disclosure proposal came on for more detailed
1561 discussion. This model aims at "robust, but not aggressive"
1562 disclosure. It works from the Arizona model, but reduces the level

January 11, 2016 draft

1563 of required disclosures in several dimensions.

1564 The first question asked why the model requires only
1565 identification of categories of relevant documents, rather than
1566 actual production. The Arizona rule requires actual production
1567 unless the documents are voluminous. Arizona lawyers report that
1568 the rule operates as a presumption for production of particular
1569 documents. The response was that the model reflects concern that
1570 too much burden will be imposed by requiring actual production at
1571 the outset of an action, particularly if that were added to the
1572 obligation to identify witnesses, the fact basis for claims and
1573 defenses, and legal theory. To be sure, not much is accomplished by
1574 disclosing that relevant information can be found in such
1575 categories as "personnel files," "R & D files," or the like. But
1576 the parties can figure out where to start discovery by other means.
1577 Still, this question is open to further consideration if this model
1578 moves toward testing in a pilot project.

1579 Initial disclosure was viewed from an expanded perspective.
1580 The bar was not ready for the 1993 rule that required disclosure of
1581 information unfavorable to the disclosing party. "The Arizona
1582 experience may not convince" federal judges in 49 other states. It
1583 would be difficult to move directly to adopting a rule that
1584 embodies the Arizona practice. But if it works in 5 or 10 pilot
1585 districts, there could be support for adopting a national practice.

1586 A member reported work on a CJRA committee that adopted an
1587 initial disclosure rule. "It failed. Lawyers weren't ready." But
1588 the "pilot project" label may not be effective in selling a
1589 program. We want to test ideas to see whether they work. We need
1590 something that facilitates culture change. Seeing that something
1591 actually works can do a lot.

1592 A truly pointed question was asked: (a) (2) and (a) (2) (A) of
1593 the model require disclosing:

1594 (2) whether or not the disclosing party intends to use
1595 them in presenting its claims or defenses:

1596 (A) the names and addresses of all persons whom the
1597 party believes may have knowledge or information
1598 relevant to the events, transactions, or
1599 occurrences that gave rise to the action * * *.

1600 Just what is intended? The purpose is to require disclosure of
1601 information unfavorable to the disclosing party – it is enough that
1602 the information is relevant to the events, etc.

1603 The alternative of judge training programs came back for

January 11, 2016 draft

1604 expanded discussion with the question whether it is a fool's
1605 errand. A judge responded that there are some judges who will
1606 resist training. But overall, training can do more than can be done
1607 by rules. Still, it would be a mistake to adopt a pilot that forces
1608 all judges into training. Another judge said that newer judges are
1609 particularly likely to want to take training in subjects they do
1610 not know well. But forcing it will not work. Still another judge
1611 agreed that new judges are more amenable to this sort of training.

1612 "Baby judges school" also was noted, but it was suggested that
1613 new judges are still so new at this point that the school cannot do
1614 the job of more focused and advanced programs. And in any event,
1615 "I'm not sure the problem is newer judges." However that may be,
1616 the training has to be meaningful. It will not work just to tell us
1617 judges that early case management is important. "Tell me how to
1618 make it happen."

1619 A similar perspective was offered. "The important thing is to
1620 move from the abstract to the concrete." "Here's what actually
1621 works": A phone call on a 3-page statement of a motion to dismiss
1622 leads to an amended complaint. If the motion is renewed, whatever
1623 is dismissed is with prejudice. The ideas must be packaged in a way
1624 that makes it easier for the judge to do it.

1625 So it was noted that "we learn more in gatherings of judges
1626 where we talk together." Mid-career judges help newer judges in
1627 informal exchanges that often are more useful than formal training
1628 programs. So one promising approach may be to go to the districts
1629 to get the local judges talking among themselves about topics they
1630 would not "fly to D.C. to learn about."

1631 Other questions were raised about pilot projects. "We know a
1632 lot about what works." A pilot project will take 3 or 4 years in
1633 practice. Then it will have to be evaluated. And the result may be
1634 a simple message that it works better with more judge involvement.

1635 One note of frustration was expressed. In many districts the
1636 district judges refer all pretrial matters to magistrate judges,
1637 but do not set trial dates. The magistrate judge can move cases,
1638 but the district judge has to be involved.

1639 It was noted that sometimes a pilot project will not be able
1640 to enlist every judge in a district. It may be necessary to look
1641 for judges. The Administrative Office can tell a district whether
1642 it is moving faster or slower than the national average. "It's a
1643 question of putting the resources in the right place."

1644 A final suggestion was that it could be useful to get on the
1645 agenda of the Chief District Judges conference.

January 11, 2016 draft

1646

New Docket Items

1647

15-CV-C

1648 This suggestion protests the overuse of "objection as to form"
1649 during oral depositions. The proposed remedy is to create a
1650 Committee Note "indicating that it is improper to merely object to
1651 'form' without providing more precise information as to how the
1652 question asked is 'defective as to form' (e.g., compound, leading,
1653 assumes facts not in evidence, etc.)."

1654 It is well established that a Committee Note can be written
1655 only as part of the process of adopting or amending a rule. Rule
1656 30(c)(2) could be amended to say something like this: "An objection
1657 must be stated in a nonargumentative and nonsuggestive manner that
1658 reasonably explains the basis of the objection." But the Committee
1659 concluded that any revisions of the rule text are unlikely to
1660 change behavior for the better, and might easily create more
1661 problems than would be solved.

1662 This suggestion was removed from the docket.

1663

15-CV-E

1664 This suggestion addresses the time to file a responsive
1665 pleading when a Rule 12(b)(6) motion to dismiss addresses only part
1666 of a complaint or when the motion is converted to a motion for
1667 summary judgment. The concern is that some courts rule that the
1668 time to respond is suspended by Rule 12(a)(4) only as to the parts
1669 of the complaint challenged by the motion; an answer must be filed
1670 as to the remainder of the complaint. The same problem can persist
1671 if the motion to dismiss is converted to a motion for summary
1672 judgment.

1673 It is urged that it is better to suspend the time to respond
1674 as to the entire complaint. This practice avoids duplicative
1675 pleadings and confusion over the proper scope of discovery. Many
1676 cases support it.

1677 Discussion revealed that even though many cases support the
1678 suggested approach, not all judges follow it. One Committee member
1679 reported that some judges in his home district require a response
1680 to the parts of a pleading not addressed by the motion, even though
1681 the time to respond is suspended as to the parts addressed by the
1682 motion. There is some reason for concern.

1683 Despite these possible concerns, the Committee concluded that
1684 there is not yet evidence of a problem so general as to warrant
1685 amending the rules. This suggestion will be removed from the

January 11, 2016 draft

1686 docket, although without any purpose to suggest that it should not
1687 be considered further if a general problem is shown.

1688 **15-CV-X**

1689 This suggestion raises two or three issues.

1690 One suggestion is that Rule 45 should be revised to extend the
1691 reach of trial subpoenas so as "to force a representative of a non-
1692 resident corporate defendant to appear at trial in the court that
1693 has jurisdiction over the parties and the case." This question was
1694 thoroughly explored in working through the recent amendments of
1695 Rule 45. A proposal similar to this one was published for comment,
1696 albeit without any recommendation that it be adopted. No sufficient
1697 reasons are offered to justify reexamination now.

1698 A second suggestion would adopt the procedure of Rule 30(b)(6)
1699 for trial subpoenas. A trial subpoena could name an entity as
1700 witness and direct the entity to produce one or more real persons
1701 to testify for the entity. Discussion noted that Rule 30(b)(6)
1702 itself has been examined twice in the recent past. Each time the
1703 Committee found problems in practice, but concluded that the
1704 problems were not sufficiently pervasive to justify amending the
1705 rule. It was concluded that however well Rule 30(b)(6) works for
1706 discovery, extending it to trial would generate additional problems
1707 that could become serious.

1708 The suggestion also might be read to urge that a nonparty
1709 entity be required to produce witnesses to testify at a deposition
1710 in the district where an action is pending.

1711 The Committee concluded that this set of suggestions should be
1712 removed from the docket.

1713 **15-CV-EE**

1714 This submission offers four discrete suggestions, all of which
1715 touch on other sets of rules in addition to the Civil Rules.

1716 The first suggestion is to amend Rule 5.2(a)(1). The rule now
1717 permits disclosure in a filing of the last four digits of the
1718 social-security number and taxpayer-identification number. The
1719 suggestion is that no part of these numbers be disclosed. The
1720 reason is that the method of generating social security numbers
1721 relies on a well-known formula that, together with additional
1722 information about a person that is often readily available, can be
1723 used to reconstruct the full number. This phenomenon was considered
1724 by the joint subcommittee that drafted Rule 5.2 and the parallel
1725 Appellate, Bankruptcy, and Criminal Rules. The decision to allow

January 11, 2016 draft

1726 filing the last four digits was made because this information was
1727 thought important for the Bankruptcy Rules. A preliminary inquiry
1728 suggests that this information may remain important for bankruptcy
1729 purposes. This suggestion will be carried forward for consultation
1730 with the other advisory committees.

1731 The second suggestion is that any affidavit made to support a
1732 motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed
1733 under seal and reviewed ex parte. The court could order disclosure
1734 to another party for good cause and under a protective order, or
1735 permit unsealing in appropriately redacted form. The concern seems
1736 to be to protect privacy interests. Again, the other advisory
1737 committees are involved. Brief discussion suggested that filing
1738 under seal is not a general practice now. One judge says that he
1739 does not order sealing because it imposes costly burdens on the
1740 court. Another participant suggested that i.f.p. disclosures
1741 generally invade privacy only to the extent of disclosing a lack of
1742 financial resources, a state that could be inferred from a grant of
1743 in forma pauperis permission in any event. This suggestion too will
1744 be carried forward for consultation with other advisory committees.

1745 The third suggestion is for a new Rule 7.2. It is modeled on
1746 a local rule for the Eastern and Southern Districts of New York. It
1747 would address citation by counsel of cases or other authorities
1748 "that are unpublished or reported exclusively on computerized data
1749 bases." Counsel who cites such authority would be required to
1750 provide copies to a pro se litigant. In addition, on request,
1751 counsel would be required to provide copies of such cases or
1752 authorities that are cited by the court if they were not previously
1753 cited by counsel. Discussion began by asking whether other courts
1754 have local rules similar to the E.D. & S.D.N.Y. rule; no one had
1755 information to respond. A judge noted that he makes copies
1756 available when he cites unpublished authority. A lawyer suggested
1757 that Assistant United States Attorneys seem to do this in some
1758 districts. It was suggested that some way might be found to
1759 encourage this as a best practice. A note of this suggestion will
1760 be sent to the head of the FJC. But it was concluded that this
1761 practice involves a detail of practice that need not be enshrined
1762 in the Civil Rules.

1763 The final suggestion is that pro se litigants should be
1764 permitted, but not required, to file by paper, and should be
1765 permitted to qualify for e-filing and service to avoid burdens that
1766 other parties do not have to bear. These questions are being
1767 actively considered by several advisory committees, as noted during
1768 earlier parts of this meeting. They will continue to be considered.

1769 **Pre-Motion Conference: Rule 56**

January 11, 2016 draft

1770 Judge Jack Zouhary, a member of the Standing Committee, has
1771 offered an informal suggestion that this Committee consider the
1772 practice of requiring a party to request a conference with the
1773 court before making a motion for summary judgment. He follows that
1774 practice, and finds that it has many benefits.

1775 The benefits that may be realized by pre-motion conference
1776 include these possibilities: The movant may decide not to make the
1777 motion, or may focus it better by omitting issues that are
1778 genuinely disputed. The nonmovant may realize that some issues are
1779 not genuinely disputed or are not material. Discussion in the
1780 conference may lead the parties to a better understanding of the
1781 facts, the law, or both. A conference with the court may work
1782 better than a conference of the parties alone. The court may not
1783 use the conference to deny permission to make the motion – Rule 56
1784 establishes a right to move. But the court can suggest and advise.

1785 Similar advantages can be gained by holding a conference with
1786 the court before other motions are made. These advantages were
1787 discussed in developing the package of case-management amendments
1788 now pending in Congress. The result of those deliberations is to
1789 add a new Rule 16(b)(3)(B)(v), which provides that a scheduling
1790 order may "direct that before moving for an order relating to
1791 discovery, the movant must request a conference with the court."
1792 This provision was limited to discovery motions in a spirit of
1793 conservatism in adding details to the rules. It was recognized that
1794 many courts require pre-motion conferences for motions other than
1795 discovery motions, including summary-judgment motions. But it also
1796 was recognized that some judges do not. One step was to reject any
1797 general requirement – the new Rule 16(b) provision serves simply as
1798 a reminder and perhaps as an encouragement.

1799 It would be easy enough to expand pending Rule 16(b)(3)(B)(v)
1800 to encompass summary-judgment motions. It would authorize a
1801 scheduling-order provision that "direct[s] that before moving for
1802 an order relating to discovery or for summary judgment, the movant
1803 must request a conference with the court." Or Rule 56(b) could be
1804 amended to mandate this procedure: "a party may, after requesting
1805 a conference with the court, file a motion for summary judgment at
1806 any time until 30 days after the close of all discovery."

1807 Discussion began with a judge who requires a pre-motion
1808 conference for "all sorts of motions." This practice has many
1809 benefits. Recognizing that some judges would oppose a mandate, why
1810 not expand Rule 16(b) to encompass not only discovery but any
1811 "substantive" motion?

1812 Another judge thought the underlying idea is good. "But we
1813 have just been through one round of amendments. We did it

January 11, 2016 draft

1814 carefully." We can find a way to recommend pre-motion conferences
1815 as a best practice, but should wait before suggesting another rule
1816 amendment. And then we will need to think about how broadly the
1817 rule should apply. For example, is there a sufficiently clear
1818 concept of what is a "substantive motion" to support use of that
1819 term in rule text?

1820 A lawyer noted that the AAA rules used to provide for summary
1821 disposition in general terms. The rules were amended to require
1822 permission of the arbitrator before making the motion. As an
1823 arbitrator, he has denied permission when the motion seemed
1824 inappropriate. That is not to suggest that a judge be authorized to
1825 deny leave to make a summary-judgment motion, but requiring a
1826 conference would give the judge an opportunity to observe that a
1827 motion would not have much chance of succeeding.

1828 The discussion concluded by determining to hold this
1829 suggestion open, without moving forward now.

1830 **Rules 81, 58**

1831 Two additional items were included in the agenda materials.
1832 One addresses the provisions of Rule 81(c) that govern demands for
1833 jury trial in an action that has been removed from state court. The
1834 other addresses the Rule 58 requirement that a judgment be entered
1835 in a "separate document." These items will be carried forward on
the agenda.

Respectfully submitted,

Edward H. Cooper
Reporter

January 11, 2016 draft

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TAB 3

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Legislative Activity

Item 3 will be an oral report.

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I. Rules Proposed for Publication
A. Rule 23: Class Actions

Rule 23 Subcommittee Report

At the Advisory Committee's November 2015 meeting, the Rule 23 Subcommittee presented its sketches of possible rule amendments to address six issues. It also recommended that certain issues it had examined be dropped from its current agenda, and that others be put "on hold" pending developments.

Since the November meeting, the Subcommittee has continued to work on these six issues. It has also added an issue mentioned by the Department of Justice during the November meeting -- extending the time for the Government to decide whether to take an appeal under Rule 23(f). This work has included six conference calls and a presentation at the January 2016 meeting of the Standing Committee. Notes of the six conference calls (on Nov. 16, 2015, Nov. 23, 2015, Jan. 19, 2016, Jan. 29, 2016, Feb. 5, 2016, and Feb. 10, 2016) are included in this agenda book.

The Subcommittee now proposes that the package of amendments addressing these issues be forwarded to the Standing Committee with a recommendation that they be published for public comment. That recommendation is contained in Part I of this report.

Since the Advisory Committee's last meeting, the Subcommittee has refined several of the items presented at the Advisory Committee's last meeting. In particular, after discussions with the Standing Committee and extensive help from Judge Colloton (Chair, Appellate Rules Committee) and Prof. Maggs (Reporter, Appellate Rules Committee), it has identified what it regards as the preferred method of addressing the issue of problem objectors to class-action settlements. As set forth below, it has decided to endorse the "simple" approach of proceeding with only a change to the civil rules. It is expected that the topic of class-action objector appeals will be on the agenda for the April meeting of the Appellate Rules Committee, and that a report on the results of that discussion can be made during the Civil Rules meeting in Palm Beach.

Part II below is an informational report on other issues that are "on hold." One significant development has been the Supreme Court's decision in a case involving what have come to be called the "pick-off" issues. In the wake of that decision, discussion has continued to focus on amendment ideas included in the Subcommittee's mini-conference in September 2015, but has also prompted a new idea -- providing explicitly in Rule 23 that when a proposed class representative is unable to serve (whether due to mootness or another reason) class counsel should have an opportunity to locate and present a substitute representative. The Subcommittee has begun to work through the sketches of rule provisions that might address these issues. The most recent

sketches are included in an Appendix to the notes of the Feb. 10, 2016, conference call, included in this agenda book.

At the April meeting of the full Committee, the Subcommittee does not propose detailed discussion of these sketches. Instead, it hopes to explore the general issues, including whether it appears that the pick-off efforts have continued to occur since the Supreme Court's decision in January 2016. It is particularly interested in receiving reactions to its one new idea -- enabling class counsel to seek a replacement class representative if the original class representative cannot serve.

The other informational issue is what has come to be known as the "ascertainability" question. One pending petition for certiorari raises that issue, and two cases not yet decided by the Supreme Court may also have some potential relevance.

The Subcommittee does not recommend proceeding with amendments regarding these "on hold" issues at this time, but it does recommend retaining them on its current agenda for further study. For that purpose, it invites reactions and ideas about the matters it continues to study.

**I. ACTION ITEM: THE CURRENT PRELIMINARY DRAFT PACKAGE
RECOMMENDED FOR TRANSMITTAL TO THE STANDING COMMITTEE**

The Subcommittee recommends that the Advisory Committee forward the following preliminary draft of proposed amendments to Rule 23 to the Standing Committee for publication for public comment. These are the six items presented during the Committee's November 2015 meeting, plus a further change to Rule 23(f) (mentioned during that meeting) extending the time for the United States to seek review.

[The draft rule language below has been reviewed by the Standing Committee Style Consultants, and revised in response to their recommendations. One remaining language issue is mentioned in a footnote below, with the suggestion that the Advisory Committee support the Subcommittee's unanimous view on this question.]

Rule 23. Class Actions

* * * * *

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

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11 (2) **Notice.**

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13
14
15 (B) *For (b) (3) Classes.* For any class certified
16 under Rule 23(b) (3) -- or upon ordering notice
17 under Rule 23(e) (1) to a class proposed to be
18 certified for purposes of settlement under
19 Rule 23(b) (3) -- the court must direct to
20 class members the best notice that is
21 practicable under the circumstances, by United
22 States mail, electronic means or other
23 appropriate means. The notice must include
24 ~~including~~ individual notice to all members who
25 can be identified through reasonable effort. *
26 * * * *

27 * * * * *

28
29
30 (e) **Settlement, Voluntary Dismissal, or Compromise.** The
31 claims, issues, or defenses of a certified class -- or a
32 class proposed to be certified for purposes of settlement
33 -- may be settled, voluntarily dismissed, or compromised
34 only with the court's approval. The following procedures
35 apply to a proposed settlement, voluntary dismissal, or
36 compromise:

37
38 (1) Notice to the class

39
40 (A) Information Parties Must Provide to the Court.
41 The parties must provide the court with
42 sufficient¹ information to enable it to
43 determine whether to give notice of the
44 proposal to the class.

45
46 (B) Grounds for Decision to Give Notice. The
47 court must direct notice in a reasonable
48 manner to all class members who would be bound
49 by the proposal if giving notice is justified
50 by the parties' showing that the court will
51 likely be able to:

52
53 (i) approve the proposal under Rule 23(e) (2);
54 and

¹ The Standing Committee Style Consultants suggested substituting "enough" for "sufficient" in (e) (1) (A). The Subcommittee developed this rule language after substantial discussions. It unanimously rejected the Style Consultants' substitute language, believing that "sufficient" carries pertinent connotations for the bench and bar. A clear choice by the Advisory Committee will be welcome.

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- (ii) certify the class for purposes of judgment on the proposal.
- (2) Approval of the proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:-

 - (A) the class representatives and class counsel have adequately represented the class;
 - (B) the proposal was negotiated at arm's length;
 - (C) the relief provided for the class is adequate, taking into account:

 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
 - (iii) the terms of any proposed attorney-fee award, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e) (3); and
 - (D) class members are treated equitably relative to each other.
- (3) Identification of Side Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) New Opportunity to Be Excluded. If the class was previously certified under Rule 23(e) (2), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) Class-member Objections.

 - (A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ The objection must state whether it applies only to the objector, to a specific subset of

108 the class, or to the entire class, and also
109 state with specificity the grounds for the
110 objection.

111 **(B)** Court Approval Required for Payment to an
112 Objector or Objector's Counsel. Unless
113 approved by the court after a hearing, no
114 payment or other consideration may be provided
115 to an objector or objector's counsel in
116 connection with:

117
118 **(i)** forgoing or withdrawing an objection, or

119
120 **(ii)** forgoing, dismissing, or abandoning an
121 appeal from a judgment approving the
122 proposal.

123 * * * * *

124
125
126 **(f) Appeals.** A court of appeals may permit an appeal from an
127 order granting or denying class-action certification
128 under this rule, but not from an order under Rule
129 23(e) (1). if a petition for to appeal is filed A party
130 must file a petition for permission to appeal with the
131 circuit clerk within 14 days after the order is entered,
132 or within 45 days after the order is entered if any party
133 is the United States, a United States agency, or a United
134 States officer or employee sued for an act or omission
135 occurring in connection with duties performed on the
136 United States' behalf. An appeal does not stay
137 proceedings in the district court unless the district
judge or the court of appeals so orders.

COMMITTEE NOTE

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

4
5 **Subdivision (c) (2).** As amended, Rule 23(e) (1) provides that
6 the court must direct notice to the class regarding a proposed
7 class-action settlement only after determining that the prospect of
8 class certification and approval of the proposed settlement
9 justifies giving notice. This decision is sometimes inaccurately
10 called "preliminary approval" of the proposed class certification
11 in Rule 23(b) (3) actions, and it is common to send notice to the
12 class simultaneously under both Rule 23(e) (1) and Rule 23(c) (2) (B),
13 including a provision for class members to decide by a certain date
14 whether to opt out. This amendment recognizes the propriety of
15 this notice practice. Requiring repeat notices to the class can be
16 wasteful and confusing to class members.

17
18 Subdivision (c) (2) is also amended to recognize contemporary
19 methods of giving notice to class members. Since Eisen v. Carlisle

20 & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice
21 requirement for class members in Rule 23(b)(3) class actions, many
22 courts read the rule to require notice by first class mail in every
23 case. But technological change since 1974 has meant that other
24 forms of communication are more reliable and important to many.
25 Courts and counsel have begun to employ new technology to make
26 notice more effective, and sometimes less costly. Because there is
27 no reason to expect that technological change will halt soon,
28 courts giving notice under this rule should consider existing
29 technology, including class members' likely access to such
30 technology, when selecting a method of giving notice.

31
32 Rule 23(c)(2)(B) is amended to take account of these changes,
33 and to call attention to them. The rule calls for giving class
34 members "the best notice that is practicable." It does not specify
35 any particular means as preferred. Although it may often be true
36 that electronic methods of notice, for example by email, are the
37 most promising, it is important to keep in mind that a significant
38 portion of class members in certain cases may have limited or no
39 access to email or the Internet. Instead of preferring any one
40 means of notice, therefore, courts and counsel should focus on the
41 means most likely to be effective in the case before the court.
42 The amended rule emphasizes that the court must exercise its
43 discretion to select appropriate means of giving notice. In
44 providing the court with sufficient information to enable it to
45 decide whether to give notice to the class of a proposed class-
46 action settlement under Rule 23(e)(1), it may often be important to
47 include a report about the proposed method of giving notice to the
48 class.

49
50 Professional claims administration firms have become expert in
51 evaluating differing methods of reaching class members. There is
52 no requirement that such professional guidance be sought in every
53 case, but in appropriate cases it may be an important resource for
54 the court and counsel.

55
56 In determining whether the proposed means of giving notice is
57 appropriate, the court should give careful attention to the content
58 and format of the notice and, if this notice is given under Rule
59 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members
60 must submit to obtain relief. Particularly if the notice is by
61 electronic means, care is necessary not only regarding access to
62 online resources, but also the manner of presentation and any
63 response expected of class members. As the rule directs, the means
64 should be the "best * * * that is practicable" in the given case.
65 The ultimate goal of giving notice is to enable class members to
66 make informed decisions about whether to opt out or, in instances
67 where a proposed settlement is involved, to object or to make
68 claims. Means, format, and content that would be appropriate for
69 class members likely to be sophisticated, for example in a
70 securities fraud class action, might not be appropriate for a class
71 made up in significant part of members likely to be less
72 sophisticated. As with the method of notice, the form of notice
73 should be tailored to the class members' anticipated understanding

74 and capabilities.
75

76 Attention should focus also on the method of opting out
77 provided in the notice. The proposed method should be as
78 convenient as possible, while protecting against unauthorized opt-
79 out notices. As with making claims, the process of opting out
80 should not be unduly difficult or cumbersome. As with other
81 aspects of the notice process, there is no single method that is
82 suitable for all cases.
83

84 **Subdivision (e).** The introductory paragraph of Rule 23(e) is
85 amended to make explicit that its procedural requirements apply in
86 instances in which the court has not certified a class at the time
87 that a proposed settlement is presented to the court. The notice
88 required under Rule 23(e)(1) then should also satisfy the notice
89 requirements of amended Rule 23(c)(2)(B) for a class to be
90 certified under Rule 23(b)(3), and trigger the class members' time
91 to request exclusion. Information about the opt-out rate could
92 then be available to the court at the time that it considers final
93 approval of the proposed settlement.
94

95 **Subdivision (e) (1).** The decision to give notice of a proposed
96 settlement to the class is an important event. It should be based
97 on a solid record supporting the conclusion that the proposed
98 settlement will likely earn final approval after notice and an
99 opportunity to object. The amended rule makes clear that the
100 parties must provide the court with sufficient information to
101 enable it to decide whether notice should be sent. The amended
102 rule also specifies the standard the court should use in deciding
103 whether to send notice -- that notice is justified by the parties'
104 showing regarding the likely approval of the proposal. The
105 prospect of final approval should be measured under amended Rule
106 23(e)(2), which provides criteria for the final settlement review.
107

108 If the court has not previously certified a class, this
109 showing should also provide a basis for the court to conclude that
110 it likely will be able to certify a class for purposes of
111 settlement. Although the order to send notice is often
112 inaccurately called "preliminary approval" of class certification,
113 it is not appealable under Rule 23(f). It is, however, sufficient
114 to require notice under Rule 23(c)(2)(B) calling for class members
115 in Rule 23(b)(3) classes to decide whether to opt out.
116

117 There are many types of class actions and class-action
118 settlements. As a consequence, no single list of topics to be
119 addressed in the submission to the court would apply to each case.
120 Instead, the subjects to be addressed depend on the specifics of
121 the particular class action and proposed settlement. But some
122 general observations can be made.
123

124 One key element is class certification. If the court has
125 already certified a class, the only information ordinarily
126 necessary in regard to a proposed settlement is whether the

127 proposal calls for any change in the class certified, or of the
128 claims, defenses, or issues regarding which certification was
129 granted. But if a class has not been certified, the parties must
130 ensure that the court has a basis for concluding that it likely
131 will be able, after the final hearing, to certify the class.
132 Although the standards for certification differ for settlement and
133 litigation purposes, the court cannot make the decision regarding
134 the prospects for certification without a suitable basis in the
135 record. The decision to certify the class for purposes of
136 settlement cannot be made until the hearing on final approval of
137 the proposed settlement. If the settlement is not approved and
138 certification for purposes of litigation is later sought, the
139 parties' earlier submissions in regard to the proposed
140 certification for settlement should not be considered.
141

142 Regarding the proposed settlement, a great variety of types of
143 information might appropriately be included in the submission to
144 the court. A basic focus is the extent and type of benefits that
145 the settlement will confer on the members of the class. Depending
146 on the nature of the proposed relief, that showing may include
147 details of the claims process that is contemplated and the
148 anticipated rate of claims by class members. The possibility that
149 the parties will report back to the court on the actual claims
150 experience after notice to the class is completed is also
151 important. And because some funds are frequently left unclaimed,
152 it is often important for the settlement agreement to address the
153 use of those funds. Many courts have found guidance on this
154 subject in § 3.07 of the American Law Institute, Principles of
155 Aggregate Litigation (2010).
156

157 It is important for the parties to supply the court with
158 information about the likely range of litigated outcomes, and about
159 the risks that might attend full litigation. In that connection,
160 information about the extent of discovery completed in the
161 litigation or in parallel actions may often be important. In
162 addition, as suggested by Rule 23(b)(3)(A), information about the
163 existence of other pending or anticipated litigation on behalf of
164 class members involving claims that would be released under the
165 proposal -- including the breadth of any such release -- may be
166 important.
167

168 The proposed handling of an attorney-fee award under Rule
169 23(h) is another topic that ordinarily should be addressed in the
170 parties' submission to the court. In some cases, it will be
171 important to relate the amount of an attorney-fee award to the
172 expected benefits to the class, and to take account of the likely
173 take-up rate. One method of addressing this issue is to defer some
174 or all of the attorney-fee award until the court is advised of the
175 actual claims rate and results. Another topic that normally should
176 be considered is any agreement that must be identified under Rule
177 23(e)(3).
178

179 The parties may supply information to the court on any other
180 topic that they regard as pertinent to the determination whether
181 the proposal is fair, reasonable, and adequate. The court may
182 direct the parties to supply further information about the topics
183 they do address, or to supply information on topics they do not
184 address. It must not direct notice to the class until the parties'
185 submissions show it is likely that the court will have a basis to
186 approve the proposal after notice to the class and a final approval
187 hearing.
188

189 **Subdivision (e) (2).** The central concern in reviewing a
190 proposed class-action settlement is that it be fair, reasonable,
191 and adequate. This standard emerged from case law implementing
192 Rule 23(e)'s requirement of court approval for class-action
193 settlements. It was formally recognized in the rule through the
194 2003 amendments. By then, courts had generated lists of factors to
195 shed light on this central concern. Overall, these factors focused
196 on comparable considerations, but each circuit developed its own
197 vocabulary for expressing these concerns. In some circuits, these
198 lists have remained essentially unchanged for thirty or forty
199 years. The goal of this amendment is not to displace any of these
200 factors, but rather to focus the court and the lawyers on the core
201 concerns of procedure and substance that should guide the decision
202 whether to approve the proposal.
203

204 One reason for this amendment is that a lengthy list of
205 factors can take on an independent life, potentially distracting
206 attention from the central concerns that inform the settlement-
207 review process. A circuit's list might include a dozen or more
208 separately articulated factors. Some of those factors -- perhaps
209 many -- may not be relevant to a particular case or settlement
210 proposal. Those that are relevant may be more or less important to
211 the particular case. Yet counsel and courts may feel it necessary
212 to address every single factor on a given circuit's list in every
213 case. The sheer number of factors can distract both the court and
214 the parties from the central concerns that bear on review under
215 Rule 23(e) (2).
216

217 This amendment therefore directs the parties to present the
218 settlement to the court in terms of a shorter list of central
219 concerns, by focusing on the primary procedural considerations and
220 substantive qualities that should always matter to the decision
221 whether to approve the proposal.
222

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

232 The information submitted under Rule 23(e)(1) may provide a
233 useful starting point in assessing these topics. For example, the
234 nature and amount of discovery in this or other cases, or the
235 actual outcomes of other cases, may indicate whether counsel
236 negotiating on behalf of the class had an adequate information
237 base. The pendency of other litigation about the same general
238 subject on behalf of class members may also be pertinent. The
239 conduct of the negotiations may also be important. For example,
240 the involvement of a neutral or court-affiliated mediator or
241 facilitator in those negotiations may bear on whether they were
242 conducted in a manner that would protect and further the class
243 interests.
244

245 In undertaking this analysis, the court may also refer to Rule
246 23(g)'s criteria for appointment of class counsel; the concern is
247 whether the actual conduct of counsel has been consistent with what
248 Rule 23(g) seeks to ensure. Particular attention might focus on
249 the treatment of any attorney-fee award, with respect to both the
250 manner of negotiating the fee award and its terms.
251

252 **Paragraphs (C) and (D).** These paragraphs focus on what might
253 be called a "substantive" review of the terms of the proposed
254 settlement. The relief that the settlement is expected to provide
255 to class members is a central concern. Measuring the proposed
256 relief may require evaluation of the proposed claims process and a
257 prediction of how many claims will be made; if the notice to the
258 class calls for pre-approval submission of claims, actual claims
259 experience may be important. The contents of any agreement
260 identified under Rule 23(e)(3) may also bear on the adequacy of the
261 proposed relief, particularly regarding the equitable treatment of
262 all members of the class.
263

264 Another central concern will relate to the cost and risk
265 involved in pursuing a litigated outcome. Often, courts may need
266 to forecast what the likely range of possible classwide recoveries
267 might be and the likelihood of success in obtaining such results.
268 That forecast cannot be done with arithmetic accuracy, but it can
269 provide a benchmark for comparison with the settlement figure.
270

271 If the class has not yet been certified for trial, the court
272 may consider whether litigation certification would be granted were
273 the settlement not approved.
274

275 Examination of the attorney-fee provisions may also be
276 important to assessing the fairness of the proposed settlement.
277 Ultimately, any attorney-fee award must be evaluated under Rule
278 23(h), and no rigid limits exist for such awards. Nonetheless, the
279 relief actually delivered to the class can be an important factor
280 in determining the appropriate fee award. Provisions for reporting
281 back to the court about actual claims experience, and deferring a
282 portion of the fee award until the claims experience is known, may
283 bear on the fairness of the overall proposed settlement.
284

285 Often it will be important for the court to scrutinize the
286 method of claims processing to ensure that it facilitates filing of
287 legitimate claims. A claims processing method should deter or
288 defeat unjustified claims, but unduly demanding claims procedures
289 can impede legitimate claims. Particularly if some or all of any
290 funds remaining at the end of the claims process must be returned
291 to the defendant, the court must be alert to whether the claims
292 process is unduly demanding.
293

294 Paragraph (D) calls attention to a concern that may apply to
295 some class action settlements -- inequitable treatment of some
296 class members vis-a-vis others. Matters of concern could include
297 whether the apportionment of relief among class members takes
298 appropriate account of differences among their claims, and whether
299 the scope of the release may affect class members in different ways
300 that affect the apportionment of relief.
301

302 **Subdivision (e) (3).** A heading is added to subdivision (e) (3)
303 in accord with style conventions. This addition is intended to be
304 stylistic only.
305

306 **Subdivision (e) (4).** A heading is added to subdivision (e) (4)
307 in accord with style conventions. This addition is intended to be
308 stylistic only.
309

310 **Subdivision (e) (5).** Objecting class members can play a
311 critical role in the settlement-approval process under Rule 23(e).
312 Class members have the right under Rule 23(e) (5) to submit
313 objections to the proposal. The submissions required by Rule
314 23(e) (1) may provide information important to decisions whether to
315 object or opt out. Objections can provide the court with important
316 information bearing on its determination under Rule 23(e) (2)
317 whether to approve the proposal.
318

319 **Subdivision (e) (5) (A).** The rule is amended to remove the
320 requirement of court approval for withdrawal of all objections. An
321 objector should be free to withdraw on concluding that an objection
322 is not justified. But Rule 23(e) (5) (B) (i) requires court approval
323 of any payment or other consideration for withdrawing the
324 objection.
325

326 The rule is also amended to clarify that objections must
327 provide sufficient specifics to enable the parties to respond to
328 them and the court to evaluate them. One feature required of
329 objections is specification whether the objection asserts interests
330 of only the objector, or of some subset of the class, or of all
331 class members. Beyond that, the rule directs that the objection
332 state its grounds "with specificity." Failure to provide needed
333 specificity may be a basis for rejecting an objection. Courts
334 should take care, however, to avoid unduly burdening class members
335 who wish to object, and to recognize that a class member who is not
336 represented by counsel cannot be expected to present objections
337 that adhere to technical legal requirements.

338 **Subdivision (e) (5) (B)**. Good-faith objections can assist the
339 court in evaluating a proposal under Rule 23(e)(2). It is
340 legitimate for an objector to seek payment for providing such
341 assistance under Rule 23(h). As recognized in the 2003 Committee
342 Note to Rule 23(h): "In some situations, there may be a basis for
343 making an award to other counsel whose work produced a beneficial
344 result for the class, such as * * * attorneys who represented
345 objectors to a proposed settlement under Rule 23(e)."
346

347 But some objectors may be seeking only personal gain, and
348 using objections to obtain benefits for themselves rather than
349 assisting in the settlement-review process. At least in some
350 instances, it seems that objectors -- or their counsel -- have
351 sought to extract tribute to withdraw their objections or dismiss
352 appeals from judgments approving class settlements. And class
353 counsel sometimes may feel that avoiding the delay produced by an
354 appeal justifies providing payment or other consideration to these
355 objectors.
356

357 The court-approval requirement currently in Rule 23(e)(5)
358 partly addresses this concern. Because the concern only applies
359 when consideration is given for withdrawal of an objection,
360 however, the amendment requires approval under Rule 23(e)(5)(i)
361 only when such consideration is involved. The term "consideration"
362 should be broadly interpreted, particularly when the withdrawal
363 includes some arrangements beneficial to objector counsel. If the
364 consideration involves a payment to counsel for an objector, the
365 proper procedure is by motion under Rule 23(h) for an award of
366 fees; the court may approve the fee if the objection contributed to
367 the settlement-review process even though the settlement was
368 approved as proposed.
369

370 Rule 23(c)(5)(B)(ii) applies to consideration for forgoing,
371 dismissing, or abandoning an appeal from a judgment approving the
372 proposal. Because an appeal by a class-action objector may produce
373 much longer delay than an objection before the district court, it
374 is important to extend the court-approval requirement to apply in
375 the appellate context. The district court is best positioned to
376 determine whether to approve such arrangements; hence, the rule
377 requires that the motion seeking approval be made to the district
378 court.
379

380 Until the appeal is docketed by the circuit clerk, the
381 district court may dismiss the appeal on stipulation of the
382 parties. See Fed. R. App. P. 42(a). Thereafter, the court of
383 appeals has authority to decide whether to dismiss the appeal.
384 This rule's requirement of district court approval of any
385 consideration in connection with such dismissal by the court of
386 appeals has no effect on the authority of the court of appeals over
387 the appeal. It is, instead, a requirement that applies only to
388 providing consideration for forgoing, dismissing, or abandoning an
389 appeal. A party dissatisfied with the district court's order under
390 Rule 23(e)(5)(B) may appeal the order.

391 **Subdivision (f)**. As amended, Rule 23(e)(1) provides that the
392 court should direct notice to the class regarding a proposed class-
393 action settlement in cases in which class certification has not yet
394 been granted only after determining that the prospect of eventual
395 class certification justifies giving notice. This decision is
396 sometimes inaccurately characterized as "preliminary approval" of
397 the proposed class certification. But it does not grant or deny
398 class certification, and review under Rule 23(f) would be
399 premature. This amendment makes it clear that an appeal under this
400 rule is not permitted until the district court decides whether to
401 certify the class.
402

403 The rule is also amended to extend the time to file a petition
404 for review of a class-action certification order to 45 days
405 whenever a party is the United States, one of its agencies, or a
406 United States officer or employee sued for an act or omission
407 occurring in connection with duties performed on the United States'
408 behalf. [Similar treatment is appropriate for an action involving
409 a United States corporation.] In such a case, the extension
410 applies to a petition for permission to appeal by any party. The
411 extension of time recognizes -- as under Rules 4(i) and 12(a) and
412 Appellate Rules 4(a)(1)(B) and 40(a)(1) -- that the United States
413 has a special need for additional time in regard to these matters.
414 The extension applies whether the officer or employee is sued in an
415 official capacity or an individual capacity; it may happen that the
416 defense is conducted by the United States even though the action
417 asserts claims against the officer or employee in an individual
418 capacity. An action against a former officer or employee of the
419 United States is covered by this provision in the same way as an
420 action against a present officer or employee. Termination of the
421 relationship between the individual defendant and the United States
does not reduce the need for additional time.²

II. **INFORMATIONAL ITEMS FOR DISCUSSION:** ISSUES "ON HOLD"

 During the November 2015 meeting, the Rule 23 Subcommittee
reported on two issues that it has considered with some care, but
that it favored putting "on hold" pending further developments.
The Subcommittee does not have recommendations at present for
amendments responsive to those issues, in significant measure
because developments on these issues remain in flux. It is
therefore making this informational report in hopes of receiving

² The bracketed sentence was added at the suggestion of the
Department of Justice. It was prompted by the fact (pointed out
by the Standing Committee Style Consultants) that Rule 4(i)(2)
refers to service on "a United States agency or corporation."
Rule 12(a)(2), on the other hand, extends the time to answer only
for "[t]he United States, a United States agency, or a United
States officer or employee." Rule 12(a)(2) makes no reference to
a United States corporation.

reactions from the full Committee to inform its ongoing work on these issues.

On the first issue -- the "pick-off" question arising when defendant makes an offer to the class representative that may entirely satisfy the representative's claim and then seeks dismissal -- a Supreme Court decision in January 2016 has clarified some aspects of the question but left others uncertain. The Subcommittee has concluded that there are sufficient questions about the present circumstances to make proposing an amendment now inappropriate. It invites reactions from the full Advisory Committee on these matters. It has also identified an additional amendment idea prompted by the pick-off issues that may have wider importance -- time to recruit a substitute class representative if the initial class representative proves inadequate.

On the second issue -- "ascertainability" -- the case law continues to evolve. Petitions for certiorari were filed in two cases that present these issues to the Supreme Court, although one petition was recently denied. The Court has pending two other cases whose resolution may have some bearing on this collection of issues. The Subcommittee did not bring forward an amendment proposal in part because of the uncertain state of the law.

A. PICK-OFF ISSUES

It is useful to begin with some general background. Mootness questions can emerge in distinctive ways in class actions. For example, if class members' claims are inherently short-lived, it could happen that before the time needed to decide a certification motion has elapsed the class representative's claim might be moot. In some such circumstances, the Supreme Court has said that later certification suffices to solve the mootness problem. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). Another issue that could arise occurs when the district court denies class certification and the individual plaintiffs continue with their suit. If they prevail, but decide not to appeal the certification issue, is the case moot? In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the Court held that other putative class members could then intervene to pursue appellate review of the certification issue.

A similar issue can arise if defendant offers the proposed class representative "full relief" and then argues that the class action should be dismissed even though no relief has been offered to any other member of the proposed class. This is the "pick-off" situation. The Supreme Court disapproved such a maneuver in *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980). But in the lower courts defendants sometimes pursued a similar strategy, employing Rule 68 offers of judgment as methods of mooting the putative class representative's claims. In some courts, a plaintiff could blunt that maneuver by making a class certification motion before the pick-off offer arrived, leading to what came to be called "out of the chute" class certification motions. Given

the need for a complete record to support the class-certification decision, this was not a welcome development.

One additional piece of background is useful. Until 2003, Rule 23(e) had said that a "class action" could not be voluntarily dismissed without court approval and notice to the class. The virtually unanimous view of the courts of appeals was that such court approval was required after a suit was filed as a class action even if the settlement was only of the "individual" claim of the putative class representative and without prejudice to the rights of any other class member. Concern expressed about this sort of thing included the risk that plaintiffs might be claiming a premium for bringing a class action, and that other class members might be desisting from asserting their own claims in reliance on the class action. But in 2003, Rule 23(e) was amended to require court approval only of settlements that would bind the class. The way was thus opened for "individual" settlements with the class representative. Pick-off activity seemingly picked up.

In *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), the Court held, by a 5-4 vote, that a Rule 68 offer of full compensation to the plaintiff in a proposed Fair Labor Standards Act collective action did moot the case. Justice Kagan and three others argued in dissent that basic contract law -- and the provisions of Rule 68 itself -- should defeat such pick-off efforts. A rejected offer to contract has no importance, and the rule says that an offer of judgment that is not accepted may not be filed or otherwise used until the case is resolved, although it may then bear on allocation of costs. The question whether class actions should be handled in the same way as FLSA actions persisted, but after the Supreme Court's decision in 2013 the courts of appeals all concluded that Rule 68 offers to the individual plaintiff could not moot class actions, and the Seventh Circuit (which formerly had said they could) changed its rule.

In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Court held that a Rule 68 offer to a putative class representative does not moot the case because "an unaccepted settlement offer has no force." But the decision left open possibilities that the Subcommittee is monitoring and evaluating. Some detail about the Court's various opinions therefore seems helpful.

The majority adopted Justice Kagan's analysis in her dissent in the 2013 FLSA case, relying on "basic principles of contract law" because an offer imposes no obligation on the offeree unless it is accepted. The court also noted that Rule 68 "hardly supports the argument that an unaccepted settlement offer can moot a complaint." But the majority qualified its holding:

We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.

Justice Thomas concurred in the judgment, but relied on "the common law history of tenders," which he said had "many rigid formalities" that had not been satisfied. Hence, the Rule 68 offer and additional settlement offer by defendant did not eliminate the court's jurisdiction to decide the case.

Chief Justice Roberts (joined by Justices Scalia and Alito) dissented on the ground that the offer of "full redress" for the representative's claim mooted the case. He agreed with the majority that rejection of the settlement offer meant that it was a "legal nullity" as a matter of contract law, but insisted that the pertinent issue was whether there was still a case or controversy under Article III. On that score, he said in footnotes that the fact the case was filed as a class action did not matter (footnote 1) and that Justice Thomas's insistence on a formal tender of the full amount also was wrong (footnote 3). He concluded by observing that the question of the effect of a deposited payment remained open.

As might be expected, the Court's decision has produced much discussion about what parties to class actions would do in the future. But as of this writing the answer to that sort of inquiry is not clear. As reflected in the notes on Subcommittee conference calls after the Court's decision, considerable time has been spent considering whether the Subcommittee should return to one or more of the various possible sketches presented in the past. It has also identified a further possibility -- requiring by rule that class counsel be afforded time to find a substitute class representative should the original class representative be found inadequate due to mootness or for another reason.

Approaches previously presented

Before its mini-conference in September 2015, the Subcommittee had developed three approaches to pick-off issues. It has resumed considering these ideas in light of the Supreme Court's decision. The current sketches themselves are in an Appendix to the notes on the Subcommittee's Feb. 10, 2016, conference call, included in these agenda materials. The purpose of this report is to provide a brief description of their features to enable a discussion not only about whether pick-off issues remain important, but also about possible rulemaking solutions. The approaches previously presented are:

The "Cooper Sketch" -- This approach would direct that "tender of relief" could terminate a proposed class action only if the court has already denied class certification and finds that the tender "affords complete relief on the class member's personal claim." It would also provide that such a dismissal would not defeat standing for the class member to appeal the denial of certification. This approach is the one most focused on the issues addressed in the Supreme Court's decision, and it would seemingly preserve standing even if the

defendant deposited "full relief" into court and the court entered judgment in that amount in favor of the plaintiff.

Restoring part of pre-2003 Rule 23(e) -- This approach would restore the pre-2003 provision that an action filed as a class action may not be voluntarily dismissed without the court's approval, and require that any agreement made in connection with the proposed dismissal be disclosed to the court. It could also seek to preserve the right for the class representative to appeal denial of class certification.

Amending Rule 68 to specify that it does not apply in class actions or derivative actions -- This would amend Rule 68 in a way first formally proposed in 1984. But it does not seem to address directly the Supreme Court's decision, which placed emphasis on "basic principles of contract law" rather than Rule 68. So it might be a useful confirmation of other changes, but probably is not sufficient by itself to prevent pick-off maneuvers if those continue to occur.

New idea -- Affording a window of opportunity to recruit a substitute class representative

Subcommittee discussions after the Supreme Court decision prompted a further idea, which might be useful in dealing with pick-off issues and also other problems. The idea is that Rule 23 (perhaps Rule 23(c)) should guarantee an opportunity to recruit a replacement class representative when the original one was found wanting. There have been cases that said the court should afford such an opportunity. It may be difficult, however, to define in a rule what event triggers this opportunity, or how long it should last, or whether it should forbid a "revolving door" effort to locate an adequate representative somewhere. But it would move beyond the pick-off situation and include any instance of mootness, and also instances in which the class representative proved unsatisfactory for another reason.

Discussion at April 2016 meeting

The Subcommittee intends to continue studying these issues. It welcomes reactions regarding the actual practice since the Supreme Court's decision as well as reactions to the various approaches described above.

B. ASCERTAINABILITY

During the Committee's April 2015 meeting, the Subcommittee was urged to look carefully at issues surrounding the concern with "ascertainability." Decisions by the Third Circuit had raised considerable concerns in other courts, and the Third Circuit had revised its views somewhat. The Subcommittee did focus on this issue, and presented a sketch of what it regarded as a "minimalist" approach at the mini-conference it held in September 2015. Several participants at the mini-conference regarded the Subcommittee's sketch as adopting a strong version of the Third Circuit view that many have questioned. The Subcommittee remains uncertain what should be in a rule amendment if one is warranted.

At the Advisory Committee's November 2015 meeting, the Subcommittee reported that it felt both the difficulty of identifying a suitable response to these issues and the shifting case law in the area made it wise to put these issues "on hold."

Meanwhile, there have been other developments. The Seventh Circuit, in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), petition for certiorari filed (no. 15-549), Oct. 28, 2015, articulated a view of ascertainability that contrasts with the view seemingly endorsed by the Third Circuit. In *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), mandate stayed, Oct. 28, 2015, petition for certiorari filed (no. 15-835), Dec. 28, 2015, the Sixth Circuit rejected ascertainability objections to a consumer class action. As of this writing, the Supreme Court has denied the *Mullins* petition for certiorari. In addition, the Court has before it two cases -- *Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S.Ct. 1892 (2015), and *Tyson Foods, Inc. v. Bouaphakeo*, 765 F.3d 791 (8th Cir. 2015), cert. granted, 135 S.Ct. 2806 (2015) -- whose resolution might also bear on these issues.

Under these circumstances, the Subcommittee believes it wise to retain ascertainability on its agenda, but "on hold" without a formal amendment proposal. It invites input from the full Committee.

TAB 4A.2

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Feb. 10, 2016

On Feb. 10, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf (A.O.).

Judge Bates summarized the discussion he had with Judge Sutton about the best way forward regarding the issues initially discussed by the Subcommittee during its Feb. 5 conference call. A prime concern is that progress on the current package not be impeded by addition of provisions addressing the pick-off question. Instead, the appropriate handling of that problem seems to depend significantly on what actually happens in the wake of the Campbell-Ewald decision.

That should not mean that the Subcommittee ought cease paying attention to pick-off issues, but that this attention be recognized as distinct from the package of amendment ideas that have been developed in discussions with the Advisory Committee and presented to the Standing Committee. The exact content of any remaining pick-off issues remains uncertain, and it could appear premature to try to design a rulemaking response to a problem whose contours are presently uncertain.

Additionally, on the "recruitment of a substitute class representative" issue presented on p. 11 of the memo for the Feb. 5 conference call, it does seem that this idea is pretty new, and not something that has been raised before. The sort of approach outlined on p. 11 seems to have a broader focus than only the pick-off idea. It could be important whenever the claim of the initial class representative becomes moot, for whatever reason, or that person turns out to be an unsuitable class representative for some other reason, not mootness of his or her individual claim.

A reaction to this report was that it seems consistent with the approach approved by the Advisory Committee in its November, 2015, meeting. The Subcommittee was to put the pick-off issue and ascertainability issues "on hold." The Supreme Court's Campbell-Ewald decision introduces new questions about that issue, but the existence of those additional questions may be a further reason for these issues to remain on hold a bit longer.

Another reaction was that there is much appeal in something along the lines sketched on p. 11 of the memo for the Feb. 5 conference call. It would be good to make it clear that judges may afford proposed class counsel a brief but reasonable time to locate a substitute class representative, and that judges need

not dismiss the action or deny class certification without affording this opportunity. Such a provision would likely also address all or many of the pick-off issues that remain after the Campbell-Ewald decision. But it would also be helpful if the class representative dies, has a change of heart, or turns out to be inappropriate for another reason. This could be advanced for discussion to see if it proves at all controversial. If not, including it could be a useful addition to the current package.

Another participant echoed these sentiments. It would be good if a simple sentence could be added that would accomplish this result. Judges should not have to search through Rule 23 for authority to provide this sort of opportunity to class counsel. Maybe Rule 23(d) already does provide such authority. Maybe there is some sort of "inherent authority" implicit in Rule 23 that supports this activity. It is, ordinarily, the actual practice in the courts. It would be good to have explicit recognition in the rule of that practice.

Agreement was expressed about this practice being recognized already in many courts. In the 7th Circuit, it is surely recognized.

But a question was raised: "What exact language could capture this idea?" The existing initial sketch raises a number of obvious issues:

(1) What is the trigger? The draft says it is denial of certification under Rule 23(a)(3) or (4). That seems too narrow to address all the situations discussed. Suppose that the class representative's individual claim becomes moot, or the class representative experiences a change of heart. How can a rule provision accurately capture all the possible developments that would make this dispensation appropriate?

(2) How does the class opponent or the court become aware that the trigger has been pulled? If this is a time limit, it would be desirable to have a distinctive event that starts the time running.

(3) How does one approach these issues if the court has already certified the class? Certainly there is a stronger argument in that situation that a replacement representative could be found. Indeed, notice may already have gone out to the class informing the members that a class action has been certified. Surely the court ought not allow the unexpected difficulty with the class representative to sink the class action then, or at least it might be necessary to give notice to the class of this development.

(4) What verb should be used? The draft offers "may," "must," and "should." Is there really any question under the current rule that the court may afford time to find a

substitute? Should that be mandatory in every case? Perhaps "should" comes closest to what has been discussed, but that could be regarded as a somewhat squishy rule.

(5) How much time is allowed? The shorter the time, the more important it might be to be very clear about the trigger.

(6) What does the rule allow to be done during that time? The sketch says it is "to permit one or more members of the class to seek leave to intervene as representative parties." Should a formal motion to intervene be required under these circumstances? Could amendment of the complaint suffice?

No doubt careful review of the issues would identify additional questions, but the variety that currently exist suggest that a simple fix is unlikely to emerge in the next two or three weeks, and the agenda materials for the April meeting will be due in a bit more than a month.

Another participant expressed concern about the process. "Questions will be raised about why this is being added at this juncture."

Another concern was expressed -- Would this lead to a revolving cast of "replacements"? If replacement no. 1 is unsatisfactory, is the court required to await no. 2, and then no. 3? The stronger the verb ("must," for example) the more one might want to focus on this issue.

A summary of the discussion was that "unless there's a clear and simple solution," trying to devise something and add it to the current package sounds risky. We really don't want to slow down progress on the current package. That drew agreement. "Maybe we can just keep thinking about these issues, and also learning more about what's actually happening. But we should make sure it does not slip between the cracks."

The consensus was that the presentation to the Advisory Committee in April would have two parts. The first would be the current package or six or seven items (depending on how one counts the DOJ proposal). That should be presented in what is hoped to be a final form to recommend to the Standing Committee to publish for public comment. Then the second part would be about the matters that are on hold. One would be the pick-off question, along with the recently identified question of explicit recognition in the rule of authority to postpone dismissal to recruit a substitute class representative. Another would be ascertainability. There are two petitions for certiorari seemingly raising such issues before the Supreme Court. It may be known by April whether the Court has granted one or both of them. Meanwhile, courts continue to address ascertainability

issues in their class-certification decisions. The Subcommittee's report to the Advisory Committee should explain that it continues to examine the remaining issues. It should also afford a basis for discussion of the issues during the Advisory Committee meeting.

Meanwhile, a revised draft of the various ideas the Subcommittee has discussed could be included as an Appendix to the notes of this call in order to carry these issues forward.

Professor Marcus is to attempt to send out an initial draft of the agenda memo before he leaves the country on Feb. 12, and then Subcommittee members can offer comments on that draft by the time he returns on Feb. 20. That schedule should make it possible to see if a further conference call is necessary and meet the schedule for distribution of the agenda book to the Advisory Committee well in advance of the April meeting.

In addition, it seems that the Civil Rules treatment of the objector issue is to be at least an information item on the agenda of the Appellate Rules Committee. Prof. Maggs (Reporter of the Appellate Rules Committee) has said that he will be using the discussion items regarding an Appellate Rule treatment of objector issues in his agenda materials. It would be desirable for either Judge Bates or Judge Dow to try to participate by phone in that portion of the Appellate Rules Committee's meeting in order to be available to answer any questions that might arise.

APPENDIX

SKETCHES OF PICK-OFF MEASURES

The following is a revised version of the sketches the Subcommittee considered in its Feb. 10, 2016, conference call, including points discussed during that call.

Cooper Sketch
Focusing on pick-off alone

- 1 (x) (1) When a person sues [or is sued] as a class
2 representative, the action can be terminated by a tender of
3 relief only if
4 (A) the court has denied class certification and
5 (B) the court finds that the tender affords complete
6 relief on the representative's personal claim and
7 dismisses the claim.
8 (2) A dismissal under Rule 23(x)(1) does not defeat the
9 class representative's standing to appeal the order
denying class certification.

Committee Note

1 A defendant may attempt to moot a class action before a
2 certification ruling is made by offering full relief on the
3 individual claims of the class representative. This ploy should
4 not be allowed to defeat the opportunity for class relief before
5 the court has had an opportunity to rule on class certification.
6

7 If a class is certified, it cannot be mooted by an offer
8 that purports to be for complete class relief. The offer must be
9 treated as an offer to settle, and settlement requires acceptance
10 by the class representative and approval by the court under Rule
11 23(e).
12

13 Rule 23(x)(1) gives the court discretion to allow a tender
14 of complete relief on the representative's claim to moot the
15 action after a first ruling that denies class certification. The
16 tender must be made on terms that ensure actual payment. The
17 court may choose instead to hold the way open for certification
18 of a class different than the one it has refused to certify, or
19 for reconsideration of the certification decision. The court also
20 may treat the tender of complete relief as mooting the
21 representative's claim, but, to protect the possibility that a
22 new representative may come forward, refuse to dismiss the
23 action.
24

25 If the court chooses to dismiss the action, the would-be
26 class representative retains standing to appeal the denial of
27 certification. [say something to explain this?]
28

29 [If we revise Rule 23(e) to require court approval of a
30 settlement, voluntary dismissal, or compromise of the
representative's personal claim, we could cross-refer to that.]

Reporter's Notes

This approach is the most focused. Several points could be made about this approach:

(1) It does not undo the 2003 amendment that limited Rule 23(e) to settlements that are binding on class members.

(2) It is worded in terms of "tender," which has emerged in Campbell-Ewald as an operative term for some Justices at least.

(3) It does not make entry of judgment for the class representatives a necessary ingredient for dismissal of the action, although it could be reworded to do that.

(4) It precludes "termination" by "tender" before class certification.

(5) It preserves the ability of the class representative to seek appellate review of denial of class certification, but seemingly does not do that if the class representative voluntarily dismisses.

(6) It does not deal with the possibility that putative class members would want to intervene to appeal denial of class certification if the person who filed the suit does not want to appeal.

(7) It does not address the question whether class counsel must be afforded some period of time to recruit a replacement class representative if the original one is found wanting (or wants to accept an individual settlement).

Placement of this provision in current Rule 23 is uncertain. Perhaps it could be a new Rule 23(i), entitled something like "Termination by Tender."

Restoring part of pre-2003 23(e)

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) Before certification. An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) Certified class. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable manner * * * * *

(3) Settlement[, compromise, or voluntary dismissal] after denial of certification. If the court denies class-action certification, the plaintiff may settle[, compromise, or voluntarily dismiss] an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e) (1). It could also note the prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

This version is not drafted in terms of "tender" or "termination" of the action, which are (I think) not used elsewhere in the rules. It does not require that class certification be resolved before the court approves the

settlement. It is thus broader and different in focus from the Cooper version because it includes situations in which the parties willingly agree to settle the individual claim and dismiss the action. That seems to be what the ALI was addressing. So this approach is, in that sense, broader. But like the Cooper approach, it does not address the question whether class counsel should be given a window of opportunity to seek a replacement class representative if the first one proves unworthy, or with intervention by putative class members who want to appeal denial of class certification.

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Adding the "voluntarily dismiss" provision could address the question now before the Supreme Court in *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015), cert. granted, 136 S.Ct. ____ (no. 15-547, granted Jan. 15, 2016), presenting the following question: "Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice."

Window of opportunity to recruit
substitute class representative

The Subcommittee's discussion of the pick-off issues prompted the suggestion that there should be a window of opportunity for proposed (or actual) class counsel to seek a substitute class representative should the original class representative be found wanting. One possible problem with that original class representative would be mootness due to some sort of development such as a deposit, etc. Another might be because the proposed class representative was found not to satisfy Rule 23(a)(3) or (a)(4). So this approach would be broader than the others mentioned above.

Probably the two possible methods of proceeding above would go some distance toward responding to this concern without explicitly saying so. Thus, the Cooper approach prevents termination by the court on the basis of the tender of "full" relief until class certification has been decided and preserves the right of the class representative to seek appellate review of that decision. The alternative keyed to undoing the 2003 amendment to Rule 23(e) does much the same. Neither explicitly addresses the situation in which class certification is denied on the ground that the proposed representative flunks 23(a)(3) or (4).

It may be that amending the rule to ensure a chance to recruit a replacement would be difficult and not necessary. If the goal is to provide some time to recruit a substitute, it would seem that the time required for defendant to obtain dismissal for mootness would afford some such opportunity. If the problem is that the original class representative is inadequate or atypical, that argument would presumably emerge from the briefing on class certification, which might afford an opportunity to locate a substitute representative.

For purposes of discussion, one might consider an addition to Rule 23(c):

- (c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses; Replacement Representative Parties.**

* * * * *

- (6) **Replacement Representative Parties.** If the court denies class-action certification under Rule 23(a)(3) or 23(a)(4), it may [must] {should} defer dismissing the action for ___ days [after denial of class-action certification] to permit one or more members of the class to seek leave to intervene as representative

parties.

A number of questions come immediately to mind in relation to an approach like this one:

(1) What is the trigger? The draft says it is denial of certification under Rule 23(a)(3) or (4). That seems too narrow to address all the situations discussed. Suppose that the class representative's individual claim becomes moot, or the class representative experiences a change of heart. Is the pick-off situation clearly covered? How can a rule provision accurately capture all the possible developments that would make this dispensation appropriate?

(2) How does the class opponent or the court become aware that the trigger has been pulled? If this is a time limit, it would be desirable to have a distinctive event that starts the time running.

(3) How does one approach these issues if the court has already certified the class? Certainly there is a stronger argument in that situation that a replacement representative could be found. Indeed, notice may already have gone out to the class informing the members that a class action has been certified. Surely the court ought not allow the unexpected difficulty with the class representative to sink the class action then, or at least it might be necessary to give notice to the class of this development.

(4) What verb should be used? The draft offers "may," "must," and "should." Is there really any question under the current rule that the court may afford time to find a substitute? Should that be mandatory in every case? Perhaps "should" comes closest to what has been discussed, but that could be regarded as a somewhat squishy rule.

(5) How much time is allowed? The shorter the time, the more important it might be to be very clear about the trigger.

(6) What does the rule allow to be done during that time? The sketch says it is "to permit one or more members of the class to seek leave to intervene as representative parties." Should a formal motion to intervene be required under these circumstances? Could amendment of the complaint suffice?

For present purposes, the Subcommittee invites full Committee input on this approach to pick-off and other issues. It is not something that the Subcommittee has presented before. It may be the practice in many courts already. It seems (somewhat unlike the conventional pick-off situation) to be important in cases in which there has been much development

already.

Rule 68 recognition

Rule 68. Offer of Judgment

* * * * *

1 **(e) Inapplicable in Class and Derivative Actions.** This
2 rule does not apply to class or derivative actions
 under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

Assuming one of the above Rule 23 approaches is adopted, this provision could be added to reaffirm that this rule does not in any way undercut those changes. At least, Committee Note might note the simultaneous change to Rule 23 and explain that this change to Rule 68 is consistent with that change. But this amendment would not blunt all the possibilities left open by Campbell-Ewald because Campbell-Ewald does not make the mootness issue turn on the provisions of Rule 68.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Feb. 5, 2016

On Feb. 5, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Derek Webb (Judge Sutton's Rules Law Clerk).

Pick off

The various ideas under the heading "pick off" were summarized as involving, probably, a basic choice between the first two approaches (pp. 7-8, and pp. 9-10). The features of both of those are introduced in the memorandum for the call. Although they could conceivably both be pursued, it seems that they are sufficiently overlapping that they should not be. There is a choice to be made between them.

Then the "recruit a substitute" idea (at pp. 11-12) addresses a distinctive issue that is related to the pick-off issue but not limited to it. So this one could exist separately from the first two ideas.

Finally, the Rule 68 idea on p. 13 might be useful if others justified going forward, although the Supreme Court's decision in Campbell-Ewald really did not seem keyed to this rule.

An initial observation was that, at least in mediated TLPA cases initiated as class actions, there have been instances in which the named plaintiff (and lawyer) received a premium for "walking away" from the proposed class action. That might be a reason for favoring the provision on p. 9 to require court approval for "individual" settlements before class certification is resolved. This is sort of a "reverse pick off" in that the plaintiff is using the class action device to extract money from the defendant, rather than the defendant using a settlement offer to the putative class representative in order to let the air out of the class action.

Another reaction was that the idea of a chance to find a replacement class representative was really designed for a case in which there have been considerable proceedings and then a problem arises with the class representative or representatives. The law in at least some circuits has recognized that there should be a fair period for recruiting a substitute.

A different subject emerged: Might it be too late to introduce this new idea? We have a package of six (perhaps -- with the DOJ proposal -- seven) amendments that together form a package. This set of ideas has not been included. Can this

really be readied for inclusion in the package for the April meeting of the Advisory Committee?

One reaction to that question was that all but the recruitment proposal had been presented to quite a few groups. What was included in the memo for this call was virtually identical to the ideas in the issues memo for the Sept. 11 mini-conference. So in a sense the only really new thing was the recruitment idea on p. 11.

Another reaction was to ask whether the Subcommittee really felt that it had reached consensus on these issues. The other proposals have all been very extensively examined and discussed. For a variety of reasons, the pick-off idea has not attracted much attention during the discussions of these other issues. That does not mean it is not important, but does mean that the full Advisory Committee has not had much exposure to it. Would this seem to come out of the blue?

Another question also arose -- Is there any possibility that any of the amendment ideas outlined in the memo might be thought to be substantive rather than procedural? On that question, the response was that at least one of the proposals -- requiring court approval for pre-certification "individual" settlements -- had been found to be required by the pre-2003 rule, and nobody had seriously questioned that it was a procedural requirement. The Supreme Court says that rules are valid so long as they are "arguably procedural," and these should qualify.

Another reaction to the "out of the blue" concern was whether we should seek comment from the full Advisory Committee before the April meeting. The time line for these items is quite different from the one used for the six that are now in the package. "It is hard to jump right into this without some background."

On the other hand, this is really a package. "It would be artificial" to leave out this ingredient. But it's also true that we really can't confidently say whether this is a problem. So if we can't resolve the matter, it could delay the entire package.

One reaction to these concerns was to recall the eventual revision of the Rule 37(e) amendment that went into effect last December 1. That was finally revised the night before the second day of the Advisory Committee's meeting in Portland, Ore., and the revised language was handed around the following morning before the vote. That is far from ideal, but shows that the process can be responsive to revisions, even after the public comment period is completed. Ideally, that will not happen again, but we are nowhere near that point at present.

Another possible issue would be the other issue put "on hold" -- ascertainability. There is not a great likelihood that

the Supreme Court's pending decisions in Spokeo or Tyson Foods will have a significant bearing on handling of ascertainability. But it may be that the Supreme Court will grant certiorari in the 7th Circuit's Mullins case or the 6th Circuit's Procter & Gamble case. That would be a strong reason for the Subcommittee not to return to the issue until the Court had decided.

In these circumstances, it seemed important at the outset to determine whether there was a consensus on the Subcommittee about how best to handle the pick-off problem. It seemed that there was a general consensus that it was inappropriate for the defendant to be able in this manner to prevent a class action from going forward. But that did not mean there was consensus about whether pick-off maneuvers would continue to be a real problem and, if so, how best to craft an amendment to achieve the desired goal of dealing with them.

The shared sentiment was that although the pick-off maneuver should not sink the proposed class action, the Subcommittee members were not confident about whether the first or second approach would be preferable.

Another question emerged: "Do we have enough information to make this decision?" So far as the Supreme Court's recent decision is concerned, much seems to depend on whether things that have been discussed actually happen. It may not be sensible to hurry along a proposed amendment that deals with a "problem" that never actually emerges.

Similar points were made about the "recruit a substitute" idea on p. 11. "That is the one I like the best," but it is not clear that it would entirely solve the pick-off problem. And it is the one that does, in a sense, "come out of the blue." The Subcommittee has not suggested this before this conference call.

One reaction was "I'd like to take the weekend to reflect on these issues." Others agreed.

Another consideration emerged: It would be important to find out the views of Judge Sutton (Chair of the Standing Committee) on questions of deferring, etc. There is much to be said for having one Rule 23 package that includes everything the Advisory Committee things should be included. Adding this issue could require a year's delay, but not adding it could be unfortunate.

That produced the question: "Does anyone feel strongly in favor of the first or second alternative?" A response was "I'm not ready to pull the trigger yet." It was noted that the question what to include for the Advisory Committee agenda would have to be resolved by early to mid March for inclusion in the agenda materials for the Advisory Committee meeting. It would

not be desirable to try to add one issue via a supplemental circulation after the agenda materials are published.

On the other hand, repeated revisions of the rules -- particularly of Rule 23 -- should be avoided. There is a strong appeal to an "all at once" approach. If this issue is important enough to justify a rule amendment, it should be in the package.

But it would be important to consult Judge Sutton about how best to proceed. Judge Bates will try to do that early in the coming week. Meanwhile, the Subcommittee members can reflect on which approach is best, in hopes of reaching a consensus during the next conference call. For that purpose, a tentative date for the next call was set -- **Wednesday, Feb. 10, at 5:00 Eastern time.**

"Recruit a replacement" idea

There was brief further discussion of this proposal. As noted, this is new to a potential package. The idea is that neither the courts nor the plaintiffs should be stuck if a problem emerges with the original class representative. The Subcommittee is comfortable with that goal. It might go a considerable distance toward resolving the pick-off problem, as well as providing a response to other issues.

But at least one serious drafting issue exists. The draft on p. 11 of the memo for the call says that the trigger for the recruitment period occurs when "the court denies class-action certification under Rule 23(a)(3) or 23(a)(4)." That's not the pick-off situation, although an effective pick off might produce this result. Is there a different way to describe the event or events that trigger the need to find a substitute?

Style consultants' recommendations

There was some discussion of the presentation of the various recommendations from the style consultants. The resolution was that the Reporters, after consultation with Judge Bates, should communicate with the style consultants about the suggestions that alter the meaning of the proposed amendments. One goal is to work through any residual disagreements about style issues. The goal is to have these matters resolved before the Advisory Committee meeting if possible, and certainly before the Standing Committee meeting. The five matters identified in the memorandum seem to be the right focus, and the Subcommittee is comfortable with proceeding this way.

DOJ proposal

One style issue and one substantive issue were before the

Subcommittee.

The style issue is that the style consultants proposed the addition of three words that could be added at line 3 of the draft on p. 16:

. . . , but not from an order to give notice under Rule 23(e)(1). . . .

Whether those three words cause a problem could be left up to the Reporters, along with the other style issues. It may be that nobody would seek review from a court's refusal to give notice under Rule 23(e)(1). But perhaps that could be claimed to be a refusal to grant class-action certification and eligible for immediate review? The question deserves further reflection, and once resolved could be included in the communication to the style consultants.

The substantive matter was the question whether the extended period to seek review should be for all parties or only the governmental parties.

The first reaction was that the government gets special treatment on timing in several settings. And in criminal cases the defendant has a shorter period to appeal than the government.

But there are administrative reasons to have one time frame for all, and that seems to be the norm in civil cases. "In my experience, it is better to have an across-the-board time limit."

The consensus was to leave the draft as written -- an across-the-board extension for all parties if the government is a party.

Next conference call
Wed., Feb. 10, 5:00 Eastern

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Jan. 29, 2016

On Jan. 29, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge Gene Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Judge Stephen Colloton (Chair, Appellate Rules Committee) and Prof. Gregory Maggs (Reporter, Appellate Rules Committee) participated in the discussion of the objectors issues.

Objectors

"Simple" approach

The discussion began with the revised objector sketches circulated after the Jan. 19 conference call. The principal addition was a new (C), including a 60 day time limit for seeking court approval of a payment or other consideration for forgoing, dismissing, or abandoning an appeal.

The introduction included concerns about how a 60-day time limit could complicate some cases. At least one could predict that it is very unlikely the court of appeals would take important actions within 60 days of entry of judgment in the district court. But requiring that any amicable resolution of the appeal be completed within 60 days might be unrealistic. For example, the objector might persuade class counsel that she was really in a different position and deserved different treatment. Or the court of appeals' mediation efforts might produce a resolution that included some additional consideration for the objector. Absolutely forbidding those sensible solutions might be unfortunate. On the other hand, the original proposal made some years ago the Appellate Rules Committee was for an absolute ban on any consideration ever for dismissing an appeal, so a 60-day window for seeking district court approval would be more flexible than that approach.

An initial reaction was that the time limit simplification seemed on examination to present considerable difficulties. Maybe most cases involve deals within 60 (or perhaps 90) days, but that is not all cases.

Another reaction indicated agreement; this approach seems a very blunt instrument.

Another reaction was similar. "I'm in favor of time limits generally, but this one seems to create significant problems."

The resolution was to preserve a record of the consideration of this possibility for future reference. A copy of the revised

objector sketch circulated for the conference call would in included as an appendix to these notes of the call for that purpose.

Possible reference in Appellate Rules

Discussion shifted to the possibility of calling attention in the Appellate Rules to the existence of the requirement that district court approval be sought. One prompt was an apparent concern at the Appellate Rules Committee's Fall 2015 meeting about whether appellate practitioners would be aware of a requirement in the civil rules. The idea is similar to the reference to Fed. R. Evid. 502 inserted into Rule 16 and 26 by the package of amendments that just went into effect. That addition was prompted partly by concerns that many civil litigators are not familiar with the evidence rules, and that a prompt to look at Rule 502 would be desirable. On the other hand, objector appeals can only be brought by those who object in the district court, which implies some familiarity with the civil rules, and class counsel (the likely other party to any agreement regarding dismissal) surely must be familiar with the civil rules.

An initial reaction to this idea was that it seems an odd appendage in the Appellate Rules. The draft says that the parties to the motion to dismiss the appeal must either notify the court of appeals or provide a copy of the district court's order. What is the point of that? Is the court of appeals supposed to review that order in some way? Is the court of appeals to feel constrained in making its decision about whether to dismiss the appeal? The overall point is that Rule 23 is amended to require district court approval.

Another concern was raised -- the appeal may languish if there is a suggestion in the Appellate Rules that it should be carried forward until the district court issues its approval. The court of appeals can do whatever it thinks appropriate with the appeal. The parties can ask it to defer action pending action by the district court, but nothing requires that it do so. And if the parties want to urge it to defer action (such as postponing the due date for filing briefs) they would need to provide a reason. That should be sufficient to cause them to alert the court of appeals to what is happening in the district court.

An additional observation was that the "jurisdictional" concern about intruding on the proper sphere of the court of appeals seems not too pressing, although some further exploration might be in order.

The discussion was summed up with the question: "Why do this?" The consensus was to resolve that the matter had been examined and set aside. If it is thought important at the Spring meeting of the Appellate Rules Committee, it can be revived. But

it does not seem useful

Alternative of new Appellate Review 42(c)

This alternative was introduced as more complicated but not including the timing difficulties that were present with the 60-day limitation on district-court approval discussed earlier. Instead, the framework would be to recognize separate spheres of district court and court of appeals authority. So part (1) of draft Rule 42(c) would require the court of appeals to approve any payment or other consideration for dismissing or abandoning an appeal after the appeal was docketed by the circuit clerk, and part (2) would permit the court of appeals to refer the question whether to approve the payment to the district court. What exactly the district court would be doing might be described as a "recommendation" or an "indicative ruling." The latter seems to be about rulings that the district court could make upon remand, and that is not seemingly what is involved here (because the question is whether the court of appeals, not the district court, will approve the payment). A "recommendation," on the other hand, is something the court of appeals could follow or not follow.

Consistent with this approach, Rule 23(e)(5) would be amended in a different way. Up to the point of docketing of the appeal by the circuit clerk, the responsibility and authority to pass on the proposed consideration for abandoning the appeal would rest in the district court, under a new (B). Then a new (C) would direct the district court to report its recommendation or indicative ruling to the court of appeals if the matter were referred to it by the court of appeals.

The abiding question is whether this more complicated approach is preferable to the simpler approach involving an amendment only of the civil rule.

An initial reaction to the abiding question was that it is better to amend only the civil rule.

Another reaction was that appellate judges on the Standing Committee and the Appellate Rules Committee seem receptive to the simpler approach. There is some uneasiness about jurisdictional implications. But there are no firm arguments for the view that this sort of limitation on the parties' actions (in making a deal for dismissal of the appeal) intrudes on the authority of the court of appeals. The arguments have been significantly examined in the memorandum from Derek Webb, Judge Sutton's Rules Law Clerk. As yet, there do not seem to be strong counterarguments.

The current thinking, then, was that the preferable approach would be the simpler one limited to the civil rule amendment. Meanwhile, if questions arise later, the record should show that

the more complicated alternative approach was carefully examined. And if there is enthusiasm for returning to it, there is a starting point for drafting in the sketches developed already.

Another point was that, if the simpler approach goes out for public comment, the comment period can provide an occasion for illuminating any policy debates that may emerge.

Another view, more generally, was that a goal of working through subcommittees is to have those subcommittees examine various ideas and drop those that are not promising. The larger group can restore them to the agenda, but picking and choosing is part of this Subcommittee's job. It ought to make choices, like deciding to shelve the more complex approach involving amending the Appellate Rules. Should enthusiasm for these measures revive, the record should provide a basis for responding.

Drafting matters on simple approach

After completion of the choice to proceed with only the simpler approach, brief discussion addressed two questions raised by brackets in that approach.

At the end of (5) (A) there were brackets around the phrase "for the objection." The consensus was to remove the brackets and retain the phrase.

At the end of (5) (B) (ii), there were brackets around the phrase "despite the objection." The consensus was to remove that phrase as unnecessary. After a class member has objected to a proposed settlement, the entry of judgment approving the proposal intrinsically is "despite the objection." That need not be spelled out.

Rule 23(e) (2) Settlement approval criteria

This topic was introduced as largely having been examined already, but involving several items that have not yet been resolved. The purpose of the call is mainly to resolve four that were identified in the Standing Committee agenda book with brackets or footnotes.

But an additional matter was brought up. In (C) (iv), the word "settlement" seems superfluous and possibly distracting. The rule is about the "proposal," so it was agreed that the word "settlement" will be dropped there.

Turning to the issues presented in the Standing Committee agenda book materials, the first is whether to combine (A) and (B) or leave them separate. In favor of combining might be the fact that the question of adequate representation inherently

includes the negotiation of the proposed settlement. On the other hand, there may be value in emphasizing that focusing on how the deal was negotiated is an important thing to do somewhat separately from the general question of overall adequate representation. The consensus was to leave the separation as presented in (A) and (B) in the text of the draft.

It was also noted that during the AALS discussion in New York in January, there was some sentiment for putting the "substantive" issues ((C) and (D)) first, and the "procedural" issues ((A) and (B)) afterwards. Shouldn't the substance matter more? A reaction was that it's difficult to draw a firm line between the two sorts of concerns, for the attitude one brings to the substantive matters is influenced by one's attitude toward the procedural matters. The consensus was to leave the ordering as presented in the draft.

Footnote 2 raises the question whether an additional consideration bearing on factor (C) should be added -- "the probable effectiveness of the proposal in accomplishing the goals of the class action." Much can be said in favor of emphasizing that general concern, but it is more difficult to determine what it means if it goes beyond "the relief provided for the class." The consensus was that adding this consideration to the rule would not be useful.

Footnote 3 presented an alternative formulation of the considerations in (C), which did not break them out into headings (i) through (iv). A question was raised on whether the version in text was consistent with prevailing style protocols. The answer was that, at a general level, it might be, but that this consideration is not critical. Discussion revealed, however, that the members were comfortable with the version in text, and that would be retained.

Attention shifted to a short paragraph in the draft Committee Note -- "If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved."

At least some circuits have noted this consideration among the very many that can bear on settlement approval decisions. The ways in which it bears on those decisions might be debated. One view could be that if certification could not be obtained for full litigation that strongly supports approving the settlement. One of the distinctive things about settlement certification is that it affords relief to class members in situations in which they might get none otherwise. On the other hand, in some situations one might regard the fact that the class cannot be certified as a reason for skepticism about approving a class settlement. Perhaps the reason is that the class is riven with

conflicts, or that there really are not significant common issues. In that sort of situation, these possibilities probably would crop up as pertinent to the listed factors, but the role of the prospect of full certification seems ambivalent.

Brief discussion yielded a consensus that retaining the brackets for present seems appropriate. It was noted, however, that publishing an amendment proposal with brackets, even in the Note, would not be preferable.

Impact of Campbell-Ewald decision

The Subcommittee recommended putting the "pick-off issue" on hold pending the Supreme Court's Campbell-Ewald v. Gomez decision. The case was decided on Jan. 20. So the question whether to proceed with rulemaking has returned.

An initial reaction was that there has already been "a lot of discussion" about the impact of the decision in the week since the Court decided the case. It does not seem that the Court's decision was a knock-out blow for either side. On the plaintiff side, there is a lot of continuing worry about pick-offs. On the defense side, it seems that there is a lot of discussion about how defendants can exploit the opportunities left open by the Court's decision to nip class actions in the bud. So maybe the best idea would be the simplest -- exclude class actions and derivative actions from Rule 68. That was one of the ideas we developed before, and it might be useful now.

Another reaction was that "Somebody is going to pay money into court for the class representative and then demand that the court dismiss the case as moot." That will have to go back to the Supreme Court unless we do something about it. "It's only a matter of time."

Under these circumstances, it may be that a rule change could prevent a lot of litigation about what "works" and does not work after Campbell-Ewald.

Another reaction was that it's not clear that a change to Rule 68 will do the job. In the Court's decision, the rule played at best a secondary role. The main basis for the decision was "first year contract law" -- a rejected offer is nothing. Focusing on Rule 68, it says that neither party can file the offer unless the other party accepts, and that an unaccepted offer is "considered withdrawn." So the alternative maneuver mentioned by the Court in Campbell-Ewald (depositing the full amount in an account for the plaintiff) does not seem to be embodied in Rule 68. And it may be that the majority opinion requires that judgment be entered against the defendant to moot the case. Meanwhile, Justice Thomas's opinion seems to say that making a fully effective "tender" would constitute an admission

of liability, which may deter defendants from doing so.

On the other hand, going back to the Court's decision in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), shows that the Court then regarded pick-off behavior as unacceptable, and also regarded it as inimical to the proper functioning of the class action. *United Air Lines v. McDonald*, 432 U.S. 385 (1977), might also be pertinent. In that case, the district court denied class certification and the named class representatives indicated they intended to appeal that decision when final judgment was entered. But after they won on the merits they decided not to appeal the certification decision. At that point, other class members sought to intervene, and the Court held that they could, although only to obtain appellate review of the certification decision.

There has been much water under the bridge since these Supreme Court decisions, and some suggestions more recently that the Court is not of entirely the same mind. But these early decisions suggest many issues that might emerge.

Another view was that there's considerable risk for defendants who try a pick-off move in the current situation. "Allowing judgment to be entered against your client is very significant." Maybe this problem will not actually emerge.

A counterpoint was that there need not necessarily be any preclusion resulting from the entry of such a judgment. The main goal should be to ensure that the class action can remain viable if the pick off occurs before class certification is resolved. If certification has already been denied, that is a different matter.

It was observed that, if defendants react to the Court's decision by making deposits into court that is not a Rule 68 measure and not affected by a change to Rule 68.

That idea suggested another measure -- that, if a small amendment to Rule 68 will not do the job, there should be a mechanism in the rule assuring the opportunity to replace class representatives, at least if mootness is what prompts a need for replacing them. Perhaps that should have a time limit -- 30 to 60 days to find a replacement should suffice and should not seem an undue imposition from the perspective of the defense bar. There is a small amount of district court jurisprudence.¹ There

¹ For a very old court of appeals case on the same general subject, consider *Johnson v. American Credit Co.*, 581 F.2d 526, 533 n.13 (5th Cir. 1978):

When faced with a situation when no named plaintiff can

may be authority from the mid 1990s.

The basic point, it was emphasized, is that this sort of interruption of the class action is really contrary to the objectives of the rule. There are two basic issues: (1) whether the claim of the individual class representative is moot, and (2) what happens to the class claims if the named representative's claim becomes moot. This discussion is focused on the second issue.

Another pending Supreme Court decision was mentioned. On January 15, 2016, the Court granted cert. in *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015), cert. granted, 136 S.Ct. _____ (no. 15-547, Jan. 15, 2016). The question presented is: "Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice." That is not the same as the topic under discussion here, but may be similar to a situation in which a named plaintiff either accepts a settlement or is in "receipt" of a payment deposited into court by the defendant. It is not certain, but seems unlikely that this case could be decided this Term.

An overall reaction was that the most promising next move would be to return to the sorts of sketches that were presented at the mini-conference and see how they might be adapted to the current setting. That would enable a concrete discussion of the issues. It might also begin to identify possible issues with such measures. It was stressed that several relatively basic issues might emerge.

A reaction to this proposal was that it seems fine to get more concrete, but also seems likely that if five Justices of the Court say there must be a judgment entered against a defendant to moot the claim of the resisting class representative, and another Justice says that making a tender constitutes an admission of liability, there may be few takers. This may turn out to be a non-issue. "I doubt the people on the defense side will really get excited about doing this."

But only Justice Thomas says that the judgment implies liability, it was responded. Moreover, as Rule 23(e) shows, a "judgment" may be pursuant to a settlement, and not be res

represent a subclass, a trial court should consider whether it is in the interests of justice and judicial economy to postpone dismissal as to the subclass for a specified period in which members of the subclass could become plaintiffs by amendment of the Complaint or by intervention and thereby save the subclass action.

Appendix
 Objector proposal
 circulated before Jan. 29 call

Redraft of Objector provisions
 After Jan. 19 conference call

Based on the Jan. 19, conference call, redrafting of the objector provisions might be as follows:

A. Simple Model
 (favored by Subcommittee)

- 1 (5) (A) Any class member may object to the proposal if it
 2 requires court approval under this subdivision
 3 ~~(e); the objection may be withdrawn only with the~~
 4 ~~court's approval. The objection must state~~
 5 whether it applies only to the objector, to a
 6 specific subset of the class, or to the entire
 7 class, and state with specificity the grounds [for
 8 the objection].
 9
 10 (B) Unless approved by the court after a hearing, no
 11 payment or other consideration may be provided to
 12 an objector or objector's counsel in connection
 13 with:
 14 (i) forgoing or withdrawing an objection, or
 15 (ii) forgoing, dismissing, or abandoning an appeal
 16 from a judgment approving the proposal
 17 [despite the objection].
 18
 19 (C) A motion for court approval under Rule
 20 23(e) (5) (B) (ii) must be filed no later than 60
 21 days after the entry of judgment.²
 22
 23

DRAFT COMMITTEE NOTE

1 **Subdivision (e) (5).** Objecting class members can play a
 2 critical role in the settlement-approval process under Rule
 3 23(e). Class members have the right under Rule 23(e) (5) to

² This timing requirement is modeled on Rule 59(b) regarding a motion for a new trial. An alternative model might be Rule 60(c), which requires that a motion for relief from a judgment be made "no more than a year after the entry of the judgment." A concern might be whether there is ambiguity about when judgment was entered if the district court has "retained jurisdiction" over some implementation aspects of the case.

judicata in any conventional sense.

Ascertainability

Discussion of the pick-off issue prompted brief reference to the other issue "on hold" -- ascertainability. The Court still has the Spokeo and Tyson Foods cases submitted. It may be that they will inform the handling of ascertainability. But given the experience with Campbell-Ewald, it may also be that they will not provide definitive answers. Moreover cert. petitions are pending in the 7th Circuit's Mullins case and a Sixth Circuit Procter & Gamble case.

Style Consultants' Suggestions

Brief discussion was had of the suggestions from the Standing Committee Style Consultants. Prof. Cooper has identified several issues with those recommendations. For one, the substitution of "enough" for "sufficient" seems to alter meaning. The Advisory Committee is ultimately in a position to decide whether recommendations intrude on meaning. The question seemed not to be ripe for discussion during this conference call, but the Subcommittee should carefully review the suggestions and determine which raise difficulties. Then communication can be had with the Style Consultants.

DOJ Proposal

The DOJ proposal would be discussed in the next conference call. Prof. Cooper has suggested a way of integrating it (and our pending Rule 23(f) proposal) into the rule. It was asked why the time to appeal should be extended for others -- not just the Department -- in every case in which a federal actor is a party. If the Government does not want to appeal, why should other litigants get more time? The tentative answer was that it is undesirable to give different litigants in the same case different times to appeal. But it may be that there are examples from other contexts in which such differences do exist. This possibility deserves exploration.

Next Call

Judge Dow will try to identify a good time for the next conference call.

4 submit objections to the proposal. The submissions required by
5 Rule 23(e)(1) may provide information important to their
6 decisions whether to object or opt out. If class members file
7 objections, they can provide the court with important information
8 bearing on its determination under Rule 23(e)(2) whether to
9 approve the proposal.

10
11 **Subdivision (e)(5)(A).** The rule is amended to remove the
12 requirement of court approval for withdrawal of an objection
13 unless court approval is required under Rule 23(e)(5)(B)(i).
14 When objecting class members conclude that their objections are
15 not justified, there is no need to seek court approval if there
16 is no payment or other consideration for the withdrawal.

17
18 The rule is also amended to clarify that objections must
19 provide sufficient specifics to enable the parties to respond to
20 them and to enable the court to evaluate them. One feature
21 required of objections is specification whether the objection
22 asserts interests of only the objector, of all class members, or
23 of some subset of the class. Beyond that, the rule directs that
24 the objection state its grounds "with specificity." Failure to
25 provide needed specificity may be a basis for rejecting an
26 objection. Courts should take care, however, to avoid unduly
27 burdening class members who wish to object. Particularly if they
28 are not represented by counsel, they cannot be expected to
29 present objections that adhere to technical legal requirements.

30
31 **Subdivision (e)(5)(B).** Good faith objections can assist the
32 court in evaluating a proposal under Rule 23(e)(2), which is a
33 reason for the requirement of specifics in Rule 23(e)(5)(A). It
34 is legitimate for such objectors to seek payment for providing
35 such assistance under Rule 23(h). As recognized in the 2003
36 Committee Note to Rule 23(h): "In some situations, there may be
37 a basis for making an award to other counsel whose work produced
38 a beneficial result for the class, such as * * * attorneys who
39 represented objectors to a proposed settlement under Rule 23(e)."

40
41 But some objectors may be seeking personal gain, and using
42 objections to obtain benefits for themselves rather than
43 assisting in the settlement-review process. At least in some
44 instances, it seems that objectors -- or their counsel -- have
45 sought to extract tribute to withdraw their objections or dismiss
46 appeals from judgments approving class settlements. And class
47 counsel sometimes may feel that avoiding the delay produced by an
48 appeal justifies providing consideration to these objectors.

49
50 The court-approval requirement currently in Rule 23(e)(5)
51 partly addresses this concern. Because the concern only applies
52 when consideration is given for withdrawal of an objection, the
53 amendment requires approval under Rule 23(e)(5)(i) only when such
54 consideration is involved. The term "consideration" should be

55 broadly interpreted, particularly when the withdrawal includes
56 some arrangements beneficial to objector counsel. [Under Rule
57 23(h), the court may approve payments to objector counsel who
58 have contributed value to the litigation, and a court asked to
59 approve such arrangements might give weight to the contribution
60 the objection made to the settlement-review process.]³
61

62 Rule 23(c)(5)(B)(ii) applies to consideration for forgoing,
63 dismissing, or abandoning an appeal from a judgment approving the
64 proposal. Because an appeal by a class-action objector may
65 produce much longer delay than an objection before the district
66 court, it is important to extend the court-approval requirement
67 to apply in that context. Because the district court is best
68 positioned to determine whether to approve such arrangements, the
69 rule requires that the motion seeking approval be made to the
70 district court.
71

72 Until the appeal is docketed by the circuit clerk, the
73 district court may dismiss the appeal on stipulation of the
74 parties. See Fed. R. App. P. 42(a). Thereafter, the court of
75 appeals has authority to decide whether to dismiss the appeal.
76 This rule's requirement of district court approval of any
77 consideration in connection with such dismissal by the court of
78 appeals has no effect on the authority of the court of appeals
79 over the appeal. It is, instead, a requirement that applies only
80 to provision of consideration for dismissal or abandonment of an
81 appeal, consistent with other circumstances in which both the
82 district court and the court of appeals have authority in
83 relation to the same case. See, e.g., Fed. R. App. P. 8(a)(1)
84 (requiring that a party seeking certain kinds of relief first
85 move in the district court before seeking relief in the court of
86 appeals). A party dissatisfied with the district court's order
87 under Rule 23(e)(5)(B) may seek review of the order in the court
88 of appeals.⁴
89

90 **Subdivision (e)(5)(C).** Any motion for approval of payment
91 or other consideration in connection with withdrawal of an
92 objection or forgoing, dismissing, or abandoning an appeal must
93 be filed within 60 days after entry of judgment approving the
94 proposal under Rule 23(e)(2). This deadline ensures that the

³ This is a first attempt to state something about how the district court should decide whether to approve such arrangements. It is intended to go beyond focusing solely on changes to the deal that "benefit" the class.

⁴ Does there need to be some rule provision providing an avenue for such appeal? Note that Fed. R. App. P. 8(a)(2) says that a motion may be made in the court of appeals after the district court denies relief.

95 district court retains familiarity with the details of the review
 96 process under Rule 23(e)(2), which may be important to deciding
 97 whether to approve the payment or other consideration, and also
 98 that the court of appeals is unlikely to have taken substantive
 99 action on the appeal.

Possible reference in Appellate Rules

One thought that emerged from the Fall 2015 meeting of the Appellate Rules Committee is the possibility that appellate litigators might not know about the Rule 23(e)(5) requirement of district-court approval. One way to address this concern might be as follows:

Rule 42. Voluntary Dismissal

* * * * *

1 **(b) Dismissal in the Court of Appeals.** The circuit clerk
 2 may dismiss a docketed appeal if the parties file a signed
 3 dismissal agreement specifying how costs are to be paid and pay
 4 any fees that are due. But no mandate or other process may issue
 5 without a court order. An appeal may be dismissed on the
 6 appellant's motion on terms agreed to by the parties or fixed by
 7 the court. If any terms of the dismissal require district court
 8 approval under Fed. R. Civ. P. 23(e)(5)(B), the parties must
 9 [provide the district court's order of approval] {notify the
 10 court}.

DRAFT COMMITTEE NOTE

[As with any Appellate Rule language, this does not represent any presumption about authority to write a Committee Note for another committee. Still, it may offer some useful starting points if this approach is used.]

1 **Subdivision (b).** As amended, Fed. R. Civ. P.
 2 23(e)(5)(B)(ii) requires district-court approval of any payment
 3 or other consideration in connection with dismissal or
 4 abandonment of an appeal by a class-action objector. This
 5 amendment to Rule 42(b) ensures that the court of appeals is
 6 notified that such approval has been obtained.

Reporter's Reactions

Many points might seem important in regard to this draft. Given the length of Subcommittee discussions already, it is probably not necessary to mention many of them.

One is whether the treatment of court of appeals

jurisdiction in the Note is suitable. The goal is to reassure that this Civil Rule does not seek to intrude on the court of appeals' authority.

Another that springs to mind is whether (C) does present a risk of intrusion into the court of appeals' province. (C) seems to say no objector can ever receive anything for dropping its appeal more than 60 days after the district court entered judgment, even if its objection was for itself alone (per the requirement in (A) that the objector specify whether he is objecting only for himself).

Assume such an objection ("I should not be lumped in with all these other people because I'm different"). Assume further that the court of appeals has some sort of mediation setup, and that mediation produces an agreement six months after the appeal is noticed that actually this class member is different. Does this rule say that the court of appeals, despite having "encouraged" the settlement of the appeal, can't achieve the goals of that settlement if (as seems possible) the resolution involves a payment to the objector?

Similarly, consider a case in which (in the Second Circuit, say) the court of appeals has heard oral argument on the appeal and then the parties reach a settlement. Does this rule say that the court of appeals is required to go ahead and decide the appeal even though the parties have settled because more than 60 days have passed?

One answer might be to say that after 60 days the parties must seek approval from the court of appeals, but that seems to introduce complexities this approach seeks to avoid. On the other hand, the original proposal to the Appellate Rules Committee was to forbid payoffs at any time for dismissing an appeal, so this approach at least offers a 60-day window after entry of judgment in the district court.

No doubt many additional points will arise.

Changing Appellate Rule 42(c) also
(not favored by Subcommittee)

An alternative approach would leave what one could call "primary" authority to deal with payoffs in connection with dismissals of appeals after they have been docketed by the circuit clerk to the court of appeals, while authorizing the court of appeals to refer the matter to the district judge.

Sketch of possible Appellate Rule 42(c)

Rule 42. Voluntary Dismissal

* * * * *

1
2 (c) (1) Unless approved by the court, no payment or other
3 consideration may be provided to an objector or
4 objector's counsel in connection with dismissing or
5 abandoning an appeal from a judgment approving a
6 proposed class-action settlement despite an objection
7 under Rule 23(e) (5) of the Federal Rules of Civil
8 Procedure [after the appeal has been docketed by the
9 circuit clerk]. Such payment or consideration must be
10 disclosed to the court.

11
12 (2) Before or after ruling on a motion to dismiss [or
13 dismissing for failure to prosecute], the court may
14 itself decide whether to approve a payment or other
15 consideration disclosed under Rule 42(c) (1), or may
16 refer the question whether to approve the payment to
17 the district court for a [recommendation] {indicative
18 ruling}, retaining jurisdiction to review the
19 [recommendation] {indicative ruling} [on request by any
20 party to the appeal].

DRAFT COMMITTEE NOTE

[As with any Appellate Rule language, this does not represent any presumption about authority to write a Committee Note for another committee. Still, it may offer some useful starting points if this approach is used.]

1
2 **Subdivision (c).** Fed. R. Civ. P. 23(e) (5) has been amended
3 to forbid providing any payment or other consideration to a
4 class-action objector in return for dismissing or abandoning an
5 appeal before the appeal is docketed by the circuit clerk. The
6 reasons for that amendment are set forth in the Committee Note
7 accompanying the amendment to that rule.
8

9 Rule 42(c) is added to address the handling of dismissal or
 10 abandonment of a class-action objector's appeal after it is
 11 docketed in the court of appeals. It requires the parties to
 12 disclose any proposed payment or consideration to the court. As
 13 under Fed. R. Civ. P. 23(e)(5), the term "consideration" should
 14 be broadly interpreted, particularly when the withdrawal includes
 15 some arrangements beneficial to objector counsel.
 16

17 Rule 42(c)(2) authorizes the court of appeals to decide
 18 itself whether to approve the payment or other consideration, or
 19 to refer the question to the district court for a
 20 [recommendation] {indicative ruling}. If the court of appeals
 21 does refer the matter to the district court, the parties may seek
 22 review, any party to the appeal may request that the court of
 23 appeals review the district court's action.

Revised Fed. R. Civ. P. 23(e)(5)

[New 23(e)(5)(A) would remain as set forth earlier]

1 (B) Unless approved by the court after a hearing, no
 2 payment or other consideration may be provided to
 3 an objector or objector's counsel in connection
 4 with forgoing or withdrawing an objection, or
 5 forgoing, abandoning, or dismissing an appeal at
 6 any time before the appeal is docketed by the
 7 circuit clerk.
 8

9 (C) If the court of appeals refers to the district
 10 court the question whether to approve payment or
 11 other consideration for dismissal or abandonment
 12 of an appeal [under Rule 42(c)(2) of the Federal
 13 Rules of Appellate Procedure], the district court
 14 must[, after a hearing,] report its
 15 [recommendation] {indicative ruling} to the court
 16 of appeals.

DRAFT COMMITTEE NOTE

[The draft for (e)(5) presented above could be used up
 the point where (B) begins.]

1 **Subdivision (e)(5)(B).** Good faith objections can assist the
 2 court in evaluating a proposal under Rule 23(e)(2), which is a
 3 reason for the requirement of specifics in Rule 23(e)(5)(A). It
 4 is legitimate for such objectors to seek payment for providing
 5 such assistance under Rule 23(h). As recognized in the 2003
 6 Committee Note to Rule 23(h): "In some situations, there may be
 7 a basis for making an award to other counsel whose work produced

8 a beneficial result for the class, such as * * * attorneys who
9 represented objectors to a proposed settlement under Rule 23(e)."

10
11 But some objectors may be seeking personal gain, and using
12 objections to obtain benefits for themselves rather than
13 assisting in the settlement-review process. At least in some
14 instances, it seems that objectors -- or their counsel -- have
15 sought to extract tribute to withdraw their objections or dismiss
16 appeals from judgments approving class settlements. And class
17 counsel sometimes may feel that avoiding the attendant delay
18 justifies providing consideration to these objectors.
19

20 The court-approval requirement currently in Rule 23(e)(5)
21 partly addresses this concern. Because the concern only applies
22 when consideration is given for withdrawal of an objection, the
23 amendment requires approval under Rule 23(e)(5)(i) only when such
24 consideration is involved. The term "consideration" should be
25 broadly interpreted, particularly when the withdrawal includes
26 some arrangements beneficial to objector counsel. [Under Rule
27 23(h), the court may approve payments to objector counsel who
28 have contributed value to the litigation, and a court asked to
29 approve such arrangements might give weight to the contribution
30 the objection made to the settlement-review process.]
31

32 Rule 23(c)(5)(B)(ii) applies to consideration for forgoing,
33 dismissing, or abandoning an appeal from a judgment approving the
34 proposal. Because an appeal by a class-action objector may
35 produce much longer delay than an objection before the district
36 court, it is important to extend the court-approval requirement
37 to apply in that context. Until the appeal is docketed by the
38 circuit clerk, the district court may grant a stipulated motion
39 to dismiss the appeal. See Fed. R. App. P. 42(a). After that
40 date, the question whether to approve a payment or other
41 consideration to an objector or objector counsel is subject to
42 Fed. R. App. P. 42(c), which forbids any such consideration
43 unless approved by the court of appeals.
44

45 **Subdivision (C).** Under Fed. R. App. P. 42(c)(2), the court
46 of appeals may refer the question whether to approve the payment
47 or other consideration to the district court for its
48 [recommendation] {indicative ruling}. If the court of appeals
49 makes such a reference, the district court must report its
50 [recommendation] {indicative ruling} to the court of appeals.

Reporter's Reactions

This approach would be more elaborate. That is one of the reasons why the Subcommittee does not favor it. One question is whether or how to deal with "abandonment" in the court of appeals, or dismissal for failure to prosecute. One might expect that an order to show cause re dismissal would precede dismissal

for failure to prosecute, and that is the hook for requiring disclosure of the payoff to the court of appeals in the abandonment situation. Whether that method really is employed (or would be employed) is uncertain. There does not seem to be an Appellate Rule that provides a parallel to Civil Rule 41(b) regarding failure to prosecute. It would seem that class counsel would not be willing to pay off the objector until certain that the appeal is gone, and that the abandonment situation makes that less clear. So maybe the abandonment for payoff problem is not really a problem on appeal.

This approach does not have a hearing requirement in the court of appeals. Should one be added? Is that useful in the court of appeals? The idea of requiring it before the district court is to reduce the prospect class counsel might be willing to stipulate but not to support the payment face-to-face with the judge.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Jan. 19, 2016

On Jan. 19, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene Prater, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf of the Administrative Office. Prof. Gregory Maggs (Reporter, Appellate Rules Committee) participated in the discussion of the objectors issues.

The call began with a brief review of points made during the Standing Committee meeting and the AALS Section of Civil Procedure discussion of Rule 23. The purpose of this call is to get started on the next steps. The goal remains to have a final set of proposals for the Advisory Committee's April meeting so it can be presented to the Standing Committee in June with a recommendation for publication for public comment.

Objectors

Because it was the topic on which the most attention had focused during the Standing Committee meeting, and because Prof. Maggs was present for this discussion, the first topic was the objector problem. This is one on which there has been near unanimity from the experienced bar in many events attended by Subcommittee members.

A starting point was the view expressed during the Standing Committee meeting that adopting a requirement for court approval might be harmful. A related concern was that this solution would not be successful in achieving its purpose of disrupting the business plan of bad faith objector counsel. But it will be important to keep in mind the possibility that such a rule might actually make things worse. On the other hand, publishing a proposal along the lines identified by the Subcommittee would provide an occasion for the public comment period to shed light on whether the rule change would produce desirable changes in behavior.

A distinct issue is presented by the problem of jurisdictional "overlap" between the court of appeals and the district court. This topic did not attract attention during the Standing Committee meeting, but it might influence the choice between the simpler amendment approach looking only to a change to Rule 37(e)(5), and a combined rule-amendment approach relying also on a change to the Appellate Rules.

On the jurisdictional question, the memorandum from Derek Webb (Judge Sutton's Rules Law Clerk) provides significant

comfort by showing that, in many contexts, various matters are "retained" by the district court while other matters are on appeal. In somewhat the same vein, 16 Fed. Prac. & Pro. § 3937.1 deals with the topic "Retained Jurisdiction" of the court of appeals while further proceedings occur in the district court.

One reaction to the Webb memorandum was that, if we were to pursue the more complex rulemaking approach, the best analogy might be a limited remand rather than an indicative ruling. The goal should be a "real ruling."

A first reaction to the current set of choices was "I like the simple approach." Perhaps the best way to proceed would be to deal with the jurisdictional issues in a Committee Note. That Note could emphasize that this bifurcated authority to deal with different aspects of a piece of litigation has many parallels and implies no limitation on the jurisdiction of the court of appeals.

Another reaction was that (1) the Webb memorandum shows that there is a solid legal basis for something like what we have discussed, but (2) there may be a somewhat separate question of the attitudes of court of appeals judges.

Those ideas were pursued: Suppose that we go with the simple approach and say nothing about the handling of motions to dismiss appeals. Would the court of appeals refuse to suspend its briefing schedule based on a pending motion for district court approval of the payment for dismissal? Could it be that the case might have progressed so far in the court of appeals that it would want to proceed?

Those possibilities reminded the Subcommittee of an FJC study of the handling of class-action objector appeals in three circuits. In two of them, none or almost none of the appeals was decided on the merits. But in the Second Circuit some 63% of the objector appeals during the study period were resolved on the merits. It may be that the bad faith objectors will make their deals very early in the appellate process, fitting the model of the two circuits in which few or none of those appeals lead to an appellate decision. But consider a case in which the appeal has been fully argued and the decision is about to be handed down when the parties reach a settlement. Should the court of appeals then be required to await action by the district court before granting a motion to dismiss the appeal?

This possibility prompted a suggestion -- How about a civil rule that said nobody may accept payment for dismissing an appeal after more than a certain period of time -- 60 days, for example. This raised the question whether there would be a risk that parties would simply wait until after the deadline, but that could be solved by forbidding any payments after the deadline. A refinement would be that the deadline should apply to when the permission is sought from the district court, not to when the

district court grants permission. That might produce a "pocket veto" that is not what the rule is trying to provide.

Another reaction was "The less we say in a Note the better." A response to that was agreement, but also the thought that it would be useful to emphasize in a Note that this is not a revolutionary approach to the division of responsibility between district courts and courts of appeals. This matter is like determining the amount of attorney fees, something often separated from the merits of the appeal of the underlying judgment. Such a comment might be reassuring to court of appeals judges concerned about possible encroachment on their jurisdiction.

A different concern was raised, prompted in part by a comment made during the Appellate Rules Committee meeting in Fall, 2015: Perhaps even with the "simple" version of a Civil Rule change it would be desirable to have some note in the Appellate Rules calling attention to the need to get district court approval if a payment would accompany dismissal of the appeal. The disappointing experience with use of Fed. R. Evid. 502 had been one thing that prompted putting a reference to that rule into the Civil Rules in the most recent package of amendments.

Another participant reported being unsurprised by the Standing Committee reaction to the court-approval possibility. Indeed, the Subcommittee has discussed some similar misgivings in the past. But given the widespread concern in the bar we ought to try to do something, even though this solution may not really work.

Another member echoed what others had said -- it is good to make an effort. We should move ahead. Another member agreed. Guarantees can't be given, and surely some people will try to find a way around the new rule.

A question arose about the role of the Appellate Rules Committee in the process. It seems that a Civil Rule that appeared to divest the courts of appeals of some portion of their jurisdiction would run into tough sledding. A reaction to this concern was that the simple model says nothing about the jurisdiction of the court of appeals. The district court acquires no authority to pass on a motion to dismiss an appeal.

It seemed best to try to refine the proposal and then to invite some from the Appellate Rules Committee to react to the idea. The Appellate Rules Committee will have its Spring meeting in early April, before the Civil Rules meeting.

It was suggested that there are essentially two kinds of concerns: (1) anxiety about appellate jurisdiction, and (2)

functional considerations about which court is best equipped to evaluate the payment question.

The bottom line was that Prof. Marcus would attempt to do a redraft of the "simple" version on p. 200 of the Standing Committee agenda book, including an appropriate time limit on the request, and a draft Committee Note. It would probably also be good to redo the drafts on p. 202 for the more complicated treatment (including an Appellate Rule change). With regard to that, the consensus was to prefer the language in braces at lines 5-7 on p. 200 over the language in brackets at lines 3-5.

"take rate"

Another subject raised at the Standing Committee meeting was the use of the term "take rate" to describe the number or frequency of claims against the settlement funds. Should that be reconsidered?

An initial reaction was that this is "shorthand jargon." Perhaps a different term could be substituted.

A deeper concern was identified: This can mean different things in some class actions, particularly consumer class actions for small individual damages. There may be at least two types of issues:

- (1) It is difficult to determine the take rate in terms of the overall number of potential claimants. There may be no way to determine how many potential claimants there are, and as a result a "take rate" that indicates how many of them actually sought relief could not be determined.
- (2) Although there are large individual entitlements and a determinable class of potential claimants, there are few actual claims. Even institutional claimants in securities class actions may fail to claim their share of the settlement funds.

In addition to these sorts of considerations, there may also be debates like some we have seen in connection with cy pres issues. Is that "take rate" the right measure of the value of using the class action procedure? It is an imperfect measure.

On the other hand, it was suggested, there are various ways in which the claims history or prospect is relevant to topics we continue to consider. One focus might be the claim-making process; a low level of claims may show that it is too difficult. (Maybe it would be best, where possible, just to pay class members without insisting they submit claims.) Another focus might be the attorney fee award; one reason class actions have a negative aura in some settings is that occasionally it seems that

only the lawyers get any real money. If the total paid out to class members who made claims is \$10,000 and the lawyers got \$3 million in fees, something looks wrong.

A reaction was that "you can't reduce it to a formula." Thus, trying to rank or evaluate all settlements in these terms is not justified. There is a lot of controversy about when attorney fees should be pegged to the claims payout. We have heard that cy pres provisions are important because there very often is at least some leftover residual money. Moreover, it may take a long time to determine that actual claims rate. Consider, for example, a case in which there is a ten-year claims period.

The consensus was that we should proceed with care in this area.

Department of Justice proposal

After the Advisory Committee's November meeting the Department of Justice submitted a proposal to extend the time to seek appellate review under Rule 23(f) from the current 14 days to 45 days for any case in which it is involved. The justification for this deferral is that the Government is a singularly complicated entity, and the Solicitor General's office needs time to consider proposed appeals and choose those that will be approved.

An initial reaction was that having the same period apply to all litigants in a given case seems clearly preferable to varying times for different litigants. Another reaction was to ask whether it was necessary to include former U.S. officers or employees, since a class action would presumably also be brought against current officers and employees to make the relief effective. One response to this concern was that it could happen that the Government had changed the practice in question, but that the former officer remained a defendant in a damages suit. Another was that in regard to Rules 4 and 12 the Committee Note said that references to officers or employees of the U.S. included former officers and employees. Perhaps similar treatment would work in this instance.

The question whether the Government was a unique litigant could be debated. There are surely others before the federal courts that are very large. After discussion, the consensus was that the Government does need more time, and that 45 days is probably an acceptable amount of time.

The consensus was that there is no basic problem with the DOJ proposal, and that drafting should go forward on it.

Style

The Standing Committee style consultants have reacted to the sketches included in the Standing Committee agenda book. The way to proceed will be to see what the drafts look with the style changes included. The question is, in theory, whether the Advisory Committee misgivings are about "substance" or "style." But the dividing line between the two is not absolute. For example, changing "sufficient" to "enough," as the style consultants propose at one point, may involve equivalents in terms of the dictionary, but may also produce subtle but importance shades of meaning. It is important that the Advisory Committee recognize its primary authority to produce rules that effectively state its choices, even if they are not stylistically exactly what the style consultants might prefer.

The resolution was that Judge Dow and Professors Cooper and Marcus would review the style consultants' reactions and share the result with the Subcommittee in a timely fashion.

Additional matters left open
in the Standing Committee memo

It seemed that all but one of the remaining choices on the face of the Standing Committee memo are about the standards for settlement approval under Rule 23(e)(2). That discussion seems likely to take too long to begin it this afternoon.

The one other issue involves lines 56-57 of the draft Committee Note on p. 195 of the Standing Committee agenda book. The choice there is whether to say particular attention should focus on the breadth of any release of class claims.

An initial reaction was that this is a distinctive and important issue. A response was that it is notwithstanding not so prominent that it deserves "particular attention" compared to all the others. So the suggestion was that the thought could be inserted into the prior sentence in somewhat the following way:

In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involves claims that would be released -- including the breadth of any such release -- under the proposal is often important.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Nov. 23, 2015

On Nov. 23, 2015, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene E.K. Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf and Derek Webb of the Administrative Office. Judge Steven Colloton (Chair, Appellate Rules Committee) and Prof. Gregory Maggs (Reporter, Appellate Rules Committee), participated in the discussion of the objectors issues.

The purpose of the call was to review the redrafting that had occurred since the Subcommittee's Nov. 16 conference call. Prof. Marcus and Prof. Cooper had both circulated redrafts of the sketches before the Subcommittee on Nov. 16.

Objectors

The topic was introduced as involving some basic questions about where the primary responsibility for evaluating payments to objectors should lie, and also whether it really is necessary to make any change in the Appellate Rules if a change to the Civil Rules would suffice. At the same time, there is a jurisdictional issue -- once a notice of appeal is docketed in the court of appeals, it (not the district court) has authority to decide whether to dismiss the appeal. And if that dismissal is contingent on approval of a payment by the district court, that could produce a jurisdictional complication should the district court have primary authority on approving such payments.

An initial subject was disclosure -- how is anyone to know about such a proposed payment? The redraft of a Civil Rule says nothing about disclosing the payment, but only that it must be approved. The alternative draft Appellate Rule does say that a motion to dismiss the appeal must disclose any such arrangement. A reaction was that the disclosure requirement is implicit in the sketch of a Civil Rule. How otherwise could one obtain approval?

A further reaction was that the simplest model is to have the district court decide. For that to work, there has to be disclosure. But that drew the observation that even if we say the court of appeals cannot approve the payment it would want to know about it. Whether that is necessarily true is unclear, however. Unless the court of appeals defers the due dates for briefing, the appeal goes forward. Assuming bad faith objectors do not want that, they would have to move to postpone the due date for their briefs. To justify the postponement, they would normally have to explain that they've sought approval from the district court for the deal under which the appeal would be

dismissed.

That drew the question "How fast can the district court address the question of payment?" A reaction to that was that the objectors would dismiss the appeal to avoid having to write a brief, according to the "business plan" of bad faith objectors we have heard about. Another reaction was that there is no need for a rule requiring disclosure to the court of appeals if it is clear that the objector must seek approval of any payment from the district court.

Attention was drawn to the "after a hearing" proviso in the Civil Rule sketch on district court approval. The idea is that the hearing will occur in the district court. Holding a hearing in the court of appeals does not seem a sensible idea. The idea of requiring a hearing in the district court is that it may be too easy for class counsel to stipulate to a payment, but that explaining to the judge, face to face, what justifies a payment to this objector counsel will put a damper on inappropriate arrangements.

The question was raised whether lodging exclusive authority in the district court to approve payments would appear appropriate from the appellate court perspective. A response was that it should entail appropriate respect for the authority of the court of appeals. The appellate court retains authority to rule on the motion to dismiss the appeal. Another reaction was that it is best to lodge this authority in the district court. Even though authority would normally be in the court of appeals, this is a unique situation in which the district court is the right place. To the extent this is "encroaching" on the court of appeals' jurisdiction, that can be explained.

A different reaction was "This will never happen." Once this new regime is in place, the business plan of bad faith objectors will fail and they will go away. A response was that "they will still try to get around it." That drew the reply that "it takes two to tango." If class counsel will never agree to work-arounds, that will put an end to this behavior. But that is a reason to make sure that the prohibition is a broad one -- against any sort of consideration, not only direct payments -- for otherwise some may contrive ways around it.

A different perspective was to focus on the good objector. That person raises valid points, producing improvements in the settlement. The fact that an objector wants to be paid for the helpful effort surely does not show that it is a "bad" objector. To the contrary, the 2003 Committee Note to Rule 23(h) recognizes that payment may be appropriate. So the court can simply approve that payment. And more generally, it is important not to say that objectors are somehow per se "bad." They can contribute valuable insights to the settlement-review process.

The question of notice to the court of appeals returned. Won't we need to ensure that the court of appeals is notified of this proceeding in the district court? What if there are delays in the district court? The response was that the court of appeals only needs to know if the delays in the district court run up against the briefing schedule in the court of appeals. If so, the objector/appellant will move for an extension of time. Then it will also presumably inform the court of appeals of what's happening in the district court to explain its reasons for seeking an extension. So disclosure will take care of itself without the need for any rule.

This discussion prompted the observation that a stand-alone Civil Rule addition of a court-approval requirement would work without any need to change the Appellate Rules. That idea produced concerns about whether there might be difficulties that we have not yet identified. "We need to foresee the reactions of court of appeals judges." The solution for the present was to develop two rule-amendment approaches. In part, that would enable us to make clear how complicated it becomes to involve the court of appeals more deeply in this matter.

That idea drew agreement: "It behooves us to recognize that it's better to have fewer cooks in the kitchen." The district court is the proper forum for the decision whether to approve the payment, and it is equipped to hold the hearing that is an important adjunct to the process. That drew agreement -- any transmittal to the Standing Committee (which includes court of appeals judges) should say that the simpler approach is the clear preference of the Subcommittee.

A different subject was raised -- how about "abandoning" an appeal or an objection? Might that be a way around our new requirement? Rather than formally move to dismiss an appeal or formally withdraw an objection in the district court, the objector simply disappears and abandons the field. What happens then?

This possibility could produce uncertainty. "It's hard to figure out whether the objector is abandoning the objection or appeal, or is simply slow in getting things done." A response was that any such abandonment should require approval from the district court of any payment, if one is contemplated in return for the abandonment.

A related question was raised: How about forgoing an objection? The drafts before the Subcommittee mention forgoing an appeal, but not forgoing an objection. How about the bad faith objector counsel who sends class counsel an objection and says "We'll file this and appeal if it's not accepted by the district court unless you pay us off." Is that a risk? Should we try to cut that off? A reaction was that this is a

possibility. But is such a person "an objector" and thus subject to the court's authority? The response was "They are objectors, functionally." There is no need to refer to them as "potential" objectors.

A different issue was raised. Earlier drafts of rule amendments have included the idea that the district court retains jurisdiction to address payments to objectors even after approving and entering judgment on the settlement. Should that be considered? The response was that this does raise an issue. There is not a simple answer. Perhaps the right view is that this is a "collateral matter" that remains within the district court's authority even after an appeal is docketed in the court of appeals.

It was noted that there are other examples of "shared" jurisdiction between the district court and the court of appeals. Under Rule 23(f), the case may continue in the district court even if the court of appeals allows an appeal of class certification. With a preliminary injunction, an immediate appeal is available as a matter of right, but that does not stop the district court proceeding in its tracks.

One analogy might be the handling of costs on appeal. That is often regarded as "collateral" and subject to the district court's control (at least as to amount). Perhaps this is different, however, because the costs on appeal are assessed in accord with the disposition of the appeal and on direction of the court of appeals. The situation we are discussing is different from that.

Another possibility was raised: In some circuits, there is a "settlement master" who tries to get parties to compromise to resolve the appeal. What if such a court officer brokers a deal under which the class-action objector agrees to dismiss the appeal in response to some sort of consideration. Does our rule say that the district court must approve that deal? A reaction was that this is not a problem.

The consensus was that it is wiser to present both options (one limited to amending the Civil Rules, and other involving changes to the Appellate Rules also) to the Standing Committee to get additional input, but also to make clear that the simpler option (Civil Rule amendment only) is the distinct preference of the Subcommittee. The jurisdictional issues should be mentioned to the Standing Committee also. Prof. Marcus would try to circulate a redraft promptly for all to review.

It was also noted that it's striking that this is the only topic on which it seems all agree with the need for action and the objective, but that it's proving in many ways the most challenging to put into the rules in a way that will work. It

may be that research on the handling of "collateral matters" left to district court control in connection with appeals would be informative.

Frontloading

The first question raised had to do with line 22 of the redraft. It had been suggested that a comma and "but" be added before "only if it determines that giving notice is justified . . ." The goal was to make it clear that this is a serious requirement. A reaction was that the word "only" there seems to make the point, and indeed that some might object that it is an intensifier that adds nothing to "if it determines that." The risk that this could be read to say that a court could proceed without giving any notice on determining that giving notice is not justified is not a serious concern.

An alternative reaction was to ask whether we really need the "only" in the draft. Another participant mentioned having the same reaction. The requirement that the court determine that giving notice is justified would remain. Dropping "only" was supported on the ground that using fewer words is generally preferable. And one reaction to that idea was that we could go forward without "only" and see whether anyone raised concerns that made restoring it seem desirable. The consensus was to drop "only" for the draft to be presented to the Standing Committee.

Another correction was noted: we need to add "to" in line 16 between "enable it" and "determine."

Another concern was raised about bracketed Note language on p. 3. The language calls attention to the possible need for the court to review "continued certification" in light of the settlement proposal even if it has already certified a class. As the footnote mentions, this might suggest too strongly that "decertification" should be considered. The consensus was to drop this bracketed sentence.

This discussion called attention also to (B)(ii) in the redrafted sketch. That contains a bracketed portion ("for purposes of judgment pursuant to the proposal"). Including this provision in the rule calls attention to the reality that class certification must be confirmed to be proper for the actual settlement even if the court has already certified a class for purposes of litigation. In dealing with voluntary abandonment of claims after certification, we have already seen that refinement of the case after certification can happen. And a settlement proposal may do the same sort of thing. So this language may be important, and also make sense since the court's decision whether to send notice to a certified class is one of the things addressed in the rule provision.

The basic value of including this provision was accepted by consensus, but language issues arose. One is that "pursuant to" will not pass muster with the style consultants. It should be replaced by "on." Another was that it would be desirable to add "settlement" before "proposal." That is what the new language says in line 18 of (e)(1)(A). For present purposes, then, (B)(ii) would be revised as follows:

class certification for purposes of judgment on the
settlement proposal

Rule 23(f) amendment

The only concern about the redraft of this amendment idea (on p. 6) was about the phrase at the end -- "under Rule 23(f)." Various possibilities were considered (including "under this subdivision" or "under this rule"), and the eventual resolution was to use "under subdivision (f)."

Opt-out trigger in (b)(3) cases
upon notice under (e)(1).

The redraft of this proposal (p. 7) drew no further comments.

Form of notice in (b)(3) cases

The discussion focused on the right way to state what we want the rule to say. First, the use of em dashes to set off the new language was supported. Then the question whether to say "first class" mail was considered, in light of the risk that changes in mail service might mean it would cease to exist, at least under that name. Additionally, the comma after "electronic" was questioned on the ground that it is an adjective and that "electronic or other appropriate means" is the right thing to say. The consensus was to replace the new language on p. 8 with the following:

-- by United States mail, electronic or other appropriate
means --

Settlement approval criteria

The discussion began with a consideration of the choice between Alternative 1 ("and on finding that") and Alternative 2 ("after considering whether"). Several expressed support for Alternative 2.

A response urged consideration of Alternative 1. "How can one find that a settlement is fair, reasonable, and adequate if it flunks one of these criteria?" The basic thought in the ALI was that these four factors were fundamental. A reaction was "we

are not robots." Judges need flexibility. But, it was responded, how about a settlement that was not negotiated at arm's length? How can one approve that?

A contrasting view was expressed: Even if it was done on a napkin in a bar, it might be a reasonable deal for the class. It should not be rejected out of hand just because it was initially reached in a bar.

An alternative hypothetical was offered: What if class counsel and defense counsel are spouses? Could a court approve the deal they reach? That drew the response that this was not at arms length. This drew the observation that real conflicts are not disregarded by judges nowadays.

A different consideration was raised: Shifting to a specific findings requirement could have a substantial effect on the nature of appellate review.

The majority preference going forward was to use Alternative 2.

Attention shifted to the factors. One question was whether to retain (B), which focused attention on whether the settlement was negotiated at arms length. It also added the language "and was not the product of collusion," but the consensus was that this language did not add to the "at arms length" directive and could be dropped.

Regarding "at arm's length," it was asked how that would work if counsel on both sides are very experienced in this sort of litigation and have worked on opposite sides of many cases. Suppose these repeat player lawyers negotiate a settlement in short order and a straightforward fashion. Would saying that negotiations must be "at arm's length" raise questions about whether such a negotiation was flawed? A quick response was "This is at arm's length."

[Clarify the following with Subcommittee]

Discussion shifted to the bracketed item (iii) in (C) -- "the probable effectiveness of the proposal in accomplishing the goals of the class action." An initial reaction was that this item is not about what (C) addresses -- the adequacy of the relief awarded to the class. It seems to be about whether the class settlement is adequate even though the class does not really get much out of it. Maybe the "goals" of the class action are nevertheless somehow furthered by the deal.

Another comment focused on item (ii) in the draft. That focuses on whether the settlement will effectively deliver relief to the members of the class. Perhaps the "goals" should be added

there.

Another reaction about (iii) was "we don't need it at all."

A caution was raised. Suppose a case in which the payout is only \$15, and class members must do something to get that amount. Does their general indifference to making the effort show that the "goals" of the class action have or have not been achieved? One way of looking at this is to focus on (ii) -- the method of making claims and getting a payout. Should that suffice?

Another reaction was that this item tends to emphasize the issues that we have previously addressed in regard to cy pres arrangements. An extreme example is the idea that a class action in which no member of the class gets any direct relief is nevertheless one that achieves the "goals" of the class action because of something else.

Another comment was that these criteria should address the situation in which the relief is injunctive relief or other equitable relief. Then it seems that the question is whether it changes the defendant's conduct toward the plaintiff class, not whether it somehow otherwise achieves the "goals" of the class action.

The discussion reflected a consensus among those involved that dropping (iii) would be wise. But it was noted that not all members of the Subcommittee were present on the call at this time. Probably the best thing to do would be to leave the question somewhat open pending reactions from the other members of the Subcommittee. Professor Marcus would write and invite views on this subject.

Discussion shifted to other items in (C). On (ii), discussion led to a rewording of the factor:

the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required.

This reformulation could serve to cover class actions for injunctive or declaratory relief as well as class actions for monetary relief. The question of low claims rates was raised, but one concern was that "you can't force people to make claims." At some point, some sort of cy pres alternative may be the way to go with leftover settlement funds, but this focus makes sense as a way to call the court's attention to the basic concern. There is also a concern with requiring that judges tick too many boxes when reviewing proposed settlements; this approach is designed to get away from having to tick too many boxes. We should be careful about adding new ones.

On factor (iv), the suggestion was to remove the brackets around attention to the timing of payment.

On (e)(2)(D), the resolution was to remove the bracketed material. It is sufficient to focus on whether "class members are treated equitably relative to each other."

Attention turned to the Draft Committee Note. At lines 11-13, there was a statement that there is "nothing intrinsically wrong" with any factor used by any circuit. But at least one invoked by some -- support from the lawyers who negotiated the settlement -- does seem dubious. Instead of saying that, the following sentence would be amended by adding a thought to the end:

The goal of this amendment is to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal, not to displace any of these factors.

Discussion turned to the Committee Note on item (4) in the Subcommittee's list -- manner of notice. On p. 9 of the memorandum, two paragraphs were in brackets about the content of the notice and the method of opting out. A question was asked about whether this Note material is really about the change being made to the rule.

A response was that the change to the rule deals with the means of notice, but directs the court to determine which is "appropriate." That links up rather naturally to the content of the notice. But more significantly, given the likelihood that electronic or similar means may be used for giving notice and submitting claims, it seems appropriate to emphasize the need for the court to determine whether that is appropriate. This need is reinforced by the existing rule requirement that the court give "the best notice that is practicable." The Note should make it clear that this discussion ties in with the mode of notice and the need for careful consideration of the content when that mode is electronic.

The call concluded with the anticipation that Prof. Marcus would circulate a draft of the agenda memo for the Standing Committee meeting. That is due at the A.O. on Dec. 14, and will be the basis for discussion during the Standing Committee meeting in January.

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Nov. 16, 2015

On Nov. 16, 2015, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf of the Administrative Office. Judge Steven Colloton (Chair, Appellate Rules Committee) and Prof. Gregory Maggs (Reporter, Appellate Rules Committee) participated in the discussion of the objectors issues.

The purpose of the call was to consider further the matters discussed during the full Committee's meeting on Nov. 5 in Salt Lake City. Prof. Marcus had circulated a redraft addressing the six topics that would be presented to the Standing Committee before the call. The order of discussion was, somewhat, from the less challenging to the more challenging topics. The discussion of objectors occurred when both Judge Colloton and Prof. Maggs were linked to the call.

Rule 23(f) appellate review and
Rule 23(e) (1) order for notice

There was unanimity about this proposal, although some participants mentioned that they had some drafting ideas that they would send to Prof. Marcus.

Rule 23(c) (2) (B) acknowledgement that
Rule 23(e) (1) notice triggers opt-out

There was also unanimity about going forward with this proposal. One change is that the brackets around "for settlement" should be removed, but the phrase should be retained.

Manner of notice in 23(b) (3) class actions

The redraft suggested that Rule 23(c) (2) (B) be revised to add the phrase "by the most appropriate means[, including first class mail. electronic, or other means]" after "individual notice" in the current rule.

One suggestion was that the brackets be removed, and that the added language be "including first class mail or electronic means." That might be modified to direct "appropriate" electronic means.

Another suggestion was that one might add the possibility of hand deliver in some cases. That suggestion prompted a concern that if the rule invited hand delivery some people might insist

on that. It would seem a very rare case in which hand delivery would be appropriate. It would be better to indicate flexibility about what is the "best notice practicable under the circumstances," which is the language currently in the rule.

A way to do so might be to add "or other means" at the end, or perhaps "or other appropriate means."

Attention shifted to the proposal to add the directive that the court select the "most appropriate means." Would that invite aggressive arguments in the district court or on appeal about what is "most appropriate"? Isn't it sufficient to be "appropriate" even if somebody might say the means selected are the "most appropriate."

Another possibility offered was: "by such means as . . . [listing two or three specific methods]."

The eventual consensus was to say "by first class mail, electronic mail, or other appropriate means." That would yield an amendment proposal as follows:

Rule 23. Class Actions

* * * * *

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

* * * * *

(2) Notice

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by first class mail, electronic mail, or other appropriate means to all members who can be identified through reasonable effort. * * * * *

Another question was raised about the inclusion of the word "individual." Does including that word invite trouble? An immediate reaction was that the word has been in the rule since 1966, and that any suggestion of removing it would likely generate considerable controversy. It was agreed that there was no sufficient reason to consider removing "individual" from the rule.

Objectors

This topic (including participation by Judge Colloton and Prof. Maggs) was introduced as involving questions about allocation of decisionmaking authority between the appellate courts and the district court and whether the focus should be on payments to objectors or their counsel rather than on withdrawal of objections or appeals.

The current rule says that court approval is necessary whether or not an objector receives anything in return for withdrawing the appeal. But that requirement seems to stop applying after a notice of appeal is filed, or after the appeal is docketed by the circuit clerk, since Fed. R. App. P. 42(a) permits the district court to dismiss the appeal on stipulation or noticed motion before the circuit clerk has docketed the appeal even though a notice of appeal has been filed.

The drafts of possible rule amendments also include disclosure requirements at both the district court and appellate court levels, at least with regard to any consideration for the withdrawal of the objection or the dismissal of the appeal.

An initial reaction was that the discussion in the Salt Lake City Advisory Committee meeting was about how simple the goal sought to be accomplished seems to be, compared to how difficult it is becoming to achieve that goal. The goal is to respond to bad behavior by some objectors or objector counsel -- to put an end to their "business model." That business model depends on exploiting the delays resulting from an appeal. The cure is to require that there be court approval for payments to such bad faith objectors. The problem is that by the time the payoff demand arrives (after entry of judgment in the district court) it seems that the jurisdictional ball has arrived in the court of appeals' lap. Can we set up something simple that will achieve our objective without requiring an elaborate "clockwork orange" sort of back-and-forth between the court of appeals and the district court?

A first reaction was to ask how this would work. The basic starting point is that the judicial action involved is dismissal of the appeal by the court of appeals. How does the court of appeals decide whether to dismiss? At least, it would seem essential that it be notified that there is a proposed payment to the objector or the objector's lawyer that is consideration for the dismissal. Otherwise, under Fed. R. App. 42(b) it seems that the appeal can be dismissed based on the appellant's motion or on terms agreed to by the parties to the appeal. That presumably includes passing on the propriety of payments for dismissal.

A reaction was that it is hard to characterize the payment in this case as payment for litigating the appeal. The business

model described by experienced class-action litigators seems premised on the appellant not litigating the appeal. There may even be a demand for a much higher payoff "if we have to file a brief." Some of these appeals seemingly consist of nothing more than preparing an objection that says nothing more than "I object" and then filing a notice of appeal.

Another view was that the district court should have the principal responsibility to resolve the questions about attorney fee awards to class counsel and objector counsel. In an earlier sketch, that was achieved by providing in the rule that the district court "retained jurisdiction" to address those issues. But that idea seemed to raise serious questions about how far the Civil Rules could go in affecting the jurisdiction of the courts of appeals.

One possibility that was suggested was an analogy to an indicative ruling. But it was noted that such rulings seem to be on matters such as whether to grant a new trial, matters that ordinarily would be within the purview of the district judge but for the filing of the notice of appeal. The problem then is that -- absent a remand -- the district court lacks authority to grant a motion the parties direct to it. See Fed. R. App. P. 12.1. But that rule seems to be about motions the district court ordinarily could grant, and (except as provided in Fed. R. App. P. 42(a)) a motion to dismiss an appeal is not one of those.

It would perhaps be possible, however, for the dismissal to be "separated from the payment." If so, the court of appeals could dismiss the appeal and leave the question whether to approve any payment to the district court for later determination. That idea drew the question: "Would bad objectors agree to dismissal of the appeal with the possibility that the district court would refuse to approve the payment?"

A reaction to that question was that they would not agree. But this may nevertheless be the right direction to move. The point is to deter the bad objectors. The goal is to ensure that they can't get paid for doing nothing, and maybe this sort of rule would deter the bad conduct. The bad objectors do not want to face the district judge. A way to do that might be to make it clear that the Civil Rule requires district-court approval of such a payment "at any time," that might do the job all by itself.

It was suggested that something like that might be done with revisions to Rule 23(e)(5) alone, perhaps only with the (A) and (B) in the draft under discussion. But that drew a concern that such a rule "might step on the toes of the court of appeals." On the other hand, in the sorts of situations we have heard about the court of appeals is unlikely to know much about the case. That drew the suggestion that there might be no need to address

the role or actions of the court of appeals in rule text. Perhaps, without a rule change, one could simply leave it to the court of appeals to "do whatever is appropriate."

That possibility prompted the question "Can a Civil Rule regulate the Court of Appeals? Why would the objector go to the district court once the case was in the Court of Appeals?" A response was that "You don't get paid without the district judge's approval."

This possibility may fit in with much general class-action practice. "District courts administer aspects of settlements while the case is on appeal. This happens all the time." The BP case is an example. The district court has continuing jurisdiction to administer the settlement even though there have been lots and lots of appeals. But that drew the question: "Is that continuing jurisdiction a result of a rule or an order in the particular case?"

A reaction was that it is commonplace that there is continuing jurisdiction to regulate fees and enforcement of the class-action decree. Indeed, the enforcement of the settlement is usually conditioned on the exhaustion of all appeals, even petitions for writs of certiorari. On the one hand, that's why the holdup is possible -- nothing can be finished until the appeals are finished. On the other hand, it shows that contemplating a decision by the district court fits right in with the customary handling of class settlements.

A different perspective was raised: "Can a Civil Rule prohibit the Court of Appeals from approving a payment to an objector for dismissing an appeal?" One answer was that "The Court of Appeals would be happy to refer that back." Another was that there already are civil rules that do something like that. Rule 62, for example, deals with a stay pending appeal. Perhaps the solution is to say that any payment to an objector after a notice of appeal is filed must be approved by the district court that entered the judgment. Then that decision whether to approve the payment can itself be appealed. In such a setup, the court of appeals could rule on the motion to dismiss the appeal, or deny approval to the payment, or await the district court's action on the payment.

This discussion prompted the observation that this is "mostly a rule about plaintiff attorneys, and it provides them with a basis to say 'we can't pay.' In essence, its a 'call your bluff rule.'" The reality is that the whole problem only arises when class counsel is willing to pay. The problem would go away if they would say "We will never pay anything," or "We will never agree to pay anything unless the district judge approves the payment."

A response to these thoughts was that, for class counsel, the point is not to burden the dismissal or delay classwide relief. The key is that, before money can change hands, some court must approve after disclosure.

The discussion was summed up with the observation that the Appellate Rule 42 draft included in the materials seemed a relatively clear way to move toward that outcome. "All agree on the policy objective. The problem is to arrange for review of the proposed payment before dismissal of the appeal." Perhaps there is a way to achieve that goal without having to change the Appellate Rules at all.

That idea drew support. "An elaborate procedure will invite people to use it. If you build it they will come; this is the Field of Dreams problem." Current practice comes close to providing a method -- particularly in cases where the district court has, by order, retained jurisdiction over various implementation features of the class-action settlement.

A caution was raised: Will making this kind of change put an end to the disfavored behavior? Suppose an objector who is willing to accept a relatively modest payoff, but insists that class counsel support the payment under the criteria of Rule 23(h). If class counsel affirmatively supports the payment (which comes out of class counsel's pocket), will the district court really refuse to approve it to get the settlement implemented and clear the case from the court's docket? If that can still be done under this rule, why will the rule solve the problem?

This led to an additional idea -- that sort of possibility would be less troubling if the rule required a hearing before payment to the objector occurs. It would be too easy to submit a nondescript "statement of support" in relation to the payment, and quite a different matter to have to face the district judge and support the payment while answering the judge's questions about it.

Another reaction was that the entire shake-down method creates an adequacy dilemma. It is surely possible for class counsel to take a "principled stand" and refuse to pay a penny. But doing that hurts the class, and it may seem that counsel is doing it just to keep the entire class counsel fee award.

The discussion was summed up as suggesting that two approaches should be explored. One would look to a "simple" solution, perhaps relying entirely on a Civil Rules amendment. The other would look to a more "complicated" approach, including both Civil Rules and Appellate Rules amendments.

It seemed expeditious to ask Prof. Cooper to try to work the

"short version," and Prof. Marcus to refine the "long version." With those before the Subcommittee, it may be able to decide whether to be more or less elaborate in pursuing the universally shared goal of defeating improper behavior by bad-faith objectors and their counsel.

Another question that will remain is whether it is necessary to make a rule change to achieve the desired result. One possibility might be for settlement agreements to address the question and provide for it. Why not say that any payment to objectors is forbidden unless approved by the district court in the settlement agreement itself? That idea drew the response that the practice might move that way, but that such provisions could be attacked as efforts to deter objections. It was also observed that the settlement agreement approach might be more complicated than at least the "simple" rule change approach.

Discussion shifted from the larger question of overall framework for the objector amendments to narrower issues raised by bracketed material in the draft.

One question was whether or how to say that the court could reject an objection if it were not sufficiently specific. A possible improvement would be to say failure to provide specifics would be a ground for "striking" rather than "rejecting" an objection, since the problem is that the objection does not provide a basis for evaluating it. But the larger question was whether there was any need to say that objections that do not comply need not be considered. Stating that specifics are required should suffice, and courts need not be told that they may refuse to credit objections that do not provide the specifics the rule says are required.

A different question is whether the rule should include phrases in brackets in the draft about what the objection should say -- "state whether the objection applies only to the objector or to the entire class" and state the objection "with specificity." The consensus was to include both those phrases in the amendment draft, removing the brackets.

Another wording change was explored. In draft (B) and (C), the trigger for court approval was payment to "the objector or objector's counsel." Should that be limited to payment to objector counsel? It might seem that payoffs for counsel are the main problem being addressed, but would there be a risk that counsel might agree that the objector would pay through some or all of the payment to counsel, thus defeating the effort. The consensus was that this is a real risk; "objector or objector's counsel" should remain.

Yet another wording question was presented. The draft includes in brackets the phrase "or other consideration" after

"any payment." The idea is that some other tradeoff might occur if that were not included. For example, "If you withdraw your objection in this case, I will see that you are added to the executive committee in another case where I am class counsel." This sort of possibility seemed real, and the consensus was to retain "or other consideration."

Another question was raised about proposed (B). It actually narrows the approval requirement under current Rule 23(e) (5), which says that court approval is required for any withdrawal of an objection, whether or not there is any payment. Is that narrowing desirable. It seems that a significant number of objections are made in entire good faith by class members who conclude the objections are unwarranted when they learn more about the settlement. They withdraw, or perhaps "abandon," their objections at that point. Should the rule really require that they get court approval to do so? Do people really do that now? The answer was that they do not and they should not have to. Narrowing the approval requirement to apply only where a payment accompanies the withdrawal of the objection (or an appeal) is desirable. This limiting provision should go forward.

Frontloading

The redraft offered three alternatives for the lead-in paragraph. The first was the one before the Advisory Committee, adding "or a class proposed to be certified as part of a settlement" to the current situation in which court approval is required. The second alternative breaks that out and limits the approval requirement to settlement or compromise with regard to a class to be certified. The third alternative removes "voluntary dismissal" from the approval requirement of the rule, and (with that removal) treats certified classes and classes to be certified as part of a settlement the same, but without any approval for voluntary dismissals.

A first reaction was that the third possibility is risky because voluntary dismissal of a certified class could be abused. Consider a Rule 23(b) (3) class action in which the class has been given notice of class certification and the opt-out time has passed. What if defendant then proposes to pay the class representative a considerable sum for voluntary dismissal. Even if that is "without prejudice," it could result in considerable prejudice to the unnamed members of the class, who may have been relying on the notice they received from the court saying that they would be represented in the action. So that should limit consideration to the first two alternatives.

As between the first and the second, a key consideration is whether there is ever a settlement that includes a voluntary dismissal as well as class certification. An answer is that this happens with some frequency in practice. Suppose that a

consolidated complaint is confected and, after that but before class certification is decided, interim class counsel reach a settlement that includes voluntary dismissal of certain claims and judgment in the class's favor on other claims after final approval by the court. The best practice currently would be to include that voluntary dismissal of certain claims as one of the things to be approved by the court under Rule 23(e). This is the "best practice" even if it is not clearly required by the current rule.

A question was raised: "What if I propose dismissal of all the claims as part of the settlement on behalf of the defendant?" The answer was that this is a package deal. The settlement agreement will almost certainly contain a classwide release of all related claims, and the only way to make that effective is probably to enter judgment. That judgment should require approval of the court. Alternatively, the solution may be to amend the complaint to drop certain claims, but it makes sense to require court approval of those rearrangements even if the class has not yet been certified. Indeed, the dismissal of certain claims (with prejudice) may be an important part of the overall deal.

The consensus was that Alternative 1 would be the best choice.

Turning to proposed (e)(1), the consensus was that the proposal should read as follows:

The parties must provide the court sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

Then the redraft would tie in with this directive to the parties:

The court must direct notice in a reasonable manner to all claims members who would be bound by the proposal only if it determines that giving notice is justified by the parties' showing regarding the prospect of class certification and approval of the proposal.

Settlement approval criteria

The redraft showed a revision in accord with what was discussed in Salt Lake City, but a concern had arisen with the use of "because." After the redraft was circulated, Prof. Marcus circulated another possibility -- leaving the current rule as is and adding to it:

The court may approve the proposal only if it finds:

Then the same four factors would be remain as finding

requirements.

This approach was introduced as avoiding some of the difficulties that might attend the formulation included in the redraft initially sent out, for the use of "because" might mean to mean that any court that so finds must conclude that the settlement is fair, reasonable, and adequate. If one truly wants to authorize and/or direct the court to make a finding whether the proposal is fair, reasonable, and adequate, the "because" formulation raises problems.

A different issue was raised: The use of the word "only" in the reformulated rule might also raise concerns about overruling existing circuit precedent. A reaction was that it might be best only to require that the court take account of the listed factors as a minimum or baseline method of evaluating the proposal.

This approach was supported on the ground that the objective should be to move away from somewhat mindless checking off of a dozen or more factors; the idea is "think about the core concerns."

Various alternative formulations were suggested:

"The court must consider the following factors:"

The court could approve "only on a finding that the proposal is fair, reasonable, and adequate, including consideration of:"

"The court must consider whether:"

A concern was raised: Making findings, and perhaps consideration, mandatory could affect the standard of review. Now the district court's approval is reviewed under an abuse of discretion standard. We are not trying to change that. But the more pointed this rule becomes the more it introduces the possibility of enhanced appellate review.

The resolution of these issues for current purposes was that a redraft should offer two alternatives:

"fair, reasonable, and adequate after considering:"

"fair, reasonable and adequate. The court must consider:"

The discussion shifted to whether revisions of the factors themselves should be considered. One suggestion was combining factors (A) and (B). Presently factor (B) is in brackets recognizing the possibility that it is not really needed. Perhaps factor (A) is sufficient without (B).

One reaction was that emphasizing a focus on the actual conduct of the negotiations is a valuable thing to include. At least one Seventh Circuit case actually involved a nationwide class-action settlement reached in a Chicago bar on a cocktail napkin by class counsel who had been relatively inactive and were willing to go along with defense counsel who were seeking a way to prevent a trial in a class action in a Texas state court that exposed the defendant to much greater liability. That proposed settlement was used as a basis for an injunction against proceeding in the Texas litigation.

A reaction was that this emphasis did not necessarily require that (B) be retained. One alternative that was suggested was that (A) be rewritten along the following lines:

the class representatives and class counsel have adequately represented the class in [preparing for litigation and] in negotiating the proposal at arms length.

The possibility of combining (A) and (B) prompted the suggestion that (B) may not often be helpful to the judge (in addition to (A)).

* * * * *

The call concluded with the intention of resuming the discussion in a conference call at the same time on Monday, Nov. 23, at the same time. Before that, Prof. Marcus would circulate a redraft reflecting the discussion during this conference call, and Prof. Cooper would attempt to devise a simpler manner of dealing with objectors, perhaps without any need for change to the Appellate Rules.

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B. Rule 62: Stay of Enforcement

The Rule 62 proposal has been developed by a joint subcommittee appointed by the Appellate and Civil Rules Committees. The Subcommittee is chaired by Judge Scott Matheson. Its members have included Judge Peter Fay, Judge Brett Kavanaugh, Douglas Letter, Kevin Newsom, and Virginia Seitz. The Committee Chairs, Judge Steven Colloton and Judge John Bates, also participated in the Subcommittee's work.

A more elaborate draft was presented to the Committees for discussion at their fall meetings. The discussion in this Committee is described in the draft minutes for November 5. The Subcommittee prepared a revised draft that was presented to the Standing Committee for discussion in January. The revised draft deletes complicating provisions that seemed unnecessary. It also eliminates the provision that would have expressly authorized the court to refuse to approve a stay despite presentation of a satisfactory bond. The only question raised in the Standing Committee asked about the 30-day period recommended for the automatic stay in Rule 62(a). The explanation that 30 days accommodates the 28 days allowed for post-judgment motions and allows two more days to arrange security if the 28 days expire without a motion that suspends appeal time was readily accepted.

The Subcommittee continued work on the proposal presented to the Standing Committee after it met. The only change in the draft rule text deleted words suggesting that the stay can remain in effect "until a designated time~~{, which may be as late as issuance of the mandate on appeal}~~ * * *." Those words were found to imply an undesirable limit – it may be desirable to extend the stay beyond issuance of the mandate, recognizing the possibility of a petition for certiorari or post-mandate proceedings in the court of appeals.

The Committee Note also was simplified. Two paragraphs that briefly anticipated lengthier discussions in later paragraphs were deleted. Three more paragraphs that offered advice about issues that may arise in various circumstances were deleted to honor the tradition that the Note should not be used to offer advice beyond what is needed to explain the purpose and effect of the rule text amendments. Two sentences were removed from later paragraphs for similar reasons.

The Subcommittee now recommends that the Standing Committee be asked to approve publication of the present draft for comment.

This proposal serves all of the needs that prompted consideration of Rule 62. It eliminates the gap that exists under present Rule 62 between expiration of the automatic stay 14 days after judgment and the court's authority to order a stay "pending disposition of" a motion that may be made up to 28 days after judgment. It expressly authorizes security in a form other than a

bond. And it authorizes a single security that endures from termination of the automatic stay through completion of all appellate proceedings.

Other changes reorganize the provisions of present Rule 62(a), (b), (c), and (d) to bring together closely related matters that had been separated. The remaining parts of Rule 62 were studied, some in detail, but the Subcommittee concluded that it is better to carry them forward without change.

The operation of the amended rule is described in the Committee Note.

Three versions of Rule 62 are set out below. The first is the clean text that is recommended for publication. The second shows the changes that have been made in the version that was presented to the Standing Committee in January. The third is the text of current Rule 62(a), (b), (c), and (d).

RULE 62 PROPOSED FOR PUBLICATION

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

2 (a) *Automatic Stay.* Except as provided in Rule 62(c) and (d),
3 execution on a judgment and proceedings to enforce it are
4 stayed for 30 days after its entry, unless the court orders
5 otherwise.

6 (b) *Stay by Other Means.*

7 (1) *By Court Order.* The court may at any time order a stay
8 that remains in effect until a designated time, and may
9 set appropriate terms for security or deny security.

10 (2) *By Bond or Other Security.* At any time after judgment is
11 entered, a party may obtain a stay by providing a bond
12 or other security. The stay takes effect when the court
13 approves the bond or other security and remains in
14 effect for the time specified in the bond or security.

15 (c) *Stay of Injunction, Receivership, or Patent Accounting*
16 *Orders.* Unless the court orders otherwise, the following
17 are not stayed after being entered, even if an appeal is
18 taken:

19 (1) an interlocutory or final judgment in an action for an
20 injunction or a receivership; or

21 (2) a judgment or order that directs an accounting in an
22 action for patent infringement.

23 (d) *Injunction Pending an Appeal.* While an appeal is pending
24 from an interlocutory order or final judgment that grants,
25 continues, modifies, refuses, dissolves, or refuses to
26 dissolve or modify an injunction, the court may suspend,
27 modify, restore, or grant an injunction on terms for bond or
28 other terms that secure the opposing party's rights. If the
29 judgment appealed from is rendered by a statutory three-
30 judge district court, the order must be made either:
31 (1) by that court sitting in open session; or
32 (2) by the assent of all its judges, as evidenced by their
signatures.

* * * * *

COMMITTEE NOTE

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

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

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

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay

may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b) (1) that lasts longer or requires security.

Subdivision (b) (1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation – for example, a contract claim may be fully secured by a payment bond.

Subdivision 62(b) (2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) (2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security – a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(b) (2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as its form and terms, and the quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well

as to the appellant, the appellant also may seek a stay.

RULE 62 PRESENTED TO STANDING COMMITTEE, WITH EDITS

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

2 (a) *Automatic Stay.* Except as provided in Rule 62(c) and (d),
3 execution on a judgment and proceedings to enforce it are
4 stayed for 30 days after its entry, unless the court orders
5 otherwise.

6 (b) *Stay by Other Means.*

7 (1) *By Court Order.* The court may at any time order a stay
8 that remains in effect until a designated time~~[, which~~
9 ~~may be as late as issuance of the mandate on appeal]~~,
10 and may set appropriate terms for security or deny
11 security.

12 (2) *By Bond or Other Security.* At any time after judgment is
13 entered, a party may obtain a stay by providing a bond
14 or other security. The stay takes effect when the court
15 approves the bond or other security and remains in
16 effect for the time specified in the bond or security.

17 (c) *Stay of Injunction, Receivership, or Patent Accounting*
18 *Orders.* Unless the court orders otherwise, the following
19 are not stayed after being entered, even if an appeal is
20 taken:

21 (1) an interlocutory or final judgment in an action for an
22 injunction or a receivership; or

23 (2) a judgment or order that directs an accounting in an
24 action for patent infringement.

25 (d) *Injunction Pending an Appeal.* While an appeal is pending
26 from an interlocutory order or final judgment that grants,
27 continues, modifies, refuses, dissolves, or refuses to
28 dissolve or modify an injunction, the court may suspend,
29 modify, restore, or grant an injunction on terms for bond or
30 other terms that secure the opposing party's rights. If the
31 judgment appealed from is rendered by a statutory three-
32 judge district court, the order must be made either:

33 (1) by that court sitting in open session; or

34 (2) by the assent of all its judges, as evidenced by their
signatures.

* * * * *

COMMITTEE NOTE

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

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

~~The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means. A single bond or other form of security can be provided for the life of the stay.~~

~~— The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (b)(2) provides for a stay by providing a bond or other security at any time after judgment is entered; it is no longer necessary to wait until a notice of appeal is filed. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.~~

~~— Subdivisions (a) and (b) address stays of all judgments, except as provided in subdivisions (c) and (d). Determining what the terms should be may be more complicated when a judgment includes provisions for relief other than — or in addition to — a payment of money, and that are outside subdivisions (c) and (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.~~

~~— Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction, for example, is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But~~

~~if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.~~

~~Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive, before entry of a final judgment. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This question is left to the court's inherent control of the contempt power and the authority to refuse a stay.~~

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

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b) (1) that lasts longer or requires security.

Subdivision (b) (1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. ~~An appellant may prefer a court-ordered stay under (b) (1), hoping for terms less demanding than the terms for obtaining a stay by posting a bond or other security under (b) (2).~~ A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation – for example, a contract claim may be fully secured by a payment bond.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security – a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(b)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as its form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. ~~Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.]~~ The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62(c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, the appellant also may seek a stay.

PRESENT RULE 62(a), (b), (c), AND (d)

Rule 62. Stay of Proceedings to Enforce a Judgment

- 1 (a) AUTOMATIC STAY; EXCEPTIONS FOR INJUNCTIONS, RECEIVERSHIPS, AND PATENT
- 2 ACCOUNTINGS. Except as stated in this rule, no execution may
- 3 issue on a judgment, nor may proceedings be taken to enforce
- 4 it, until 14 days have passed after its entry. But unless
- 5 the court orders otherwise, the following are not stayed
- 6 after being entered, even if an appeal is taken:
- 7 (1) an interlocutory or final judgment in an action for an
- 8 injunction or a receivership; or
- 9 (2) a judgment or order that directs an accounting in an
- 10 action for patent infringement.
- 11 (b) STAY PENDING THE DISPOSITION OF A MOTION. On appropriate terms for
- 12 the opposing party's security, the court may stay the

13 execution of a judgment – or any proceedings to enforce it –
14 pending disposition of any of the following motions:
15 (1) under rule 50, for judgment as a matter of law;
16 (2) under Rule 52(b), to amend the findings or for
17 additional findings;
18 (3) under Rule 59, for a new trial or to alter or amend a
19 judgment; or
20 (4) under Rule 60, for relief from a judgment or order.
21 (c) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an
22 interlocutory order or final judgment that grants,
23 dissolves, or denies an injunction, the court may suspend,
24 modify, restore, or grant an injunction on terms for bond or
25 other terms that secure the opposing party's rights. If the
26 judgment appealed from is rendered by a statutory three-
27 judge district court, the order must be made either:
28 (1) by that court sitting in open session; or
29 (2) by the assent of all its judges, as evidenced by their
30 signatures.
31 (d) STAY WITH BOND ON APPEAL. If an appeal is taken, the appellant
32 may obtain a stay by supersedeas bond, except in an action
33 described in Rule 62(a)(1) or (2). The bond may be given
34 upon or after filing the notice of appeal or after obtaining
35 an order allowing the appeal. The stay takes effect when the
36 court approves the bond.
37

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C. Rule 5: e-service and e-filing

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The drafts presented below represent the stage reached by the time for generating agenda materials. Further evolution may occur, but it is likely to be on fine points.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions – determining what

exceptions to make would be difficult, and there were likely to be many of them.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that the user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person proceeding without an attorney may file electronically only if required or allowed by court order or local rule. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But it is shown in brackets to reflect

ongoing discussions with the Criminal Rules Committee. The Criminal Rules Subcommittee working with Rule 49.1 has expressed concerns that local rules or orders requiring e-filing by an unrepresented party might have the effect of barring access to court in collateral proceedings. One question is whether courts are likely to be so obtuse as to require e-filing when there is any risk that it would block access. A possible solution would be to amend the rules for habeas corpus and § 2255 proceedings, leaving it open to require e-filing by a pro se party in a purely civil action. A different solution would be to conclude that there are too few occasions to order e-filing by a pro se party to justify the "or require" provision. This question deserves further consideration.

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) FILING * * *

(2) *Nonelectronic Filing* ~~*How Filing is Made — In General*~~. A paper [not filed electronically] is filed by delivering it:

(A) to the clerk; or

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

(3) *Electronic Filing and Signing* ~~*, or Verification*~~.

(A) *Represented Party — When Required; Paper Filing Required or Allowed*. ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by [filing with][alternative: using] the court's electronic-filing system by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper [alternative: nonelectronic] filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) [Alternative 1] *Unrepresented Party — When Allowed or Required*. A person proceeding without an attorney:

(i) may file electronically only if allowed by court order or by local rule, and

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

(B) [Alternative 2] *Unrepresented Party — When Allowed or Required*. A person proceeding without an attorney may

file electronically only if allowed by court order or by local rule, and may be required to file electronically only by court order or by a local rule that allows reasonable exceptions.

(C) *Electronic Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

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

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

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

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Clean Rule Text

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) FILING * * *

- (2) *Nonelectronic Filing* A paper [not filed electronically] is filed by delivering it:
- (A) to the clerk; or
 - (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing.*

(A) *Represented Party – When Required; Paper Filing Required or Allowed.* All filings, except those made by a person proceeding without an attorney, must be made by [filing with][*alternative: using*] the court's electronic-filing system. But paper [*alternative: nonelectronic*] filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) [Alternative 1] *Unrepresented Party – When Allowed or Required.* A person proceeding without an attorney:

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

(B) [Alternative 2] *Unrepresented Party – When Allowed or Required.* A person proceeding without an attorney may file electronically only if allowed by court order or by local rule, and may be required to file electronically only by court order or by a local rule that allows reasonable exceptions.

(C) *Electronic Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

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

Rule 5(b) (2) (E) : e-Service

Present Rule 5(b) (2) (E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b) (3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b) (3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user – and very few now are – is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

[Striking this paragraph reflects a change made in working with the Criminal Rules Committee:] ~~Although consent remains important when it is required, the requirement that consent be in writing is deleted. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.~~

Rule 5. Serving and Filing Pleadings and Other Papers

(b) SERVICE: HOW MADE. * * *

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

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or [sending it] by other electronic means if that the person consented to in writing – in either of which events service is complete upon transmission, but is not effective if the serving party learns that it did not

reach the person to be served; or * * *

COMMITTEE NOTE

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

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

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

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) SERVICE: HOW MADE. * * *

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

(A) handing it to the person * * *

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

Permission to Use Court's Facilities: Abrogating Rule 5(b) (3)

This package includes a proposal to abrogate Rule 5(b) (3) to reflect the amendment of Rule 5(b) (2) (E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent. Rule 5(b) (3) reads:

(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b) (2) (E).

The basic reason to abrogate (b) (3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b) (2) (E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b) (3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b) (2) (E), with added support in a Committee Note explaining the abrogation of (b) (3).

The published proposal would look like this:

~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b) (2) (E).~~

COMMITTEE NOTE

Rule 5(b) (3) is abrogated. As amended, Rule 5(b) (2) (E) directly authorizes service on a registered user by filing with the court's electronic-filing system. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Notice of Electronic Filing as Proof of Service

Rule 5(d) (1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d) (1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by filing with the court's electronic-filing system. The draft amendment does that, retaining the requirement for a

certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where filing was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

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

(A) Papers after the Complaint. Any paper after the complaint that is required to be served ~~—together with a certificate of service—~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) Certificate. A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served [using the court's electronic-filing system] [by filing with the court].

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any person served by filing with the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

(d) FILING.

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

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served [using the court's electronic-filing system] [by filing with the court].

TAB 5

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TAB 5A

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II. New and Carry-Over Proposals for Study

A. Rule 5.2: Redact Filed Documents

The Bankruptcy Rules Committee is considering addition of a new subdivision (h) to Bankruptcy Rule 9037, the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5) adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state, and expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c)(limitations on remote access).

This common origin adds extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

There is good reason for this Committee to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish

required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all committees have reached their own conclusions. This question has come up late enough in the winter cycle that it may not be feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But it will be useful to have discussion now, even on the style issues identified in the footnotes.

Rule 5.2. Privacy Protection for Filings Made with the Court

* * * * *

1 (i) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

2 (1) *Content of the Motion.* Unless the court orders
3 otherwise, a person ¹ that seeks to redact from a
4 previously filed document information that is

¹ Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

5 protected under Rule 5.2(a)² must file a motion
6 under seal. The motion must:
7 (A) include³ an identical⁴ copy of the original
8 document showing the proposed redactions;
9 (B) include the docket number of the original
10 document; and
11 (C) be served on all parties⁵ and any person whose
12 identifying information⁶ is to be redacted.
13 (2) *Restricting Public Access to an Unredacted*
14 *Document*. The court must:
15 (A) [promptly]⁷ restrict [deny]⁸ public access to

² The Bankruptcy draft is: "information that is subject to privacy protection under" seems longer than necessary.

³ The Bankruptcy Draft reads: "attach a copy." That works in their draft. This version consolidates the various requirements for the motion in a series of subparagraphs. It is clearer that way: "The motion must * * *." "Include" works with that formula. It may be argued that "attach" treats the copy of the paper as an exhibit, while "include" makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

⁴ "[I]dential" is carried forward for uniformity with draft Rule 9037(h). But the 9037(h) Committee Note introduces an ambiguity. It explicitly states that the "identical" copy is identical to the unredacted document "except for the redaction." The intended meaning is "identical to the unredacted document except for the redactions." It seems better to delete "identical," relying on the sense of "copy" to prevent surreptitious deletion of information beyond that protected – or at least arguably protected – by Rule 5.2(a).

⁵ The Bankruptcy Rule includes a long list of bankruptcy characters that does not fit the Civil Rules context.

⁶ The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

⁷ The Bankruptcy Rule begins: "Upon receipt of the motion, the court shall promptly restrict public access." The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted

16 the motion and the unredacted document:
17 (i) pending its ruling on the motion, and
18 (ii) if the motion is granted, until the
19 court amends or vacates the order; and
20 (B) restore public access if the motion is
denied.⁹

document in the court file.

Rendered in Civil Rules language, this approach would substitute "must" for "shall," and "receiving" for "receipt of." But "filed" may be better than "receiving": "When the motion is filed, the court must promptly restrict public access * * *."

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed "[promptly]."

⁸ "Deny" likely is better than restrict. No public access.

⁹ The Bankruptcy Rule includes a final sentence: "If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia – that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful--if the Bankruptcy Rules Committee wishes to retain it, the gain in uniformity is worthwhile.

Uniformity also may require that "unless the court orders otherwise" be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

COMMITTEE NOTE

Subdivision (i) is new. It is adopted to reflect the parallel adoption of new Bankruptcy Rule 9037(h). Subdivision (i) differs from Rule 9037(h) in some details that reflect differences from the circumstances that may arise in bankruptcy filings.

Any person may file a motion to redact a filed document to delete information protected by Rule 5.2(a).

The motion should include a copy that is identical to the filed document except for the redactions. It should identify the location of the unredacted document in the docket.

A single motion may relate to one or more unredacted documents. But if the proposed redactions involve different documents it may be better to file separate motions, particularly if different types of protected information are involved.

The motion should request immediate action to deny public access to [the motion and]¹⁰ the unredacted document pending the court's ruling on the motion. Because the motion itself may call attention to the unredacted document, the court should act as promptly as possible to deny public access pending its ruling. The movant may assist the court by invoking whatever means are compatible with the court's electronic and paper filing procedures.

If the motion is granted, the redacted document should be placed on the docket, and public access to [the motion and] the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to [the motion and] the document should be lifted.

This procedure does not affect any remedies that a person whose personal identifiers are exposed may have against the person that filed the unredacted document.

¹⁰ Once the unredacted document in the file is protected, is there any need to deny access to the motion? On the other hand, will there be any circumstances in which there is a public interest in access to the motion, so long as all parties have access to the motion?

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TAB 5B

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B. 16-CV-A: Rule 30(b) (6)

This proposal is submitted by "members of the Council and Federal Practice Task Force of the ABA Section of Litigation, in our individual capacities." It asks the Committee to "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules."

The specific issues identified by the proposal are summarized briefly below. They are framed in ways that call to mind concerns that were raised by two earlier proposals advanced by other bar groups that have been valuable sources of information and ideas over the years. A set of proposals made in 2013 by the New York City Bar was considered and put aside, in large part because extensive efforts were devoted in 2006 to a set of proposals made by a committee of the New York State Bar Association. The present proposals overlap the 2013 proposal, and suggest expanding it. They also identify a number of points that cause aggravation in practice.

The history of recent and relatively recent proposals cuts two ways. Rule 30(b) (6) was studied extensively ten years ago. The conclusion then was, roughly, that although real problems may arise in deposing an entity, it would be at best difficult to craft rules amendments that would do more good than harm. A similar conclusion was reached in addressing the much more modest 2013 proposal. The present proposals, moreover, largely go to issues of administration that should be worked out as a matter of cooperative common sense. Some persuasive reason must be found to justify entering once again into this thicket.

The other side of the coin is that Rule 30(b) (6) has provoked genuine concern in three different and valuable bar groups. It seems worthwhile to at least consider the possibility that some rules changes might improve the practice.

In relatively short compass, these are the issues identified by the ABA group:

(1) "Most knowledgeable person": Rule 30(b) (6) does not require that an entity designate the most knowledgeable person to testify on its behalf. The recommendation is that the rule should not be amended to add any such requirement.

(2) Objections: "Lawyers may object to the number of topics, their relevance, whether they are set forth with reasonable particularity, to the place specified for the deposition, or for

other reasons." The only formally recognized way to advance such objections is by motion for a protective order. The proposal is to add a minimum advance-notice requirement, perhaps 28 days, with a set period for making objections. An objection would suspend the deposition pending a meet-and-confer and, if need be, a motion to compel. This proposal expands the New York City Bar proposal, which was similar but limited to nonparty Rule 30(b)(6) entities. It also is similar to issues that were considered in the elaborate work that led to the 2013 Rule 45 amendments.

(3) Number of Topics: Cases are noted approving designation of 47 topics, and 55 topics, and 35 topics with a direction to develop new topics because some of the 35 were too broad. It is recognized that although more topics impose more work, increasing the number may advance the purposes served by the requirement that the topics be described with reasonable particularity. In the end this issue is tied to the number of witnesses issue.

(4) Number of Witnesses: When Rule 30 was amended to establish a presumptive limit on the number of depositions, and again when it was amended to establish a presumptive limit on the duration of a deposition, the Notes to the amended rules advised that a Rule 30(b)(6) deposition counts as one deposition, no matter how many persons are designated to testify, and that the time limit begins anew for each designated witness. The result can be a vast amount of deposing, at seeming odds with the purposes of the limits. The proposal is rather vague beyond that. It would be simpler, if anything were to be done, to establish a presumptive time budget for a 30(b)(6) deposition, to be allocated among all persons testifying.

(5) Questioning Beyond the Topics: This issue is more fundamental than the first four. "Most courts will allow a 30(b)(6) witness to be questioned beyond the confines of the topics listed in the notice." The suggestion begins by approving this practice "if it will avoid the need to recall the witness and the questioning can be completed in a single day." If the entity wishes to avoid being "bound" by testimony on topics beyond the notice, it should object or note the departure on the record, so that the questions may be framed in a way that does make the answers "binding."

(6) "Reasonable Particularity": There may be difficulties in application, but "[w]e could not articulate a better standard." Let it be.

(7) Contention Depositions: Cases are described that, remarkably, allow contention questions. The proposal is that "30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or

legal interpretations." Well, yes.

(8) Evidentiary Value – Contradicting Answers: This topic goes straight to the earlier references to "binding" the entity by the deposition testimony. The proposal recognizes that the deposition testimony should not be treated as a "judicial admission" that cannot be contradicted. Some cases treat it that way. But a majority of the group believe that contradiction – explanation or supplementation – should be permitted. At the same time, the majority believes that contradiction should not be an easy way to defeat summary judgment; an analogy is drawn to the "sham affidavit" doctrine. Others in the group believe that contradiction should be allowed only on meeting the Rule 36 standard for withdrawing a Rule 36 admission.

(9) Organizations Without Knowledge: This issue seems to reflect various confusions in some cases that seek to administer the requirement that the entity named as deponent name persons who "must testify about information known or reasonably available to the organization." Mistakes may be made in the specific circumstances of particular cases. Some of the suggestions could readily be taken up under the present rule. If the only person with knowledge in the organization refuses to impart the knowledge to anyone else and refuses to testify for the organization, for example, the organization can so state, leaving it to the other party to subpoena the named person as deponent. A more complicated proposal addresses the situation in which the organization does not have access to documents or persons with relevant knowledge at the time of the 30(b)(6) deposition, but later gains access. The Rule 26(e) duty to supplement does not apply to depositions, apart from expert trial witnesses. The suggestion here is that the organization should not be barred from presenting the later-acquired information.

(10) Nonparty Organizations: After reviewing the New York City Bar proposal, it is suggested that it would be better to adopt the greater protection recommended under (2), "Objections," above.

(11) Multiple Depositions of the Same Entity: The suggestion is that a second deposition of the same organization should be allowed without requiring court permission under Rule 30(a)(2)(A)(ii), so long as the notice truly identifies new topics. It would count against the numerical limit as a second deposition. This practice would advance the goal of achieving proportionality through staged discovery.

(12) Discovery of Preparation: The extent of preparing the witness is a proper subject of questioning into "the basis for the education of the witness and the facts that are sought to be

conveyed." A questioner can properly show a document to the witness and ask whether it is familiar and when it was last reviewed. But requiring an extensive list of documents reviewed should be protected as work product, "particularly when the selection was made by counsel."

The only thing to be done now is to decide whether to take up Rule 30(b)(6) for serious study, either now or in the near-term or intermediate future.

Summaries of 13-CV-E, the 2013 proposal, and materials on the 2006 proposal, are set out below after the text of 16-CV-A itself.

16-CV-A

January 26, 2016

Hon. John D. Bates, Senior Judge
Chair, Advisory Committee on Civil Rules
US District Court, District of Columbia
E. Barrett Prettyman U.S. Ctse.
333 Constitution Avenue N.W.
Washington, DC 20001

**Re: ABA Section of Litigation Federal Practice Task Force Report on
Rule 30(b)(6) Depositions of Organizations**

Dear Judge Bates:

We, the undersigned members of the Council and Federal Practice Task Force of the ABA Section of Litigation, in our individual capacities only, urge the Advisory Committee on Civil Rules to undertake a review of Federal Rules and Procedure 30(b)(6) and 45 with respect to the depositions of organizations.

The Task Force undertook a review of the 45 year-old Rule 30(b)(6), case law interpreting it, and current practice under the Rule. It identified a number of issues upon which courts interpret the Rule differently, it identified other issues upon which the Note suggests solutions which may no longer be the best approach, and it further identified areas upon which practice under the Rule may be improved. The Task Force's Report is enclosed.

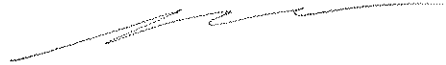
Accordingly, we respectfully request that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goals of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 Amendments to the Federal Rules.

The ABA Section of Litigation, through its Liaison to the Advisory Committee and its Federal Practice Task Force, remains available to assist the Advisory Committee in any way the Advisory Committee believes it could be helpful.

Honorable John D. Bates
January 26, 2016
Page 2

We continue to appreciate the tireless efforts of the Advisory Committee to improve our rules and hope to continue to be a positive voice in its ongoing efforts to improve federal practice under the Rules, to improve our court system, and to improve access to justice for all.

Respectfully yours,



Steven A. Weiss
Laurence Pulgram
Koji F. Fukumura
Joan K. Archer
Don Bivens
Kenneth R. Berman
Nancy Scott Degan
Charles Denton
Daniel Dowd
Dennis J. Drasco
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Tracey Salmon-Smith
Mary Smith
Palmer G. Vance II
Stacey Wang
Irwin Warren

Enclosure

**ABA SECTION OF LITIGATION FEDERAL PRACTICE TASK FORCE
REPORT ON RULE 30(b)(6) DEPOSITIONS OF ORGANIZATIONS**

INTRODUCTION

The ABA Section of Litigation Federal Practice Task Force undertook a review of current practices with respect to deposing an organization under Rule 30(b)(6). Rule 30(b)(6) depositions have been the subject of frequent well-attended CLE programs at ABA Section of Litigation Section Annual Conferences,¹ demonstrating that not only has there been much interest in the subject, but that there is much confusion on the Rule's requirements. There is also much litigation over how to interpret those requirements. Moreover, our review has enabled us to conclude that there are many issues upon which courts disagree as to the Rule's existing requirements, there are other issues upon which the Advisory Committee Notes suggest a solution which practice has demonstrated may be no longer the best approach, and there are other areas upon which practice under the Rule may be improved. Accordingly, we recommend that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules.

BACKGROUND

Federal Rule of Civil Procedure 30(b)(6) allows a party to depose an organization through one or more witnesses designated by that organization. Adopted in 1970, it essentially

¹ These programs were accompanied by excellent papers which provided some of the source material for this report. See Michael R. Gordon and Claudia De Palma, *Practice Tips and Developments in Handling 30(b)(6) Depositions*, Prepared for ABA Section of Litigation Section Annual Conference, April 2014; David Cannella, *Can I Get a Witness? 30(b)(6) overview, plus pitfalls, practical tips and consequences*, Prepared for ABA Section of Litigation Section Annual Conference, April 2015.

has remained unchanged for more than 45 years.² It was adopted to curb the practice of “bandying” where organizations would produce one deponent after another, each disclaiming knowledge of information that someone in the organization almost certainly knew. 1970 Advisory Committee Note.

The Rule in its current form provides as follows:

- (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. 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. A subpoena must advise a nonparty organization of its duty to make this designation. 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.

This report will address areas of confusion under the Rule, areas where courts have divided on the Rule’s requirements, and areas for suggested improvement.

² Amendments in 1971 extended the practice to taking the deposition of a non-party organization by subpoena. The Note was amended in 1993 to address how to apply the 10 deposition numerical limit, suggesting a deposition under Rule 30(b)(6) should be treated as a single deposition, even though more than one person may be designated to testify. In 2000, with the introduction of the durational limit of one day of seven hours for any deposition, the Note was again amended to indicate “for the purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.” Finally, the style amendments were adopted in 2007, along with adding “or other entity” to the list of the types of organizations that may be named, to include limited liability companies and other forms of organization.

SUBSTANTIVE PROVISIONS

A. Knowledge.

The Rule by its terms permits a party to notice the deposition of an organization setting forth “with reasonable particularity” the matters for examination. The named organization must then designate the one or more persons who will testify about information known or reasonably available to the organization.

Contrary to the understanding of many practitioners who seek the production of the most knowledgeable person on a given subject, the Rule does not require the organization to produce the “most knowledgeable” person on a given subject or even a person with any first-hand knowledge. *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012); *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009); *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003). The witness must be prepared to testify about the matters described in the notice known to the organization or reasonably available to it and must consent to testify on behalf of the organization.

The Task Force considered whether there should be some preference expressed, if not in the Rule, but in the Note, for the production of a witness with first-hand knowledge if such person is available. (The Report separately addresses below the situation where there exists no one at the organization with any knowledge or reasonably available to it on the designated subjects.) Such a preference might mitigate the problem presented in *Sciarretta v. Lincoln Nat'l Life Ins.*, 778 F.3d 1205 (11th Cir. 2015), where an outside expert was spoon-fed one side of the story and could not answer any sensitive questions that the organization wished to avoid answering. We concluded that despite such potential problems, which in that case were appropriately addressed with sanctions, maximum flexibility should remain with the entity's

choice of witnesses since it will be bound by that testimony. It may choose to designate a witness who has knowledge on 5 of 6 topics and educate that witness on the 6th so that the deposition can be efficiently concluded. It may wish to designate a mid-level officer who is educated on the topics for the deposition to protect privileged communications that could be at risk by producing a more senior officer with more direct first-hand knowledge, who also has access to privileged communications. It may also choose to produce a person who will make a better witness. Since the organization will be bound by the witness's testimony, it should retain maximum flexibility as to who it may choose to designate.

B. Objections.

Presently, the Rule contains no procedure to object to a Rule 30(b)(6) deposition notice. There is no procedure to object to the scope or breadth of the topics (which are required to be described with "reasonable particularity"), to the number of topics, or to whether a witness should be produced at all. The cases make clear that the only procedure recognized by the courts to object for any of the above reasons is to move for a protective order. *See, e.g., Lykins v. Certaineed Corp.*, 555 Fed. Appx. 791, 796-98 (10th Cir. 2014); *Pioche Mines Consol. Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964); *Bearch Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014); *International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, No. 11-cv-02007-MSK-KLM, 2013 U.S. Dist. LEXIS 22986, at *19 (D. Colo. Feb. 19, 2013); *Fernandez v. Penske Truck Leasing Co.*, No. 2:12-cv-00295-JCM-GWF, 2013 U.S. Dist. LEXIS 14786, at *6 (D. Nev. Feb. 1, 2013). *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989). Some courts even require a protective order to be obtained before the date scheduled for the deposition to excuse appearing, *Pioche Mines Consol. Inc.*, 333 F.2d at 269, unless the district court has a local rule staying the deposition until the motion can be decided.

Id., See, e.g., *Peterson v. DaimlerChrysler Corp.*, No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007). The Committee on Federal Courts of the Association of the Bar of the City of New York suggested a remedy of a minimum notice period at least for 30(b)(6) depositions of non-parties, and an automatic stay upon the filing of a motion for a protective order. Letter from Marilyn C. Kunstler, Chair, Comm. On Fed. Courts Association of the Bar the City of New York, Sec'y, Comm. on Rules of Practice and Procedure (Apr. 3, 2013), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072455-LetteronProposedAmendmenttoRule45reSubpoenasforRule30b6Depos.pdf>. We believe this proposed remedy does not go far enough.

While the burden on non-parties certainly needs to be appropriately addressed, we believe that an objection procedure, similar to that envisioned by Rule 45 with respect to documents, is appropriate for all Rule 30(b)(6) depositions. Lawyers may object to the number of topics, their relevance, whether they are set forth with reasonable particularity, to the place specified for the deposition, or for other reasons. After a meet and confer, the burden should be on the person seeking to take the deposition to justify the appropriateness of the notice and the topics by moving to compel.

In practice, our experience informs us that practitioners do in fact object to topics, their breadth and their particularity, and compromises are in fact sometimes reached. See *International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, 2013 U.S. Dist. LEXIS at *20. But there is no uniformity in this approach, and neither the Rule nor the case law recognize such a procedure. *But see Fernandez*, 2013 U.S. Dist. LEXIS 14786, at *7 (excusing nonappearance on the ground that notice was not proper and an objection letter was sent in advance of return date).

A rule setting forth an objection procedure may wish to set a minimum time for noticing a 30(b)(6) deposition (28 days for example) with a required period for objections (14 days before the return date), of course subject to alteration by stipulation or court order. The procedure may also incorporate a requirement for the responding party to indicate who will be testifying on its behalf and on what topics, and how many witnesses it will designate.³ The Rule could also set forth a meet and confer requirement and an award of costs and attorneys' fees if motion practice is then required.

C. Number of Topics.

Another area that is not addressed in the Rule and that has generated motion practice is in the number of topics specified for a Rule 30(b)(6) deposition. In *QBE Ins. Corp.*, a seminal case on Rule 30(b)(6) requirements, the court found nothing improper in the designation of 47 topics. 277 F.R.D. at 699. In *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 26552, at *6 (D. Kan. Apr. 9, 2007), the court upheld 55 separate topics. *Banks v. Office of the Senate Sergeant-At-Arms* approved a notice with 35 topics, but directed the parties to develop new topics because some were intrinsically overbroad. 222 F.R.D. 7, 18 (D.D.C. 2004). In *Collins v. Experian Info. Solutions Inc.*, No. 2:11-cv-938-AKK (N.D. Ala. May 9, 2012), the court addressed a motion for a protective order challenging 38 of 71 topics. The court reviewed each of the categories and sustained objections to 31.

A number of our Task Force members consider specifying a voluminous list of topics to be an abuse of the Rule. The organization has a duty to prepare a witness on each topic and if

³ The New York Commercial Division recently revised its Rule 11-d and 11-f, effective December 1, 2015, to more closely model Fed. R. Civ. P. 30(b)(6). It requires the responding party to designate one or more persons not later than 10 days before the deposition. If subjects are set forth in the notice and a particular person is requested to testify on behalf of an entity on these subjects, the responding party may also designate a different witness if done so 10 days before the scheduled deposition.

the presumption is that a 30(b)(6) notice counts as one deposition, presumably to be completed in a 7-hour day (if a single witness is presented), it may seem hardly possible to address numerous, far-reaching and varied topics in the suggested time period. Some feel that a reasonable number of topics, set forth with “reasonable particularity” should not exceed 10 without court approval.

Others feel that setting forth topics with “reasonable particularity” requires a certain amount of precision and the greater the number of topics, the more directed the witness preparation can be. Another way to address the problem is to indicate that if more than 10 topics are designated, for each 10 topics, the notice should count as an additional deposition toward the presumptive limit of 10 depositions.

A number of cases focus on the duty to prepare witnesses for a 30(b)(6) deposition and the consequences that occur when the witness is not adequately prepared or responds “I don’t know.”⁴ One thing clear from these cases is that there is a considerable duty to prepare witnesses that goes beyond that required for an ordinary fact witness. During these cost-sensitive times when many lawyers are required to strictly budget costs of each deposition, any litigation budget can be destroyed by the efforts required to properly prepare witnesses for 30(b)(6) depositions, particularly when there is a great number of topics specified. With the goal of the 2015 Rule revisions to reduce costs of discovery, some consideration should be given to the situation where an abusive number of topics is presented. A proposed solution in the next section may go a long way to control potential abuses.

D. Number of Witnesses.

The Advisory Committee Note, amended at two different times, suggests solutions for how the Rule 30(b)(6) notice counts toward the presumptive limit of 10 depositions and the 7-

⁴ Later in this report we address the extent to which an “I don’t know” answer can be later contradicted.

hour single-day presumptive time limit. The Note adopted in 1993 suggests the notice counts as a single deposition no matter how many witnesses are needed, and the Note adopted in 2000 suggests that the questioner can have up to 7 hours for each witness designated. *Sabre v. First Dominion Capital, L.L.C.*, No. 01 CIV 2145 BSJ HBP, 2001 U.S. Dist. LEXIS 20637 (S.D.N.Y. Dec. 10, 2001) at *1. There appears something inconsistent and inadequate with those solutions.

The Task Force believes that solutions suggested by the Advisory Committee, at two different times in reaction to two different rule changes, may no longer be the fairest result. If a notice covers four topics, which can easily be covered in one 7-hour day, and three topics can be addressed by one witness and the fourth topic by a second, why does it make a difference how many witnesses are needed to cover the topics? Without exceptional circumstances, logic would dictate that the depositions of both witnesses be covered in a single day. Similarly, if multiple witnesses are needed on a multiplicity of topics, if each witness will be questioned for a seven-hour day, there seems to be no reason not to count each 7-hour deposition as a separate deposition. To the extent questioning of separate witnesses will be allowed to cover more than one day, each witness should be counted as a separate deposition.

Thus, we recommend that time be the governing factor in determining how many depositions are taken. Thus, if the topics can be addressed by one witness, a single deposition in a seven-hour day would be the norm. The same should be true if a second witness is needed for a minor topic that can also be addressed in a single day.⁵ If multiple witnesses are needed for substantial areas, unless the parties agree otherwise, then generally there should be seven hours

⁵ The New York Commercial Rule 11-d, effective December 1, 2015, counts multiple witnesses as a single deposition, but requires the deposition to be completed in a single 7-hour day, unless the parties agree to extend it, or the Court grants an extension, which shall be freely granted.

for each, with each seven-hour day counted as a separate deposition. Similarly, if a single witness is produced but so many topics are noticed that 7 hours does not suffice, and the parties agree to continue beyond the day, the continuation should count as an additional deposition. We would expect the parties to discuss and work out these issues after the witnesses are designated under the objection procedure followed by the meet and confer that we propose.

E. Questioning Beyond the Topics.

A related question that arises is whether a 30(b)(6) witness will be allowed to be questioned beyond the topics listed? If so, what is the binding impact of such testimony, and how will those questions count toward the seven-hour limit, and how many depositions are expended toward the 10 deposition limit?

Most courts will allow a 30(b)(6) witness to be questioned beyond the confines of the topics listed in the notice. *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at *12 (N.D. Iowa Oct. 28, 2010); *Crawford*, 261 F.R.D. at 38; *Philbrick v. eNom Inc.*, 593 F. Supp. 2d 352, 363 (D.N.H. 2009); *Falchenberg v. NY State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008), *aff'd*, 338 Fed. Appx. 11 (2d Cir. 2009); *FCC v. Mizuho Medy Co.*, 257 F.R.D. 679, 682 (S.D. Cal. 2009); *Eng-Hatcher v. Sprint Nextel Corp.*, No. 07 Civ. 7350 (BSJ)(KNF), 2008 U.S. Dist. LEXIS 67052, at *14, *16 (S.D.N.Y. Aug. 28, 2008); *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, No. C 04-1268 VRW (MEJ), 2007 U.S. Dist. LEXIS 24869 (N.D. Cal. Mar. 23, 2007); *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. 03-6025 (SRC), 2005 U.S. Dist. LEXIS 26854, at *5-7 (D.N.J. 2005); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000); *Detoy v. City & County of S.F.*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999); *Edison Corp. v. Secaucus Town*, 17 N.J. Tax 178, 182 (Tax Ct.

1998); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995). Several courts have said no. *Bilek v. Am. Home Mortg. Servicing*, No. 07 C 4147, 2010 U.S. Dist. LEXIS 80041, at *6 (N.D. Ill. Aug. 9, 2010); *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729-30 (D. Mass. 1985). Those that allow questioning beyond the notice appear to treat the answers not as binding on the organization, but as ordinary 30(b)(1) answers of any fact witness. *Falchenberg*, 642 F. Supp. 2d at 164; *King*, 161 F.R.D. at 476.

To the extent that an organizational witness is questioned beyond the list of topics, to what extent should an objection or notation on the record⁶ that the questioning strayed beyond the specified topics be required so that the questioner can withdraw or revise the question if so desired, and if not, so that all parties will be aware that the answer will not bind the organization? In addition, how should those questions be counted toward the seven-hour and single deposition guideposts?

Our Task Force believes that a practical approach should be followed. Questioning should be permitted beyond the scope of the notice if it will avoid the need to recall the witness and the questioning can be completed in a single day. If there is a desire to take the witness's deposition on a different set of topics for which the answers are not binding on the organization, the witness should be able to be recalled as a fact witness with a separate notice but should be questioned on different subjects. The 30(b)(6) organizational witness versus 30(b)(1) fact witness distinction should not be used as an excuse to question a single witness on the organization topics for 14 hours without court permission.

⁶ Some suggest that noting on the record that the questioning strayed beyond the topics is not in fact an objection, for which the grounds are limited, because the person defending the deposition is not attempting to preclude the testimony but simply noting that the evidential impact is different.

As to the need for objections or statement on the record when questions stray beyond the subjects listed in the notice, better practice seems to require that such objections or noting be made. *Whiting v. Hogan*, No. 12-CV-08039-PHX-GMS, 2013 U.S. Dist. LEXIS 35381, at *37 (D. Ariz. Mar. 14, 2013) (stating that deponent’s counsel “may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party”); *Detoy*, 196 F.R.D. at 367 (“If Defendants have objections to . . . questions outside the scope of the 30(b)(6) designation . . . counsel shall state the objection on the record and the witness shall answer the question, to the best of the witness’s ability.”). An objection or noting will enable the questioner to restate the question to fall within the scope of topics so that the transcript results in “binding” testimony, the parties may be able to resolve disputes as to whether the questions are within the scope, and all parties may be appropriately guided by the impact of the answers to such questions. But the real question is must an objection be made when the deposition rule only requires objections to the form of the question that can be corrected, not to the substance of the questions? Practitioners on the Task Force have different views on this question.

F. Reasonable Particularity.

We have found that there is much litigation over the detail needed in the required designation of topics. The Rule requires topics to be described with “reasonable particularity.” Some courts have described the standard as “painstaking specificity.” *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 U.S. Dist. LEXIS 120818, at *4 (N.D. Okla. Aug. 26, 2013); *Health Grades Inc. v. MDX Med. Inc.*, No. 11-cv-00520-PAB-BNB, 2013 U.S. Dist. LEXIS 59271, at *8-9 (D. Colo. Apr. 25, 2013); *Whiting*, 2013 U.S. Dist. LEXIS 35381, at *34; *Kelly v. Provident Life & Accident Ins. Co.*, No. 1:09-cv-00070-jgm, 2010 U.S. Dist. LEXIS 134623, at *5 (D. Vt.

Dec. 20, 2010); *McBride v. Medicalodges Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Commc'ns v. Theglobe.com Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006); *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). Other courts have clarified that references to “painstaking specificity” do not alter or heighten the standard expressed in the rule – reasonable particularity. *Espy v. Information Techs, Inc.*, No. 08-2211-EFM-DWB, 2010 U.S. Dist. LEXIS 36594, at *4 (D. Kan. Apr. 13, 2010).

Courts have warned that an overly broad Rule 30(b)(6) notice “subjects the noticed party to an impossible task,” because where it is not possible to “identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.” *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). Thus, “[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all.” *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005).⁷

We have considered whether a different standard of specificity should be set forth. The standard should result in topics that contain enough detail to guide the organization as the subjects for which witnesses must be prepared and to avoid being blindsided. We could not articulate a better standard and believe the “reasonable particularity” standard appears sufficient for the task.

G. Contention Depositions.

Can Rule 30(b)(6) depositions be used to obtain opinions and subjective beliefs of an organization or as contention depositions? Courts are split. *Compare Radian Asset Assurance*

⁷ Courts have rejected the use of catchall phrases such as “including but not limited”, or “any other matters relevant to this case.” *Alexander v. FBI*, 188 F.R.D. 111, 120-21 (D.D.C. 1998).

Inc. v. Coll. of the Christian Bros. of N.M., 273 F.R.D. 689, 691-92 (D.N.M. 2011) (contention depositions proper), *Great Am Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (deposition may explore corporation's position, beliefs and opinions), and *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (stating that Rule 30(b)(6) permits questioning on not only facts but subjective beliefs and opinions of the corporation), with *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are invasive of attorney work product doctrine). Courts have also found improper topics focusing on discovery responses, *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986); *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 U.S. Dist. LEXIS 667, at *27-32 (N.D. Ill. Jan. 21, 2000); *McGarrah v. Bayfront Med. Ctr. Inc.*, 889 S. 2d 923, 926 (Fla. Dist. Ct. App. 2004), factual basis of defenses, *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 (JBA), 2007 U.S. Dist. LEXIS 90876, at *9-10 (D. Conn. Dec. 11, 2007); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654 (D. Kan. 1996) (stating that the company has a right to get the factual basis but not through a 30(b)(6) deposition); *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004), and information obtainable from other sources, such as a request for production of documents. *Smithkline Beecham Corp.*, 2000 U.S. Dist. LEXIS 6687, at *27-32 (denying a 30(b)(6) deposition on certain topics because the information could be obtained through less intrusive means).

The Task Force believes 30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or legal interpretations. The purpose of such depositions is to establish facts available to the organization. We believe the purpose is undermined if witnesses are required to address legal theories, contentions, etc. Such questions have a great potential to invade the work product doctrine and constitute an abuse of the

purposes for which the rule was established. To the extent discovery of a party's contentions should be permitted at all, there are other discovery devices for this purpose.

H. Evidentiary Value – Contradicting Answers.

May an answer at a Rule 30(b)(6) deposition be contradicted by the organization at trial or on summary judgment, to what extent, and under what circumstances? Will such answers be treated like judicial admissions or like ordinary deposition testimony that may be theoretically (but not practically) subject to contradiction on summary judgment or trial?

The purpose of a Rule 30(b)(6) deposition “is to create testimony that will bind the corporation.” *Sanders v. Circle & Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991) (citing *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Mass 1987)); *Resolution Trust Corp. v. Farmer*, 1994 U.S. Dist. LEXIS 8755, *5 (E.D. Pa. June 23, 1994). See also *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C 1996). Although the testimony is binding, the majority view is that such testimony does not constitute a judicial admission – which is not only binding, but cannot be contradicted by the party at trial or on appeal of the same case. *Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). Instead such testimony “is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.” *Id.* See also *State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, No. 03-6516, 2008 U.S. Dist. LEXIS 37571 (E.D. Pa. May 7, 2008); *Weiss v. Union Cent. Life Ins. Co.*, 28 Fed. Appx. 87, 89 (2d Cir. N.Y. 2002); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *R&B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8th Cir. 2001); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 723 n.17 (M.D. Pa. 2006); *A&E Prods. Group, L.P. v. Mainetti USA, Inc.*, No. 01 CV 10820, 2004 U.S. Dist. LEXIS 2904, at *19

(S.D.N.Y. Feb. 25, 2004); *Med. Serr. Grap., Inc. v. Lesso, Inc.*, 45 F. Supp. 2d 1237, 1254 (D. Kan. 1999); *W.R. Grace & Co. v. Viscase Corp.*, No-90-5383, 1991 U.S. Dist. LEXIS 14651, at *4-*5 (N.D. Ill. Oct. 15, 1991). Some cases however do not permit contradiction. *See e.g., Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000); *Rainey v. American Forest & Paper Ass'n.*, 26 F. Supp. 2d 82, 94-5 (D.D.C. 1998) (testimony is binding and no contraction may be subsequently introduced).⁸

Some on the Task Force believe that the majority rule is the appropriate one, and that Rule 30(b)(6) testimony should be treated like any other deposition testimony. While it is binding as an admission, it may be later explained or supplemented. If the purpose is to obtain the testimony of the organization, once obtained, it should be treated as an admission by the organization – the witness, like the testimony of any other witness. While failure to adequately

⁸ A related issue upon which courts are divided, but is not limited to Rule 30(b)(6) depositions, is the extent to which a witness can change a deposition answer substantively under Rule 30(e) giving a witness 30 days to review the transcript. Rule 30(e) also provides “if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.” This rule has been read somewhat narrowly by certain courts, which had held that Rule 30(e) does not:

allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.

Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992). Other courts, however, have construed Rule 30(e) as permitting substantive changes as long as the deponent timely provides an explanation for each change. *See, e.g., Innovative Mktg. & Tech. L.L.C. v. Norm Thompson Outfitters, Inc.*, 171 F.R.D. 203, 205 (W.D. Tex. 1997); *Podell v. Citicorp Diners Club, Inc.*, 914 F. Supp. 1025, 1034 (S.D.N.Y. 1996) (after plaintiff changed deposition testimony on material matter, ruling that Rule 30(e) allows deponent to make changes in deposition even if changes contradict the original answers and reasons for changes unconvincing). The Seventh Circuit has taken a middle-ground approach, allowing substantive changes provided that they do not contradict the original testimony. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

prepare will not be a good explanation, there seems to be no good reason to give such testimony judicial admission status. But similar to fact witnesses trying to contradict deposition admissions in opposing summary judgment, we would expect courts to be very reluctant to permit subsequent explanations to defeat summary judgment sought based upon such admissions.

Others believe a higher standard should be required to contradict admissions made during a Rule 30(b)(6) deposition, and all envision participation by the court in its supervisory role so that all parties will be aware of how such efforts will be treated at trial. Some feel the higher standard should be akin to asking the court for permission to withdraw an admission made under Rule 36. These members believe that even if the court grants relief, the original testimony would of course be admissible along with the new testimony and the explanation of why it has changed.

I. Organizations Without Knowledge

Courts have struggled with the right approach to the situation where the organization has no present employee with knowledge of designated subjects or to which the information is not reasonably unavailable to it. As an initial matter, the fact that employees with the knowledge have left the organization will not relieve the organization of the obligation to prepare. Organizations are required to review prior deposition testimony, documents, deposition exhibits and interview former employees so it can be in a position to produce an educated witness to speak for the organization. *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007); *Calzaturificio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 38-39 (D. Mass. 2001); *Bank of New York v. Meridien Biao Bank Tanz.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997); *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996).

But the Rule contains a limitation. It requires the designated persons to testify about information “known or reasonably available to the organization.” *Dravo Corp. v. Liberty Mut. Inc. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

Courts have struggled with situations when the information may not be reasonably available to the organization. The organization may have filed for bankruptcy protection and a trustee receives a notice when the company has no employees. Prior employees may not be willing to talk with the trustee or current counsel for the organization. There may be criminal investigations pending and all knowledgeable witnesses may have taken the Fifth Amendment. Or as in the case of *QBE Insurance Corp.*, an insurer subrogee who paid out a claim and was pursuing a recovery for what it paid, found itself in a position where its insured refused to cooperate with it and provide the needed information. Some courts have found that an organization cannot be subject to Rule 37 sanctions if it does not know the answer on a subject after diligent inquiry. *Black Horse Lane Assoc., LP v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000); *Resohlon Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197-8 (5th Cir. 1993). Others have applied sanctions and addressed the issue as a failure to properly prepare, or when the information was not available applied “consequences,” such as barring the presentation of any information at trial on the issue, not as a sanction but as a natural result of a failure to make the information available in discovery. *QBE Ins. Corp.*, 277 F.R.D at 681, 698-9.

The Task Force believes that the Rule should be amended to set forth a procedure to address the situation where a witness is truly not available to the organization on a given subject. Along with a procedure for setting forth objections, the Rule could provide an opportunity to state in writing in response to the Notice that there is no witness with knowledge of the information reasonably available to it, setting forth the circumstances, and stating why another

witness cannot be sufficiently prepared. A requirement of the present Rule is that the witness designated by the organization must also “consent to testimony on its behalf.” If there is not a knowledgeable person willing to testify on its behalf (usually a former employee) and not a current employee who can be educated, there should be in place a mechanism for the responding party to so state. As an alternative, the response could designate what documents or persons possess the relevant information and where the persons or documents may be found, if not reasonably available to the organization. By proceeding in this manner, a court may be able to address the situation in advance of a futile deposition leading to allegations of a failure to prepare, requests for sanctions, etc.

Consequences should appropriately flow from such an election but they should not be punitive. If a party identifies a knowledgeable witness who will not cooperate with it, or identifies a source of documents not within its custody or control, the organization should not be barred from subsequently presenting that witness testimony, or such documents, obtained through subsequent subpoena or other discovery. The problem however is a thorny one crying out for a mechanism to resolve it beyond case by case litigation.

J. Rule 30(b)(6) Depositions of Non-Parties by Subpoena under Rule 45

Rule 45 addressing subpoenas to non-parties recognizes that undue burden and expense should not be imposed on non-parties. The Rule, recently amended, continues to recognize the distinction between parties and non-parties. A witness may only be compelled to give testimony within the District in which the witness is served or within the 100 mile territorial limitation. Rule 45 contains a procedure for a non-party to object to the production of documents, placing the burden on the party seeking the documents to undergo the expense of a motion, if an accommodation cannot be reached. Non-parties, as stated, are protected against “undue burden.”

But the Rule does not similarly protect Rule 30(b)(6) depositions of the organization sought through subpoena.

Rule 30(b)(6) itself tersely addresses the organizational deposition of a non-party: “A subpoena must advise a nonparty organization of its duty to make this designation.” While Rule 45 seeks to protect non-parties from “undue burden or expense” and a non-party may object to subpoenas to produce documents, the Rule contains no ability for the subpoenaed organization to object to topics or to the production of a witness at all.

What if the only knowledgeable witness is a person beyond the 100 mile limit? To what extent may a party circumvent the 100 mile limit by asking for the Rule 30(b)(6) deposition of a non-party organization by subpoena with knowledge that the only witness with knowledge is beyond the subpoena power? Must the organization interview that witness and prepare a witness within the territorial limit with the knowledge of the witness beyond the reach of a subpoena? At least one court, appropriately in our view, has said no. In *Wultz v. Bank of China*, 293 F.R.D. 677, 680 (S.D.N.Y. 2013), the court found that the subpoenaed party need not produce a witness located beyond the 100-mile territorial boundary and by extension, need not educate a witness on topics upon which only employees located outside that limit have knowledge.

The same court also found that there is not the same burden to prepare witnesses when the organization sought to be deposed is a non-party. The court found the Rule 45 requirement to protect non-parties from “undue burden” lessens the burden of preparation imposed upon parties. *Id.* at 680.

The Committee on Federal Courts of the Association of the Bar of the City of New York proposed in 2013 that greater protections for Rule 30(b)(6) should be a given to non-parties. It recommended a minimum notice period (21 days), an explanation of the need for the testimony,

and an automatic stay of such deposition if a motion for a protective order were filed by the non-party.

The Task Force believes these protections are warranted but not sufficient. We have already recommended a procedure for objections to apply to all requests for Rule 30(b)(6) depositions. At a minimum, such a procedure should apply to non-parties subjected to Rule 30(b)(6) organizational depositions by subpoena. Moreover, the burden of asking for an order compelling the deposition should be on the party seeking the deposition, rather than on the non-party to seek a protective order, in the same manner as Rule 45 requires with respect to the production of documents. In addition, protection for the 100-mile territorial limit should apply and be recognized in a rule tailored for Rule 30(b)(6) depositions through subpoena. Moreover, we agree that the burden to prepare witnesses should be consistent with the limitation to protect third parties from undue burden and expense. Thus, we recommend the Rule 45 also be amended to address the separate problems applicable to Rule 30(b)(6) deposition notices to non-parties through a Rule 45 subpoena.⁹

K. Multiple Organization Depositions

Since leave of court is required to take a second deposition of the same witness, is leave of court required if the examiner seeks to serve a second Rule 30(b)(6) notice on an organization

⁹ Members of the ABA Section of Litigation Council and its Federal Practice Task Force previously recommended that the amendments to Rule 45 include a recognition of a duty to inform adverse parties when documents are received pursuant to subpoena, in addition to the requirement to serve a copy of a subpoena for documents on all parties. Our experience indicated that the explicit requirement would avoid problems litigators experience when documents are produced weeks or months after a subpoena return date, a prevalent occurrence. For some inexplicable reason the Advisory Committee declined to incorporate that requirement (presumably on the assumption that such documents are routinely made available). That lack of such a requirement in the Rule continues to cause problems. *See* *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 967 n. 9 (9th Cir. 2014). If Rule 45 is amended to address Rule 30(b)(6) depositions, and even if it is not, we strongly recommend that this deficiency be corrected.

on different topics? Again courts have not answered this question in the same way. First, as an initial matter, to proceed a second time on the same topics should certainly require leave of court. Some cases require leave of court even if the topics sought to be inquired into are different. *See, e.g., Ameristar Jet Charter Inc. v. Signal Composites Inc.*, 244 F.3d 189 (1st Cir. 2001); *Terry v. Unified Gov't of Wyandotte Co.*, 2011 U.S. Dist. LEXIS 20581, at *11 (D. Kan. 2011); *State Farm Mutual Auto. Ins. Co. v. New Horizon Inc.*, 254 F.R.D. 227 (E.D. Pa. 2008). At least one court says leave of court in that situation is not required. *See Quality Aero Tech. v. Telemetrie Elektronik*, 212 F.R.D. 313, 319 (E.D.N.C. 2002); *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104, at 14 (3d ed. 2010). *Wright and Miller* suggests a second deposition should be permitted (without leave of court) if the topics are different but it certainly would count as a second deposition. It also suggests a different result in the case of a subpoena upon a non-party, who should not be unduly burdened. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104 (3d ed. 2010).

The Task Force believes court permission should not be required for a second deposition of the organization on different topics (if they are truly different topics and not efforts to redepose the witness on some areas previously covered), subject to the organization's right to move for a protective order to prevent abuse. The new discovery rules aimed at controlling costs and focusing on staged or iterative discovery make it appropriate in certain cases to limit topics to certain core issues, to be followed at a later time with more expansive questioning on other topics, if necessary. In these circumstances, each deposition would count as a separate deposition.

L. Discovery of Preparation

A frequent question that arises at all depositions is: “what did you do to prepare for this deposition?” It inevitably invokes a work product objection to the extent it seeks to explore conversations with counsel and even when it seeks to explore what documents were reviewed, particularly when the review was directed by counsel. Courts are split. *Compare Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (documents reviewed invokes work product when counsel selected documents for review by client); *with N. Natural Gas Co. v. Approximately 9117.53 Acres*, 289 F.R.D. 644 (D. Kan. 2013) (selection process not protected).

Since the extent of preparation of a 30(b)(6) witness is a proper area of inquiry, the Task Force believes that counsel should have some latitude to explore the extent to which a witness was properly prepared. Work product and privilege objections should still have a place when it comes to discussions with counsel, except when such discussions provide the basis for the education of the witness and the facts that are sought to be conveyed. We believe requiring a comprehensive listing of the documents reviewed in preparation for a deposition, particularly when the selection was made by counsel, does properly invoke protected work product. Nevertheless, a questioner who shows a witness particular documents can certainly inquire of the witness whether the witness is familiar with the document and when it was last reviewed.

CONCLUSION

It is clear that over the last 45 years, Rule 30(b)(6) practice has resulted in not only much confusion among practitioners as to what it requires, but also the development of many issues upon which courts have been divided. We recommend that the Advisory Committee on Civil Rules undertake a thorough review of the Rule and conflicting case law and resolve all issues

upon which courts have divided on the interpretation of the Rule. Throughout this Report we have recommended solutions on areas where courts have been divided.

We have also recommended changes to the Rule that we believe will improve practice in taking organizational depositions. These recommendations will reduce overall litigation cost by providing mechanisms to resolve issues that frequently arise before time is needlessly spent posturing at the actual deposition with the witness present. These include mechanisms for (1) providing for an objection procedure to set forth objections to the number, scope and particularity of topics listed; (2) to identify the witness or witnesses to be produced; and (3) to address the situation when there is not a witness who has knowledge of the topics requested or who can be educated. The recommendations also include a specific provision to protect organization non-parties whose 30(b)(6) deposition is sought to be obtained by subpoena. The recommendations further seek to reconcile an apparent inconsistency in the Note that provides that the organizational deposition counts as one deposition toward the ten deposition limit regardless of how many topics are listed and how many witnesses are designated, but that each designated witness may be separately deposed for seven hours. By adopting these proposed improvements and resolving the numerous conflicts, we believe practice will be greatly improved, greater certainty will be achieved, and time and expense will be greatly reduced in deposing organizations.

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13-CV-E: Nonparty Rule 30(b) (6) Deposition

13-CV-E is a set of recommendations by the Committee on Federal Courts of the New York City Bar. The Bar Committee offers a reasonably clear picture of the problems they see with nonparty Rule 30(b) (6) depositions, although the discussion wanders into party depositions and at least two of the specific suggestions at the end address deposition subpoenas more generally. The problems are related to topics that were considered during the process of framing the recent amendments of Rule 45. It is easy to imagine that attempts to address them could generate greater problems than would be solved. These first notes provide a sketch. The proposals are described first. Then come the reasons for caution.

The Proposals

The problem clearly identified has to do with subpoenas for a nonparty Rule 30(b) (6) deposition. There may be not enough "notice" to give time to prepare adequately. Unlike an individual deponent, who can appear when demanded without advance preparation if that seems like the thing to do, an entity subject to a Rule 30(b) (6) deposition must provide one or more witnesses who can testify to information known or reasonably available to the entity. That takes time. And there may not even be enough time to make an orderly motion for a protective order. A pending motion, moreover, does not excuse compliance; it is only a court order that protects.

Two "common practices" are adopted in an attempt to mitigate these problems. The entity may "issue written objections to the scope of a Rule 30(b) (6) subpoena * * * and prepare their witness only to the extent the topics are not the subject of objections." Or it may seek a protective order and choose not to appear until the motion is decided. Neither tactic is authorized by the rules. Either may be met by sanctions imposed as a matter of inherent power.

The City Bar Committee has concluded that it would be overkill to expand the Rule 45(d) (2) (B) objection procedure to include oral depositions, whether under Rule 30(b) (6) or more generally. Recall that this procedure applies to a subpoena to produce. The person subject to the subpoena can object "before the earlier of the time specified for compliance or 14 days after the subpoena is served." The objection automatically suspends the subpoena; production is required only on court order, which must spare the nonparty from "significant expense resulting from noncompliance." Applying this procedure to a Rule 30(b) (6) subpoena "would shift the balance of power too far in favor of" the witness, resulting in unnecessary delays and disputes. The deposition is a discrete event, as compared to the often

"rolling" nature of document and ESI productions. There is less time to negotiate a reasonable outcome.

The first suggestion, then, is "a minimum notice period for Rule 30(b)(6) depositions of non-parties." 21 calendar days would be reasonable. A specific location in the rules is not proposed. Presumably what counts is notice to the nonparty subject to the subpoena, not the notice given to other parties under Rule 30(b)(1). The parallel to a nonparty subpoena to produce under Rule 45 is no help, because the closest provision is Rule 45(d)(3)(A)(i), which directs that the court must quash or modify a subpoena that fails to allow a reasonable time to comply. That provision is there now, and applies to deposition subpoenas as well as subpoenas to produce. One approach would be to add a few words here:

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply, which must be at least 21 days if the subpoena is for a nonparty deposition under Rule 30(b)(6) [or 31(a)(4)]¹; * * *

This approach would avoid a question that was avoided deliberately in framing the recent Rule 45 amendments – whether a specific notice period should be provided for a subpoena to produce. And it could be justified by accepting the arguments advanced by the proponents.

The second suggestion is that "to avoid unnecessary disputes a Rule 30(b)(6) non-party subpoena should be required to contain an explanation of the party's need for the testimony being sought." This is illustrated by NY CPLR § 3101(a)(4), requiring notice to a nonparty "stating the circumstances or reasons such disclosure is sought or required." This suggestion could be incorporated in Rule 45(a)(1), either as a new item (iv) in (a)(1)(A) or perhaps better as a new subparagraph (B):

(a) IN GENERAL.

(1) *Form and Contents.* * * *

(B) Nonparty Rule 30(b)(6) [or Rule 31(a)(4)]

¹ The Bar Committee does not refer to Rule 31(a)(4). Presumably the subpoena should be the vehicle for informing the nonparty of the matters for examination. Whether depositions on written questions create problems similar to those described for depositions on oral examination remains to be determined.

Deposition. A command that a nonparty attend a Rule 30(b)(6) [or Rule 31(a)(4)] deposition must [describe with reasonable particularity the matters for examination and]² state the reasons for [seeking] discovery [of these matters].

This proposal raises serious questions about the value of the required statement and about the risk of inviting prolonged disputes. In addition, it could easily imply a substantive limit on the right to depose a nonparty entity. A nonparty entity could easily argue for something akin to a "good cause" standard.

The third proposal is at least framed as one that would apply to "any deposition." If a timely motion is made for a protective order, the deposition should be "suspended." This would supplement the provision in Rule 30(d)(3) for suspending a deposition after it has begun, see also Rule 30(c)(2) on instructing a deponent not to answer while presenting a motion under (d)(3). The motion would require certification that the movant has in good faith conferred, or attempted to confer, with the "relevant" parties. If this approach is to apply to all depositions, it likely would fit in Rule 30, with a parallel provision in Rule 31. Rather than squeeze it into an existing subdivision, it might become a new subdivision (b). The fourth proposal is likely to fit in the same place – it would require that the motion for protection be "made" "sufficiently in advance of the scheduled deposition."

(b) MOTION FOR PROTECTIVE ORDER. The time stated for the deposition [in the Rule 30(b)(1) notice] is voided by a motion [for a protective order] under Rule 26(c) or [a motion to quash or modify] under Rule 45(d)(3)(A)(i) if the motion is made no later than 14 days after service on the deponent of the notice or the subpoena, whichever is served earlier, and if the movant certifies that it has in good faith conferred or attempted to confer with the party who gave the notice. After the motion is decided, a new time may be set by order or by the party who noticed the deposition.

² This is the direction of Rule 30(b)(6), which says that the notice of the deposition or the subpoena must do this. If we go down this road, it may be useful to have a reminder in Rule 45. Rule 30(b)(6) already provides that "[a] subpoena must advise a nonparty organization of its duty to make this designation" of persons who will "testify about information known or reasonably available to the organization."

Reasons for Caution

One reason for caution is noted above. In framing the proposals that have become the recent amendments of Rule 45, the Discovery Subcommittee considered whether to add some specific minimum notice period. It decided not to. Recent consideration is itself reason to go slow.

More importantly, this proposal is the first inkling we have had that there may be a problem with deposition notices and subpoenas that do not allow a reasonable time for compliance by a nonparty Rule 30(b)(6) organization named as deponent. Professor Marcus attempts to read all reported discovery cases and has not found any that address this possible problem. It may be that the problem arises only in the peculiarities of local practice as encountered by the City Bar Committee. Lawyers around the rest of the country may be more sensitive to these matters in setting the time for a Rule 30(b)(6) deposition, whether the organization named as deponent is a party or is not. A great many cases struggle with claims that an organization has not honored the direction to provide witnesses who know, or who have been taught, the information known or reasonably available to the organization. The party noticing the deposition has every incentive to allow sufficient time to enable a fruitful deposition that actually produces the desired information. And if the time is not sufficient to the needs of a particular deposition, lawyers elsewhere may be better attuned to the need to negotiate a reasonable schedule. Rather than rush to make a national rule to address what may be a local problem, it is better to wait for better information about experience elsewhere.³

Many years ago a committee of the New York State Bar Association raised a different question about Rule 30(b)(6) depositions that may go more to depositions of an organization

³ The cases noted in the City Bar Committee recommendation bear on issues collateral to the question whether parties are attempting to force unreasonably short periods to prepare for nonparty Rule 30(b)(6) depositions. For example, one supports the proposition that a nonparty deponent cannot refuse to appear at the time stated in a subpoena simply because it has made a motion for a protective order. Only an actual protective order will do.

Judge John Koeltl reports that he has never encountered the problem identified by the City Bar Committee, and adds that local rules governing discovery motions in the Southern District should avoid any apparent need to appear for the deposition before obtaining a ruling on a motion for a protective order.

that is a party than to nonparty depositions. One of the problems they saw was that the lawyer taking the deposition would badger, lure, or otherwise fool the witness designated by the organization to make statements about things the witness did not know and had not been taught by the organization. The answers then would be put to use as if the committed position of the organization. All of the questions raised by this report were considered seriously by the Civil Rules Committee and the Discovery Subcommittee, but no proposed solution commanded any confidence and Rule 30(b)(6) was put aside.⁴

The short of the matter is that Rule 30(b)(6) is not free of problems. Underpreparation of the organization's witnesses seems to recur with some frequency. Overreaching questioning may also be a persistent, if less prominent problem. It would be good to know whether there are enough signs of unreasonably abrupt nonparty deposition notices to justify adding these proposals to the log of Rule 30(b)(6) problems. The collective experience of Committee Members is likely to be the best basis for deciding whether to develop any of these topics further.

⁴ The report is 04-CV-B. It raised many challenging questions about the conduct and scope of Rule 30(b)(6) depositions. The focus was deliberately limited to depositions of a party, but with the observation that many of the problems occur with nonparty depositions as well. See pp. 15-17. It would be a shame to lose sight of this report in the Rules Committee archives. But there is no apparent reason to revisit these matters now.

Rule 30(b)(6) Issues

May, 2006

At its October, 2005, meeting, the Committee discussed a number of issues concerning the operation of Rule 30(b)(6), including receiving a presentation from David Bernick, a past member of the Standing Committee. Thereafter a Rule 30(b)(6) Subcommittee was formed, and it has probed further into these issues. The question now before the Committee is whether the Subcommittee should attempt to draft amendment language to deal with the issues identified. This memorandum will introduce the work done since last October and the issues that emerged.

Survey of Bar Groups and Subcommittee Reaction

The questions discussed last October were brought to the Committee's attention by a submission from the New York State Bar Association that was included in the agenda materials for the October meeting. After the meeting, the Subcommittee determined that additional input would be extremely useful and decided to send an inquiry about Rule 30(b)(6) practice to a number of bar groups. A copy of the inquiry is included with these agenda materials. It was sent to all bar groups that had submitted commentary on the E-Discovery amendment proposals. Thirteen comments were received in response. Many were obviously based on considerable work and surveying of bar group members. A summary of those comments was prepared and is included with these agenda materials. Any member who wishes to see individual comments, or all the comments, can obtain them from James Ishida of the Rules Committee Support Office ([202] 502-1820 or James_Ishida@ao.uscourts.gov).

After the survey was completed and the summary of the comments had been prepared, the Subcommittee met by conference call to consider next steps. A copy of the notes of that conference call is included in these agenda materials. This memorandum introduces the issues emerging from that discussion, and also mentions some topics that the Subcommittee decided need not be brought forward for discussion.

Objectives of Rule 30(b)(6)

A reminder of the objectives of Rule 30(b)(6) seems in order at the outset, before turning to present issues. Prior to 1970, there was much concern with "bandying," a label attached to the reported practice of some organizational litigants that imposed on their opponents the considerable task of locating a person who could actually speak about the issues of the case on behalf of the organization. That difficulty was portrayed as resulting

sometimes from gamesmanship of the organization, but it is important to recognize that locating a person with knowledge could be quite difficult for the organization as well. Particularly with regard to events occurring in the distant past, the organization could find it extremely challenging to dredge up reliable information about what had happened. Corporate combinations, layoffs, etc., could present a similar problem even if the events had occurred somewhat recently.

One view of the rule, then, is that it presents a zero/sum situation in which there is an unavoidable clash of interests between the party seeking discovery and the party asked to provide it. The greater the reduction in the burden on the party seeking discovery, the greater the corresponding imposition of burden on the responding party. When the rule was introduced in 1970, the Advisory Committee seemed to regard the burden on the responding party as much less significant, for the Advisory Committee Note says that "[t]his burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that on the examining party ignorant of who in the corporation has knowledge." Given the free-ranging and spontaneous nature of a deposition, compared with answering an interrogatory, one could debate this proposition. But as recently three years ago, a magistrate judge wrote that "the underlying principle of the rule is to shift the burden of determine who is able to provide information from the requesting party to the corporation." Schenkier, *Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, 29 *Litigation* 20, 22 (Winter 2003).

The salience of this background is that an undercurrent of the following discussion is the concern among some bar groups that revisions of the rule might inappropriately shift the burden of obtaining information back onto the discovering party and revive a version of bandying.

*Values of Rule 30(b)(6) practice
and concerns about changes to the rule*

Many of the respondents emphasized the importance of Rule 30(b)(6) in providing needed information, and several were quite concerned about changes that might hobble it. Several of the groups submitting comments are made up of members who regularly use the rule, and they reported that their main difficulty had been in obtaining compliance with the rule's expectation (and the caselaw's requirement) that the responding party adequately prepare the designated person to testify. At the same time, among those lawyers who had to prepare witnesses for such depositions, there was recognition that this could involve a very considerable effort. Some who emphasized the burden of

preparation also urged that sanctions be used vigorously when there is a failure to prepare adequately.

Some groups were rather vehement about their view that the rule should not be changed. See, e.g., Calif. Employ. Lawyers' Ass'n (saying that there does not appear to be any showing of problems that justify amendments); Consumer Att'ys of Calif. (urging the committee to reject proposals to amend the rule).⁵ Other groups cited the need to amend the rule to address or provide guidance on specific matters. See, e.g., Amer. Coll. of Trial Lawyers (favoring a clarification whether questioning beyond the topics identified in the notice is allowed); N.Y. State Bar Ass'n (favoring an amendment forbidding preclusive effect for testimony of 30(b)(6) witnesses, another directing that only one 30(b)(6) deposition of a party be allowed unless there is a stipulation or court order for additional such depositions, and another limiting such depositions -- no matter how many representatives are designated -- to one day of seven hours).

*Limiting the scope of Rule 30(b)(6)
depositions to locating sources of proof*

One idea that was discussed during the October meeting was to refocus the rule so that it would require a responding party only to identify sources of information. Such a change would permit the party seeking discovery then to use conventional discovery devices to obtain the information, and would excuse the organization from providing answers to "substantive" questions about the events underlying the case. This narrowing, in turn, could reduce the burden of preparing for a deposition and the risk of inappropriate foreclosure of proof by the organization regarding topics covered in the deposition.

⁵ The Federal Courts Committee of the Assoc. of the Bar of the City of New York observed as follows:

While our members understand that Rule 30(b)(6) offers the potential for abuse, their experience suggests that abuse of this Rule is no more likely than that accompanying any other discovery device, and that the potential for abuse is suitably managed by the district court's supervision of the process. In addition, existing case law surrounding the Rule provides sufficient guidance about which practices are unlikely to meet with court approval in the event disputes arise. With this context, the Association does not believe an amendment would improve the effectiveness of Rule 30(b)(6) or provide any greater protection against attempted abuse.

One question raised by this possibility was the degree to which it corresponded to what the Committee was trying to accomplish with the 1970 addition of Rule 30(b)(6). Research into the deliberations of the Committee during the 1960s indicated that the goal then was broader than requiring designation of sources of proof. A copy of the report on that research is included in the agenda book.

The inquiry to bar groups nonetheless asked about whether this sort of change would have a positive effect. Of the groups that discussed the idea, none supported it, and several criticized it vigorously. The Subcommittee decided not to proceed further with this idea. As explained in the notes to the Subcommittee's April 4 conference call, however, it did decide to bring forward six topics for discussion. These numbered topics are discussed below.

*(1) Treating answers in a 30(b)(6)
deposition as judicial admissions*

The first issue that the Subcommittee decided to bring forward is the judicial admission concern. The issue is whether an answer given by the 30(b)(6) witness -- including "I don't know" -- is a "judicial admission" in the sense that the organization is forbidden to offer evidence at trial that contradicts the answer. It seemed to the Subcommittee that this issue devolved into two distinct topics -- whether the courts have been so treating such deposition answers, and if so whether and how that should be changed. This memorandum therefore turns first to the state of the caselaw on judicial admission treatment of Rule 30(b)(6) deposition responses.

Caselaw on judicial admissions

Several bar groups said that some courts have held that answers during 30(b)(6) depositions are judicial admissions, or that there is a split of authority on the subject. These discussions are covered in more detail in the attached summary of comments. See, e.g., ABA Section of Litigation (reporting that counsel who regularly represent corporations said that they had faced arguments for the preclusive effect of 30(b)(6) testimony, and that the risk of preclusion increased the burden of preparation); Amer. Coll. of Trial Lawyers (reporting that the rule can be, and has been, interpreted to provide for a binding effect); Federation of Def. & Corp. Counsel (reporting that "[m]any courts prohibit a party from submitting evidence that contradicts its deposition testimony"). Compare Assoc. of the Bar of the City of New York (reporting that none of the members of its Committee on Federal Courts said that the issue had played an important role in one of their cases, but noting that this

could be due to the fact so few cases reach trial).

Some groups applauded giving binding effect to answers during a 30(b)(6) deposition. See, e.g., ATLA (asserting that a corporation should be bound because the buck must stop somewhere); Calif. Employ. Lawyers' Ass'n (asserting that if the answers did not bind the entity, the deposition would be of very little value). Other groups that seemingly wanted such answers to be preclusive, but reported that the courts did not so order. See, e.g., Nat. Employ Lawyers Ass'n (reporting that 30(b)(6) depositions are generally not given binding effect, but only used to impeach trial testimony).

We invited the groups to offer caselaw examples, and some of them did. A review of those examples does not show that reported decisions often result in judicial admission treatment of 30(b)(6) testimony in ways that are troubling. Our initial research indicated that it was unclear whether courts often treat the "binding" effect of Rule 30(b)(6) testimony to foreclose evidence from outside the organization supporting a different version. Decisions that appear to do so may at heart reflect the view that the organization did not adequately prepare its Rule 30(b)(6) witness, and that information available to the organization was not presented as a result. In these circumstances, courts may order that information not presented during the 30(b)(6) deposition, when it should have been presented, cannot be presented later either. This view consistent with Rule 37(c)(1).

Except as a sanction for failure to do proper preparation, however, it seems flatly wrong to say that the testimony of any party witness "binds" that party at trial and precludes it from offering otherwise admissible evidence that supports competing conclusions. See e.g., *Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315 (3d Cir. 1969) (even though plaintiff testified at trial that he was injured by the explosion of a "black wall" tire, he could introduce evidence from other witnesses that he was actually injured by the "white wall" tire that plaintiffs produced at trial as the offending item).

The magistrate judge's decision that is regularly cited as emblematic of overly broad application of preclusion under the rule stops short of treating the testimony as a judicial admission. See *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("answers given at a Rule 30(b)(6) deposition are not judicial admissions"). And the district court's affirmance of the magistrate judge's decision appears to regard it as premised on the preparation obligation:

The major thrust of UCC's appeal is its contention that it should not be held responsible for preparing its Rule 30(b)(6) deposition witnesses at the time of their depositions. Rather, it claims it should be allowed to continue their preparation after the depositions by being allowed to dribble in its final positions through Fed. R. Civ. P. 26(e) supplementations and Rule 26(a)(3) disclosures thirty days prior to trial, or else release them in a final deluge at trial. The impracticality of UCC's position is evident. The fact that this case involves events which occurred two or three decades ago does not alter the situation.

United States v. Taylor, 166 F.R.D. 367, 367-68 (M.D.N.C. 1996). Thus, this case is one of those later cited by the Seventh Circuit (which refused to follow the only aggressive decision favoring a judicial admissions treatment) as rejecting the judicial admissions approach.

At least two recent court of appeals decisions appear to recognize that the organization is not forbidden from offering evidence different from that provided in the testimony of its Rule 30(b)(6) witness:

Although Amana is certainly bound by Mr. Schnack's testimony, it is no more bound than any witness is by his or her prior deposition testimony. A witness is free to testify differently from the way he or she testified in deposition, albeit at the risk of having his or her credibility impeached by the introduction of the deposition.

R & B Appliance Parts, Inc. v. Amana Co., 258 F.3d 783, 786 (8th Cir. 2001); see also A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001) (rejecting the argument that Rule 30(b)(6) testimony constitutes a judicial admission).

Nonetheless, enthusiasts for use of 30(b)(6) remark that "The whole point of Rule 30(b)(6) is that it creates testimony that binds the corporate entity. * * * It is extraordinary that there is so little case law on developing Rule 30(b)(6) as an offensive weapon to bind entities to their deposition testimony and bar contrary trial testimony." Solovy & Byman, Rule 30(b)(6), Nat.L.J., Oct. 28, 1998, at B13. A similar notion is found in a leading treatise: "It should be kept in mind that a Rule 30(b)(6) designee testifies on behalf of the corporation, and binds the entity with its testimony." 7 Moore's Federal Practice § 30.25[3] at 30-56.3.

The caselaw cited by the responding bar groups provides some support for the judicial admission view. The strongest example

is *Rainey v. American Forest & Paper Ass'n, Inc.*, 26 F.Supp.2d 83 (D.D.C. 1998), and it bears description in some detail as the sole reported case strongly endorsing a judicial admission attitude. The court refused to permit defendant to rely in response to plaintiff's summary judgment motion on an affidavit from a former employee because the affidavit differed from the testimony given by defendant's 30(b)(6) witness. In this Fair Labor Standards Act case, plaintiff's 30(b)(6) notice specified that her duties while employed by defendant were a topic to be covered in the deposition. Despite that, the 30(b)(6) witness made no suggestion that plaintiff was exempt from the protections of that statute on the ground that she spent at least 50% of her time on managerial tasks. More generally, the court later found, this witness's testimony was deficient in details. See *id.* at 92-93. After plaintiff moved for summary judgment, defendant obtained and submitted an affidavit from plaintiff's former supervisor, who was one of its former employees. The affidavit said that the former employee had personal knowledge of plaintiff's day-to-day responsibilities, and that plaintiff had spent most of her time on managerial tasks.

The court held that the affidavit could not be considered. It emphasized that the corporation had a duty to prepare its designee "'to be able to give binding answers' on its behalf." *Id.* at 94.⁶ "Unless it can prove that the information was not

⁶ The court quoted from *Ierardi v. Lorillard, Inc.*, 1991 WL 158911 (E.D.Pa., Aug. 13, 1991). In that case, the court refused to grant defendant Hollingsworth & Vose Co. a protective order against having to prepare a witness to testify about its practices with regard to asbestos activities decades in the past, when it had manufactured the "Micronite" cigarette filter containing asbestos in the 1950s and 1960s. Defendant argued it would face an undue burden if required to prepare a witness. The judge disagreed: "Although this task may be somewhat difficult, it is clear that if a corporate employee familiar with the structure and organization of the corporation would find this task difficult, plaintiffs, who have no such familiarity, likely would find it impossible." *Id.* at *1. The court added:

Defendant's suggested interpretation would permit defendants to profess ignorance of information the plaintiffs request during a 30(b)(6) deposition, but then allow H & V to present evidence on the same subject at trial. Defendant's interpretation, however, subverts the purpose of Rule 30(b)(6). Under Rule 30(b)(6), a defendant has an obligation to prepare its designee to be able to give binding answers on behalf of H & V. If the designee testifies that H & V does not know the answer to plaintiffs'

known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." Id. Even though defendant had identified the affiant (Kurtz) as plaintiff's supervisor in other discovery, the court found that preclusion was required by the rule (id. at 95):

This result is supported not just by the text of Rule 30(b)(6) but by the purposes underlying its promulgation. Foremost among those purposes, according to the Advisory Committee Notes, is to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." In other words, the Rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case. * * * [I]t is clear that allowing it to introduce the Kurtz affidavit at this juncture would produce the very result that the Rule aims to forestall. If Ms. Kurtz was -- as her affidavit suggests -- so closely involved with the human resources department while plaintiff worked there, surely the information she has come forward with was equally well-known at the time plaintiff sought to depose as corporate representative. Defendant's failure to produce it then -- either by designating Ms. Kurtz as its representative or by preparing its designees to represent what Kurtz knew -- clearly violated Rule 30(b)(6).

It might be noted that this case seems to have involved a central and relatively simple issue -- whether plaintiff should be viewed as a managerial employee under the Act. But the court's reasoning is very broad. It has not, however, been broadly accepted. To the contrary, the Seventh Circuit had this to say about the Rainey decision while holding (as noted above) that 30(b)(6) answers are not judicial admissions:

McPherson cites Rainey v. American Forest & Paper Ass'n, Inc., 26 F.Supp.2d 82, 94 (D.D.C. 1998), in support, but two other district courts have reached different conclusions and we think theirs is the sounder view. See Indus. Hard Chrome, Ltd. v. Hetran, Inc., 92 F.Supp.2d 786, 791 (N.D. Ill.) ("testimony given at a Rule 30(b)(6) deposition is

questions, H & V will not be allowed effectively to change its answer by introducing evidence during trial. The very purpose of discovery is "to avoid trial by ambush."

Id. at *3.

evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes"); *United States v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996 (testimony of Rule 30(b)(6) designee does not bind corporation in sense of judicial admission)).

A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001). In 2005, an Indiana appellate court, interpreting the analogous Indiana rule, quoted the Seventh Circuit view and concluded that "[w]e agree with the Seventh Circuit and conclude that the testimony of an Ind. Trial Rule 30(B)(6) designee does not bind a corporation in the sense of a judicial admission." *Everage v. Northern Ind. Pub. Serv. Co.*, 825 N.E.2d 941, 950 (Ind.App. 2005).⁷ Note also, as quoted above, that the Eighth Circuit ruled against the judicial admission approach in 2001. See *R & B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8th Cir. 2001).

The remainder of the cases cited in bar group submissions do not seem to raise significant concerns. The leading example is *Hyde v. Stanley Tools*, 107 F.R.D. 992 (E.D. La. 2000). This is the only case cited by the Moore treatise in support of the proposition that answers in a 30(b)(6) deposition are "binding," and was cited by two of the bar groups that submitted comments. In that case, defendant's 30(b)(6) witness testified in "no uncertain terms" that the hammer that caused plaintiff's injury was manufactured by defendant. He said that he reached this conclusion "after close inspection of the hammer, including microscopic inspection, and comparing the hammer to Stanley drawings and specifications. [The witness] further determined that the hammer was manufactured by Stanley between 1983 and 1986." *Id.* at 992. Plaintiff then moved for partial summary judgment on the basis of this identification testimony about six months after the 30(b)(6) deposition.

⁷ As noted by the Seventh Circuit, another district court decision rejects the judicial admission idea:

While Hestran and Global are bound by the testimony given by their designated representative during the Rule 30(b)(6) deposition, such testimony is not a judicial admission that ultimately decides an issue. The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.

Industrial Hard Chrome, Ltd. v. Hetran Inc., 92 F.Supp.2d 786, 791 (N.D. Ill. 2000).

Defendant responded to the summary judgment motion with an affidavit from one of its engineers asserting that the hammer was not one of its products. This engineer had been present during the entire 30(b)(6) deposition but had not said anything when the designee gave his unequivocal testimony identifying the hammer as defendant's product. The court refused to allow the affidavit to be considered, citing sham affidavit cases. See *id.* at 993, citing *Perma Research & Devel. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."). Thus, the court was treating the 30(b)(6) deposition just like any party deposition. The court also recognized leeway for the corporate party (*id.* at 993):

[C]ourts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted if it is accompanied by a reasonable explanation. [But this is not available because there is no indication] that the expert report was based on newly discovered evidence or that [the 30(b)(6) witness] was somehow confused or made an honest mistake.

Other cases in bar group submissions also involve the sham affidavit doctrine.⁸ In addition, several involve a failure to

⁸ The following are the additional cases of this sort cited by the groups that submitted citations:

International Gateway Exchange, LLC v. Western Union Finan. Serv., Inc., 335 F.Supp.2d 131 (S.D.N.Y. 2004): The issue was whether defendant's delay in processing credit card transactions breached the parties' agreement. Defendant took plaintiff's deposition pursuant to Rule 30(b)(6), and plaintiff's representative admitted during the deposition that plaintiff was not contending that certain delays constituted a breach of the agreement. After defendant moved for summary judgment, plaintiff tried to retract this admission. The court said that "IGE cannot retract that testimony in opposing Western Union's motion," but added that plaintiff submitted no evidence to support its assertion, and that its submissions also violated the court's local rules on submission of material on a summary judgment motion. See *id.* at 144-45.

Newport Electronics, Inc. v. Newport Corp., 157 F.Supp.2d 202 (D. Conn. 2001): In a service mark infringement action, plaintiff took defendant's deposition using Rule 30(b)(6) and then moved for summary judgment. In response to the motion,

produce a witness prepared in the manner required by the rule.⁹

defendant submitted an affidavit conflicting with the deposition testimony. Plaintiff argued that the court should strike the affidavit because the rule does not permit a party to contradict or alter his 30(b)(6) testimony. *Id.* at 219. Defendant responded that the rule "does not require a witness to be omniscient." The court granted the motion to strike the affidavit, invoking the sham affidavit doctrine and also finding a violation of the rule's requirement to prepare the witness (*id.* at 220):

The settled law in the Second Circuit is that "a party may not create a material issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Rasking v. Wyatt Co.*, 125 F.3d 55, 63 (2d Cir. 1997). Here, Blake's affidavit contradicts statements in his deposition. Newport Corporation received notice of the topics on which Newport Electronics wished to depose a 30(b)(6) witness; Blake was not at liberty, therefore, to delay reviewing information on those topics until after the deposition and, thereby, submitting information in his affidavit which contradicts statements in his deposition regarding his lack of knowledge on various topics.

Also cited was *Mack v. United States*, 814 F.2d 120 (2d Cir. 1987): This case does not involve a 30(b)(6) deposition. Plaintiff sued after being terminated by the FBI for cocaine use. Among other things, he claimed that the FBI had violated the Fourth Amendment by asking him to submit to a urinalysis. He has signed a consent form acknowledging that he had no obligation to submit to the test, and during his deposition had said that he had not been forced to give a sample and had been "totally cooperative." But after defendants moved for summary judgment on this ground, plaintiff submitted an affidavit in opposition asserting that he had submitted to the test in fear of loss of his job, and that he was coerced. The appellate court held that it was proper to grant defendants' motion for summary judgment despite the filing of plaintiff's affidavit: "It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." *Id.* at 124.

⁹ As noted in the previous footnote, failure to prepare issues were present in some of the sham affidavit cases. Other cited cases seem principally to depend on failure to prepare:

It does not seem that, except for the special preparation requirement in Rule 30(b)(6), these cases impose distinctive requirements.

In sum, a considerable effort to identify caselaw support for the reported problem produced limited grounds for uneasiness about courts treating 30(b)(6) answers as judicial admissions.

Possible amendment to address judicial admissions issue

Whatever the state of the caselaw, there remains some concern about inappropriate preclusion of evidence based on a judicial admission theory. It does not seem that any bar groups question the basic idea that if a corporation properly prepares a witness it should not be held to the answers given no matter what they are. At the same time, it also seems that orders foreclosing contradictory evidence have on a number of instances been used by courts that concluded they were appropriate to redress failure to comply with the rule's preparation requirement. Therefore, even though there seems little reason to amend the rule solely to put into it the accepted idea that there is a duty to prepare, it may well be important to add that statement as a predicate to any limitation on the court's authority to make preclusion orders. For purposes of discussion

Reilly v. Natwest Markets Group, Inc., 181 F.3d 253 (2d Cir. 1999): The court ruled that defendant violated Rule 30(b)(6) by failing to produce two proposed witnesses as its representatives for the deposition, and that the trial court therefore properly barred them from testifying at trial. Although this might be at tension with the rule, which does not require the designation of any particular witness, the point for present purposes is that the decision was based on a violation of the rule. See *id.* at 268-69.

Audiotext Commun. Network v. US Telecom, 1995 WL 625962 (D. Kan., Oct. 5, 1995): This case is not about preclusion, but rather about requiring further testimony from plaintiff, who proffered a witness not able to answer questions during a 30(b)(6) deposition. Although the questions were within the scope of the deposition, the representative said that he could not answer them. The court emphasized that the corporation must "prepare [the 30(b)(6) witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation." *Id.* at *13, quoting *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989). Concluding that this was a refusal or failure to answer deposition questions, the court ordered plaintiff to produce knowledgeable, prepared corporate representatives for a further deposition at plaintiff's expense.

only, it may be useful to indicate how such an amendment might look:

(6) Notice or Subpoena Directed to an Organization.

It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. 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. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. The responding organization must adequately prepare the person or persons designated to testify so that they can testify as to the information known or reasonably available to the organization. If such preparation is adequately done, the court may not treat answers given during the deposition as judicial admissions. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Undoubtedly improvements can be made in the language regarding both the duty to prepare the witness and the restriction on the court's use of judicial admission treatment. It should also be noted that both ideas could be explored in greater detail in an accompanying Committee Note.

Whether such an amendment would be wise can certainly be debated. For one thing, the caselaw does not show a great need in reported cases for making such a change. But making the change could accomplish objectives favored by bar groups who submitted comments. Some favored adding an express requirement to prepare to the rule even though they acknowledged that it is well-recognized in the caselaw. But as the National Ass'n of Consumer Advocates points out, something of the sort is probably implicit in the rule already as it says that the organization must send a person to "testify" "on its behalf." And those worried about overuse of the rule might become uneasy about fortifying the statement of the duty to prepare.'

Adding a limitation on judicial admission treatment seems contrary to the views of several surveyed groups, although they don't appear to expect that the testimony will be more "binding" than with any other litigant. Some ask why anyone would conduct the depositions at all if the answers are not binding. See Calif. Employ. Lawyers' Ass'n. As compared with a supplementation approach (no. 2 below), this provision might be

superior for responding parties because it would not carry with it the directive of Rule 37(c)(1) that material not provided through supplementation usually may not be used in the case. To the contrary, the thrust of this possible change is that -- so long as the witness is adequately prepared -- the material may be used. Nonetheless, it is also possible that the change might promote use of judicial admission sanctions when the court does find a failure to prepare.

It might also be objected that the adequate preparation predicate could impose on the court and the parties an onerous burden of determining whether such preparation has been adequate. But in all likelihood that would be an issue whether or not the rule were thus changed. As the caselaw review above noted, courts presently invoke their attitudes toward adequate preparation as a criterion in deciding whether to preclude organizational litigants from later submitting contradictory or inconsistent material.

2. Supplementation

If the goal of the rule is to get requested information to the party seeking it, a supplementation approach might be preferred to a judicial admission or preclusion approach. Supplementation would provide a recognized avenue for a party to provide additional information when it was not provided in the 30(b)(6) deposition. It would thus treat 30(b)(6) depositions differently from all other depositions (except depositions of expert witnesses).

An obvious starting concern is whether such a change might undercut the duty to prepare. As the American College of Trial Lawyers put it, "[a] supplementation procedure would take some of the burden and apprehension out of the preparation process, but it should not be allowed to serve as a substitute for adequate preparation; otherwise a 30(b)(6) deposition would become an exercise in which the answer to every question would be 'I will get back to you on that.' The right and duty to supplement should be just that -- a supplement." Other groups caution that such an addition would reduce incentives to prepare witnesses adequately. See, e.g., ATLA. Some say that it would have dramatic consequences. See, e.g., Calif. Employ. Lawyers' Ass'n (making such a change would result in trial by ambush); Nat. Employ. Lawyers' Ass'n (permitting supplementation would require retaking the 30(b)(6) deposition). To a considerable extent, Committee Note material on the duty to prepare the witness adequately could ameliorate such problems. In addition, it might be that adding an express requirement of preparation (as under no. 1 above) would be important in connection with this possible change as well.

Whether the "right" to supplement would promote deficient preparation could be debated. Actually, a strong supplementation requirement was not inserted in the rules until 1993, and before then supplementation was required only in limited circumstances. So treating supplementation as a right that provides an escape hatch for the responding party, rather than as a duty imposed on the responding party, is not entirely in keeping with the way in which it has emerged. And in 1993 supplementation was linked to the new provisions of Rule 37(c)(1), which direct the court to deny parties that fail to supplement to use the material they should have provided through supplementation. Thus, adding supplementation could mandate preclusion in instances where it is not available today. Such an outcome would seem consistent with the concerns of bar groups (e.g., Nat. Employ. Lawyers' Ass'n) that lament that courts are not binding parties by their 30(b)(6) answers. In an important way, 37(c)(1) treatment would do so.

Among those favoring adding a supplementation provision, some bar groups are notably cautious about what it should include. The ABA Section of Litigation, for example, offered the following thoughts about the problem of "binding" effect:

One possible idea would be to allow a party to "unbind" itself by giving timely notice that it has found new information that leads it to believe that a previous 30(b)(6) piece of testimony needs to be modified. The court should retain the option of denying the "notice of change of testimony" if, for example, the notice was given after the discovery cut-off date or too close to trial or would require a continuance of the trial date. The burden of proving good faith preparation of the corporate representative would be on the party seeking the change, with the opposing party permitted reasonable discovery to test the good faith assertion and the resulting expenses paid by the party seeking the change in testimony. If a "notice of change of testimony" is permitted and depending on the circumstances, the party giving this notice may then be required to pay the additional expenses, including attorneys' fees, of the opposing side in proffering the corrected testimony. This would seem to even the playing field and prevent either side from taking unfair advantage of the 30(b)(6) mechanism. Another possibility (not mutually exclusive) would be to require the 30(b)(6) witness to appear in person at trial so that he or she could be questioned about the change in testimony.

Against that background, at least a starting point could be provided by the following possible amendment ideas, which are offered only for purposes of facilitating discussion of the issue whether this is a course to be pursued. The sensible place for

such an amendment seems to be Rule 26(e), which has the other supplementation provisions, and which directly links to Rule 37(c) (1):

(e) Supplementing Disclosures and Responses

(1) In General. A party who has made a disclosure under Rule 26(a) -- or who has responded to an interrogatory, request for production, or request for admission[, or Rule 30(b)(6) deposition notice] -- must supplement or correct its disclosure or response to include later-acquired information.¹⁰ The party must do so:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

{(3) Rule 30(b)(6) Depositions. A party that has produced a representative to testify under Rule 30(b)(6) must supplement or correct the testimony given [within --- days of the conclusion of the deposition] [no later than the time when the party's pretrial disclosures under Rule 26(a)(3) are due]. [The party that took the deposition may then retake the deposition of the representative with regard to the supplemental information {at the expense of the supplementing party}.]}

¹⁰ Note that, in connection with the Style Project, there remains an open question about whether to include this phrase -- "later acquired information" -- in the restyled rule.

The foregoing obviously offers two alternative approaches to providing a supplementation provision for Rule 30(b)(6) depositions. Surely there are others as well.¹¹ And the proposals raise many issues, including those introduced above.

One issue is whether to provide a special supplementation provision for Rule 30(b)(6) depositions, as with expert witness evidence. That is distinctive in the current rules because it is the only occasion on which there is a requirement to supplement deposition testimony. A new and separate (3) might therefore be more in keeping with the format of the treatment. In addition, using the 26(e)(2) approach seems well suited to providing specifics about timing and (if thought desirable) cost consequences.

Another issue is whether allowing supplementation of deposition testimony in this instance is inconsistent with the overall thrust of the rules. Rule 30 permits a witness to request the opportunity to read and correct deposition testimony. Presumably that applies to Rule 30(b)(6) depositions as to any others. So this opportunity might be viewed as "second" chance, and thus to provide a special opportunity to corporate parties. The time limitation suggested above might be a way of addressing that concern, but might also create difficulties that would undercut the value of supplementation. And it is worth noting again that the addition of such a provision would seem to magnify the likelihood of preclusion orders due to the role of Rule 37(c)(1).

3. Scope of Rule 30(b)(6) Depositions

Limiting questioning to topics specified in notice

The fundamental starting point for a Rule 30(b)(6) deposition is the listing of topics in the notice. The selection of a representative may depend heavily on what is on that list.

¹¹ A more demanding one, along the lines suggested by the ABA Section of Litigation, might look like this:

(3) Rule 30(b)(6) Depositions. A party that has produced a representative to testify under Rule 30(b)(6) may supplement the testimony only on demonstrating that it made a good faith effort to prepare its representative to testify during the deposition. If the court grants leave to supplement, the opposing party may retake the deposition of the representative at the expense of the supplementing party.

The responding party can designate different representatives to address different topics on that list. The preparation obligation applies to what is on that list. And the questioning should be about the topics on that list.

Sometimes the representative may have no knowledge about anything except the topics on that list.¹² But with considerable frequency, the person designated has personal knowledge about other issues involved in the lawsuit besides those topics listed in the notice. Should this be permitted in the 30(b)(6) context? Here is the reaction of the American College of Trial Lawyers submission, which raises a number of issues:

We believe that a clarification on this issue would be helpful. There are many instances with questioning that goes beyond the designated topics. What is the effect of an answer that is not within the proper scope? Is it an admission at all? It is a binding admission? Does it convert the 30(b)(6) deposition into an individual deposition under Rule 30(b)(1), counting as two depositions under the 10 deposition rule? What should be the process for objecting to questioning that exceeds the topics? While the trial bar can live with a clear rule either way, the better rule probably would be to limit the questions to the designated topics.

See also comments of Fed. of Defense & Corp. Counsel (urging that questioning be limited to topics listed).

Other groups oppose such a rule change. Some say that the courts are imposing such a limit already. See ATLA; Nat. Employ. Lawyers' Ass'n. Others point out that the matter is often easily resolved among counsel. If the choice is between having the witness answer the additional questions at the same time, or

¹² For example, the Trial Lawyers for Public Justice comment includes the following:

[O]ver the past decade, it has increasingly become the practice for organizations not to produce an officer, director or managing agent as its Rule 30(b)(6) deponent. More commonly, organizations choose wholesome looking, young people who, prior to receipt of the Rule 30(b)(6) deposition notice, had little, if any involvement in or knowledge of the issues which are the subject matter of the deposition. One corporate defendant even produced a document about this practice, referring to its designee -- who was chosen to testify precisely because he had no knowledge of the noticed topics -- as "the fall guy."

requiring that the witness return on a different occasion to answer in an individual capacity on other topics, it may be much more expedient to proceed with all relevant information. Whether parties address the problem of counting depositions for purposes of the ten-deposition limitation is not clear. But it surely might happen that on occasion the responding party would take the position that the witness was only prepared for certain questions and that he or she is therefore not prepared to answer questions on other subjects. In the same vein, the questioning lawyer might insist on grounds of lack of preparation for other topics that questioning be limited to the listed topics even if the witness wanted to cover all at the same time.

For purposes of discussion, here is a possible way to implement such a rule provision:

(6) Notice or Subpoena Directed to an Organization.

It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. 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. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. Questioning during the deposition must be limited to the matters for which the person was designated to testify. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Adding "factual" to limit the ambit of questioning

The New York State Bar Association, whose comments spurred the initial inquiry into this rule, urges that the rule be amended as follows:

(6) Notice or Subpoena Directed to an Organization.

It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. 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. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify

about factual information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

The objective of this change would be to confine the questioning and protect against overreaching concerning contentions or legal positions. At least the most obvious efforts to inquire into legal contentions could be curtailed by this amendment.

As set out in the materials circulated for the October 2005 meeting, the effectiveness of this change is uncertain. The change might do little to curtail many activities to which objection has been made. It could also re-introduce some difficult questions that were deliberately avoided in drafting the pleading rules in the original Civil Rules. By the early twentieth century, the dividing line between "facts" and "conclusions" was a hotly debated and litigated focus of pleading decisions. For example, it was long debated whether the allegation that defendant drove "negligently" was an allegation of fact or a mere conclusion. The framers of the rules intentionally defined the sufficiency of a claim without using the word "facts" to bury this past. See Form 9 (stating that an allegation that defendant drove "negligently" is sufficient). Restoring this distinction, but putting it into the discovery rules, is a dubious undertaking.

Moreover, making the change might well not solve most of the problems that have been cited. Questions about "all facts supporting plaintiff's allegations in paragraph 7 of the complaint" would seemingly not be affected by such a change. Efforts to force the organization to elect one of a number of different versions of the facts would not seem to be affected by such a change. In addition, this amendment would not seem to respond to the judicial admission concern that courts may preclude the organization from offering any evidence supporting a view different from the testimony of its witness, or prohibiting it from offering any evidence on subjects on which the witness said "I don't know."

4. Number/time limitations as applied to Rule 30(b)(6) depositions

Numerical and time limitations on discovery events inevitably raise strategic issues. All can be changed by agreement of the parties or court order (perhaps under Rule 16(b) based on the parties' Rule 26(f) discovery plan. Essentially there are three possible foci with regard to 30(b)(6) depositions. Two of them have received attention in the Committee Notes, and the third is the subject of some conflicting

caselaw:

Ten-deposition limit: When the ten-deposition limit was added to Rule 30(a) in 1993, the Committee Note observed: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify."

One-day duration limit: When the "one day of seven hours" limit was added to Rule 30(d) in 2000, the Committee Note said: "For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition."

Requirement of stipulation or leave of court for second deposition: When Rule 30(a)(2) was amended in 1993 to permit a person's deposition to be taken a second time only by stipulation or with leave of court, there was no reference to whether that rule would apply to a 30(b)(6) deposition. There seems to be little law on this question. A First Circuit decision takes the view that the prohibition on a second deposition applies to Rule 30(b)(6) depositions, as does one district court decision and the Moore's treatise;¹³ one district court, declaring that "Rule

¹³ In *Ameristar Jet Charter, Inc. v. Signal Compositers, Inc.*, 244 F.3d 189 (1st Cir. 2001), the court upheld an order quashing subpoenas for a second 30(b)(6) deposition of a nonparty corporation and also quashed subpoenas for the depositions of three individuals associated with that corporation. Regarding the 30(b)(6) notice, the court said that "[b]ecause this second Rule 30(b)(6) subpoena was issued . . . without leave of court, it was invalid." *Id.* at 192. The court emphasized, however, the narrowness of its review of a discovery order.

In *In re Sulfuric Acid Antitrust Litigation*, 2005 WL 1994105, 2005 U.S. Dist LEXIS 17420 (N.D. Ill., Aug. 19, 2005), the court followed the First Circuit decision on the ground that the plain meaning of Rule 30(a) forbids a second 30(b)(6) deposition without leave of court. Citing the 1993 Committee Note provision that, for purposes of the ten-deposition limit, the court found no ground for excluding 30(b)(6) depositions from the requirement imposed at the same time that there be court permission for a second deposition:

The Advisory Committee's explanation of why Rule 30(b)(6) depositions were to be treated differently from individual depositions for "purposes of" the ten-deposition rule, is readily apparent. As the instant case demonstrates, Rule 30(b)(6) deposition notices routinely

30(b)(6) depositions are different from depositions of individuals," had said that the limitation does not apply.¹⁴

Whatever the resolution of these issues, there seem to be strategic reactions that could be employed. Providing that the seven-hour limitation applies to each designated representative, for example, may deter corporations from designating more than one person. But a reverse rule could prompt them to designate

specify a number of topics of inquiry, which often necessitate the designation of multiple witnesses. The more complex the case, the greater the number of topics to be explored during the deposition and the greater number of witnesses. If each witness were counted separately, a party could easily exhaust the number of allowable depositions in one or two Rule 30(b)(6) depositions. The Advisory Committee Notes make clear that the drafters intended to avoid that problem by counting a 30(b)(6) deposition as a single deposition, regardless of how many individuals were required to be designated to comply with a 30(b)(6) notice.

There is nothing in the text, history, or purpose of Rule 30 that supports the conclusion that "for purposes of" the prior judicial approval requirement for successive depositions, Rule 30(b)(6) depositions should be treated differently from depositions of individuals.

See also 7 Moore's Federal Practice § 30.05[1][c] at 30-30.3 ("Even though a party may be deposing a different corporate representative, it is still seeking a 'second' deposition of the entity"); *Sunny Isle Shopping Center, Inc. v. Xtra Super food Centers, Inc.*, 2002 WL 32349792 (D.V.I., July 24, 2002) (stating that the Rule 30(a)(2) limitation "has been held applicable to corporate depositions noticed pursuant to Rule 30(b)(6)").

¹⁴ *Quality Aero Technology, Inc. v. Telemetrie Elecktronik, GMBH*, 212 F.R.D. 313 (E.D.N.C. 2002). The court's reasoning was as follows (*id.* at 319):

Rule 30(b)(6) depositions are different from depositions of individuals. That difference is confirmed by the Advisory Committee Notes to the 1993 amendments to the Federal Rules, which expressly state that for purposes of calculating the number of depositions in a case, a 30(b)(6) deposition is separately counted as a single deposition, regardless of the number of witnesses designated. Further, there is no aspect of the Rules which either restricts a party to a single 30(b)(6) deposition or restricts the allotted time for the taking of a 30(b)(6) deposition.

many. Similarly, the ten-deposition rule could, if applied to each designated representative, similarly provide an incentive for an entity to designate many. The Committee Note admonitions quoted above prevent that sort of behavior, but they may undercut efficient designation of representatives if they unduly encourage that entities use only one.

The "second deposition" problem is more difficult to assess, and was not addressed in the Committee Note when that limitation was adopted. On the one hand, the burden of preparing a 30(b)(6) witness is considerable, and having to do it more than once may be worthy of the protection afforded by the rule. On the other hand, to say that all topics must be examined at this one deposition may place additional stress on the corporate party (and require designation of additional representatives), as well as taxing the corporation's adversary. In addition, the notion (in the background, at least, with regard to the E-Discovery amendments) that an early 30(b)(6) deposition of IT people may be important to facilitate discovery of electronically stored information) could be undercut if that were the one and only opportunity for a 30(b)(6) deposition absent court approval of another one. As noted above, a related question arises if questioning of the representative goes beyond the scope of the topics listed in the notice -- should that be considered a "second" deposition, of the individual rather than the organization.

It may be that the best the Committee can do is to leave things as they are. Presently, the majority view on one of these three subjects (the one-deposition rule) favors the organizational litigant, while the resolution on the other two favors the organization's adversary. Reasonable litigants should be able to resolve such matters without the need for court intervention, and it may make sense to have a situation in which the onus is on each side with regard to certain matters to seek court intervention when agreement is not reached. If that is so, however, the question may remain whether the present burden of proceeding is in the right place.

The bar group comments include differing reactions to these issues. The New York State Bar Ass'n favored applying the one-day limit to a 30(b)(6) deposition, no matter how many representatives were designated. The American College of Trial Lawyers Federal Courts Committee saw no problem with the Committee's position that all designees be treated as a single deposition for the ten-deposition rule, and favored using the one-deposition rule to protect the corporation so that "litigants would be required to exhaust all possible topics in their first (and perhaps only) 30(b)(6) deposition of an entity." Proponents of Rule 30(b)(6) depositions urge that limits on taking them be

avoided. See, e.g., Consumer Att'ys of California (urging that limitations on the number of 30(b)(6) depositions would be counterproductive, and that one cannot properly limit the number of representatives designated); Nat. Employment Lawyers' Ass'n (asserting that limiting the number of 30(b)(6) depositions will only lead to motions for additional depositions); W. Va. Trial Lawyers Ass'n (contending that limiting the number of such depositions is not warranted).

It may be that there is no perfect solution, and that any default will afford some opportunities for gamesmanship. But some might wisely be avoided. For example, it would be passing strange to provide that an organizational litigant that had to supply numerous representatives because the first several were inadequately prepared thereby curtailed its opponent's ability to take non-30(b)(6) depositions under the ten-deposition rule. Nonetheless, for purposes of discussion, the following amendment ideas may be helpful. First, to deal with the number of depositions in the most restrictive way, one could make amendments to Rule 30(a)(2):

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2);

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions, including each person designated to testify under Rule 30(b)(6), being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent, [including a person deposed under Rule 30(b)(6)] {except a person deposed under Rule 30(b)(6)}, has already been deposed in the case; or * * *

Second, to deal with the durational limitation, one could amend Rule 30(d)(1) as follows:

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition, including a Rule 30(b)(6) deposition, is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

5. *Timing of Rule 30(b)(6) depositions*

The question of timing is important in significant measure because of the bearing it has on other issues. Thus, the earlier in the litigation a 30(b)(6) deposition occurs, the greater the preparation burden for the responding party, particularly if there is a significant risk of judicial admission treatment, or if there is a supplementation requirement that requires that all additional responsive information be provided in a specified (and relatively short) period of time.

A number of bar groups opposed limitations on the timing of 30(b)(6) depositions. ATLA, for example, says that "30(b)(6) depositions should be taken when they need to be taken." It adds that generally this will be relatively early in the litigation, because delaying this foundational discovery would impede plaintiffs' ability to learn the corporate position. The Consumer Att'ys of Calif. says that usually its members take such depositions early, but that they need flexibility to take them at any time during the litigation. The Nat. Ass'n of Consumer Advocates says that the timing of such depositions depends on the condition of the circumstances of the individual case, but that it should occur early enough to allow time for follow-up discovery before dispositive motions or trial preparation. The Nat. Employ Lawyers' Ass'n says that 30(b)(6) depositions should be taken early to assist the parties to move efficiently to the central issues in the case.

It may be that developing suitable methods for addressing concerns about preparation burden, preclusion, and inquiry beyond the listed topics would alleviate concerns about timing of 30(b)(6) depositions. Moving beyond those concerns and addressing the timing of such depositions directly in the rules might present drafting difficulties. For purposes of discussion, the following are some ideas about how such drafting might be attempted.

One approach would be add to the specific listing of topics in the discovery plan provisions of Rule 26(f)(3):¹⁵

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a),

¹⁵ The following includes the restyled additions for the E-Discovery amendments that are before the Committee during the May meeting.

including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order;

(E) any issues about Rule 30(b)(6) depositions, including the timing of any such depositions;

(FE) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(GF) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

This approach may unduly emphasize 30(b)(6) depositions. One objection made to adding reference to discovery of electronically stored information and to privilege waiver to Rule 26(f) was that it unduly focused on these topics. It could well be that a more forceful objection of that sort would be made to an approach like the one above. Beyond that, it does not provide any specifics on when such depositions may be taken, but only tells the parties to discuss the topic. An additional provision could be added to Rule 16(b) to call the court's attention to the issue, but one could still object that it was be amorphous there as well.

A more direct approach might be added to Rule 26(d) (1) :

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a) (1) (B), or when authorized by these rules, by stipulation, or by court order. A party may notice a Rule 30(b) (6) deposition fewer than --- days after the court has entered a scheduling order only on stipulation or by court order.

Alternatively, one might add a timing provision to Rule 30(b) (6) itself:

(6) Notice or Subpoena Directed to an Organization.

It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. A party may notice a Rule 30(b) (6) deposition fewer than --- days after the court has entered a scheduling order only on stipulation or by court order. 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. A subpoena must advise a nonparty organization of its duty to make this designation. 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.

Given the need in some cases to take an early 30(b) (6) deposition regarding a party's electronic information systems, this approach might be seen as too restrictive for some cases. But it could be that such a default provision would have a positive effect in prompting the parties to work out a schedule to accommodate such features of individual cases. Perhaps that effect would be amplified if a Rule 26(f) amendment like that mentioned above were also added. Again, however, it may be objected that 30(b) (6) depositions are not such important topics that they warrant such prominent treatment in the rules.

6. Witness preparation

Through much of the above discussion, the burden of witness preparation has been a regular concern. Several bar group comments stressed the burdens of preparing witnesses for Rule 30(b) (6) depositions. See, e.g., ABA Section of Litigation (reporting that the burden of preparing witnesses is substantial,

particularly regarding events that occurred long in the past, and particularly when the 30(b)(6) deposition is taken early in the litigation); Assoc. of the Bar of the City of N.Y. (reporting that preparing a 30(b)(6) witness requires unusually extensive time from both the witness and the attorney, in part because the attorney must assure that organization gathers all responsive information from any sources); N.Y. State Bar Ass'n (saying that the caselaw is not clear on the extent of the preparation burden).

Other bar groups questioned the extent of the burden, or urged that it would have to be shouldered at some point in the litigation anyway. See, e.g., Consumer Atty's of California (stating that there is some burden on the corporation, but noting that the corporation knows best how to find the needed information and has the option to select the person to respond); Nat. Employ Lawyer's Ass'n (asserting that the entity will have to identify the relevant witnesses eventually, and that 30(b)(6) simply moves this process to an earlier stage); Trial Lawyers for Public Justice (asserting that the burden on the corporation is not great because the basis for the corporation's testimony is contained in the corporation's records and the lawyer for the entity will have to become familiar with those records, so that counsel will be well situated to direct the representative to the needed records).

Many of those groups who contend that preparation of witnesses is not unduly taxing also contend that witnesses are often underprepared. Thus, several urge that the rule be amended to specify that there is such a duty to prepare. See, e.g., Nat. Ass'n of Consumer Advocates; Trial Lawyers for Public Justice. But there is no shortage of caselaw on the need to prepare the witness adequately. And adding an affirmative statement of the duty to prepare to the rule (as suggested in relation to item no. 1 above) might actually worsen the problem of preparation for responding parties. To facilitate discussion, it is perhaps worth noting that one possibility of a rule change would be to alter the "known or reasonably available" language of the current rule:

(6) Notice or Subpoena Directed to an Organization.

It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. 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. A subpoena must advise a nonparty organization of its duty to

make this designation. The persons designated must testify about information [known or reasonably] {readily} available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

It is doubtful whether this modification of the current rule would improve matters. The current phrase seems to have sufficient flexibility to permit reasonable calibration for individual circumstances. Taking out "known or reasonably" without a substitute could heighten the exposure of the organization to criticism for failure to provide information. Substituting the word "readily" or some similar word would seem to weaken the obligation of the responding party very significantly. It might be seen as inconsistent with the obligation of the organization to provide in response to a Rule 34 request all materials within its "possession, custody, or control," not only those readily available.

Other amendment ideas

Bar groups that submitted comments also suggested other amendments, but the Subcommittee did not decide to bring them forward for consideration by the full Committee. Mention of some of them in this memorandum may nonetheless be useful

Requiring that the organization designate the "most knowledgeable" person: California requires that the "most knowledgeable" person be designated. Some bar groups suggested that Rule 30(b)(6) should also. This might reduce the problem of lack of preparation of witnesses proffered under the rule. Nonetheless, it could generate significant problems. It may often not be clear which person is most knowledgeable, and disputes or litigation about that subject often would serve no useful purpose. In the first place, it would seem to override the requirement now in the rule that a representative other than an officer, director, or managing agent may be designated only with the representative's consent. With notices that designate many topics, moreover, inserting such a requirement would likely mean that multiple representatives would have to be designated. As to events that occurred in the distant past, there may be nobody with significant personal knowledge currently in the organization's employ. And those most knowledgeable on one topic may have personal knowledge on other topics, thereby heightening the problem of whether examination is permitted on subjects beyond those specified in the notice. The current rule permits the responding party great latitude to make its choice; so long as it is responsible for producing a properly prepared witness this additional requirement is not likely to be helpful and may provoke problems.

Requiring the responding party to specify in advance the identity of the person or persons will be testifying on its behalf: Frequently the interrogating lawyer may have no idea what individual will appear for the deposition until it begins. It was suggested that a requirement of advance notice should be built into the rule. Yet it is not clear what use could be made of that advance notice. Absent a requirement that the person designated be the "most knowledgeable," it is unclear why a party would have a ground for objecting in advance to such a designation. Even if organizations select fresh-faced young innocents who are to act on their behalf, the sufficiency of the designation is measured by the person's actual performance as a 30(b)(6) witness. The notion that the interrogating party could insist that the organization designate a specific spokesperson was rejected in the drafting of the rule in the 1960s, and the rule now requires that when the organization selects somebody who is not an officer, director, or managing agent that person must consent to do the job. Allowing the interrogating party an advance opportunity to object to a designation seems contrary to the thrust of the rule.

Mandatory sanctions: Some urged that there be a requirement that the court impose sanctions for failure to prepare, perhaps somewhat on the model of Rule 37(a)(4) regarding costs of discovery motions. But mandatory sanctions are a blunt instrument at best, and Rule 37(a)(4) has not proved particularly useful. And in this context there is considerable room for debate on what is sufficient preparation of a witness and a wide range of sanctions that a court might employ, making the "mandatory" nature of the sanctions potentially illusory.

Numerical limit on topics: It was also suggested that parties be limited to a specified number of topics in a Rule 30(b)(6) notice. Such a limit seemingly could not work if the rules require also that there be only one 30(b)(6) deposition per party. Beyond that, it would seem to suffer from the same sort of flaw that was true of the proposal some years ago that Rule 34 be amended to limit the number of document requests a party could make -- that would provide an incentive for broad rather than rifle shot requests. Rule 30(b)(6) provides that the matters for examination be specified with reasonable particularity. Placing a numerical limit on them could undermine that goal.

SUMMARY OF RESPONSES
RULE 30(b)(6) INQUIRY
March, 2006

The following attempts to summarize the responses received to the January, 2006, inquiry from a subcommittee of the Advisory Committee on Civil Rules regarding Rule 30(b)(6). The comments are ordered alphabetically among bar groups. A seemingly individual comment is at the end.

Typically, the comments are arranged in the sequence of the questions in the inquiry (which are repeated before the comments received pertinent to those inquiries).

Overall

ABA Section of Lit.: Our comments should not be interpreted as urging changes to Rule 30(b)(6). More information and input would have to be gathered from our Section members before we would be in a position to recommend any changes on behalf of the Section. At a leadership meeting attended by Judge Rosenthal, however, the strong consensus of the group was that a study was appropriate.

Assoc. of the Bar of the City of N.Y.: Our Federal Courts Committee agreed that Rule 30(b)(6) serves an important purpose in streamlining the pretrial search for information held by organizational litigants. Although we understand that the rule offers the potential for abuse, our members' experience suggests that abuse of this rule is no more likely than with any other discovery device, and that the potential for abuse is suitably managed by the district court's supervision of the process. In addition, existing caselaw surrounding the rule provides sufficient guidance about which practices are unlikely to meet with court approval in the event disputes arise. Given this context, the Association does not believe an amendment would improve the effectiveness of the rule or provide any greater protection against attempted abuse.

Assoc. of Trial Lawyers of America: We start with first premises. We require human litigants to testify to all the topics that might be designated in a 30(b)(6) notice. Once they say, under oath, that X happened, or that my contention is Y, they can explain further, but we do not let them pretend that they never said X or Y. The same should be true for a corporation, testifying through a designated representative. We reject the conclusion asserted by others that corporate knowledge does not exist, and believe that Congress' recent adoption of the Sarbanes-Oxley Act shows that it also regards corporations as actors responsible for what they know. The buck needs to stop

somewhere. The corporation's burden of being treated as a person under Rule 30(b)(6) is a concomitant obligation from the privilege of being able to use the corporate form to conduct business. The many advantages of the corporate form should not include privileged treatment by the federal rules.

Calif. Employ. Lawyers' Ass'n: There does not appear to be any showing of problems with Rule 30(b)(6) which would require the rule to be altered. Judges have been able to deal with any issues that arise under the current rule. Rule 30(b)(6) depositions allow parties to narrow issues and focus discovery, at a very early stage of the litigation. The rule has led to greater efficiency, and to better use of time and economic resources, than would be true if parties were not allowed to depose entities in this way.

Consumer Att'ys of Calif.: We urge the committee to reject suggestions that Rule 30(b)(6) be changed. The rule is a critically necessary discovery tool for parties litigating against corporations -- whether they be injured individuals or other businesses. Although it is not a complete solution, it goes far toward solving the problems of bandying. Making the rule friendlier to corporations would only serve to make it less effective. That would create greater litigation obstacles and would result in even more need for judicial intervention in the discovery process.

Fed. of Defense & Corp. Counsel: Rule 30(b)(6) is being used with greater frequency early in discovery to comprehensively -- and prematurely -- examine corporate representatives on issues that can be outcome determinative.

Nat. Ass'n of Consumer Advocates: NACA agrees with the fundamental premise of the rule, that the organization, like an individual litigant, can fairly be required to answer questions in a deposition about its knowledge regarding the events in issue. That is not an undue imposition on organizational litigants because, at some point in the litigation, they have to determine their knowledge regarding the events at issue. The only issue is when they have to do that. The rule properly pushes that point back so that all parties can learn the organizational entity's knowledge.

Nat. Employ. Lawyers' Ass'n: The rule is critical to timely discovery. Although it puts a burden on the corporation to identify sources of information, it is the corporation that has the information. Our members have successfully used 30(b)(6) to avoid lengthy detailed interrogatories and unnecessary depositions. Early use of a 30(b)(6) deposition often obviates the need for other discovery, and thereby significantly reduces the costs of litigation for all parties. Rule 30(b)(6) is not a rule that provokes significant contention. But because careful use of it has a dramatic impact in reducing discovery, changes to it are likely to cause an increase in those costs.

W. Va. Trial Lawyers Ass'n: The rule has served to provide a level playing field in litigation involving corporations. It plays a crucial role in assuring access to justice. Three perspectives show that the rule should not be changed, and that it is right to rely on the well-developed body of caselaw: (1) the risk of bandying; (2) the substantial body of caselaw now in existence; and (3) the unique perspective of the presiding trial judge in administering any disputes. The rule has been tried and tested over more than 30 years under myriad factual scenarios.

R. Graham Esdale, Jr.: Based on my experience over the last 12 years or so of litigating products liability cases, I do not believe the rule needs to be changed as suggested by the inquiry. If anything, it needs to be strengthened. It is a major tool for those suing corporations to get information. Defendants in products liability cases always want to get the plaintiff's deposition first in order to lock the plaintiff into the facts and claims being made. Often that happens before defendants have produced anything in the case. The plaintiff should be allowed to use 30(b)(6) to do somewhat the same thing. Yet corporations often produce a representative who knows little or nothing regarding the listed matters, and judges rarely impose sanctions when this happens. I have never had an occasion where a judge imposed a sanction or required the defendant to pay costs when it was necessary to take a second deposition because the first representative was unable to respond to all areas in the notice. If the corporation could change its answers at trial, that would cause confusion and devalue the 30(b)(6) deposition. Similarly, forbidding contention questions would deprive the plaintiff of an essential discovery opportunity. Answering about matters beyond the notice is rare, and not a problem. This is an attempt to enact tort reform through changing the rules of court.

(1) General: Have your members encountered difficulties in using or responding to Rule 30(b)(6) depositions? If so, have the difficulties become more acute in the last decade?

Assoc. of Trial Lawyers of America: Our members do report difficulties using 30(b)(6) depositions, primarily with failure to produce suitably knowledgeable designees. This is viewed as willful. We don't know whether these problems have become more acute over the last decade.

Calif. Employ. Lawyers' Ass'n: From the perspective of our members, who notice such depositions, there are a number of problems. First, if the person who is most knowledgeable about the matter of interest is no longer employed by the entity, there seems to be nothing in the law which requires the entity to gather information from former employees. Second, the entity may claim that there is no one person most qualified to testify regarding a particular matter, which can require the propounding party to conduct numerous depositions; we would prefer that the responding entity have to designate the person "most knowledgeable" to testify about the particular matter stated in the notice. Another problem is that the responding entity may not do a sufficient investigation to determine whom to designate; often the department head will be designated, and it is only at the deposition that the lawyers find that this person is not really qualified to answer questions. There should be some consequence for such misconduct, but the rule does not need to be changed for that to happen. Judges have the means of correcting discovery problems such as this. Yet another problem comes from the ten-deposition limit, particularly if the entity does not produce the correct person, with the result that one of the propounding party's depositions has been wasted. A Rule 30(b)(6) deposition should count as only one deposition for purposes of the ten-deposition rule. It is also undesirable that there is no requirement that the responding party identify the individual who will testify in advance, so that the propounding party learns for the first time on the day of the deposition the identity of the individual. Requiring advance notice would be better. In addition, it often happens that counsel for the witness resists questions about the witness's possible bias, but such questions should be allowed, so it would be good if the rule said so explicitly. Finally, it often happens that the individual has discoverable information on topics not listed in the notice. A deposing attorney should be able to question on these matters, but the deposition should still count as only one toward the ten-deposition limit of Rule 30(a).

Consumer Att'ys of Calif.: The only difficulties under the rule are in obtaining full responses. It is still possible, despite the rule, for corporations to hide their wrongdoing. But with 30(b)(6) as a foundation, at least the adverse party has the ability to set the stage for a motion to compel.

Nat. Ass'n of Consumer Advocates: A quotation from one of our members best summarizes NACA's experience with the rule: "In 26 years of practice, my impression has been that Rule 30(b)(6) generally works well. The major problem I have seen is the practice of some defense counsel producing witnesses with little or no real knowledge of the topics they have been designated to testify about." This response was echoed by lawyers from around the country.

Nat. Employ. Lawyers' Ass'n: The short answer is no. Like any other discovery tool, there are disputes as to scope of depositions and the deponents provided. These disputes are usually resolved by the parties and in circumstances where the parties are unable reach agreement, courts have proven quite adept at reaching a resolution.

Trial Lawyers for Public Justice: The largest problem is the failure of corporations to meet their obligation to provide knowledgeable representatives. Although corporate lawyers often claim that Rule 30(b)(6) places a great burden on the corporation, in our experience the opposite is true. The rule is vulnerable to circumvention by corporate defendants. The choice of the designee rests entirely with the corporation, and it is often to the advantage of the corporation to choose somebody who is not most knowledgeable. Increasingly, corporations choose wholesome looking, young people who, prior to receipt of the notice, had little, if any, involvement with the issues involved in the case. One corporate defendant even produced a document about this practice, which referred to its designee as "the fall guy." One problem that results is that the designee cannot fully address the topics listed in the notice. Often the designee will deny personal knowledge and suggest others who have such knowledge. Too often, entities seem to think that so long as they produce a witness, they have satisfied their obligations no matter how much the witness knows. And entities frequently try to evade discovery by asserting that the information is old, or that all knowledgeable employees have died or left. They thus ignore their obligation to provide a designee prepared to testify beyond his or her personal knowledge. In the experience of several of our members, corporations never seek information from former employees about designated topics. Designees often say they have never seen pertinent documents when presented with them during the deposition. Although the caselaw says that the corporation must prepare the witness, the rule does not; it should. A related problem is that corporations often disregard their duty to provide a substitute witness when the first one claims lack of knowledge. This problem becomes more acute in light of the ten-deposition limit, for corporate parties can exhaust the ten-deposition limit by failing to prepare their witnesses properly.

W. Va. Trial Lawyers Ass'n: Before the rule went into effect in 1970, there must have been a great deal of difficulty caused by bandying. Under the rule, the risk of bandying has been reduced a great deal, although not eliminated. Because there is a body of caselaw on the obligations of the corporation, there is less risk of the corporation "pushing the envelope" to avoid revealing information. Rather than restrict the rule at the behest of those who gain by returning to the problems of bandying, the better route is to preserve the rule and to allow it to develop as it has.

(2) Burdens and benefits of Rule 30(b)(6) practice: Do your members find that the burden of preparing witnesses for Rule 30(b)(6) depositions outweighs the benefits of such depositions to the discovery process? If so, please explain why. If burden is a problem, is it more acute (or only important) with regard to events that occurred in the distant past or are otherwise obscure? Is there often difficulty determining what information is "reasonably available" to the organization?

ABA Section of Lit.: For large organizations, or with regard to topics that involve events that occurred many years ago, it is often difficult to gather all the information that may be requested by a 30(b)(6) deposition notice. This is particularly true early in discovery, when all the witnesses and documents may not have been located. It is also true when those most familiar with the facts are no longer employed by the organization. A corporation served with a 30(b)(6) notice has an obligation not only to designate and produce persons who will satisfy the requirements of the rule, but also to prepare its witnesses so that they can give complete and accurate information. But those goals, while easy to express, are hard to implement. Too often counsel conducting 30(b)(6) depositions are inclined to make the extent and nature of preparation for the deposition an issue in the litigation. Much of the deposition may focus on preparation rather than the underlying facts. Some counsel would like to see the Advisory Committee consider amendments to reduce the situations in which the rule creates an inappropriate burden on a litigant.

Amer. Coll. of Trial Lawyers: This issue has two faces -- the burden on the entity to provide a witness who can testify to its knowledge concerning enumerated subjects, and the degree to which the entity can "create" an expert who presents himself as a fact witness. A supplementation procedure would take some of the burden and apprehension out of the preparation process, but it should not be allowed to serve as a substitute for adequate preparation. Otherwise, a 30(b)(6) deposition would produce the

same answer to every question -- "I will get back to you on that."

Assoc. of the Bar of the City of N.Y.: The consensus of our Committee members was that preparing a Rule 30(b)(6) witness for deposition requires unusually extensive time from both the witness and the attorney. Because the witness must testify about information not only known but also "reasonably available" to the organization, counsel must assure that the organization gathers responsive information from all sources. This is important because there is a risk that if the witness cannot properly testify the court may find that there has been a non-appearance, which might result in the inability to present additional evidence in the future. (The example cited involves failure to consult a former employee who had relevant information, with the result that the entity was barred from presenting subsequent contradictory evidence by that employee.) Notwithstanding these points, our members believe that witnesses can be effectively prepared and protected from overreaching during the deposition by giving careful attention to the scope of the examination specified in the notice, and challenging or negotiating items where necessary. Existing caselaw already provides significant guidance to aid witness preparation and informs the bases on which protection should be sought. (Several cases are cited.)

Assoc. of Trial Lawyers of America: Our members don't have to prepare such witnesses, but they are quick to note that corporate failure to prepare witnesses regularly leads to frustration and to further depositions. Even if proper preparation is burdensome, it is less burdensome than serial depositions.

Calif. Employ. Lawyers' Ass'n: We firmly believe that Rule 30(b)(6) depositions are enormously beneficial, and that they streamline the litigation and discovery process. Without such depositions, the time required for, and cost of, litigation would increase tremendously.

Consumer Att'ys of Calif.: Obviously, there is some burden on the corporation to respond. But it best knows how to find the needed information, and it has the option to select the person to answer questions. The general discovery process demands that the relevant information be found and produced. Fulfilling that obligation is no more burdensome in the 30(b)(6) situation than in any other. But the benefits of that process are extraordinary because it streamlines discovery for the adverse party, who is a distinct disadvantage in the discovery process. If it is a "burden" for a corporation to figure out who is the most knowledgeable person with respect to a particular issue, it is simply impossible for the adverse party to figure out how

otherwise to get the needed information.

Nat. Employ. Lawyers' Ass'n: Eventually the entity will have to identify the relevant witnesses, either for trial or for a motion for summary judgment. Rule 30(b)(6) depositions simply move this process to an earlier stage of the litigation, making it more efficient. For a corporation that honestly seeks to represent its interests with candid discovery responses, 30(b)(6) depositions are really a boon. They become burdensome only when the corporation does not want to provide candid responses. That can result in substituting interrogatory answers that are carefully drafted by a lawyer that invariably lead to further discovery. There is no difference between depositions regarding recent events and older ones. To the contrary, when the corporation has difficulty identifying a suitable witness because of the length of time that has passed, it is forced to recognize the paucity of available evidence. That realization often leads to an early settlement.

N.Y. St. Bar Ass'n: We hope that consideration can continue of ways of narrowing or at least making clearer the scope of required preparation for a Rule 30(b)(6) witness. In complex litigation, that can be a thorny problem as to which there is no clear guidance in the Rule or the caselaw. At the same time, the Committee should consider whether more emphasis should be given to the imposition of meaningful sanctions for inadequate preparation of, or performance by, a Rule 30(b)(6) witness given the nominal sanctions in the reported cases. Courts should be encouraged to consider preclusive sanctions under Rule 37(c) where other parties have been prejudiced by failure to prepare the witness.

Trial Lawyers for Public Justice: These depositions are incredibly beneficial. They are among the most potent weapons in a litigant's arsenal. They can streamline litigation. They reduce discovery costs. Were the Committee to recommend substantial changes along the lines suggested in its inquiry, this would be tantamount to eliminating the chance of any meaningful discovery against organizational entities. The burden involved for the corporation is not great. The usual basis for testimony is the corporation's records. The lawyer for the entity will have to become familiar with those records, so counsel knows what sources should be used to prepare the witness. True, the party seeking discovery does not have any burden of preparing the witness. Although the corporation will always claim that the burden outweighs the benefit, that is very rarely true in this situation.

(3) Adequacy of preparation of witnesses proffered by organizations: Is it clear what is required to prepare a witness to testify in a Rule 30(b)(6) deposition? Is it frequent that witnesses are not properly prepared? Under the current rule, have courts been able to handle arguments about whether witnesses were adequately prepared in an appropriate manner?

Assoc. of Trial Lawyers of America: Unprepared witnesses are a signal concern of our members. They find that judges are too reluctant to use the tools at their disposal to sanction misconduct.

Calif. Employ. Lawyers' Ass'n: Witnesses are often ill-prepared for their depositions. Sometimes they are unaware that they have been designated by the entity to testify on its behalf. They are often not prepared to testify fully regarding the areas designated. We believe that there should be a sanction for any waste of time involved due to an ill-prepared witness. Judges should be encouraged to impose such sanctions.

Consumer Att'ys of Calif.: Although Rule 30(b)(6) witnesses are often not adequately prepared, that is not the fault of the rule. Inadequate preparation results either from insufficiently-specific designations of the areas of testimony or from the corporate defendant's deliberate obfuscation. The former problem is typically resolved through objections and a meet-and-confer process. The latter problem requires resort to judicial intervention. Judges are very effective at assessing whether a witness is adequately prepared.

Nat. Ass'n of Consumer Advocates: The problems that do occur usually involve a witness repeatedly answering "I do not know" or identifying some other person that needs to be asked. Because judges vary in their application of the rules, the consequences of such answers also vary. One member who practices in the "Rocket Docket" in the E.D. Va. finds that the judges tolerate very little bandying, but another reports a judge seemingly impatient at the lawyer's persistence when 30(b)(6) witnesses insisted on testifying only about their personal knowledge. Currently, Rule 37 adequately provides a rule-based method of dealing with such issues, but there is a difference among judges in whether or how to respond to problems of lack of preparation. The basic problem is that some corporations don't appreciate or accept the fundamental fairness of revealing their facts to the other side during the deposition. How quickly the entity marshals these facts is normally a function of the amount of resources and effort expended to accomplish the task.

Nat. Emply. Lawyers' Ass'n: Little preparation is really required of a 30(b)(6) witness. Either an individual has the information or he does not. Preparation really means identifying the proper individual and making sure this person is capable of answering questions. This is best done simply by reviewing the 30(b)(6) notice with the potential deponent. Problems develop only when attorneys do not properly use the rule. Examiners who poorly phrase their notices will lose the value of the deposition. When the notice is ambiguous, it falls to counsel to work together to reach an understanding. If the corporation fails to do its job in making the first designation, it should have to make another. Occasionally courts will deem the corporation to be without knowledge on a particular topic due to failure to respond. This again narrows discovery and decreases the cost of litigation.

Trial Lawyers for Public Justice: This is the largest problem under the rule. As one lawyer wrote, "Is it frequent that witnesses are not properly prepared? Answer: Without exception in my quarter century of experience using this rule."

W. Va. Trial Lawyers Ass'n: Instances of inadequate preparation do occur, but not due to any deficiency in the rule. That results, instead, from improper behavior by counsel or efforts by corporations to avoid revealing information. The courts have a settled body of caselaw to deal with these problems.

(4) Scope of examination and specification of issues: Are Rule 30(b)(6) notices typically sufficiently detailed and limited to permit adequate preparation of witnesses? Does examination often proceed on issues not identified in the notice if the witness also has knowledge about those additional issues? Has such examination on additional topics caused problems?

ABA Section of Lit.: Counsel may require in the notice that a large organization track down and prepare a witness to testify about every issue in the litigation, even if those topics are not appropriate for 30(b)(6) testimony. For tactical reasons, counsel may serve repeated 30(b)(6) notices with multiple categories, which makes it virtually impossible for one witness to be able to address all the issues.

Amer. Coll. of Trial Lawyers: The caselaw is not uniform on whether it is permissible to ask questions that go beyond the scope of the designated topic areas (citing a case that identifies two lines of cases). We believe that a clarification would be helpful.

Assoc. of Trial Lawyers of America: Our members report following lines of questioning within the knowledge of the witness if that knowledge is otherwise discoverable. They view this as efficient.

Calif. Employ. Lawyers' Ass'n: We recommend that examination of the witness be allowed as to all relevant areas within the witness's knowledge. Otherwise, it is conceivable that a single person could be produced as a witness under Rule 30(b)(6) and then again as an individual. The inefficiency of that procedure is obvious. Moreover, that would count as two witnesses against the ten-deposition limit.

Consumer Att'ys of Calif.: As with every discovery device, the quality of 30(b)(6) designations is necessarily tied to the experience and skill of the lawyer drafting them. But when there are problems, it is relatively easy for opposing counsel to work them out in a meet-and-confer process. Regarding questioning about topics beyond the list, that depends on whether the parties think it preferable to wrap up everything in one session. If the responding party opts for a second deposition to cover the other area, so be it.

Nat. Ass'n of Consumer Advocates: In its training sessions, NACA takes the position that Rule 30(b)(6) notices must be sufficiently detailed. Given that our members are producing the notices, we have heard no complaints from them about the sufficiency of what they produce. Whether the examination goes beyond the notice is up to the counsel in the deposition. For efficiency reasons, it often happens that if the witness has pertinent knowledge that can be obtained later by having another deposition, counsel normally allow the witness to provide that testimony during the 30(b)(6) deposition.

Nat. Employ. Lawyers' Ass'n: The burden falls on the examiner to provide a clear and detailed notice. A good notice eases the way of discovery. If a notice is poor, the corporation can respond by working with the examiner to clarify what is needed, or simply provide the best witness it can. In our experience, courts are generally not inclined to reopen depositions, forcing counsel to do their job carefully in the first instance. Because the examiner is prepared on the issues in the notice, he is generally not prepared to ask questions beyond the notice. The 30(b)(6) deposition has specific goals and going beyond the notice is often worthless. Objections to questions which go beyond the scope are invariably sustained by the court and examiners who do so typically find that they have wasted time. But if it turns out that the witness has a wealth of other information, that usually saves time on other depositions, as the testimony of this witness is used instead.

Trial Lawyers for Public Justice: The party seeking discovery knows that its effort will be hopeless unless the subject matter is specified in great detail. But the organization often objects to the scope of the notice. Defendants may object for tactical reasons, essentially extorting plaintiffs into abandoning requests for relevant information as the price for going forward on other topics. When the witness has personal knowledge about matters beyond the scope of the notice, it would be a waste of time to require a second deposition to pursue those matters.

(5) Timing and number: Should Rule 30(b)(6) depositions usually be taken early or late in the discovery process? If they are taken early, should there be an opportunity to supplement? Should there be any limitation on the number of Rule 30(b)(6) depositions a party can take?

Amer. Coll. of Trial Lawyers: Our committee is not aware of any problems that have arisen from the Committee Note suggestion to treat all individuals designated in response to a 30(b)(6) notice as a single deposition for purposes of the number of depositions, but to treat each individual as subject to the seven-hour day limitation for his or her deposition. We agree with a magistrate judge's ruling that a 30(b)(6) deposition is the deposition of the entity, and that a second deposition of that same entity can only be done by agreement or order. That would mean that litigants would be required to exhaust all possible topics in their first 30(b)(6) deposition. We note that many district courts have local rules limiting the number of interrogatories, and suggest that there could be a limit on the number of topics included in a 30(b)(6) notice.

Assoc. of Trial Lawyers of America: Inadequacy of witness preparation raises concerns about how depositions or designees should be counted. As the deposition of the corporation, the 30(b)(6) deposition should count as one deposition, regardless of how many persons are designated. In terms of timing, it is impossible to declare what is the right time for all cases; "30(b)(6) depositions should be taken when they need to be taken." Generally, this will be relatively early in the litigation. Delaying testimony would prevent plaintiffs from discovering the corporate position. We see no reason, however, to address the timing or number by rule. Judges can handle these things on a case-specific basis.

Calif. Employ. Lawyers' Ass'n: We believe that there should be no opportunity to supplement. Particularly in the late stages of litigation, supplementation might result in a completely different factual scenario than that for which the parties have

been preparing. It would required reopening discovery in many cases, resulting in tremendous inefficiency.

Consumer Att'ys of Calif.: Our members normally take 30(b)(6) depositions early in the discovery process, but litigants need flexibility to take them at any time during the litigation. Limitations on the number of 30(b)(6) depositions would be counterproductive. Crafting one would also be difficult. You can't limit the number of individuals designated. If one tried to limit the number of topics designated, all that would result is that litigants would delineate broader, less specific and less effective topics to cover more with fewer. Propounding lawyers don't want corporations to spend more time than is necessary to get the information they need to litigate their cases. The simple reality is that most attorneys use 30(b)(6) depositions only as needed.

Nat. Ass'n of Consumer Advocates: These issues should be addressed and normally worked out during the Rule 26(f) conference. Regardless of the number of people designated by the corporation, a Rule 30(b)(6) should count as one deposition for purposes of the ten-deposition limit. The duration and timing of the deposition depends on the condition of the court's docket and the circumstances of the individual case. The 30(b)(6) deposition should occur early enough to allow for follow-up discovery before dispositive motions or trial preparation.

Nat. Employ. Lawyers' Ass'n: Rule 30(b)(6) depositions should be taken early in the discovery process, because they have a unique ability of helping the parties cut directly to the central issues and avoid wasted discovery efforts. If the witness is carefully selected, there should be no need to supplement a 30(b)(6) deposition. Supplementation would be necessary only in cases in which the witness is not able to answer the questions asked. It is unusual for more than one 30(b)(6) deposition to be noticed. When there is another, it is usually because the corporation has changed its position, or because amendments have been made in the pleadings. Limiting the number of 30(b)(6) depositions a party may take will only lead to motions for additional depositions. The rule should state that all depositions taken pursuant to this rule shall count as one deposition for purposes of the ten-deposition limit.

Trial Lawyers for Public Justice: There should be no restriction on the number or timing of Rule 30(b)(6) depositions. They are useful on a broad array of topics. Interrogatories, by way of contrast, have proven a poor discovery tool. Rule 30(b)(6) depositions provide a way to pierce the objections, evasions, non-information and non-responsive features of interrogatory answers.

W. Va. Trial Lawyers Ass'n: Some counsel take these depositions "up front" to get the position of the institutional litigant on the record. Others prefer to utilize them further into, or even at the end of, the discovery process. Like other discovery tools, these matters are best left to the lawyers. Changing the rule to limit the number of such depositions is not warranted; the trial judge is well-situated to deal with such issues.

(6) Possible impact on work product protection: Do Rule 30(b)(6) depositions pose greater threats to work product protection than other depositions? Are contention questions used in Rule 30(b)(6) depositions in ways that intrude into protected areas? Are Rule 30(b)(6) depositions used to compel organizations to take positions on contested issues too early in the litigation?

Amer. Coll. of Trial Lawyers: It is not clear that Fed. R. Evid. 612(2) should apply to a 30(b)(6) deposition. Does the document really refresh the witness's memory? Or does it "create" a memory brought into being for purposes of the deposition? Depending on how the court resolves that issue, it might insist that any documents used to prepare the witness be turned over to the other side.

Assoc. of the Bar of the City of N.Y.: Our members reported that this sort of problem does not usually arise, and they were confident that it could be successfully addressed by a court on a motion for a protective order. One of our members, however, was concerned that such a deposition could invade work-product immunity when the notice requests the witness to testify about all documents and information supporting the organization's claims or defenses. Because it is reasonable to assume that counsel is involved in gathering that information and analyzing documents that support claims, the attorney's thought processes may well be revealed.

Calif. Employ. Lawyers' Ass'n: We have found that contention questions are not being asked in these depositions. The rule does not explicitly invade or violate the work product protection. Rule 30(b)(6) depositions pose no greater threat to work product than do any other types of deposition. Contention questions, if they are asked at all, do not endanger the attorney work product immunity any more gravely than if they are posed to individual parties.

Consumer Att'ys of Calif.: We have not found that 30(b)(6) depositions have any greater impact on work product issues than any other type of depositions. Nor is it our experience that

contention-type issues arise in the 30(b)(6) context. Generally, the depositions focus on obtaining information about the corporation's structure, departments, organization, document retention and access policies, and other general informational facts, not contentions or positions.

Nat. Ass'n of Consumer Advocates: The deponent has the most control over how much work product is involved in its own investigation. If it chooses to have its lawyer perform its investigation, then it will have work product that must be disclosed. If it instead has non-lawyers interview its employees and examine documents and records, it will avoid most work-product issues. (Note: Rule 26(b)(3) provides protection for trial preparation work done by nonlawyer agents of the party.) NACA has heard no complaints from its members about the contention question issue raised by the Committee's request for comments.

Nat. Employ. Lawyers' Ass'n: Rule 30(b)(6) depositions pose no greater threat to work product protection than interrogatories or document requests. Indeed, in a sense there is less threat because the topics are specified in advance. Contention questions don't pose a problem. There should be nothing protected about contentions. Often contention questions cut to the heart of the matter much faster and save discovery and litigation costs. Rule 30(b)(6) depositions are often used to compel organizations to take positions on contested issues early in litigation. That is one of the great benefits of such depositions, because they save the other side from doing much additional discovery to get to the same place. Particularly in an era of early discovery deadlines, this is important. A corporation should no more be permitted to avoid taking positions than an individual.

Trial Lawyers for Public Justice: Often, having chosen a "fall guy" to represent the corporation, counsel educate the witness for the deposition and try to thwart discovery about the basis for the testimony by interposing work product objections. This is improper, since work product protection does not apply to facts learned in preparation for litigation. It does not matter that this particular witness has learned some or all of this factual information from the lawyer.

(7) "Binding" effect of answers: Are Rule 30(b)(6) deposition answers being given an unduly binding effect at trial? Are organizations being unfairly prevented from providing evidence that contradicts or supplements what was said in the deposition?

ABA Section of Lit.: Counsel who regularly represent

corporations believe that treating Rule 30(b)(6) testimony as a judicial admission is too harsh. "Most had faced arguments for the preclusive nature of testimony; some reported that a court had issued preclusion rulings. All reported that the potential for a preclusion ruling increased the burden of producing a properly prepared 30(b)(6) designee." Even the best intentioned counsel and their clients face a risk of careless or wrong answers during such a deposition. Some opportunity for supplementation should be considered. This is not to suggest that it is never appropriate to preclude an organization from contradicting the testimony, or lack of testimony, on a particular topic. It is important that counsel and parties take seriously the obligation to prepare thoroughly for a 30(b)(6) deposition. When there has been undue prejudice to the examining party, or to litigants who rely on original testimony, preclusive sanctions may be warranted.

Amer. Coll. of Trial Lawyers: The rule can be, and has been, interpreted to provide for a binding effect. A substantial and persuasive argument can be made that a 30(b)(6) deposition ought to be no different than the deposition of an individual. Beyond that, even allowing impeachment of the entity that provided the deposition answers might be questioned. "When an individual says different things on different occasions under oath, the impeachment value is real. But when two different individuals who are spokespersons for the same entity say two different things, the effect is far different, far less substantial." "If 30(b)(6) depositions are not binding, what is the point of taking them? . . . Yet if they are binding, how does one avoid the potential for unfairness?" One answer may be a supplementation process. That is allowed for interrogatory answers, even though by their nature they allow for reflection and dissemination within the entity that is not true of 30(b)(6) answers. "Parties should have a right to binding answers from corporate entities; corporate entities should have a right not to be led into binding themselves by blindsided testimony." If one decides that a 30(b)(6) deposition should be treated the same as any other deposition -- that the witness is free to give contrary trial testimony subject to impeachment -- then perhaps there should be some provision to make the impeachment as effective as in individual depositions. Although many courts already make a practice of explaining to juries what a representative deposition is, perhaps that explanation could be required by the rules.

Assoc. of the Bar of the City of N.Y.: None of our members had found that the binding effect issue played an important role in one of their cases. This may be because few cases reach trial, where the admissibility and effect of deposition testimony becomes important. But although the decisions on this issue approach it from slightly differing points of view, none appears

to preclude additional testimony when the facts suggest it would not be fair to do so. (The letter cites cases.) The Association expects this body of law to continue to develop and to narrow, if not eliminate, uncertainty about the binding effect of Rule 30(b)(6) testimony.

Assoc. of Trial Lawyers of America: We mean for a corporation to be bound in a 30(b)(6) deposition in the same way a human litigant is bound by a deposition. There is no unfairness in requiring a corporation to present its knowledge. It chooses the person through whom to do it and prepares the agent to testify. The buck must stop somewhere.

Calif. Employ. Lawyers' Ass'n: We wonder, if deposition answers are not being given a binding effect at trial, why one would conduct the depositions at all. All depositions are intended to be given a binding effect at trial; if a party wishes to contradict its testimony the trier of fact is entrusted with the obligation of determining the facts and giving the deposition answers proper weight. Requiring deposition answers to be given binding effect guarantees fairness and prevents "trial by ambush."

Consumer Att'ys of Calif.: Rule 30(b)(6) depositions are no different than any other discovery devices -- if a change or supplement is required, it can be made. Obviously, like every other change or alternation, such changes can be commented on at trial.

Nat. Ass'n of Consumer Advocates: The rule requires the entity to send a person to "testify" "on its behalf." The use of the word "testify" implies that the information is sworn to be true. The phrase "on its behalf," in turn, means that the answers be truthful on behalf of the entity. The inherent nature of any testimony -- that it can be used against the deponent -- is not a problem for those entities who complete a suitable investigation of their own facts prior to the deposition.

Trial Lawyers for Public Justice: The courts are split on whether a Rule 30(b)(6) transcript is binding on the organization. If the deposition is not binding, there is no reason for the rule.

Nat. Employ. Lawyers' Ass'n: Unfortunately, the contrary is true; depositions are generally not given binding effect at trial. Rather, they are used to impeach witnesses who testify differently than they did in their deposition. This is a very effective technique against individuals, but when a corporation presents someone at trial to provide testimony contrary to that provided by the person who gave the 30(b)(6) deposition, the fact that the deposition was of a different individual makes its use

as a tool of impeachment very weak. The result is that corporations use this technique to defeat the purpose of Rule 30(b)(6). A corporation should not be allowed to contradict its own testimony free of consequence any more than an individual.

(8) Conflicting decisions under current rule: Have your members found that conflicting rulings are emerging in the application of current Rule 30(b)(6)? If so, we would appreciate being apprised about those decisions.

ABA Section of Lit.: Courts have taken two opposing positions on the "binding" nature of Rule 30(b)(6) deposition testimony. In some jurisdictions, the testimony is taken as a judicial admission, and the organization is precluded from taking any position inconsistent with its 30(b)(6) testimony. In others, the organization is bound to the same extent as any other witness, but it may contradict its position, with a credibility price to pay.

Amer. Coll. of Trial Lawyers: The current caselaw is in conflict regarding whether and to what extent a 30(b)(6) deposition binds the entity that designated the witness. The caselaw is neither definitive nor uniform. We believe that the practicing bar would benefit from knowing what the rule really means, one way or the other. There is also a conflict about whether questioning can go beyond the scope of the notice.

Assoc. of Trial Lawyers of America: We are not aware of significant conflicting authority.

Calif. Employ. Lawyers' Ass'n: We are not aware of conflicting rulings, and have found that judges are able to manage this discovery very well under the current rule.

Consumer Att'ys of Calif.: At least in California, no conflicts or problems have emerged.

Fed. of Defense & Corp. Counsel: Many courts prohibit a party from submitting evidence that contradicts its deposition testimony. Greater leeway is given in other jurisdictions, which allow an organization to present evidence that contradicts or rebuts the testimony of its own 30(b)(6) witness. (The letter cites cases.)

Nat. Ass'n of Consumer Advocates: There are differences among judges and among courts in their attitude toward the failure of parties to prepare their witnesses adequately.

Nat. Employ. Lawyers' Ass'n: Courts have managed to resolve the rare 30(b)(6) disputes with great facility. Rule 30(b)(6) is really far easier to police than regular depositions because the notice is provided in advance. We have seen no conflicting rulings on this issue.

Trial Lawyers for Public Justice: The courts are split on whether a Rule 30(b)(6) transcript is binding on the organization.

(9) Resolve problems though caselaw? Until there is a good understanding of the gravity and nature of any current problem with practice under Rule 30(b)(6), there can be no serious consideration of whether a rule amendment might be desirable. Can any problems your members have encountered with practice under Rule 30(b)(6) be addressed through litigation under the current rule, or would a rule change be a better way to address such problems?

Amer. Coll. of Trial Lawyers: Our Federal Rules of Civil Procedure Committee believes that the rule leaves substantial open questions in its current form. We believe further that those question are better answered by amending and clarifying the rule than by the development of caselaw, which to some extent already has produced and likely will continue to produce inconsistent results. At the same time, we believe that the rule can be a very important and valuable litigation tool.

Assoc. of Trial Lawyers of America: ATLA is a strong believer in the mechanisms of the common law. We do not perceive problems that can be addressed better through rulemaking than through the judicial application of principles to fact.

Consumer Att'ys of Calif.: Our members have not experienced problems with this rule. It is the use of the tool by some parties -- often responding parties -- that has created difficulties. Legislating more changes will not solve that problem; it will just change the issues courts will have to resolve.

Nat. Ass'n of Consumer Advocates: NACA requests that the Committee allow any problems that exist to be addressed through caselaw.

Nat. Employ. Lawyers' Ass'n: Generally, rule changes make litigation less certain and increase the costs to the parties. Although changes may be appropriate in certain circumstances, such as dealing with E-Discovery, this is not an area where changing the rules would be helpful. Rule 30(b)(6) is a rule

more easily managed by the courts than many others.

Trial Lawyers for Public Justice: Generally, we think that it is better to let courts resolve issues relating to Rule 30(b)(6) through specific decisions with specific facts rather than attempting to craft general rules in response to pressures from interested groups.

- Limiting Rule 30(b)(6) discovery to identifying the location of discoverable information within the custody or control of the organization: This approach would limit Rule 30(b)(6) depositions to providing a precursor to other discovery and would preclude their use to generate admissible evidence for trial. That would seem likely to reduce burdens on organizations preparing witnesses. But for organizations that wanted to designate a single representative to present their positions, this would perhaps be a negative change. And it could also significantly erode the value of Rule 30(b)(6), which now permits the organization's opponent to discern the organization's position through a deposition.

Assoc. of Trial Lawyers of America: This proposal would recreate the very problems that the rule was designed to solve.

Calif. Employ. Lawyers' Ass'n: this change would render the depositions pointless. Although this would reduce the burdens on organizations, the result would be testimony by witnesses who cannot testify confidently, resulting in further motions and further discovery. This would also give the entity an advantage in litigation.

Nat. Employ. Lawyers' Ass'n: Such a limitation would effectively eliminate the primary value of the rule. The result would inevitably be to return to the "bandying" that the rule was created to eliminate. Currently, Rule 30(b)(6) depositions can dramatically decrease the cost of litigation, but if such a deposition cannot be used to obtain a corporation's position on a matter or to obtain specific information, parties will often find themselves in need of more depositions and extensions on discovery.

N.Y. St. Bar Ass'n: We oppose this suggestion. Rule 30(b)(6) depositions have an important role in developing the factual record in appropriate cases involving organizations, particularly when the institution has an advantage in collecting information or employee knowledge that is relevant to the case

and perhaps difficult to integrate or widely dispersed within it. It would be better to limit examination to "factual" matters.

- Providing by rule that the witness's testimony is not a "judicial admission": A rule amendment might deal with the effect of testimony in the deposition, perhaps by affirmatively preserving the organization's right to offer evidence in support of different versions of the facts. But such a change might significantly reduce the utility of Rule 30(b)(6) and might encourage bandying.

Assoc. of Trial Lawyers of America: This would clarify existing law. Caselaw already says that testimony is not a judicial admission, and that it may be explained or contradicted. An organization is bound by a designee's testimony in the same way that any other individual would be.

Calif. Employ. Lawyers' Ass'n: If the answers did not bind the entity, the deposition would be of very little value. Making such a change would encourage bandying.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to confirm a party's right to provide evidence that contradicts or explains the testimony of 30(b)(6) deponents.

Nat. Employ. Lawyers' Ass'n: Our membership does not see courts treating 30(b)(6) testimony as a judicial admission. Rather, parties use depositions to impeach witnesses at trial who contradict their depositions. Corporations have an unfair advantage because they can simply send a different person to testify at trial. To remove this unfair disparity, the rule should probably be amended to require that the testimony of a 30(b)(6) witness be treated as a judicial admission.

- Providing for supplementation of a Rule 30(b)(6) deposition: If it is a problem that the rule currently freezes the organization's version of events to that presented in an early Rule 30(b)(6) deposition, that might be solved by providing for supplementation in Rule 26(e)(1), which presently makes no provision for such supplementation. But such a change would, under Rule 37(c)(1), seem to strengthen arguments that the organization is not allowed to proffer competing evidence unless it has provided a timely supplementation.

ABA Section of Lit.: A change to allow supplementation or amendment to answers given at 30(b)(6) depositions, at least under limited circumstances, may be appropriate. Rule 26(e)(2) allows and requires such supplementation with respect to both interrogatories, documents production requests, and requests for admissions.

Amer. Coll. of Trial Lawyers: The potentially unfair burden of binding effect can be ameliorated by having clear procedures in place for the entity to reflect and amend. With an interrogatory answer, a party that learns its answer was wrong has a duty and right to correct or supplement it. One possibility would be amending Rule 26(e), Rule 30(b)(6), or both to make it clear that the entity has some period of time to amend or supplement its answers before the answers become binding. Of course, when there is newly discovered information that was not reasonably known at the time of the deposition or supplementation period, that new information could provide an acceptable basis to supplement. But the supplementation right should not be a substitute for adequate preparation of the witness in the first instance; it should be only a right to supplement, not to substitute a promise to provide more information later.

Assoc. of Trial Lawyers of America: This would lessen incentives to prepare thoroughly and invite delay.

Calif. Employ. Lawyers' Ass'n: Making such a change would result in trial by ambush. It would also make problems for a court ruling on a summary judgment motion if the entity were not bound by statements made in the deposition, and could contradict them with affidavits prepared after service of the motion.

Nat. Employ. Lawyers' Ass'n: Permitting supplementation would basically require retaking the 30(b)(6) deposition and probably impact on other discovery as well because 30(b)(6) depositions are commonly used to identify the necessary parameters of discovery. Supplementation is a sign that the corporation did not do a proper job of preparing the witness in the first place.

Trial Lawyers for Public Justice: Like any party's deposition, Rule 26(e) provides a process that permits the deponent to amend or supplement an answer. Why should parties who are corporations receive more protections than individuals? They should not.

- Forbidding "contention" questions during 30(b)(6) depositions: If efforts to require the organization to commit to certain positions during

the deposition are unfair, perhaps a prohibition on contention questions during a deposition could be fashioned. Defining what is forbidden might prove difficult, however, and disputes about whether certain questions are of the forbidden type could complicate Rule 30(b)(6) depositions.

ABA Section of Lit.: Several counsel expressed concern about using 30(b)(6) depositions to ask questions about legal arguments, contentions, or positions. They noted that interrogatories are better vehicles for eliciting the other side's contentions and positions, and that few, if any, lay litigants are competent to testify on those matters in any event. Several suggest that if there are contention depositions, then the depositions should occur later in discovery, a sequence specifically recognized for contention interrogatories.

Assoc. of Trial Lawyers of America: The suggestion that interrogatories would be a better tool for getting at contentions is wrong. If a corporation wants counsel to answer questions (as would be true for interrogatories), it can designate counsel to testify at the deposition. A deposition, with opportunities for clarifying questions and for significantly narrowing issues, can reveal more than edited and calculated writing, and can do it more quickly. Limiting deposition questions by forbidding contention questions would hinder, not assist, the search for truth.

Calif. Employ. Lawyers' Ass'n: We are not aware that such questions are being asked during deposition. The typical practice in state court in California is that contention questions may be asked in interrogatories but not in depositions.¹⁶

¹⁶ The comment cites *Rifkind v. Superior Court*, 27 Cal.Rptr. 822 (Cal. Ct. App. 1994), which held that contention questions were improper in the deposition of a party who was a lawyer. The court explained (*id.* at 826-27):

[L]egal contention questions require the party interrogated to make a "law to fact application that is beyond the competence of most lay persons." (1 Hogan, *Modern California Discovery* (4th ed. 1988) § 5.9, p. 252.) Even if such questions may be characterized as not calling for a legal opinion or as presenting a mixed question of law and fact, their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot.

Fed. of Defense & Corp. Counsel: We urge that the rule be reformed to eliminate or curtail a party's ability to take binding "contention" depositions of 30(b)(6) witnesses in the early stages of the case.

Nat. Employ. Lawyers' Ass'n: Although forbidding contention questions would not eviscerate the rule as much as limiting the deposition to the location of discoverable information, it would greatly reduce the usefulness of these depositions in identifying the parameters of discovery. Without that tool, many litigants would be forced to use wider discovery requests.

- Limiting questioning to those matters identified in the notice, or for which the witness was designated: If questioning about matters not identified in the notice of deposition is a serious problem, the Rule 30(b)(6) deposition could be limited to those matters. That change would seem consistent with the provision now in the rule that, if it designates more than one person to testify, the organization may specify the matters on which each such witness will testify on its behalf.

Amer. Coll. of Trial Lawyers: We believe that a clarification on this subject would be useful. There are issues raised by questioning beyond the scope of the notice. What is the effect of an answer? Is it an admission of the organization at all? Is it binding? Does venturing beyond the scope convert a 30(b)(6) deposition into one under Rule 30(b)(1), counting as two depositions under the ten-deposition rule? What should be the process for objecting to questions that exceed the topics listed. Although the trial bar can live with a clear rule either way, the better rule probably would be to limit the questions to the designated topics.

There is no legitimate reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions. . . . So used, the interrogatory becomes an instrument for forcing one's opponent (or, more realistically, the opponent's attorney) to engage in a rather sophisticated process of legal reasoning.

Assoc. of Trial Lawyers of America: Caselaw holds parties to the matters identified in the discovering party's notice (citing S.D.N.Y. case). We do not see any need to amend.

Calif. Employ. Lawyers' Ass'n: We believe that it should be permissible to ask the witness about any discoverable information, whether or not on a topic listed in the notice. The party doing discovery should not be required to notice a second deposition of the witness (perhaps counted as another deposition against the ten-deposition limit). Moreover, to the extent there is a need for relief on this issue, judges can make sensible decisions without a rule change.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to clarify that a party's right to interrogate a 30(b)(6) witness is limited to those categories specified with reasonable particularity in the deposition notice.

Nat. Employ. Lawyers' Ass'n: Typically, courts are already enforcing this limitation. Where questions go beyond the scope, courts usually sustain objections. But sometimes examination on additional topics is allowed, and that provides benefits. The alternative is a second deposition of the witness.

Other ideas

ABA Section of Lit.: One possible idea to deal with the "binding" effect problem would be to allow a party to "unbind" itself by giving timely notice that it has found new information that leads it to believe that a previous 30(b)(6) piece of testimony needs to be modified. The burden of proving good faith preparation of the witness would be on the party seeking the change, and the opposing party would be permitted reasonable discovery to test the assertion at the expense of the party seeking the change in testimony. The party seeking the change might also be required, if the change is permitted, to pay the additional expenses, including attorney fees, resulting to the other side from the change in testimony. Another possible idea would be to require the 30(b)(6) witness to appear in person at trial so that he or she could be questioned about the change in testimony.

Amer. Coll. of Trial Lawyers: There are a number of issues about the use of the 30(b)(6) witness at trial. Should personal knowledge or hearsay issues be approached differently from ordinary witnesses? Ordinarily personal knowledge is not a prerequisite for admissibility of statements or testimony by a party, which would seem to include the testimony of a 30(b)(6)

witness. The lack of personal knowledge of the individual who testified should not be controlling. Indeed, the obligation to prepare the witness to testify underscores the impropriety of treating that witness's lack of knowledge as a ground for excluding at trial the deposition testimony. But if the testimony is offered by the entity itself, a different attitude may be proper. Otherwise, the entity is allowed to get in evidence that does not satisfy Fed. R. Evid. 602. The caselaw is not uniform, however. In a similar vein, are there any limits on using the deposition testimony to impeach a witness called by the entity at trial? Even if it's the same individual, at trial he or she may be testifying in an individual rather than representative capacity. How should the rule of completeness be handled with regard to hearsay if the entity insists on admission of additional parts of the deposition in addition to those used by its opponent? There are also questions about how the comparable procedure under Rule 45 should operate. Can a party subpoena a nonparty entity and require it to designate and prepare a witness at trial knowledgeable on specified topics? The commentators have not yet addressed that question, but there is nothing in Rule 45 that prohibits it.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to limit the number of categories that can be designated under the rule.

Nat. Ass'n of Consumer Advocates: If the rule is to be changed, it should be strengthened, as follows:

(1) The rule does not presently say explicitly that an entity will be bound by the testimony absent a good cause showing of changed circumstances. To help deponents understand how the rule works, this could be made explicit.

(2) Unlike Cal. Civ. Proc. § 2025.230, the federal rule does not require the deponent to produce the "most qualified" or "most knowledgeable" person. The entity may thus have a tendency to offer the least qualified individuals in an effort to prevent plaintiffs from developing evidence.

(3) The rule does not require that an organizational entity "immediately" or "promptly" designate an additional witness in the event the person first designated cannot answer a question on a matter designated in the notice. This encourages defendants to draw out discovery.

N.Y. St. Bar Ass'n: We think that the Committee should consider the following specific proposals that were included in our 2004 submission (which prompted the Committee's interest in this subject):

Our proposal (1): All 30(b)(6) depositions of a party should be treated as one deposition with a presumptive cumulative limit of seven hours in total.

Our proposal (3): Although an examining party should be permitted to direct attention in the deposition notice to specific testimony about, or documents concerning, the organization's conduct, the obligation of the testifying witness in preparation should not generally extend to the review of testimony or documents from other parties or nonparties, unless these are present or former employees or agents of the organization.

Our proposal (5): Rule 30(b)(6) should be amended to insert the word "factual" before "matters" in the fourth sentence to establish that such depositions should not be a vehicle for seeking discovery of legal arguments, contentions or positions that are not simply factual statements or evaluations of the legal significance of facts.

Our proposal (8): Testimony under Rule 30(b)(6) should not be treated as preclusive, but merely as probative.

Trial Lawyers for Public Justice: The rule does not currently say that the entity must adequately prepare the witness, although the caselaw does so state. The rule should say so. There are three ways of doing this: (1) the rule could require that the organization provide the "most knowledgeable person" rather than leaving it free to choose whomever it wishes; (2) the rule could be amended to specify clearly the organization's responsibility to prepare the witness; and (3) the rule could mandate monetary sanctions for failure to provide a prepared witness.

TAB 5C

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C. 15-CV-A: Rule 81(c) (3) (A): Jury Demand on Removal

This submission was on the November agenda but was carried forward without an opportunity for consideration. It addresses a single word in Rule 81(c) (3) (A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c) (3). Examination of the specific problem in the setting of the full rule suggests more serious questions. It seems worthwhile to identify the questions, even if the most likely outcome will be to put all of them aside to defer to more pressing work. Apart from this one submission, there is little reason to believe that significant problems are arising in practice.

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court. * * *

(3) *Demand for a Jury Trial.*

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

- (i) it files a notice of removal; or
- (ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts

continue to interpret the rule as if it says "does;" an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed – if fixing is needed – in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal – a demand must be served, not "14 days after the last pleading directed to the issue is served," but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job – Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it

might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: it did not require an express demand at any time in the progress of the case, but has been revised after removal to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts — no matter what may be the experience of particular lawyers — seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case – but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial only because the judge does not seem sufficiently sympathetic is reduced. Rule 39(b) protects the opportunity to reclaim a jury trial after failing to make a timely demand.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

- (3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one¹ if the party serves a demand within 14 days after:
- (A) it files a notice of removal, or
 - (B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing, or undertake a thorough reexamination of Rule 81(c). Matters can be resolved reasonably without changing “did” back to “does.” But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification.

¹ This version simply tracks the current rule. It might be shortened: “If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *.”

From: Mark Wray <mwrap@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched "style" changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called "style" changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 "style" changes objected repeatedly that the "style" changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don't know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever "costs" may be borne by those of us subject to the substantive and unintended consequences of "style" changes, those costs are "acceptable".

I respectfully disagree. Enough people, like my client, have paid the "costs", and the "costs" are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA

12 TOM GONZALES,

13
14 Plaintiff,

Case No. 2:13-cv-00931-RCJ-VPC

15 vs.

(Eighth Judicial District Court
Case No. A-13-679826)

16 SHOTGUN NEVADA INVESTMENTS,
17 LLC, a Nevada limited liability company;
18 SHOTGUN CREEK LAS VEGAS, LLC,
19 a Nevada limited liability company;
20 SHOTGUN CREEK INVESTMENTS,
21 LLC, a Washington State limited liability
22 company; and WAYNE PERRY, an
23 individual,

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
STRIKE JURY DEMAND

24 Defendants.
_____ /

25 In this action removed from the District Court in and for Clark County,
26 Nevada, Plaintiff filed a jury demand September 18, 2014, two days after this
27 Court denied the Defendants' motion for summary judgment. With summary
28 judgment having been denied, Plaintiff believed it was appropriate to consolidate

1 this action with the Desert Lands case (3:11-cv-00613-RCJ-VPC), file demands
2 for jury in both cases, and prepare for trial. *See Wray Decl., attached.*

3 According to the applicable rule for jury demands in actions removed from
4 state court, Plaintiff believes his jury demand was timely. Fed. R. Civ. P.
5 81(c)(3)(A) states:

6 (3) *Demand for a Jury Trial.*

7
8 (A) *As Affected by State Law.* A party who, before removal,
9 expressly demanded a jury trial in accordance with state law need
10 not renew the demand after removal. If the state law did not require
11 an express demand for a jury trial, a party need not make one after
12 removal unless the court orders the parties to do so within a
13 specified time. The court must so order at a party's request and may
14 so order on its own. A party who fails to make a demand when so
15 ordered waives a jury trial.

14 This case was removed from a state court in Nevada. Under Nevada law,
15 “[a]ny party may demand a trial by jury of any issue triable of right by a jury by
16 serving as required by Rule 5(b) upon the other parties a demand therefor in
17 writing at any time after the commencement of the action and not later than the
18 time of the entry of the order first setting the case for trial.” Nev. R. Civ. P. 38(b).
19 Thus, jury demands are not required to be filed in Nevada state court until the time
20 of the entry of the order first setting the case for trial.

21 Defendants removed this action within 30 days of being served with the
22 Summons and Complaint and before even filing their Answer to the Complaint.
23 *ECF No. 1, 4.* Obviously, at that point in time, a jury demand was not required by
24 Nevada law. In such a situation, the second sentence of Rule 81(c)(3)(A) states:
25 “If the state law did not require an express demand for a jury trial, a party need not
26 make one after removal unless the court orders the parties to do so within a
27 specified time.” The Court still has not ordered the parties to file a jury demand
28

1 within a specified time, and thus the Plaintiff's jury demand filed September 18,
2 2014 was timely under the rule.

3 Defendants now bring this Motion to Strike Plaintiff's Jury Demand (*ECF*
4 *No. 69*), objecting that the second sentence of Fed. R. Civ. P. 81(c)(3)(A) is
5 inapplicable because "the second sentence applies where State Law *does not*
6 *require an express demand for jury trial* and Nevada law, NRCivP Rule 38, does
7 require an express demand for a jury trial." *Motion, ECF No. 69, p. 8:5-7*
8 (*emphasis in original*).

9 The Defendants' argument incorporates a subtle, yet significant,
10 anachronism that leads to a faulty interpretation of Rule 81(c)(3)(A). The
11 Defendants argue that Rule 81(c)(3)(A) applies when state law "**does** not require
12 an express demand for jury trial," thus using the present tense of the verb. The
13 second sentence of the rule actually is written in the past tense: "If the state law
14 **did** not require an express demand for jury trial . . .". The shift from present to
15 past tense results in a change in the meaning of the rule that is significant to
16 deciding this motion.

17 Using the present tense, as the Defendants choose to do, the meaning is that
18 if the state law does not require an express demand for jury trial; i.e., if no express
19 demand for jury trial is required by state law *at any time*, then the Court must order
20 the parties to file a demand. Stated alternatively, using the present tense, if *at any*
21 *time* the state law requires an express demand for jury trial, then Rule 81(c)(3)(A)
22 does not apply, and a jury demand must be filed with 14 days of filing of the last
23 pleading directed to the issue. *See Fed. R. Civ. P. 38(b)(1)*.

24 On the other hand, using the past tense, which is how the rule is written, of
25 course, the meaning is that if the state law did not require an express demand for
26 jury trial; i.e., if the Plaintiff did not have to make a jury demand under state law
27 *before the case was removed*, then the Plaintiff need not make a jury demand until
28

1 ordered to do so. Reading Rule 81(c)(3)(A) as it is written, therefore, Plaintiff
2 filed a timely jury demand on September 18, 2014.

3 The use of the present tense is an anachronism because prior to 2007, the
4 rule was written in the present tense -- “does not” -- and starting in 2007, the rule
5 was changed to the past tense -- “did not”. The Defendants’ motion disregards this
6 distinction, but in fairness, court decisions have overlooked it as well.

7 A leading case on Rule 81(c) in the Ninth Circuit is *Lewis v. Time, Inc.*, 710
8 F.2d 549, 556 (9th Cir. 1983), which has been cited by courts in the Ninth Circuit at
9 least 27 times for its interpretation of the rule. When *Lewis* was decided in 1983,
10 Rule 81(c) was written in the present tense, and stated, in pertinent part: “If state
11 law applicable in the court from which the case is removed does not require the
12 parties to make express demands in order to claim trial by jury, they need not make
13 demands after removal unless the court directs that they do so. . .”. *Id.* The court
14 held in *Lewis* that California law does require an express demand when the trial is
15 set. *Id.* Lewis had not requested a trial before his case was removed from
16 California state court. *Id.* “Therefore, F.R. Civ. P. 38(d), made applicable by Rule
17 81(c), required Lewis to file a demand ‘not later than 10 days after the service of
18 the last pleading directed to such issue [to be tried].’ Failure to file within the time
19 provided constituted a waiver of the right to trial by jury. Rule 38(d).” *Id.* (The
20 10-day deadline subsequently was extended to 14 days by other rule amendments.)

21 This holding from *Lewis* continues to be followed, uncritically, by district
22 courts in the Ninth Circuit. *See, e.g., Ortega v. Home Depot U.S.A., Inc.*, 2012
23 U.S. Dist. LEXIS 2787 (E.D.Cal. 2012) (following *Lewis* as to its interpretation of
24 Rule 81(c)(3)(A)); *Nascimento v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS
25 111019 (D.Nev. 2011) (applying the *Lewis* holdings to an action removed from
26 Nevada state court); *Kaldor v. Skolnik*, 2010 U.S. Dist. LEXIS 137109 (D.Nev.
27 2010) (finding that under *Lewis*, Rule 81(c)(3)(A) is inapplicable if state law
28

1 requires an express demand for jury trial, “regardless of when the demand is
2 required”).

3 With due respect for these district court decisions, it is questionable that they
4 would follow the holding in *Lewis* today, as a matter of *stare decisis*, given the
5 intervening changes in Rule 81(c). For *Lewis* to supply the rule of decision, it
6 would seem that one must discount the change from the present to the past tense –
7 from “does not” to “did not” -- as having no effect on the meaning of the second
8 sentence of Rule 81(c)(3)(A). Disregarding differences in words runs counter to
9 well-established rules of statutory construction. *See Boise Cascade Corp. v.*
10 *United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (“Under accepted canons
11 of statutory interpretation, we must interpret statutes as a whole, giving effect to
12 each word and making every effort not to interpret a provision in a manner that
13 renders other provisions of the same statute inconsistent, meaningless or
14 superfluous.”); *In re Transcon Lines*, 58 F.3d 1432, 1437 (9th Cir. 1995) (the
15 cardinal principle is that the plain meaning of a statute controls).

16 Furthermore, taking the view that the change from “does not ” to “did not”
17 makes no difference to the meaning of the second sentence then begs the question
18 as to why rule-makers made the change at all.

19 The Notes of the Advisory Committee on 2007 Amendments state: “The
20 language of Rule 81 has been amended as part of the general restyling of the Civil
21 Rules to make them more easily understood and to make style and terminology
22 consistent throughout the rules. These changes are intended to be stylistic only.”

23 The problem with the Advisory Committee’s note is that a change in “style”
24 can also affect meaning, and therefore affect substance. A practitioner can read the
25 amended Rule 81(c)(3)(A) to mean exactly what it says, and can reasonably
26 believe that a jury trial demand that state law did not require to be filed before
27 removal is not required to be filed in federal court unless and until ordered by the
28 federal judge. The problem with the note of the Advisory Committee is that in the

1 case of Rule 81(c)(3)(A), the effect of “style” changes is a critical change in
2 meaning; if that meaning is not applied and the result is the loss of the right to trial
3 by jury, the rule has become a trap for the unwary.

4 Many district courts in the Ninth Circuit have acknowledged that Rule 81
5 suffers from poor drafting and tricky wording, but have applied *Lewis* regardless.
6 In *Rump v. Lifeline*, 2009 U.S. Dist. LEXIS 98506 (N.D.Cal. 2009), the court said:

7
8 The Court recognizes that the federal rules governing jury demands
9 after removal, in conjunction with California's rules permitting a
10 plaintiff to make a jury demand up until the time of trial, creates
11 ambiguity and a trap for the unwary. However, *Lewis* addressed the
12 interplay between California's rules and Rules 38 and 81, and held that
13 a jury demand must be made within 10 days of removal. Accordingly,
14 ***because the Court is bound by Lewis***, the Court GRANTS
15 defendants' motion and STRIKES plaintiff's jury demand.

16 *Id.*, *emphasis added*; see also: *Gilmore v. O'Daniel Motor Ctr., Inc.*, 2010 U.S.
17 Dist. LEXIS 57792 (D.Neb. 2010); *Cross v. Monumental Life Ins. Co.*, 2008 U.S.
18 Dist. LEXIS 109235 (D.Ariz. 2008) (“[T]he needless complexity of the removal
19 rule, Rule 81(c), sometimes creates a trap for the unwary.”)

20 Indeed, if Rule 81(c)(3)(A) cannot be relied upon to mean what it says, it is
21 not only a trap for the unwary, it is an unfair trap for the unwary.

22 The problem with altering the “style” of any rule is that it requires changes
23 in language, and changes in language alter meaning, which is a principle that was
24 recognized by the people who changed the rules in 2007. The Judicial Conference
25 Committee on Rules of Practice and Procedure keeps online records of its
26 proceedings through the Administrative Office of the U.S. Courts in Washington,
27 D.C. The online archives¹ contain the minutes and reports of various rules
28 committee meetings. Attached as Exhibit 1 to this Opposition are copies of

¹ <http://www.uscourts.gov/rulesandpolicies/rules/archives.aspx>

1 excerpts from the June 2, 2006 report of the Civil Rules Advisory Committee on
2 the subject of “style” changes, with portions highlighted for purpose of emphasis.
3 The report refers to various contributors to the process who were highly critical of
4 the “style” changes, including the Committee on Civil Litigation of the U.S.
5 District Court for the Eastern District of New York, whose members wrote:

6 The unanimous judgment of every member of the Committee who
7 expressed a view was that the costs and other disadvantages of the
8 style revision project outweigh its benefits. First, there is the risk of
9 unintended consequences. After finding a number of ambiguities and
10 apparent substantive changes, review of the Burbank-Joseph report
11 found they had uncovered many more – and there was almost no
12 overlap, suggesting that there remain a significant number of
13 unintended consequences that neither we nor they have spotted.
14 Second, any style revisions will bring disruptions. The sheer
15 magnitude of the rewording and subdivision of rules that have become
16 familiar to the courts and the profession in their present form will
17 complicate research and reasoning about the rules for many years to
18 come.

16 *See Exhibit 1, attached.* The words of the committee from the Eastern District of
17 New York are amazingly prescient in anticipating the current situation with the
18 Plaintiff.

19 In its “Overall Evaluation”, the rules committee asked Professor Stephen B.
20 Burbank and Gregory P. Joseph, Esq. (the “Burbank-Joseph” group) to comment
21 on their working group’s view of the wisdom of the style project. Burbank-Joseph
22 reported that 14 members participated in the final conference call. “Of them, nine
23 believed that the project should not be carried to a conclusion, while five believed
24 that the advantages of adopting the Style Rules outweigh the costs that will be
25 entailed.” *See Exhibit 1, attached.*

26 The rules committee spoke of “costs that will be entailed”, which in this
27 case, is the cost of losing the right to a jury trial. Forfeiting that Constitutional
28

1 right because of a tricky rule, which cannot be relied upon to mean what it says, is
2 not a cost that can or should be borne by the Plaintiff or any other litigant.

3 Nor is the situation in the Plaintiff's case in any way unique. Dozens of
4 cases are reported from U.S. District Courts across the country where a party was
5 deprived of a right to a jury trial in a case removed from state court based on an
6 interpretation of Rule 81(c)(3)(A). This means attorneys across the land are losing
7 the right to jury trials for their clients in cases that are removed from state court to
8 federal court because the rule is not being interpreted the way it reads.

9 To Plaintiff's knowledge, only one of the many reported decisions on this
10 issue explicitly discusses the change from the present to past tense, and is the only
11 case that squarely addresses the issue raised by this Opposition. In *Kay Beer*
12 *Distrib. v. Energy Brands, Inc.*, 2009 U.S. Dist. LEXIS 49792 (E.D. Wisc. 2009),
13 the district judge analyzed and decided the issue as follows:

14 The language of the current Rule 81 is ambiguous. At least one court
15 has observed that the Rule is "poorly crafted." *Cross v. Monumental*
16 *Life Ins. Co.*, 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1
17 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense --
18 "If state law did not require an express demand" -- without any
19 qualification, makes it unclear whether the exception is intended to
20 apply to cases in which a demand for a jury under state law was not
21 yet due when the case was removed, or to cases in which a demand is
22 not required at all. *Kay's* interpretation of Rule 81(c)(3)(A) thus has
23 some merit. But ultimately, I conclude that *Energy's* interpretation is
24 correct. Rule 81(c)(3)(A) only applies when the applicable state law
25 does not require a jury demand at all. It has no application when, as in
26 this case, the applicable state law requires an express demand, but the
27 time for making the demand has not yet expired when the case is
28 removed.

25 This is apparent from the language of the Rule prior to its amendment
26 in 2007. Prior to the 2007 amendment to Rule 81, it read:

27 If state law applicable in the court from which the case is removed
28 *does not* require the parties to make express demands after removal in

1 order to claim trial by jury, they need not make demands after
2 removal unless the court directs that they do so within a specified time
3 if they desire to claim trial by jury.

4 Fed. Rule Civ. P. 81(c) (2006) (amended 2007) (*italics added*).

5 The Advisory Committee Notes for the 2007 Amendments to Rule 81
6 state that the language of the Rule was amended "as part of the
7 general restyling of the Civil Rules to make them more easily
8 understood and to make style and terminology consistent throughout
9 the rules." The note states that the changes were intended to be
"stylistic only."

10 The earlier version of Rule 81(c) was the result of the 1963
11 amendment to the Rules which added the exception in the first place.
12 The Advisory Committee Notes relating to the 1963 Amendment state
13 that the change was meant to avoid unintended waivers of a party's
14 right to a jury trial in cases that are removed to federal court from
15 state courts in which no demand is required. To achieve this purpose,
16 "the amendment provides that where by State law applicable in the
17 court from which the case is removed a party is entitled to jury trial
18 without making an express demand, he need not make a demand after
19 removal." Fed. R. Civ. P. 81 Advisory Committee Note, 1963
20 Amendment. See also 9 Wright & Miller, Federal Practice and
21 Procedure (hereafter Wright & Miller) § 2319 at 228-29 (3d ed.
22 2008). It therefore follows that the exception in Rule 81(c)(3)(A),
23 which relieves a party in a removed case from the obligation to
24 demand a jury trial, applies only where the applicable state law does
25 not require an express demand for a jury trial. Since Wisconsin law
26 does require a jury demand, Rule 81(c)(3)(A)'s exception does not
27 apply.

28 Kay cites *Williams v. J.F.K. Int'l Carting Co.*, 164 F.R.D. 340
(S.D.N.Y. 1996) and *Marvel Entm't Group, Inc. v. Arp Films, Inc.*,
116 F.R.D. 86 (S.D.N.Y. 1987), in support of its interpretation of Rule
81, but both dealt with actions removed from New York courts. Cases
removed from New York court provide little guidance because "the
practice in New York falls within a gray area not covered by Rule
81(c)." *Cascone v. Ortho Pharm. Corp.*, 702 F.2d 389, 391 (2d Cir.
1983); see also 9 Wright & Miller § 2319 at 231 ("Many cases

1 removed from New York state courts pose a unique situation.").
2 Wisconsin law unequivocally requires a demand in order to preserve
3 one's right to a jury trial. I therefore conclude that Rule 81(c)(3)(A) is
4 inapplicable and Kay's demand for a jury trial was untimely under
5 Rule 38(b).

6 Plaintiff respectfully urges that this Court *not* adopt the reasoning of *Kay*
7 *Beer*. The court in *Kay Beer* did not apply the language of the rule as it reads
8 today, and instead reverted to the former version of the rule. The court stated:
9 "Rule 81(c)(3)(A) only applies when the applicable state law **does not** require a
10 jury demand at all." (Emphasis added). The only rationale offered by the court in
11 *Kay Beer* for applying the former version of the rule instead of the current rule is
12 that the Notes of the Advisory Committee state that the 2007 changes to the rules
13 were intended to be "stylistic only". Respectfully, changes that may have been
14 intended to be "stylistic only" can in fact be substantive. The people that adopted
15 the rules openly debated the effect that the "stylistic" changes would have on the
16 substantive law, and ultimately, the rules committee adopted the rules knowing that
17 certain "costs" would be borne by litigants and the court system, including "costs"
18 in the form of substantive rule changes that may not have been intended. The rules
19 committee nonetheless deemed these costs to be acceptable in adopting the new
20 rules. *See Exhibit 1, attached*. When a "stylistic" change alters the meaning of a
21 rule, this is deemed an acceptable cost, and the Court should apply the rule as it is
22 written. Practitioners also should be able to rely on the rules as written.

23 As an additional consideration, the court in *Kay Beer* only followed the
24 rationale that the general purpose of the 2007 changes was to effect changes in
25 style and not substance. The court in *Kay Beer* had no apparent knowledge as to
26 the specific reasons why the change was made from "does not" to "did not". One
27 would have to access the minutes and reports of the style subcommittee of the
28 Civil Rules Advisory Committee to obtain that knowledge. The minutes and
reports of the style subcommittee do not appear to be available online or in any

1 readily available alternative source, however, and Plaintiff is unable to provide
2 them to the Court. *See Wray Decl., attached.*

3 In the absence of the subcommittee minutes and reports, the proper approach
4 is to apply ordinary rules of statutory construction and construe the rule as it is
5 written. By applying the plain language of the rule, one must reasonably conclude
6 that in cases removed from state to federal court, when the applicable state law
7 requires an express jury demand, but the time for making the demand has not yet
8 expired when the case is removed, the time for making a jury demand is to be set
9 by the court.

10 Accordingly, the jury demand filed September 18, 2014 in this action is
11 timely. It respectfully requested that the Defendants' Motion to Strike Plaintiff's
12 Jury Demand be denied.

13 DATED: October 16, 2014

LAW OFFICES OF MARK WRAY

14
15 By /s/ Mark Wray

16 MARK WRAY

17 Attorneys for Plaintiff TOM GONZALES
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1 **DECLARATION OF MARK WRAY IN SUPPORT OF OPPOSITION TO**
2 **STRIKE JURY DEMAND**

3 I, Mark Wray, declare:

4 1. My name is Mark Wray. I substituted in as attorney for Plaintiff Tom
5 Gonzales in this action on June 11, 2014. I know the following facts of my
6 personal knowledge and could, if asked, competently testify to the truth of the
7 same under oath.

8 2. On September 16, 2014, the Court denied the Defendants’ motion for
9 summary judgment. *ECF No. 65*.

10 3. Upon receiving the order, I reviewed Fed. R. Civ. P. 81(c)(3)(A) and
11 prepared a jury demand which I filed with the Court on September 18, 2014. I also
12 called Defendants’ counsel, Mr. Schwartzer, and asked if he would inquire about
13 obtaining his clients’ permission to consolidate the trial of the two related actions.

14 4. On September 26, 2014, Mr. Schwartzer advised me that his clients
15 would not agree to consolidation and that he would be filing a motion to strike the
16 jury demand.

17 5. After receiving the Defendants’ motion and re-reading Rule
18 81(c)(3)(A), I reviewed minutes and reports of the Judicial Conference Committee
19 on Rules of Practice and Procedure for the years 2003 through 2007. I also
20 contacted the support staff of the committee in Washington, D.C. I learned there
21 are six members of the support staff, headed by their chief, Jonathan Rose, and
22 they are busy with six different committees. Over a period of days and follow-up
23 phone calls, I attempted to find out whether anyone on the support staff has access
24 to any minutes and reports of the style subcommittee of the Advisory Committee
25 on Civil Rules during the years leading up to the 2007 rule changes. I spoke to Mr.
26 Rose specifically about this subject, explaining my interest in knowing the genesis
27 of the change from “does not” to “did not”. Although I followed up several times
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seeking to obtain this information from Mr. Rose or his staff, I did not receive a response from them before having to prepare and file this Opposition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 16, 2014 at Reno, Nevada.

 /s/ Mark Wray
MARK WRAY

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CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray hereby certifies that a true copy of the foregoing document was sealed in an envelope with first-class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on October 16, 2014 addressed as follows:

Lenard E. Schwartzer
Schwartz & McPherson Law Firm
2850 S. Jones Blvd., Suite 1
Las Vegas, NV 89146

_____/s/ Theresa Moore_____

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EXHIBIT INDEX

Exhibit 1 Excerpts of Minutes of the Civil Rules Advisory Committee

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EXHIBIT 1

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: June 2, 2006

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

Rule 81(b)-(c)

<p>(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.</p>	<p>(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.</p>
<p>(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.</p>	<p>(c) Removed Actions.</p> <p>(1) Applicability. These rules apply to a civil action after it is removed from a state court.</p>
<p>Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.</p>	<p>(2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:</p> <p>(A) 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;</p> <p>(B) 20 days after being served with the summons for an initial pleading on file at the time of service; or</p> <p>(C) 5 days after the notice of removal is filed.</p>
<p>A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law <u>applicable in the court from which the case is removed does not require the parties to make express demands</u> in order to claim trial by jury, they <u>need not make demands</u> after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.</p>	<p>(3) Demand for a Jury Trial.</p> <p>(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. <u>If the state law did not require an express demand for a jury trial, a party need not make one after removal</u> unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.</p> <p>(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after:</p> <p>(i) it files a notice of removal; or</p> <p>(ii) it is served with a notice of removal filed by another party.</p>

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Draft Summary: Civil Rules Hearing & Meeting
 November 18, 2005
 page -11-

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

November 22 draft

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TOM GONZALES,)
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 Plaintiff,)
)
 vs.)
)
 SHOTGUN NEVADA INVESTMENTS, LLC et)
 al.,)
)
 Defendants.)
 _____)

2:13-cv-00931-RCJ-VPC

ORDER

This case arises out of the alleged breach of a settlement agreement that was part of a confirmation plan in a Chapter 11 bankruptcy action. Pending before the Court are a Motion to Reconsider (ECF No. 68) and a Motion to Strike Jury Demand (ECF No. 69). For the reasons given herein, the Court denies the motion to reconsider and grants the motion to strike jury demand.

I. FACTS AND PROCEDURAL HISTORY

This is the second action in this Court by Plaintiff Tom Gonzales concerning his entitlement to a fee under a Confirmation Order the undersigned entered over ten years ago while sitting as a bankruptcy judge.

A. The Previous Case

On December 7, 2000, Plaintiff loaned \$41.5 million to Desert Land, LLC and Desert

1 Oasis Apartments, LLC to finance their acquisition and/or development of land (“Parcel A”) in
2 Las Vegas, Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land
3 and Desert Oasis Apartments, as well as Desert Ranch, LLC (collectively, the “Desert Entities”),
4 each filed for bankruptcy, and the undersigned jointly administered those three bankruptcies
5 while sitting as a bankruptcy judge. The court confirmed the second amended plan, and the
6 Confirmation Order included a finding that a settlement had been reached under which Gonzales
7 would extinguish his note and reconvey his deed of trust, Gonzales and another party would
8 convey their fractional interests in Parcel A to Desert Land so that Desert Land would own 100%
9 of Parcel A, Gonzales would receive Desert Ranch’s 65% in interest in another property, and
10 Gonzales would receive \$10 million if Parcel A were sold or transferred after 90 days (the
11 “Parcel Transfer Fee”). Gonzales appealed the Confirmation Order, and the Bankruptcy
12 Appellate Panel affirmed, except as to a provision subordinating Gonzales’s interest in the Parcel
13 Transfer Fee to up to \$45 million in financing obtained by the Desert Entities.

14 In 2011, Gonzales sued Desert Land, Desert Oasis Apartments, Desert Oasis Investments,
15 LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co., and Wells
16 Fargo (as trustee for a mortgage-backed security) in state court for: (1) declaratory judgment that
17 a transfer of Parcel A had occurred entitling him to the Parcel Transfer Fee; (2) declaratory
18 judgment that the lender defendants in that action knew of the bankruptcy proceedings and the
19 requirement of the Parcel Transfer Fee; (3) breach of contract (for breach of the Confirmation
20 Order); (4) breach of the implied covenant of good faith and fair dealing (same); (5) judicial
21 foreclosure against Parcel A under Nevada law; and (6) injunctive relief. Defendants removed
22 that case to the Bankruptcy Court. The Bankruptcy Court recommended moving to withdraw the
23 reference, because the undersigned issued the underlying Confirmation Order while sitting as a
24 bankruptcy judge. One or more parties so moved, and the Court granted the motion. The Court
25 dismissed the second and fifth causes of action and later granted certain defendants’ counter-

1 motion for summary judgment as against the remaining claims. Plaintiff asked the Court to
2 reconsider and to clarify which, if any, of its claims remained, and defendants asked the Court to
3 certify its summary judgment order under Rule 54(b) and to enter judgment in their favor on all
4 claims. The Court denied the motion to reconsider, clarified that it had intended to rule on all
5 claims, and certified the summary judgment order for immediate appeal. The Court of Appeals
6 affirmed, ruling that the Parcel Transfer Fee had not been triggered based on the allegations in
7 that case, and that Plaintiff had no lien against Parcel A.

8 **B. The Present Case**

9 In the present case, also removed from state court, Plaintiff recounts the Confirmation
10 Order and the Parcel Transfer Fee. (*See* Compl. ¶¶ 10–14, Apr. 10, 2013, ECF No. 1, at 11).
11 Plaintiff also recounts the history of the ‘613 Case. (*See id.* ¶¶ 17–21). Plaintiff alleges that
12 Defendant Shotgun Nevada Investments, LLC (“Shotgun”) began making loans to Desert Entities
13 for the development of Parcel A between 2012 and January 2013 despite its awareness of the
14 Confirmation Order and Parcel A transfer fee provision therein. (*See id.* ¶¶ 22–23). Plaintiff sued
15 Shotgun, Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M.
16 Perry for intentional interference with contract, intentional interference with prospective
17 economic advantage, and unjust enrichment based upon their having provided financing to the
18 Desert Entities to develop Parcel A. Defendants removed and moved for summary judgment,
19 arguing that the preclusion of certain issues decided in the ‘613 Case necessarily prevented
20 Plaintiffs from prevailing in the present case. The Court granted that motion as a motion to
21 dismiss, with leave to amend.

22 Plaintiff filed the Amended Complaint (“AC”). (*See* Am. Compl., Aug. 20, 2013, ECF
23 No. 28). Plaintiff alleges that the Confirmation Order permitted Parcel A to be used as collateral
24 for up to \$25,000,000 in mortgages of Parcel A itself or as collateral for a mortgage securing the
25 purchase of real property subject to the FLT Option if the proceeds were used only for the

1 purchase of that real property, but that any encumbrance of Parcel A outside of these parameters
2 would trigger the Parcel Transfer Fee. (*See id.* ¶¶ 15–16). Various Shotgun entities made
3 additional loans to the Desert Entities in 2012 and 2013 “related to the development of Parcel
4 A.” (*Id.* ¶¶ 25–26). Multiple Shotgun entities have also invested in SkyVue Las Vegas, LLC
5 (“SkyVue”), the company that owns the entities that own Parcel A. (*Id.* ¶ 27). Plaintiff alleges
6 that the reason Perry, the principal of the Shotgun entities, did not document his \$10 million
7 investment was to “avoid evidence of a transfer,” and thus the triggering of the Parcel Transfer
8 Fee. (*See id.* ¶ 29).

9 Defendants moved for summary judgment, and Plaintiff moved to compel discovery
10 under Rule 56(d). The Court struck the conspiracy and declaratory judgment claims from the
11 AC, because Plaintiff had no leave to add them. The Court otherwise denied the motion for
12 summary judgment and granted the motion to compel discovery, although the Court noted that
13 the intentional interference with prospective economic advantage claim (but not the intentional
14 interference with contractual relations claim) was legally insufficient. Defendants again moved
15 for summary judgment after further discovery and filed a motion in limine asking the Court to
16 exclude any testimony of witnesses or documents not disclosed in discovery. The Court denied
17 the motion for summary judgment because the allegations in the AC concerned events
18 subsequent to the events alleged in the ‘613 Case, and Plaintiff had submitted evidence sufficient
19 to create a genuine issue of material fact for trial as to the sole remaining claim for intentional
20 interference with contractual relations. The Court denied the motion in limine because it
21 identified no particular evidence to exclude but simply asked the Court to enforce the evidence
22 rules at trial as a general matter.

23 Defendants have asked the Court to reconsider their latest motion for summary judgment
24 and to strike Plaintiff’s recently filed jury demand.

25 ///

1 **II. DISCUSSION**

2 **A. Motion to Reconsider**

3 Defendants argue that the Court noted no timely reply had been filed, but that they in fact
4 filed a reply that was timely under a stipulation to extend time. The Court has examined the
5 reply, and it does not negate the genuine issue of material fact Plaintiff showed in his response.

6 **B. Motion to Strike Jury Demand**

7 Plaintiff did not demand a jury trial in the Complaint, (*see* Compl., ECF No. 1, at 11), or
8 in the AC, (*see* Am. Compl., ECF No. 28). Defendants did not demand a jury trial in the Answer
9 to the Complaint, (*see* Answer, ECF No. 4), or in the Answer to the AC, (*see* Answer, ECF No.
10 30). A jury must be demanded by serving the other parties with a written demand no later than
11 fourteen days after service of the last pleading directed to the issue for which a jury trial is
12 demanded. Fed. R. Civ. P. 38(b)(1). The last such pleading in this case was the Answer to the
13 AC, which was served upon Plaintiff via ECF on September 3, 2013. (*See* Cert. Service, ECF
14 No. 30, at 8). The deadline for any party to demand a jury trial was therefore Tuesday,
15 September 17, 2013. The Jury Demand at ECF No. 67 was served upon Defendants via ECF on
16 September 18, 2014, over a year after the deadline. (*See* Cert. Service, ECF No. 67, at 3).
17 Defendants are therefore correct that the demand is untimely and should be stricken.

18 In response, Plaintiff notes that in removal cases such as the present one, an express jury
19 demand made before removal that is sufficient under state law need not be renewed after
20 removal, and that where state law requires no express jury demand, a party need not make such a
21 demand after removal unless specially ordered to do so by the court within a specified time. *See*
22 Fed. R. Civ. P. 81(c)(3)(A). Plaintiff argues that Nevada law requires a jury demand “not later
23 than the time of the entry of the order first setting the case for trial.” Nev. R. Civ. P. 38(b).
24 Plaintiff argues that because a jury demand was not yet due under state law at the time the case
25 was removed, he need not make such a demand after removal unless ordered to do so by the

1 court within a specified time, and the Court has not issued such an order in this case.

2 Rule 81 waives the requirements of Rule 38 where an express jury demand has been
3 made under state law before removal. Plaintiff does not claim to have made any express jury
4 demand before removal, however. It is also true that where state law does not require an express
5 jury demand, none need be made after removal. The questions here are whether and when a
6 party must make a jury demand in federal court after removal in cases where state law does in
7 fact require a jury demand, but where it was not yet due under state law at the time of removal.
8 In such cases, is the jury demand requirement under Rule 38 negated, as is the case where state
9 law requires no demand at all?

10 Plaintiff candidly admits that the Court of Appeals has ruled that in such cases a jury
11 demand must be made in accordance with Rule 38, and that district courts typically follow that
12 rule. *See Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983). However, Plaintiff also notes
13 that the rule at the time of *Lewis* read, “If state law applicable in the court from which the case is
14 removed *does* not require the parties to make express demands in order to claim trial by jury . . .
15 .” *See id.* (quoting Fed. R. Civ. P. 81(c) (1983)) (emphasis added). Plaintiff argues that the result
16 should be different today, because the rule was amended in relevant part in 2007 to read, “If the
17 state law *did* not require an express demand for a jury trial” Fed. R. Civ. P. 81(c)(3)(A)
18 (emphasis added). Plaintiff argues that because the current rule uses the past tense as to the
19 requirement to make a jury demand under state law when viewed from the point of removal, that
20 there is no requirement to make a jury demand in federal court if none was yet due under state
21 law at the time of removal. Plaintiff admits that the 2007 amendments to the rules were
22 “intended to be stylistic only,” *see* Fed. R. Civ. P. 81 advisory committee’s note, but argues that
23 the stylistic change is an “unfair trap for the unwary.”

24 The Court agrees with the district courts that continue to enforce the *Lewis* rule. Rule 81
25 is not a trap for the unwary. Even if that had been a fair argument when Rule 81 was newly

1 amended, as Plaintiff notes, district courts, including those in this district, have consistently
2 enforced the *Lewis* rule under Rule 81 as amended. *See Nascimento v. Wells Fargo Bank*, No.
3 2:11-cv-1049, 2011 WL 4500410, at *2 (D. Nev. Sept. 27, 2011) (Mahan, J.); *Kaldor v. Skolnik*,
4 No. 3:10-cv-529, 2010 WL 5441999, at *2 (D. Nev. Dec. 28, 2010) (Hicks, J.). And the new
5 language of the rule is not particularly confusing. The Rule 38 demand is required unless the
6 state law “did not require an express demand,” not only if the state law “did not *yet* require an
7 express demand *to have been served at the time of removal.*” The latter reading of the rule is
8 improbable. The committee’s notes make clear that such a meaning was not intended, as the
9 amendment was only for style. The authors of the rule surely knew how to distinguish the
10 concepts of whether and when, and they did not add any language reasonably invoking the
11 concept of timing into the amendment of Rule 81(c)(3)(A).

12 Moreover, Plaintiff’s own Case Management Report of July 30, 2013 notes that “A jury
13 trial has not been requested” under paragraph VIII, entitled “JURY TRIAL.” (*See* Case Mgmt.
14 Report 6, July 30, 2013, ECF No. 25). If Plaintiff had truly been under the impression that the
15 right to a jury trial had been preserved under Rule 81(c)(3)(A) because no jury demand was yet
16 due at the time of removal, he surely would have noted his expectation of a jury trial and/or
17 explained his position that no jury demand was necessary; he would not have simply noted that
18 no jury trial had been requested and left it at that. Plaintiff’s “unfair trap for the unwary”
19 argument in this case is therefore not made in good faith, even if the argument could avail a
20 litigant in an appropriate case.

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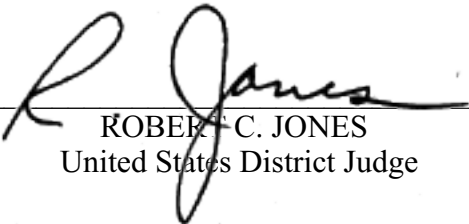
1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 68) is DENIED.

3 IT IS FURTHER ORDERED that the Motion to Strike Jury Demand (ECF No. 69) is
4 GRANTED.

5 IT IS SO ORDERED.

6 Dated this 23rd day of October, 2014.

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9 ROBERT C. JONES
10 United States District Judge
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TAB 5D

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D. 15-CV-EE: Pro se e-Filing and More

This submission addresses four topics. Some of them affect the Appellate, Bankruptcy, Civil, and Criminal Rules. They were initially considered at the November 2015 meeting, and put over to await reactions from the other advisory committees. The question of e-filing by pro se litigants is addressed with the e-filing and notice discussion earlier in these materials. It appears likely that the other advisory committees will agree that the other suggestions do not warrant rule amendments now.

Social Security Numbers: The first proposal is to amend Civil Rule 5.2(a)(1) to forbid including any part of a social security or taxpayer identification number. The underlying concern is that if the place and date of birth are known, the last four digits "effectively give[] away all of the private information" because only the last four digits are random for numbers issued before "a recent change by the SSA." This concern was considered carefully when Rule 5.2 was first adopted. The risk was recognized then, but the several committees decided that the value of having the information overcame the risks. The Bankruptcy Rules Committee found particular needs for full numbers in some settings. Preliminary exchanges suggest that they continue to recognize these needs. This question should be resolved in coordination with the other advisory committees. The Reporters for the Appellate, Bankruptcy, and Criminal Rules Committees join in recommending that each Committee take no action on this proposal. At the same time they suggest that it may be appropriate to ask the Court Administration and Case Management Committee whether it wishes to consider the question.

In forma pauperis Affidavits: The second proposal is to add a new subdivision to Rule 5.2 to address "any affidavit made in support of a motion under 28 U.S.C. § 1915." The rule would provide that the affidavit must be filed under seal and reviewed ex parte. For good cause, the court may order that the affidavit be disclosed to other parties under an appropriate protective order, or be unsealed in appropriately redacted form. The submission directs attention to an unsuccessful petition for certiorari regarding this issue. (The proposal includes affidavits under 18 U.S.C. § 3006A, which directs each district court to create a plan for furnishing representation for any person "financially eligible." It is not apparent that much would be accomplished by addressing representation of criminal defendants in a Civil Rule.)

Section 1915(a)(1) enables a court to

authorize commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the

nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

The privacy interests affected by the affidavit are manifest. Whether a rule is required to deal with them is not so clear. Preliminary discussion at the November 2015 meeting suggested concern that sealing imposes a substantial burden on the court, and doubts whether the privacy interests affected by the affidavit are so great as to justify the burden. If the proposal is to be pursued, current practice should be reviewed, beginning with the Federal Judicial Center study of sealing practices in general.

This proposal affects the other advisory committees. Coordination will be required if any committee decides to move toward consideration of new rule text.

New Rule 7.2 – Copies of Unpublished Authorities: This proposal is to adopt a new Rule 7.2 that would address the needs of pro se litigants created by citation by counsel of cases or other authorities "that are unpublished or reported exclusively on computerized databases." Counsel would be required to provide the pro se litigant with copies. In addition, counsel, upon request, must provide copies of such cases and authorities that are cited in a decision of the court if they were not previously cited by any party. The proposal tracks verbatim Local Rule 7.2, E.D. & S.D.N.Y.

Something like this is also to be found in Appellate Rule 32.1(b): "If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited." This rule is part of the rule on citing non-precedential opinions added in 2007. As compared to 2007, it seems likely that most, if not all, federal-court orders are now available from the court's own site. However that may be, this rule applies only on appeal, and does not reach decisions by state courts or courts in other countries.

This proposal raises the familiar question whether this level of detail should be fixed in the national rules, or is better left to local practice, and perhaps reflected in a local rule.

e-Filing by Pro Se Litigants: This proposal is that pro se litigants should be permitted, but not required, to file by paper. They must be permitted to qualify for CM/ECF access to avoid imposing burdens not borne by other parties who have such access.

This topic is addressed by the current e-filing proposals pending before all advisory committees other than the Evidence Rules Committee. This proposal will be considered in the final development of those proposals.

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Re: Proposed rule changes for fairness to pro se and IFP litigants

Sai to: Rules_Support

09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:

> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
> number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> <https://www.pnas.org/content/106/27/10975.full.pdf>
> <http://www.heinz.cmu.edu/~acquisti/ssnstudy/>
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> <https://epic.org/privacy/ssn/>
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> <http://latanyasweeney.org/work/ssnwatch.html>
> <http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html>
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: <http://s.ai/ifp>
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

TAB 5E

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E. 15-CV-GG: Pleading Rules and Forms

Sai suggests that Rule 8(a)(2) and the appendix of forms "are so misleading as to be plain error." A litigant pleading under Rule 8(a)(2) or the forms is likely to be dismissed for failure to state a claim.

The Appendix of Forms was abrogated on December 1, 2015.

The question whether to amend the pleading rules to reflect accumulating experience with evolving pleading standards has been on the agenda since 2007. It has subsided into the background. It may be that practice is gradually maturing into identifiable patterns. The first question is whether the time has come to attempt an overall assessment of current pleading standards and practices. When the time has come, the next question will be whether current standards are desirable, too demanding, or too lenient. Whatever the answer to that question may be, the final question will be whether it is feasible to revise rule texts in ways that will capture or improve on current practice.

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**Proposed rules & forms change: Iqbal / Twombly****Sai** to: Rules_Support

09/28/2015 07:07 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

Currently, the federal rules, and the forms, reflect pre-Iqbal/Twombly notice pleading standards.

However, post-Iqbal/Twombly, FRCP 8(a)(2) and forms 10-21 (for instance) are so misleading as to be plain error. A litigant narrowly obeying the rule as stated, or using the forms, would be likely to have their suit dismissed on an Iqbal challenge.

This is unfair to litigants attempting to understand the rules by reading their plain meaning.

I therefore request that the Committee update all federal rules and forms to reflect the current state of the law.

In particular, the Committee should ensure that an otherwise reasonable litigant, who is unfamiliar with case law such as Iqbal, and narrowly reads the plain language of the rules or uses the forms provided, does not do so to their detriment.

I do not know to what extent Iqbal applies outside of civil procedure, nor what similar issues may exist due to other developments in case law. I defer to the Committee to examine what rules and forms need to be updated.

The goal should be simply to ensure that they are an accurate guide to current law and reasonable to rely upon.

Respectfully submitted,

/s/ Sai

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TAB 5F

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F. 15-CV-HH: Rule 6(d), "Making" Disclosures

Amy Reverdy raises a question about the application of Rule 6(d) to the time for making disclosure of rebuttal expert trial witness testimony and for serving objections to pretrial disclosures.

Rule 6(d) allows additional time "[w]hen a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F)." [A pending recommendation would amend Rule 6(d) to delete electronic service, (E), from this list.] Rule 26(a)(2)(D)(2) directs that disclosure of a rebuttal expert be "made" within 30 days after the other party's disclosure. Rule 26(a)(3)(B) directs that a party serve a list of objections "[w]ithin 14 days after" pretrial disclosures are made. The set of relevant provisions is completed by Rule 26(a)(4), which directs that all disclosures under Rule 26(a) "be in writing, signed, and served."

Although the initial expert witness disclosures and trial disclosures must be served, the operative language of the rules sets the time for disclosing rebuttal experts and making objections to run from the time the underlying disclosures are "made." The submission recognizes the apparent meaning of the rule language, and notes that practice seems to be that Rule 6(d) does not provide extra time. But it suggests clarification: either direct that the underlying disclosures be "served," not simply "made," or add a sentence to Rule 26(a)(4) [or elsewhere] pointing out that the time is set for making, not serving, the underlying disclosures.

The question is whether the potential for confusion is so great as to warrant amending the rules. Probably not.

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Federal Rules of Civil Procedure 26(a) / Additional Days for Service?

15-CV-HH

Amy Reverdy

to:

Rules_Support

10/14/2015 11:45 AM

Hide Details

From: Amy Reverdy <areverdy@gmail.com>

To: Rules_Support@ao.uscourts.gov

Dear Rules Committee,

I'm writing regarding Rule 26(a) of the Federal Rules of Civil Procedure and to inquire whether additional days should be added for service under Rule 6(d).

Subsection (a)(2)(D)(ii) of Rule 26 states that absent stipulation or court order parties must make their rebuttal expert witness disclosures "within 30 days after the other party's disclosure" and subsection (a)(3)(B) states that parties should file and serve objections to pretrial disclosures "[w]ithin 14 days after they are made."

Subsection (a)(4) of Rule 26 requires that disclosures be "served" and Rule 6(d) provides that "[w]hen a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)."

As expert witness disclosures and pretrial disclosures must be served and the opposing party may or must act within a specific time, e.g., 30 days and 14 days, respectively, it seems that the rebutting/objecting party should receive additional time in which to respond if service is made as outlined in Rule 6(d). Though in practice, this does not seem to be the case.

The argument for not adding additional days for service is placed on the terms "disclose" in subsection (a)(2)(D)(ii) and "made" in subsection (a)(3)(B). The date the expert witnesses are disclosed and the date the pretrial disclosures are made are considered to be the triggers from which the deadlines run. However, if these disclosures must be served, then it would seem the date that they are disclosed or made is the service date. Otherwise, it's not clear how the disclosure and made dates are determined for purposes of responding.

If the Committee's intent was to have the additional time for service apply, I suggest that subsection (a)(2)(D)(ii) be amended to provide that rebuttal witnesses must be served 30 days after the other party's disclosure is served, and that (a)(3)(B) be amended to read that objections must be filed and served within 14 days after the pretrial disclosures are served.

Conversely, if the Committee intended that additional time for service not apply to the rebuttal and objection deadlines, perhaps a sentence could be added to subsection (a)(4), or elsewhere, indicating as such.

Thank you for your consideration.

Sincerely,

Amy Reverdy

CA Bar No. 203678

TAB 5G

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G. 15-CV-JJ: Pro-se e-Filing

Robert M. Miller, Ph.D., urges that pro se litigants be permitted to file by electronic means. He offers his own experience with the burdens of filing on paper while other parties are allowed to e-file: "I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking."

This topic is addressed with the proposal to publish for comment amendments to the e-filing and e-service provisions of Rule 5.

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Suggested Rule Change - ECF for Pro Se Litigants

Rob Miller

to:

Rules_Support

10/26/2015 02:26 PM

Hide Details

From: "Rob Miller" <robmiller44@hotmail.com>

To: <Rules_Support@ao.uscourts.gov>

15-AP-H

15-CV-JJ

15-CR-E

To whom it may concern:

I have been a pro se litigant in one district court and two US Courts of Appeals. In the U.S. District Court for Northern California and the U.S. Court of Appeals for the Ninth Circuit, I was permitted to use Electronic Case Filing for my lawsuit and appeal.

In a recent appeal to the U.S. Court of Appeals for the Federal Circuit, I discovered that pro se litigants are not permitted to e-file. Since I discovered this rule the day before my Notice of Appeal was due in Washington, DC, I forfeited my right to appeal.

I discovered today that I am not entitled to file using ECF in an appeal to the U.S. District Court for the Eastern District of Virginia. The rule was not prominent in the local rules or the pro se handbook, and I only learned about it by calling the Clerk's office. Later, I found one line in the rules regarding this restriction that was difficult to see. Oddly, this court allows pro se litigants to receive service of documents through PACER.

Whether or not the courts have reasons from experience to believe pro se litigants have difficulty with electronic filing, litigants such as myself have been unjustly burdened relative to our legal adversaries based not on our own failures, but with failures by other pro se litigants. The US Courts could look to the Ninth Circuit's experiment in permitting all litigants to e-file to see what the results are. In any case, clerks in the Ninth Circuit have informed me that even experienced attorneys and paralegals make errors in ECF. Pro se litigants should not be held to a higher standard than professional litigants, but have their errors excused or unexcused consistent with the courts' approach to professional litigants.

These rules have an adverse impact on pro se litigants relative to their adversaries. While the defendants, government officials, can use ECF from the convenience of their home or office right up until a midnight deadline, I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking.

The rules of the courts must ensure that no party is disadvantaged relative to another. Pro se litigants already suffer from a lack of experience and resources. These rules only further compound the disadvantage.

Sincerely,

Robert M. Miller, Ph.D.

4094 Majestic Lane

#278

Fairfax, VA 22033

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TAB 5H

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H. 15-CV-KK: Third Party Litigation Financing

This submission by John Beisner is on behalf of the U.S. Chamber Institute for Legal Reform. It follows an earlier proposal for an amendment that would require disclosure of third-party litigation financing arrangements. (The submission uses a variant phrase, "third-party litigation funding.")

The immediate purpose is to inform the Committee of "noteworthy developments" that have emerged since the Committee considered the earlier proposal and decided not to take immediate action, but to continue monitoring third-party litigation financing arrangements. The conclusion: "We look forward to continuing discussion of this important issue, and we urge the Committee to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation."

The developments described in the exhibits begin with letters sent to three third-party litigation financing companies by Senator Charles E. Grassley, Chairman of the United States Senate Judiciary, and Senator John Cornyn, Chairman of the Subcommittee on the Constitution. The letters seek extensive information about the business and practices of these firms. Responses were requested by September 18, 2015. The additional exhibits include several articles about third-party litigation financing.

This topic remains open on the agenda. The information provided by this submission will be added to the agenda file.

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15-CV-KK

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October 30, 2015

Via E-Mail

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and
Procedure of the Administrative Office of the United
States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Update on Third-Party Litigation Funding

Dear Ms. Womeldorf:

I am writing on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”) to update the Advisory Committee on Civil Rules (“the Committee”) on several important developments in the area of third-party litigation funding (“TPLF”). Last year, ILR and certain other organizations submitted a proposal to the Advisory Committee that would have amended the Federal Rules of Civil Procedure to require the disclosure of TPLF arrangements in any civil action filed in federal court. While the Committee ultimately elected not to proceed with formal consideration of that proposal, it indicated it would continue monitoring TPLF and its usage in the federal courts. Since that time, there have been several noteworthy developments in the TPLF arena, including the announcement of an investigation into TPLF usage and practices by Senate Judiciary Committee Chairman Chuck Grassley and Senator John Cornyn (R. Texas), chairman of the Judiciary Committee’s Subcommittee on the Constitution. This development and others are explored in greater detail below.

Senate investigation into TPLF. Perhaps the most notable development on the issue of TPLF is a probe into the practice that was recently launched by Senators Grassley and Cornyn. According to a press release issued by Senator Grassley on August 27th, the two senators are “examining the impact third party litigation financing is having on civil litigation in the United States.”¹ To that end, the Senators sent letters to Burford Capital, Bentham IMF and Juridica Investments Ltd., three of the largest commercial litigation funders, requesting various information regarding their TPLF activities in the United States. Copies of these documents are attached collectively as Exhibit 1. In particular, the letters seek information regarding the cases they finance, the structure and terms of the agreements they have executed and their returns on investment. The letters also seek information on the firms’ general practices, including whether their financing arrangements were disclosed to other parties in the litigation.

As Senator Grassley explained in announcing the TPLF inquiry, “[l]itigation speculation is expanding at an alarming rate. And yet, because the existence and terms of these agreements lack transparency, the impact they are having on our civil justice system is not fully known. The information we requested today will help us better understand this industry. It’s vitally important to our civil justice system that litigation decisions aren’t unduly influenced by third parties.”² Senator Cornyn similarly remarked that “[t]hird party litigation financing pumps millions of dollars into our justice system, and the current lack of oversight makes it difficult to track this money’s influence on the actions of litigants and the outcomes of litigation. These letters will give us insight into where this money is going and will help us craft effective protection to keep the civil justice system honorable and fair.”³

Expansion of TPLF in the United States. Over the last several months, more data have also emerged about the expansion of TPLF in the United States.⁴ Indeed, according to a March 2015 article from *The Lawyer*, Burford Capital has reported a 35 percent increase in income for 2014, up to \$82 million from \$60.7

¹ Grassley, *Cornyn Seek Details on Obscure Third Party Litigation Financing Agreements*, Aug. 27, 2015, <http://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements>.

² *Id.*

³ *Id.*

⁴ See, e.g., Mattathias Schwartz, *Should You be Allowed to Invest in a Lawsuit*, N.Y. Times Magazine, Oct. 22, 2015, http://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html?_r=1. A copy of this document is attached as Exhibit 2.

million, of which nearly 60 percent (or \$47.9 million) comes from litigation investment activities.⁵ In addition to expanding TPLF activities by Burford and other companies like it, the TPLF industry is also seeing a proliferation of new TPLF entities that are raising money from investors to buy interests in U.S. litigation matters. For example, the Wall Street Journal reported in March 2014 that the hedge fund EJP Capital (based in Arlington, Va.) has raised hundreds of millions of dollars to invest in mass tort lawsuits, including transvaginal mesh and Risperdal litigation.⁶ The hedge fund is targeting “class-action injury lawsuits” at “hefty interest rates,” with the loans to be repaid by law firms “as they earn fees from settlements and judgments.”⁷ EJP Capital’s announcement is one indication of the rapid expansion of TPLF in the United States.

TPLF’s foray into the mass-tort arena is illustrated in a breach-of-contract complaint recently filed in Texas state court by a disgruntled former plaintiffs’ firm employee who was hired to secure third-party litigation funding for television ads and the direct purchase of mass-tort lawsuits from other plaintiffs’ lawyers.⁸ According to the complaint, the plaintiff helped the Texas law firm of AkinMears secure over \$93 million from Gerchen Keller Capital (“GKC”) to acquire thousands of transvaginal mesh cases that could yield the law firm fees of “\$130 million on the low side, and \$200 million on the high.”⁹ The complaint goes on to summarize the business model employed by the law firm:

(i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and

⁵ Richard Simmons, *Revenue at Litigation Funder Burford Capital Booms by 35 Percent to \$82m*, *The Lawyer*, Mar. 18, 2015.

⁶ See Rob Copeland, *Hedge-Fund Manager’s Next Frontier: Lawsuits*, *Wall Street Journal*, Mar. 9, 2014, <http://www.wsj.com/articles/hedge-fund-managers-next-frontier-lawsuits-1425940706>.

⁷ *Id.*

⁸ See *Shenaq v. Akin*, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015).

⁹ *Id.* ¶ 40.

thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.¹⁰

This lawsuit, which has already been reported on in the press,¹¹ is worthy of close attention because it may provide new information about the way in which TPLF is being used to fund and expand mass torts litigation.

Changes in funding methods. TPLF companies are also expanding the ways in which they invest in litigation. The usual course has been for TPLF entities to collect money from investors that they would in turn use to buy interests in a collection of cases of the fund's choosing. LexShares Inc., a recent entrant to the market, however, plans on attracting investors, commercial plaintiffs, and plaintiffs' firms to its online marketplace. Accredited investors are able to shop among individual cases and contribute as little as \$2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment.¹² Unlike traditional third-party litigation finance firms, LexShares solicits investments using a crowdfunding model, which allows ordinary accredited investors to choose among cases vetted through LexShares' due diligence. Another TPLF company, Invest4Justice, has joined the crowdfunding fray.¹³ As of April 2015, the company had 18 campaigns, with almost \$3 million funded. In light of a recent repeal of prohibitions against general solicitation, these companies can advertise their cadre of lawsuits and offer shares in the cases as securities.

* * *

¹⁰ *Id.* ¶ 76.

¹¹ See Daniel Fisher, *Lawsuit Details How Law Firms Borrow And Pay Millions To Get Mass Tort Cases*, *Forbes*, Oct. 20, 2015, <http://www.forbes.com/sites/danielfisher/2015/10/20/lawsuit-details-how-law-firms-borrow-and-pay-millions/>; Paul Barrett, *Inside Massive Injury Lawsuits, Clients Get Traded Like Commodities for Big Money*, *Bloomberg*, Oct. 22, 2015, <http://www.bloomberg.com/news/articles/2015-10-22/inside-massive-injury-lawsuits-clients-get-traded-like-commodities-for-big-money>; Brenda Sapino Jeffreys, *Ex-Employee of AkinMears Sues Firm, Alleges Millions Owed*, *Texas Lawyer*, Oct. 20, 2015, <http://www.texaslawyer.com/id=1202739910841/ExEmployee-of-AkinMears-Sues-Firm-Alleges-Millions-Owed?slreturn=20150930140928>. Copies of these documents are attached collectively as Exhibit 3.

¹² See David Bario, *Litigation Finance Meets Crowdfunding With New Wall Street Startup*, *The Am Law Litigation Daily*, Nov. 19, 2014, <http://www.litigationdaily.com/id=1202676828979/Litigation-Finance-Meets-Crowdfunding-With-New-Wall-Street-Startup#ixzz3VrxxITaI>.

¹³ Brian S. Kabateck & Tsolik Kazandjian, *Should you Crowdfund your Case?*, *New Jersey Law Journal*, June 15, 2015.

Ms. Rebecca A. Womeldorf
October 30, 2015
Page 5

We hope the information summarized above will aid the Committee in further assessing TPLF. We look forward to continuing discussion of this important issue, and we urge the Committee to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. Beisner". The signature is written in a cursive style with a large initial "J".

John H. Beisner

Enc.

EXHIBIT 1

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

August 27, 2015

VIA ELECTRONIC TRANSMISSION

Charlie Gollow
Managing Director, Bentham IMF
885 Third Avenue, 19th Floor
New York, NY 10022

Director Gollow,

Over the last several years, a growing number of reports have raised concerns about what impact the rapid expansion of third party litigation financing (TPLF) is having on our civil justice system. We write you, Managing Director of one of the most prominent TPLF funders, seeking information related to those concerns.

In 2011, the New York City Bar Association estimated that more than \$1 billion was committed to litigation financing in the United States. By some estimates, that amount has tripled in just the last few years. While three of the largest firms involved in commercial litigation lending—Burford Capital (“Burford”), Bentham IMF (“Bentham”), and Juridica Investments Ltd. (“Juridica”)—are all publicly traded on foreign exchanges, each invests heavily in the United States civil justice system.¹ For instance, while your firm is based in Australia, it recently announced it was funding 10 additional lawsuits within the United States, and reported a gross revenue of \$31 million in the United States.² Likewise, in January, Burford Capital announced a 300 percent increase in its capital commitment, including an additional \$62 million in 2014 alone. A majority of this capital is committed to “U.S. litigation and arbitration.”³ Finally, Juridica earned \$73.9 million in net proceeds in 2014, and brought its total gross proceeds to over \$241 million from litigation, \$178 million of which is net profit. According to Juridica, its investments “have been made predominately in the United States.”⁴

¹ Both Burford and Juridica are incorporated in Guernsey and publicly traded on the London Stock Exchange’s Alternative Investment Market. Bentham Capital LLC is the wholly owned subsidiary of IMF Bentham Ltd. IMF Bentham Ltd is incorporated and domiciled in Australia and publicly traded on the Australian Securities Exchange.

² Bentham’s chief investment officer observed that “[t]he pace and volume of new funding opportunities have grown sharply in the past year.” *Id.*

³ Burford Capital, *Annual Report 2014*, (March 17, 2015) at 8.

⁴ Juridica Investments Ltd, *Annual Report 2014*, (April 10, 2015), at 15.

Your burgeoning industry is largely unregulated and operates with no licensing or oversight. Lending agreements between plaintiffs and commercial funders are confidential and generally not disclosed to the courts, the opposing party, or the public unless the terms of the agreement itself are the subject of subsequent litigation. And while commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions.⁵

We are concerned about the nature of commercial financing agreements and the impact they have on our civil justice system. Accordingly, please provide answers to the following questions:

1. For each year from 2009 to 2014, please identify the matters (by case name and docket number) being litigated or arbitrated in the United States, where you have entered into a financing agreement, or similar arrangement.
2. For each matter being litigated or arbitrated in the United States, please identify the lawyers or law firms, or other persons, with whom you have entered into financing agreements, or similar agreements.
3. For each matter being litigated or arbitrated in the United States, please summarize the subject of the dispute, whether it resolved and how much money was paid to (i) the plaintiffs; and (ii) your firm.
4. For each year from 2009 to 2014, please provide the total amount of capital committed to matters being litigated or arbitrated in the United States. Please provide these figures both in absolute terms, and as a percentage of the overall capital committed on a worldwide basis, for each calendar year.
5. Please describe your returns on investment for each matter for the years 2009-2014.
6. Please identify any referral agreements, either formal or informal, you, your firm (including any subsidiaries) or any representatives thereof have entered into with any lawyers or law firms in the United States. If you, your firm (including any subsidiaries) or any representatives thereof have entered into any such agreements, please provide copies, as well as a description of the terms. In your answer, please also provide the number of referrals made, the number of cases financed, and the final resolution of those financed cases.

⁵ See, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014).

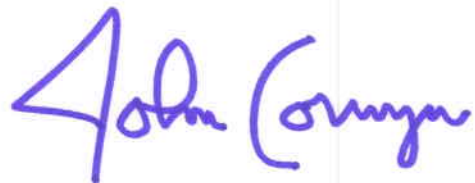
7. Have you been a party to any litigation or arbitration arising out of the terms or provisions of the financing agreements you have entered into? If so, please identify the matter, as well as the forum and current status.
8. Do any of your agreements include either: (a) a provision or language that vary the interest collected on the amount funded depending on the amount recovered by the plaintiff, or (b) language that provides that if plaintiffs settle the matter for an amount below a contractually provided figure, the net recoveries will be calculated by reference to an amount other than the actual recovery? Please provide copies of any such agreements, and identify the relevant provisions.
9. Do your financing agreements typically include arbitration clauses? If so, do those clauses cover disputes between you and the plaintiff over whether or not to enter into a settlement with the defendant?
10. In any matters where class treatment was sought under FRCP Rule 23 (or similar state rule of civil procedure), have you disclosed the existence or terms of the financing arrangement to the court or other interested parties?
11. Regardless of your answer to number 10, under what circumstances, if any, do you disclose the existence and/or terms of your financing agreements to other interested parties (including but not limited to the court and opposing parties)?
12. Does your firm or any of its affiliates make any investments other than in litigation? If so, please identify these investments and the amount of capital – absolute and relative, as described in question 4 – committed to those investments?

Thank you in advance for your cooperation with this request. We would appreciate a response by September 18, 2015. If you have questions, please contact Ted Lehman or Noah Phillips from our respective Committee staffs at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
United States Senate Judiciary Committee



John Cornyn
Chairman
Subcommittee on the Constitution

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

August 27, 2015

VIA ELECTRONIC TRANSMISSION

Sir Peter Middleton GCB
Chairman, Burford Capital
292 Madison Avenue, 23rd Floor
New York, NY 10017

Sir Peter,

Over the last several years, a growing number of reports have raised concerns about what impact the rapid expansion of third party litigation financing (TPLF) is having on our civil justice system. We write you, Chairman of one of the most prominent TPLF funders, seeking information related to those concerns.

In 2011, the New York City Bar Association estimated that more than \$1 billion was committed to litigation financing in the United States. By some estimates, that amount has tripled in just the last few years. While three of the largest firms involved in commercial litigation lending—Burford Capital (“Burford”), Bentham IMF (“Bentham”), and Juridica Investments Ltd. (“Juridica”)—are all publicly traded on foreign exchanges, each invests heavily in the United States civil justice system.¹ In January, for instance, your firm announced a 300 percent increase in its capital commitment, including an additional \$62 million in 2014 alone. A majority of this capital is committed to “U.S. litigation and arbitration.”² Likewise, while Bentham is based in Australia, it recently announced it was funding 10 additional lawsuits within the United States, and reported a gross revenue of \$31 million in the United States.³ Finally, Juridica earned \$73.9 million in net proceeds in 2014, and brought its total gross proceeds to over \$241 million from litigation, \$178 million of which is net profit. According to Juridica, its investments “have been made predominately in the United States.”⁴

¹ Both Burford and Juridica are incorporated in Guernsey and publicly traded on the London Stock Exchange’s Alternative Investment Market. Bentham Capital LLC is the wholly owned subsidiary of IMF Bentham Ltd. IMF Bentham Ltd is incorporated and domiciled in Australia and publicly traded on the Australian Securities Exchange.

² Burford Capital, *Annual Report 2014*, (March 17, 2015) at 8.

³ Bentham’s chief investment officer observed that “[t]he pace and volume of new funding opportunities have grown sharply in the past year.” *Id.*

⁴ Juridica Investments Ltd, *Annual Report 2014*, (April 10, 2015), at 15.

Your burgeoning industry is largely unregulated and operates with no licensing or oversight. Lending agreements between plaintiffs and commercial funders are confidential and generally not disclosed to the courts, the opposing party, or the public unless the terms of the agreement itself are the subject of subsequent litigation. And while commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions.⁵

We are concerned about the nature of commercial financing agreements and the impact they have on our civil justice system. Accordingly, please provide answers to the following questions:

1. For each year from 2009 to 2014, please identify the matters (by case name and docket number) being litigated or arbitrated in the United States, where you have entered into a financing agreement, or similar arrangement.
2. For each matter being litigated or arbitrated in the United States, please identify the lawyers or law firms, or other persons, with whom you have entered into financing agreements, or similar agreements.
3. For each matter being litigated or arbitrated in the United States, please summarize the subject of the dispute, whether it resolved and how much money was paid to (i) the plaintiffs; and (ii) your firm.
4. For each year from 2009 to 2014, please provide the total amount of capital committed to matters being litigated or arbitrated in the United States. Please provide these figures both in absolute terms, and as a percentage of the overall capital committed on a worldwide basis, for each calendar year.
5. Please describe your returns on investment for each matter for the years 2009-2014.
6. Please identify any referral agreements, either formal or informal, you, your firm (including any subsidiaries) or any representatives thereof have entered into with any lawyers or law firms in the United States. If you, your firm (including any subsidiaries) or any representatives thereof have entered into any such agreements, please provide copies, as well as a description of the terms. In your answer, please also provide the number of referrals made, the number of cases financed, and the final resolution of those financed cases.

⁵ See, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014).

7. Have you been a party to any litigation or arbitration arising out of the terms or provisions of the financing agreements you have entered into? If so, please identify the matter, as well as the forum and current status.
8. Do any of your agreements include either: (a) a provision or language that vary the interest collected on the amount funded depending on the amount recovered by the plaintiff, or (b) language that provides that if plaintiffs settle the matter for an amount below a contractually provided figure, the net recoveries will be calculated by reference to an amount other than the actual recovery? Please provide copies of any such agreements, and identify the relevant provisions.
9. Do your financing agreements typically include arbitration clauses? If so, do those clauses cover disputes between you and the plaintiff over whether or not to enter into a settlement with the defendant?
10. In any matters where class treatment was sought under FRCP Rule 23 (or similar state rule of civil procedure), have you disclosed the existence or terms of the financing arrangement to the court or other interested parties?
11. Regardless of your answer to number 10, under what circumstances, if any, do you disclose the existence and/or terms of your financing agreements to other interested parties (including but not limited to the court and opposing parties)?
12. Does your firm or any of its affiliates make any investments other than in litigation? If so, please identify these investments and the amount of capital – absolute and relative, as described in question 4 – committed to those investments?

Thank you in advance for your cooperation with this request. We would appreciate a response by September 18, 2015. If you have questions, please contact Ted Lehman or Noah Phillips from our respective Committee staffs at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
United States Senate Judiciary Committee



John Cornyn
Chairman
Subcommittee on the Constitution

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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August 27, 2015

VIA ELECTRONIC TRANSMISSION

Lord Daniel Brennan
Chairman, Juridica Investments Ltd.
11 New Street , St. Peter Port
Guernsey, GY13EG

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EXHIBIT 2



The New York Times Magazine | <http://nyti.ms/1NVIdoN>

Should You Be Allowed to Invest in a Lawsuit?

In recent years, investors have started buying shares in other people's litigation proceedings. Are they warping the legal system in the process?

By **MATTATHIAS SCHWARTZ** OCT. 22, 2015

The Miller quick coupler comes in a few different sizes. The one I tried out has the proportions of a laundry bin and weighs nearly 700 pounds. It allows the operators of hydraulic digging machines to switch buckets without ever leaving the cab. Two flanges rise from its sides, supplying it with the Volkswagen-like curves that inspired its nickname, the Bug. The flanges are drilled clean through with four holes set inside four bosses; beneath the front pair of holes are two upturned latches, like the open ends of two wrenches. Other than its poppy-red color, the device appears to be an ordinary specimen from the menagerie of heavy-duty construction equipment.

But in a Chicago courtroom on Oct. 26, the Bug will star in a multimillion-dollar dispute that represents a new frontier in the march of global capitalism. The nominal occasion is a paternity feud between two of the Bug's corporate parents, Miller UK, the equipment manufacturer based in Cramlington, England, and Caterpillar, the American construction-equipment giant that was once Miller's biggest customer. The themes of Miller UK v. Caterpillar are classics of the intellectual-property genre: greed, betrayal, bloodlines. But Miller's method of funding its side of the production is something new. Rather than paying its lawyers out of pocket, Miller has turned to a private firm to front the money for its legal costs: the Illinois-based Arena Consulting, which is headed by two brothers, Herbert and Douglas Lichtman. If Miller loses, Arena gets nothing. If it wins, Arena will get a share of the proceeds, which could run well into the tens of millions of dollars.

This new form of lawsuit funding is called litigation finance. It lies at the crossroads of two Anglo-American tendencies. The first is our litigious side, in which we celebrate our equality before the law by dragging those who have wronged us before a judge. The second is our ingenious mercantilism, as demonstrated by our penchant for turning everything from church raffles to mortgages into marketable securities to be chopped up, bundled and resold. Like the celebrity bonds backed by royalties and popularized by David Bowie during the 1990s, litigation finance represents the expansion of securitization into hitherto virgin territory. Those involved in the practice argue that it allows smaller companies like Miller to afford a day in court. Detractors worry that it could give rise to a litigation arms race, with speculative money aggravating the already high costs of the American legal system.

While the amount of litigation funded by outside financiers is still relatively small, the industry — which barely existed outside personal-injury cases until the mid-2000s — is growing rapidly, driven by increasingly permissive laws, the promise of high returns and hourly billing rates that run \$500 or more for the largest and most sophisticated law firms. Between 2013 and 2014, Burford Capital, a public company traded in Britain, increased its lawsuit investments from \$150 million to \$500 million. During the same period, its profits rose by 89 percent, with a 61 percent net profit margin. The two-year-old Gerchen Keller, one of the industry's youngest funds, manages more than \$840 million. With investor-backed war chests, plaintiffs are crossing borders to find the most favorable jurisdictions, and sometimes enlisting the help of foreign governments. Like equities and mortgages, lawsuits are making a transition from a private arrangement to a fully monetized asset class. The “portfolio” held by IMF Bentham, an Australia-based funder, consists of 39 cases, which the firm values at just over \$2 billion. United States lawmakers are beginning to ask questions. In August, two senators from the Judiciary Committee sent letters to major funders asking them for the names of the cases they had invested in and many details of their business dealings. The letter called litigation finance a “burgeoning industry” that was “largely unregulated and operates with no licensing or oversight.”

Larger companies, even those with their own in-house counsel, are selling off pieces of lawsuits to smooth out cash flow and offload risk. Juridica Investments, a Miami-based fund with \$650 million under management, specializes in working

with Fortune 500 companies, which make up 80 to 85 percent of its investments, according to Richard Fields, its chief executive, who says that outside funding helps align the interests of plaintiffs' lawyers with those of their clients. "You want the largest recovery, in the shortest time, with the least uncertainty," he says. Smaller companies can use litigation financing to finance growth, by using their future award as a credit line.

Over the last century, many have come to see lawsuits as a means of expression, a political weapon and a powerful deterrent against those who might do wrong. And yet creating lawsuits is not the same as creating something like the Bug. Litigation is a zero-sum industry — every dollar in damages taken home by the winner, minus fees, must be wrung out of the loser. Litigation also helps shape legal precedent, defining the terms under which civil justice may be sought. It's hard to imagine how billions in outside capital won't wind up changing the justice system. The only question is how.

To help me understand what a quick coupler does, David Ridley, a straw-haired Miller mechanic in a jumpsuit, arranged a demonstration. Beside a chain-link fence near the Miller UK factory, he had set up a yellow Komatsu digging machine, of the scale favored by demolition crews and construction-minded toddlers. Attached to the end of its hydraulic arm was a digging bucket. Ridley picked up a sledgehammer and tapped a wrist-like joint, then slid out one of the two cylindrical pins holding the bucket in place. The pin's chrome surface was coated with grease. He hoisted it onto his shoulder. It weighed about 100 pounds.

"How many people want to be changing that all day?" Ridley asked.

Ridley then tapped out the other pin, climbed up into the Komatsu's cab and revved the diesel engine up to a gentle hum. He swung the yellow arm over to the Bug and positioned it within the flanges so the four holes aligned. He connected some hydraulic hoses to deliver power to the Bug's innards and tapped the two pins back in. Then, using the Bug-enhanced Komatsu, Ridley picked the bucket back up. Thanks to the Bug, it was an idiotproof process. A bright yellow safety latch tightened neatly over one of the pins. It took less than 10 seconds.

Before quick couplers, operators would waste 30 minutes or more each time they wanted to switch out a bucket or other tool. Miller's first quick coupler, nicknamed the Magnificent Seven, came to market in the early 1990s, reducing that time to seven seconds. They also solved another problem. Previously, a construction company with three kinds of machines would need to buy three lines of buckets to match. Quick couplers soon created universal compatibility among product lines: A Komatsu bucket, for example, could now be slapped onto a Volvo machine.

Caterpillar soon took notice. Compared with Miller, Cat is a leviathan: It's one of the 200 largest corporations in the world, with more than 100,000 employees. In 1997, according to legal filings from Miller, Cat approached a Miller executive at a trade show in Germany. The two companies began to talk about having Miller contract to supply Cat with a fully automatic coupler that the companies ultimately brought to market as the Pin Grabber Plus. Over the years, Cat (by Miller's count) bought about 27,000 of these units for resale to its own customers, generating upward of \$100 million in revenue. Each generation of couplers had to mesh perfectly with the specifications of Cat's machines, so the companies' engineers exchanged technical drawings, and their executives hobnobbed over dinners in Northumberland and Illinois. By 2006, Caterpillar was ordering about 10,000 Miller couplers a year. According to Miller, Caterpillar orders accounted for as much as 28 percent of its business and a larger share of its profits.

Then, in the midst of the 2008 downturn, Cat, according to Miller's version of events, abruptly told Miller that its couplers would no longer be needed. Cat had designed its own coupler in-house. (Cat's filings deny that its coupler used Miller's proprietary technology and say that it was allowed to terminate its contract with Miller at any time.) Keith Miller, the company's founder, was gutted. With the loss of his largest customer, Miller earnings swung from an eight-million-pound profit to a million-pound loss. Miller took on debt and dismissed more than half of its employees.

A year after Cat broke the news, Keith Miller saw its competing coupler for the first time. "It wasn't just similar," he told me. "It was a replica of ours." Miller felt certain that the new Cat couplers made use of his company's know-how. He sued Caterpillar for breach of contract, fraud and misappropriating trade secrets. But he

quickly learned what it means to sue a company as large as Cat. Caterpillar's lawyers made dozens of preliminary filings. They claimed that Miller had delivered "substandard" couplers and failed to address "continuity of supply" issues that it had repeatedly raised.

Miller's lawyers quickly went through millions of pounds. To make it through the discovery phase of the suit would require millions more. Keith and his two siblings, who own the company together, mortgaged their houses and signed personal guarantees on the company's debt. But still they didn't have enough money to see their case through to court. So a contact in London introduced them to Reed Oslan, a Chicago lawyer who specializes in litigation finance.

In the legal world, the Miller lawsuit is what is known as a "David and Goliath" case, in which a plaintiff is so outgunned financially that it wouldn't be able to have its day in court without a lawyer willing to work on contingency or an infusion of investor cash. The Davids come in a variety of guises. Patricia Cohen, ex-wife of the billionaire hedge fund manager Steven A. Cohen, got a reported \$1.2 million war chest from a firm called Balance Point, which specializes in funding divorce cases like hers. In 2006, 16 years after their divorce, Patricia saw a "60 Minutes" report on her ex-husband's business, which led her to file a lawsuit accusing Cohen of racketeering and fraud, claiming that he concealed \$5.5 million during their legal proceedings. In 2014, after a string of findings and appeals, a federal judge dismissed the racketeering portion of Patricia's claim, noting that the only difference between it and other family disputes was "the seemingly inexhaustible resources that each side has brought to bear," but he allowed Patricia to continue her case against Steven for fraud and other claims. The litigious aftermath of the Cohen divorce, he noted, had persisted for twice as long as the Cohen marriage. Gerald Lefcourt, Patricia Cohen's lawyer, said that outside financing was necessary for Patricia to challenge someone with the resources of her ex-husband. "The average person who has a good job making \$100,000 a year is middle class, but totally shut out of the legal system," he said. "You can't fight a big case. How do you do it?"

Terms of the deal between Miller UK and its funders have not been disclosed, but funders typically acquire the rights to 20 to 60 percent of all damages in hopes of recouping two or three times their original investment, sometimes more. This

month, when *Miller UK Ltd. v. Caterpillar Inc.* is scheduled to reach trial in a federal court in Chicago, Miller's lawyers will ask a jury to award Miller more than \$100 million. "As the boss, I have to find a way forward," Keith Miller said. "We're just a little business from the northeast of England. Without litigation finance, we couldn't take them on."

Despite the hypercapitalist spirit of its rise, litigation finance actually has its roots in antiquity. According to Max Radin, a historian of ancient city-states, members of Athenian political clubs would back each other in lawsuits against their rivals. Apollodorus, a wealthy banker's son, bought shares of lawsuits and hired professional orators — some of the earliest lawyers in Western history — to write his court speeches. The Romans tolerated the practice in some cases until the sixth century, when it was banned by Emperor Anastasius. The Roman taboo on litigation finance, Radin writes, sprang from the idea that "a controversy properly concerned only the persons actually involved in the original transaction," not self-interested meddlers. In medieval England, litigants could hire "champions" to represent them in "trial by battle." By the late 13th century, these strongmen were being compared to prostitutes, and their prevalence hastened the movement of dispute resolution to the courtroom. During the Middle Ages, this concept of "champerty" — assisting another person's lawsuit in exchange for a share of the proceeds — emerged as part of the larger ecclesiastical taboo against usury. Though the word was associated with feudal land grabs, Radin notes that in practice, champerty was used by rich lawyers "on behalf of propertied defendants." In 1787, Jeremy Bentham, the political philosopher, mocked prohibitions on champerty as a holdover from feudal days, where courts were beholden to "the sword of a baron, stalking into court with a rabble of retainers at his heels."

Nevertheless, a vestigial squeamishness about investing in lawsuits made its way across the Atlantic. The first such disputes, early in the 20th century, were over contingency fees, the practice, now common, of lawyers taking on a case in exchange for a percentage of future damages. Unlike England, which still caps fees for winning solicitors, America was open to this kind of payment structure, in keeping with its frontier ethic toward credit and speculation. Twenty-eight states now explicitly permit champerty, as long as funders do not act out of malice, back frivolous lawsuits or exert too much control over trial strategy.

Hedge funds, banks and insurance companies have long been quietly funding the occasional lawsuit, but no major United States investment outfit in the commercial arena specialized in the practice until Juridica was founded in 2007. The industry's early growth was driven in part by the recession, which made lawyers at big companies eager to hand off risk and also increased the demand among investors for opportunities that could pay off no matter what was happening in the world's markets. Today the industry seems to have become a permanent part of the financial landscape, with shares of prominent funders trading every day on stock exchanges in London and Sydney.

Anthony Sebok, a professor at Cardozo Law who advises Burford, says he sees the practice as part of a broader trend toward the financialization of the law. "Why can't I promise a stranger some piece of the game?" he asked me, paraphrasing Bentham's writings. "Is there something icky about it, like I'm commodifying my rights? Bentham says these legal rights are our property. Why shouldn't we be able to sell them?" Jonathan Molot, a professor at Georgetown Law who serves as Burford's chief investment officer, has written that stock offerings by law firms could improve morale, lower rates and help lawyers focus on maximizing long-term profits. Like lawsuits, the firm itself should evolve into an asset. "It's a mistake for lawyers to hunker down and say we're different, we're excluded, we're not part of the economy," he said.

But the interests of financiers and plaintiffs are not always so well aligned. Depending on the structure of the deal and the ultimate payout, plaintiffs sometimes walk away with a few crumbs after the funders and lawyers take their share. One such outcome happened in 2007, when Altitude Capital, a funder, invested \$8 million in an intellectual-property suit filed by DeepNines, a small network security company, against McAfee, a much larger competitor. The case was settled for \$25 million, but after expenses (\$2.1 million), lawyers' fees (roughly \$11 million) and Altitude's cut (\$10 million), DeepNines took home \$800,000, a little over 3 percent of its settlement. Then, Altitude questioned DeepNines' math, arguing that the company shouldn't have deducted its own expenses before calculating contingency fees. It sued its former partner for \$5 million more, eventually dropping the suit in 2011.

This kind of falling out is unusual, but it shows the fundamental conflict that can occur. When it's time to divvy up the prizes, allies can turn into competitors, and smaller, inexperienced plaintiffs can find themselves facing down a second Goliath — their former champion.

The Institute for Legal Reform, a Washington-based lobby affiliated with the Chamber of Commerce, argues that litigation finance will prompt courts to award damages so large that they hurt American businesses. Executives from Johnson & Johnson, FedEx, Dow Chemical and many other large companies have sat on its board. “We support the position taken by the Institute for Legal Reform,” said a spokeswoman for Caterpillar, who said she could not comment further on the Miller case because of the pending lawsuit.

Lisa Rickard, the institute's president, calls litigation finance “the biggest single threat to the integrity of our justice system.” As evidence, she put me in touch with Howard Schrader, a lawyer for Ace Limited, a \$35 billion insurance company engaged in a multifront legal battle over a grievance dating back to the Liberian Civil War of 1991. At its root was the question of whether a Liberian company run by Lebanese nationals was due an insurance settlement over a looted supermarket, or whether the damage fell under a war-risk exclusion in its insurance policy that ruled out “insurrection.” The plaintiff was a Liberian official, represented by a lawyer from the British Virgin Islands, who had found outside investors and sued in a Cayman Islands court to enforce a Liberian judgment. Schrader spent more than an hour speaking with me by phone, dutifully walking me through the case and peeling back mind-numbing layers of acquisitions, indemnity agreements, receiverships and jurisdictional disputes. To Rickard, the Ace Limited case was an example of buccaneering funders tracking down far-flung plaintiffs to pick at old wounds. I wasn't so sure. On one hand, a giant Swiss insurance company felt it was being shaken down. On the other, a small business felt it was due something for paying years of premiums. I had trouble feeling too sorry for either.

In another long-running legal battle, which began in Ecuador and has since spread to several other jurisdictions, Steven Donziger, a Harvard Law School-educated lawyer, has pursued Chevron with an Ahab-like single-mindedness. He has donned the hats of advocate, adviser and ad hoc fund-raiser for some 30,000

indigenous Ecuadorians who live around the Lago Agrio area and claim that Texaco, which Chevron acquired, left contaminated waste pits around old oil-drilling sites on their land. In 2010, after the case had gone on for 19 years and Donziger's team had gone through \$7 million, Burford bought in. They invested \$4 million, with another \$11 million planned. In exchange for its support, Burford would receive 5.5 percent of the settlement, which could work out to a 100-to-1 jackpot should Chevron pay \$27 billion in damages, an ambitious sum calculated by a court-appointed expert.

Chevron went on offense, digging up outtakes from a documentary in which Donziger extols the suit as an act of "brute force" and the purpose of plaintiffs' law as "to make [expletive] money." (Donziger has said that these excerpts are "grossly misleading or lacking in context.")

In September 2011, Burford sent Donziger a letter ending their relationship. They accused his team of "fraudulent conduct" and "deception," citing Donziger's communications with the supposedly impartial expert who had come up with the \$27 billion settlement figure. Burford said that consultants working with Donziger's team had "ghost written" the expert's report and "worked very hard to cover that up." Donziger, meanwhile, has continued his crusade against Chevron in Canada, Argentina and Brazil. "You cannot sustain this kind of case without money, and a lot of money," Donziger said in 2010. You can imagine Chevron's being more inclined to settle had Donziger taken a less ambitious approach. Considering that scenario, it's arguable that Burford's investment could have been part of what has kept those 30,000 Ecuadorians — Donziger's clients — from receiving one penny in damages, more than 20 years after Texaco left their area. In 2014, a federal judge ruled that Donziger could not continue to pursue Chevron in the United States. Donziger has appealed and continues his foreign lawsuits. Chevron calls the case against the company "the legal fraud of the century."

Not long ago I had breakfast with Christopher Bogart, Burford's C.E.O. He is in early middle age, and his well-tended appearance and subtly asymmetric eyeglasses signal prosperity. "We've done more than 100 deals," he said, speaking of the Chevron case. "We haven't had another one that's gone that way." Burford, Bogart told me, never anticipated a \$27 billion payout. "We believed that Chevron would

settle for much less than that,” he said, perhaps \$1 billion, a more modest 3-to-1 or 4-to-1 win.

“The case illustrates something that I think all lawyers know,” he continued. “You don’t always get all of the facts from your client.” His tone was somewhere between resignation and remorse, like a banker who had made a bad bet.

Of course, the transformation of legal disputes into deals didn’t begin with litigation finance. For years, observers of the legal profession have criticized how the market economy erodes its ethical obligations, pushing private advantage over public good and billable hours above all. Only the truly rich can afford to hire a professional who will zealously and exhaustively defend their interests. When litigation financiers talk about expanding access to justice and standing up for the little guy, they generally mean helping millionaires pursue claims against billionaires. In some ways, the rise of litigation finance is a symptom of what the American civil-justice system has become — a slow, expensive and complicated system for mediating corporate breakups. The judges in this system might talk like referees, but their function is moving toward that of accountants.

Keith Miller sometimes imagines his lawsuit as a movie, the heavy-equipment version of “Erin Brockovich.” For years, he claims, Caterpillar denied rumors that it was building its own version of the Bug, reassuring Miller of the prospects for their ongoing relationship up to the moment that Cat terminated the contract. Emails turned up during discovery by Miller’s legal team show Caterpillar employees’ strategizing about what to do if the information somehow leaked. To Keith Miller, the dispute over the quick coupler’s origin is about more than money.

“All we want to do is set the record straight about what happened and why,” he told me.

An initial skirmish in Miller v. Caterpillar involved a major question for litigation finance as a whole — should plaintiffs be forced to disclose their funding arrangements, or are they entitled to keep these deals confidential? Lisa Rickard, from the Institute for Legal Reform, argues in favor of disclosure. “That helps the judge and the defendant understand who’s pulling the strings,” she told me.

Judge Jeffrey Cole, who is presiding over the Miller case, disagreed. He called champerty “a hoary doctrine” that time had “narrowed to a filament.” Many of the particulars of Miller’s financial dealings with its backers, Cole found, are irrelevant, as they “have nothing to do with the claims or defenses in the case.” Miller could keep the specifics of how it was financing its lawsuit confidential.

If Cole’s ruling is any indication, the day is approaching when lawsuits are something like the Bug itself — complicated, expensive and eminently transferable commodities. More and more lawyers will find themselves being paid by people whose interest in the outcome is speculative, not personal. Somewhat like mortgage banking, lawyering will involve serving as a buffer between the people who care and the people who manage the probabilities.

Like most entrepreneurs, Keith Miller is a bit of both. His feelings about Caterpillar’s treatment of the Bug haven’t stopped him from continuing to sell the company some of Miller’s smaller products. “We’re hand-to-mouth each month,” he says. “Quite frankly, we’re not in a position to turn anything down.” Could he ever imagine repairing Miller’s relationship with Cat? “I’d be delighted to do that,” he said. “So long as we’re reimbursed for our losses.”

Correction: October 23, 2015

An earlier version of this article misstated the amount of money managed by the firm Gerchen Keller. It has more than \$840 million under management, not \$475 million in private capital.

Mattathias Schwartz is a contributing writer for the magazine. His **last article** was about the meaning of the word “relevant” in the USA Patriot Act.

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A version of this article appears in print on October 25, 2015, on page MM55 of the Sunday Magazine with the headline: Trial by Money.

EXHIBIT 3

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Daniel Fisher Forbes Staff

I cover finance, the law, and how the two interact.

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Lawsuit Details How Law Firms Borrow And Pay Millions To Get Mass Tort Cases

A former employee of a Houston law firm offers a revealing look at the world of mass torts in a lawsuit detailing how the firm borrowed millions of dollars at near-usurious rates to buy control of thousands of cases that it hoped to turn into as much as \$200 million in fees.

In the lawsuit, former Wells Fargo leveraged-finance executive Amir Shenaq says he was lured to AkinMears, a high-volume Houston law firm, by the promise of millions in dollars in fees for himself if he could obtain needed financing. Shenaq claims he earned \$1.4 million during his four-and-a-half-month stint at AkinMears but is owed another \$4.2 million for arranging some \$90 million in loans, part of which was used to buy some 14,000 lawsuits from other firms.

The claims, if true, paint an unflattering portrait of a business where law firms use television and Internet ads to recruit clients, whom they then trade with other firms in exchange for a piece of the contingency fees that often run to 40%. This division of labor may make economic sense, but can run afoul of ethics rules that prohibit lawyers from splitting fees unless they perform meaningful legal work for their clients.

AkinMears lists four partners and three attorneys “of counsel” [on its website](#) including name partners Truett Akin IV and Michelle Mears. A lawyer for the firm said they would have no comment. Shenaq’s lawyer, Kenneth S. Wall, didn’t respond to a request for comment. Houston Judge Randy Wilson issued an order sealing the case on Oct. 7, with the agreement of both sides, because of the potential for “immediate and irreparable injury” to AkinMears. The suit was first reported in a [Texas Lawyer article last week](#).

In a filing that reads more like a potboiler detective novel, Wall explains how the then-29-year-old banker moved to Houston in 2014 to set up a leveraged finance office for Wells Fargo. He began talking to his neighbor, Truett Akin IV, and the two

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quickly began discussing a job. AkinMears owed \$40 million to a local litigation-finance firm that was charging it 24% interest, Shenaq claims, yet it was down to its last \$2 million in cash because of heavy spending on television ads to recruit new clients.

“AkinMears is not run like a traditional plaintiff’s law office, and the Firm’s lawyers do not do the types of things that regular trial lawyers do,” like meet clients, file pleadings and motions, attend depositions “or, heaven forbid, try a lawsuit,” Shenaq claims in his suit. “Despite the fact that AkinMears’ lawyers do not have to dirty their hands with the mundane chores that come with actually practicing law,” the firm charges a 40% contingency fee “which is then divided in some fashion among the participants in its ever-shifting syndicate.”

Akin told Shenaq he wanted to change the firm’s strategy from finding clients through advertising to buying cases from other firms. Shenaq says Akin had a goal of buying \$100 million worth of cases by the end of 2015. He was hired in March 2015, the lawsuit says. Shenaq says he “hit the ground running” and immediately arranged a meeting with [Gerchen Keller Capital](#), a Chicago firm that is one of the biggest in litigation finance.

Hedge funds and firms like Gerchen Keller have long loaned money to plaintiff lawyers, often at high rates, because litigation finance is an attractive investment that is uncorrelated with anything else. In his suit, Shenaq says he lowered AkinMears’ rate from 24% to 16%. With some of the proceeds, he says, Akin bought a fifth interest in a [Phenom 300 corporate jet](#) for \$1.5 million. GKC didn’t immediately respond to a request for comment.

At the same time as he was arranging the new loan, Shenaq says he negotiated transactions with Houston lawyer Fletch Trammel and Dallas lawyer Mazin Sbaiti, who he says was affiliated with four firms that called themselves Alpha Law. They ultimately agreed AkinMears would pay \$40 million for 13,837 mesh cases. Shenaq estimated AkinMears could reap \$130 million to \$200 million in fees from the 14,000 cases, at \$14,000 to \$16,000 per case.

Transvaginal mesh litigation has surged over claims the products made by Johnson & Johnson, C.R. Bard, Boston Scientific and others can lead to infections, incontinence and other conditions. Manufacturers have paid out billions in settlements so far. On its website, AkinMears says it also represents clients in other mass torts including mesothelioma, Risperdal, power morcellators, testosterone therapy, Xarelto, Lipitor and the Mirena intrauterine device.

Shenaq says he was operating under an 18-month contract that promised him \$30,000 a month plus commissions, with the goal of raising \$20 million in capital from new sources. He claims he was to be paid 3% up front, or \$1.5 million on \$50 million, plus a back-end fee that could amount to 2% of the fees AkinMears earned on the cases he helped finance. He also claims he was promised 7.5% of any investment deals he brought to the firm on the front end, plus 5% of resulting fees on the back end. ([Texas ethics rules](#) say “a lawyer or law firm shall not share or promise

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to share legal fees with a non-lawyer,” although a person with Shenaq’s name is a graduate of Emory Law School and member of the State Bar of Georgia.)

Before leaving on a family vacation in July, Shenaq says he sent Akin an e-mail specifying the commissions he was owed. Akin replied “let’s discuss when you return.”

“Uh-oh. You know where this is headed,” the lawsuit states.

In a meeting after he returned, Akin launched into a what he called “a big boy talk” about his work on the deal. Akin claimed another lawyer active in transvaginal mesh litigation originated the deal, and Shenaq hadn’t raised any capital. By the weekend he learned his health insurance had been cancelled. When he went to pick up his belongings, he learned from the firm’s lawyer that he’d been fired on July 31 for self-dealing and conflicts of interest.

The firm didn’t specify what those were, and if it was his help arranging loans for other lawyers in the syndicate, Shenaq says, Akin suggested them both. “Akin and Mears didn’t pay Shenaq for one reason and one reason only: They didn’t pay him because they didn’t feel like it,” he says.

The lawsuit is dated Sept. 29 and soon after it was filed AkinMears moved to seal it. “This information would be valuable to any competitor by, for example, assisting the competitor in creating a business plan or financial model maximizing efficiency similar to that of AkinMears and otherwise allowing a competitor to gain an unfair advantage in financing deals similar to those to which AkinMears was a party by knowing AkinMears’ financial data,” Texas Lawyer reported the firm said in its motion to seal the case.

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Inside Massive Injury Lawsuits, Clients Get Traded Like Commodities for Big Money

A disgruntled former law firm employee spills secrets on a mass tort factory.

Paul Barrett

October 22, 2015 — 2:05 PM EDT

For all the black robes and ceremony, the American legal system often operates more like a factory assembly line than a citadel of individualized justice. Ninety-five percent of criminal prosecutions end in plea deals. Many defective-product claims settle in mass pacts that benefit attorneys more than putative victims. Now a legal dispute within a plaintiffs' law firm that organizes massive torts is threatening to pull back the curtain on the mechanics of high-volume litigation.

It's not a pretty picture.

Amir Shenaq, a 30-year-old financier, sued his former employer, the Houston law firm [AkinMears](#), over \$4.2 million in allegedly unpaid commissions. To earn those fees, Shenaq says he raised nearly \$100 million used to purchase thousands of injury claims from other lawyers. The suit portrays a claim-brokering marketplace that normally operates in secret, with clients recruited en masse through TV and Internet advertising who are then bundled and traded among attorneys like so many securitized mortgages.

AkinMears “is not run like a traditional plaintiffs’ law office, and the firm’s lawyers do not do the types of things that regular trial lawyers do,” according to the Shenaq suit, which was filed in Texas state court in late September by another Houston firm, Oaks, Hartline & Daly. AkinMears doesn’t do “things like meet their clients, get to know their clients, file pleadings/motions, attend depositions/hearings, or, heaven forbid, try a lawsuit,” Shenaq alleges. Rather, AkinMears “is nothing more than a glorified claims-processing center, where the numbers are huge, the clients commodities, and the paydays, when they come, stratospheric.”

AkinMears's outside attorney, Allan Neighbors IV of Houston, declined to comment or make the firm's name partners, Truett Akin IV and Michelle Mears, available for interviews. In court filings, AkinMears denied wrongdoing and said Shenaq had been fired last July 31 for unspecified reasons. Shenaq, a former Wells Fargo Securities leveraged-finance banker, alleges Akin fired him to avoid paying the multimillion-dollar commissions.

AkinMears asked the trial judge to seal Shenaq's suit, saying his disclosures "will cause immediate and irreparable harm to the continued nature of financial and other information belonging to AkinMears and those with whom it does business under terms of confidentiality." Judge Randy Wilson granted the gag order earlier this month, but only after the original filing had been disseminated online. Shenaq and the Oaks firm did not respond to requests for comment.

While it primarily concerns Shenaq's attempt to get paid commissions he says he's owed, the employment suit illuminates the now-common practices of litigation finance and claim aggregation. Shenaq alleges that in 2014, five-attorney AkinMears switched strategies away from "buying non-stop advertisements and acquiring clients in a random, unpredictable manner." Instead, the firm's principals decided "to start making direct investments in ongoing mass tort litigation" over such products as hip implants, Viagra, and Lipitor.

To finance those investments, AkinMears asked Shenaq to raise tens of millions of dollars from outside investors. The former banker says he did that primarily by obtaining nearly \$100 million from the Chicago-based hedge fund Gerchen Keller Capital. The fund specializes in betting on other people's lawsuits—a form of alternative investing known as litigation finance.

With the Gerchen capital, according to the Shenaq suit, AkinMears purchased some 14,000 defective-product claims, most of them concerning so-called transvaginal mesh, a type of implant designed to bolster sagging organs. Some women have complained that once implanted, the devices also cause injury and severe pain. By Shenaq's calculations, the mesh cases cost AkinMears between \$2,500 and \$3,125 apiece and yielded attorneys' fees of \$15,000 each.


It isn't clear from the court filings how much the plaintiffs stood to gain from settlement of their claims or where the AkinMears-owned cases stand. It also isn't clear which companies AkinMears sued with the client information it acquired. Among the defendants that have been sued in connection with transvaginal mesh implants are C.R. Bard, Boston Scientific, and Johnson & Johnson.

Gerchen Keller managing director Travis Lenkner declined to comment, citing client confidentiality, but the hedge fund has been highly visible in the burgeoning litigation finance field. The firm announced a new \$475 million fund in February for investments such as the AkinMears financings. Taken all together, Gerchen Keller says it manages some \$800 million in assets for pension funds, endowments, foundations, and financial institutions—enough to make it one of the largest players in litigation finance.

In some instances, Gerchen Keller invests in litigation in exchange for a cut of any recovery. The investments with AkinMears, however, were essentially loans extended at an interest rate of “slightly below 16 percent,” according to the Shenaq suit.

The U.S. Chamber of Commerce has condemned both claim aggregation and litigation finance as likely to encourage frivolous and abusive lawsuits. “The allegation that a law firm used hedge fund money to buy and sell thousands of personal injury lawsuits shows plaintiffs have become little more than commodities,” says Lisa Rickard, president of the Chamber's Institute for Legal Reform. “This case appears to be a new example of how litigation financing perverts the justice system and puts the interests of lawyers and financiers ahead of actual plaintiffs.”

More about the plumbing of mass lawsuits could become public if the Shenaq case defies the odds and proceeds to a public trial. And even the information available so far has helped to underscore that the life of a plaintiffs’ attorney isn’t necessarily what’s taught in law school. “Despite the fact that AkinMears’s lawyers do not have to dirty their hands with the mundane chores that come with actually practicing law,” the suit alleges, “the firm nonetheless charges a robust 40 percent contingency fee for its efforts (which is then divided in some fashion among the various participants in its ever-shifting syndicate).” Lucrative work, if you can swing it.

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Ex-Employee of AkinMears Sues Firm, Alleges Millions Owed

Brenda Sapino Jeffreys, Texas Lawyer

October 20, 2015

A Harris County judge has temporarily sealed a petition filed by a former employee of Houston mass tort firm AkinMears who alleges that the plaintiffs firm fired him in July because it didn't want to pay him millions in unpaid commissions and fees for his work raising capital for firm.

In that Sept. 29 petition, Amir Shenaq alleges that when his employment was terminated on July 31, the firm owed him \$4.2 million in unpaid commissions and fees for raising nearly \$100 million for the firm in four months. Shenaq alleges in the petition that he not only met the goal set in his employment contract, but "shattered" it, since he was asked to raise \$20 million in capital from new sources or \$40 million from all sources.

Shenaq alleges that after he sent the firm an email requesting payment of the compensation due him, partner Truett Akin IV told him the request was "insulting" and demanded to know why Shenaq should be paid before him or partner Michelle Mears.

Shenaq alleges in the petition that AkinMears may have planned all along to find a way to not pay him all that he's due.

"And looking back at how it all went down, it is now clear that the question wasn't if AkinMears was going to screw Shenaq. The only question was when," Shenaq alleges in the petition.

Defendants Akin and Mears did not return telephone messages seeking a comment. Neither did defense attorney Allan H. Neighbors IV, a shareholder in Littler Mendelson in Houston.

Defendants AkinMears, Akin and Mears have not filed an answer to the allegations in Shenaq v. Akin. However, AkinMears filed a motion on Oct. 1 seeking temporary and permanent orders to seal the court record on the ground that Shenaq breached a confidentiality agreement with the firm by disclosing "large and varied types of confidential, proprietary, and trade secret information about AkinMears, its business partners and clients.

"This disclosure was certainly no accident and serves no purpose other than to financially harm AkinMears and those with whom it does business."

AkinMears alleges that it fired Shenaq for cause on July 31, and that in the petition he filed on Sept. 29, Shenaq disclosed confidential and proprietary information that is valuable because it gives the firm a competitive advantage and could give competitors an unfair advantage.

"This information would be valuable to any competitor by, for example, assisting the competitor in creating a business plan or financial model maximizing efficiency similar to that of AkinMears and otherwise allowing a competitor to gain an unfair advantage in financing deals similar to those to which AkinMears was a party by knowing AkinMears' financial data," the firm alleges in the motion.

It alleges that Texas Rule of Civil Procedure 76a allows court records to be sealed.

On Oct. 6, plaintiff Shenaq and defendant AkinMears filed an agreed temporary order sealing the original petition and request for disclosure filed on Sept. 29. On Oct. 7, 157th District Judge Randy Wilson signed an order temporarily sealing the petition and setting a hearing in November on AkinMears' motion to seal a court record.

In a notice of oral hearing on AkinMears' motion to seal, filed on Oct. 7, the firm alleges that Shenaq sued the firm and partners Akin and Mears for claims arising from his employment and for compensation. Shenaq brings breach of contract, quantum meruit, accounting and constructive trust causes of action against the defendants.

AkinMears alleges in the notice of oral hearing that Shenaq discloses confidential information in the petition, including information "concerning the source and identity of AkinMears' financing; amounts of financing obtained by AkinMears; settlement values of cases in which AkinMears or its business associates have interest; AkinMears' borrowing costs and related financial impacts of such borrowing costs; actual and potential fees received by AkinMears; commissions paid to others; and confidential deal terms related to the purchase of litigation dockets, including the purchase price, number of cases and financing terms."

Plaintiffs attorney Kenneth Wall, of counsel with Oaks, Hartline & Daly in Houston, did not return a telephone message seeking a comment.

The Alleged Arrangement

In the petition, Shenaq alleges that he left a job in finance at Wells Fargo Securities to join AkinMears in March to help it raise money to "start making direct investments in mass tort litigation" and to get away from the business practice of securing clients through television advertisements. Shenaq alleges that he learned that the firm had borrowed more than \$40 million from Virage Capital Management, but by mid-February, "the firm's cash position had withered below \$2 million."

Shenaq alleges that he joined the firm on March 16 and signed an employment contract calling for a minimum of 18 months of employment and with a goal to raise at least \$20

million in capital from new sources or \$40 million from all sources. As for compensation, Shenaq alleges that he would receive a \$30,000 monthly draw on a nonrecourse basis, and receive commission or fees for capital acquisition, deal origination and deal closing. He alleges that the firm put no limit on his potential compensation.

Shenaq alleges in the petition that he secured financing for the firm from Chicago-based Gerchen Keller Capital (GKC), including a \$50 million commitment in April. He alleges that GKC wired half of the money to the firm and half to Virage to pay down its debt. He alleges that the firm paid him \$1,430,765, a 3 percent commission, for raising that \$50 million, and Akin "assured" him that he would be paid another \$1 million in 18 months.

In addition to several smaller financings, Shenaq alleges that he also secured another \$45 million commitment from GKC to fund the purchase of about 14,000 transvaginal mesh cases from a group of four law firms. Shenaq alleges that he estimated the value of fees from those cases at \$130 million to \$200 million, based on a net return of attorney fees of \$14,000 to \$16,000 per case. He alleges that final terms of the deal, which closed in July, called for AkinMears to pay \$40 million for a docket of 13,837 mesh cases and 900 nonmesh cases, with GKC financing the purchase price and committing to provide an additional \$6 million for case expenses.

Shenaq alleges that in late July, prior to going on a family vacation, he sent an email to Akin requesting payment of \$4.2 million in compensation in commission and fees. He alleges that after he returned from vacation, he went to a meeting at the firm with Akin and Mears that was a "full-on assault" of him.

He alleges that Akin bullied him during the meeting, "intermittently screaming and doing his best to intimidate," and alleging that Shenaq did not originate the mesh case deal, but rather that it was originated by a lawyer who does business with the firm.

"It takes a very clever lawyer—or something—to argue with a straight face that GKC's transfer of over \$43 million to the firm's account at the Post Oak Bank was not an acquisition of capital," Shenaq alleges in the petition, in reference to the \$40 million funding the mesh case deal and another \$3 million in funding for another group of cases.

Shenaq alleges that he received an email from Akin on Aug. 3 notifying him he had been terminated on July 31, and on Aug. 14 he received a letter from a lawyer for the firm stating that he had been terminated for cause on July 31, "due to insubordination, breaches of fiduciary duty, self-dealing and conflicts of interest, thus extinguishing any compensation, back-end interest or fees allegedly owed to you."

Shenaq alleges that neither the firm nor its lawyers explained exactly what he did that caused the insubordination, self-dealing or other allegations. He alleges that he did help two other lawyers arrange financing with GKC, but at Akin's request and with his knowledge.

"AkinMears' after-the-fact story is utter pretext, and its revisionist history would be comical if it wasn't so sinister. Akin and Mears didn't pay Shenaq for one reason and one reason only: They didn't pay him because they didn't feel like it," he alleges in the petition.

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TAB 5I

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I. 15-CV-LL: Rule 4(e)(2) Service on U.S. Employees as Individuals

Robert M. Miller, Ph.D. writes of the difficulty of making service on United States employees sued in their individual capacities. Government agencies will not release employee addresses, making service under Rule 4(e)(2)(B) difficult. Some have permanent residences outside the District of Columbia, and reside only "temporarily" in the District. It is not clear whether they may be served at their place of work, nor whether the agency where they work is "an agent authorized by appointment or by law to receive service of process." He urges clarification of the rule, perhaps to authorize service by leaving the summons at the defendant's place of work or by requiring the agency to disclose a residence address.

He also suggests, indirectly, that "modern means of communication" would be better means of making service than the antique methods now enshrined in Rule 4.

Recent consideration of the ways to adapt practice to the realities of electronic communication has included the possibility of allowing e-service of the initial summons and complaint. The conclusion remains that it is too early to trust to this means of service. Perhaps some states will come to allow e-service, providing not only state-level experience but also experience when the state practice is absorbed through Rule 4(e)(1).

A rule requiring government agencies to reveal employee addresses, even if only for purposes of service, is likely beyond the reach of the Enabling Act, and could easily conflict with other laws.

Allowing service of the initial summons and complaint in the manner allowed for service of later papers by Rule 5(b)(2)(B)(i) may be risky. This means is leaving the paper "at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office."

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Amendment to rules for Service of Process

Rob Miller

to:

Rules_Support

10/26/2015 02:47 PM

Hide Details

From: "Rob Miller" <robmiller44@hotmail.com>

To: <Rules_Support@ao.uscourts.gov>

History: This message has been forwarded.

15-CV-LL

To whom it may concern:

I am a pro se litigant in a number of court cases.

One rule that has caused me great frustration, confusion, and expense has been the duty to serve documents to defendants at their usual place of residence. All of my cases thus far have involved suing government officials in their personal capacities. Their employers – government agencies – have not and will not release their home addresses for proper service.

As you know, failure to make proper service can have serious consequences in a case. As you also know, the average person works at their place of employment for most of the week. They may not even return home if they are frequently in a travel status. For example, two litigants in my cases are residing temporarily in the Washington, DC area but have permanent residences in other states. In most if not all cases, government employees are not permitted to waive service.

Rule 4(e)(2), Federal Rules of Civil Procedure, does not make it clear whether government officials may be served at their places of work, whether agencies must provide current addresses for service of process, or whether Rule 4 (e)(2)(C) provides for service to the agent authorized to accept service of process for the agency or agency officials in their official capacities.

In some cases, e.g. *Bivens v. Six Unknown Named Federal Agents*, the federal officers one is to serve might even be unknown.

At the very least, I recommend that you clarify the rule so that litigants may know their obligations.

However, I urge the US Courts to consider whether the rule requiring service by an adult (not yourself) to the domicile of a litigant is obsolete and unnecessary given modern means of communication, the privacy rights of litigants to their home addresses, the regular place of work of litigants, and the difficulty and cost of obtaining addresses for service.

Sincerely,

Robert M. Miller, Ph.D.
4094 Majestic Lane
#278
Fairfax, VA 22033

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TAB 5J

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J. 15-CV-NN: Minidiscovery and Prompt Trial

Judge Michael Baylson, a former member of this Committee, proposes a new rule for "Mini Discovery and Prompt Trial." It includes elements familiar from the work that led to the 2010 Rule 56 amendments (Judge Baylson chaired the Rule 56 Subcommittee), long-ago "simplified procedure" work, enhanced initial discovery pilot-project proposals, and expedited trial pilot-project proposals. In some ways it could be seen as a rule that might emerge as a culmination of all that work.

Cases would fall into the new rule either on agreement of the parties or on the court's direction.

Relevant documents would be exchanged without request, along with a certification that a reasonable search had been conducted and that all documents within the scope of the issues framed by the pleadings had been produced or listed on a privilege log. Interrogatories would be permitted, but objections must be served in 7 days and responses in 14 days. Depositions among the parties would be limited to 4 per side, with a maximum duration of 4 hours. Third-party discovery would be allowed only on showing good cause. No more than 10 requests for admissions would be allowed. The period for discovery would be limited to 90 days; expert reports would have to be filed within the 90 days.

Motions for summary judgment would be permitted only for good cause, defined as potentially meritorious legal issues but not for insufficiency of the evidence. The idea is that often it is quicker and less expensive to try a case than to prepare a motion for summary judgment, and few motions are granted for insufficiency of the plaintiff's evidence. The issues often can be better determined by post-trial motions in any event. And a welcome consequence would be an increase in the number of jury trials.

These are good and familiar ideas. They can be considered in much of the Committee's ongoing work.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
E-mail: Chambers_of_Judge__Michael_Baylson@paed.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone (267) 299-7520
Fax (267) 299-5078

November 9, 2015

Honorable John D. Bates
United States District Court
District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Proposed Amendment to the Rules of Civil Procedure

Dear John:

Congratulations on your becoming Chairman of the Advisory Committee on Civil Rules. As a former member of the Committee, I am sure that you will cherish and enjoy your tenure as Chair.

I request the Committee to consider a new rule which I have tentatively entitled 26.1 "Mini Discovery and Prompt Trial" ("MDPT"). This rule would allow the court, at the pretrial conference required by Rule 16, to designate relatively simple and non-complex cases as subject to a separate "mini discovery track" where the extensive discovery procedures allowed by Rules 30-36 would not apply.

After discovery, the Rule would provide for a prompt trial. Motions for summary judgment would not be permitted without good cause and leave of court.

Specifically, I propose that if the parties agreed, and/or the court concluded, that the case could proceed fairly with mini-discovery, the court could enter an order as follows:

1. Requiring exchange of relevant documents without a specific request, followed by a certification by the party and its counsel that it had conducted a reasonable search and produced all documents that were within the scope of issues, as alleged in the complaint and answer, and a privilege log of any documents withheld or redacted on account of privileges.
2. Interrogatories would be allowed but objections would be served within seven (7) days and responses served within fourteen (14) days.
3. Intra-party depositions would be limited to four (4) per side, of not more than four (4) hours each.
4. Third party discovery would be allowed only on a showing of good cause.

5. Requests for admissions would be limited to not more than ten (10), following depositions.
6. Any expert reports would be served within the time allowed for discovery.
7. Discovery would be limited to a period of ninety (90) days.
8. The court could modify the above deadlines at or following the Rule 16 Conference.
9. No motions for summary judgment would be permitted, unless specifically allowed by the court for good cause shown (such as a potentially meritorious “legal” defense under the statute of limitations, qualified immunity, etc., but not on grounds of insufficient evidence).
10. Promptly following the conclusion of discovery, the case would be listed for trial.

Although many cases filed in a district court do require the extensive procedures allowed by the current federal rules, the rules can be burdensome and expensive for the many relatively simple cases for which federal jurisdiction exists, such as single party employment discrimination cases, civil rights cases filed against police officers, prison guards, etc., and simple personal injury cases, etc.

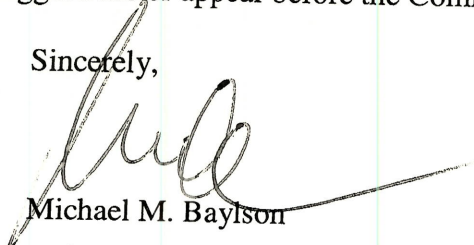
I know my proposal that a motion for summary judgment be eliminated, unless the court specifically allows it, may be controversial. However, in some cases, the time necessary for parties to prepare and the court to review a motion for summary judgment is greater than it would take to prepare and try the case. Although some might think abrogating summary judgment motions is unfair to defendants, the fact of the matter is that few of these motions, when based on insufficiency of plaintiff’s evidence, are granted. Overall, I think lawyer time, district court time, and appellate court time, would be saved if the legal issues often presented by motion for summary judgment were reserved for trial and could be better determined by post-trial motions in the event of a plaintiff’s verdict, with the benefit of a trial transcript, with direct and cross of witnesses, review of exhibits admitted into evidence, and the court’s jury charge.

I really do not see any substantial prejudice to defendants, since the court will be better prepared to decide the legal issues that would ordinarily be presented by a motion for summary judgment based on the trial record with introduction of direct and cross-examination introduction of exhibits, etc.

The other main advantage of my proposal is that it will shorten the length of time for pretrial proceedings in all of these cases, and will result in many more jury trials. Many lawyers and judges, myself included, have noted with alarm the disappearing jury trial. This proposal will help restore jury trials to their rightful place in our justice system and give young lawyers the opportunity to try cases.

I am sending a copy of this proposal to my colleague on your Committee, Gene Pratter. I would be happy to prepare more detailed suggestions or appear before the Committee.

Sincerely,



Michael M. Baylson

MMB:jb

cc: Honorable Gene E.K. Pratter
Professor Edward Cooper
Secretary, Rules Committee, Administrative Office, U.S. Courts

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K. 15-CV-00: Time Stamps, Seals, Access for Visually Impaired

G. Modan Mohan advances three proposals:

(1) "There has to be a time stamp on all records (Its a digital world)"

(2) "For visually impaired to refer to portal for education or self use purpose is not possible today, please have some option enabled."

(3) "Every page must have seal, which is missing (it can be copied or misused, so please have some kind of evidence on each sheet)."

Access for the visually impaired is important. But it also is not subject to the Rules Enabling Act.

Time stamps and means of identifying pages in the record might be addressed through the Rules Enabling Act, but are better addressed by other groups within the Judicial Conference and the Administrative Office.

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Suggestion for new rule
Madan GM to: Rules_Support

15-CV-00

12/29/2015 11:14 AM

Dear Team,

I am proud to write this note to a great nation and to the best judicial system.

---Suggestions for new rule

1. There has to be a time stamp on all records (Its a digital world)
2. For visually impaired to refer the portal for education or self use purpose is not possible today, please have some option enabled. (There are millions of visual impaired people in America. Therefore, for working age adults reporting significant vision loss, only 40.2% were employed in 2013.) THEY NEED MORE SUPPORT OR ACCESS TO AMERICAN JUDICIAL SYSTEM
3. Every page must have seal, which is missing (it can be copied or misused, so please have some kind of evidence on each sheet).

I will be very thankful if this can be implemented at the earliest and they deserve access and freedom of knowing the right.

Kind Regards,

G. Madan Mohan
Ecoln Partners
Madan@ecolnpartners.com
www.ecolnpartners.com
Ph- +91 9845911291

"LoyalT - Trust & Transparency"

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L. Civil Rule 58: Judge Pratter

Judge Pratter has transmitted a question raised by one of her colleagues about the "separate document" requirement of Rule 58:

Rule 58. Entering Judgment

(a) **SEPARATE DOCUMENT.** Every judgment and amended judgment must be set out in a separate document * * *.

The separate-document requirement was added to Rule 58 in 1963. The Committee Note observed that "some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words * * *." The difficulty was uncertainty as to the event that started the time to appeal. "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document – distinct from any opinion or memorandum – which provides the basis for the entry of judgment."

Rule 58 was amended in 2002. The separate document requirement was retained, but Rule 58(c)(2) was added. Rule 58(c)(2)(B) provides that if a separate document is required, judgment is entered when it is entered on the civil docket "and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket." The Committee Note explained: "This simple separate document requirement has been ignored in many cases." One result was that the time for post-judgment motions never ended because it never began, but that did not seem to present serious problems. But another result was that appeal time also never started to run. The Note observed that "there have been many and horridly confused problems under Appellate Rule 4(a)." The 150-day fiction was adopted to ensure that appeal time would begin at that point, and conclude in due course. Appellate Rule 4 was revised in parallel with Rule 58.

The 2002 Committee Note added this:

No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority.

These amendments did not address all questions. Many of them arise from the provision in Rule 54(a) that defines "judgment" to "include[] a decree and any order from which an appeal lies." One example of the potential difficulties is provided by collateral-order finality. The most common examples of collateral-order appeals arise from interlocutory orders that refuse to accept an official-immunity defense, ordinarily by denying a motion to

dismiss or for summary judgment. The 2002 Committee Note suggests that "[t]he new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered." It seems unlikely that many judges bother to enter a Rule 58 separate document when denying an official-immunity motion for summary judgment. But it is better not to allow 150 days plus the ordinary appeal time to take the appeal.

The 2002 amendment resulted from long and hard work by the Civil Rules and Appellate Rules Committees acting jointly. Judge Schiltz, then Reporter for the Appellate Rules Committee, studied hundreds of cases dealing with the "time bombs" of never-beginning and thus never-ending appeal time created by failures to enter judgment on a separate document.

The Appellate Rules Committee returned to the separate document requirement in 2008. Professor Struve prepared two memoranda for two separate meetings. Their liaison to circuit clerks undertook a survey of circuit clerks to determine the frequency of failures to enter judgment on a separate document. Experiences varied among the circuits, but noncompliance ranged from not uncommon to rather common. One circuit judge discussed the problem at a meeting of judges, resulting in communications with district court clerks that produced a marked increase in compliance. Discussion came to focus on a particular problem that had not been much considered during the work that led to the 2002 amendments. Judgment is entered, but not on a separate document. A timely appeal is taken. After the appeal is taken a motion for post-judgment relief is made. Because there is no separate document, the motion can be timely up to 178 days after judgment is entered on the document (150 days to the constructive entry under Rule 58(c)(2)(B) plus 28 days under Rules 50, 52, or 59, or for a Rule 60 motion made at a time that suspends appeal time). The post-judgment motion suspends the appeal. The court of appeals may – or may not – be informed of the post-judgment motion. If it is not informed, it may continue to invest effort in a case that is no longer technically in the court. The Committee found that this problem does not arise frequently. It gave some thought to eliminating the separate-document requirement as a nuisance, but in the end, it concluded that it is better to leave the rules as they are. The discussion noted both the simplicity of the requirement and the value of retaining it as a clear signal that starts appeal time. District clerks should be reminded of the need to police the separate-document requirement. And perhaps the CM/ECF system can be used to include a suitable prompt. These conclusions were reported to the Standing Committee in January 2009. They were accepted, with a suggestion that education efforts could be coordinated with the Committee on Court Administration and Court Management.

The separate document requirement survived this intense study. But it seems not to have taken on a more active life in practice. Judge Pratter's submission is accompanied by a "Not

Precedential" opinion. Bazargani v. Radel, No. 14-3110 (3d Cir., March 3, 2015). The Bazargani case found an appeal timely because the time began 150 days after "[t]he District Court's opinion [was] set forth in the footnotes to the dismissal order * * *." The footnotes meant there was no separate document.

Judge Pratter asks

whether it makes sense for the Rules to build in tolerance for such a significant timing difference simply because order language is accompanied by reasoning.

And she notes that perhaps the question is interesting only to those of us whose local judicial drafting culture is typically to incorporate reasoning (at least briefly) in orders in matters that do not merit lengthy opinions or memoranda but where it seems appropriate to give the litigants at least a brief explanation.

These succinct observations frame the question perfectly. Judges understand that it is important to explain the grounds for a decision, and that often the grounds can be stated clearly and effectively by a brief statement that is readily understood by the parties to the case. They do that. And at the same time the formal requirement to enter a still more succinct "judgment" in a separate document is easily overlooked – the district court's work is done, and there is no obvious prompt to remind the court of the needs for timing post-judgment motions and appeals that are advanced by entering judgment on a separate document.

Doing nothing to take up these questions probably will mean that matters lurch along into the future as they have for the 13 years since Rule 58(a) was most recently amended, and the 52 years since the separate document requirement was first adopted. Taking these questions up again, on the other hand, will run the risk of recreating the difficulty and uncertainties lamented in the 1963 Committee Note. Perhaps the best outcome would be to find a system that automatically prompts judges and court staff to always remember the separate document requirement. Short of that, it may be better to adhere to the judgment reached in formulating the 2002 amendments, retaining the separate document requirement and living with the occasional 150-day inadvertent extensions of appeal and motions times.

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MEMORANDUM

To: Advisory Committee

From: Pilot Project Subcommittee

Date: March 18, 2016

As you know, one of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The committee reported on its work at the November 2015 meeting. The subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the November materials.

Since the November meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada which use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this memo. Exhibits 3-8 include other materials gathered or prepared since November, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule (Ex. 3); a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures (Ex. 4); a memo summarizing reactions to and comments on a 1993 proposed amendment to the Federal Rules of Civil Procedure to require enhanced initial disclosures (Ex. 5); a memo summarizing articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s (Ex. 6); a memo summarizing the robust initial disclosure rules used in various states (Ex. 7); and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 8).

The subcommittee has concluded that two pilot projects should be implemented in federal district courts, one focused on enhanced initial disclosures and the other on expedited case management. Descriptions of these proposed pilot projects are provided in sections A and B of this memo.

The subcommittee believes that more robust initial disclosure requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol pilot project currently underway which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the November meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part of their civil rules); (c) the Arizona enhanced disclosure rule which has been in place for more than 20 years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Rule 16(b)(3) authorizes a district court to enter a scheduling order that sets deadlines for the litigation and can modify the timing of disclosures and the extent of discovery, provide for the disclosure of ESI, adopt procedures for prompt resolution of discovery disputes, and include “other appropriate matters.” Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to “carry on a continuous study of the operation and effect of the general rules of practice and procedure” used in the federal courts, and to recommend “[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]”

A. Mandatory Initial Discovery Pilot Project.

1. *Standing Order.* This pilot project would be implemented through a standing order. Our current draft of the order is as follows:

“The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order encompass the disclosures required by Rule 26(a)(1) – separate disclosures under Rule 26(a)(1) therefore are not required – and are framed as court-ordered mandatory initial discovery pursuant to the Court’s inherent authority to manage cases and Rule 16(b)(3)(B)(ii), (iii), and (vi). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party’s response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party’s response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party’s knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties’ claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its response on the basis of any other objection, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have

filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4).

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good faith belief that the dispute will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before trial.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons whom you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. Hard-Copy Documents. Hard-copy documents must be produced as they are kept in the usual course of business.

2. ESI.

a. Duty to Confer. When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

- i. requirements and limits on the disclosure and production of ESI;
- ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;

iii. the form in which the ESI will be produced.

b. Resolution of Disputes. If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. Production of ESI. Unless the parties agree or the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial discovery response. Absent good cause, no party need produce ESI in more than one form.

d. Presumptive Form of Production. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party."

2. *User's Manual.* The pilot project will require something of a "user's manual" for the pilot judges. The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot project.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. *Timing and Participation.*

We propose that the initial disclosure pilot project be approved by the Civil Rules Committee at its April meeting. Additional details will need to be worked out, but our hope is to approve this concept for a pilot to be implemented in 2017. We then would seek approval by the Standing Committee in June, the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory and all judges in the district must be willing to participate. We also think that at least three to five districts should participate. One small district has already volunteered.

B. Expedited Procedures Pilot.

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months (year?); (b) judges in the district will meet quarterly to discuss best practices, what is working and what is not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

- A. Civil Rules and Standing Committees.
- B. CACM.
- C. FJC.

3. Timetable

- A. April 2016—approval by Civil Rules Committee.
- B. June 2016—approval by Standing Committee, CACM, and FJC.
- C. September 2016—approval by Judicial Conference.
- D. Early 2017—initial implementation.
- E. End of 2020—completion.

4. Criteria for district courts to participate

- A. Court must be willing to make the pilot's requirements mandatory.
- B. All judges on the district court must be willing to participate.

C. At least three to five district courts need to participate in each pilot.

C. Conclusion and Request for Input.

Because we hope to have these pilots well underway before our next civil rules committee meeting, we need your input now. We would appreciate your careful review of these pilots and your comments and suggestions.

EX. 1

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RE: Discussion with Colorado Lawyers

Parker Folse to: David_Campbell@azd.uscourts.gov,
Judge_Grimm@mdd.uscourts.gov

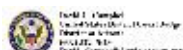
02/24/2016 11:31 AM

Edward Cooper, "coquille@law.harvard.edu"
Cc: "JBARKETT@shb.com", "Judge_Neil_Gorsuch@ca10.uscourts.gov"
, "Jeffrey_Sutton@ca6.uscourts.gov"

From: Parker Folse <pfolse@SusmanGodfrey.com>
To: "David_Campbell@azd.uscourts.gov" <David_Campbell@azd.uscourts.gov>,
"Judge_Grimm@mdd.uscourts.gov" <Judge_Grimm@mdd.uscourts.gov>
Cc: Edward Cooper <coopere@umich.edu>, "coquille@law.harvard.edu"
<coquille@law.harvard.edu>, "JBARKETT@shb.com" <JBARKETT@shb.com>,
"Judge_Neil_Gorsuch@ca10.uscourts.gov" <Judge_Neil_Gorsuch@ca10.uscourts.gov>,

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Thanks for this excellent summary. I'll add a few items.

Under the Colorado pilot project, defendants were required to file answers even if they also moved to dismiss, which seemed to be a practice that received support in the survey that Dave mentioned (perhaps in part because it helps identifies the issues in dispute and facilitates initial disclosures and early case management while the motion is pending), yet in adopting the new rules, the Colorado Supreme Court did not adopt this rule for reasons that were not explained.

I got the sense that there may not have been a lot of experience with large document cases involving significant ESI during the Colorado pilot project, but the comments indicated that in such cases the early disclosure requirements focused the parties' attention on ESI issues earlier than otherwise would have been the case and usually resulted in agreements for staged disclosures to allow time for handling ESI issues.

There seemed to be agreement among the Colorado lawyers and judges that early trial settings are meaningless (and can be inefficient) unless they really are firm. Yet it's impractical not to multi-track trial settings given the high rate of settlements. One judge said he had been lucky to have colleagues who were willing to pick up each other's trial settings to avoid continuances, but guessed that this could be a bigger problem in the federal system.

There certainly seemed to be uniform enthusiasm among the Colorado lawyers and judges for robust early disclosure and for requiring disclosure of all relevant information (harmful as well as helpful) as a means of reducing sideshow fights over what must be produced in discovery and focusing attention on the merits -- though as Dave reported, there seemed to be equally uniform agreement on the importance of early and active case management by judges to make such a system work.

Parker

Parker

From: David_Campbell@azd.uscourts.gov [David_Campbell@azd.uscourts.gov]
Sent: Wednesday, February 24, 2016 9:34 AM
To: Judge_Grimm@mdd.uscourts.gov
Cc: Edward Cooper; coquille@law.harvard.edu; JBARKETT@shb.com; Parker Folse;
Judge_Neil_Gorsuch@ca10.uscourts.gov; Jeffrey_Sutton@ca6.uscourts.gov
Subject: Discussion with Colorado Lawyers

Everyone:

We had a discussion this morning with Colorado lawyers and judges who have worked under their new rules, which include expedited litigation and case management procedures as well as mandatory initial disclosures. This email will recount some of what was said. Parker, Ed, Dan, and Neil (who kindly arranged the call) can fill in any gaps.

One of the judges began by noting that he conducted a survey of lawyers after every case management conference during the early phases of the pilot program. In total, he received comments from 97 lawyers. He asked them to grade the new system on a scale of 1 to 10, with 1 being the most unfavorable and 10 the most favorable. The average grade was 3.9. He observed that this may have reflected the fact that lawyers do not like change. Becky Kourlis, who was on the call, noted that data from various states shows that it generally takes 2 to 3 years for initial resistance to subside. Colorado's pilot project has now become a formal set of rules. All of the lawyers and judges on the call seemed to like the new system.

It was observed that collection lawyers generally did not like the requirement of robust initial disclosures. Originally, those disclosures were required just 21 days into the case. Many collection cases default, and yet these lawyers found they were required to spend time and money collecting documents before they knew if the case would default. Interestingly, the initial disclosure requirements appear to have reduced the number of defaults that occur in cases. Becky said the same phenomenon has been observed in other states. To avoid this problem, the current rule does not require disclosures until after an answer has been filed.

Those on the phone observes that lawyers in complex cases tend to like the new rules the most.

We asked how e-discovery was handled in initial disclosures. One lawyer commented that the pilot program asked the parties whether there were e-discovery issues in the case, a question which prompted lawyers to engage in a discussion about e-discovery. The parties generally worked out an agreement on the issue.

One lawyer observed that the requirement to disclose good and bad information has not really increase the amount of work done at the beginning of a case because lawyers would review the bad information while searching for the good information in any event. Thus, the amount of review is essentially the same.

Folks explained that the new rules were intended to produce a culture change, from hide-the-ball to getting all information on the table. They seemed to believe that the culture change is taking hold. They noted that initial disclosure issues are often raised at the first case management conference, but that the parties virtually always work them out. One judge said that he sets the hearing one week later to address the unresolved disclosure issues and that he has never had to actually hold such a hearing because the parties always reach agreement. Another judge said that he is simply requires the parties to discuss a solution, and they have always found a solution to the disclosure issues.

The Colorado system apparently includes a form that requires the parties to indicate whether they believe the initial disclosures have been adequate. The form is provided to the court before the initial case management conference.

Folks on the call emphasized that an in-person case management conference with the judge is key to making the initial disclosures work. We should consider making this point in our pilot project proposal.

The pilot project included mandatory sanctions for disclosure violations. There was widespread unhappiness with this portion of the rule, and judges usually found ways not to apply it. It was not included in the final rule. Becky noted that the study of the Arizona disclosure rule revealed that its success turned heavily on the willingness of judges to enforce it.

The judges commented that the new rules have been successful, in part, because appellate courts have been willing to back-up trial judge decisions. Becky noted that the designers of the pilot project actually went to the Colorado appellate courts to educate them regarding the pilot and to encourage them to support it in their appellate decisions. We should consider doing the same thing with our pilot. If a district agrees to participate, but the circuit is antagonistic to the pilot, the effort may fail. We should consider an appellate education component to our pilots. (The chiefs of the circuits will hear about it at the judicial conference, but other appellate judges will not.)

One medical malpractice lawyer expressed concern about procedures now being used by medical records and vendors. He said the vendors are deciding what is and is not a legal document, and lawyers representing defendants are able to get access only to legal documents within the system. The vendors won't disclose how they distinguish between nonlegal and legal documents, and this is causing great complexity in many states.

We talked about early trial dates. All of the lawyer say they favor them, but only when they are firm. It does no good to set an early trial date only to have it continued multiple times.

Dave

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EX. 2

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John Barkett's Notes on Call with Arizona Judges and Lawyers on Rule 26.1 (March 1, 2016)

Arizona Rule 26.1	Comments During the Focus Group
<p>The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.</p>	<p>It is helpful as to affirmative defenses in particular. Duty to supplement is helpful here as facts are developed, new disclosures are made.</p> <p>If complaint is highly detailed, there is nothing more in the disclosure statement than in the complaint. But with bare bones complaints, there will be more factual detail provided. And in supplementation, if new facts are discovered, they are disclosed in a supplement.</p>
<p>The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.</p>	<p>Duty to supplement is also helpful because parties generally develop new claims in litigation.</p>
<p>The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.</p>	<p>If a good disclosure statement, it will help decide who to depose.</p> <p>The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given.</p> <p>A proportionality determination has to be made. Could be lots of names on documents that will not be material to the case but may have some knowledge. And if dollar value is not large, that has to be taken into account in how much to say.</p> <p>Judge: problem is objection at trial comes very fast with jury sitting there. Was it "fairly described"? Will someone be prejudiced? These are inherent problems in a rule like this. "I don't think it can be better drafted."</p> <p>Unwritten rule: if you ask about a topic in a deposition, it is incorporated in the</p>

Arizona Rule 26.1	Comments During the Focus Group
	<p>disclosure statement. Or some add, "Mr. Smith will also testify on topics covered in his deposition."</p> <p>Some now are engaging in tactic of not deposing and then arguing not disclosed. Or last minute submissions of depositions to supplement disclosures.</p>
<p>The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.</p>	<p>The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given.</p> <p>Judge: The question she asks is whether the opposing side had fair notice of a general category of information possessed by a witness.</p>
<p>The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.</p>	
<p>The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.</p>	<p>No one does this.</p> <p>It is okay to say this disclosure will be supplemented. By the time of final disclosure, you had better answer this but not needed initially.</p>
<p>A computation and the measure of damage alleged by the disclosing party and the documents or testimony on</p>	<p>This does not happen up front.</p> <p>It is okay to say this disclosure will be supplemented. By the time of final</p>

Arizona Rule 26.1	Comments During the Focus Group
<p>which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.</p>	<p>disclosure, you had better answer this but not needed initially.</p> <p>Judge: you want to be sure issues are raised fairly by the disclosure.</p> <p>One lawyer gave an example: witness who is asked about lost profits but the disclosure does not say lost profits would be covered by this witness.</p>
<p>The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.</p>	<p>A proposed rule would require disclosure of indemnities and surety agreements. And if it is wasting insurance policy, one has to disclose in a supplement how much of the coverage is left.</p> <p>If indemnity is confidential? That topic was not discussed on AZ task force that proposed the change. But judges commonly enter protective orders where warranted.</p>
<p>A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents</p>	<p>Could be debate over relevance. I am sure some people don't comply, but the culture in Arizona is to turn over. However, it does not work for ESI since disclosures are due 40 days after an answer is filed. It does not happen. And it should not happen. Too costly. A proposed revised rule is currently pending before the Arizona Supreme Court. If adopted, there would be staggered disclosure. ESI is carved out. Parties required to confer and talk about formatting, searches, custodians, cost. Then go before the Judge to work out any differences.</p> <p>In commercial court, there is an ESI checklist and the Judge goes through the checklist at the case management conference to resolve any issues. Moving to more active case management. She supports Rule 26.1. She is very aggressive in enforcing the Rule. She tells parties that she enforces the disclosure rule strictly and will keep out evidence not disclosed. She sees fewer discovery disputes. She does not allow motions to compel. She gets parties on phone after receiving 1-page summary of dispute. Objections should not be made to discovery if the production is required by 26.1.</p> <p>One change proposed in Arizona is to eliminate "reasonably calculated" standard</p>

Arizona Rule 26.1	Comments During the Focus Group
<p>and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.</p>	<p>and leave it just as “relevance.”</p> <p>The disclosure rule eliminates hiding the ball and if you do so, you are in serious trouble. The Federal Rules allow you to hide the ball if no one asks for it. In this individual’s cases in state court, he almost never issues interrogatories.</p> <p>One downside: initial disclosures accelerate the cost of prosecuting or defending the case. But parties can agree to postpone the 40-day disclosure deadline if they are going to talk settlement.</p> <p>Another judge spoke up. Rule is designed to make litigation civil again and eliminate gamesmanship. But there is still gamesmanship. Does not eliminate need for depositions. Does eliminate need of interrogatories. Does eliminate arguments over notice pleadings when you have disclosure rules. “Yeah, they have not given you a lot of facts, but they will in 40 days, so dismissal motion is denied.” We get motions to exclude evidence based on non-disclosure. They become “gotchas” for some lawyers, who should have just picked up the phone and called to ask for a supplement.</p> <p>One lawyer was trained under federal rules and then moved to Arizona and encountered Rule 26.1. This lawyer also practices against highly sophisticated lawyers. This lawyer said 26.1 has been positive. Saves money. Moves matters more quickly. Parties tend to adjust timing based on Rule 26.1 This lawyer has never seen a party prejudiced by following the disclosure rule but has seen lawyers who failed to comply face evidence exclusion by virtue of the failure.</p> <p>One plaintiff’s lawyer believes that the disclosure rule has affected plaintiff’s lawyers more than defense lawyers: it is more costly; this lawyer has to constantly review the 26.1 disclosure to be sure it is supplemented as facts develop so he does not face an exclusion request at trial.</p> <p>A plaintiff’s personal injury lawyer felt that Rule 26.1 adds a layer of discovery.</p>

Arizona Rule 26.1	Comments During the Focus Group
	<p>Statements are filed but then this lawyer still gets interrogatories and requests for production on a number of issues. This lawyer felt it would be great if all judges did what judge above does: no discovery motions—call the court instead. This lawyer suggested a discovery master could play a role in ferreting out those that comply and those that don't intentionally versus accidentally.</p> <p>Judge disagrees with use of discovery master. Had bad experience with it. Cost the parties too much and took too long. Court involvement can move a matter along more quickly. She would add to the Rule that a party must issue a litigation hold when a case is filed. As to ESI, she thinks the Maricopa County Superior Court model should be the one followed in the Rule. Judges need to get involved in ESI discovery immediately. This judge says rule has helped, but it has not eliminated sharp practices that judges have to police.</p> <p>When supplemental disclosures are produced, new information is typically bolded or in italics.</p> <p>Deadline for final disclosure? It is typically in the scheduling order under AZ Rule 16. Rule says 60 days before trial, but the Court can trump this deadline and make it earlier than that. Most judges do. 60 days before trial is too late.</p> <p>One lawyer said he could never remember seeing anything “startling” in a disclosure statement. This lawyer has gotten favorable documents from the other side, however. In a \$25,000 or \$50,000 case, it adds expense.</p> <p>Lawyers do press client for every potential relevant document to be sure you are complying with the disclosure statement.</p> <p>Clients do balk. The Rule then is invoked by the lawyers to support them with respect to documents when clients balk at production.</p> <p>Conceptually, though, it is harder to explain to some clients that AZ's rule</p>

Arizona Rule 26.1	Comments During the Focus Group
	<p>requires full disclosure. One has to think differently than when responding to a request for production. In that respect, it is more expensive. But on balance, this lawyer believes the disclosure rule saves money.</p> <p>Another lawyer: must think through your entire case, including its problems, because of what has to be disclosed.</p> <p>If there is a large amount of ESI, what is done? Disclosure would likely say: “we are negotiating an ESI protocol,” or “we have agreed on an ESI protocol and this is what will happen...” If no discussion occurs, it might say: “We will make disclosure in due course after review.”</p> <p>When data rich parties are against each other, they work things out. In asymmetrical cases, it is more difficult to work out. If data poor party tries to use ESI burden as leverage, then can be difficult.</p> <p>Judge: try to discuss with counsel and with the judge.</p> <p>One lawyer told story of NY lawyers dribbling out ESI and he is back to issuing requests for production. It will cost him quite a bit of money to engage in this iterative process.</p> <p>Should disclose sources of ESI at a minimum.</p> <p>If a “data dump,” hard to argue something was not disclosed.</p> <p>Rule 26.1 is really drafted for small cases; sometimes with no lawyers involved. For larger cases, the proposed amendment on ESI will be make it self-executing versus now where lawyers have to avoid the rule in order to comply.</p> <p>Lawyers generally said they prefer the Arizona disclosures to federal court discovery practices.</p>

Arizona Rule 26.1	Comments During the Focus Group
	<p>A plaintiffs' lawyer said he finds the disclosures of facts, legal theories, and documents to be helpful. He finds that judges generally enforce the disclosure rules.</p> <p>A judge said she thinks the disclosure rule, when enforced, makes cases move more quickly and reduces the amount of written discovery.</p> <p>A defense lawyer said the rule eliminates hiding the ball and makes litigation more cost-effective. He rarely serves interrogatories because they are not necessary in light of disclosures. If he thinks information is missing, he sends a letter to the opposing side requesting it. If it is not produced, the letter provides a basis for excluding it at trial. It does front-load costs, and can interfere with settlement of smaller cases.</p> <p>A judge agreed that the disclosure rule generally makes interrogatories unnecessary. On balance, he thinks the disclosure approach is better than the federal rules approach.</p> <p>A defense lawyer who learned to practice in Chicago before moving to Arizona said that she thinks the disclosure rules are extremely positive. They reduce costs and move cases more quickly. She has never seen a party unfairly prejudiced by the disclosure rule, but has seen parties fairly prejudice when they failed to comply.</p> <p>A plaintiffs' lawyer said he thinks the document disclosure requirement is helpful, but the other disclosure obligations just increase cost. Some lawyers turn them into a "gotcha" tactic by arguing something obvious was not disclosed.</p> <p>A plaintiffs' lawyer said he thinks the disclosure rule would be more effective if other forms of discovery were limited. He still has to respond to much discovery, which means the disclosure obligation only adds another layer of cost.</p>

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of Readiness, however, were not retained in that process. The Committee was of the view that this requirement had been rendered obsolete by the provisions of Rule 26.1, which requires the voluntary and seasonable disclosure of, *inter alia*, the identities of trial witnesses and exhibits. This necessitated the amendment of Rule 26(b)(5) to eliminate the former reference to Rule V(a) and to substitute in its place a reference to new Rule 38.1(b)(2) of the Arizona Rules of Civil Procedure.

Rule 26(b)(4) was amended to incorporate, as a new separate paragraph, the provisions of former Rule 1(D)(4) of the Uniform Rules of Practice for Medical Malpractice Cases. The Comment to that former Rule had observed that, if a medical malpractice case involved issues of nursing care, anesthesia, and general surgery, the plaintiff should be entitled to three standard-of-care experts and, similarly, if the hospital employed the nurse, anesthesiologist and surgeon and was the sole defendant, it would also be entitled to three standard-of-care experts. The addition of the phrase “except upon a showing of good cause” merely incorporates the standards of former Rule 43(g), which addressed the same subject and was abrogated as unnecessary. Finally, the provisions of Rule 26(e) were amended to reflect prior amendments to Rules 26.1 and 37 which require the disclosure of such information by no later than sixty (60) days prior to trial, without leave of court.

Comment

2002 Amendment to Rule 26(c)

The amendment to Rule 26(c) does not limit the discretion of trial judges to issue confidentiality orders in the appropriate case. Trial judges should look to federal case law to determine what factors, including the three listed in the rule, should be weighed in deciding whether to grant or modify a confidentiality order where parties contest the need for such an order. Trial judges also should look to federal case law to determine whether to permit nonparties to intervene and obtain access to information protected by such orders.

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose; Disclosure Categories. Within the times set forth in Rule 26.1(d) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

- (1) the factual basis of each of the disclosing party’s claims or defenses;
- (2) the legal theory on which each of the disclosing party’s claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities;

- (3) the name, address, and telephone number of each witness whom the disclosing party expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony;
- (4) the name and address of each person whom the disclosing party believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess;
- (5) the name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements;
- (6) the name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;
- (7) a computation and measure of each category of damages alleged by the disclosing party, the documents or testimony on which such computation and measure are based, and the name, address, and telephone number of each witness whom the disclosing party expects to call at trial to testify on damages;
- (8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;
- (9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and
- (10) for any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment: (A) a copy—or if no copy is available, the existence and substance—of the insurance policy, indemnity agreement, or suretyship agreement; (B) a copy—or if no copy is available, the existence and basis—of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement; and (C) the remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement. A party need only supplement its disclosure regarding the

remaining dollar limits of coverage upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial. Within 10 days after such a request is served, a party must supplement its disclosure of the remaining dollar limits of coverage. For purposes of this rule, an insurance policy means a contract of or agreement for or effecting insurance, or the certificate memorializing it—by whatever name it is called—and includes all clauses, riders, endorsements, and papers attached to, or a part of, it, but does not include an application for insurance. Information concerning an insurance policy, indemnity agreement, or suretyship agreement is not admissible in evidence merely because it is disclosed under this rule.

(b) Disclosure of Hard-Copy Documents and Electronically Stored Information.

(1) *Hard-Copy Documents.* Subject to the limits of Rule 26(b)(1)(B) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

(2) *Electronically Stored Information.*

(A) *Duty to Confer.* When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

- (i)** requirements and limits on the disclosure and production of electronically stored information;
- (ii)** the form in which the information will be produced; and
- (iii)** if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing the information.

(B) *Resolution of Disputes.* If the parties are unable to satisfactorily resolve any dispute regarding electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and the separate certification from all counsel required under Rule 26(g).

(C) *Production of Electronically Stored Information.* Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure

statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.

(D) *Presumptive Form of Production.* Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(E) *Limits on Disclosure of Electronically Stored Information.* Rule 26(b)(2) applies to the disclosure of electronically stored information.

(c) Purpose; Scope.

(1) *Purpose.* The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) *Scope.* A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

(d) Time for Disclosure; Continuing Duty.

(1) *Initial Disclosures.* Unless the parties agree or the court orders otherwise, a party seeking affirmative relief must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after the filing of the first responsive pleading to the complaint, counterclaim, crossclaim, or third-party complaint that sets forth the party's claim for affirmative relief. Unless the parties agree or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after it files its responsive pleading.

(2) *Additional or Amended Disclosures.* The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance

of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order—or in the absence of such a deadline, later than 60 days before trial—must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

(e) **Signature Under Oath.** Each disclosure must be in writing and signed under oath by the disclosing party.

(f) **Claims of Privilege or Protection of Work-Product Materials.**

(1) **Information Withheld.** When a party withholds information, a document, or electronically stored information from disclosure on a claim that it is privileged or subject to protection as work product, the party must promptly comply with Rule 26(b)(6)(A).

(2) **Inadvertent Production.** If a party contends that a document or electronically stored information subject to a claim of privilege or protection as work-product material has been inadvertently disclosed, the producing and receiving parties must comply with Rule 26(b)(6)(B).

Rule 26.2. Exchange of Records and Discovery Limits in Medical Malpractice Actions

(a) **Exchange of Medical Records.**

(1) **By Plaintiff.** Within 5 days after a plaintiff notifies the court under Rule 16(e) that all served defendants have either answered or filed motions, the plaintiff must serve on defendants copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(2) **By Defendants.** Within 10 days after the plaintiff serves medical records under Rule 26.2(a)(1), each defendant must serve on the plaintiff copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(3) **By Request.** In place of serving copies of the above-described medical records, counsel may—before the deadline for service of the records— inquire of opposing counsel concerning the records that opposing counsel wishes produced and may then serve by the deadline copies of only those records specifically requested.

(b) Discovery Limits Before Comprehensive Pretrial Conference.

- (1) **Generally.** Unless the parties agree or the court orders otherwise for good cause, the parties are limited to the following discovery before the Comprehensive Pretrial Conference under Rule 16(e) is held:
- (A) service of the uniform interrogatories set forth in Rule 84, Form 4;
 - (B) service of 10 additional nonuniform interrogatories under Rule 33, with any subpart to a nonuniform interrogatory counting as a separate interrogatory;
 - (C) service of a request for production of documents under Rule 34, limited to the following items:
 - (i) a party's wage information if relevant;
 - (ii) written or recorded statements by any party or witness, including reports or statements of experts;
 - (iii) any exhibits the party intends to use at trial; and
 - (iv) incident reports; and
 - (D) depositions of the parties and any known liability experts.
- (2) **Stipulations for Additional Discovery.** A party may not unreasonably withhold a stipulation for additional discovery under Rule 26.2(b)(1). A party or counsel who unreasonably withholds a stipulation for additional discovery is subject to sanctions under Rule 26(f).

Rule 27. Discovery Before an Action Is Filed or During an Appeal

(a) Before an Action Is Filed.

- (1) **Petition.** A person who wants to perpetuate testimony—including his or her own—or to obtain discovery to preserve evidence about any matter cognizable in any court within the United States may file a verified petition in the superior court in the county where any expected adverse party resides. The petition must be titled in the petitioner's name and must:
- (A) show that the petitioner expects to be a party to an action cognizable in any court within the United States but cannot presently bring it or cause it to be brought;
 - (B) identify the subject matter of the expected action and the petitioner's interest;
 - (C) show the facts that the petitioner desires to establish by the proposed discovery and the reasons for perpetuating it in advance of the expected action;

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PRINCIPLE 15:

- **Shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations. The parties should retain the right in individual cases to make a showing to the court that this initial production may not be appropriate or may need to be modified.**

In 2008, the results of our Survey reflected that only 34 percent of the respondents thought that the current initial disclosure rules reduced discovery, and only 28 percent said they save the clients money. The national surveys that have followed further confirm that lawyers nationwide generally do not believe that Federal Rule of Civil Procedure 26(a)(1) initial disclosures reduce discovery, nor do they believe that such disclosures save their clients money.²⁵ The same surveys reflect that very high percentages report requiring additional discovery after initial disclosures. In contrast, in a study of Arizona's experience, where parties are required to make extensive initial disclosures, there is a consensus that such disclosures reveal pertinent facts early in the case, do not substantially increase satellite litigation, and do not raise litigation costs.²⁶ Our original Principle recognized that the initial disclosure rules need to be revised. This holds even truer today. It is time to make initial disclosures broader to ensure that they are truly effective.

This Principle is similar to Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure's requirement for initial disclosures, but it is broader in two ways. Whereas the current Rule permits description of documents by categories and location, we would require production. This Principle is also broader because it would require the production of all known and reasonably available documents and things that support or contradict specifically pleaded factual allegations.

The disclosures must be meaningful and robust. The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are known and reasonably available and that support or contradict specifically pleaded factual allegations. The goal of this Principle is to encourage the parties to bring the facts and issues to light at the earliest opportunity, thus allowing the litigation process to be shaped by the true nature of the dispute.

Our Principle does not require the parties to do an exhaustive search for or to produce all documents in the party's possession, custody or control that meet this definition at this early stage of the case. Initial production, as we envision it, is defined by what is then known and reasonably available. By including the requirement that the documents must be "known" and "reasonably available," we contemplate, as an example, the situation in which a party collects

²⁵ See AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 56-59 (2009); REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OR RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 29 (2010).

²⁶ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 19-26 (2010), available at http://iaals.du.edu/images/wygwam/documents/publications/Survey_Arizona_Bench_Bar2010.pdf.

documents for the purpose of supporting a factual allegation in a complaint or in a defense and runs across a document that contradicts a specifically pleaded factual allegation. Many current rules would require the production of the “supporting” document in the initial disclosures. We would now require the production of the “contradictory” document as well. Where responsive documents might be voluminous and entail a substantial and expensive burden to produce within the timeframe for initial disclosures, such documents may not be considered to be “reasonably available.” We also acknowledge that the parties should retain the right in individual cases to make a showing to the court that initial production (i.e., production of documents and things before there is a “reasonably particular” request) may not be appropriate or may need to be modified.

While there should be an ongoing duty to supplement initial and subsequent productions, as there is now, we do not intend this Principle to replace the decades-old and well-understood rule that in discovery (as opposed to initial production), document requests must describe the documents to be produced with “reasonable particularity.” To the extent that discovery is required after initial production (or in cases where there is no initial production), that definition should still be the test for document requests.

We note that the proportionality Principle (Principle 13) applies to initial production, just as it underlies all of our Principles on discovery. Under Principle 19, in appropriate cases, the court should consider staying initial production pending the decision on a dispositive motion. We also expect counsel to confer as soon as possible in order to reach an agreement as to what initial production is appropriate in a particular case and to reach an agreement as to the timing of any such production. Federal Rule of Civil Procedure 26(f) requires such a conference before there can be any initial disclosures or discovery. The Seventh Circuit Electronic Discovery Pilot Program also recognizes the importance of this early conference to discuss discovery and identify disputes for early resolution.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to make the required initial production very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.

Our changes to this Principle are informed by the experiences around the country, including those in Colorado and Arizona, both of which require early robust disclosure of relevant documents, whether supportive or harmful. In neither jurisdiction has there been a backlash against the more robust disclosures. In fact, in Arizona, lawyers who have experience with both state and federal systems prefer the Arizona scheme to the federal rules.²⁷ One takeaway from both jurisdictions is that enforcement is essential. Thus, it is critical that there be consequences related to the lack of initial disclosures or inadequate disclosures. A sanction for a bad faith failure to comply absent cause or excusable neglect could be included in the rules implementing this Principle. Examples include an order precluding use of such evidence at trial, or a denial of

²⁷ *See id.*

the right to object to the admissibility of the evidence at trial, although we urge caution about creating a scheme that would encourage “discovery about discovery” or unwarranted sanctions litigation.

We also urge the specialty bars to develop specific initial disclosure rules for certain types of cases that could supplement or even replace this Principle.²⁸

By requiring early, meaningful initial production, the goal of this Principle is to limit gamesmanship throughout the pre-trial process, to decrease the current concentration of resources on the litigation of discovery disputes, and to increase the opportunity for meritorious trials. This change represents a dramatic shift in litigation practice, but business as usual is not working for clients and it is certainly not ideal for legal professionals. It is our hope that this Principle will lead to significant cultural change. The civil pre-trial process should not be a game of “hide the ball,” with the outcome decided by attrition. Rather, the arguments should be about the merits, with the outcome decided by the evidence (whether at trial or through settlement).

PRINCIPLE 16:

- **Discovery in general, and document discovery in particular, should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

The current Federal Rules permit discovery of all documents and information relevant to a claim or defense of any party, and the proposed amendments add the requirement of proportionality to that definition. It is not uncommon to see discovery requests that begin with the words “all documents relating or referring to” Such requests are far too broad and are subject to abuse. They should not be permitted, and we are hopeful that the addition of a proportionality requirement will eliminate such requests.

Especially when combined with notice pleading, discovery is very expensive and time consuming, and easily permits substantial abuse. We recommend changing the scope of discovery to allow only such limited discovery as will enable a party to prove or disprove a claim or defense, or to impeach a witness.

Until 1946, document discovery in the federal system was limited to things “which constitute or contain evidence material to any matter involved in the action,” and then only upon motion showing good cause. The scope of discovery was changed for depositions in 1946 to the “subject matter of the action.” It was not until 1970 that the requirement for a motion showing good cause was eliminated for document discovery. According to the Advisory Committee Notes, the “good cause” requirement was eliminated “because it has furnished an uncertain and erratic protection to the parties from whom production [of documents] is sought” The change also was

²⁸ See, e.g., FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf).

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EX. 5

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MEMORANDUM

To: Judge David Campbell, Chair Pilot Project Subcommittee
From: Derek Webb
Subject: Rule 26(a) Disclosure Reform History: A Canvas of the Arguments in Favor of Reform and a Brief History of the Reform Effort
Date: February 10, 2016

Ten Arguments Made on Behalf of the 1993 Discovery Reform

Below are 10 of the most prominent arguments made on behalf of initial mandatory disclosure.

- 1) To realize the original purposes of 1938 discovery reform – ascertainment of truth¹
 - a. Purpose of 1938 amendments: To take game/sporting element out of discovery – to secure complete disclosure of all relevant evidentiary information – to have the sides lay their cards on the table in advance.²
 - i. Expected litigators to undertake more elevated, less competitive, and less adversarial, self-protective stylistic approach.³
 - ii. “The clear policy of the rules is toward full disclosure.”⁴
 - iii. Edson R. Sunderland, the University of Michigan Law School professor credited with drafting the discovery components of the 1938 Federal Rules, wrote that the new procedural rules “mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game.”⁵
 - iv. The new Federal Rules of Civil Procedure “effectively carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill but to do justice as between the parties and to

¹ Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vanderbilt Law Review 1295, 1298 (1978).

² *Id.* at 1300. See also William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 University of Pittsburgh Law Review 703 (1989).

³ Brazil, *supra* note 1, at 1302.

⁴ *Id.* at 1298.

⁵ *Id.* at 1299, quoting Edson Sunderland, *Discovery Before Trial under the New Federal Rules*, 15 TENN. L. REV. 737 (1939).

decide controversies on their merits. For this purpose the courts are entitled to have laid before them all available and pertinent materials.”⁶

- v. As the Supreme Court put it, the Federal Rules of Civil Procedure had been adopted to make trials “less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”⁷
- b. Adversarial legal culture as it developed in the mid-1970’s and 1980’s undermined these original goals.
 - i. Rather than discourage the “sporting or game theory of justice” discovery expanded both the scope and the complexity of the sport.⁸
 - ii. While the adversarial legal culture helped in the promotion of truth at the trial stage, it did not help during the pre-trial discovery stage – rather, it permitted a no-stone left unturned philosophy of discovery that imposed costs and was used to harass opponents.⁹ According to one study at the time, between 80 and 92% of attorneys imposed financial burdens on their opponents in an attempt to force settlement.¹⁰
 - iii. Lawyers came to see themselves principally as agents of their clients rather than officers of the court.¹¹
 - iv. Instead of diminishing the adversarial nature of pre-trial litigation, discovery had enhanced this competitive culture.
 1. And it did so at a stage of litigation in which court supervision was minimal.¹²
 2. “Discovery had made judges of lawyers and bystanders of judges.”
- c. Purpose of 1993 amendment: To address the incentive structure in the legal profession that had undermined the purposes of the 1938 amendments
 - i. Mandatory discovery would alter the incentives of the marketplace and the legal profession and would help encourage lawyers to see themselves as officers of the court as well as partisan advocates for their clients.¹³
 - ii. Private lawyers would have the same obligation to truth and the integrity of the system in the civil context as government lawyers do in the criminal context under *Brady*.¹⁴

⁶ *Id.* at 1300-01, quoting Alexander Holtzhoff, *The Elimination of Surprise in Federal Practice*, 7 Vand. L. Rev. 576 (1954).

⁷ *U.S. v. Procter & Gamble*, 356 U.S. 677, 682 (1958).

⁸ Brazil, *supra* note 1, at 1304.

⁹ Judge Ralph Winter, *In Defense of Discovery Reform*, 58 BROOKLYN LAW REVIEW 263, 263-64 (1992); see also Schwarzer, *supra* note 2, at 713-14.

¹⁰ Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 Indiana Law Journal 657, 666 (1995).

¹¹ Schwarzer, *supra* note 2, at 719-20.

¹² Brazil, *supra* note 1, at 1304.

¹³ Brazil, *supra* note 1, at 1311-15, 1332, 1349.

- iii. Would allow some court supervision of the discovery phase.¹⁵
- 2) To encourage settlement
 - a. With all the cards laid on the table up front, this would allow parties to speed up their evaluation of the case, improve their chances of predicting the outcome, and thereby promote earlier settlements.¹⁶
 - b. Thus, while there will be some new burdens for judges under the disclosure system, these will be offset by savings in the system as a whole – fewer cases will enter and fewer that do will require judicial supervision at trial.¹⁷
 - c. “Of especial importance was the required disclosure of damage computations and insurance agreements; the frequent failure of counsel early in litigation to address damage claims and the capacity of a party to satisfy a judgment leads to disproportionate litigation activity, especially discovery, and neglect of settlement opportunities.”¹⁸
- 3) To make discovery and trials more efficient
 - a. Allow parties to be better informed at discovery conferences, so they may better define and narrow issues and plan needed discovery.¹⁹
 - b. Make the limits on the number and length of depositions and on the number of interrogatories feasible thus reducing cost and delay in litigation.²⁰
- 4) To save costs
 - a. With more settlement and fewer depositions and interrogatories – the cost and time of trial should go down.
 - b. Disclosure may encourage parties to place greater reliance on available investigatory resources and techniques and less on the more costly methods of adversary discovery.²¹
 - c. And while costs may be increased up front, the savings overall through less prolonged litigation will compensate for these front-end expenses.²²
- 5) To increase access to justice
 - a. With lower costs, lower and middle income people would be in a better position to litigate

¹⁴ Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 UNIVERSITY OF COLORADO LAW REVIEW 51, 53-56 (1982); Wright and Miller, FEDERAL PRACTICE & PROCEDURE § 2053 (3d ed. 2010) (drawing an analogy between disclosure requirements in criminal law and the civil discovery system.)

¹⁵ Brazil, *supra* note 1, at 1357.

¹⁶ William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?* 74 JUDICATURE 178, 182 (1991).

¹⁷ *Id.* See also Brazil, 1302.

¹⁸ William Schwarzer, *New Discoveries for the Discovery Process: The Thought of Voluntarily Exchanging Sensitive Documents with an Opposing Party and Putting a Lid on Depositions and Interrogatories may Sound Like Heresy to Many Litigators but They Could Get Used to It – And the Trial Process Would Benefit*, LEGAL TIMES, November 25, 1991.

¹⁹ Schwarzer, *supra* note 16, at 183.

²⁰ *Id.*

²¹ Schwarzer, *supra* note 18.

²² Brazil, *supra* note 1, at 1357-58.

- b. Prior to the reform, litigating a case in a metropolitan federal court typically cost at least \$100,000.²³
- 6) Empirical studies indicate that mandatory disclosure regimes were effective.
 - a. Mandatory disclosure already used in three federal districts: Southern District of Florida, Central District of California, and Guam.²⁴
 - b. This was also tested in Arizona pursuant to AZ Supreme Court decision. A pilot project was conducted on the effects of the “Zlaket rule” in Arizona.²⁵
 - i. Cases terminated two months earlier than non-Zlaket Rule cases.²⁶
 - ii. In non-complex cases, there were fewer depositions, fewer interrogatories, fewer requests for production of documents.²⁷
 - iii. Fewer discovery motions.²⁸
 - iv. Discovery was completed in a shorter period of time.²⁹
 - v. 8000 cases – 3300 were arbitrated 8 months sooner than under old rules, 3000 were settled or abandoned by parties, discovery motions reduced by 90%.³⁰
- 7) International experience indicate that mandatory disclosure regimes were effective
 - a. UK and Canada.³¹
- 8) The rule would not damage the adversary system
 - a. As the Advisory Committee note indicated, the disclosing party has the right to object to production based on privilege or work product protection.³²
 - b. Retain right to withhold information if not relevant.³³
 - c. Disclosure rule only applies to “core” information – which certain to be subject of formal discovery requests in most cases
 - d. The disclosure amendments are merely the functional equivalent of standing interrogatories which no lawyer could ordinarily ignore anyway.³⁴
- 9) The rule would not impose excessive burdens on parties
 - a. As the Advisory Committee note indicated, the duty of disclosure is directly tied to the level of specificity and particularity in the case pleadings. So if the

²³ Schwarzer, *supra* note 16, at 179.

²⁴ Lang, *supra* note 10, at 673. Linda Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 NORTH CAROLINA LAW REVIEW 795, 813-22 (1991).

²⁵ Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, PUBLIC LAW RESEARCH INSTITUTE 1 (1995).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Lang, *supra* note 10, at 674-75.

³¹ Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 305, 308, September 1994; *see also* Advisory Committee Note rule 26(a).

³² Winter, *supra* note 9, at 268; *see also* Lang, *supra* note 10, at 672-73.

³³ Lang, *supra* note 10, at 672-73.

³⁴ Schwarzer, *supra* note 16, at 183.

complaint is very general, or provides little or no detail, the level of required disclosure is also reduced.³⁵

- 10) The rule would enhance the level of professionalism among attorneys
- a. Eliminate the undesirable excesses of the adversary process that occurs in discovery – overdiscovery, harassment, evasion, and game playing.³⁶
 - b. “Once it becomes routine and counsel become more generally aware of their professional obligations as officers of the court, disclosure should reduce the burdensome and unproductive adversariness that now often characterizes discovery.”³⁷
 - c. “The courtroom is our special bailiwick and responsibility. It is the primary arena in which our professional and moral leadership should be exerted. We are not commissioned, after all, as agents of general uplift. We are commissioned to pursue justice and to deal uprightly in the courts.”³⁸

Key Works by Proponents of Mandatory Initial Disclosure

Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VANDERBILT LAW REVIEW 1295 (1978).

Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 UNIVERSITY OF COLORADO LAW REVIEW 51 (1982).

William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 UNIVERSITY OF PITTSBURGH LAW REVIEW 703 (1989).

William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure be More Effective than Discovery?* 74 JUDICATURE 178 (1991).

Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOKLYN LAW REVIEW 263 (1992).

Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 INDIANA LAW JOURNAL 657 (1995)

³⁵ Lang, *supra* note 10, at 671-72.

³⁶ *Id.*

³⁷ Schwarzer, *supra* note 18.

³⁸ Frankel, *supra* note 14, at 63.

Key Dates in Rule 26(a)(1) Reform

Drafting of the Rule

Summer 1989

Preliminary discussion about the rule between Judge John F. Brady, then Chair of the Advisory Committee on Civil Rules, James Powers, and Wayne Brazil. In August 1989, Judge Grady requested that the Federal Judicial Center conduct preliminary research into local informal discovery rules then in existence in several federal and state courts.¹

November 1989

Advisory Committee on Civil Rules first discussed proposed rule change and authorized the reporter to draft a proposed Rule 25.1 that required mandatory disclosure.²

August 1991

Advisory Committee, under the leadership of Judge Sam C. Pointer, modified the proposal and moved it into Rule 26. The rule required plaintiffs and defendants to disclose information which was “likely to bear significantly on any claim or defense.”³

The preliminary draft proposal was published and sent out for public comment.

August 1991 – February 1992

Public comment period

251 of 264 written comments submitted to the Rules Committee during the public comment period were negative.⁴

70 people appeared at two public hearings in Los Angeles (November 1991) and Atlanta (February 1992) to testify against disclosure on behalf of businesses, bar associations, and public-interest groups.⁵

According to the Reporter’s summary, criticisms came from judges, law firms, insurance companies, bar associations, legal scholars, public interest groups, corporations,

¹ Linda Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 NORTH CAROLINA LAW REVIEW 795, 808 (1991).

² Lisa Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that have Transpired Since its Adoption*, 21 SETON HALL LEGISLATIVE JOURNAL 425 (1993).

³ *Id.*

⁴ Alfred W. Cortese and Kathleen L. Blaner, *A Change in the Rules Draws Fire: Litigators Fight to Stop Mandatory Disclosure*, NATIONAL LAW JOURNAL, October 18, 1993.

⁵ *Id.*

plaintiff's trial attorneys' associations, and defense attorneys' associations. According to a memorandum from Dean Erwin Griswold to the Supreme Court, 49 bar associations, business associations and government agencies, 66 corporations, and more than 150 law firms individual attorneys and judges filed formal complaints.⁶ This group included the American Bar Association, the American Corporate Counsel Association, Public Citizen Litigation Group, the American Civil Liberties Union, the American Institute of Certified Public Accountants, American Trial Attorneys, the NAACP Legal Defense Fund, the Defense Research Institute, and the Product Liability Advisory Council, for example, all opposed the amendment.⁷

Despite the criticism, over 20 district courts adopted the draft proposal in their Cost and Delay Reduction Plans.⁸

February 1992

In light of critical comments made at the Atlanta hearing and the fact that several district courts in PA and NY were adopting experimental local rules, the Advisory Committee decided to delay action on voluntary disclosure.⁹

March 1992

Advisory Committee issued new proposed rules which eliminated automatic disclosure.

The proposed advisory committee note suggested that further local experimentation was needed: "It is appropriate that any national standard prescribing the type, form and timing of required disclosures not be adopted until some experience has been gained under these various local plans."¹⁰

April 1992

Reversing its March decision, the Advisory Committee voted unanimously to endorse the reform.

Judge Ralph Winter initiated reconsideration of the vote along with Judge J. Dickson Phillips Jr., Wayne Brazil, Dennis Linder, and Mark Nordenberg.

⁶ Eric F. Spade, *A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments*, 43 CLEVELAND STATE LAW REVIEW 147, 158 (1995).

⁷ Griffin B. Bell, Chilton Davis Vaner, and Hugh Q. Gottschalk, *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GEORGIA LAW REVIEW 1, 28 (1992).

⁸ Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, September 1994.

⁹ Ann Pelham, *Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, Legal Times, March 16, 1992.

¹⁰ Bell, *supra* note 7, at 35.

As Judge Phillips put it, delaying this would “put the whole of the national amendment process back to 1998.”

The Advisory Committee abandoned the earlier, broader formulation that called for disclosure of anything that bears significantly on a claim and replaced it with a requirement that the parties disclose information “relevant to disputed facts alleged with particularity in the pleadings.”¹¹ This language was taken from Rule 9(b) and had a body of caselaw defining it, which the Advisory Committee regarded as helpful.¹²

May 1, 1992

Advisory Committee on Civil Rules submitted rule proposal to Standing Committee.¹³

June 20, 1992

Standing Committee approved the proposal and submitted it to the Judicial Conference.

Judges Wright, Sloviter, and Stotler wanted the issue of automatic disclosure resubmitted for public discussion.¹⁴

Judge Easterbrook suggested that “some action needed to be taken to solve discovery problems” and expressed the prevailing sentiment of the Standing Committee to recommend it to the Judicial Conference.¹⁵

September 22, 1992

Judicial Conference approved the proposed rule change.¹⁶

November 27, 1992

Judicial Conference transmitted rule proposal to Supreme Court.¹⁷

Supreme Court

April 22, 1993

Supreme Court approved the rule.

¹¹ Ann Pelham, *Panel Flips, OKs Discovery Reform*, LEGAL TIMES, April 20, 1992. See also Gerald MacDonald, *Hesiod, Agesilaus and Rule 26: A Proposal for a More Effective Mandatory Initial Disclosure Procedure*, 28 WAKE FOREST LAW REVIEW 819, 834 (1993).

¹² Judge Ralph Winter, *In Defense of Discovery Reform*, 58 BROOKLYN LAW REVIEW 263, 268 (1992).

¹³ Trembly, *supra* note 2, at 444.

¹⁴ Bell, *supra* note 7, at 39.

¹⁵ *Id.*

¹⁶ Trembly *supra* note 2, at 444.

¹⁷ *Id.*

Chief Justice Rehnquist wrote a transmittal letter to Rep. Tom Foley, the Speaker of the House of Representatives

“While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.”¹⁸

Justice White Concurring Statement:

Statement of Justice White. 28 U. S. C. § 2072 empowers the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts, including proceedings before magistrates and courts of appeals.¹ But the Court does not itself draft and initially propose these rules. Section 2073 directs the Judicial Conference to prescribe the procedures for proposing the rules mentioned in § 2072. The Conference is authorized to appoint committees to propose such rules. These rules advisory committees are to be made up of members of the professional bar and trial and appellate judges. The Conference is also to appoint a standing committee on rules of practice and evidence to review the recommendations of the advisory committees and to recommend to the Conference such rules and amendments to those rules “as may be necessary to maintain consistency and otherwise promote the interest of justice.” § 2073(b). Any rules approved by the Conference are transmitted to the Supreme Court, which in turn transmits any rules “prescribed” pursuant to § 2072 to the Congress. Except as provided in § 2074(b), such rules become effective at a specified time unless Congress otherwise provides.

The members of the advisory and standing committees are carefully named by The Chief Justice, and I am *502 quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. It is not at all rare that advisory committee proposals are returned to the originating committee for further study.

During my 31 years on the Court, the number of advisory committees has grown as necessitated by statutory changes. During that time, by my count at least, on some 64 occasions we have “prescribed” and transmitted to Congress a new set of rules or amendments to certain rules. Some of the transmissions have been minor, but many of them have been extensive. Over this time, Justices Black and Douglas, either together or separately, dissented 13 times on the ground that it was inappropriate for the Court to pass on the merits of the rules before it.² Aside from those two Justices, Justices Powell, Stewart and then-Justice Rehnquist dissented on one occasion and Justice O'Connor on another as to the substance of proposed rules. 446 U. S. 995, 997 (1980) (Powell, J., dissenting); 461 U. S. 1117, 1119 (1983) (O'Connor, J., dissenting). Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference. 500 U. S. ____ (1991).

¹⁸ Carl Tobias, *The Transmittal Letter Translated*, 46 FLORIDA LAW REVIEW 127 (1994).

That the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference and the *503 fact that, aside from Justices Black and Douglas, it has been quite rare for any Justice to dissent from transmitting any such rule, suggest that a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process. The vast majority (including myself) obviously have not explicitly subscribed to the Black-Douglas view that many of the rules proposed dealt with substantive matters that the Constitution reserved to Congress and that in any event were prohibited by § 2072's injunction against abridging, enlarging or modifying substantive rights.

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

“to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legislation to Congress. The present rules produced under 28 U. S. C. § 2072 are not prepared by us but by Committees of the Judicial Conference designated by The Chief Justice, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. § 331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate *504 more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.” 374 U. S. 865, 869-870 (1963) (footnote omitted).

Despite the repeated protestations of both or one of those Justices, Congress did not eliminate our participation in the rulemaking process. Indeed, our statutory role was continued as the coverage of §2072 was extended to the rules of evidence and to proceedings before magistrates. Congress clearly continued to direct us to “prescribe” specified rules. But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, and I remain of this view, were quite sure that the Judicial Conference and its committees, “being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.” 383 U. S. 1089, 1090 (1966) (Douglas, J., dissenting).

I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a de novo review and should defer to the Judicial Conference and its committees *505 as long as they have some rational basis for their proposed amendments.

Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. If it has not, such a fact, or even such a claim, about a body so open to public inspection would inevitably surface. This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.

In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Justice Douglas thought that the Court should be taken out of the rulemaking process entirely, but as long as Congress insisted on our “prescribing” rules, he refused to be a mere conduit and would dissent to forwarding rule changes with which he disagreed. I note that Justice Scalia seems to follow that example. But I also note that as time went on, Justice Douglas confessed to insufficient familiarity with the context in which new rules would operate to pass judgment on their merits.³

*506 In conclusion, I suggest that it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have said, over the years our role has been a much more limited one.

Justice Scalia, joined by Justices Thomas and Souter, dissented:

Justice Scalia, with whom Justice Thomas joins, and with whom Justice Souter joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

...

II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information “relevant to disputed facts alleged with particularity.” See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is “relevant” to “disputed facts,” whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, **511* in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is “relevant to disputed facts” plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, *The Adversary Character of Civil Discovery: A*

Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments *512 relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.² See Fed. Rule Civ. Proc. 26. I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. §2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

* * *

Constant reform of the federal rules to correct emerging *513 problems is essential. Justice White observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

Congressional Reaction

April 22, 1993

Supreme Court transmitted to Congress the proposed amendment.

Up until this time, Congress had only rejected Court-approved rules twice – once in the early 1970's when the new Federal Rules of Evidence were proposed, and in the early 1980's when a change to Rule 4 dealing with service of process was proposed.¹⁹

June 16, 1993

House Judiciary Committee's Subcommittee on Intellectual Property and Court Administration held hearings on the proposed rule change.

Many who had criticized the rule before the Advisory Committee now made the same criticisms before Congress.²⁰

American Bar Association urged Congress to defer implementation of the disclosure rule until after the CJRA experiments had concluded.²¹

Department of Justice, in a reversal of its earlier position under the Bush administration, suggested that a rule mandating disclosure was not prudent or in the best interest of the United States and that proposed Rule 26(a)(1) should be deleted from the pending amendments.²²

July 28, 1993

Senate Judiciary Subcommittee on Courts and Administrative Practice held a hearing

Witnesses who testified were very similar to those who testified at the June 16 House hearing.²³

July 30, 1993

¹⁹ William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGISLATIVE JOURNAL 1 (1993).

²⁰ Linda Mullenix, *Should Congress Decide Civil Rules?: No, Not a Subject to Wheel 'N Deal*, NATIONAL LAW JOURNAL, November 22, 1993.

²¹ Letter from Michael McWilliams, president, American Bar Association to Sen. Howell T. Heflin, D-Ala., chairman, Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary (June 23, 1993).

²² Letter from Associate Attorney General Webster L. Hubbell, to Rep. William J. Hughes, chairman, Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee, (June 25, 1993).

²³ Hughes, *supra* note 19, at 9.

Reps. William J. Hughes, D-NJ, and Carlos J. Moorehead, R-Calif, co-sponsored the introduction of H.R. 2814 to modify the pending amendments to the federal rules by deleting the mandatory disclosure rule of Rule 26(a)(1).²⁴

August 5, 1993

Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee favorably reported H.R. 2814 by unanimous vote, without amendment.²⁵

October 6, 1993

House Judiciary Committee unanimously approved H.R. 2814 and ordered it favorably reported without amendment to the full House of Representatives.²⁶

November 3, 1993

The House of Representatives passed H.R. 2814 on a voice vote.²⁷

November 20, 1993

At least partly in response to plaintiffs and civil rights attorneys who encouraged the Senate to amend H.R. 2814 by adding a provision that would cancel the presumptive limits on depositions and interrogatories in the proposed rules, Senator Howard Metzenbaum, D-Ohio, blocked Senate action on H.R. 2814.²⁸

November 24, 1993

Senate adjourned.

December 1, 1993

Rule 26(a)(1) as originally proposed went into effect.

The Advisory Committee Note that went along with the 1993 rule read as follows:

“A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand. L. Rev.* 1348 (1978), and Schwarzer, *The*

²⁴ Cortese, *supra* note 4.

²⁵ Trembly, *supra* note 2, at 445.

²⁶ Cortese, *supra* note 4.

²⁷ Randall Samborn, *Bill to Stop Change Dies; New Discovery Rules Take Effect*, NATIONAL LAW JOURNAL, December 6, 1993.

²⁸ *Id.*; see also Hughes, *supra* note 19, at 10; and Carrington, *supra* note 8, at 309.

Federal Rules, the Adversary Process, and Discovery Reform, 50 *U. Pitt. L. Rev.* 703, 721–23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.”

District Court Opt-Outs

March 30, 1998

By this date, 45 out of 94 district courts had opted out of 26(a)(1). 3 of these district courts, however, had similar initial disclosure rules under local rule or the CJRA, and 18 permitted the judge to order initial disclosure in a specific case.²⁹

Abandonment of Rule

June 19, 1998

Standing Committee approved for public comment amendment to Rule 26(a)(1) which removed the mandatory disclosure requirement.

December 1, 2000

The revised Rule 26(a)(1) without the 1993 mandatory initial disclosure requirement went into effect.

²⁹ Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998).

EX. 6

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MEMORANDUM

To: Pilot Project Subcommittee

From: Paul W. Grimm

Re: Surveys on Initial Disclosures and Articles from 1997 Boston College Discovery Meeting

BACKGROUND

In 1996, Judge Paul Niemeyer, Chair of the Civil Rules Advisory Committee (“Committee”), decided that a comprehensive examination of the civil discovery rules was needed. He created the discovery subcommittee, and Judge (now Dean) David Levi was appointed chair of the subcommittee, Professor Rick Marcus became its reporter. The Discovery subcommittee organized a meeting at Boston College Law School in September, 1997 to receive “data opinions, ideas and proposals in preparation for the Committee’s reexamination.”¹

Part of the examination included assessing various reforms and rule changes adopted following the passage of the Civil Justice Reform Act (“CJRA”) in 1990. One of the discovery reforms adopted was the use of Initial Disclosures in advance of formal discovery. Specifically, Pilot Districts were created in the wake of the CJRA to try various methods of reducing discovery cost and burden, and Initial Disclosures were used in these Pilot Districts. Many modeled their Initial Disclosures on proposed amendments to the civil rules published by the Committee in 1991². Those proposed Initial Disclosures required “initial disclosure of the identity of any witness or document with information ‘that bears significantly on any claim or defense’, and all other discovery was precluded until the disclosure was made.”³ The reaction to the Committee’s 1991 proposed Initial Disclosure rule was a “flood of objections unprecedented in fifty plus years of rule-making.”⁴ The Committee’s response was to propose (and adopt in 1993) a revised approach to Initial Disclosures. “It permitted any district to opt out, and permitted the parties to stipulate not to disclose. Additionally, although disclosure would apply to the full scope of discovery, it would only apply as to disputed facts alleged with particularity, thereby reducing the burden resulting from vague complaints.”⁵

Papers that were submitted to the Committee in connection with the Boston College Law School discovery conference were published in the Boston College Law Review. Papers were submitted by the RAND Corporation regarding its study of CJRA reforms⁶, as well as by the FJC examining the Initial Disclosures adopted by the 1993 changes to the civil rules.⁷ Paradoxically, the RAND and FJC reports appeared to reach diametrically opposite conclusions on the value of Initial Disclosures to reduce discovery delay and expense, which may be explained by the fact that “the FJC and RAND projects investigated the mandatory disclosure rule as it had been developed and used in two different time periods. Thus, RAND studied the use of this procedure in federal courts under the authority of CJRA plans, beginning in 1991, while the FJC studied the use of the rule after the 1993 federal rule amendment.”⁸

THE RAND STUDY

The RAND study focused on 5222 cases filed from 1992-1993 in twenty federal districts. Surveys were sent to the judges and lawyers involved in the cases, and their responses used to analyze the effectiveness of various CJRA remedial proposals.⁹ The RAND study excluded cases typically requiring little management (prisoner cases, Social Security appeals, bankruptcy appeals, foreclosure cases, forfeiture and penalty cases, and debt recovery cases).¹⁰ The FJC study analyzed 1000 closed cases in the last quarter of 1996, and surveys were sent to 2000 lawyers identified from the cases. The FJC study also excluded cases that involved little or no discovery (Social Security appeals, student loan collections, foreclosures, default judgments, and cases terminated within sixty days of filing).¹¹

With respect to Initial Disclosures, RAND concluded

“[o]ur data and analyses do not support strongly the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours and thereby reducing the costs of litigation, or as a means of reducing time to disposition. We find that cases in districts with some type of *mandatory disclosure policy* had lawyer work hours and time to disposition that are not significantly different from cases in districts without any type of mandatory disclosure policy. Regardless of whether or not early disclosure actually occurs, cases from districts with mandatory early disclosure policies tend to have similar estimated lawyer work hours as cases from districts without a mandatory disclosure policy that had no early disclosure.”¹²

Further, the study found that when subsets of cases were analyzed based on “stakes, complexity and discovery difficulty” “no strong evidence [was found] that a policy of early mandatory disclosure reduced lawyer work time or time to disposition on any of the subsets of cases examined.”¹³

RAND did note that their disappointing findings regarding the effectiveness of Initial Disclosures did not apply for one particular type of Initial Disclosure, observing

“[i]t should be noted, however, that in our main evaluation report we found that attorney work hours were significantly lower for the three districts that had a particular type of mandatory disclosure: *early mandatory disclosure of information bearing on both sides of the dispute*. With only three districts using this particular type of mandatory disclosure policy however, it is difficult to generalize this statistical finding.”¹⁴

THE FJC STUDY

In contrast, the findings in the FJC study regarding Initial Disclosures were considerably more encouraging. It concluded

“[i]n general, initial disclosure appears to be having its intended effects. Among those attorneys who believed there was an impact, the effects were most often of the type intended by the drafters of the 1993 amendments. Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them.”¹⁵

Further, the FJC Study stated “[w]e found a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure. Holding all variables constant, those with disclosure terminated more quickly. This finding corroborates attorneys’ evaluations of the effects of initial disclosure on case duration.”¹⁶

Not all findings in the FJC Study were rosy, however. It cautioned

“[a]lthough attorneys’ assessment of initial disclosure was mostly positive, more than a third of the attorneys . . . who participated in initial disclosure identified one or more problems with the process The most frequently identified problem was too brief or incomplete disclosure Relatively few attorneys reported that disclosure requirements led to motions to compel, motions for sanctions, or other satellite litigation. **Problems in initial disclosure arose more frequently in cases involving large stakes and high expenses or that were characterized as complex or contentious.**”¹⁷

Why did Rand and the FJC draw such different conclusions about the effectiveness of Initial Disclosures? The answer may lie in the fact that the RAND study examined Initial Disclosures patterned after the 1991 (much criticized) draft Initial Disclosure rule proposed, but later abandoned, by the Committee. Further, the cases analyzed were filed in 1992-93, when lawyer experience with Initial Disclosures was minimal. Finally, as noted, only three of the twenty courts that had adopted Initial Disclosures had versions that required disclosures on “both sides” of the litigation (i.e. “hurtful” as well as “helpful”), and for those that did, the conclusions drawn were closer to those of the FJC study.

FOOD FOR THOUGHT

As we draw insight from the efforts of those who preceded us in the efforts to adopt meaningful Initial Disclosures, we should keep in mind an important question. Should Initial Disclosures be required for all cases, or only certain cases? Both the RAND and FJC studies eliminated categories of cases that comprise a significant number of the cases filed in federal court, and current Rule 26(a)(1)(B) excludes nine categories of cases from Initial Disclosures. In determining the types of cases to include in an Initial Disclosure pilot project, we should bear in mind that

“[f]ormal discovery actually occurs in fewer cases than uninformed observers might estimate. In the 1978 Federal Judicial Center . . . study of more than 3000 federal civil cases sampled from six metropolitan districts . . . [the researchers] found that 72% of the cases had no more than two discovery events, with no formal discovery at all in 52% of the cases. In the Civil Litigation Research Project . . . which included state and federal cases . . . [the researchers] found recorded discovery events in slightly fewer than one-half of cases. More recent evidence from state courts suggests that this pattern continues to hold: a 1998 National Center for State Courts. . . study found that no formal discovery occurred in 42% of . . . cases sampled from five general jurisdiction courts in four states.”¹⁸

Similarly, “[t]he following statistics have remained true, no matter how much or in what manner the rulemakers have tinkered with the rules. First, there is no discovery in anywhere from 38% (RAND) to approximately 50% (FJC) of civil cases. No discovery. The RAND data here is especially interesting. For fully half of their survey cases—cases that ‘close’ within nine months—the median time lawyers report spending on discovery is only three hours”.¹⁹ Another article submitted for the 1997 Boston College conference observed

“[t]he recent studies of civil discovery by the RAND Institute . . . and the Federal Judicial Center . . . establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity and . . . probably even lawyers. The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high conflict cases, in contrast, raise many more problems and involve much higher stakes. It is therefore essential to understand the distinction and to try to explain why it operates.”²⁰

Moreover, “[over] half of the RAND sample—which excluded ‘minimal management cases’ . . . involved little or no discovery on the way to some kind of resolution. Overall, as the report states, ‘lawyer work hours are zero for 38 percent of general civil cases, and low for the majority of cases.’”²¹ If 38-50% of all general civil cases filed in federal court (not counting the kinds of cases that already are exempt from initial disclosure) resolve with no discovery at all, will we impose discovery costs by requiring disclosures that otherwise would not be incurred? And, if we limit Initial Disclosures to the more “high-stakes” and contentious cases, what will be gained from doing so if, as the FJC study concluded “[p]roblems in initial disclosure arose more frequently in cases involving large stakes and high expenses or that were characterized as complex or contentious”?²² We need to have a clear idea what we gain from Initial Disclosures by thinking through how they would apply in a variety of hypothetical (but realistic) cases to see what we gain by requiring them. Only then are we able to design a pilot that will yield helpful information.

¹ Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?* 39 B.C. L. Rev. 517, 521 (1998)

² Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747 (1998)

³ *Id.* at 767.

⁴ *Id.*

⁵ *Id.* at 767.

⁶ Kakalik, et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. Rev. 613 (1998) (hereinafter the “RAND Study”).

⁷ Willging, et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998) (hereinafter, the “FJC Study”).

⁸ Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. Rev. 683 (1998).

⁹ Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. Rev. 597, 599 (1998).

¹⁰ *Id.*

¹¹ Id.

¹² RAND Study, *supra*, note vi at 677 (emphasis in original text).

¹³ Id. at 678.

¹⁴ Id. at 679 (emphasis in original text).

¹⁵ FJC Study, *supra* note vii at 534-5.

¹⁶ Id. at 535.

¹⁷ Id. at 535 (emphasis added).

¹⁸ McKenna, et al., *Empirical Research on Civil Discovery*, 39 B.C. L. Rev. 785, 790 (1998).

¹⁹ *Supra*, note viii at 684.

²⁰ *Supra*, note ix at 597.

²¹ Id. at 600.

²² *Supra*, note xvii.

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EX. 7

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To: Judge Campbell
Cc: Rebecca Womeldorf
From: Amelia Yowell, Supreme Court Fellow
Date: December 13, 2015
RE: State Initial Disclosure Models

The Pilot Projects Subcommittee asked me to compile information about states with robust initial disclosure rules. I found seven states with initial disclosure rules that I thought would be helpful to the Subcommittee as it drafts a possible pilot program (Alaska, Arizona, Colorado, Nevada, New Hampshire, Texas, and Utah). I have provided a summary of these states' initial disclosure rules in the attached table, which I hope will provide a quick and easy way to compare the rules. Because I have simplified the rules for space and ease of comparison, I have linked each section of the table to the text of the relevant state rule.¹ If the Subcommittee thinks it would be helpful, I am happy to do additional research or analysis.

¹ You can access the text of the rule by clicking anywhere on a state's section in the table. The links are invisible. To get back to the main table, go to the bookmark bar on the left side of the PDF and click on "AGY Table."

TABLE COMPARING SELECTED STATE INITIAL DISCLOSURE RULES

	Scope of Disclosure	List or Summary re Individuals	Produce or Identify Docs, ESI, data compilations, tangible things	Damages	Insurance Agreements
Federal Fed. R. Civ. P. 26(a)(1)	Helpful information (but not impeachment information)	Name, address, and telephone number <u>and</u> subject	A copy <u>or</u> description by category and location, limited to possession, custody, or control	A computation of each category <u>and</u> documents/material must be available for inspection or copying	Inspection and copying
New Hampshire N.H. Superior Court Civ. R. 22(a)	Helpful information (but not impeachment information)	Name, address, and telephone number <u>and</u> summary (unless the information is in a produced document)	A copy, limited to possession, custody, or control	A computation of each category <u>and</u> a copy of documents/materials	Inspection and copying
Nevada Nev. R. Civ. P. 16.1(a)(1), 26(b)(1)	Helpful <u>and</u> hurtful information, including impeachment <i>“Relevant to the subject matter”</i>	Name, address, and telephone number <u>and</u> subject	A copy <u>or</u> description by category and location, limited to possession, custody or control	A computation of any category <u>and</u> documents/materials must be available for inspection and copying	Inspection and copying
Alaska Alaska R. Civ. P. P. 26(a)(1)	The factual basis for each claim or defense Helpful <u>and</u> hurtful information	Name, address, and telephone number <u>and</u> subject	For relevant documents, a copy <u>or</u> a description by category <u>and</u> a copy of any un-privileged	List categories of damages <u>and</u> a computation of each category of special damages <u>and</u>	Produce a copy

	<i>“Relevant to disputed facts alleged with particularity in the pleadings”</i>		statements <u>or</u> the name, address, and telephone number of the custodian of the statement <u>and</u> photos, diagrams, and videotapes	documents/materials must be available for inspection or copying	
Colorado Colo. R. Civ. P. 26(a)(1)	Helpful <u>and</u> hurtful information <i>Relevant to the claims and defenses of any party”</i>	Name, address, and telephone number <u>and</u> “brief description”	A listing <u>and</u> a copy <u>or</u> description by category and location, limited to possession, custody, or control <u>and</u> make available for inspection and copying	A description of the categories <u>and</u> a computation of economic damages <u>and</u> relevant documents/materials must be available for inspection or copying	Inspection and copying
Utah Utah R. Civ. P. 26(a)(1)	For individuals: helpful information (but not impeachment information) <u>and</u> each fact witness the party may call in its case-in-chief For documents: any referred to in the pleadings <u>and</u> any the party may offer in its case-in-chief (but not charts, summaries,	Name, address, and telephone number <u>and</u> subject <u>and</u> , if an expected fact witness, a summary	A copy, limited to possession or control of the party	A computation of any damages claimed <u>and</u> a copy of documents/materials	Produce a copy

	and demonstrative exhibits)				
<p>Arizona</p> <p>Ariz. R. Civ. P. 26.1(a)</p>	<p>The factual basis <u>and</u> legal theory for each claim or defense</p> <p>For individuals: helpful <u>and</u> hurtful information (<i>knowledge or information relevant to the events, transactions, or occurrences</i>) <u>and</u> witnesses the party intends to call at trial <u>and</u> all persons who have given statements (written, recorded, signed, or unsigned) <u>and</u> anticipated expert witnesses</p> <p>For documents, etc.: any the party plans to use at trial <u>and</u> helpful <u>and</u> hurtful documents (<i>relevant to the subject matter</i>), <u>and</u> those reasonably calculated to lead to the discovery of admissible evidence</p>	<p>Names, address, and telephone number <u>and</u> nature <u>and</u>, for witnesses expected at trial, a fair description of the substance of the testimony <u>and</u>, for witnesses who have given a statement, the identity of the custodian of the copies <u>and</u>, for expert witnesses, the subject matter, the facts and opinions, a summary of the grounds for the opinions, the expert's qualification, and the name and address of the custodian of the expert's reports</p>	<p>For documents expected to be used at trial, "the existence, location, custodian, and general description," <u>and</u> for relevant documents, a list <u>or</u>, in the case of voluminous information, a list of the categories known to exist (no possession, custody, or control limitation) <u>and</u> unless good cause, a copy</p>	<p>A computation of damages <u>and</u> a copy of the documents/materials <u>and</u> the names, addresses, and telephone numbers of all damage witnesses</p>	<p>List existence, location, custodian, <u>and</u> general description</p>

<p>Texas</p> <p>Tex. R. Civ. P. 194.2</p> <p>(NOT MANDATORY)</p>	<p>Factual basis <u>and</u> legal theories for claims or defenses (but not all evidence that may be offered at trial)</p> <p>Helpful <u>and</u> hurtful information</p> <p><i>“Relevant facts”</i></p>	<p>Name, address, and telephone number <u>and</u> a brief statement of connection <u>and</u> for expert witnesses, the subject matter, general substance of impressions and opinions, brief summary of the basis, or documents reflecting the information (if not subject to the control of the party)</p>	<p>A copy of any witness statements <u>and</u> for experts controlled by the party, a copy of everything provided to, reviewed by, or prepared by or for the expert and the expert’s current resume and bibliography</p>	<p>The amount and method of calculating economic damages <u>and</u>, if physical or mental injury, all medical records and bills reasonably related <u>or</u> authorization permitting disclosure</p>	<p>A copy</p>
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United States Code Annotated

Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)

Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.**(1) Initial Disclosure.**

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under [Rule 34](#), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

- (ii) a forfeiture action in rem arising from a federal statute;
- (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
- (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
- (v) an action to enforce or quash an administrative summons or subpoena;
- (vi) an action by the United States to recover benefit payments;
- (vii) an action by the United States to collect on a student loan guaranteed by the United States;
- (viii) a proceeding ancillary to a proceeding in another court; and
- (ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [Federal Rule of Evidence 702, 703, or 705](#).

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially

employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under [Federal Rule of Evidence 702](#), [703](#), or [705](#); and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under [Rule 32\(a\)](#) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under [Federal Rule of Evidence 402](#) or [403](#)--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under [Rule 30](#). By order or local rule, the court may also limit the number of requests under [Rule 36](#).

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and [Rule 37\(a\)\(5\)](#) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in [Rule 35\(b\)](#); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) **Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) **Early Rule 34 Requests.**

(A) **Time to Deliver.** More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) **When Considered Served.** The request is considered to have been served at the first Rule 26(f) conference.

(3) **Sequence.** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) **In General.** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) **Conference Timing.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under [Rule 16\(b\)](#).

(2) **Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) **Discovery Plan.** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under [Federal Rule of Evidence 502](#);

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under [Rule 16\(b\)](#) and (c).

(4) **Expedited Schedule.** If necessary to comply with its expedited schedule for [Rule 16\(b\)](#) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat. Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat. Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse*; when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md. Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St. Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat. Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat. Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St. Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat. Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2

Ind.Stat. Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky. Codes (Carroll, 1932) Civ. Pract. §§ 557, 606(8); La. Code Pract. (Dart, 1932) arts. 347-356; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, §§ 61 to 67; Mo. St. Ann. §§ 1753, 1759, pp. 4023, 4026; Neb. Comp. Stat. (1929) §§ 20-1246, 20-1247; 2 N.H. Pub. Laws (1926) ch. 337, § 1; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann. Civ. Stats. Tex. arts. 3738, 3753, 3769; [Wis. Stat. \(1935\) § 326.12](#); Ontario Consol. Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ. Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn. Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo. Rev. Stat. Ann. 1939, § 1917; 2 Burns' Ind. Stat. Ann. 1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, [C.C.A.2](#), 1943, [139 F.2d 469](#); *Mahler v. Pennsylvania R. Co.*, E.D.N.Y. 1945, 8 Fed. Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.*, D.Conn. 1939, [27 F.Supp. 946](#); *Engl v. Aetna Life Ins. Co.*, supra; *Mahler v. Pennsylvania R. Co.*, supra; *Bloomer v. Sirian Lamp Co.*, D.Del. 1944, 8 Fed. Rules Serv. 26b.31, Case 3; *Rosseau v. Langley*, N.Y. 1945, 9 Fed. Rules Serv. 34.41, Case 1 (Rule 26 contemplates “examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial.”); *Olson Transportation Co. v. Socony-Vacuum Co.*, E.D. Wis. 1944, 8 Fed. Rules Serv. 34.41, Case 2 (“... the Rules . . . permit ‘fishing’ for evidence as they should.”); Note, 1945, 45 Col. L. Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word “relevant” in effect meant “material and competent under the rules of evidence”. *Poppino v. Jones Store Co.*, W.D. Mo. 1940, 1 F.R.D. 215, 3 Fed. Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.*, E.D.N.Y. 1939, [26 F.Supp. 424](#). Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. See *Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, D.Md. 1940, 1 F.R.D. 213, 3 Fed. Rules Serv. 26b.211, Case 3; *Gitto v. “Italia,” Societa Anonima Di Navigazione*, E.D.N.Y. 1940, [31 F.Supp. 567](#); *Rose Silk Mills, Inc. v. Insurance Co. of North America*, S.D.N.Y. 1939, [29 F.Supp. 504](#); *Colpak*

v. Hetterick, E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.*, E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York*, S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman*, D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.*, supra; *Stevenson v. Melady*, S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.*, supra; *Application of Zenith Radio Corp.*, E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York*, S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.*, E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.*, S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.*, D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.*, supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.*, E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500*, N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer*, C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse*, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, *2A Barron & Holtzoff, Federal Practice and Procedure*, § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf. 4 Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty*, 253 F.Supp. 875 (D.D.C.1966) (cases cited); *Johanek v. Aberle*, 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules*, 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning*, 207 F.Supp. 476 (D.N.J.1962); *Cooper v. Stender*, 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage*, 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits*, 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in *2A Barron & Holtzoff, Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra*. Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker*, 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information

about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer “may be liable” on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons “carrying on an insurance business” and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the “good cause” requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of “good cause” and the other variously described in the *Hickman* case: “necessity or justification,” “denial * * * would unduly prejudice the preparation of petitioner's case,” or “cause hardship or injustice” 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether “good cause” is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the “good cause” required by Rule 34 and the “necessity or justification” of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of “good cause” for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate “good cause” to a showing that the documents are relevant to the subject matter of the action. *E.g.*, *Connecticut Mutual Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.*, 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of “good cause”, although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g.*, *Lauer v. Tankrederi*, 39 F.R.D. 334 (E.D.Pa.1966).

As to trial-preparation materials, however, the courts are increasingly interpreting “good cause” as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate “good cause” with relevance, e.g., *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read “good cause” as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and “good cause”; the court declined to rule on whether the statements were work-products. The court's treatment of “good cause” is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with “good cause” do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of “good cause” from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of “good cause” whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a “good cause” requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the “good cause” requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire v. Pennsylvania RR*, 14 F.R.D. 154 (N.D. Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. Cf. *Hauger v. Chicago, R.I.*

& *Pac. RR*, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham*, *supra* at 131-133; *Pickett v. L. R. Ryan, Inc.*, 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.*, 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder*, 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A *Barron & Holtzoff, Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. Cf. *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, e.g., *Safeway Stores, Inc. v. Reynolds*, 176

F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.*, 19 F.R.D. 144 (W.D.Pa.1956); with *e.g.*, *New York Central R.R. v. Carr*, 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.*, 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g.*, *Smith v. Central Linen Service Co.*, 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.*, 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A *Barron & Holtzoff, Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery*, 74 *Harv.L.Rev.* 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes*: Fla.Stat. Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat. Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat. Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules*: Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g.*, *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D.Ohio 1947), *aff'd*, *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts*, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy--and often fruitless--cross-examination

during trial,” and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, *Discovery in Eminent Domain Proceedings* 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.*, 41 F.R.D. 234 (W.D.Tex.1966); *United States v. 23.76 Acres*, 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.*, 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g.*, *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres*, 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio*, 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan.L.Rev. 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g.*, *American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay*, 372 F.2d 174, 176-177

(5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of “unfairness”. See *e.g.*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. *E.g.*, *Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to “time” as well as to “place” or may not safeguard against “undue burden or expense.”

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g.*, *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g., E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.*, 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g., Kaeppler v. James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A *Barron & Holtzoff, Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment*, 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim*, 46 *Corn.L.Q.* 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 *Yale L.J.* 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure*, 11 *Fed.B.J.* 289, 296-297 (1951); *Developments in the Law-Discovery*, 74 *Harv.L.Rev.* 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 *Yale L.J.* 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are

not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.*, E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.*, 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g.*, *Chenault v. Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.*, 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 *Harv.L.Rev.* 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." *Fed.R.Civ.P. 1.*

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) "the frequency of use" of the various discovery methods was not to be limited, is an attempt

to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute*, 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, e.g., *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However,

since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 *U.Pitt.L.Rev.* 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement [*sic*] or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and

expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See [Rule 411, Federal Rules of Evidence](#). Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case

is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the “substance” of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term “expert” to refer to those persons who will testify under [Rule 702 of the Federal Rules of Evidence](#) with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was “without substantial justification” and hence would not bar

an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.*, a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under [Rules 402 and 403 of the Federal Rules of Evidence](#)). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide “foundation” testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion “in limine” and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly

increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for

a scheduling order under Rule 16(b), such as cases in which there will be no discovery (*e.g.*, bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (*e.g.*, government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (*e.g.*, actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that--partly in response to the first publication in 1991 of a proposed disclosure rule--many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques*, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal “standing” orders of an individual judge or court that purport to create exemptions from--or limit or expand--the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. “Use” includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if--in the language of Rule 26(a)(3)--“the need arises.”

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to “claims and defenses,” and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials “warranted on the evidence,” and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of “proceedings” rather than categories of “actions” because some might not properly be labeled “actions.” Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as

an “appeal” based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or “standing” orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to “opt out” of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be “inappropriate in the circumstances of the action.” Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures--if any--should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others--such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)--may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is “first served or otherwise joined” after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they--and any objections--should be filed “promptly.”

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

“Shall” is replaced by “must” under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party “may use to support” its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the “subject matter” language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the “subject matter” language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the “subject matter” involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.

In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the “reasonably calculated to lead to the discovery of admissible evidence” standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, “relevant” means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See 8 Federal Practice & Procedure § 2008.1 at 121*. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton, 118 S.Ct. 1584, 1597 (1998)* (quoting Rule 26(b)(2)(iii) and stating that “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly”).

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any “matter”—not “information”—relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of “relevant” in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but “standing” orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but “standing” orders altering the moratorium are not authorized.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). “Standing” orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a “conference” of the parties, rather than a “meeting.” There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but “standing” orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

“Shall” is replaced by “must,” “does,” or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court’s action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term “electronically stored information” has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term “data compilations” is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in

a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver

has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on “issues relating to disclosure or discovery of electronically stored information”; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation (4th) § 40.25(2)* (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2) (B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be

particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. Cf. *Manual for Complex Litigation* (4th) § 11.422 (“A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.”) The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called “clawback agreements” -- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of “books” in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement “on request.” Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response “to include information thereafter acquired.” This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented “at appropriate intervals.” A prior discovery response must be “seasonably * * * amend[ed].” The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct “in a timely manner.”

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided “promptly * * * after being called to the attorney's or party's attention.”

Former Rule 26(b)(2)(A) referred to a “good faith” argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a “nonfrivolous” argument to achieve consistency with Rule 11(b)(2).

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including—for many experts—an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under [Evidence Rule 702](#), [703](#), or [705](#). Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)

(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B) (vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the

discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.” The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added “to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices.”

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: “[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as “limitations”, no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: “Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery.”

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether “the burden or expense of the proposed discovery outweighs its likely benefit,” and “the importance of the proposed discovery in resolving the issues.” Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...!

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): “All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)].” The Committee Note recognized that “[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1).” It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination.

A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision ...". The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under [Evidence Rule 502](#).

[Notes of Decisions \(1465\)](#)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-15

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Revised Statutes Annotated of the State of New Hampshire
New Hampshire Court Rules
Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions (Refs & Annos)
A. Civil Rules
V. Discovery

NH Superior Court Civil Rule 22

RULE 22. AUTOMATIC DISCLOSURES

Currentness

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to Rule 22 (a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by Rule 22(a) shall be made as follows:

(1) by the plaintiff, not later than 30 days after the defendant to whom the disclosure is being made has filed his or her Answer to the Complaint; and

(2) by the defendant, not later than 60 days after the defendant making the disclosure has filed his or her Answer to the Complaint.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 21.

Credits

[Adopted May 22, 2013, effective October 1, 2013. Comment amended July 24, 2014, effective September 1, 2014.]

Editors' Notes

COMMENT

This rule, formerly PAD Rule 3, accomplishes a major change from prior New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there was a similar but not identical requirement in the so-called “fast-track” section of former Superior Court Rule 62(II), the rule was used very little and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. Requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce “gamesmanship” in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Section (a) of Rule 22 is taken largely from [Rule 26\(a\)\(1\) of the Federal Rules of Civil Procedure](#). It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide “the subjects” of the discoverable information known to individuals likely to have such information, [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(i\)](#), and “a description by category and location” of the discoverable materials in the possession, custody or control of the disclosing party, [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(ii\)](#). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, Rule 22(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under Rule 22(a)(1) unless that information is contained in the materials disclosed under Rule 22(a)(2). This more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(iii\)](#), in that the rule eliminates reference to “privileged or protected from disclosure” information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the intention is not to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. Therefore, there is no need to make a specific reference to privileged or otherwise protected materials in this rule.

The time limits established in section (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before the time when the defendant is required to file its Answer. The plaintiff should have the benefit of the defendant's Answer before making its initial disclosure since the Answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Section (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal [Rule 26\(e\)](#) and [Rule 21\(g\)](#). It should be noted, however, that this rule differs from [Rule 21\(g\)](#). [Rule 21\(g\)](#) sets forth

the general rule governing discovery and contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule. Section (c) of this rule, relating only to materials that must be disclosed pursuant to the automatic disclosure requirements of Rule 22, is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Section (d) of the rule references [Rule 21](#) and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

NH Superior Court Civil Actions Rule 22, NH R SUPER CT CIV Rule 22

The state court rules are current with amendments received through August 15, 2015.

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
III Pleadings and Motions

Rules of Civil Procedure, Rule 16.1
Formerly cited as NV ST Rule 16.1

RULE 16.1. MANDATORY PRE-TRIAL DISCOVERY REQUIREMENTS

Currentness

<Text of rule effective for all civil proceedings except proceedings in the Family Division of the Second and Eighth Judicial District Courts and in all domestic relations cases in the judicial districts without a family division as of February 1, 2006. For text of rule applicable to proceedings in the Family Division of the Second and Eighth Judicial District Courts and all domestic relations cases in judicial districts without a family division effective February 1, 2006, see following version of Rule 16.1.>

(a) Required Disclosures.

(1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under [NRS 50.275](#), [50.285](#) and [50.305](#).

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under [NRS 50.275](#), [50.285](#) and [50.305](#); a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under [NRS 50.275](#), [50.285](#) and [50.305](#), which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

(C) These disclosures shall be made at the times and in the sequence directed by the court.

(i) In the absence of extraordinary circumstances, and except as otherwise provided in subdivision (2), the court shall direct that the disclosures shall be made at least 90 days before the discovery cut-off date.

(ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 16.1(a)(1) and (2), a party must provide to other parties the following information regarding the evidence that it may present at trial, including impeachment and rebuttal evidence:

(A) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present, those witnesses who have been subpoenaed for trial, and those whom the party may call if the need arises;

(B) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under [NRS 48.025](#) and [48.035](#), shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 16.1(a)(1) through (3) must be made in writing, signed, and served.

(b) Meet and Confer Requirements.

(1) Attendance at Early Case Conference. Unless the case is in the court annexed arbitration program or short trial program, within 30 days after filing of an answer by the first answering defendant, and thereafter, if requested by a subsequent appearing party, the parties shall meet in person to confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1) of this rule and to develop a discovery plan pursuant to subdivision (b)(2). The attorney for the plaintiff shall designate the time and place of each meeting which must be held in the county where the action was filed, unless the parties agree upon a different location. The attorneys may agree to continue the time for the case conference for an additional period of not more than 90 days. The court, in its discretion and for good cause shown, may also continue the time for the conference. Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than 180 days after an appearance is served by the defendant in question.

Unless otherwise ordered by the court or the discovery commissioner, parties to any case wherein a timely trial de novo request has been filed subsequent to an arbitration, need not hold a further in person conference, but must file a joint case conference report pursuant to subdivision (c) of this rule within 60 days from the date of the de novo filing, said report to be prepared by the party requesting the trial de novo.

(2) Planning for Discovery. The parties shall develop a discovery plan which shall indicate the parties' views and proposals concerning:

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 16.1(a), including a statement as to when disclosures under Rule 16.1(a)(1) were made or will be made;

(B) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(C) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(D) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c); and

(E) An estimated time for trial.

(c) Case Conference Report. Within 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, each party must serve and file a case conference report which, either as a joint or individual report, must contain:

(1) A brief description of the nature of the action and each claim for relief or defense;

(2) A proposed plan and schedule of any additional discovery pursuant to subdivision (b)(2) of this rule;

(3) A written list of names exchanged pursuant to subdivision (a)(1)(A) of this rule;

(4) A written list of all documents provided at or as a result of the case conference pursuant to subdivision (a)(1)(B) of this rule;

(5) A calendar date on which discovery will close;

(6) A calendar date, not later than 90 days before the close of discovery, beyond which the parties shall be precluded from filing motions to amend the pleadings or to add parties unless by court order;

(7) A calendar date by which the parties will make expert disclosures pursuant to subdivision (a)(2), with initial disclosures to be made not later than 90 days before the discovery cut-off date and rebuttal disclosures to be made not later than 30 days after the initial disclosure of experts;

(8) A calendar date, not later than 30 days after the discovery cut-off date, by which dispositive motions must be filed;

(9) An estimate of the time required for trial; and

(10) A statement as to whether or not a jury demand has been filed.

After any subsequent case conference, the parties must supplement, but need not repeat, the contents of prior reports. Within 7 days after service of any case conference report, any other party may file a response thereto objecting to all or a portion of the report or adding any other matter which is necessary to properly reflect the proceedings occurring at the case conference.

(d) Discovery Disputes.

(1) Where available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner.

(2) Following each discovery motion before a discovery commissioner, the commissioner must prepare and file a report with the commissioner's recommendations for a resolution of each unresolved dispute. The commissioner may direct counsel to prepare the report. The clerk of the court shall forthwith serve a copy of the report on all parties. Within 5 days after being served with a copy, any party may serve and file written objections to the recommendations. Written authorities may be filed with an objection, but are not mandatory.

(3) Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.

(1) If the conference described in Rule 16.1(b) is not held within 180 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

(2) If the plaintiff does not file a case conference report within 240 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(3) If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(f) Complex Litigation. In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it shall also order a conference pursuant to Rule 16 to be conducted by the court or the discovery commissioner.

(g) Proper Person Litigants. When a party is not represented by an attorney, the party must comply with this rule.

Credits

Added, eff. Jan. 1, 1988. As amended, eff. Jan. 1, 2005; Jan. 1, 2013.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

Subdivision (a) is amended to conform to the 1993 and 2000 amendments to [Rule 26\(a\) of the federal rules](#), with some notable exceptions. Consistent with the federal rule, the revised rule imposes an affirmative duty to disclose certain basic information without a formal discovery request.

Subdivision (a)(1) incorporates the federal rule but adopts the “subject matter” standard for the scope of discovery that is retained in revised Rule 26(b) of the Nevada rules. Paragraph (1) also retains the Nevada requirement that impeachment witnesses and documents be disclosed, whereas the federal rule exempts impeachment evidence. Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages. Paragraph (1)(D) expands on the federal rule by requiring disclosure and production of liability policy denials, limitations or reservations of rights.

Subdivision (a)(2) imposes an additional duty to disclose information regarding expert testimony and requires that certain experts must prepare a detailed and complete written report. But unlike its federal counterpart, subdivision (a)(2)(B) allows the court to relieve a party of this duty upon a showing of good cause. The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. Given this limitation, a treating physician could be deposed or called to testify without any requirement for a written report. See [Fed. R. Civ. P. 26\(a\) advisory committee note \(2000\)](#). The expert witness disclosures and written reports are not part of the initial disclosure under paragraph (1). Instead, subdivision (a)(2)(C) contemplates that the court will set the time for such disclosures but that they must be made at least 90 days before the discovery cut-off date absent extraordinary circumstances. This provision differs from its federal counterpart, which allows the disclosures to be made at least 90 days before the trial date or the date the case is to be ready for trial.

Subdivision (a)(3) retains the Nevada requirement for pretrial disclosure of impeachment and rebuttal evidence and the names of witnesses who have been subpoenaed for trial. Unlike the federal rule, there is no requirement that the information disclosed be filed with the court.

Subdivision (b) is repealed in its entirety. New subdivision (b)(1) incorporates the requirement under former Rule 16.1(a) of attendance at an early case conference. It is based on [Rule 26\(f\) of the federal rules](#), but is tailored to practice in state court and, unlike the federal rule, it requires the parties to meet in person. The rule also retains deadlines that are unique to Nevada. Subdivision (b)(2) incorporates provisions of [Rule 26\(f\) of the federal rules](#) regarding planning for discovery. But the Nevada provision expands the subjects to be discussed at the early case conference beyond those listed in the federal rule to include an estimated time for trial.

Subdivision (c) is amended to reflect the new disclosure provisions of subdivision (a). The requirements for a case conference report are more detailed and extensive than those in [Rule 26\(f\) of the federal rules](#) and include specific time periods for the close of discovery, filing of motions to amend pleadings or add parties, expert disclosures, and filing of dispositive motions.

Subdivision (d) retains the Nevada provisions on discovery disputes with some revisions.

DRAFTER'S NOTE 2012 AMENDMENT

Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

[Notes of Decisions \(22\)](#)

Civ. Proc. Rules, Rule 16.1, NV ST RCP Rule 16.1

Current with amendments received through 11/15/15

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
V Depositions and Discovery

Rules of Civil Procedure, Rule 26
Formerly cited as NV ST Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1) may obtain discovery by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition after being sealed be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(d) Sequence and Timing of Discovery. After compliance with subdivision (a) of this rule, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

As amended, eff. Sept. 27, 1971; Jan. 1, 2005.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

- (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(f) Form of responses. Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

Added, eff. Feb. 11, 1986; Jan. 1, 2005.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure and report made pursuant to Rules 16.1(a)(1), 16.1(a)(3), 16.1(c), 16.2(a)(2), 16.2(a)(4), and 16.2(d) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection, is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,

response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Added, eff. Jan. 1, 1988; Jan. 1, 2005.

(h) Demand for Prior Discovery. Whenever a party makes a written demand for discovery which took place prior to the time the party became a party to the action, each party who has previously made discovery disclosures, responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the discovery disclosures and responses in question are contained for inspection and copying or furnish to the demanding party a list identifying each such document by title and upon further demand shall furnish to the demanding party, at the expense of the demanding party, a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at the latter's expense.

Added, eff. Feb. 11, 1986. As amended, eff. Jan. 1, 2005.

Credits

As amended, eff. Sept. 27, 1971; Jan. 1, 2005; July 1, 2008.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

The initial-disclosure provisions in [Rule 26\(a\) of the federal rules](#), as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules; only other discovery methods are retained as part of Rule 26(a) of the Nevada rules.

Subdivision (b) retains the Nevada rule as to the scope of discovery--“any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Thus, the Nevada rule does not conform to the 2000 amendments to its federal counterpart which limits the scope of discovery to “any matter, not privileged, that is relevant to the claim or defense of any party,” except upon a showing of “good cause.”

The insurance discovery provisions in subdivision (b)(2) of the former rule have been amended and moved to Rule 16.1(a)(1)(D).

Subdivision (b)(2)(iii) does not incorporate the weighing provisions that were added to the federal rule in 1993 but instead retains the language in the Nevada rule, which was based on the federal provision as it was adopted in 1983.

Expert discovery under subdivision (b)(4) is modified consistent with expert disclosure under revised Rule 16.1(a)(2). The provisions of former subdivision (b)(5) regarding demands for expert witness lists and the exchange of reports and writings, are repealed as unnecessary under the new expert disclosure provisions in Rule 16.1. New subdivision (b)(5) conforms to the federal rule.

Subdivision (c) is amended to conform to the 1993 amendment to subdivision (c) of the federal rule. The amendment requires that the parties meet and confer in an effort to resolve discovery disputes before seeking a protective order from the court. The party filing a motion for a protective order must include a certificate stating that the parties met and conferred, or, if the moving party is unable to get opposing parties to meet and confer regarding the dispute, indicating the moving party's efforts in attempting to arrange such a meeting.

Subdivision (d) is amended to clarify that once the parties have complied with the provisions of subdivision (a) of the rule, the parties may use any method of formal discovery provided in the rules in any sequence unless the court orders otherwise. The provision is similar to subdivision (d) of the federal rule, but it does not include the first sentence of the federal rule, which provides that with certain exceptions, the parties may not commence formal discovery until after they have met and conferred as required by subdivision (f) of the federal rule (cf. [NRCPC 16.1\(b\)](#)). The parties must comply with subdivision (a) of the Nevada rule.

Subdivision (e) is amended to conform to the 1993 amendments to subdivision (e) of the federal rule. The rule is amended to provide that the requirement for supplementation applies to disclosures required by [Rule 16.1\(a\)](#). Paragraph (1) is amended to address when a party must supplement disclosures made under [Rule 16.1\(a\)](#) and to require supplementation of expert reports and depositions. Paragraph (2) is amended to address the duty to supplement responses to formal discovery requests including interrogatories, requests for production and requests for admissions. Like its federal counterpart, paragraph (2) does not include deposition testimony. However, under paragraph (1), a party must supplement information provided through a deposition of an expert from whom a report is required under [Rule 16.1\(a\)\(2\)\(B\)](#). Paragraphs (3) and (4) of the former rule are repealed.

Subdivision (f) of the former rule is repealed as duplicative of provisions in [Rules 16](#) and [16.1](#). To avoid redesignating the remaining subdivisions, former subdivision (f) is replaced with the language from former subdivision (j) regarding the form of responses to discovery requests. There is no federal counterpart to this provision.

Subdivision (g) is amended to conform to the 1993 amendments to subdivision (g) of the federal rule. Paragraph (1) is added to require signatures on certain disclosures required by [Rule 16.1](#). Paragraph (2) retains language from the former rule for signatures on discovery requests, responses, and objections with some revisions to conform to the 1993 amendments to the federal rule. Paragraph (3) retains language from the former rule regarding sanctions if a certification is made in violation of the rule with modifications to make it consistent with [Rules 37\(a\)\(4\)](#) and [37\(c\)\(1\)](#)--in combination, these rules provide sanctions for violation of the rules regarding disclosures and discovery matters.

Subdivision (h) is amended to address technical issues. It has no federal counterpart. The provision is retained because it clarifies responsibilities to exchange discovery with new parties.

Subdivision (i) of the former rule is repealed in favor of a strong scheduling order under [Rule 16](#) that will set discovery deadlines.

ADVISORY COMMITTEE'S NOTE

Revised in 1971 in accordance with the federal amendments, effective July 1, 1970, but with subsection (f) added.

[Notes of Decisions \(62\)](#)

Civ. Proc. Rules, Rule 26, NV ST RCP Rule 26
Current with amendments received through 11/15/15

West's Alaska Statutes Annotated
Alaska Court Rules
Rules of Civil Procedure
Part V. Depositions and Discovery

Rules of Civil Procedure, Rule 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Currentness

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under [Civil Rule 16\(g\)](#), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of [AS 09.17.080](#), and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under [Evidence Rules 702, 703, or 705](#).

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under [Rule 32\(a\)](#) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with [Rule 5](#).

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under [Rule 30](#), and the number of requests under [Rule 36](#). The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of [Rule 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in [Rule 35\(b\)](#) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified

terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of [Rule 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) *Timing of Discovery--Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under [Rule 33\(a\)](#) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery--Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under [Civil Rule 30](#), a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service under [Rule 4\(e\)](#) if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under [Civil Rule 30\(a\)\(2\)\(C\)](#).

(B) For depositions upon written questions under [Civil Rule 31](#), a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under [Civil Rules 33, 34, and 36](#), discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under paragraph (a) or [Civil Rule 26.1\(b\)](#) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under [Rule 16\(b\)](#), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6) whether a scheduling conference is unnecessary; and

(7) any other orders that should be entered by the court under paragraph (c) or under [Rule 16\(b\) and \(c\)](#).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) [Applicable to cases filed on or after August 7, 1997.] **Limited Discovery; Expedited Calendaring.** In a civil action for personal injury or property damage involving less than \$100,000 in claims, the parties shall limit discovery to that allowed under [District Court Civil Rule 1\(a\)\(1\)](#) and shall avail themselves of the expedited calendaring procedures allowed under [District Court Civil Rule 4](#).

Credits

[Amended effective July 15, 1990; July 15, 1994; July 15, 1995; July 15, 1997; August 7, 1997; August 7, 1997; July 15, 1998; October 15, 2005; April 15, 2009; October 15, 2014.]

Editors' Notes

NOTE

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies “to all causes of action accruing on or after the effective date of this Act.” The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases filed on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Ch. 26, § 10, SLA 1997 repeals and reenacts [AS 09.17.020](#) concerning punitive damages. New [AS 09.17.020\(e\)](#) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new [AS 09.17.020\(e\)](#) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Section 2 of chapter 95 SLA 1998 amends [AS 09.19.050](#) to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 “by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners.”

Note to SCO 1647: The supreme court has approved certain procedures for Anchorage cases that vary from those specified in this rule. Civil Rule 26(a)(1) sets out a procedure to be used “[e]xcept to the extent otherwise directed by order or rule,” and sets a timeline for disclosures “[u]nless otherwise directed by the court.” Civil Rule 26(f) also sets out a procedure to be used “except when otherwise ordered.” In Anchorage, Administrative Order 3AO-03-04 (Amended) applies to modify the procedures set out in subdivisions (a)(1) and (f). That Order, commonly referred to as the Anchorage Uniform Pretrial Order, was issued and adopted according to the provisions of [Administrative Rule 46](#), and is available on the court system's website at <http://www.courts.alaska.gov/orders-cr16-26.htm>.

Rules Civ. Proc., Rule 26, AK R RCP Rule 26

Current with amendments received through October 15, 2015

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery

C.R.C.P. Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Currentness

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, [C.R.C.P. 120](#), or other expedited proceedings.

(1) Disclosures. Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to [C.R.C.P. 34](#);

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to [C.R.C.P. 34](#) the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to [C.R.C.P. 34](#); and

(D) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to [C.R.C.P. 34](#).

Disclosures shall be served within 28 days after the case is at issue as defined in [C.R.C.P. 16\(b\)\(1\)](#). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to [C.R.C.P. 16\(d\)](#).

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to [Rules 702, 703, or 705 of the Colorado Rules of Evidence](#) together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead [C.R.C.P. 16\(c\)](#).]

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to [C.R.C.P. 10](#), signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to [C.R.C.P. 34](#); physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) **Discovery Scope and Limits.** Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(I) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(II) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of [C.R.C.P. 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b) (1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by [C.R.C.P. 35\(b\)](#) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a) (2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) **Protective Orders.** Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to [C.R.C.P. 16\(b\) \(18\)](#). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by [C.R.C.P. 26\(b\)\(2\)](#). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See [C.R.C.P. 16](#)].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection

and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Credits

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006; Jan. 1, 2012; Sept. 18, 2014; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with [C.R.C.P. 16](#), C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, [C.R.C.P. 120](#), or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and [C.R.C.P. 16](#) to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after [Fed.R.Civ.P. 26](#) as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in [C.R.C.P. 16](#), which is very different from its Federal Rule

counterpart. The interrelationship between C.R.C.P. 26 and [C.R.C.P. 16](#) is described in the Committee Comment to [C.R.C.P. 16](#).

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different ([C.R.C.P. 16\(b\)](#)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules ([C.R.C.P. 121](#) § 1-12) but not the Federal Rule ([Fed.R.Civ.P. 26\(c\)](#)); (7) presumptive limitations on discovery as contemplated by [C.R.C.P. 16\(b\)\(1\)\(VI\)](#) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule ([C.R.C.P. 16\(b\)\(1\)\(IV\)](#)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations ([C.R.C.P. 29](#)); and (10) pretrial endorsements governed by [Fed.R.Civ.P. 26\(a\)\(3\)](#) are part of Colorado's trial management system established by [C.R.C.P. 16\(c\)](#) and [C.R.C.P. 16\(d\)](#).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in [C.R.C.P. 16\(b\)](#) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in [C.R.C.P. 8](#) for a "short, plain statement" of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal "Committee Notes" to the December 1, 1993 and December 1, 2000 amendments of [Fed.R.Civ.P. 26](#) are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the [C.R.C.P. 16\(b\)](#) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed [Fed. R. Civ. P. 26\(b\)\(1\)](#). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-

case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules “shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.” [C.R.C.P. 1](#).

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)-- *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.--have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information “whether or not supportive” of the disclosing party's case. This should not be a significant change from prior practice. In 2000, [Fed. R. Civ. P. 26\(a\)\(1\)](#) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of [Rule 26\(a\)\(1\)](#) require information related to claims for relief and defenses (consistent with the scope of discovery in [Rule 26\(b\)\(1\)](#)). Also the identification of persons with relevant information calls for a “brief *description* of the *specific* information that each individual is known or believed to possess.” Under the prior rule, disclosures of persons with discoverable information identifying “the subjects of information” tended to identify numerous persons with the identification of “X is expected to have information about and may testify relating to the facts of this case.” The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a “summary” of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. [Rule 26\(a\)\(2\)\(B\)\(I\)](#).

“Other” (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a “statement” must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. [Rule 26\(a\)\(2\)\(B\)\(II\)](#).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. [Rule 26\(b\)\(4\)\(A\)](#).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. [Rule 26\(e\)](#). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to [Rule 26](#), like the current and proposed version of [Fed. R. Civ. P. 26](#), emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe, administer and employ" these rules "to secure the just, speedy, and inexpensive determination of every action." [C.R.C.P. 1. Rule 26\(a\)\(2\)](#) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

[Notes of Decisions \(393\)](#)

Rules Civ. Proc., Rule 26, CO ST RCP Rule 26
Current with amendments received through August 15, 2015

West's **Utah** Code Annotated
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part V. Depositions and Discovery

Utah Rules of Civil Procedure, Rule **26**

RULE **26**. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under [Rule 702 of the Utah Rules of Evidence](#) and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days

thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under [Rule 702 of the Utah Rules of Evidence](#) from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) *Pretrial disclosures.*

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under [Rules 402 and 403 of the Utah Rules of Evidence](#), objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the [Utah Health Care Malpractice Act](#) for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality.* Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden.* The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming \$50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than \$300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Total	Rule 33	Rule 34	Rule 36	Days
	Fact	Interrogatories	Requests	Requests	to
Amount of	Deposition	including all	for	for	Complete
Damages	Hours	discrete subparts	Production	Admission	Standard
					Fact
					Discovery

1	\$50,000 or less	3	0	5	5	120
2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180
3	\$300,000 or more	30	20	20	20	210

(c)(6) *Extraordinary discovery.* To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii)

a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in [Drew v. Lee, 2011 UT 15](#), wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may

be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce “satellite litigation” over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by “relevance” or the “likelihood to lead to discovery of admissible evidence.” These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that “the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.” The Federal Rules of Civil Procedure contains a similar provision. See **Fed. R. Civ. P. 26(b)(2)(C)**. This method of limiting discovery, however, was rarely invoked either under the **Utah** rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of “standard” discovery has the burden of showing that the request is “relevant to the claim or defense of any party” and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The “one-size-fits-all” system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the

rule itself. “Tier 1” describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth larger limits on standard discovery that are applicable in cases involving damages above \$50,000 but less than \$300,000. Finally, “Tier 3” prescribes still greater standard discovery for actions involving damages in excess of \$300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the **Utah** State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule **26(c)** governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule **26(d)**. If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive

to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the **Utah** Rules of Civil Procedure. These privileges, found in both **Utah** common law and statute, include [Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953](#). The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the **Utah** Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

LAW REVIEW AND JOURNAL COMMENTARIES

[Appellate highlights. Rodney R. Parker and Julianne P. Blanch, 28-FEB **Utah** B.J. 38 \(January/February, 2015\).](#)

[Are medical records now off limits? An examination of Sorenson v. Barbuto. S. Grace Acosta, 22 **Utah** B.J. 17 \(May/June, 2009\).](#)

[Case Law Developments: The Work-Product Doctrine. Lauder, 1996 **Utah** L. Rev. 265 \(1996\).](#)

[Case Law Developments: Work Product Protection for an Insurer's Claim File. Smith, 1997 **Utah** L. Rev. 137 \(1997\).](#)

[AN EXPERT FOR ALL SEASONS: EXPERT TESTIMONY USUALLY REQUIRED, AND UNUSUALLY SPECIFIC. TANNER LENART, 27-APR **UTAH** B.J. 61 \(2014\).](#)

[How to Take an Out-of-State Deposition. Bushnell, 14 **Utah** B.J. 28 \(Jan./Feb. 2001\).](#)

[Standard 19. Donald J. Winder and Lance F. Sorenson, 20 **Utah** B.J. 41 \(January/February 2007\).](#)

[Talkin' 'bout a revolution?: **Utah** overhauls its rules of civil discovery. Marc Therriern, 2011 **Utah** L. Rev. 669 \(2011\).](#)

UNITED STATES CODE ANNOTATED

In general, see [FRCP Rule 26 et seq.](#)

Relevant Notes of Decisions (163)

[View all 202](#)

Notes of Decisions listed below contain your search terms.

In general

Trial court mooted for appeal purported creditor's argument that court erred in dismissing his debt collection claims for failure to comply with rules of civil procedure by not arranging for scheduling conference, in debtor's motion to dismiss for failure to prosecute, where court acknowledged that rule requiring a scheduling conference did not apply because some of the defendants were not represented by counsel, and court determined that the change in its analysis did not affect its original conclusion to

dismiss for failure to prosecute. *Velander v. LOL of Utah, LLC*, 2015, 2015 UT App 171, 2015 WL 4130505. Appeal and Error ☞ 781(4)

Injured driver's failure to designate his witness as expert precluded consideration of witness' proposed opinion testimony regarding proper inspection and repair of tie rods on all terrain vehicle, in driver's action against mechanic for negligent inspection and repair of tie rods. *Warenski v. Advanced RV Supply*, 2011, 257 P.3d 1096, 685 *Utah Adv. Rep.* 50, 2011 UT App 197, certiorari denied 268 P.3d 192. Pretrial Procedure ☞ 45

An attorney has a responsibility to use the available discovery procedures to diligently represent her client, and in civil matters, Rules of Civil Procedure provide the means to do this. Rules of Prof.Conduct, Rule 1.3. *Brown v. Glover*, 2000, 16 P.3d 540, 408 *Utah Adv. Rep.* 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Attorney And Client ☞ 112; Pretrial Procedure ☞ 11; Pretrial Procedure ☞ 24

Where wife filed divorce complaint and, before service of summons and without notice to husband, a hearing was held in which wife testified and thereafter an order for service of summons by publication was obtained and default of husband was entered upon his failure to answer and divorce was granted on basis of testimony which had been given by wife previously, court had no legal evidence before it upon which to grant divorce and exceeded its jurisdiction when it attempted to grant a divorce without first having taken legal evidence. U.C.A.1953, 30-3-4; Rules of Civil Procedure, rule 26 et seq. *Treutle v. District Court of Salt Lake County*, 1958, 7 *Utah* 2d 155, 320 P.2d 666. Divorce ☞ 146

Under Rules of Civil Procedure, pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with the vital role in the preparations of trial. Rules of Civil Procedure, rule 8(a). *Blackham v. Snelgrove*, 1955, 3 *Utah* 2d 157, 280 P.2d 453. Pleading ☞ 1; Pretrial Procedure ☞ 16; Pretrial Procedure ☞ 61

Construction and application

Rule with respect to discovery must be applied with common sense and within reasonable bounds consistent with its objective. Rules of Civil Procedure, rules 1(a), 30(b), 33. *State By and Through Road Commission v. Petty*, 1966, 17 *Utah* 2d 382, 412 P.2d 914. Pretrial Procedure ☞ 13

Nature and purpose of discovery

Rules authorizing discovery sanctions are aimed at encouraging good faith compliance with the discovery obligations imposed under the rules of civil procedure, and provide the court with the authority to sanction those who fail to live up to the requirements of those rules. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 *Utah Adv. Rep.* 22, 2012 UT App 61. Pretrial Procedure ☞ 44.1

Purpose of discovery rules is to facilitate fair trials with full disclosure of all relevant testimony and evidence. *Roundy v. Staley*, 1999, 984 P.2d 404, 374 *Utah Adv. Rep.* 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure ☞ 14.1

Discovery rules were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities and to remove elements of surprise or trickery, and accordingly rules should be liberally construed. Rules of Civil Procedure, rules 1(a), 26(b), 33. *Ellis v. Gilbert*, 1967, 19 *Utah* 2d 189, 429 P.2d 39. Pretrial Procedure ☞ 15

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 *Utah* 1, 245 P.2d 224. Pretrial Procedure ☞ 15

Because the courts at common law allowed parties to conceal from each other up to the time of trial the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, the equitable remedy of bills

for discovery to assist the prosecution or defense of an action pending in a court at law arose. [Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 🔑 14.1](#)

Actions and proceedings in which discovery is available

Discovery is to be liberally permitted in condemnation cases. [Utah Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Pretrial Procedure 🔑 21](#)

Right to discovery and grounds for allowance or refusal, generally

Former client violated discovery deadline by serving discovery on attorney in legal malpractice action on the last day for discovery, because attorney did not have time in which to respond. [Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 🔑 25](#)

Insofar as discovery will aid in eliminating noncontroversial matters and in identifying, narrowing and clarifying issues on which contest may prove to be necessary, it should be liberally permitted. Rules of [Civil Procedure, rules 1\(a\), 30\(b\), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 🔑 17.1; Pretrial Procedure 🔑 335](#)

The fact that a party having peculiar knowledge of a matter fails to bring it forward does not furnish any basis for the court to make an order requiring such party to divulge his knowledge before trial to the adverse party, or to supply him with the means of obtaining it. [Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 🔑 17.1](#)

Discretion of court

The trial court's failure to grant motorist's wife's request to extend the discovery deadlines so she could amend her expert designation list was not an abuse of discretion; the depositions of highway patrol officers occurred before wife's expert disclosures and reports were due, and wife admitted that she learned during the depositions which officer was most knowledgeable about the highway patrol diagram she desired to admit into evidence at trial, and thus which officer should be designated as an expert. [Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 🔑 25](#)

A trial court must exclude an expert witness disclosed after expiration of the established deadline unless the court chooses to exercise its equitable discretion. [Callister v. Snowbird Corp., 2014, 2014 UT App 243, 771 Utah Adv. Rep. 43, 2014 WL 5305967. Pretrial Procedure 🔑 45](#)

An abuse of discretion in the amount of a discovery sanction award may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 🔑 961](#)

To show that a trial court abused its discretion in choosing which discovery sanction to impose, a party must show either that the sanction is based on an erroneous conclusion of law or that the sanction lacks an evidentiary basis. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 🔑 961](#)

Trial court did not abuse its discretion by awarding seller attorney fees incurred on seller's second motion for discovery sanctions, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, where information that seller had sought in discovery was pertinent to seller's defense, and purchaser's eventual admission, that crane trailer purchaser touted in a bank application was never built, should have been disclosed much earlier in the discovery process. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 🔑 44.1](#)

Trial courts have broad discretion regarding discovery matters, including protective orders. [Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370](#), rehearing denied, certiorari denied 4 P.3d 1289. [Pretrial Procedure 19](#); [Pretrial Procedure 41](#)

Generally, trial court is granted broad latitude in handling discovery matters. [R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33](#), rehearing denied. [Pretrial Procedure 19](#)

Time, place, and manner requirements relating to discovery are committed to the discretion of the tribunal. [Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135](#). [Pretrial Procedure 19](#)

Tribunal has sufficient discretion to require discovery practices that are fair and effective in circumstances of pending controversy. [Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135](#). [Pretrial Procedure 11](#)

Wide latitude of discretion is vested in trial judge in determining whether good cause exists for requiring production of documents. Rules of [Civil Procedure, rule 34](#). [Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254](#). [Pretrial Procedure 336](#)

Discovery methods and procedure

Burden is on the discovering party to be diligent in using the available procedures to obtain discovery, and to notify the court when a problem in doing so arises. [Rules Civ.Proc., Rule 37](#). [Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89](#), on remand 2001 UT App 52, 2001 WL 298577. [Pretrial Procedure 24](#)

Sequence, timing, and condition of cause

The failure of third-party plaintiff property owners to take any steps in pursuit of their claim against title company between the time they purchased the cause of action back from bankruptcy trustee and the expert disclosure deadline was unjustified, and thus, the trial court did not abuse its discretion by declining to relieve the property owners of the automatic exclusion of their expert for their failure to disclose; even if the property owners were confused about their role in the case when the bankruptcy trustee was substituted, any doubt regarding their authority and responsibility to pursue their claim should have been resolved after they bought back the cause of action at auction. [R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850](#). [Pretrial Procedure 45](#)

A discovery request must be served early enough that the responding party will have a full thirty days in which to respond before the discovery deadline. [Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389](#), certiorari denied 275 P.3d 1019. [Pretrial Procedure 25](#)

Trial court properly granted protective order prohibiting any further discovery against county, in connection with action in which landowners challenged county's approval of construction of railroad loading facility, on basis that all of plaintiffs' substantive claims against county had been resolved when plaintiffs had earlier been granted partial summary judgment. [Harper v. Summit County, 1998, 963 P.2d 768, 348 Utah Adv. Rep. 7](#), certiorari granted 982 P.2d 87, affirmed in part, reversed in part 26 P.3d 193, 414 Utah Adv. Rep. 21, 2001 UT 10, rehearing denied. [Pretrial Procedure 25](#)

Trial court did not err in striking student's motions to compel discovery after motion disposing of the case had been granted, since student could have preserved his right to discovery by seeking continuance of hearing on his first motion and, in view of dismissal, no purpose would be served by defendants' responding to outstanding request for discovery. [Reece v. Board of Regents of State of Utah, 1987, 745 P.2d 457](#). [Pretrial Procedure 25](#)

Scope of discovery--In general

Trial court acted within its discretion in granting protective order to limit plaintiff's discovery in action seeking recognition of an unsolemnized marriage, where plaintiff's counsel failed to meet with defendant's counsel or schedule a meeting, and order was granted two weeks before trial, after plaintiff had submitted certificate of readiness for trial one year earlier. *Richards v. Brown*, 2009, 222 P.3d 69, 642 **Utah** Adv. Rep. 25, 2009 UT App 315, certiorari granted 225 P.3d 880, affirmed on other grounds 274 P.3d 911, 704 **Utah** Adv. Rep. 39, 2012 UT 14. *Pretrial Procedure* 🔑 41

“Rebuttal evidence,” which party need not disclose pursuant to discovery request, is that which a party may or may not use, depending on the testimony elicited at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) *Roundy v. Staley*, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. *Pretrial Procedure* 🔑 38

Use of discovery should not be extended to permit ferreting unduly into detail, nor to have effect of cross-examining opposing party or his witnesses nor should it be distorted into fishing expedition in hope that something may be uncovered, but should be confined within proper limits of enabling parties to find out essential facts for legitimate objectives. Rules of *Civil Procedure*, rules 1(a), 30(b), 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. *Pretrial Procedure* 🔑 28

One means of accomplishing objectives of new Rules of Civil Procedure is to permit discovery of information which will aid in eliminating noncontroversial matters and identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Rules of *Civil Procedure*, rules 1(a), 30(b), 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. *Pretrial Procedure* 🔑 27.1

---- Relevancy and materiality, scope of discovery

Ultimate objective of lawsuit is determination of dispute, and whatever helps attain that objective is “relevant” to lawsuit, within discovery rule. Rules of *Civil Procedure*, rule 26(b). *Ellis v. Gilbert*, 1967, 19 **Utah** 2d 189, 429 P.2d 39. *Pretrial Procedure* 🔑 31

---- Probable admissibility at trial, scope of discovery

Report written by former engineer for truck manufacturer was not sufficiently connected to testimony of manufacturer's door latch expert to justify its admission in products liability action brought against truck manufacturer in order to impeach its expert; manufacturer's expert could not properly lay the foundation for the engineer's report because he was not involved in its preparations, and when questioned about his reliance on the engineer's report, expert stated that he had read the engineer's report, eliminated it from the possibilities, and did his own work. *Clayton v. Ford Motor Co.*, 2009, 214 P.3d 865, 632 **Utah** Adv. Rep. 12, 2009 UT App 154, certiorari denied 221 P.3d 837. *Evidence* 🔑 560

Provision of discovery rule authorizing discovery of testimony even though it would not be admissible is not a restriction on inquiry allowed into any matter which is relevant to subject matter of action. Rules of *Civil Procedure*, rule 26(b). *Ellis v. Gilbert*, 1967, 19 **Utah** 2d 189, 429 P.2d 39. *Pretrial Procedure* 🔑 32

---- Witnesses, scope of discovery

No expert report is required where the expert is the party's treating physician. *Brussow v. Webster*, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. *Pretrial Procedure* 🔑 39

In judicially imposing a deadline for the disclosure of witness lists in a civil case, a court must explicitly, either orally or in writing, impose a month and day deadline. Rules *Civ.Proc.*, Rule 37(b)(2). *Rehn v. Rehn*, 1999, 974 P.2d 306, 363 **Utah** Adv. Rep. 8, 1999 UT App 41. *Pretrial Procedure* 🔑 40

Requiring condemnor to answer as to what it contended was fair market value of property taken was proper, in condemnation proceeding, even though condemnor may have based his claim as to such value upon advice it had received from expert witnesses. Rules of Civil Procedure, rule 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. [Pretrial Procedure](#) 🔑 39

Requiring condemnor to state names and addresses of its witnesses in condemnation case was not improper particularly where they were supposed to be experts and credence to be given their testimony depended to large extent upon their qualifications. Rules of Civil Procedure, rule 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. [Pretrial Procedure](#) 🔑 40

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 **Utah** 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 379

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 **Utah** 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 379

--- Insurance, generally, scope of discovery

A showing of breach of express contract by insurer is not a condition precedent to an insured seeking discovery in connection with ongoing litigation of a bad faith claim. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. [Pretrial Procedure](#) 🔑 37

Information underlying vehicle valuation comparison (VVC) completed by defendant motorist's insurer was irrelevant to automobile accident case brought by plaintiff truck owners, where defendant's stipulation in open court that she would not use the VVC at trial removed any need plaintiffs had for information to impeach the VVC and where plaintiffs had never suggested they would rely on the VVC at trial, and thus, information underlying the VVC was not subject to discovery. Rules Civ.Proc., Rule 26(b)(1); Rules of Evid., Rule 401. *Major v. Hills*, 1999, 980 P.2d 683, 369 **Utah** Adv. Rep. 24, 1999 UT 44. [Pretrial Procedure](#) 🔑 36.1

Information in possession of uninsured motorist (UM) carrier on similar accidents and injuries, its internal policies and procedures for handling UM claims, and internal aspects of processing of insured's claim were irrelevant in insured's tort suit in which carrier had intervened to dispute uninsured motorist's liability and damages, and, thus, information sought in interrogatories was not subject to discovery; information about other accidents and injuries would not assist in determining degree of negligence or dollar value of insured's injuries, and information on internal policies and procedures would be related only to hypothetical bad faith claim. Rules Civ.Proc., Rule 26(b)(1). *Chatterton v. Walker*, 1997, 938 P.2d 255, 312 **Utah** Adv. Rep. 3, rehearing denied. [Pretrial Procedure](#) 🔑 283

Copy of automobile liability policy of defendant motorist should be produced for plaintiff upon proper demand, but information regarding insurance should not be disclosed to jury. Rules of Civil Procedure, rules 26(b), 33. *Young v. Barney*, 1967, 20 **Utah** 2d 108, 433 P.2d 846. [Pretrial Procedure](#) 🔑 381

Defendant in automobile accident case must answer in discovery procedure whether she was insured, name of insurer, and amount of coverage. Rules of Civil Procedure, rules 1(a), 16, 26(b), 33. *Ellis v. Gilbert*, 1967, 19 **Utah** 2d 189, 429 P.2d 39. [Pretrial Procedure](#) 🔑 180

Privileged matters--In general

Materials which are subject of protective order under **Utah** Rule of Civil Procedure governing protection from discovery for trade secret or other confidential research, development, or commercial information are not privileged for purposes of Freedom of Information Act trade secret exemption; rather, determination of whether documents contain trade secrets under Freedom of Information Act exemption is to be made solely by applying express exemption for trade secrets and confidential commercial or financial information found in exemption itself. 5 U.S.C.A. § 552(b)(4, 5); **Utah** Rules Civ.Proc., Rule 26(c)(7). *Anderson v. Department of Health and Human Services*, 1990, 907 F.2d 936. [Records](#) 🔑 59

The burden is on the party asserting a privilege to establish that the material sought is protected from discovery. *Allred v. Saunders*, 2014, 2014 UT 43, 2014 WL 5334034. [Privileged Communications and Confidentiality](#) 🔑 26

Trial court did not abuse its discretion by entering protective order prohibiting ethanol plant builder from obtaining discovery from city, which purchased electricity generated using energy from geothermal energy producer, of information that was allegedly secret, proprietary, and confidential, in builder's action against producer, claiming that producer had underpaid builder under settlement agreement requiring producer to pay builder amount based on percentage of producer's gross geothermal energy sales revenues; producer submitted affidavits demonstrating that builder was competitor of producer, and information was clearly outside realm of relevant information and was highly sensitive information that might have given builder competitive edge against producer in future energy ventures. Rules Civ.Proc., Rule 26(c). *R & R Energies v. Mother Earth Industries, Inc.*, 1997, 936 P.2d 1068, 313 **Utah** Adv. Rep. 33, rehearing denied. [Pretrial Procedure](#) 🔑 41; [Privileged Communications And Confidentiality](#) 🔑 402

When statutory confidential information privilege or the common-law executive privilege is asserted in opposition to request for discovery, trial court must make an independent determination of extent to which the privilege applies to the material sought to be discovered; such determination is a result of the ad hoc balancing of the interests in the disclosure of the materials, and the government's interests in their confidentiality. U.C.A.1953, 78-24-8; Rules Civ.Proc., Rule 26(b)(1). *Madsen v. United Television, Inc.*, 1990, 801 P.2d 912. [Privileged Communications And Confidentiality](#) 🔑 354

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41. *Mower v. McCarthy*, 1952, 122 **Utah** 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 389

---- Work product, privileged matters

Any material that would not have been generated but for the pendency or imminence of litigation receives attorney work product protection; by contrast, documents produced in the ordinary course of business or created pursuant to routine procedures or public requirements unrelated to litigation do not qualify as attorney work product. *Schroeder v. Utah Attorney General's Office*, 2015, 2015 UT 77, 794 **Utah** Adv. Rep. 109, 2015 WL 5037832. [Pretrial Procedure](#) 🔑 359

Documents created as part of a government actor's official duties receive no protection from disclosure under work product doctrine even if the documents are likely to be the subject of later litigation. *Schroeder v. Utah Attorney General's Office*, 2015, 2015 UT 77, 794 **Utah** Adv. Rep. 109, 2015 WL 5037832. [Pretrial Procedure](#) 🔑 359

Opinion work product, which includes mental impressions, conclusions, opinions or legal theories of an attorney or party, is afforded higher protection than fact work product; however, to utilize the opinion work product privilege, the party asserting it has the burden to establish that it is applicable. *Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Division of Information Technology*, 2008, 200 P.3d 643, 620 **Utah** Adv. Rep. 8, 2008 UT 88. [Pretrial Procedure](#) 🔑 35

Acts performed by a public employee in the performance of his official duties are not prepared in anticipation of litigation or for trial merely by virtue of the fact that they are likely to be the subject of later litigation; instead they are performed in the ordinary course of business and are not protected from disclosure under the work product doctrine. *Southern Utah Wilderness*

Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 **Utah** Adv. Rep. 8, 2008 UT 88. *Pretrial Procedure* 🔑 36.1

Trial court could not order that death-sentenced defendant produce all documents relating to defendant's communications with appointed post-conviction counsel and pro-bono attorneys who originally represented defendant, for purposes of State's response to defendant's claim that he received ineffective assistance of post-conviction counsel, in motion to set aside default judgment dismissing post-conviction petition, until State first made showing that it had substantial need for documents which it could not, without undue hardship, obtain by other means, that communications were at issue, and that documents had been edited to prevent unnecessary disclosure of irrelevant information. *Menzies v. Galetka*, 2006, 150 P.3d 480, 567 **Utah** Adv. Rep. 15, 2006 UT 81. *Criminal Law* 🔑 1590

There is a sense in which an attorney's mental impressions, conclusions, and opinions of an attorney constitute the facts of the case and therefore may be discoverable; however, this exception must be applied very carefully in ineffective assistance of counsel cases because a discovery policy whereby counsel's files can be freely accessed in subsequent proceedings has the potential to significantly impair the trial preparation process. *Menzies v. Galetka*, 2006, 150 P.3d 480, 567 **Utah** Adv. Rep. 15, 2006 UT 81. *Criminal Law* 🔑 1590

Certain materials otherwise subject to discovery are, upon appropriate objection, protected from disclosure and introduction into evidence because of their creation by an attorney in preparation for litigation. Rules Civ.Proc., Rule 26(b)(3). *Featherstone v. Schaerrer*, 2001, 34 P.3d 194, 432 **Utah** Adv. Rep. 6, 2001 UT 86, rehearing denied. *Pretrial Procedure* 🔑 359

"Peace letter" in which insurer of both passenger who was injured in head-on collision, and driver of oncoming vehicle, had allegedly made unconditional promise to pay any judgment rendered against driver in action arising from collision, was prepared in anticipation of litigation, and thus was protected from discovery by attorney work-product privilege, even though letter was not prepared by an attorney. Rules Civ.Proc., Rule 26(b)(3). *Green v. Louder*, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. *Pretrial Procedure* 🔑 359

Therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised were not prepared in anticipation of litigation, as required for discovery of documents prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). *Smith v. Smith*, 1999, 995 P.2d 14, 384 **Utah** Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. *Divorce* 🔑 85

Surveillance videotape of plaintiff was not protected from disclosure as attorney work-product in automobile negligence action, where videotape was prepared in anticipation of introduction at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule 26(b)(1). *Roundy v. Staley*, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. *Pretrial Procedure* 🔑 383

While procedural rule mandates that protection against discovery of attorney's or representative's mental impressions, conclusions, opinions or legal theories be provided, such protections would not screen information directly at issue. Rules Civ.Proc., Rule 26(b)(3). *Salt Lake Legal Defender Ass'n v. Uno*, 1997, 932 P.2d 589, 309 **Utah** Adv. Rep. 11. *Criminal Law* 🔑 627.5(6)

In prisoner's action for postconviction relief based on claim of ineffective assistance of trial counsel, "at issue" exception to work product immunity did not apply across the board to documents and files in possession of legal defense association which had employed prisoner's trial counsel, but would only apply upon special showing by state for specific document; client's adversary was seeking access to files rather than client, at issue was performance of counsel during preparation and trial rather than solely counsel's internal processes in compiling file, and ineffective assistance of counsel was in significant part question of behavior observable from record and ascertainable from counsel's testimony. *U.S.C.A. Const.Amend. 6*; Rules Civ.Proc., Rule 26(b)(3). *Salt Lake Legal Defender Ass'n v. Uno*, 1997, 932 P.2d 589, 309 **Utah** Adv. Rep. 11. *Criminal Law* 🔑 1590

Documents in insurance claim file may qualify for work-product protection if there is sufficient evidence to show that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Documents in liability insurer's claim file, including insured horse owner's statement to adjuster following motor vehicle collision with horse, could be found to be protected as work product in tort action by injured passenger against owner; owner informed police of fear of suit for his animal causing the accident, insurer investigated pursuant to attorney's instructions for potential legal claims, and evidence thus indicated that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Whether document prepared by insurer is prepared in anticipation of litigation and is protected work product is question of fact to be determined by trial court on basis of evidence before it. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Court of Appeals erroneously concluded that document generated in investigation of accident involving insured and third party is generally discoverable; rather, documents in insurance claim file may be protected as work product. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Case-by-case approach applies to determining whether documents in insurance claim file are protected work product prepared in anticipation of litigation; trial court should consider nature of requested documents, reason for preparation of documents, relationship between preparer of document and party seeking its protection from discovery, relationship between litigating parties, and any other facts relevant to the issue. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Attorney need not be involved for document in insurance claim file to be deemed work product prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Report prepared by insurance adjuster was not entitled to work-product protection; fact that no attorney was involved in preparation of claim file suggested that it was prepared in ordinary course of business, and not in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Documents which convey mental impressions, conclusions, opinions, or legal theories of attorney or party will be afforded heightened protection under work-product privilege as "opinion work product." Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 🔑 359](#)

Attorney involvement is only one factor to be weighed in reaching conclusion of whether documents sought in discovery are protected by work-product privilege; plain language of rule does not require that attorney be involved in preparation of material. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 🔑 359](#)

Fact that no attorney was involved may suggest that document was prepared in ordinary course of business and not in anticipation of litigation, so that work-product privilege would not apply. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 🔑 359](#)

Inquiry to determine whether document was prepared in anticipation of litigation for purposes of work-product privilege should focus on primary motivating purpose behind creation of document; if primary purpose behind creation of document is not to

assist in pending or impending litigation, then work-product protection is not justified. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 359

Inaction and delay of one year in filing motion for protective order constituted independent waiver of right to work product privilege over mining company memoranda discussing claim by mining partner of contractual requirement for independent feasibility study. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 373

Mining company waived work-product privilege for memoranda discussing mining partner's claim regarding contract requirement for independent feasibility study where mining company allowed memoranda to become part of general reading file circulated among its employees without much regard for confidentiality and, as a result, employee obtained copies of memoranda and turned them over to mining partner; work-product protection was waived when disclosure substantially increased opportunity for potential adversaries to obtain information. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 373

Inadvertent disclosure by mining company of memoranda discussing results of internal investigation resulted in waiver of work-product privilege regarding memoranda where mining company voluntarily produced memoranda in response to demand for production of documents, memoranda were used during five different depositions, and mining company did not file motion for protective order until full year after it knew that opponent had memoranda and until three months after their last use. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 373

Letter whose tone is threatening but which does not state intent to pursue litigation is insufficient to allow party to invoke work-product protection to protect in-house report prompted by letter. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 373

Mere possibility that litigation may occur, even mere fact that litigation does eventually ensue, is insufficient to cloak materials with mantle of work-product protection. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 35

For written materials to fall under work-product protection, three criteria must be met: material must be documents and tangible things otherwise discoverable, prepared in anticipation of litigation or for trial, by or for another party or for or by that party's representative; even if these requirements are met, however, privilege does not apply if party seeking discovery can show need for information and that it cannot be obtained without substantial hardship. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 35; [Pretrial Procedure](#) 🔑 359

Memoranda of mining company in response to letter from mining partner stating that mining company had not provided independent feasibility study as required by agreement were not written to assist in pending or impending litigation so that work-product privilege would not apply, even though mining partner filed lawsuit two and one-half years after letter, where letter addressed wrongs perceived by partner but did not threaten litigation, letter expressed partner's interest in purchasing mine from mining company, and memoranda were apparently written in ordinary course of business as part of mining company investigation to determine whether feasibility study had been performed. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#) 🔑 373

Document must have been either created for use in pending or impending litigation or intended to generate ideas for use in such litigation to meet "prepared in anticipation of litigation or for trial" element of work product doctrine. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure](#) 🔑 359

There are three essential requirements for materials to be protected by work product doctrine: material must consist of documents or tangible things; material must be prepared in anticipation of litigation or for trial; and material must be prepared by or for another party or by or for that party's representative. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp.](#), 1990, 801 P.2d 909. [Pretrial Procedure](#) 🔑 35; [Pretrial Procedure](#) 🔑 359

Letter to attorney outlining retainer agreement and setting plan for allocating costs and burdens among clients in event they should be involved in litigation was not protected by work product doctrine; although letter was prepared because of threatened suit against clients, its primary purpose was not to assist in pending or impending litigation. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp.](#), 1990, 801 P.2d 909. [Pretrial Procedure](#) 🔑 371

Condemnor's witness' appraisal report did not lie within protection of attorney's work product immunity from discovery, and refusal to order production of report for use in condemnee's cross-examination of such witness in eminent domain proceeding was prejudicial error. Rules of Civil Procedure, rules 1(a), 26(b)(4)(A); Const. art. 1, § 22. [Utah Dept. of Transp. v. Rayco Corp.](#), 1979, 599 P.2d 481. [Eminent Domain](#) 🔑 262(5); [Pretrial Procedure](#) 🔑 379

Record of emissions from defendant's smelter facilities, which plaintiffs suing for damage to their motor vehicles allegedly caused by emissions sought to examine, and which had been forwarded to defendant's legal counsel allegedly in anticipation of litigation, did not qualify as a "privileged communication." [Jackson v. Kennecott Copper Corp.](#), 1972, 27 [Utah](#) 2d 310, 495 P.2d 1254. [Pretrial Procedure](#) 🔑 359; [Privileged Communications And Confidentiality](#) 🔑 142

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work product of the attorney. Rules of Civil Procedure, rules 26(b), 30(b), 34. [Mower v. McCarthy](#), 1952, 122 [Utah](#) 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 359

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. [Mower v. McCarthy](#), 1952, 122 [Utah](#) 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 359

Proceedings to secure production of documents and things--In general

Trial court did not abuse its discretion in excluding, as a discovery sanction, evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff date, and denying its request for additional attorney fees, in action against purchasers to foreclose on property purchasers acquired at a sheriff's sale, where purchasers requested that beneficiary produce "copies of all documents or other items" that it intended to introduce into evidence, and assignee's response stated that it had not yet designated documents for trial; under amended version of rule on a party's duty to supplement discovery responses, assignee had a duty seasonably to amend its prior response. Rules Civ.Proc., Rule 26(e). [American Interstate Mortg. Corp. v. Edwards](#), 2002, 41 P.3d 1142, 439 [Utah](#) Adv. Rep. 20, 2002 UT App 16. [Pretrial Procedure](#) 🔑 403; [Pretrial Procedure](#) 🔑 434

Even if unamended version of rule requiring parties to supplement discovery responses applied, trial court did not abuse its discretion in imposing discovery sanctions excluding evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff, and denying assignee's request for additional attorney fees, in assignee's foreclosure action; assignee's responses to discovery requests were varied and contradictory, and responses did not identify what documents purchasers were entitled to inspect. Rules Civ.Proc., Rule 26(e). [American Interstate Mortg. Corp. v. Edwards](#), 2002, 41 P.3d 1142, 439 [Utah](#) Adv. Rep. 20, 2002 UT App 16. [Pretrial Procedure](#) 🔑 403; [Pretrial Procedure](#) 🔑 434

Order compelling plaintiff to produce documents she alleged had been altered by defendants was essentially one demanding a response to discovery, not requiring document production only, and thus, even though plaintiff alleged that no altered documents

existed, she was required to state so in written response. Rules Civ.Proc., Rules [26\(c\)](#), [34\(b\)](#), [37\(b\)\(2\)\(C\)](#). [Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure](#) [🔑 403](#)

---- Affidavits and showing, proceedings to secure production of documents and things

Good cause for production of documents is shown where the full, accurate disclosure of facts, which it is the purpose of the discovery process to secure, could not be accomplished through other means. Rules of [Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure](#) [🔑 405](#)

Party moving for order compelling production of documents must make showing not only that the documents are relevant and are in the possession of the other party, but that the documents sought are necessary for proof of the case and either cannot be obtained in any other way or that obtaining them another way would involve extraordinary expense that the moving party should not in fairness be expected to bear. Rules of [Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure](#) [🔑 404.1](#)

Determination that showing of good cause had been made to compel corporation operating smelter facilities to produce records of emissions for examination by plaintiffs who claimed their motor vehicles were damaged by acid or other harmful substances flowing into air about the smelter facilities was not an abuse of discretion. Rules of [Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure](#) [🔑 405](#)

Defendant corporation asserting that record of emissions from smelter facilities which had been forwarded to legal counsel was not subject to discovery had burden of proving that the record was a privileged communication. Rules of [Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Privileged Communications And Confidentiality](#) [🔑 173](#)

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of [Civil Procedure, rules 26\(b\), 30\(b\), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure](#) [🔑 404.1](#)

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of [Civil Procedure, rules 26\(b\), 30\(b\), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure](#) [🔑 404.1](#)

---- Determination, proceedings to secure production of documents and things

Trial court was required, under the new evidence exception to the law of the case doctrine, to reconsider previous order denying seller discovery sanctions on seller's first motion for sanctions, when trial court awarded seller sanctions on seller's second motion for discovery sanctions in declaratory judgment action purchaser brought against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill, where both sanction motions involved seller's discovery requests seeking information on purchaser's asserted collaboration with a crane broker on a custom designed crane trailer, purchaser's prior responses implied that the information existed though purchaser asserted that seller's requests were overbroad, and by the time that seller made second motion for sanctions purchaser had admitted that the trailer was never built. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Courts](#) [🔑 99\(6\)](#)

When official confidence privilege is claimed, trial court must balance competing interests through an in camera examination of the materials for which the privilege is claimed; such review enables trial court to allow or disallow discovery as to individual items for which the privilege is claimed, or to excise or edit from individual items those matters which it determines to come within the scope of the privilege, or to take other protective measures pursuant to civil procedure rule. Rules Civ.Proc., Rule 26(c); U.C.A.1953, 78-24-8. *Madsen v. United Television, Inc.*, 1990, 801 P.2d 912. [Privileged Communications And Confidentiality](#) 🔑 351

Although ability of movant seeking order for production of documents to obtain the desired information by other means is relevant in determining existence of good cause, the real question is whether the movant can obtain the facts without production of the documents. Rules of Civil Procedure, rule 34. *Jackson v. Kennecott Copper Corp.*, 1972, 27 [Utah](#) 2d 310, 495 P.2d 1254. [Pretrial Procedure](#) 🔑 411

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 [Utah](#) 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 411

Objections and protective orders

Patient waived her objection to hospital's use as trial exhibit a Computed Tomography (CT) scan that was not specifically identified during pretrial discovery process, in medical malpractice action, as patient specifically designated the CT scan as a trial exhibit and then used select images from it at trial, and patient failed to object to the listing of all of patient's medical records when she submitted her other objections to the hospital's trial exhibits. *Turner v. University of Utah Hosp.*, 2011, 271 P.3d 156, 698 [Utah](#) Adv. Rep. 51, 2011 UT App 431, certiorari granted 280 P.3d 421, reversed 310 P.3d 1212, 741 [Utah](#) Adv. Rep. 51, 2013 UT 52. [Pretrial Procedure](#) 🔑 413.1

Insurer failed to show good cause for a protective order against discovery in insureds' bad faith suit, even though they had not yet established breach of contract; the claims of breach of express contract and bad faith were premised on distinct duties that gave rise to divergent and severable causes of action. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 [Utah](#) Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. [Pretrial Procedure](#) 🔑 41

A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 [Utah](#) Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. [Pretrial Procedure](#) 🔑 41

District court is entrusted with broad discretion in dealing with discovery matters, including protective orders. *In re Discipline of Pendleton*, 2000, 11 P.3d 284, 405 [Utah](#) Adv. Rep. 3, 2000 UT 77. [Pretrial Procedure](#) 🔑 41

The failure to respond in writing to a discovery request is not excused on the basis that the discovery is objectionable, absent a written objection or motion for a protective order. Rules Civ.Proc., Rules 26(c), 34(b). *Hales v. Oldroyd*, 2000, 999 P.2d 588, 391 [Utah](#) Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. [Pretrial Procedure](#) 🔑 41

Trial court did not abuse its discretion in issuing protective order preventing wife from discovering therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised, where affidavits of child therapist and guardian ad litem stated release of records could be damaging to the children and the protective order was less restrictive of discovery than a similar protective order wife later requested. Rules Civ.Proc., Rule 26(c)(4). *Smith v. Smith*, 1999, 995 P.2d 14, 384 [Utah](#) Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. [Divorce](#) 🔑 86

Rule of civil procedure providing for protective orders upon showing of good cause applies to public records, including judicial records, under the Public and Private Writings Act; the Act is intended to apply to documents filed in court in the absence of a specific order of court to the contrary. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 26, 26(c), Const. Art. 8, § 4. *Carter v. Utah Power & Light Co.*, 1990, 800 P.2d 1095. Records 🔑 32; Records 🔑 34

Pretrial depositions filed with clerk of court but not used by the litigants in court are “judicial records” and thus “public writing” subject to public access under the Public and Private Writings Act, absent a showing of good cause necessary to secure a protective order from the court; rule providing for sealing of such depositions is not a mandate for secrecy but is intended to safeguard the integrity of the depositions. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 5(d), 26(c), 30(f)(1); Judicial Administration Rules 4-202, 4-502(4); Const. Art. 8, § 12. *Carter v. Utah Power & Light Co.*, 1990, 800 P.2d 1095. Records 🔑 32

Sanctions for failure to disclose--In general

When reviewing the imposition of discovery sanctions, appellate courts first consider whether the district court has made a factual finding that the party's behavior merits sanctions, and any such finding will be upheld unless it is clearly erroneous. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 🔑 1024.3

District court made a factual finding that purchaser's behavior merited a discovery sanction, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, though the district court's finding stated that purchaser's positions in response to seller's discovery motions were inconsistent, where the court's imposition of a not insignificant sanction demonstrated that the court did not accept purchaser's explanations for the inconsistencies. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 🔑 44.1

Though a district court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, prior to entering discovery sanctions, a trial court need not specifically state that willfulness, bad faith, fault, or persistent dilatory tactics are present to impose sanctions. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 🔑 44.1

Trial court was within its discretion in striking all but two of gym member's experts as sanction for member's failure to comply with discovery, in member's action for injuries sustained in trip and fall in gym parking lot; member filed expert designation well after deadline had passed, failed to include expert reports, identified one expert by first name only, and after a stipulated extension, only provided a report from only one of five designated experts. *Johnson v. Gold's Gym*, 2009, 206 P.3d 302, 626 Utah Adv. Rep. 6, 2009 UT App 76, certiorari denied 215 P.3d 161. Pretrial Procedure 🔑 45

Necessary prerequisite to imposition of sanction for party's failure to cooperate in discovery is order that brings the offender squarely within possible contempt of court. Rules Civ.Proc., Rules 26(f), 37(b)(2). *Berrett v. Denver and Rio Grande Western R. Co., Inc.*, 1992, 830 P.2d 291, certiorari denied 836 P.2d 1383. Pretrial Procedure 🔑 44.1

--- Dismissal or striking of pleading, sanctions for failure to disclose

Trial court did not abuse its discretion in dismissing plaintiff's complaint as discovery sanction, where plaintiff failed to respond in any way to court order compelling her to produce documents she alleged had been altered, and record indicated that plaintiff had repeatedly delayed in responding to discovery, failed to timely file pleadings, and failed to timely provide specific witness lists. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). *Hales v. Oldroyd*, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 🔑 46; Pretrial Procedure 🔑 435

---- Preclusion of evidence or witnesses, sanctions for failure to disclose

Expert report which contained three new damages theories not disclosed during discovery was inadmissible in secondary lender's action against borrower and bank for unjust enrichment, fraud, and other tort claims; secondary lender disclosed during initial discovery period that its damages "constitute the funds advanced, together with interest at the legal rate, less the payment received" from primary lender and clarified in response to request for admission that he sought interest at the legal rate as provided by statute, report included three new damages theories, including the benefit of the bargain rule, the modified benefit of the bargain rule, and the comparable rate of return theory, secondary lender's citation to statute was insufficient to constitute disclosure of the "computation of any category of damages claimed by the disclosing party," and borrower and bank were prejudiced by the late disclosure due to their inability to discover asserted essential facts such as secondary lender's loan history and ability to lend money to others in lieu of loan which ultimately went to borrower. [Bodell Const. Co. v. Robbins, 2009, 215 P.3d 933, 636 Utah Adv. Rep. 3, 2009 UT 52. Pretrial Procedure 45](#)

Plaintiff's attorney should have anticipated that his failure to comply with defendant's discovery requests would result in sanctions of not allowing one witness to testify and limiting the testimony of another witness at negligence trial, and thus, relief from judgment on grounds that attorney was "surprised" by the sanctions was not warranted, even though attorney claimed he notified defense counsel orally of his intent to call a number of witnesses at trial, where attorney did not produce documents and expert reports in response to discovery requests and failed to supplement interrogatories, and attorney failed to identify witnesses in writing with required disclosures for expert witnesses. [Rukavina v. Sprague, 2007, 170 P.3d 1138, 588 Utah Adv. Rep. 18, 2007 UT App 331. Pretrial Procedure 45; Pretrial Procedure 313; Pretrial Procedure 434](#)

Trial court did not abuse its discretion in excluding independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to supplement its responses to interrogatories asking defendant to articulate its affirmative defenses, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules [26, 37\(b\)\(2\)](#). [Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 Utah Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312](#)

Trial court did not abuse its discretion in limiting independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to give complete answer in its interrogatories regarding affirmative defenses it would assert, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules [26, 37\(b\)\(2\)](#). [Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 Utah Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312](#)

Expert witnesses

Evidence supported finding that motorist's wife failed to timely disclose her intent to rely on highway patrol officer as an expert witness, in negligence action against defendant driver and others following fatal automobile accident; motorist's wife disclosed that officer would be a trial witness, but failed to designate officer as an expert. [Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 39](#)

The expert disclosure discovery rule contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40](#)

Treating physicians do not fall into the category of "retained or specially employed" expert witnesses, and expert reports as mentioned in the expert disclosure discovery rule are not required for treating physicians who will testify as experts. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 39; Pretrial Procedure 40](#)

Treating physicians must be disclosed as expert witnesses under the expert disclosure discovery rule if they will provide opinion testimony based on their experience or training. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40](#)

Plaintiff's disclosure of his intent to call treating physicians as fact witnesses was not sufficient to allow the admission of their expert opinions on causation in negligence action; treating physicians were required to be designated as experts if they were to provide expert testimony. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 45](#)

Third-party plaintiff property owners' challenge to the trial court's dismissal of their claim against title company for failure to prosecute, after they purchased their cause of action back from bankruptcy trustee, was moot, given their inability to establish damages after the automatic exclusion of their expert report for failing to comply with the discovery rules regarding disclosure of expert witnesses. [R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 587](#)

Court of Appeals reviews district court's exclusion of expert for abuse of discretion. [Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Appeal and Error 961](#)

Any error in district court's permitting psychiatric physician to testify as an expert was invited by Office of Professional Conduct (OPC) in attorney disciplinary proceeding, so that OPC could not take advantage of the alleged error on appeal; OPC asked physician on cross-examination to opine on causation of attorney's misconduct, thus "opening the door" to the very kind of expert testimony of which OPC complained on appeal. [In re Discipline of Corey, 2012, 274 P.3d 972, 705 Utah Adv. Rep. 40, 2012 UT 21. Attorney And Client 57](#)

An expert report in pretrial discovery in divorce proceedings is required only if not otherwise stipulated by the parties or ordered by the court. [Liston v. Liston, 2011, 269 P.3d 169, 698 Utah Adv. Rep. 24, 2011 UT App 433. Divorce 85](#)

Former client's expert disclosures in legal malpractice case were not timely, because they were clearly inadequate. [Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 44.1](#)

Formal disclosure of experts is not pointless; knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. [Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 40](#)

Whether the cost rule allows recovery for expert preparation time is a question of law, and the trial court's legal conclusions are reviewed for correctness. [Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Appeal and Error 842\(2\); Costs 208](#)

Fees for expert time spent preparing for depositions are recoverable, as long as the fees are reasonable. [Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187](#)

When determining reasonableness of expert fees for time spent preparing for depositions, factors that can but are not required to be considered include the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. [Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187](#)

Expert testimony changed

Changes to expert's deposition after again reviewing patient's records and reading a deposition of another expert were new testimony, rather than change or supplementation, and, therefore, were properly struck in medical malpractice action; the changes did not revise incorrect information and were not minor. [Daniels v. Gamma West Brachytherapy, LLC, 2009, 221 P.3d 256, 640 Utah Adv. Rep. 8, 2009 UT 66](#), rehearing denied. [Pretrial Procedure](#) 202

Written expert report

Good cause did not exist for townhome association's failure to comply with deadline for submitting expert report specified in amended case management order in construction defect action, such that trial court did not abuse its discretion in excluding association's expert, despite argument that association had agreement with developer to modify order to extend deadline; third-party defendants had also agreed to be bound by order, and reliance on agreement with only some defendants was unreasonable and did not justify extension of discovery deadline. [Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707](#). [Pretrial Procedure](#) 45

Townhome association's failure to timely disclose its expert in construction defect action was not harmless, such that trial court did not abuse its discretion in excluding expert, despite contention that association's final expert report would be "largely identical" to its preliminary report; preliminary report failed to properly identify association's expert in such a way as to enable developer and subcontractors to depose expert, attempt to disqualify expert, or retain rebuttal experts, report did not address scope of claimed damages, and substantial discovery would need to be revisited or performed to respond to disclosure. [Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707](#). [Pretrial Procedure](#) 45

Treating physician who planned to testify at trial was not retained or specially employed to testify, and therefore was not required to file written expert report pursuant to rule governing production of written expert reports in action by motorcyclist against driver of automobile arising from automobile accident; plain language of rule suggested that a "retained or specially employed" expert was a person a party hired and paid to express a particular expert opinion for the purposes of litigation, and the substance, sources, or scope of the physician's proposed testimony was irrelevant, as the court simply looked to the status of the individual as a treating physician. [Drew v. Lee, 2011, 250 P.3d 48, 678 Utah Adv. Rep. 4, 2011 UT 15](#). [Pretrial Procedure](#) 379

Jurisdiction

Trial courts may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. (Per Durham, J., with one Justice concurring and two Justices concurring in the result.) [Phone Directories Co., Inc. v. Henderson, 2000, 8 P.3d 256, 402 Utah Adv. Rep. 7, 2000 UT 64](#). [Courts](#) 39; [Pretrial Procedure](#) 24

Admissibility of evidence

Plaintiff's untimely designation of expert witnesses prejudiced defendant in negligence action arising out of automobile accident, and therefore trial court properly excluded testimony of witnesses, where untimely disclosure impaired defendant's ability to defend against plaintiff's claims because defendant did not have opportunity to depose expert witnesses, and fact witnesses' memories could have faded due to protracted nature of the litigation. [Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193](#), certiorari denied 268 P.3d 192. [Pretrial Procedure](#) 45

Sufficiency of evidence

Evidence was sufficient to establish that purchaser of construction cranes and associated goodwill engaged in actions that warranted the imposition of discovery sanctions, in purchaser's declaratory judgment action against seller seeking to rescind its obligation to pay for goodwill and recover payments previously made; there was evidence that purchaser was aware at hearing on seller's second motion to compel that seller was seeking information regarding the time frame of purchaser's asserted

collaboration with a crane broker on a custom designed crane trailer, that purchaser's responses implied that the subject matter of the requests was extant though purchaser objected that the requests were overbroad, that seller was thus encouraged to pursue the information through additional discovery and judicial resources, and that purchaser through reasonable inquiry could have determined that the trailer was never built. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. [Pretrial Procedure](#) 🔑 44.1

Summary judgment

Purpose of discovery and of summary judgment procedures is to furnish method of searching out and facilitating resolution of issues which are not in dispute, and of settling rights of parties without time, trouble and expense of trial, and it is indispensable to carrying out of that purpose that parties furnish essential information when it is requested in conformity with rules of procedure. Rules of *Civil Procedure*, rules 31, 33, 37, 56(c). *Transamerica Title Ins. Co. v. United Resources, Inc.*, 1970, 24 **Utah** 2d 346, 471 P.2d 165. [Judgment](#) 🔑 178; [Pretrial Procedure](#) 🔑 14.1; [Pretrial Procedure](#) 🔑 15

New trial

There was no error in denial of new trial on theory of surprise testimony where pretrial statement of officer who investigated accident, stating that plaintiff had said that he could not get out of way of automobile before it struck him, was not necessarily inconsistent with officer's trial testimony that plaintiff said he had "sprinted" across the road, and since the "surprise" claimed could not be so categorized since it could have been easily guarded against by the utilization of available discovery procedures. Rules of *Civil Procedure*, rules 26 et seq., 59, 59(a)(3). *Anderson v. Bradley*, 1979, 590 P.2d 339. [New Trial](#) 🔑 90; [New Trial](#) 🔑 95

Plaintiff in automobile accident case was not entitled to a new trial on the ground that he was surprised by testimony of defendant's expert witness regarding the cause of plaintiff's transient ischemic attacks, since plaintiff failed to timely object to the witness' testimony; in view of the fact that defendant, in answer to an interrogatory, had stated in substance that she would call the witness to testify concerning Raynaud's disease, an objection by plaintiff should have been immediately made when the witness at trial mentioned transient ischemic attacks and added "which I imagine, would be pertinent to address here." Rules of *Civil Procedure*, rules 26(e)(1), 59(a)(3). *Jensen v. Thomas*, 1977, 570 P.2d 695. [New Trial](#) 🔑 97

Costs

In order to support award of prevailing costs for copies of depositions of patient and her husband, and members of patient's family, copies had to be essential to prevailing hospital's defense of malpractice case; finding that costs were "reasonable and necessary" was insufficient by itself, even if plaintiff's deposition was included in trial record and several depositions were used for impeachment. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154; [Costs](#) 🔑 208

Absent showing that deposition of patient's expert was necessary to develop hospital's defense to malpractice claim, prevailing hospital would not be entitled to award of costs for deposition, notwithstanding fact that expert's opinion was necessary for patient to make her case. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154

Prevailing party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154

Costs of depositions not used at trial may be recovered if the trial court determines, in addition to finding that deposition was taken in good faith, that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154

Copies of patient's depositions of hospital's doctors were not essential to hospital's defense of malpractice claim, as would permit hospital to recover cost of copies as prevailing party in suit, where depositions were of hospital's own employees, were used only by plaintiff in her case in chief, and hospital had other methods of acquiring information contained in depositions. *Young v. State*, 2000, 16 P.3d 549, 409 [Utah Adv. Rep. 3](#), 2000 UT 91. Costs [🔑 154](#)

Witness fee of \$1,000 paid by hospital to secure attendance of patient's expert at his deposition, to extent it exceeded witness fee allowed by statute, was not recoverable by hospital as part of prevailing party costs. *U.C.A.1953, 21-5-4*; *Rules Civ.Proc., Rule 30(a)*. *Young v. State*, 2000, 16 P.3d 549, 409 [Utah Adv. Rep. 3](#), 2000 UT 91. Costs [🔑 187](#)

Review--In general

If a finding that a party's conduct merits discovery sanctions has been made and upheld on appeal, an appellate court will not disturb the amount of the sanction unless abuse of discretion is clearly shown. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 [Utah Adv. Rep. 22](#), 2012 UT App 61. Appeal and Error [🔑 961](#)

Denial of motion for a protective order is reviewed for an abuse of discretion, but to extent that the denial is based on the district court's interpretation of binding case law, it is reviewed for correctness. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 [Utah Adv. Rep. 12](#), 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Appeal And Error [🔑 840\(4\)](#); Appeal And Error [🔑 961](#)

Generally, the trial court is granted broad latitude in handling discovery matters, and appellate courts will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings. *Thurston v. Workers Compensation Fund of Utah*, 2003, 83 P.3d 391, 490 [Utah Adv. Rep. 9](#), 2003 UT App 438. Appeal And Error [🔑 961](#); Pretrial Procedure [🔑 19](#)

Trial court's grant of protective discovery order and order disqualifying counsel are reviewed for an abuse of discretion. *Rules Civ.Proc., Rule 26*. *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003, 78 P.3d 603, 2003 UT 39, rehearing denied. Appeal And Error [🔑 949](#); Appeal And Error [🔑 961](#)

Assignee of deed of trust beneficiary did not preserve for appellate review claim that trial court improperly applied the amended version of rule on a party's duty to supplement discovery responses, instead of the unamended version, in action to foreclose on property acquired by purchasers at a sheriff's sale; assignee did not raise that issue at trial, and argued it for the first time in his appellate brief. *Rules Civ.Proc., Rule 26(e)*. *American Interstate Mortg. Corp. v. Edwards*, 2002, 41 P.3d 1142, 439 [Utah Adv. Rep. 20](#), 2002 UT App 16. Appeal And Error [🔑 199](#)

Trial courts have broad discretion in matters of discovery, and their determinations regarding such matters are reviewed for abuse of discretion. *Green v. Louder*, 2001, 29 P.3d 638, 426 [Utah Adv. Rep. 25](#), 2001 UT 62. Appeal And Error [🔑 961](#); Pretrial Procedure [🔑 19](#)

Failure to require defendant in automobile negligence action to disclose surveillance videotape of plaintiff and the identity of its preparer was harmful error in action in which videotape and preparer's testimony were admitted to show plaintiff's injuries were less severe than she alleged; while jury did not reach damages issue because it found plaintiff more than 50 percent at fault in accident, the determination of liability hinged on parties' credibility, and plaintiff's credibility was directly undermined by evidence in question. (Per Greenwood, Associate P.J., with one Judge concurring in result.) *Rules Civ.Proc., Rule 26(b)(1)*. *Roundy v. Staley*, 1999, 984 P.2d 404, 374 [Utah Adv. Rep. 15](#), 1999 UT App 229, certiorari denied 994 P.2d 1271. Appeal And Error [🔑 1043\(6\)](#)

Trial court committed prejudicial error in denying tort plaintiff's discovery request for report prepared by defendant's insurance adjuster where defendant did not demonstrate that denial of discovery request was not prejudicial. *Rules Civ.Proc., Rule 26(b)*

(3). *Askew v. Hardman*, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. [Appeal And Error](#) 1043(6); [Pretrial Procedure](#) 381

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff; expert was one of five defense experts in response to testimony of plaintiff's 15 experts; and plaintiff thoroughly cross-examined expert. Rules Civ.Proc., Rules [26](#)(e)(1), [61](#); U.C.A.1953, 41-6-46(1)(1981). *Onyeabor v. Pro Roofing, Inc.*, 1990, 787 P.2d 525. [Appeal And Error](#) 1043(1)

Refusal of court to permit defendant in special statutory action to remove city commissioner from malfeasance in office from taking depositions of witnesses, was error, but did not result in any prejudice to commissioner who had examined testimony which witnesses had given before grand jury, received answers to interrogatories submitted to district attorney and had procured substantially all discoverable information in action. U.C.A.1953, 77-7-1, 77-7-2, 77-7-11; Rules of [Civil Procedure](#), rules [1](#), [61](#), [81](#). *State v. Geurts*, 1961, 11 [Utah](#) 2d 345, 359 P.2d 12. [Appeal And Error](#) 1170.6; [Pretrial Procedure](#) 61

---- Standard of review, review

In reviewing the imposition of discovery sanctions, an appellate court applies a two-part approach: (1) the court considers whether the district court was justified in ordering sanctions, and (2) the court then reviews the type and amount of sanctions for abuse of discretion. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 [Utah](#) Adv. Rep. 22, 2012 UT App 61. [Appeal and Error](#) 840(4); [Appeal and Error](#) 961

An appellate court will affirm an award of discovery sanctions so long as the findings appear in the lower court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion, or where there is evidence in the record to support the award. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 [Utah](#) Adv. Rep. 22, 2012 UT App 61. [Appeal and Error](#) 1024.3

Rules [Civ. Proc.](#), Rule [26](#), UT R RCP Rule [26](#)

current with amendments received through December 1, 2015.

Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
V. Depositions and Discovery (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 26.1

Rule 26.1. Prompt disclosure of information

Currentness

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

- (1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.
- (2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.
- (3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.
- (4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.
- (5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.
- (6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.
- (7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.
- (8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.
- (9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party

to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

COURT COMMENT TO 1991 AMENDMENT

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

COMMITTEE COMMENT TO 1991 AMENDMENT

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

COMMITTEE COMMENT TO 1996 AMENDMENT

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or additional information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such deadline, sixty (60) days before trial, must seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

COMMITTEE COMMENT TO 1991 AMENDMENT

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(c) Deleted effective Dec. 1, 1996.

(d) **Signed Disclosure.** Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Deleted effective Dec. 1, 1996.

COMMITTEE COMMENT TO 1991 AMENDMENT

Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(f) **Claims of Privilege or Protection of Trial Preparation Materials.**

(1) *Information Withheld.* When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced.* If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

STATE BAR COMMITTEE NOTE

2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a “hold” on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, “does not address whether the privilege or protection

that is asserted after production was waived by the production.” Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

(g) Deleted effective Dec. 1, 1996.

Credits

Added Dec. 20, 1991, effective July 1, 1992. Amended May 30, 1996, effective Dec. 1, 1996; Nov. 22, 1996, effective March 1, 1997; Sept. 5, 2007, effective Jan. 1, 2008; Dec. 20, 1991, effective July 1, 1992; July 31, 2014, effective July 31, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

Editors' Notes

GUIDELINES FOR RULE 26.1 [WITHDRAWN]

Court Note

Rule 26.1 Guidelines have been withdrawn because of rule changes and court opinions that have been adopted or issued since the Guidelines were adopted.

APPLICATION

<Order R-05-0008 dated October 10, 2005, effective January 1, 2006, provided, “with respect to family law cases pending as of January 1, 2006, that if disclosure was previously made pursuant to Rule 26.1, Arizona Rules of Civil Procedure, further disclosure shall not be required under Rule 49 or 50 of the Arizona Rules of Family Law Procedure, except for the duty to seasonably supplement the earlier disclosure.”>

<The text of this rule which is effective March 1, 1997 is inapplicable to cases which are set for trial between March 1 and April 30, 1997.>

[Notes of Decisions \(90\)](#)

16 A. R. S. Rules Civ. Proc., Rule 26.1, AZ ST RCP Rule 26.1

Arizona State court rules are current with amendments received through 10/15/15

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 194. Requests for Disclosure (Refs & Annos)

TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

- (a) the correct names of the parties to the lawsuit;
- (b) the name, address, and telephone number of any potential parties;
- (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (d) the amount and any method of calculating economic damages;
- (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- (f) for any testifying expert:
 - (1) the expert's name, address, and telephone number;
 - (2) the subject matter on which the expert will testify;
 - (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - (B) the expert's current resume and bibliography;
- (g) any indemnity and insuring agreements described in [Rule 192.3\(f\)](#);
- (h) any settlement agreements described in [Rule 192.3\(g\)](#);

(i) any witness statements described in [Rule 192.3\(h\)](#);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

[Notes of Decisions \(50\)](#)

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Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

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A Study of Civil Case Disposition Time in U.S. District Courts

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Federal Judicial Center

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

Contents

Introduction, 1

MCC Project Origin and Goals, 2

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times, 2

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times, 4

Challenges Identified in Districts with Delayed Civil Case Disposition Times, 5

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times, 7

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times, 8

Interviews in Districts with Fast Civil Case Disposition Times, 9

Procedures and Practices in Districts with Fast Civil Case Disposition Times, 10

The Characteristics of Courts with Fast Civil Case Disposition Times, 17

The Future of the Most Congested Courts Project, 17

Attachment 1: Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code, 19

Attachment 2: Explanation of the Civil Case Disposition Time Dashboard, 27

Attachment 3: Example Email Sent to Chief Judge and Clerk of Court in “Most Congested” Districts in Preparation for Telephone Interview, 33

Attachment 4: Example Email Sent to Chief Judge and Clerk of Court in “Expedited” Districts in Preparation for Telephone Interview, 37

Introduction

This report summarizes the Federal Judicial Center's research for the Court Administration and Case Management Committee on the Most Congested Courts (MCC) Project.¹ The Center submitted an earlier memorandum to the Committee on courts that dispose of their cases most slowly.² The present report is a full and final report to the Committee on the Center's development of a new type of caseload analysis, use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their caseloads, as measured by case disposition time;
- developed an analysis of case disposition time, by nature of suit, for each of the ninety-four district courts;
- identified seven districts that have particularly long disposition times on a significant number of different case types (the "most congested courts");
- in summer 2013, provided the caseload analyses to and conducted interviews with the chief judge and clerk of court in the seven districts with slower case disposition times to determine the sources of delay;
- in November 2013, submitted to the Committee's Case Management Subcommittee a confidential memo on the districts with delayed civil case disposition times, which presented findings from the interviews with these districts;
- identified seven districts that have particularly short disposition times for a significant portion of their caseload (the "expedited courts"); and
- in fall 2014, provided the caseload profiles to and conducted interviews with the chief judge and clerk of court in the seven districts with faster disposition times to determine the procedures these districts use to expedite their caseloads.

To complete the project, we are providing this final report, which presents a history of the MCC Project, an overview of the Center's development of a new method of caseload analysis, and the findings from the interviews with the fourteen districts selected for the study.

1. We had valuable assistance and guidance from the Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. And I am very grateful to my colleague Margaret Williams for the caseload analysis on which the Most Congested Courts Project relies.

2. The Center submitted its report on the courts with delayed civil case disposition times on November 20, 2013. Given the confidential nature of some of the court-specific findings, the report is not a public document.

Although the close examination of specific districts is completed with this report, there is one important respect in which the Most Congested Courts Project will continue indefinitely. Periodically the Center will update the caseload analysis for each of the ninety-four district courts and will provide each district with its analysis. The Committee approved this distribution at its December 2014 meeting because the analyses have been well received by and helpful to the districts that have received them. Each of the ninety-four districts has received the first transmission of its own caseload analysis, in the form of a case disposition time dashboard prepared by the Center and reviewed by the Case Management Subcommittee. The long-term goal is for the districts to access their caseload analyses at an intranet website. In the meantime, the Center will provide the analyses individually to each district.

MCC Project Origin and Goals

Before presenting findings from interviews with the courts, we briefly recap the purpose and methodology of the Most Congested Courts Project.

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the ninety-four district courts on this measure, and identified the most delayed 25% as the “most congested courts” (“MCCs”). Approximately once every two years, the Committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the Committee’s efforts, it became clear that membership on the list of MCCs changed little and that the Committee’s letters had limited effect. The Committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts where civil case disposition times are lengthy.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The Committee wanted the new method to provide the Committee and courts with better information about caseload delay so assistance could be more targeted. If the problem lies in habeas cases, for example, a quite different remedy might be needed than if the problem lies in patent cases. Working with the Committee’s Case Management Subcommittee, the Center developed a method that examines district caseloads at the case type level—that is,

an analysis that gives a district information about the status of each case type, or nature of suit (NOS), in its civil caseload.³

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature of suit codes across all ninety-four districts combined. The Center then calculated the average disposition time for each nature-of-suit code for each district for the past three years.⁴ In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national historical average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1⁵). Because of the graphic presentation—the colors in particular—districts quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis tells the Committee which districts have fallen seriously behind the national average in disposing of their civil caseloads, which districts are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate. If a district meets these criteria, it merits attention by the Committee.

The new analyses of case disposition time have proven to be very helpful to the courts and have been well received by the fourteen districts selected by the Committee for further discussions (see descriptions below of interviews conducted with these courts). These districts unanimously expressed their intent to use the new analyses for serious, district-

3. The analysis and the graphics produced by the analysis were developed by Margaret Williams, Senior Research Associate, of the Center's Research Division.

4. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size.

5. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. A second generation presentation—a case disposition dashboard—does not group the natures of suit nor include the criminal felony caseload.

specific, and data-driven assessments of case-management practices. Several districts said they had, in fact, already made significant changes in case-management practices after reviewing the new caseload analyses.

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than sending letters. The Committee also agreed that each district should receive its own caseload analysis, since the Committee members themselves had found the graphics exceptionally helpful in understanding their own court's caseload. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the Subcommittee selected seven that were seriously delayed. Then-chair of the Committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.⁶

Because the issue of delay was potentially sensitive, the Committee agreed that it would be helpful to the Center's research staff to have a judge member of the Committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the Committee, a member of the Committee staff, and myself.⁷ In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.⁸ Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared "talking points"—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the Committee to know.⁹

6. Because the report on the most congested courts is confidential but this report on the expedited districts very likely will be a public report, we do not identify the most congested districts.

7. The Committee member was Judge Richard Arcara, who also chairs the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the Committee staff member was Jane MacCracken.

8. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

9. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerk of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the Committee's inquiry and offers to help.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judge and clerk of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of eighty-one percent more slowly than the national average and in another these case types were disposed of seventy-two percent more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, ERISA, insurance, and “other” contract cases. Prisoner civil rights, foreclosure, and “other” statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of

these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

case types and was not limited to a few case types, and (2) several case types, involving large numbers of litigants—for example, prisoner cases, employment civil rights cases, and ERISA cases—were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the Committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in some districts, the reasons cited can be grouped into several categories—keeping in mind that these are perceived, and not quantitatively measured, causes.¹⁰

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings results in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases and, as a consequence, more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had sixty-four judgeships and 434 vacant judgeship months for the five-year period 2010–2014 compared to seven courts with fast disposition times (see below), which had seventy-nine judgeships and 303 vacant judgeship months.¹¹ Most of the districts also

10. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and FLSA cases.

11. Numbers are from the Federal Court Management Statistics, which can be found at <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. Three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge,

identified too few staff as a cause of delay, particularly too few pro se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside help, they had found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for IFP compliance under the PLRA. When the court transferred this screening to the clerk's office, it reduced the screening stage from four-to-five months to four-to-five days. This district also moved responsibility for non-prisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolv-

for example, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

ing prisoner cases, a district had started working with a local law school clinic, which gave law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a sixty-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the appointment should be significantly longer than the current one-year term, which permits barely enough time for a law clerk to become familiar with the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The Committee had been inclined to conduct interviews in the fastest—or “most expeditious”—districts in addition to the delayed—or “most congested”—districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate “best practices,” the Committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases very quickly. The Subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

Central District of California	Northern District of Texas
Southern District of Florida	Western District of Washington
District of Maine	Eastern District of Wisconsin
Western District of Missouri	

Then-chair of the Committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting the chief judges to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.¹²

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay and, if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerk of court were very responsive in providing information and offered to be of further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

12. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. Although we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways—early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind, as in the districts with delayed civil case disposition times, that we are presenting the courts' perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench or senior judges who still took a significant caseload, or both. In one district, where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, “the lawyers can do their work”; and no continuances, which is generally achieved by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all

judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and in most districts the court's own internal reports, not only the CJRA reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose, and effect, of the reports is to provide a case management tool and to encourage judges to keep their own caseloads within the court's norms.
- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten

their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and over time have developed efficient systems for screening these cases and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their court reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often delayed in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into twenty-six two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two-to-four weeks after answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately twelve to fifteen cases are set for each two-week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference ten to fourteen days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated “Model Agreement Regarding Discovery of Electronically Stored Information.” The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed guidelines for “Best Practices for Electronic Discovery in Criminal Cases,” which provide a general set of best practices, as well as guidelines for multi-defendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a pre-filing conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the “Fast Track Summary Judgment” (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within thirty days of filing. At forty-five days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court’s panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three

types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within seventy-five days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), watches the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the CJA panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in ADA cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for FLSA cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that that office automatically receives all notices. The court has an agreement with the Maine Attorney General's office for more efficient filing of prisoner cases.

The Western District of Missouri court has a memorandum of understanding with the Department of Corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

By agreement with the state prisons, prisoners may file electronically in the Eastern District of Wisconsin. The court also has an agreement with the prisons for more efficient service. And the court screens cases early and dictates orders of dismissal.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have Memorandums of Understanding under which the Department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within thirty days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a re-

called magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out at the court's website under the tab "Efiling Procedures."

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district—but each court has procedures for, and a culture that supports, setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases.

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on

averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled “most congested,” even as both these courts and the average are improving? One of the judges suggested that the Committee consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that a future stage of the project might consider developing additional analyses based on court size or other court characteristics.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label but about their very real need for assistance. They wanted to know whether the Committee would stay involved with their courts and whether there would be any follow-on efforts. They understood that at a time of budget constraints they might not get additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient. And they genuinely appreciated the Committee’s inquiry and desire to be helpful.

The courts with faster civil disposition times appreciated the Committee’s interest, too, and the opportunity to discuss their practices. They also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to other members of the court. One chief judge said, “This is a really healthy thing to do. Whether we’re doing well or poorly in a couple of years, call us so we can go through this review again.” More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Committee’s Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more resources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change without need for a “dunning” letter from the Committee.

Given that the Committee’s assignment from the Judicial Conference—to monitor district court caseloads—is a long-term assignment, the interviews suggest at least the following actions on the part of the Committee:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.

2. Update the caseload analysis at least yearly, make it easily available to all district courts (as already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.
3. Work with other Judicial Conference committees and the Administrative Office to explore whether more visiting judges can be provided, whether more staff law clerks can be provided, and whether temporary law clerks can be appointed for at least two years.

One additional step the Committee might consider is to ask the Center for a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help the Committee identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

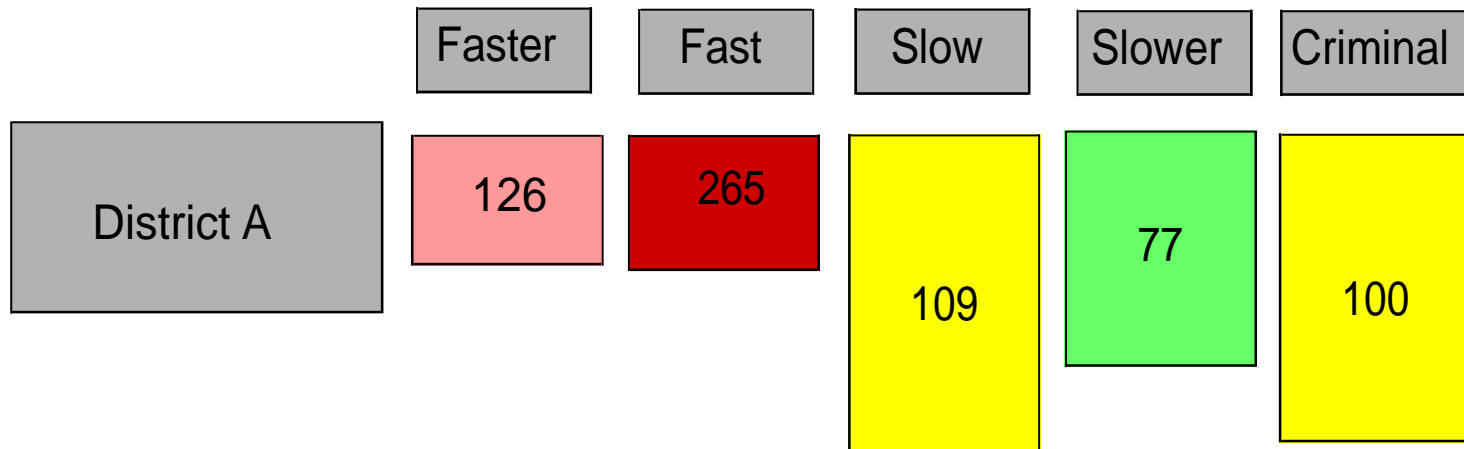
Attachment 1

Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code

Graphic and Tables Developed By
Margaret Williams
Federal Judicial Center

District A: 2010–2012

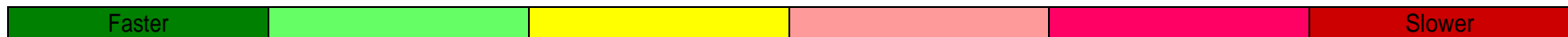
Average Disposition Time for the District Relative to the Average Disposition Time Nationwide
For Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*



* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases
Ranked by Time*

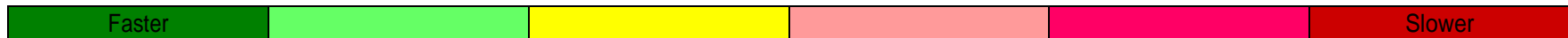
Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
BANKS AND BANKING	2.00	1	1	0.61	0.10
PRISONER - PRISON CONDITION	7.00	1	3	0.61	0.10
CONSUMER CREDIT	87.50	2	51	1.21	0.20
BANKRUPTCY APPEALS RULE 28 USC 158	132.92	13	66	7.88	1.31
CONTRACT FRANCHISE	196.00	1	68	0.61	0.10
TRADEMARK	198.33	6	72	3.64	0.61
PRISONER - CIVIL RIGHTS	235.38	29	83	17.58	2.93
CIVIL RIGHTS ADA OTHER	237.00	3	88	1.82	0.30
COPYRIGHT	299.11	9	98	5.45	0.91
NATURALIZATION APPLICATION	200.00	2	120	1.21	0.20
EMPLOYEE RETIREMENT INCOME SECURITY ACT	318.95	41	120	24.85	4.14
LABOR/MANAGEMENT RELATIONS ACT	291.20	5	122	3.03	0.50
MARINE CONTRACT ACTIONS	414.15	33	137	20.00	3.33
INTERSTATE COMMERCE	427.00	1	146	0.61	0.10
FORECLOSURE	294.60	5	159	3.03	0.50
RENT, LEASE, EJECTMENT	350.50	2	257	1.21	0.20
AIRLINE REGULATIONS	387.00	1	271	0.61	0.10
RECOVERY OF DEFAULTED STUDENT LOANS	568.00	10	399	6.06	1.01
TOTAL	258.15	165	126		



*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

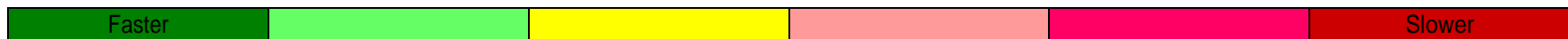
District A: 2010–2012
Fast Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
PRISONER PETITIONS - VACATE SENTENCE	239.85	61	75	26.29	6.16
CIVIL RIGHTS ACCOMMODATIONS	308.00	4	94	1.72	0.40
CONSTITUTIONALITY OF STATE STATUTES	287.00	1	99	0.43	0.10
PRISONER PETITIONS - HABEAS CORPUS	414.89	70	124	30.17	7.06
OTHER PERSONAL PROPERTY DAMAGE	576.17	6	142	2.59	0.61
DRUG RELATED SEIZURE OF PROPERTY	468.76	21	150	9.05	2.12
ASSAULT, LIBEL, AND SLANDER	523.00	5	178	2.16	0.50
OTHER REAL PROPERTY ACTIONS	477.18	11	189	4.74	1.11
OTHER STATUTORY ACTIONS	691.20	49	227	21.12	4.94
FAIR LABOR STANDARDS ACT	1278.67	3	358	1.29	0.30
ASBESTOS PERSONAL INJURY - PROD. LIAB.	4116.00	1	1280	0.43	0.10
TOTAL	852.79	232	265		



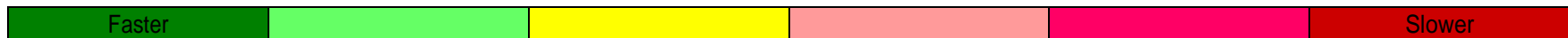
District A: 2010–2012
Slow Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
OTHER FORFEITURE AND PENALTY SUITS	197.53	15	59	5.15	1.51
D.I.W.C./D.I.W.W.	258.93	40	71	13.75	4.04
CIVIL RIGHTS VOTING	195.50	6	77	2.06	0.61
CIVIL RIGHTS ADA EMPLOYMENT	277.60	5	78	1.72	0.50
S.S.I.D.	281.08	25	80	8.59	2.52
MILLER ACT	287.79	14	100	4.81	1.41
OTHER LABOR LITIGATION	342.38	8	101	2.75	0.81
MARINE PERSONAL INJURY	400.00	23	104	7.90	2.32
INSURANCE	372.77	53	116	18.21	5.35
MOTOR VEHICLE PERSONAL INJURY	417.96	23	118	7.90	2.32
OTHER FRAUD	432.25	4	193	1.37	0.40
OTHER CONTRACT ACTIONS	663.42	66	212	22.68	6.66
TAX SUITS	754.67	9	109	3.09	0.91
TOTAL	375.53	291			



District A: 2010–2012
Slower Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
CIVIL (RICO)	9.33	3	2	0.99	0.30
SECURITIES, COMMODITIES, EXCHANGE	56.00	1	7	0.33	0.10
PERSONAL INJURY - PRODUCT LIABILITY	284.09	23	34	7.59	2.32
PATENT	153.00	1	58	0.33	0.10
OTHER PERSONAL INJURY	417.06	66	58	21.78	6.66
PROPERTY DAMAGE -PRODUCT LIABILITY	252.67	6	63	1.98	0.61
ENVIRONMENTAL MATTERS	328.79	29	64	9.57	2.93
AIRPLANE PERSONAL INJURY	296.75	4	64	1.32	0.40
OTHER CIVIL RIGHTS	235.45	88	81	29.04	8.88
OVERPAYMENTS UNDER THE MEDICARE ACT	303.00	2	92	0.66	0.20
LAND CONDEMNATION	618.50	2		0.66	0.20
FEDERAL EMPLOYERS' LIABILITY	425.00	1	94	0.33	0.10
CIVIL RIGHTS JOBS	403.33	21	151	6.93	2.12
TORTS TO LAND	673.25	4	158	1.32	0.40
MEDICALMALPRACTICE	658.71	49	159	16.17	4.94
BANKRUPTCY WITHDRAWAL 28 USC 157	441.33	3	77	0.99	0.30
TOTAL	347.27	303			

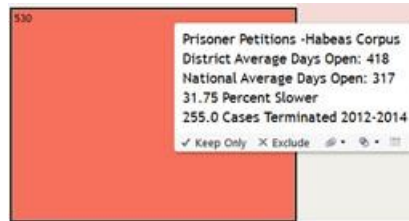


Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Federal Judicial Center

As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court's average case disposition time, the national average disposition time, the court's overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

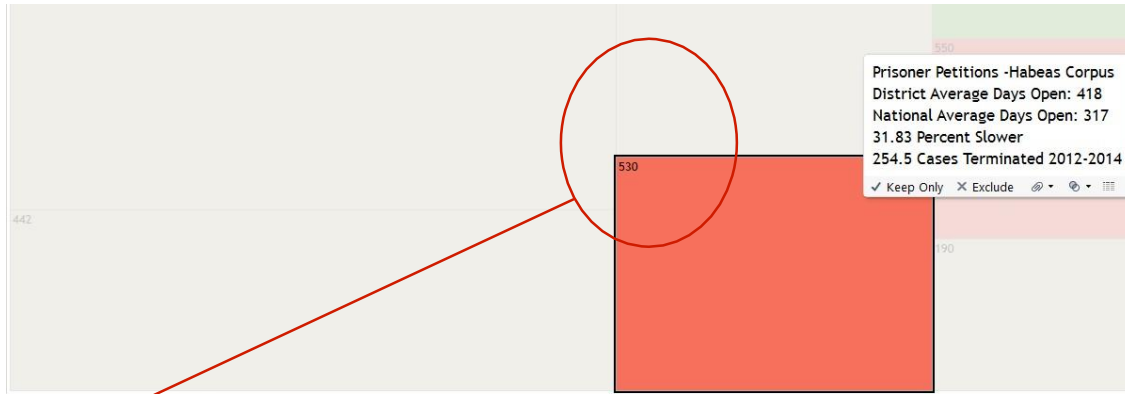


At the bottom of the dashboard, the user can see the cases used to calculate the district's average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

NOS Code	Nature of suit	Docket	Plaintiff	Defendant	Days	F
110	Insurance	05-00831	SMITH	SMITH	66	
		08-00019	MAPP	GEORGIA DEPARTMENT OF C, ET AL	760	
		09-00169	CULVER, ET AL	UNITED STATES OF AMERICA	94	
		09-00375	HOLTCAMP	GLOBAL MEDICAL SAFETY DIVISION	822	
		09-00574	NINO	MACY'S RETAIL HOLDINGS, INC.	383	
		09-00713	BATISTE	LAWRENCE	380	
		09-00780	ELLIS	JACKSON NATIONAL LIFE I, ET AL	324	
		09-01055	BROOKS FARMS, INC.	AGRICOMMODITIES, INC., ET AL	564	
		10-00222	JOHNSON	KEITH, ET AL	167	
		10-00242	FRAZIER	HAYNES	748	
		10-00502	GOMEZ	COLVIN	153	
		10-00531	PERRY	FORT WAYNE CITY OF, IN, ET AL	70	
		10-00611	BELL	MCCANN, ET AL	55	
		10-00842	SHAKIR	DONAHOE, ET AL	64	
		10-00858	SELLERS	SOCIAL SECURITY ADMINISTRATION	322	
		10-00969	BAILEY	WALGREEN CO., ET AL	166	

As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.



Cases Terminated 2012-2014

NOS Code	Nature of Suit	Docket	Plaintiff	Defendant	Days
530	Prisoner Petitions -Habeas Corpus	08-00745	UNITED STATES OF AMERICA	EXXONMOBIL PIPELINE COMPANY	270
		09-00121	DARBY	HENDRICKS	246
		09-00429	BAUER	COMMISSIONER OF SOCIAL SECURIT	116
		09-00448	SANDERS	CENTER, INC	131
		09-00479	SEARS	BRADLEY, ET AL	23
		09-00551	THE INDEPENDENCE PROJEC, ET AL	SANDS BETHWORKS GAMING LLC	409
		09-00577	SANDERS	THE OFFICE OF CHILDREN , ET AL	118
		09-00998	HICKS	SMITH	92
		10-00065	GATHERS	PEOPLE OF THE STATE OF NEW YOR	123
		10-00066	LANE	FEATHERS	1049
		10-00072	LITERAL	WARDEN TOLEDO CORRECTIONAL INS	490
		10-00102	FINN	COLVIN	899
		10-00147	CHANCE	PHARIS, ET AL	0
		10-00210	RIVAS	UNITED STATES OF AMERICA	117

If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district’s average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district’s average disposition time, and the black dash is the national average disposition time.



If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Who to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov , 202-502-4080).

Attachment 3

**Example Email Sent to Chief Judge and Clerk of Court in “Most Congested”
Districts in Preparation for Telephone Interview**

From: Donna Stienstra/DCA/FJC/USCOURTS
 To: Chief Judge _____
 Cc: Clerk of Court _____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
 Date: _____
 Subject: Preparation for conference call

Dear Chief Judge:

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on _____ about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases -- or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

Faster Quartile	Consumer Credit	895 cases, 213 days to disposition	23% longer than the national ave.
	Foreclosure	114 cases, 264 days to disposition	43% longer than the national ave.
	ERISA	132 cases, 575 days to disposition	117% longer than the national ave.
Fast Quartile	Other Stat. Actions	162 cases, 400 days to disposition	31% longer than the national ave.
	FSLA	47 cases, 1029 days to disposition	188% longer than the national ave.
Slow Quartile	Insurance	66 cases, 518 days to disposition	58% longer than the national ave.
	Oth. Contr.Actions	200 cases, 574 days to disposition	67% longer than the national ave.
	Motor Vehicle PI	84 cases, 625 days to disposition	74% longer than the national ave.
Slower Quartile	Civil Rights Jobs	387 cases, 694 days to disposition	77% longer than the national ave.
	Other Civil Right	393 cases, 715 days to disposition	94% longer than the national ave.

During our conversation on _____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition times -- for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

**Example Email Sent to Chief Judge and Clerk of Court in “Expedited” Districts in
Preparation for Telephone Interview**

From: Donna Stienstra/DCA/FJC/USCOURTS
 To: Chief Judge _____
 Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
 Date: _____
 Subject: Preparation for conference call

Dear Chief Judge:

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name} next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for _____at_____. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?
2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads--e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?
3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them

considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: "Civil Caseload Analysis, [district name].pdf"

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