

**ADVISORY COMMITTEE  
ON  
CIVIL RULES**

**Austin, TX  
April 25–26, 2017**



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## **AGENDA**

Meeting of the Advisory Committee on Civil Rules  
April 25-26, 2017

1. Opening Business
  - a. Report on the January 2017 Meeting of the Committee on Rules of Practice and Procedure
  - b. Report on the March Meeting of the Judicial Conference of the United States
2. **ACTION ITEM:** Approve Minutes of the November 2016 meeting of the Advisory Committee on Civil Rules
3. **Information Item:** Legislation
  - A. Class-Action Legislation
  - B. Other Legislation
4. **ACTION ITEM: Rule 23** amendments published August 2016
5. **ACTION ITEM: Rule 5** amendments published August 2016
6. **ACTION ITEM: Rules 62, 65.1** amendments published August 2016
7. **Information Item:** Report of the Rule 30(b)(6) Subcommittee
8. **Information Item:** Pilot Projects
9. **Information Item:** Administrative Conference Recommendation to adopt Rules for Social-Security Review cases
10. **Action Item:** Ordering the Future Agenda
  - A. Jury Trial: Rules 38, 39, 81.3
  - B. Rule 47: Party or Lawyer Participation in Voir Dire
  - C. Rule 45: Subpoena Service Alternatives
  - D. Rule 68: Offers of Judgment

11. **INFORMATION ITEMS:** Other Docket Matters
  - A. Pre-Motion Conferences, 17-CV-A
  - B. Rule 45 and the Patient Safety Act, 17-CV-B
  - C. Letter of Supplemental Authorities: 16-CV-H
  - D. Title VI, Puerto Rico Oversight Act, 16-CV-J
  - E. Disclaimer of Fear or Intimidation, 16-CV-G
  - F. "Nationwide Injunctions," 17-CV-E
  - G. Rule 7.1: Supplemental Disclosure Statements



## INTRODUCTION

1 Part I of these materials addresses the proposed rules  
2 amendments that were published for comment last August. In order of  
3 presentation, these are Rules 23 (aspects of class-action  
4 practice); 5 (e-filing and service); and 62 and 65.1 (stays of  
5 enforcement and security). Each rule can be advanced to the  
6 Standing Committee with a recommendation that it be approved for  
7 adoption, with modest changes that reflect further work inspired by  
8 the comments.

9 Part II is the Report of the Rule 30(b)(6) Subcommittee.

10 Part III introduces a submission by the Administrative  
11 Conference of the United States proposing adoption of "special  
12 procedural rules for cases under the Social Security Act in which  
13 an individual seeks district court review of a final administrative  
14 decision of the Commissioner of Social Security pursuant to 42  
15 U.S.C. § 405(g)."

16 Part IV reviews four projects that carry over on the agenda  
17 from earlier discussions. The purpose of present discussion is to  
18 establish an order of priorities: which of these projects deserve  
19 further development, and which should be developed first? Any one  
20 of them will, when pursued, demand serious work.

21 The proposal to expand the means of serving a Rule 45 subpoena  
22 is likely to be the least burdensome.

23 Repeated past experience, on the other hand, shows that the  
24 offer-of-judgment provisions of Rule 68 will demand a great deal of  
25 effort for several reasons – current Supreme Court interpretations  
26 that rest on the rule language may be undesirable as a matter of  
27 policy; taking up the frequent suggestions that claimants should be  
28 authorized to make Rule 68 offers leads to contentious issues of  
29 sanctions, attorney-fee awards, and multiple complexities that  
30 likely should be addressed in rule text rather than pushed over to  
31 the courts for uncertain outcomes; and strong arguments that Rule  
32 68 itself is misguided and should be abrogated.

33 The proposal to eliminate the Rule 38 provision waiving the  
34 right to jury trial absent an early demand, or at least to extend  
35 the time to make a demand, can be drafted readily enough. But it  
36 confronts two difficult questions: How often does a party forfeit  
37 the right to jury trial because of ignorance or oversight? And is  
38 there a real value in determining early in the action whether the  
39 case is to be tried to a jury?

40 The proposal to enhance the opportunities of lawyers to  
41 participate in voir dire examination of prospective jurors is  
42 similar to a Rule 47 proposal that was advanced vigorously by the  
43 Committee twenty years ago. The voluminous comments on the  
44 published proposal were clearly divided: most lawyers welcomed the  
45 proposal, and most judges – including many who permit active lawyer

46 involvement – were strongly opposed.

47 Part V presents several additional items that have been added  
48 to the agenda. Although described as information items, it will be  
49 appropriate to determine which should be retained on the agenda for  
50 further study and which can properly be removed from the agenda  
51 now.



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### Advisory Committee on Civil Rules

| Members                              | Position | District/Circuit     | Start Date             | End Date     |
|--------------------------------------|----------|----------------------|------------------------|--------------|
| John D. Bates<br>Chair               | D DC     | Washington, DC       | Member:<br>Chair: 2015 | ----<br>2018 |
| John M. Barkett                      | ESQ      | Florida              | 2012                   | 2017         |
| Elizabeth J. Cabraser                | ESQ      | California           | 2010                   | 2017         |
| Robert Michael Dow, Jr.              | D        | Illinois (Northern)  | 2013                   | 2019         |
| Joan N. Ericksen                     | D        | Minnesota            | 2015                   | 2018         |
| Parker C. Folse                      | ESQ      | Washington           | 2012                   | 2018         |
| A. Benjamin Goldgar**                | B        | Illinois (Northern)  |                        | 2017         |
| Peter D. Keisler***                  | ESQ      | Washington, DC       |                        | 2019         |
| Robert Klonoff                       | ACAD     | Oregon               | 2011                   | 2017         |
| Sara E. Lioi                         | D        | Ohio (Northern)      | 2016                   | 2019         |
| Scott M. Matheson, Jr.               | C        | Tenth Circuit        | 2012                   | 2018         |
| Brian Morris                         | D        | Montana              | 2015                   | 2018         |
| David E. Nahmias                     | JUST     | Georgia              | 2012                   | 2018         |
| Solomon Oliver, Jr.                  | D        | Ohio (Northern)      | 2011                   | 2017         |
| Chad A. Readler*                     | DOJ      | District of Columbia |                        |              |
| Virginia A. Seitz                    | ESQ      | District of Columbia | 2014                   | 2017         |
| Craig B. Shaffer                     | M        | Colorado             | 2014                   | 2017         |
| Edward H. Cooper<br>Reporter         | ACAD     | Michigan             | 1992                   | Open         |
| Richard Marcus<br>Associate Reporter | ACAD     | California           | 1996                   | Open         |

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\*\*\*Ex-officio - Liaison from Standing Rules

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|   | <b>Judge Pamela Pepper</b> <i>(Bankruptcy)</i>       |
| <b>Liaison for the Advisory Committee<br/>on Bankruptcy Rules</b> | <b>Judge Susan P. Graber</b> <i>(Standing)</i>       |
| <b>Liaisons for the Advisory Committee<br/>on Civil Rules</b>     | <b>Judge A. Benjamin Goldgar</b> <i>(Bankruptcy)</i> |
|   | <b>Peter D. Keisler, Esq.</b> <i>(Standing)</i>      |
| <b>Liaison for the Advisory Committee<br/>on Criminal Rules</b>   | <b>Judge Amy J. St. Eve</b> <i>(Standing)</i>        |
| <b>Liaisons for the Advisory Committee<br/>on Evidence Rules</b>  | <b>Judge James C. Dever III</b> <i>(Criminal)</i>    |
|   | <b>Judge Solomon Oliver, Jr.</b> <i>(Civil)</i>      |
|   | <b>Judge Richard C. Wesley</b> <i>(Standing)</i>     |

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**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
 Meeting of January 3, 2017 | Phoenix, Arizona

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**ATTENDANCE**

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) held its spring meeting at the Sandra Day O’Connor United States Courthouse in Phoenix, Arizona, on January 3, 2017. The following members participated in the meeting:

- |   |  |
|---|--|
| Judge David G. Campbell, Chair<br>Judge Jesse M. Furman<br>Gregory G. Garre, Esq.<br>Daniel C. Girard, Esq.<br>Judge Susan P. Graber<br>Judge Frank Mays Hull<br>Peter D. Keisler, Esq. | Professor William K. Kelley<br>Judge Amy St. Eve<br>Professor Larry D. Thompson<br>Judge Richard C. Wesley (by telephone)<br>Chief Justice Robert P. Young<br>Judge Jack Zouhary |
|---|--|

The following attended on behalf of the advisory committees:

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

Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Sally Q. Yates, Deputy Attorney General.

Other meeting attendees included: Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules and Chair of the Pilot Projects Working Group; Judge Robert Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Zachary Porianda, Attorney Advisor to the Court Administration and Case Management (CACM) Committee; Professor Bryan A. Garner, Style Consultant; and Professor R. Joseph Kimble, Style Consultant.

Providing support to the Standing Committee:

|                                 |   |
|---------------------------------|---|
| Professor Daniel R. Coquillette | Reporter, Standing Committee            |
| Rebecca A. Womeldorf            | Secretary, Standing Committee           |
| Julie Wilson                    | Attorney Advisor, RCSO                  |
| Scott Myers                     | Attorney Advisor, RCSO                  |
| Bridget Healy (by telephone)    | Attorney Advisor, RCSO                  |
| Hon. Jeremy D. Fogel            | Director, Federal Judicial Center (FJC) |
| Dr. Emery G. Lee III            | Senior Research Associate, FJC          |
| Dr. Tim Reagan                  | Senior Research Associate, FJC          |
| Lauren Gailey                   | Law Clerk, Standing Committee           |

## **OPENING BUSINESS**

### *Welcome and Opening Remarks*

Judge Campbell called the meeting to order. He introduced the Standing Committee’s new members, Judge Furman of the Southern District of New York, Judge Hull of the U.S. Court of Appeals for the Eleventh Circuit, attorney Peter Keisler of Sidley Austin, and Justice Young of the Michigan Supreme Court.

Judge Campbell discussed the timing and location of meetings. The Standing Committee holds a meeting in June, after the advisory committees’ spring meetings have been concluded, and in time to approve matters to be published in August. The Standing Committee’s winter meeting is held during the first week of January, after the advisory committees’ fall meetings (which run from September through November) and the holidays, but before the reporters’ spring semesters begin. Although it has been a tradition for the past few years to hold the winter meeting in Phoenix, Judge Campbell welcomed the members to suggest alternative locations.

In his previous role as Chair of the Advisory Committee on Civil Rules, Judge Campbell found the January meeting to be an invaluable opportunity to share proposals with the Standing Committee and solicit feedback from its members. Judge Campbell encouraged all to share their thoughts.



*Report on Rules and Forms Effective December 1, 2016*

The following Rules and Forms went into effect on December 1, 2016: Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, new Form 7, and the new Appendix; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, new Rule 1012, and Official Forms 410S2, 420A, and 420B; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45 (*see* Agenda Book Tab 1B).

Judge Molloy reported that Congress is considering possible legislative action that would undo the recent amendment to Criminal Rule 41. Judge Campbell added that the Department of Justice (DOJ) had been helpful in advising Congress of the intent behind the rule change. Discussion followed.

*Report on September 2016 Judicial Conference Session,  
Proposed Amendments Transmitted to the Supreme Court, and  
Rules and Forms Published for Public Comment*

Rebecca Womeldorf reported on the September 2016 session of the Judicial Conference. In its semiannual report to the Judicial Conference, the Standing Committee submitted several rules amendments for final approval and requested approval for publication of a number of other proposed rule amendments.

The Judicial Conference approved the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and Evidence Rules 803(16) and 902. These amendments were submitted to the Supreme Court on September 28, 2016. The Court will review the package and, barring any objection, adopt it and transmit it to Congress by May 1, 2017. If Congress takes no action, the amendments will go into effect on December 1, 2017.

The Judicial Conference also approved the Mandatory Initial Discovery Pilot Project and the Expedited Procedures Pilot Project.

The Standing Committee previously approved for public comment proposed amendments to the following Rules: Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, and 8023, Part VIII Appendix (New), and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; Civil Rules 5, 23, 62, and 65.1; and Criminal Rules 12.4, 45, and 49. These rules and forms were published for public comment in July and August 2016. Many of these changes are non-controversial. The proposal to amend Civil Rule 23 has generated the most interest at public hearings; other hearing testimony has pertained to electronic filing changes affecting all rule sets.

**APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING**

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 6, 2016 meeting.**

## INTER-COMMITTEE WORK

### *Coordination Efforts*

Scott Myers of the RCSO delivered a report on coordination efforts regarding proposed rules amendments that affect more than one advisory committee. He described rules amendments currently out for public comment that have implications for more than one set of federal rules. The first example related to electronic filing, service, and signatures (proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49). Mr. Myers noted that the advisory committees coordinated language prior to publication; any changes the advisory committees recommend when the rules are submitted to the Standing Committee for final approval will also go through the coordination process.

Mr. Myers explained that proposed amendments to Civil Rules 62 and 65.1 that would eliminate the term “supersedeas bond” also have inter-committee implications. The Appellate Rules Committee published proposed amendments to Appellate Rules 8, 11, and 39 that would eliminate the term, and that the Bankruptcy Rules Committee planned to do the same by recommending technical conforming amendments to Bankruptcy Rules 8007, 8010, and 8021. The advisory committees will need to coordinate any additional changes made as a result of comments received.

Proposed amendments published for comment to the criminal disclosure rule could impact the appellate, bankruptcy, and civil disclosure rules. As published, the criminal disclosure rule would change the timing for initial and supplemental corporate disclosure statements, and that parallel amendments to the appellate, bankruptcy, and civil disclosure rules would need to be made for consistency across the rules. A reporter to the Criminal Rules Committee said that this may be a case where factors specific to criminal procedure warrant a change that need not be adopted by the other advisory committees. Mr. Myers added that if parallel amendments are pursued by the Appellate, Bankruptcy, and Civil Rules Committees, the effective date of any changes to rules in those areas would trail the proposed criminal rule change by a year.

Finally, Mr. Myers noted that the Bankruptcy Rules Committee planned to address at its next meeting an amendment to its privacy rule to address redaction of personal identifying information from filed documents. The proposal responded to a suggestion from the CACM Committee after a national creditor sought assistance from the Administrative Office in efficiently removing personal identifying information from thousands of proof of claims it had filed across the country. The Civil and Criminal Rules Committees considered recommending similar amendments to their privacy rules, but both committees determined that courts have the tools needed to handle the relatively small number of documents filed on their dockets containing protected personal identifying information. Accordingly, the Civil and Criminal Rules Committees did not plan to follow the lead of the Bankruptcy Rules Committee in amending their privacy rules unless the Standing Committee believed amendments should be made to all the privacy rules in the interests of uniformity.

Judge Campbell solicited additional issues that will require or benefit from inter-committee coordination.

*Five-Year Review of Committee Jurisdiction*

Ms. Rebecca Womeldorf introduced discussion of the five-year review of committee jurisdiction required by the Judicial Conference. In 1987, the Judicial Conference established a requirement that “every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.” In 2017, therefore, each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

As the Bankruptcy Rules Committee had completed a version of the Five-Year review, Judge Ikuta was invited to summarize its recommendations. Judge Ikuta discussed the Bankruptcy Rules Committee’s responses, focusing on three issues: (1) inter-committee coordination, (2) voting rights for non-member participants such as the representative from the DOJ and the bankruptcy clerk participant, and (3) background knowledge requirements for judge members.

With respect to the first issue of coordination, Judge Ikuta said she supported the addition of the coordination report to the Standing Committee’s agenda, but urged more coordination once overlap is identified, so that there is a clear process transparent to all, with perhaps one advisory committee leading the effort.

Judge Campbell asked Judge Ikuta what additional steps should be added to the Standing Committee’s current coordination efforts. Judge Ikuta suggested that the existing charts of overlapping rules could provide a starting point from which to identify overlap among rules. Once points of overlap are identified, the question becomes how best to proceed. Should one advisory committee take the lead? Should all of the committees discuss the issue first? Should the procedure vary, depending on the particular situation? Judge Ikuta took the position that a specific procedure for handling overlapping provisions should be adopted.

The stated goal of coordination is generally parallel language among identical rules provisions across rules sets, adopted during the same rules cycle. A reporter stated that a coordination procedure *is* currently in place—proposed changes with inter-committee implications are to be referred to a subcommittee of the Standing Committee—and that process was followed when the time counting amendments were made to all the rule sets. This procedure was not followed precisely with respect to the current round of amendments concerning electronic filing, service, and signatures, but the basic procedure of using a Standing Committee subcommittee to coordinate when necessary is available when needed.

Another reporter agreed and added that the structure of committee hierarchy can complicate coordination. Although the Standing Committee is charged with coordinating the work of the advisory committees, and suggesting proposals for them to study, it does not simply direct advisory committees to amend particular rules. Rather, proposed rule changes flow up from the advisory committees to the Standing Committee, and it is not always clear until an advisory committee presents a fully developed recommendation that coordination with other advisory committees is needed. Even so, the Standing Committee may—and has—set up subcommittees

for the purpose of persuading the advisory committees to cooperate regarding related rules changes.

A staff member asked what role the Standing Committee liaisons, as part of the coordination machinery, could be expected to play in the coordination process. A Standing Committee member agreed that, while liaison members do not have voting privileges, they could be helpful to the coordination efforts by alerting the Standing Committee to possible overlapping changes under consideration.

A third reporter said advisory committees need more information about the other advisory committees' agenda items. Specifically, beyond the general subject matter under discussion, what exact amendments are under consideration for a parallel rule? Armed with this information, the advisory committees could better consider parallel amendments in the same meeting cycle. A suggestion was made that the most effective way to disseminate this information is to ensure that each advisory committee's agenda book is shared with the chairs and reporters of all of the other advisory committees. There was agreement that sharing agenda books would benefit coordination. A reporter reiterated that more proactive use of subcommittees can go a long way toward solving coordination issues.

A reporter observed that the Bankruptcy Rules are more frequently affected by coordination issues because many of the rules either incorporate or are modeled on the Civil and Appellate Rules. A staff member added that often changes to Bankruptcy Rules have lagged by a year or more parallel Civil or Appellate Rules changes, without issue. It may sometimes be necessary to ask the other advisory committees to delay a change for a year if the Standing Committee wants parallel changes to go into effect at the same time, but the fact that a bankruptcy version of a change sometimes goes into effect a year later than a parallel appellate or civil rule change has not been a historical source of problems for courts or attorneys, if it has been noticed at all. A reporter pointed to the recent proposal dealing with payments to class-action objectors as one that required substantial coordination between the Civil and Appellate Rules Committees and the current system worked well. A Standing Committee member cited Civil Rules 62 and 65 as another example of a successful coordination effort.

Judge Campbell identified four actions to be taken to further the Standing Committee's coordination efforts: (1) the RCSO will continue to identify, track, and report on proposed rules amendments affecting multiple advisory committees; (2) agenda books will be shared by each advisory committee with the chairs and reporters of all of the other advisory committees; (3) the RCSO will assist in establishing coordination subcommittees when that seems appropriate; and (4) the Standing Committee will look for opportunities for coordination and future process improvements. A Standing Committee member added that advisory committees affected by a proposed rule change could send a member to participate in the proposing advisory committee's meeting. Judge Campbell agreed that this would be a good idea in appropriate circumstances.

Judge Ikuta's second bankruptcy-specific issue in the Five-Year review concerned whether the Bankruptcy Rules Committee's substantive experts – such as a recent Chapter 13 trustee invitee, the bankruptcy clerk advisor, and the representatives from the DOJ and the Office of the United States Trustees – should be made voting members, and whether Article III judges being

considered for membership on the Bankruptcy Rules Committee should be required to have some knowledge of the bankruptcy process. Judge Campbell asked why the Bankruptcy Rules Committee's expert members do not currently vote. One possible answer is that the Bankruptcy Rules Committee does not consider them full voting members because they were not appointed by the Chief Justice. Several Standing Committee members noted that the DOJ representative on other rules committees have always voted, though clerk representatives have not. It was observed that because the United States Trustee is an arm of the DOJ, the government would have two votes if voting rights were extended to both representatives on the Bankruptcy Rules Committee.

Providing additional historical perspective, a reporter explained that the DOJ is unique among the committees' membership because it represents the Executive Branch in addition to the interests of the justice system generally. To give all bankruptcy expert invitees a vote could set a problematic precedent as many interest groups would seek to join the rules committees to advance their views. The DOJ is deserving of an exception from advocacy, however, because it is an Executive Branch agency, and the other two branches of government are represented in the rulemaking process.

A Standing Committee member supported making the bankruptcy DOJ representative a voting member, as was the case on the other rules committees, but added that the United States Trustee and DOJ representatives should have only one vote between them because they are the same office. After further discussion, Judge Campbell suggested the Bankruptcy Rules Committee should be consistent with the other advisory committees in its treatment of its expert members; the DOJ member should vote, and any other expert advisors should be treated like the clerk members of the other committees, who play an informational role but do not vote. No member objected to this approach.

Judge Ikuta's third bankruptcy-specific item from the Five-Year review concerned whether Article III judges being considered for membership on the Bankruptcy Rules Committee should be required to have bankruptcy experience. Judge Campbell agreed that bankruptcy experience should be considered in recommending potential members to the Chief Justice.

After further discussion of the Five-Year review, it was agreed that the Standing Committee should submit a single report for the rules committees.

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Civil Rules Committee, which met on November 3, 2016, in Washington, D.C. The Civil Rules Committee's single action item involved recommending to the Judicial Conference for approval a technical amendment to Rule 4(m).

#### *Action Item*

*Technical Amendment to Rule 4(m)* – Rule 4(m) establishes a time limit for serving the summons and complaint. The proposed rule text revises the final sentence of Rule 4(m), which was

amended on December 1, 2015, and again on December 1, 2016. The 2015 amendment shortened the time for service from 120 days to 90 days, and added to the list of exemptions to that time limit Rule 71.1(d)(3)(A), notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. At the time the 2016 proposal was prepared, the advisory committee was working from Rule 4(m) as it was in 2014, because the 2015 amendment exempting service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. For this reason, the part of the 2015 amendment adding Rule 71.1(d)(3)(A) was inadvertently omitted from the 2016 proposal. Therefore, that proposal, as published, recommended, and adopted, read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The Standing Committee explored with Congress's Office of the Law Revision Counsel (OLRC) the possibility of correcting the rule text as a scrivener's error. The OLRC declined to do so, but did place in an explanatory footnote the official print for the House of Representatives Committee on the Judiciary.

Because the OLRC declined to correct the omission of Rule 71.1(d)(3)(A), it must be corrected through the Rules Enabling Act process. Given that the provision has already been published, reviewed, and adopted, and because its omission was inadvertent, further publication is not required. The final sentence of Rule 4(m) should read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The Civil Rules Committee voted to recommend approval of this rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court in the spring of 2017, for an effective date of December 1, 2017.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously voted to recommend the technical amendment to Rule 4(m) to the Judicial Conference for approval.**

*Pilot Projects Working Group*

Judge Bates, Judge Grimm, Judge Fogel, and Emery Lee of the FJC led the discussion of two pilot projects approved by the Judicial Conference in September 2016, both of which are intended to improve pre-trial case management and reduce the cost and delay of civil litigation: (1) the Expedited Procedures Pilot, which will utilize existing rules, practices, and procedures and is intended to confirm the merits of active case management under these existing rules and practices; and (2) the Mandatory Initial Discovery Pilot, which is intended to measure whether court-ordered, robust, mandatory discovery produced before traditional discovery will reduce cost, burden, and delay in civil litigation. It was noted that Chief Justice Roberts mentioned the pilot projects in his 2016 Year End Report.

Judge Bates advised that these projects are expected to be implemented beginning in the spring of 2017, likely with their starts staggered for administrative-convenience purposes. One key to the projects' success will be getting enough districts to participate.

To discuss these projects in more detail, Judge Bates called upon Judge Grimm, a former member of the Civil Rules Committee and Chair of the Pilot Projects Working Group. Judge Grimm noted that during the public comment period and in public hearings held on the 2015 Civil Rules Package, some practitioners questioned whether rule changes should be implemented absent empirical support. Other practitioners noted that active case management is essential to reducing the cost and delay of civil litigation. Both pilot projects are responsive to these concerns. The Mandatory Initial Discovery Pilot will provide empirical data regarding whether the procedures implemented in the pilot project are effective and warrant future rules amendments. The goal of the Expedited Procedures Pilot is to promote a culture change by confirming the benefits of active case management using existing procedural rules. The Pilot Projects Working Group is coordinating with the FJC to design the pilot projects to produce measurable markers that yield good data.

Judge Grimm reviewed the history of the Mandatory Initial Discovery Pilot. The concept of mandatory initial discovery was first introduced in the 1993 rules amendments. The idea was to create an obligation that parties exchange information relevant to claims and defenses underlying the litigation without a formal discovery request. "It was an idea whose time had perhaps not yet come." The 1993 amendments included opt-out provisions, and most opted out. As a result, mandatory initial discovery has been little-used, and there has been no opportunity to verify empirically whether such procedures would help to reduce the cost and length of litigation. Interestingly, approximately ten states have since adopted mandatory initial discovery, to great success.

The Mandatory Initial Discovery Pilot will be implemented through a standing order (*see* Agenda Book Tab 3B, Attachment 5). Participating courts will also have access to resources developed by the Pilot Projects Working Group, including a reference manual, model forms and orders, and additional educational materials.

Judge Grimm then turned to the Expedited Procedures Pilot, the goals of which include ensuring courts' compliance with the requirements of: a prompt Rule 16 conference; issuance of a scheduling order setting a definite period of discovery of no more than 180 days and allowing no more than one extension, and then only for good cause; the informal resolution of discovery disputes; a commitment on the part of judges to resolve dispositive motions within 60 days from the filing of a reply brief and a firm trial date. The trial date would be set either at the initial scheduling conference, after the filing of dispositive motions, or upon the resolution of those motions.

The Pilot Projects Working Group is continuing to develop and finalize the procedures and supporting materials for the pilot projects. Judge Grimm confirmed that the pilot projects will be staggered, with the Mandatory Initial Discovery Pilot beginning first. Once the pilot projects have begun, administrative support will be provided by RCSO and CACM. The pilots will last for three years, but data collection and analysis will continue for longer than three years.

Judge Grimm noted the need for additional recruitment of courts to participate. The original goal was to have least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court. Recruitment efforts in the Northern District of Illinois resulted in a participation rate of approximately 75 percent, which will permit intra-district comparisons between participating and non-participating judges.

The District of Arizona will participate in the Mandatory Initial Discovery Pilot. Judge Campbell reported that because Arizona's state rules of civil procedure already include provisions similar to those the pilot projects are intended to test, the District of Arizona's judges have found the experiences of their state counterparts in handling these rules to be reassuring. Twenty years after the adoption of mandatory initial discovery in Arizona state court, a survey revealed that 74 percent of Arizona practitioners "prefer to be in state court" over federal court, as opposed to 41 percent nationally. When surveyed, lawyers in Arizona responded that they prefer state court because "[they] spend less money, and . . . cases [are] resolved more quickly." Judge St. Eve, whose Northern District of Illinois is confirmed to participate as well, suggested this information might be useful in helping judges to convince their colleagues to participate.

The District of Montana is also considering taking part. However, Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar's negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.

The Eastern District of Kentucky is confirmed to participate in the Expedited Procedures Pilot. Thanks to the efforts of Judges Diamond and Pratter in the Eastern District of Pennsylvania, that district remains a possibility, as do the Southern District of Texas, the District of Utah, and the District of New Mexico.

Judge Grimm shared several lessons learned as it has tried to recruit participating courts: the process takes time, success requires buy-in from multiple judges on a given court, and persuasion can be a challenge. Asked what percentage of a court's judges would constitute sufficient participation, Judge Grimm responded that 50 to 60 percent would provide a "center of gravity." A judge member requested clarification as to the term, "firm trial date," which Judge Grimm acknowledged had been an "area of concern" for some. He further acknowledged that the goal of disposing of 90 percent of cases within 14 months of either 90 days from service or 60 days from the entry of an appearance was "ambitious" by design.

Judge Fogel argued that "a culture change" is "quite difficult," but is necessary to drive up recruitment. Although the FJC has engaged in education methods such as webinars, receptivity to pilot project participation has largely been confined to so-called "baby judges," while "longer-tenured judges" seem "more comfortable with the status quo." Judge Fogel anticipated this topic would be discussed at the upcoming Chief District Judges meeting in March 2017. The FJC hopes to use adult education principles (specifically, by focusing training on certain areas of knowledge, skills, and abilities) to encourage judges to adopt active case management practices (*see* Agenda Book Tab 3B, Attachment 6). A judge member suggested the FJC consider



including a chambers staff member in the training, along with his or her judge. Judge Campbell also suggested including in the training process state judges who have experience with similar rules provisions.

Emery Lee then addressed the topic of data collection. He reviewed his November 29, 2016 memorandum to the Standing Committee, which addressed potential problems (*see* Agenda Book Tab 3B, Attachment 7). The first issue is whether and when to set the firm trial date. Available data from eight districts and 3,000 civil cases previously addressing this topic shows significant variance among district courts. In approximately forty-nine percent of cases, no trial date could be found. Second, the two pilot projects are very different from one another in terms of measures. The Expedited Procedures Pilot, which will require the tracking of motion practice and discovery disputes, is the easier of the two, although the lack of a definitive and consistent starting point for the “fourteen-month clock” is problematic.

Dr. Lee expressed interest in obtaining feedback through attorney surveys, which could be automated via the district’s CM/ECF system. When a “case-closing event” occurs in CM/ECF, it can trigger another “CM/ECF case event” directing attorneys to be noticed to a survey conducted by an outside vendor. Automation of the surveys in this manner will save significant time, but will require assistance from clerks’ offices.

A judge member asked whether, in addition to comparison among districts, the data collected would allow for a “before-and-after” comparison within a single district. The answer is yes by district and for individual judges, but the usefulness of the data can hinge on many factors over the next four to five years. Another judge member wondered whether “within-court data [was] *more* helpful” than data from a number of diverse districts, in that the former controls for more variables. Two other judges responded that the “self-selection bias” becomes an issue in that situation, as the judges opting in might already be using expedited procedures. In closing, another judge member pointed out the need to define the metrics: “What are we comparing?”

### *Information Items*

*Rules Published for Public Comment* – Proposed amendments to Rules 5, 23, 62, and 65.1 were published for public comment in August 2016, and will be the subject of three hearings. The changes to Rule 23, which largely concern class-action settlements, have generated the most interest. Eleven witnesses testified at the November 3, 2016 hearing held in conjunction with the advisory committee’s fall 2016 meeting, and eleven more were scheduled to testify at the January 4, 2017 hearing. More than a dozen were already scheduled to testify at the February 16, 2017 hearing, which will be held by telephone.

*Rule 30(b)(6) Subcommittee* – The Civil Rules Committee has decided to explore whether it is feasible and useful to address some of the problems that bar groups have regularly identified with depositions of entities under Rule 30(b)(6). The Civil Rules Committee studied this issue ten years ago, but concluded that any problems were attributable to behavior that could not be effectively addressed by rule. When the question was reassessed a few years later, the advisory committee reached the same conclusion. Recently, certain members of the American Bar Association Section of Litigation submitted a suggestion reviving these concerns.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Joan Ericksen, to consider possible amendments to Rule 30(b)(6). The Rule 30(b)(6) Subcommittee has begun to develop a tentative initial draft of a potential amendment to help to make the challenges of the process concrete, but it has not yet decided whether to recommend any amendments to the rule.

*Redacting Improper Filings: Rule 5.2* – Court filings frequently include personal information that should have been redacted. Rule 5.2 (Privacy Protections for Filings Made with the Court) was designed to protect litigants’ privacy by permitting court filings to “include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial-account number.” The rule resulted from a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

The Bankruptcy Rules Committee intends to publish proposed new Bankruptcy Rule 9037(h), which would establish a procedure for replacing an improper filing with a properly-redacted filing, for public comment.

The Civil Rules Committee considered a parallel amendment to the Civil Rules that would have added a specific provision to Rule 5.2 for correcting papers that are filed without redacting personal identifying information in the manner that the rule requires. During its consideration of the proposed amendment at its fall 2016 meeting, the Civil Rules Committee determined that the district courts seem to be managing the problem well when it arises and, therefore, determined that there is no independent need for a national rule to correct improperly-redacted filings. The advisory committee decided to remove this item from its agenda.

*Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A)* – Rule 81(c)(3) sets forth the procedure for demanding a jury trial in actions removed from state court. Specifically, Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law does not need to renew the demand after removal. Before the 2007 Style Project amendments, the rule provided that the party need not make a demand if state law “does not” require a demand (emphasis added). Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as pointed out in a suggestion submitted in 2015 by Mark Wray, Esq. (Suggestion 15-CV-A), replacing “does” with “did” inadvertently created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Discussion of this issue at the Standing Committee’s June 2016 meeting led Judges Gorsuch and Graber to suggest that the demand requirement in civil cases be reconsidered altogether (Suggestion 16-CV-F). Specifically, the suggestion would adopt the procedure currently used in criminal cases: a jury trial should be the default; a case would be tried without a jury only if all parties waive a jury trial, and the court must approve any waiver. The Civil Rules Committee has begun follow-up work on this suggestion. Preliminarily, the advisory committee surveyed local and state court rules and case law to determine how often parties who want a jury trial do not get one due to the failure to make a timely demand.

*Service of Subpoenas: Rule 45(b)(1)* – Under Rule 45(b)(1), a subpoena is served by “delivering a copy to the named person.” The majority of courts interpret this provision to require personal service, while some courts have recognized other means of delivery, most often by mail. The advisory committee will discuss at future meetings whether Rule 45 should expressly recognize other means of delivery.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Gorsuch and Professor Maggs provided the report on behalf of the Appellate Rules Committee, which met on October 18, 2016, in Washington, D.C. Judge Gorsuch succeeded Judge Steven M. Colloton as chair of the Appellate Rules Committee at the beginning of October 2016.

Judge Gorsuch reported that the Appellate Rules Committee had one action item, a proposed technical amendment, for which it sought the approval of the Standing Committee. The agenda also included five information items.

### *Action Item*

*Technical Amendment to Rule 4(a)(4)(B)(iii)* – On December 14, 2016, OLRC informed the Appellate Rules Committee through RCSO that the published version of Appellate Rule 4 should not include subdivision (a)(4)(B)(iii), as that subsection had been inadvertently deleted in 2009. In 2009, Rules 4(a)(4)(B)(ii) and 4(a)(5) were amended as part of the Time Computation Project, but subsection (iii) was not amended. The redlined version of the proposed amendments, used during committee deliberations and published for public comment, included asterisks between subdivisions 4(a)(4)(B)(ii) and 4(a)(5) to show that the material between them—subdivision 4(a)(4)(B)(iii)—was not to be changed. However, the “clean version” combining the changes inadvertently omitted those asterisks, making it appear that subdivision 4(a)(4)(B)(iii) had been deleted. The Supreme Court’s order adopting the amendments to Rule 4(a) incorporated this version.

Accordingly, the OLRC deleted subdivision (iii) from its official document in 2009, but nonetheless the version from which the rules are printed did not include that change. For that reason, Rule 4(a)(4)(B)(iii) has continued to appear in the published version of the Appellate Rules. It was only recently that a publisher noticed the omission of subdivision (iii) from the 2009 Supreme Court order and inquired with the OLRC as to whether it was actually part of the Rule. The OLRC intends to publish Rule 4(a)(4)(B) without subdivision (iii), but include a footnote stating that the deletion was inadvertent.

Judge Gorsuch consulted with the members of the Appellate Rules Committee, who decided that the error was best remedied by a technical amendment restoring subdivision (a)(4)(B)(iii) to Rule 4. Because the change is non-substantive, publication is unnecessary. No member expressed objection or concern.

Judge Campbell added that if the Standing Committee approved the amendment, it could be approved by the Judicial Conference in March and transmitted to the Supreme Court, and

submitted to Congress by the first of May. It would then go into effect on December 1, 2017, assuming no action by Congress. There will be one year in which subdivision (a)(4)(B)(iii) will not be printed as part of Rule 4, but OLRC’s explanatory footnote will appear during that period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the technical amendment to restore Rule 4(a)(4)(B)(iii).**

#### *Information Items*

Judge Gorsuch presented the Appellate Rules Committee’s information items: (1) Appellate Rule 3(d)’s references to “mailing” in the context of electronic filing; (2) the references to security instruments in Appellate Rule 8(b); (3) possible conforming amendments to Rule 26.1’s corporate disclosure requirements; (4) possible conforming amendments in light of the Civil Rules amendments regarding class action objectors, and (5) possible amendments to Rule 25 regarding electronic filing and pro se litigants.

*Rule 3(d)* – Rule 3(d) governs service of the notice of appeal. After proposed amendments to Rule 25 were published in August 2016, the Appellate Rules Committee realized that Rule 3 still contained references to “mail,” and that the term “mail” appears throughout the Appellate Rules. The Appellate Rules Committee has discussed using the term “send” in place of “mail,” but those discussions are preliminary. Judge Gorsuch noted that the term “mail” is used in other federal rules as well, particularly the Civil and Bankruptcy Rules. As such, any terminology change may require coordination with the other committees, and he solicited input on these points.

One member cautioned that the effort could be a big undertaking, particularly for the Civil Rules. A reporter agreed the project would be substantial in scope, as there are words used in addition to “mailing” (e.g., “sending” and “delivering”) that would need to be examined as well. These instances might require a case-by-case determination as to whether electronic service is acceptable under the circumstances. To date, the Civil Rules Committee has not determined to replace these types of phrases throughout the Civil Rules. This issue had been explored by the Subcommittee on Electronic Filing two years ago, and the Subcommittee had decided not to take action due to the complexity of the problem and the potential for unintended consequences. Judge Gorsuch concluded that the Appellate Rules Committee will continue to pursue how to avoid confusion in the Appellate Rules between the references to electronic filing and references to mail.

*Rule 8(b)* – The Appellate Rules Committee is considering an amendment to clarify the recently-published draft of Rule 8(b) regarding security instruments. The proposed amendments initially came to the attention of the advisory committee as a result of the proposed amendment to Civil Rule 62, which clarifies that an appellant may post a security other than a bond in order to obtain a stay of proceedings to enforce a judgment. In June 2016, the Standing Committee approved for publication amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Civil Rule 62 by replacing the term “supersedeas bond.”

After the publication of these proposed amendments in August 2016, the Appellate Rules Committee became aware of an internal inconsistency in the language of the published draft of Rule 8(b). While the first clause of the first sentence of the proposed text includes four forms of security—“a bond, other security, a stipulation, or other undertaking”—the second clause mentions only two: “a bond or undertaking.” At the October 2016 meeting, the advisory committee tentatively decided to replace the first clause in Rule 8(b) with “a bond, a stipulation, an undertaking, or other security,” and the second clause in the rule with the term “security,” to encompass all prior iterations, explanations, or alternatives without repetition.

The Appellate Rules Committee also discussed the possibility of eliminating the reference to “stipulation,” which appears in the Appellate Rules but not in the Civil Rules. Although no published case touches upon the subject, the Appellate Rules Committee determined to retain the reference, and have consulted with the reporter for the Civil Rules Committee. The Appellate Rules Committee will wait to receive all public comments on the published version of Rule 8(b) before taking further action.

A reporter asked whether the suggested parallel amendments to Rule 8(b)’s language create an obligation on the part of the other committees to similarly conform. For example, the word “stipulation” is in the Appellate Rule but not in the corresponding Civil or Bankruptcy Rule. A member proposed that “stipulators” be treated as “other security providers,” as stipulations to the form and amount of security are routinely approved at the district court level, but expressly declined to suggest that the term be removed from Appellate Rule 8(b).

Judge Campbell noted that Appellate Rule 8 describes the person who provides the security in two different ways: once as “sureties or other security provider,” and twice as a “security provider,” and suggested a stylistic change from “surety” to “security provider.” Another member noticed that this would require amending the subsection’s title (“Proceeding Against a Surety”) as well. Professor Maggs explained that the Appellate Rules Committee had retained the term surety because the amendments to Civil Rule 62 retained the term “bond or other security,” and the “surety” referred to the security provider for the bond.

Judge Gorsuch thanked the other members for their comments, and reported that the Appellate Rules Committee expects to finalize the new text of Rule 8(b) before its next meeting.

*Rule 26.1 and Corporate Disclosure Statements* – Appellate Rule 26.1(a) currently provides that corporate parties must disclose their subsidiaries and affiliates so that judges can make assessments of their recusal obligations. For several years, the Appellate Rules Committee has discussed the possibility of expanding disclosure obligations to publicly-held non-corporate entities, and to require the disclosure, in addition to the information currently required by Rule 26.1(a), of the entity’s involvement in related federal, state, and administrative proceedings.

A careful study, including a memorandum by Professor Capra, revealed substantial variation among the circuits’ disclosure requirements. Despite the significant costs on counsel who must understand the different sets of rules in different jurisdictions, the Appellate Rules Committee concluded that it was not inclined to act because it was unable to devise a satisfying solution. Two major problems led to this decision: (1) the amount of information that is necessary and

helpful in evaluating recusal decisions varies significantly among judges, and (2) efforts to delineate which entities would be subject to the disclosure requirements were unsuccessful. Given these complicated issues, the Appellate Rules Committee decided to not go forward with a rule amendment.

The Appellate Rules Committee did, however, tentatively decide to recommend conforming amendments to Appellate Rule 26.1 in light of the proposed amendments to Criminal Rule 12.4, which requires the disclosure of nongovernmental corporate parties and organizational victims. These proposed changes to subdivisions (b) and (d) are more limited in scope. Rule 26.1(b) would be modified to replace the references to “supplemental” filings to “later” filings. This term is more precise and would include a party that was unaware of the need to make a disclosure at the time it filed its principal brief. Subdivision (d) would also be added to mirror the proposed revision of Criminal Rule 12.4(a)(2), which requires the government to “file a statement identifying any organizational victim of the alleged criminal activity” absent a showing of good cause.

The Appellate Rules Committee also tentatively approved a proposal to add a new subdivision (f) to Rule 26.1, which would impose a disclosure requirement on intervenors. Although it is rare to see a party intervene on appeal, most circuits have local rules similar to the proposed change. Judge Campbell pointed out that if the Appellate Rules Committee moves forward with the proposal to impose disclosure requirements upon intervenors, it should also consider amending Rule 15(d), which sets forth the requirements for a motion for leave to intervene. He suggested that Rule 15(d) could be amended to add procedures for making disclosures. Judge Gorsuch agreed to take this good point under consideration.

A more complicated issue is whether to expand the disclosure requirements in bankruptcy appeals. Bankruptcy cases tend to involve a much higher number of corporate entities because of the creditor entities. An ethics opinion indicates that, ideally, more detailed disclosure obligations would be required. The Appellate Rules Committee decided to consult with the Bankruptcy Rules Committee before proceeding further. Judge Ikuta confirmed that the Bankruptcy Rules do not contain a disclosure requirement, and that the Bankruptcy Rules Committee has referred the matter of corporate disclosures in bankruptcy cases to a subcommittee.

*Class Action Settlement Objectors* – In August 2016, a proposed amendment to Civil Rule 23 was published that intended to address perceived problems with objections to class action settlements. Specifically, revised Civil Rule 23(e)(5) would require objectors to state to whom the objection applies, require court approval for any payment for withdrawing an objection or dismissing an appeal, and require the indicative ruling procedure to be used in the event that an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. At its October 2016 meeting, the Appellate Rules Committee considered whether conforming amendments to the Appellate Rules are necessary in light of the proposed changes to Civil Rule 23. The Appellate Rules Committee concluded that the Civil Rules amendments currently out for publication adequately address the objector problem, and complementary Appellate Rules are unnecessary.

*Electronic Filing by Pro Se Litigants* – In August 2016, a proposed amendment to Rule 25 was published that addressed the prevalent use of electronic service and filing. Proposed subdivision (a)(2)(B)(ii) leaves in place the current requirement that *pro se* parties may file papers electronically only if allowed by court order or local rule. In response to several suggestions submitted by members of the public, at its October 2016 meeting the Appellate Rules Committee considered whether to reconsider the current rule on electronic filing by *pro se* parties. After discussion, the Appellate Rules Committee determined that it would not recommend any additional changes; however, no action will be taken as to the published revised version of Rule 25 until all public comments have been received.

*Additional Issues* – Judge Gorsuch also raised the topic of efficiency in the appellate process, an issue that has garnered increased attention in recent years. The 2016 amendments reducing Rule 32(a)(7)(B)'s presumptive word-count limit from 14,000 to 13,000 has led some to question whether all of the brief sections required under Rule 28(a), such as the summary of the argument and the components of the statement of the case, should continue to be mandatory. In addition, the Appellate Rules Committee is considering the issue of the publication of *en banc* appeals. It will continue to explore these issues in addition to the other information items discussed above.

## **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Ikuta and Professors Gibson and Harner presented the report on behalf of the Bankruptcy Rules Committee, which met on November 14, 2016, in Washington, D.C. The Bankruptcy Rules Committee had three action items for which it sought approval, including technical amendments and the new Chapter 13 package. There were also two information items.

### *Action Items*

*Chapter 13 Official Plan Form and Related Rules Amendments* – The Bankruptcy Rules Committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

The Bankruptcy Rules Committee first discussed the possibility of a national form for Chapter 13 plans at its spring 2011 meeting in response to two suggestions which criticized the variance among districts' plans and argued that a uniform plan structure would streamline the process for both creditors and judges. A working group was formed to draft an official form for Chapter 13 plans and any related rule amendments.

In August 2013, the proposed Chapter 13 plan form and proposed amendments to nine related rules were published for public comment. The Bankruptcy Rules Committee made significant changes to the rules and the form in response to the comments and republished the full package in August 2014. Because many of these comments from the second publication period strongly opposed a mandatory national form for Chapter 13 plans, the Bankruptcy Rules Committee explored the possibility of adding provisions that would allow districts to opt out under certain conditions. At its fall 2015 meeting, the advisory committee approved the proposed Chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003,

5009, 7001, and 9009, but deferred further action in order to continue to develop the opt-out “compromise proposal.”

At its spring 2016 meeting, the Bankruptcy Rules Committee decided to recommend publication of two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. It also recommended a shortened comment period of three rather than six months, due to the two prior publications and the narrow focus of the revised rules. The Standing Committee approved this recommendation, and Rules 3015 and 3015.1 were published for public comment in July 2016. Despite some comments arguing that the form should be mandatory or, at the opposite end of the spectrum, opposing the requirement of any mandatory form, whether national or local, the advisory committee unanimously approved with minor changes Rules 3015 and 3015.1 at its fall 2016 meeting.

The Bankruptcy Rules Committee submitted Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113 to the Standing Committee for approval. The Bankruptcy Rules Committee recommended that the entire package of rules and the Chapter 13 Official Plan Form be submitted to the Judicial Conference at its March 2017 session and, if approved, be sent to the Supreme Court immediately thereafter. The Court is expecting the early submission, and if it approves and sends the package to Congress by May 1, it would take effect on December 1, 2017 absent Congressional action.

A judge member proposed a minor change to the first sentence of amended Rule 3002(a), which states, “A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim . . . .” The judge member suggested that indefinite articles be used consistently throughout that clause, either by deleting the word “an” before “equity security holder,” or inserting “an” before “unsecured creditor.” The Standing Committee agreed to remove “an.”

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the following for submission to the Judicial Conference for approval: Rules 2002, 3002 (subject to the removal of “an” from subdivision (a)), 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113.**

*Technical and Conforming Amendments to Rule 7004(a)(1) and Official Form 101* – Judge Ikuta introduced two technical and conforming amendments not requiring publication: (1) updating Rule 7004’s cross-reference to a subsection of Civil Rule 4(d), and (2) correcting an error in Question 11 of Official Form 101.

Rule 7004(a) was amended in 1996 to incorporate by reference then-Civil Rule 4(d)(1), which provided, “A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.” In 2007, a number of amendments to Civil Rule 4(d) changed the former Rule 4(d)(1), renumbering it as subsection (d)(5) and altering its language to read, “**Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.”



The cross-reference to Civil Rule 4(d)(1) in Bankruptcy Rule 7004(a) was not changed at that time. Accordingly, the Bankruptcy Rules Committee recommended to the Standing Committee an amendment to Rule 7004(a) to correct the cross-reference to Civil Rule 4(d)(5). Because the amendment is technical and conforming, the Bankruptcy Rules Committee recommended submitting it to the Judicial Conference for approval without prior publication.

The second proposed amendment involved a correction to Question 11 of Official Form 101, the form for voluntary petitions for individuals filing for bankruptcy. Under § 362(b)(22) of the Bankruptcy Code, the automatic stay will generally not halt an eviction where a landlord obtained a judgment of possession against a tenant before the tenant filed a bankruptcy petition. However, that exception is subject to § 362(l), which permits the automatic stay if a debtor meets certain procedural requirements. Under § 362(l)(5)(A), the debtor must indicate whether a landlord has obtained a judgment for possession and provide that landlord's name and address. Section 362(l)(1) also requires the debtor to file a certification requesting the bankruptcy court to stay the judgment.

As currently written, Official Form 101 requires only *debtors who wish to remain in their residences* to provide information about an eviction judgment. As such, it is inconsistent with the Code, which requires *all* debtors who have an eviction judgment against them to indicate that fact on the petition and to provide the landlord's name and address. To address this inconsistency, the Bankruptcy Rules Committee recommended changing Question 11 on the form to clarify that, whether or not a debtor wants to stay in the residence, he or she must provide the required information if the landlord obtained an eviction judgment before the petition was filed.

A judge member asked whether, even though the question whether the tenant wishes to stay in the residence is being removed from Question 11, that information would still be apparent from the certification, Official Form 101A (Initial Statement About an Eviction Judgment Against You), that the tenant would also file. Judge Ikuta responded that it would. No other questions or comments were offered.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed technical and conforming amendments to Rule 7004(a)(1) and Official Form 101 for submission to the Judicial Conference for final approval.**

Judge Campbell said the Supreme Court had been alerted that the Chapter 13 package will be transmitted after the Judicial Conference in March, as the Court will have “only a short time”—until May 1—to approve it if it is to stay on track to become effective on December 1, 2017. The Court has agreed to this expedited timeline. The March 2017 submission to the Court will not include the technical amendments to Rules 7004(a)(1) and Official Form 101, which are unrelated to the Chapter 13 materials. Those technical amendments will be submitted in September 2017, which will minimize the amount of material the Court would be asked to consider on an expedited basis. No member expressed disagreement.

*Information Items*

*Conforming Amendments to Rule 8011* – As part of the coordinated inter-committee effort to account for electronic filing, signatures, service, and proof of service, the Bankruptcy Rules Committee intends to recommend an amendment to Rule 8011. Rule 8011 is the bankruptcy appellate rule that tracks Rule 25 of the Federal Rules of Appellate Procedure. Amendments to Appellate Rule 25 published for comment in August 2016 would address electronic filing (FRAP 25(a)), electronic signatures, (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). The proposed amendment to Bankruptcy Rule 8011 would add provisions to mirror the new electronic procedures proposed for Appellate Rule 25.

The Bankruptcy Rules Committee recommends that this amendment be considered without publication for a number of reasons. First, publication would delay approval, resulting in a one-year “gap period” between the effective dates of the parallel amendments to Appellate Rule 25 and Bankruptcy Rule 8011. This would result in inconsistent treatment of electronic filing, service, and proof of service in the bankruptcy and appellate arenas. Second, the proposed amendments to Rule 8011 are materially identical to the proposed amendments to Appellate Rule 25 and do not raise bankruptcy-specific issues. The comments on the amendments to Appellate Rule 25 are therefore sufficient to identify any concerns as to the amendments to Rule 8011. Judge Gorsuch noted that the Appellate Rules Committee had received no comments so far on the amendment to Appellate Rule 25. A judge member asked whether the bankruptcy community would have an adequate opportunity to consider the impact of these proposed changes to electronic procedures if there was no publication. Professor Gibson responded that a related proposed amendment to Bankruptcy Rule 5005(a) regarding electronic procedures for filing is out for public comment at this time; so the basic issue is currently before the bankruptcy community. She added that the proposed changes to Rule 5005(a) had so far not received any comments.

Judge Ikuta said that Bankruptcy Rules Committee will review the proposed amendments to Rule 8011 at its April 2017 meeting in light of any public comments to Appellate Rule 25 and any feedback from the Appellate Rules Committee. Because the Standing Committee is authorized to eliminate the comment period for technical amendments, she said that the Bankruptcy Rules Committee will request approval of Rule 8011 without publication at the Standing Committee’s June 2017 meeting. No member objected to this proposal.

*Noticing project and electronic noticing issues* – The Bankruptcy Rules Committee has been asked on a number of occasions spanning many years to review noticing issues in bankruptcy cases, i.e., how noticing and service (other than service of process) are effectuated, and which of the numerous parties often involved in bankruptcy cases are entitled to receive notices or service. Approximately 145 Bankruptcy Rules address noticing or service.

In the fall of 2015, the Bankruptcy Rules Committee approved a work plan to study these issues, but an extensive overhaul of the Bankruptcy Rules’ noticing provisions was deferred pending further study of specific suggestions. The advisory committee decided to focus on a specific suggestion aimed at businesses, financial institutions, and other non-individual parties holding claims or other rights against the debtor. Because these parties, such as credit reporting agencies

and utilities, are likely to receive numerous notices and papers in multiple bankruptcy cases, permitting them to be electronically noticed and served has the potential to avoid significant expenditures. These funds would then be more likely to be available for distribution to creditors. The advisory committee is currently exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered CM/ECF users to opt into electronic noticing and service. The Standing Committee had no questions or comments regarding the noticing project.

*Coordination* – The subject of coordination arose with respect to Bankruptcy Rule 9037(h), which governs the redaction of private information. Judge Bates reported that the Civil Rules Committee has decided not to propose an amendment to the Civil Rules that would impose privacy-redaction requirements similar to those of Rule 9037(h).

### **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Professor Capra delivered the report on behalf of the Evidence Rules Committee, which last met on October 21, 2016, at Pepperdine University School of Law. A symposium was held in conjunction with the meeting. Professor Capra presented several information items.

#### *Information Items*

*Fall Symposium* – The fall 2016 symposium focused the Evidence Rules Committee’s working drafts of possible amendments to Rules 801(d)(1)(A) and 807, and the developing case law regarding Rule 404(b). In addition to the members of the Evidence Rules Committee, attendees included prominent judges, practitioners, and professors. A transcript of the symposium will be included in the Fordham Law Review.

The Third and Seventh Circuits have issued several opinions interpreting Rule 404(b) in a non-traditional way. Among the symposium participants was Judge David Hamilton of the U.S. Court of Appeals for the Seventh Circuit, which in recent years has decided a number of important Rule 404(b) cases. After the symposium, the Evidence Rules Committee discussed several proposals for amendments to Rule 404(b). The potential changes to the rule include that: (1) courts find the probative value of evidence of uncharged misconduct to be independent of any propensity inference, (2) notice be provided earlier in the proceedings to give the court an opportunity to focus on whether the purpose is permissible and whether the path of inferences linking the purpose and the act is independent of any propensity for misconduct, (3) the government’s description of the evidence to be more specific than the “general nature,” and (4) the government to state in the notice the permissible purpose and also to state how—without relying on a propensity inference—the evidence is probative of that purpose. The application of Rule 404(b) is a controversial topic, and the DOJ has an interest in how the rule is applied as several of the suggestions would require a change in noticing practices by the government. Professor Capra stressed that any proposed amendments to Rule 404(b) are in very early stages of consideration, and will be considered further at the spring 2017 meeting.

One member asked about the application of Rule 404(b) to civil cases, and whether Rule 609 was implicated. Professor Capra responded that most of the recent case law developments have

been in criminal cases, but the impact on civil cases is under consideration as well. Another member asked whether some of the issues under consideration might be part of case management. The group also discussed the first of the proposed changes and the standard of “independent of any propensity inference” and the noticing requirements.

*Rule 807 (“Residual Exception”)* – A comprehensive review of Rule 807 case law over past decade shows that reliable hearsay has been excluded, leading the Evidence Rules Committee to consider possible amendments to expand Rule 807’s “residual exception” to the rule against hearsay. Discussion of this issue began with the symposium held in 2015. At that time, the practitioners in attendance opposed the idea of eliminating the categorical hearsay exceptions (e.g., excited utterances, dying declarations, etc.) in favor of expanding the residual hearsay exception. The Evidence Rules Committee agreed that the exceptions should not be eliminated. Instead, it has developed a working draft of amendments intended to refine and expand Rule 807 to admit reliable hearsay even absent “exceptional circumstances,” as well as streamline the court’s task of assessing trustworthiness.

In developing the draft amendments, the Evidence Rules Committee is studying the equivalence standard; i.e., that the court find trustworthiness “equivalent” to the circumstantial guarantees of the Rule 803 and 804 exceptions. This “equivalence standard” is problematic because it requires the court to make a comparison of other exceptions that share no common indicator of trustworthiness, and it does not seem to be working as it should. The idea would be to permit the court to use a totality of circumstances standard in place of the equivalence standard. Also, the Evidence Rules Committee suggests deleting the language referring to materiality and the interests of justice because both terms are repetitive of other rules. Finally, the Evidence Rules Committee determined that the requirement that the hearsay be “more probative” than any other evidence that the proponent can obtain should be retained in order to prevent overuse of the residual exception. Discussion of the working draft will continue.

A Standing Committee member asked whether a “presumption of trustworthiness” could be associated with statements admissible under Rule 807. Professor Capra responded that the Evidence Rules Committee considered this idea, but considered it unworkable because of the shifting of the burden of proof for trustworthiness. He compared Rule 807 and Rules 803 and 804 as an example of this issue.

*Rule 801(d)(1)(A) (Testifying Witness’s Prior Inconsistent Statement)* – The Evidence Rules Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows: prior inconsistent statements made under oath during a formal proceeding. The expansion under consideration would permit the substantive use of video-recorded prior inconsistent statements. This proposal was received favorably at the symposium.

A member asked whether, under this potential amended version of Rule 801(d)(1)(A), the videotaped statement would need to have been made under oath in order to be admissible, and Professor Capra explained that it would not, and added that the advisory committee is considering a suggestion that the rule would include statements that the witness concedes were made in addition to videotaped statements. A reporter asked whether these statements should properly fall under Rule 803 rather than Rule 801. Professor Capra responded that such a

reclassification would not be appropriate because, unlike the Rule 803 exceptions, these prior inconsistent statements were not made under circumstances more likely to make them reliable. Judge Campbell noted that what constitutes a videotaped statement was discussed at the symposium, and advised that this question will need to be resolved in developing any rule amendments.

Professor Capra next presented updates on several ongoing projects, including a possible exception for “e-hearsay.” Professor Capra, Judge Grimm, and Gregory Joseph have authored an article that courts and litigants could reference in negotiating the difficulties of authenticating electronic evidence. The pamphlet, entitled “Best Practices for Authenticating Digital Evidence,” was published by West Academic, and will be included as an appendix to its yearly publication.

*Rule 702 (Testimony by Expert Witness)* – There have been suggestions to revisit Rule 702 based on developments in case law. The issue of whether weight or credibility should be examined is one of the things that the Evidence Rules Committee will consider. There are several other issues that have been raised, particularly regarding forensic science and language in the committee note. A symposium will be held regarding Rule 702 in connection with its fall 2017 meeting, bringing together judges, practitioners, and experts in the sciences. One member noted the fact that Rule 702 is very broad, sometimes making application of the rule difficult, particularly in cases involving analysis under *Daubert*. Another member raised the issue of the impact of disputed facts on the analysis.

## **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Molloy and Professors Beale and King provided the report for the Criminal Rules Committee, which met on September 19, 2016, in Missoula, Montana. Judge Molloy reviewed three pending items under consideration.

### *Information Items*

*Section 2255 Rule 5 Subcommittee* – The Criminal Rules Committee has formed a subcommittee to consider a suggestion made by a member to amend Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “may submit a reply . . . within a time fixed by the judge.” While the committee note and history of the amendment demonstrate that this language was intended to give the inmate a right to file a reply, and courts have recognized this right, other courts have interpreted the rule as allowing a reply only if permitted by the court. The subcommittee presented its report to the Criminal Rules Committee at its fall 2016 meeting. The phrase “within a time fixed by the judge” was identified as the source of the ambiguity; several members read it to imply judicial discretion.

One factor weighing in favor of a rules-based solution is the limited reviewability of rulings denying reply briefs. Judge Molloy identified this scenario as an example of one “capable of repetition, but evading review.” Because appellate review is unlikely to address the issue—

most habeas petitioners are unrepresented and do not advance the argument, and a number of decisions denying the right to file a reply are several years old—the Criminal Rules Committee decided to consider an amendment. To assuage concerns that new language might add to rather than resolve the confusion, the reporters suggested language clarifying the rule’s intent that breaks the current text into two sentences.

The Criminal Rules Committee also discussed whether to add a time for filing. A RCSO survey of local rules and orders addressing this issue revealed significant variance among districts. No consensus has been reached as to whether to set a presumptive time limit or require judges or local rules to fix a time period. The subcommittee will discuss the issue further. The subcommittee will collaborate with the style consultants to draft an amendment, and aims to deliver the proposed text to the Criminal Rules Committee for consideration at the April 2017 meeting.

*Rule 16 Subcommittee* – The Criminal Rules Committee has also formed a subcommittee chaired by Judge Raymond Kethledge to consider two bar groups’ suggested amendments to Criminal Rule 16 (Discovery and Inspection), which would impose additional disclosure obligations upon the government in complex criminal cases. Although the subcommittee concluded that the groups’ proposed standard for defining a “complex case” and steps for creating reciprocal discovery were too broad, it decided to move forward with discussion of the problem and formulation of a possible solution. The subcommittee’s initial impression, however, was that the problems associated with complex discovery in criminal cases “were attributable to inexperience or indifference” that could not be addressed appropriately by rule.

The DOJ and members of the defense bar have developed a protocol for dealing with the discovery of electronically stored information, but practitioners still report problems, particularly when the judge has little experience handling discovery in complex criminal cases. The members of the Criminal Rules Committee agreed that judicial education and training materials would help to supplement an amendment, but would be insufficient on their own.

The subcommittee will hold a mini-conference on February 7, 2016 in Washington, D.C. to discuss whether an amendment to Rule 16 is warranted. Invited participants include criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

*Cooperator Subcommittee* – The Criminal Rules Committee’s Cooperator Subcommittee, chaired by Judge Lewis Kaplan, continues to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is currently studying several proposals, including the CACM proposal, and work is ongoing.

More recently, the Director of the Administrative Office has formed a Task Force on Protecting Cooperators to consider the CACM and Rules Committees’ conclusion that any rules amendments would be just one part of any solution to the cooperator problem. The Task Force is comprised of seven district judge members—including Judge Kaplan, who is serving as Chair of the Task Force, and Judge St. Eve of the Standing Committee—and will also

include key stakeholders from the DOJ, Bureau of Prisons (BOP), Sentencing Commission, Federal Public Defender, clerks of court, and U.S. Marshals Service. The Task Force is charged with taking a broad look at the issue of protecting cooperators and possible solutions, including possible rules amendments. It has held initial teleconferences and is developing working groups and a schedule. Judge St. Eve added that four working groups have been formed to address specific issues.

Judge Molloy emphasized his view that a problem exists. Because the BOP does not track the specific causes of harm to cooperators, further investigation is necessary to determine precisely what aspects of the system must be fixed and why. The Task Force's role is to determine *how* to address the issue. A national solution, uniformly applied in all districts and combining both rules and non-rules approaches, will be required.

The Criminal Rules Committee will complement the Task Force's work by drafting a proposed rule or rules to protect the privacy of cooperator information.

## **REPORT OF THE ADMINISTRATIVE OFFICE**

### *Task Force on Protecting Cooperators*

Julie Wilson of the RCSO provided additional information about the administrative status of the Task Force. The Task Force will report to the Director of the Administrative Office, and its charter is being drafted.

A judge member volunteered that his district court has already implemented its own local policy to protect cooperator information and is awaiting a uniform national policy. Judge St. Eve replied that local courts will play an important role in the Task Force's work; the Task Force is interested in learning more about local courts' practices with respect to cooperator information, and receiving feedback as to their experiences implementing the guidelines the Task Force develops.

A reporter raised two related issues with the potential to complicate the Task Force's efforts: "technological issues" and "First Amendment issues." The reporter explained that technology truly *is* the issue, as the availability of criminal docket documents online has given rise to both the cooperator problem and First Amendment implications regarding access to those documents. The reporter wondered whether, assuming the media would be affected by limitations on access to cooperator information, the Task Force might consider involving the media in the process of formulating the guidance. Judge Molloy noted that the reporters' analysis of the applicable First Amendment principles and the constitutional right to access by the media is already before the Task Force.

Another reporter suggested that data related to the cooperator problem be made available in the aggregate, as an objective showing of the extent of cooperator harm might mitigate the concerns of members of the criminal defense bar who oppose restrictions on access to cooperation information. Judge Molloy acknowledged that the bar's tendency to wear "two hats" as to this issue complicates matters: keeping the information away from those who would use it to harm a

cooperating defendant but having access for the purpose of evaluating the fairness of a given plea deal.

The Task Force will continue to work toward the development of a uniform, national approach to protecting cooperator information.

*Legislative Report*

Ms. Womeldorf reported that approximately twenty pieces of legislation introduced during the two years of the 114th Congress were very pertinent to the work of the rules committees in that they would have directly amended various rules. Discussion of specific legislation followed, including legislation introduced in the fall of 2016 that would have delayed the implementation of the 2016 amendments to Criminal Rule 41.

Judge Campbell discussed that direct channels of communication between the RCSO and Capitol Hill staff sometimes allow for opportunities to explain how legislation could have unintended consequences for the operation of the rules. Judge Campbell welcomed suggestions to preserve informed decision-making pursuant to the Rules Enabling Act process designated by Congress.

**CONCLUDING REMARKS**

Judge Campbell concluded the meeting by thanking the members and other attendees for their participation. The Standing Committee will next meet on June 13, 2017 in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf  
Secretary, Standing Committee



# TAB 1B

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

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .....pp. 2–3
  
2.
  - a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and .....pp. 4–8
  
  - b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.....pp. 4–8
  
3. Approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 8–9

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

|   |  |           |
|---|--|-----------|
| § | Federal Rules of Appellate Procedure ..... | p. 3      |
| § | Federal Rules of Civil Procedure.....      | pp. 8-13  |
| § | Federal Rules of Criminal Procedure.....   | pp. 13–15 |
| § | Federal Rules of Evidence .....            | pp. 15–16 |
| § | Other Matters .....                        | pp. 16–17 |

|  |
|--|
| <p><b>NOTICE</b></p> <p><b>NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE</b></p> <p><b>UNLESS APPROVED BY THE CONFERENCE ITSELF.</b></p> |
|--|

**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE  
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

### ***Rule Recommended for Approval and Transmission***

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: “No additional fee is required to file an amended notice.” The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Appellate Rules.

**Recommendation:** That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

### *Information Items*

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

### *Rules and Official Form Recommended for Approval and Transmission*

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

#### Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that “[c]urrently, every district’s plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district.” The States’ Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court’s then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms



subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that “[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained.” *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee’s recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a “form chapter 13 plan,” whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

**Recommendation:** That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
- b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

## **FEDERAL RULES OF CIVIL PROCEDURE**

### ***Rule Recommended for Approval and Transmission***

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

**Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee’s report.

### *Information Items*

#### Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

#### Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a “user’s manual” to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a “user’s manual” and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

### Other Projects

Among the other projects on the advisory committee’s agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand “[i]f the state law *did* not require an express demand” (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand.

Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing “does” with “did” created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee’s agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

## **FEDERAL RULES OF CRIMINAL PROCEDURE**

The Advisory Committee on Criminal Rules presented no action items.

### ***Information Items***

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a “complex case” and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both



large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “*may* submit a reply . . . within a time period fixed by the judge” (emphasis added). The conflict involves the use of the word “*may*.” Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee’s suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

## **FEDERAL RULES OF EVIDENCE**

The Advisory Committee on Evidence Rules presented no action items.

### ***Information Items***

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee's working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the "California rule," under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

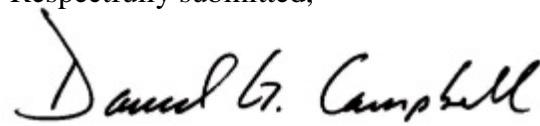
## **OTHER MATTERS**

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman  
Gregory G. Garre  
Daniel C. Girard  
Susan P. Graber  
Frank M. Hull  
Peter D. Keisler  
William K. Kelley

Amy J. St. Eve  
Larry D. Thompson  
Richard C. Wesley  
Sally Q. Yates  
Robert P. Young, Jr.  
Jack Zouhary

Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure

Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms

Appendix C – Proposed Amendment to the Federal Rules of Civil Procedure

# TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 3, 2016

1 The Civil Rules Advisory Committee met at the Administrative  
2 Office of the United States Courts on November 3, 2016. (The  
3 meeting was scheduled to carry over to November 4, but all business  
4 was concluded by the end of the day on November 3.) 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 N. Ericksen; Parker C. Folse,  
8 Esq.; Professor Robert H. Klonoff; Judge Sara Lioi; Judge Scott M.  
9 Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice  
10 David E. Nahmias; Judge Solomon Oliver, Jr.; Virginia A. Seitz,  
11 Esq.; and Judge Craig B. Shaffer. Professor Edward H. Cooper  
12 participated as Reporter, and Professor Richard L. Marcus  
13 participated as Associate Reporter. Judge David G. Campbell, Chair,  
14 and Professor Daniel R. Coquillette, Reporter, represented the  
15 Standing Committee. Judge A. Benjamin Goldgar participated as  
16 liaison from the Bankruptcy Rules Committee. Laura A. Briggs,  
17 Esq., the court-clerk representative, also participated (by  
18 telephone). The Department of Justice was further represented by  
19 Joshua Gardner, Esq. Rebecca A. Womeldorf, Esq. (Rules Committee  
20 Officer), Lauren Gailey, Esq., and Julie Wilson, Esq., represented  
21 the Administrative Office. Judge Jeremy Fogel and Emery G. Lee,  
22 Esq., attended for the Federal Judicial Center. Observers included  
23 Joseph D. Garrison, Esq. (National Employment Lawyers Association);  
24 Alex Dahl, Esq. (Lawyers for Civil Justice); Professor Simona  
25 Grossi; Brittany Kauffman, Esq. (IAALS); William T. Hangle, Esq.  
26 (ABA Litigation Section liaison); Frank Sylvestri (American College  
27 of Trial Lawyers); Derek Webb, Esq.; Ted Hirt, Esq.; Ariana Tadler,  
28 Esq.; John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelsen,  
29 Esq.; and Julie Yap, Esq.

30 **HEARING**

31 Business began with a hearing on proposed amendments published  
32 for comment in August 2016. Judge Bates announced the time that  
33 would be available to each witness, and thanked them all for  
34 attending and providing their insights and suggestions.

35 Eleven witnesses testified. The hearing ran through the  
36 morning to noon. A full transcript is available at [uscourts.gov](http://uscourts.gov).

37 **COMMITTEE MEETING**

38 Judge Bates began the Committee meeting by introducing new  
39 member Judge Sara Lioi of Akron in the Northern District of Ohio.  
40 He also welcomed Judge David G. Campbell, who is returning to  
41 Committee meetings in his new role as Chair of the Standing  
42 Committee. Judge A. Benjamin Goldgar is the new liaison from the  
43 Bankruptcy Rules Committee. And Lauren Gailey, the new Rules Law

44 Clerk, is attending her first Civil Rules Committee meeting.

45 Judge Bates reminded the Committee that proposed amendments to  
46 Rules 5, 23, 62, and 65.1 were published for comment last August.  
47 The Committee will consider all the testimony and comments; the  
48 work will start with review in the Rule 23 Subcommittee, and in the  
49 Rule 62 Subcommittees if there is a substantial level of comment on  
50 Rules 62 and 65.1. He also noted that the Rule 65.1 proposal "came  
51 about late in the game." Discussion in the Standing Committee of  
52 amendments to Appellate Rule 8 that were proposed to mesh with the  
53 Rule 62 proposals suggested the value of making parallel revisions  
54 to Rule 65.1. Publication was approved by the Standing Committee,  
55 subject to this Committee's action by an e-mail vote that approved  
56 publication.

57 Judge Bates also noted a misadventure that occurred on the way  
58 to implementing the amendment of Rule 4(m) to add Rule 4(h)(2) to  
59 the list of service provisions excluded from the 90-day presumptive  
60 limit on the time to serve. The amendment was published for  
61 comment, approved, and adopted by the Supreme Court in a form that  
62 failed to take account of the December 1, 2015 amendment that added  
63 service of a notice under Rule 71.1(d)(3)(A) to the exemptions.  
64 There was never any intent to delete the exemption for Rule  
65 71.1(d)(3)(A) notices. It was hoped that because nothing had been  
66 done to strike Rule 71.1(d)(3)(A) from Rule 4(m), the back-to-back  
67 amendments could remain in effect. But the Office of Law Revision  
68 Counsel has concluded that, assuming approval of the 2016 proposal,  
69 the safe course will be to show Rule 4(m) without Rule  
70 71.1(d)(3)(A) in rule text as of December 1, 2016, with a footnote  
71 pointing out that the exemption for Rule 71.1(d)(3)(A) notices has  
72 not been removed. The correct full rule text will be submitted to  
73 the Judicial Conference in March 2017, with the expectation that it  
74 can be transmitted to the Supreme Court and will be adopted in time  
75 to become part of the official rule text on December 1, 2017. This  
76 problem illustrates the risk of inadvertent oversights when  
77 amendments of the same rule are pursued in close sequence. New  
78 administrative systems will be adopted to guard against like  
79 mistakes in the future.

80 Judge Bates further reported that the September Judicial  
81 Conference meeting approved the Expedited Procedures and Mandatory  
82 Initial Discovery Pilot Projects. Current developments in these  
83 projects will be discussed later in the meeting.

84 Ongoing efforts to educate bench and bar in the 2015 discovery  
85 amendments were also described. Two FJC workshops have been devoted  
86 to them, emphasizing the practical skills of case management more  
87 than the details of the rules texts. Presentations have been made  
88 at several circuit conferences. John Barkett and Judge Paul Grimm

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89 are involved in an ABA webinar. And the discovery rules are  
90 included in the topics covered by an ABA road show on motion  
91 management by judges.

92 *April 2016 Minutes*

93 The draft Minutes of the April 2016 Committee meeting were  
94 approved without dissent, subject to correction of typographical  
95 and similar errors.

96 *Report of the Administrative Office*

97 The Administrative Conference of the United States is studying  
98 appeals to the courts in Social Security cases. They are concerned  
99 by disparate and at times high rates of reversals in different  
100 courts around the country. A subcommittee is considering a  
101 recommendation to suggest a court rule to establish uniform  
102 practices. But consideration also is being given to the prospect  
103 that "judicial education" may be an appropriate means of addressing  
104 whatever problems may be found.

105 The immediate question is whether it would be desirable to  
106 become involved with the Administrative Conference while their work  
107 remains in its early and mid-stream phases. The Deputy Director of  
108 the Administrative Office and the Counselor to the Chief Justice  
109 are members of the Administrative Conference and could be a natural  
110 communications channel.

111 Discussion began by observing that the Committee has long been  
112 wary of departing from the general practice of focusing on  
113 transsubstantive rules. Adopting subject-specific rules, carving  
114 out what may seem to be special interests, involves special risks.  
115 It may be difficult to acquire sufficiently deep knowledge of  
116 specific problems in particular substantive areas. Starting down  
117 this road will inevitably generate requests to adopt other  
118 substance-specific rules for other topics.

119 One way to avoid the substance-specific problem would be to  
120 adopt a more general provision. During the work that led to the  
121 2010 amendments of Rule 56, the Rule 56 Subcommittee considered the  
122 possibility of adapting Rule 56 – or perhaps a new Rule 56.1 – to  
123 cover review on an administrative record. The standard of review  
124 generally looks for substantial evidence on the record considered  
125 as a whole. Only unusual circumstances will call for taking new  
126 evidence in the reviewing court; district courts, when they are the  
127 first line of review, function in much the same way as a court of  
128 appeals does when it is the first line of review. The question was  
129 put aside as ranging beyond the purposes that launched the Rule 56  
130 project, and from a sense that courts are managing well as it is.

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131 This approach could be revived. A rule could address all review on  
132 an administrative record, if further study shows that a common  
133 approach is suitable. The proposal might be limited to review of  
134 federal administrative agencies, perhaps with some questions about  
135 distinguishing agencies from executive-branch entities. Or it might  
136 be broadened to include the special circumstances that may bring  
137 review of a state administrative decision on for review by a  
138 federal court on the state agency's record. So too it might be  
139 appropriate to consider the question whether review on ERISA  
140 records might be included, or even proceedings to confirm or set  
141 aside an arbitral award. The project, in short, could be expanded,  
142 but also could be confined to first-line review of traditional  
143 federal agencies.

144 General discussion followed, addressed to uncertainties about  
145 identifying the courts with unusually high reversal rates on Social  
146 Security review. There also was uncertainty as to the criteria that  
147 might be used to determine what reversal rates might be  
148 appropriate. The idea that a Civil Rule might undertake to  
149 articulate a standard of review, whether for a particular agency or  
150 more generally, was thought unattractive.

151 The discussion closed with agreement that Judge Bates and  
152 Rebecca Womeldorf should consider further the question whether it  
153 may be desirable to find a means of informal consultation with the  
154 Administrative Conference while their work remains in a formative  
155 stage.

156 *Five Year Committee "Jurisdiction" Review*

157 Judge Bates introduced a Questionnaire provided by  
158 Administrative Office Director Duff that, once every five years,  
159 asks for a review of Committee jurisdiction. The answers to the  
160 questions seem straight-forward for the Civil Rules Committee. But  
161 Committee members are urged to review the questions, and to send on  
162 to Judge Bates any thoughts that may suggest a non-routine answer.  
163 All suggestions and questions are welcome.

164 *Rule 30(b)(6)*

165 Judge Bates introduced the Rule 30(b)(6) discussion by noting  
166 that the Rule 30(b)(6) Subcommittee has been hard at work since it  
167 was appointed. Its work has included two conference calls; Notes on  
168 the calls are included in the agenda materials. Rule 30(b)(6) was  
169 studied carefully ten years ago, in response to a detailed  
170 memorandum provided by a New York State Bar committee. The  
171 conclusion then was that although there may be problems in the way  
172 Rule 30(b)(6) is implemented, they do not seem amenable to  
173 effective amelioration by new rule text. Questions have continued

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174 to be raised by bar groups, however. The most recent submission  
175 came from a number of members of the ABA Litigation Section. Their  
176 request for study is not a Section recommendation, but it details  
177 several questions that have persisted over the years. The immediate  
178 question is whether there is a sufficient prospect of developing  
179 helpful rule amendments to justify continued work by the  
180 Subcommittee.

181 Judge Ericksen introduced the Subcommittee Report by  
182 emphasizing, in bold and capitals, that no decisions have been  
183 made. A set of detailed Rule 30(b)(6) provisions is included in the  
184 agenda materials. But "this is a pencil-scratch draft." The  
185 Subcommittee has been at work only for a short while. But there  
186 have been repeated cries of anguish over the years. "Are there  
187 things that judges do not see?" The Subcommittee believes that  
188 continued study is worthwhile, recognizing that it may lead to  
189 recommendations for big changes, for modest changes, or no rule-  
190 text changes at all.

191 The inquiry will include finding out what is going on at the  
192 bar. Apart from traditional law review literature, it will be  
193 useful to find out what lawyers are saying to lawyers through CLE  
194 programs. Other sources of lawyer information also may be found. Do  
195 they show a troubling level of gamesmanship?

196 Professor Marcus introduced the draft provisions by  
197 emphasizing again that they are all tentative. Outreach to the  
198 profession may help. And it may help to look back at the  
199 information gathered more than a decade ago. A list of possibly  
200 promising ideas was developed. Bar groups were asked to comment.  
201 The detailed summary of the comments remains available and will be  
202 studied. Repeating the outreach process may again be useful.

203 As already suggested, it will help to get a better fix on CLE  
204 materials. Case law will be studied, including cases dealing with  
205 the circumstances that might justify treating a witness's testimony  
206 on behalf of an entity as the entity's own "judicial admission." A  
207 survey of local rules will show whether there are any that deal  
208 with the kinds of questions that have been raised by bar groups. It  
209 also may be possible to find standing orders that address some of  
210 these questions. One example is included in the agenda materials.

211 The Subcommittee has brought focus to its initial work by  
212 developing a list of 16 questions, set out at pages 101 to 103 of  
213 the agenda materials. Many of them derive from the suggestions of  
214 bar groups. These issues are tested by the tentative rules drafts.

215 One question is whether providing new specific rule text is an  
216 effective way to address these questions. An alternative approach,

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217 sketched at the end of the rules drafts, is to emphasize case  
218 management by minor revisions of Rule 16(b) or Rule 26(f).

219 A Subcommittee member said that the work already done shows  
220 there are recurring problems that increase cost and delay. Unlike  
221 many problems, these do not seem to come to courts often in forms  
222 that generate published opinions. "At least in commercial  
223 litigation the problems arise all the time." And when the problems  
224 do get to a judge, the responses are not uniform. "But it is hard  
225 to know whether we can make it better by rule." The list of issues  
226 includes many that deserve careful thought. Rules, or default  
227 rules, could save a lot of the time that lawyers burn through now.  
228 Continuing to develop specific rule language is a good way to test  
229 the possibilities.

230 Judge Ericksen directed discussion to a specific question  
231 framed by alternative drafts at page 110 of the agenda materials.  
232 Both deal with submitting exhibits that may be used at the  
233 deposition before the deposition happens. The first alternative  
234 requires the party noticing the deposition to provide the deponent  
235 organization "all" exhibits that may be used. The other simply says  
236 that the party noticing the deposition "may" provide exhibits, and  
237 that if exhibits are provided the organization must prepare the  
238 witness to testify about the exhibits or, alternatively, the topics  
239 raised by the exhibits. Either alternative may help to make clear  
240 the nature of the "matters" specified for examination in the  
241 notice. And either could reduce the risk that the designated  
242 witness will be ill-prepared.

243 A related question was asked: need this part of the rule  
244 address requests that the witness produce documents?

245 A Subcommittee member observed that most Rule 30(b)(6)  
246 opinions deal with claims that the witness has not been adequately  
247 prepared. Poor preparation may flow from notices that list too many  
248 topics, or from poor definition of the topics. Providing exhibits  
249 in advance will clarify the matters for examination. But requiring  
250 advance notice of all documents may defeat the opportunity to use  
251 surprise to advantage. The permissive alternative, on the other  
252 hand, simply blesses and emphasizes something that a party can do  
253 now, and may wish to do to achieve the advantages of clarity and  
254 better preparation.

255 The alternative drafts for advance notice of deposition  
256 exhibits were characterized as "a big change," with a question  
257 whether there is any information about this practice? Both has it  
258 been done, and has it been done successfully?

259 Professor Marcus observed that the more detail we build into

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260 the rule, the more elaborate it will become. Both of the drafts on  
261 providing advance notice of exhibits include a provision for  
262 submission a definite time, not yet specified, before the  
263 deposition. Other drafts include time periods, as for objecting to  
264 the notice. "If we have successive time periods, we get into  
265 increasing regimentation." These potential complications underscore  
266 the importance of getting a sense whether Rule 30(b)(6) is causing  
267 problems across the board. And they likewise underscore the need to  
268 consider whether other approaches may be better than attempting  
269 detailed regulation by rule text.

270 A similar observation was that rule provisions can help by  
271 provoking occasions for the parties to meet and confer.

272 The concern about poor preparation of witnesses designated to  
273 testify for the organization was met by a counter: Often the party  
274 that notices the deposition is poorly prepared. "Can we shape a  
275 rule to encourage preparation on both sides?"

276 The general question recurred: "There are problems. But are  
277 there uniform answers? Or is it better to leave them to resolution  
278 on a case-by-case basis?"

279 A Subcommittee member responded that there is room for both  
280 approaches – rules provisions can address the most common problems,  
281 while case management also should be encouraged. "Tossing it  
282 amorphously into Rule 16(b) for discussion early in the case is not  
283 likely to work for all cases." But it can help a lot when there is  
284 a hands-on case-managing judge, working with lawyers who can  
285 develop procedures for resolving future problems.

286 Another Subcommittee member observed that there are many  
287 issues. "Many other Civil Rules have changed since Rule 30(b)(6)  
288 was born." What does the experience of Committee members show?

289 One way to ask how other rules fit with Rule 30(b)(6) is to  
290 ask whether it is different enough from other discovery rules that  
291 it should be applied differently to nonparties.

292 The question of local rules recurred. A judge member noted  
293 that he did not know of any local rules, but that he raises the  
294 Rule 30(b)(6) question in scheduling conferences.

295 Another Committee member said that he sees many Rule 30(b)(6)  
296 depositions as a litigator, in many courts around the country, and  
297 has not encountered any local rules.

298 The Subcommittee noted that it does know of one standing order  
299 used for Rule 30(b)(6) depositions by Judge Donato in the Northern

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300 District of California. It sets a limit of 10 matters for  
301 examination, specifies the duration of examination of each person  
302 designated, addresses the issue of combining the deposition of the  
303 witness for the organization with deposition of the witness as an  
304 individual, and specifies that the designated witness's testimony  
305 is never a "judicial admission." But this may be the only judge in  
306 that court that follows that practice.

307 The same member also said that the draft for making objections  
308 that appears on page 109 of the agenda materials "seems a really  
309 nice innovation." An objection will trigger a meet-and-confer  
310 session. The initial scheduling conference occurs too early to  
311 enable the parties to anticipate the problems that may arise. A  
312 system that encourages a meet-and-confer is a good thing.

313 Another Committee member noted the concern that the objection  
314 procedure and the pre-deposition submission of exhibits will delay  
315 the deposition by 30 to 90 days. Often Rule 30(b)(6) depositions  
316 are designed to set the foundation for other discovery, and should  
317 occur early in the litigation. Delay here will lead to delay in  
318 other discovery. So time is allowed to make an objection after the  
319 notice is served. Then time must be available to meet and confer.  
320 Then time may be required for court assistance in ironing out  
321 disputes the parties cannot manage to work out on their own.

322 One of the draft provisions prohibits deposition questions  
323 that ask for an opinion or contention that relates to fact or the  
324 application of law to fact. This language is drawn from Rule  
325 33(a)(2), but as prohibition rather than permission. The aim is to  
326 channel contention discovery into interrogatories or requests to  
327 admit. The need arises from reports that Rule 30(b)(6) is often  
328 used to attempt to get lay witnesses to bind an organization to  
329 legal positions. A Committee member agreed, stating that his office  
330 often sees Rule 30(b)(6) used as contention interrogatories would  
331 be used.

332 Judge Campbell agreed that "these are recurring problems. We  
333 could not find answers ten years ago. Rule 30(b)(6) depositions  
334 occur in a majority of my cases – frequent use suggests they must  
335 be useful." There seem to be a lot of conferences among the  
336 lawyers, but they seem to figure out how to solve their problems  
337 without coming to the court. "I see one or two of these disputes a  
338 year." It would be good to be able to address these problems in a  
339 way that is not case-specific. But it is difficult to know how  
340 often rule text can successfully do that.

341 A Subcommittee member suggested "we may well come out of this  
342 concluding to leave it alone." But the topic has been raised in  
343 part because of the experience "of lawyers like me," and in part

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344 because of repeated entreaties from bar groups. We know Rule  
345 30(b)(6) is useful. We know there are headaches. And we know that,  
346 after howls of protest, lawyers struggle to work out their disputes  
347 and often succeed. A simple example is provided by the questions of  
348 how to count a Rule 30(b)(6) deposition with multiple witnesses  
349 against the presumptive limit on the number of depositions, and how  
350 to apply the 7-hour limit, whether to each witness or to the  
351 organization as the single named deponent. The Committee Notes from  
352 earlier years do not provide clear guidance. The rule could, for  
353 example, provide that every 7 hours of deposition time counts as a  
354 separate deposition against the presumptive limit to 10  
355 depositions. That, in turn, would reduce the pressure to name only  
356 a few witnesses for the organization for the purpose of reducing  
357 the total amount of deposition time. A rule also could address the  
358 problem of questions on matters not described in the notice.

359 A judge observed that the problems of counting numbers of  
360 depositions and hours comes up between the parties. He has never  
361 had the question presented for resolution by the court.

362 Reporter Coquillette observed that the advisory committees  
363 often face the question whether reported problems are "real"  
364 problems in the sense that they recur frequently. Some guidance can  
365 be found in collective committee experience. And help also can be  
366 sought from the Federal Judicial Center. "This is something the FJC  
367 could look at." Emery Lee responded that the kinds of problems  
368 reported with Rule 30(b)(6) rarely rise to the docket-sheet level.  
369 It might be possible to learn something useful from an attorney  
370 survey, but it is really difficult to do that.

371 Another Committee member suggested that it might be useful to  
372 look at state laws.

373 Judge Ericksen responded that these difficulties provide the  
374 motive to find out whether anything can be learned by surveying CLE  
375 program materials. And she asked whether there are yet other  
376 problems that are not covered by the drafts.

377 One suggestion was that, in part inspired by some state  
378 practices, it is common to ask whether the rule should require the  
379 organization to designate the "most knowledgeable person" as its  
380 witness.

381 Joseph Garrison, speaking as liaison from the National  
382 Employment Lawyers Association, reported an "optimistic view" of  
383 Rule 30(b)(6). It is used all the time in employment cases. "We  
384 never take problems to the court." To be sure, "employment cases  
385 are not big commercial litigation," but they make up something on  
386 the order of 15% of the civil docket. NELA gives many seminars on

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387 Rule 30(b)(6); they will be happy to share these materials with the  
388 Committee as part of the survey of what CLE programs show.

389 Rule 30(b)(6) is used to start discovery, to get it all done  
390 in the least expensive way. Individual employee plaintiffs live in  
391 a world of asymmetrical information. In this world, the draft that  
392 provides for objections to the deposition notice is a bad idea. "It  
393 would take us back before the days of the employment-case discovery  
394 protocol." "We learn a lot quickly if we have effective discovery  
395 early in the case." The plaintiff has no documents and cannot be  
396 made to show there is a claim before having an opportunity for  
397 discovery.

398 Mr. Garrison further observed that if the Committee finds a  
399 dearth of local rules, that is likely to be a sign that there are  
400 not many problems. And the deposition testimony can be used at  
401 trial, but it is subject to impeachment – it does not bind the  
402 organization. "It is rare for a judge to deny a chance to correct  
403 the record." In response to a question, he agreed that it can be  
404 desirable to allow supplementation of the designated witness's  
405 deposition testimony. The question arises when an attempt is made  
406 to bind the organization by the testimony – that's when leave to  
407 supplement is requested and is allowed. In response to a question  
408 whether allowing supplementation encourages sloppy preparation of  
409 the witness, he said "we prepare our witnesses." Supplementation  
410 issues do arise with "I don't know" responses, often when the  
411 response is met by asking whether there is a way to find out an  
412 answer. Often the answer is that yes, there is a way to find out.  
413 Then there is supplementation. Designated witnesses in individual  
414 employment cases should be well prepared. It may be different in  
415 big commercial cases.

416 Responding to a further question, he said that reasons for the  
417 "I don't know" responses sometimes arise from poor notices that do  
418 not adequately designate the matters for examination. "Sometimes it  
419 is a tactic to not prepare." If you go to court, the court wants  
420 the parties to work it out. The lawyers themselves often want to  
421 work it out. "The point is to have an efficient deposition. Rule  
422 30(b)(6) is efficient." But "you're not going to cure bad lawyers  
423 by a rule."

424 Responding to another question, Mr. Garrison said that  
425 Connecticut state practice has no presumptive limit on the number  
426 of depositions, and that may explain why they do not have fights  
427 about whether to count an organization deposition according to the  
428 number of designated witnesses. One example is provided in a letter  
429 he prepared for the Committee, a case in which the employer claimed  
430 that the decision to discharge the plaintiff was made by a  
431 committee of ten. Counting each committee member's deposition

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432 separately would exhaust the presumptive limit set in Rule  
433 30(a)(2)(A)(i).

434 He responded to another question by agreeing that there are  
435 some useful ideas in the Subcommittee drafts. But it is not clear  
436 that they need to be incorporated in rule provisions.

437 Further discussion echoed the point that a party noticing a  
438 Rule 30(b)(6) deposition is trying to figure out what sources of  
439 information exist, and may supplement that by asking for production  
440 at the deposition. The lower-level provision that would simply  
441 allow the party noticing the deposition to deliver exhibits before  
442 the deposition by a stated time before the deposition leaves an  
443 open question: suppose the exhibits are delivered after that time,  
444 but still before the deposition? One answer was that they still  
445 could be used, but do not command as much effect in arguments  
446 whether the witness was properly prepared. This does tie to the  
447 adequacy of preparation as measured by the clarity of the matters  
448 designated for examination.

449 A Subcommittee member added that the draft rules crystallize  
450 the thought. A party is free now to provide exhibits in advance of  
451 the deposition. Putting it in the rule tells people they get the  
452 advantage of greater particularity by taking this step.

453 This discussion led to a further question: The rule provides  
454 that the party noticing the deposition "must describe with  
455 reasonable particularity the matters for examination." Why does it  
456 not work? A judge responded that he gets a lot of fights over  
457 claims that the notice is too vague, too broad. Perhaps Rule  
458 30(b)(6) should include a reminder of Rule 26(g) obligations. "I  
459 get notices that the lawyer says were simply designed to start a  
460 conversation." And they may come 30 days before the discovery  
461 cutoff. "We need to figure out a way to get the gamesmanship out of  
462 it." A practicing lawyer added that talking with other lawyers, he  
463 hears stories of notices that specify 150 matters for examination  
464 and failed attempts to negotiate it out, so the dispute goes to the  
465 judge. "The plaintiff's employment bar may be using Rule 30(b)(6)  
466 in ways very different from antitrust cases."

467 Asking about means to get additional information led observers  
468 to offer suggestions.

469 Ariana Tadler said that it is important to seek out  
470 qualitative information "across the bar." The NELA observations are  
471 helpful. There are many places to go to. The mass trial bar, on  
472 both sides, the American Association for Justice, and so on. Her  
473 practice commonly involves asymmetrical discovery, but she also  
474 works in complex litigation that involves large amounts of

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475 information on both sides. "It is rare that we cannot work it out  
476 cooperatively." The new emphasis on cooperation in Rule 1 "is  
477 working." The 2015 refinements in discovery practice also help.  
478 "Rule 30(b)(6) is used in refined ways to find out what the other  
479 side has." This can help determine whether the mass of information  
480 is so large as to trigger proportionality rules; given knowledge of  
481 the information available on topics a, b, c, d, and e, the inquiry  
482 might be limited to topics a and e. But it would be a mistake to  
483 attempt to articulate new rules on the number or duration of  
484 depositions. "Depositions are costly." That provides an internal  
485 restraint. And be careful about even permissive rules on advance  
486 provision of deposition exhibits – they can backfire. In response  
487 to a question, she said that time is needed to think whether there  
488 should be a distinction between parties and nonparties for Rule  
489 30(b)(6). That is an illustration of why it is important to  
490 actually talk to lawyers.

491 Alex Dahl reported that the Lawyers for Civil Justice members  
492 are interested. "Rule 30(b)(6) is important. We spend a lot of time  
493 dealing with these depositions."

494 William T. Hanglely noted that the submission from the ABA  
495 Litigation Section, although not a Section proposal, does come from  
496 a large number of active participants. This is not a plaintiffs'  
497 problem. It is not a defendants' problem. It is in part a problem  
498 of nonuniformity in practice. In another part, it is a problem of  
499 inconsistency in the Rules. Lawyers generally work it out. Practice  
500 tends to be helpful, cooperative. But risks remain. It would be  
501 good to clarify some of the issues.

502 Frank Sylvestri indicated that the American College of Trial  
503 Lawyers federal courts committee is interested in these questions.

504 Judge Ericksen asked whether the Subcommittee should continue  
505 to inquire into attempts to ask about contentions. A judge  
506 responded that this does happen, but "trying for contentions in  
507 deposing a lay witness just does not make sense." Another judge  
508 noted that Rule 33 clearly provides that contention discovery can  
509 be deferred to a late point in the case; allowing it in a  
510 deposition, without that sort of court control, seems  
511 inappropriate. Still another judge asked why is there a need to  
512 address this kind of discovery for Rule 30(b)(6) depositions but  
513 not others. The response was that is because the deponent is the  
514 organization, the witness is speaking for the party, and the party  
515 is obliged to prepare the witness. It is different when deposing a  
516 party who is the person being examined because the individual party  
517 does not have the duty to prepare that Rule 30(b)(6) imposes on an  
518 organization.

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519 The Rule 30(b)(6) discussion concluded by asking whether these  
520 questions should be pursued further by the Subcommittee. Should it  
521 work to further develop the draft rule language? The value of  
522 drafting is its role as a reality check. Working on language tends  
523 to bring out problems that otherwise might be overlooked. The work  
524 will continue.

525 Continued work on rule drafts does not reflect a conclusion  
526 that, in the end, the Subcommittee will recommend amendments for  
527 publication. Much of the discussion, and the provisions illustrated  
528 by the rules drafts, can be seen as best practices, something that  
529 can most effectively be addressed by education of the bench and  
530 bar. The Subcommittee will pursue its literature search. And it  
531 will create a repository of information. All suggestions from  
532 outside observers should be made to the Administrative Office.

533 *Rules 38, 39, 81: Jury Trial Demand*

534 Consideration of the rules that provide for waiver of the  
535 right to jury trial unless a proper demand is made began with Rule  
536 81(c)(3), which governs demands for jury trial when a case is  
537 removed from state court. A potential ambiguity may have been  
538 introduced in one part of this rule by the Style Project. Before  
539 the Style Project, Rule 81(c)(3)(A) provided that there is no need  
540 to demand a jury trial after removal if state law "does" not  
541 require a demand. The Style Project changed "does" to "did." The  
542 need for clarification was suggested by a lawyer who is concerned  
543 that "did" could be read to excuse the need to demand a jury after  
544 removal if state law, although requiring a demand at some later  
545 time, did not require a demand by the point that the case had  
546 reached prior to removal. If the courts read the new language to  
547 have the same meaning as the pre-Style language, the result may be  
548 inadvertent forfeiture of the right to jury trial. The Committee  
549 discussed this question in April and decided to ask the Standing  
550 Committee for guidance. Discussion in the Standing Committee was  
551 brief and did not resolve the question whether anything should be  
552 done about the arguable ambiguity.

553 Shortly after the Standing Committee meeting, two of its  
554 members – Judge Gorsuch and Judge Graber – suggested that this  
555 Committee should consider the jury demand procedure in Rule 38 and  
556 the related provisions of Rule 39. See 16-CV-F. They were concerned  
557 that it is important to increase the number of jury trials, and  
558 fear that the demand requirement proves a trap for the unwary.  
559 Parties who wish to exercise a constitutional or statutory right to  
560 jury trial may lose the right by overlooking the demand  
561 requirement. They suggested that, like Criminal Rule 23(a), jury  
562 trial should become the default provision. Rule 23(a) provides that  
563 when a defendant is entitled to a jury trial, the case must be

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564 tried by a jury unless the defendant waives a jury trial in  
565 writing, the government consents, and the court approves.

566 Exploration of these questions will begin with research by the  
567 Rules Committee Support Office. One question will be historical.  
568 The Committee Note for the 1938 Rules states that the demand  
569 procedure was adopted after looking to models in the states and  
570 other common-law jurisdictions, and that the period was set at 14  
571 days after the last pleading addressed to the issue after examining  
572 a wide range of periods adopted by other rules. There is a  
573 reference to an article by Professor Fleming James, who served as  
574 a consultant to the Committee; the article focuses on  
575 administrative concerns, with a hint at concerns about strategic  
576 behavior. Can more be found out about the reasons that prompted  
577 both adoption of a demand procedure and an early cut-off for the  
578 demand?

579 A search also will be made to determine whether there are  
580 local rules that address demand procedure. And experience under  
581 state rules will be explored – they vary widely, but many of them  
582 allow demands to be made later in the proceedings than Rule 38  
583 allows, and some, as reflected in Rule 81(c)(3)(A), do not require  
584 a formal demand at any time.

585 The more elusive part of the research will attempt to  
586 determine whether there is any reliable way to estimate the number  
587 of cases in which a party who wishes a jury trial has lost the  
588 right by failure to make timely demand and by failing to persuade  
589 the court to allow an untimely demand under Rule 39(b). It may be  
590 difficult to get more than anecdotal evidence on this point.

591 Another part of the inquiry must ask whether it is important,  
592 or at least useful, to know early in the proceedings whether the  
593 case is to be tried to a jury. Is it more than a matter of  
594 convenient administrative trial-scheduling practices? Or a concern  
595 that a party who was content to waive jury trial early in the  
596 action may, as proceedings progress, come to want a jury because  
597 its position does not seem to be winning favor with the judge?  
598 (This possible concern seems likely to arise only when a case  
599 remains with the same judge from beginning through trial; it seems  
600 likely that practice in the 1930s was different in this respect.)

601 If the conclusion is that some relaxation of the demand  
602 procedure is desirable, many drafting questions will need to be  
603 addressed. The choices will range from abolition of any demand  
604 requirement through a mere extension of the time when a demand must  
605 be made. Adopting jury trial as the default that prevails unless  
606 the parties opt out could be implemented by a procedure that  
607 requires express written waiver by all parties; the court's

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608 approval might also be required, as in Criminal Rule 23(a). A  
609 further drafting choice must be made whether to complicate the rule  
610 by addressing the problem that it is not always clear whether there  
611 is a constitutional or statutory right to jury trial. The merger of  
612 law and equity has led to decisions that expand the right to jury  
613 trial in comparison with pre-merger practice, but the details may  
614 be murky. Issues common to legal and equitable relief must be tried  
615 to the jury, and the verdict binds the judge. But it may be  
616 difficult to untangle closely related but separate issues. More  
617 generally, the process of analogy to the common law of 1791 may not  
618 always yield clear answers when asking whether a novel statutory  
619 action entails a Seventh Amendment right to jury trial. Criminal  
620 Rule 23 does not address such questions, but the right to jury  
621 trial in criminal cases may be free from complications similar to  
622 those that occasionally arise in civil actions. One resolution  
623 would be to include rule text that recognizes the right of any  
624 party who prefers a bench trial to raise the question whether there  
625 is a right to jury trial.

626 Discussion began with the observation of a judge that in more  
627 than 20 years on the bench, he could not remember more than 2 or 3  
628 litigants who had lost a desired right to jury trial. But that does  
629 not diminish the value of attempting a more comprehensive inquiry.  
630 It also might be asked whether a party who has forfeited the right  
631 to jury trial by failing to make a timely demand will be inclined  
632 to settle rather than face a bench trial. There might be an  
633 independent value in adopting an all-parties waiver provision. The  
634 question of court approval also should be considered. One variation  
635 would be to revise Rule 39(b) to allow the court to order a jury  
636 trial on its own.

637 Another judge noted similar experiences – there are few cases  
638 of inadvertent forfeiture. One way to inquire further may be to  
639 research cases that deal with late requests, but disposition of  
640 these requests may not often make it into reports or electronic  
641 repositories. And a party may react to its failure to make a timely  
642 demand by settling rather than attempting to win permission to make  
643 an untimely demand.

644 Turning to the question whether and why it is useful to know  
645 early on about the mode of trial – to a judge or to a jury – a  
646 Committee member suggested there is a lot of value in knowing. The  
647 mode of trial impacts mediation. It also may affect summary-  
648 judgment practice, which may be blended with "trial" when trial is  
649 to be to the judge. Managing a jury calendar will be helped, and  
650 trial scheduling will be helped. "I'm all for more jury trials,"  
651 but no one seems to be getting trapped in practice.

652 Another Committee member said that "everyone demands jury

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653 trial so they don't waive it." They may not know until later in the  
654 case whether they really want a jury trial. It may make sense to  
655 extend the time for demands so better-supported choices are made  
656 and so as to avoid the complications when a party who demanded jury  
657 trial decides to abandon a demand that other parties may wish to  
658 enforce. The removal situation is the only setting that is at all  
659 likely to generate inadvertent waivers, especially on remand from  
660 an MDL court to the court where the case was initially filed. The  
661 need to demand a jury trial is likely to get lost from sight at  
662 times. This could be addressed by a rule provision.

663 A judge agreed that the issue seems to arise only in MDL  
664 proceedings. He also noted that he has had criminal cases in which  
665 the defendant wants to waive jury trial but the government insists  
666 on it.

667 *Draft Rule 5.2(i)*

668 Rule 5.2 was adopted as a joint project with the Appellate,  
669 Bankruptcy, and Civil Rules Committees. The purpose was not only to  
670 provide for omitting sensitive personal information from court  
671 filings but also to achieve uniform provisions in each set of  
672 rules.

673 The Committee on Court Administration and Case Management  
674 suggested that the Bankruptcy Rules Committee should study the need  
675 to revise Bankruptcy Rule 9037 to provide an explicit procedure for  
676 redacting personal identifiers inadvertently included in court  
677 filings. It made the suggestion because of reports that creditors  
678 often file thousands of claims, frequently in different courts,  
679 without properly abbreviating personal information as required by  
680 Rule 9037. The Bankruptcy Rules Committee responded by drafting a  
681 proposed Rule 9037(h). Rule 9037(h) would provide for a motion to  
682 redact the improperly filed information. Although the Bankruptcy  
683 Rules Committee was prepared to recommend publication of this  
684 proposal last summer, it agreed to defer publication to enable the  
685 Appellate, Civil, and Criminal Rules Committees to study the  
686 possibility of recommending parallel proposals.

687 The draft Rule 5.2(i) included in the agenda materials  
688 reflects a process of friendly cooperation among the Reporters for  
689 the Bankruptcy Rules and the Civil Rules. Some drafting details  
690 remain to be ironed out if Rule 5.2(i) is to proceed to a  
691 recommendation to publish. The Criminal Rules Committee is  
692 uncertain whether it should recommend a parallel draft, and the  
693 Appellate Rules Committee is content to depend on the outcome in  
694 the other Committees because Appellate Rule 25(a)(5) adopts the  
695 other rules as appropriate.

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696 Three questions remain: If the Civil Rules were treated  
697 independently, is there any sufficient need to add an express  
698 provision governing a motion to redact? If there is no sufficient  
699 independent need, should a provision be adopted nonetheless in  
700 order to maintain uniformity with the Bankruptcy and Criminal  
701 Rules? And if some form of Rule 5.2 is to be recommended for  
702 publication, what further efforts should be made to work through  
703 the drafting issues that remain following recent efforts to  
704 reconcile Rule 5.2 with Rule 9037(h)?

705 The need for an express Rule 5.2 procedure for a motion to  
706 redact may be less than the need in Bankruptcy. Bankruptcy may face  
707 a distinctive need for a uniform procedure not only because of the  
708 frequent occurrence of unredacted filings but also because the same  
709 unredacted filings may be made in different courts. It may well be  
710 that the problem is sufficiently less widespread in civil actions  
711 that parties and the courts can work out appropriate corrections  
712 without difficulty. The fact that the Committee on Court  
713 Administration and Case Management addressed its concerns only to  
714 the Bankruptcy Rules Committee may support an inference that  
715 problems have not been widely reported for civil or criminal  
716 filings.

717 The independent value of uniformity across the Bankruptcy,  
718 Civil, and Criminal Rules also may be uncertain. The present rules  
719 are not perfectly uniform – departures were made to reflect the  
720 different circumstances that arise in each type of proceeding. That  
721 fact alone may reduce whatever risk there might be that  
722 inappropriate inferences might be drawn, or at least argued, from  
723 the absence of provisions parallel to proposed Rule 9037(h) in the  
724 Civil or Criminal Rules.

725 If a decision is made to move forward toward a recommendation  
726 to publish, the remaining drafting questions will be addressed  
727 under the auspices of the Administrative Office as referee and  
728 arbiter.

729 Discussion began with a reminder that it is generally better  
730 to avoid adding new rule text unless there is a genuine need. And  
731 there are different aspects to uniformity. When separate sets of  
732 rules choose to address the same problem, care should be taken to  
733 adopt uniform terms to the extent that the underlying problems are  
734 uniform. But it is not as important to ensure that when one set of  
735 rules undertakes to address a particular problem the other sets  
736 also address the problem. As here, the needs confronting one branch  
737 of practice may be different from those that arise in the others.

738 A judge said that unredacted filings in civil actions result  
739 from simple oversight. Lawyers typically recognize the problem and

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740 want to fix it. The draft rule seems to require a motion to permit  
741 the fix, more work than is necessary for a result that can be  
742 accomplished more efficiently.

743 Judge Goldgar said that unredacted filings in bankruptcy also  
744 result from simple mistakes. Creditors or the debtor simply file  
745 attachments without recognizing the presence of personal  
746 identifiers. It is not correct to characterize the recommended  
747 motion as a motion to redact. It is rather a motion to replace the  
748 original unredacted filing with a redacted filing. The court does  
749 not itself make the redaction. He later elaborated that the problem  
750 arises in bankruptcy because "so much personal information is  
751 bandied about." Creditors file lots of documents. "Debtors' lawyers  
752 make this mistake all the time." If you do not provide an express  
753 remedy for mistakes, you lose uniformity.

754 Doubts were expressed whether an express provision in Rule 5.2  
755 is needed, coupled with uncertainty whether the interest in uniform  
756 provisions among the rules outweighs the lack of any independent  
757 need.

758 Laura Briggs noted that "Overall, we get them filed all the  
759 time." The Clerk's Office automatically restricts access to the  
760 unredacted filing so that only the parties may access it, and asks  
761 the attorneys to refile. The Clerk's Office then substitutes the  
762 redacted filing for the original filing. It is not clear that there  
763 is any need for a new rule provision, but there is an argument for  
764 uniform provisions. Her court has ECF guidelines that address  
765 redaction.

766 A judge noted that her Clerk's Office does exactly the same  
767 thing - it limits access and asks the parties to fix the filing.

768 Another judge suggested that the court clerks should not be  
769 responsible for policing unredacted filings, and that we should be  
770 reluctant to impede easy corrections through ECF procedures.

771 Another judge observed that his court sees "enough documents  
772 with personal information, but I suspect bankruptcy may see more."

773 The first question put to the Committee was whether anyone  
774 thought draft Rule 5.2(i) should not be pursued further. The  
775 Committee voted not to proceed further by 8 votes to 6. But it was  
776 agreed that the project might be resurrected if other committees  
777 urgently ask for uniformity.

778 *Rule 45(b)(1)*

779 The State Bar of Michigan Committee on United States Courts

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780 has suggested that Rule 45(b)(1) be amended to expand the methods  
781 for serving subpoenas. The suggestion is 16-CV-B.

782 Rule 45(b)(1) blandly directs that "[s]erving a subpoena  
783 requires delivering a copy to the named person." It does not say  
784 what method of delivery is required. But most courts read it as if  
785 it requires delivery to the named person personally. There are  
786 minority views that recognize delivery by mail, or that recognize  
787 delivery by mail if diligent attempts to make personal delivery  
788 fail. And occasionally a court accepts delivery by some other  
789 means. One reason to consider the question would be to establish a  
790 uniform meaning.

791 Identifying the best uniform meaning would remain to be  
792 decided. The Michigan Bar recommendation is that service of a  
793 subpoena is a less important event than service of the summons and  
794 complaint that initially brings a party into a civil action. It  
795 make sense, from this perspective, to allow service by any of the  
796 means provided by Rule 4(e), (f), (g), (h), (i), or (j). In  
797 addition, their suggestion would allow service "by alternate means  
798 expressly authorized by the court."

799 The method of service was considered during the work that led  
800 to the extensive revisions of Rule 45 adopted in 2013. An extensive  
801 research memorandum by Andrea Kuperman, the Rules Law Clerk,  
802 supplied detailed information on case-law developments that  
803 confirms the research supplied to support the present suggestion.  
804 The Subcommittee included service as one of the 17 questions to be  
805 addressed, but concluded that no change was needed. One concern was  
806 that personal service is a dramatic event that impresses on the  
807 witness the importance of compliance. The Committee, without  
808 extensive discussion, approved the Subcommittee recommendation that  
809 revision was not needed.

810 Despite this recent history, there may be reason to consider  
811 the question further. At a minimum, it might help to add an express  
812 provision authorizing the court to approve service by means other  
813 than in-hand service. Highly reliable means may be available in a  
814 particular case that ensure actual service at lower cost and with  
815 no delay.

816 Going beyond case-specific orders, there is some attraction to  
817 the view that the several Rule 4 methods of service could be  
818 incorporated. The provisions in Rules 4(e) and (h) for service on  
819 individuals and entities may be the easiest to adopt by analogy.  
820 Service on an individual by leaving a subpoena at the individual's  
821 dwelling or usual place of abode with someone of suitable age and  
822 discretion who resides there may be as well justified as service of  
823 a summons and complaint by this means. But it is not as simple to

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824 consider service on an agent authorized by appointment or by law to  
825 receive service of a subpoena. Apart from the question whether many  
826 individuals have appointed agents for service of process, how often  
827 does the appointment extend to service of a subpoena? And –  
828 remembering that a subpoena issues from the federal court where the  
829 action is pending but can be served in any state – what  
830 complications might flow from following state law for serving a  
831 summons in the state where the subpoena is served? Moving from  
832 these common and relatively simple situations to include service on  
833 an infant or incompetent person, service abroad (which may be  
834 governed by conventions different from those that apply to service  
835 of initiating process), and so on through the rest of Rule 4 raises  
836 additional uncertainties.

837 The analogy to Rule 4 suggests a further possibility: just as  
838 an intended defendant may agree to waive service of the summons and  
839 complaint, there may be some value in a rule provision that  
840 expressly recognizes agreements to accept service by specified  
841 means or to waive formal "service" entirely.

842 Serious work on the means of service might explore still  
843 greater complications. An obvious one is whether distinctions  
844 should be drawn between party witnesses and nonparty witnesses.  
845 When a party is represented by an attorney, for example, service of  
846 other papers is made on the attorney; service of a subpoena on the  
847 attorney might be still more effective than service directly on the  
848 party client. It also might be sensible to provide means of  
849 minimizing delay and disruption when a witness has actually  
850 received a subpoena – there is something incongruous about a motion  
851 to quash a subpoena on the ground that although it has been  
852 received, it should be ignored and replaced by further efforts to  
853 serve by formally correct means.

854 Discussion began by asking whether there is sufficient reason  
855 to take up a topic that was considered and put aside a few years  
856 ago. In some circumstances there may be convincing reasons that  
857 justify reconsideration after only a short interval. It is not  
858 apparent that sufficient reason appears here, although the Michigan  
859 Bar suggestion speaks of a plague of delay and expense. Is that  
860 reason enough?

861 A judge asked whether there indeed is a plague – judges do not  
862 often see these questions.

863 A Committee member observed that she had thought that service  
864 by mail is proper. The rule should be clarified. "I thought I knew  
865 what it means. Rules should tell us these simple things."

866 A judge echoed the thought: "Why not say what 'delivery'

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867 means"? The cases offer different interpretations. That may be  
868 reason enough to clarify the rule.

869 Another Committee member observed that this question was not  
870 a major focus of the recent Rule 45 revision discussions. The  
871 thought seemed to be only that there was no big need for change.  
872 This view was seconded – the issue did not seem as important as  
873 many others that commanded the attention of the Subcommittee and  
874 Committee.

875 Still another Committee member noted that states often follow  
876 the federal rule on service. The Michigan rule calls for  
877 "delivery." Any amendment of Rule 45 is likely to make work for  
878 state rules committees.

879 The conclusion was that the Administrative Office staff should  
880 be asked to explore further the possible reasons for pursuing these  
881 questions.

882 *Pilot Projects*

883 Judge Bates opened the discussion of pilot projects by noting  
884 that the pilot projects have been developed by a working group that  
885 includes members from the Standing Committee, this Committee, and  
886 the Committee on Court Administration and Case Management. Judge  
887 Grimm, a former Civil Rules Committee member, chairs the working  
888 group. The two pilot projects have reached the final stages of  
889 development and description.

890 The Expedited Procedures pilot is designed to expand the use  
891 of practices that many judges adopt under the present Civil Rules.  
892 No changes in rule texts are contemplated. The purpose is to  
893 demonstrate the values of active case management, hoping to promote  
894 a culture change. The practices aim at: (1) holding a scheduling  
895 conference and issuing a scheduling order as soon as practicable,  
896 but no later than the earlier of 90 days after any defendant is  
897 served or 60 days after any defendant appears; (2) setting a  
898 definite period for discovery of no more than 180 days and allowing  
899 no more than one extension, only for good cause; (3) informal and  
900 expeditious disposition of discovery disputes by the judge; (4)  
901 ruling on dispositive motions within 60 days of the reply brief,  
902 whether or not there is oral argument after the reply brief; and  
903 (5) setting a firm trial date that can be changed only for  
904 exceptional circumstances, allowing flexibility as to the point in  
905 the proceedings when the date is set but aiming to set trial at 14  
906 months from service or the first appearance in 90% of cases, and  
907 within 18 months in the remaining cases. Work is proceeding on a  
908 Users Manual. Mentor judges will be made available to support  
909 implementation in the pilot courts. The goal is to have the project

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910 in place in 2017, to run for a period of three years. Means of  
911 measuring the results are a central part of the project.

912 The Mandatory Initial Discovery pilot seeks to test new  
913 procedures to see whether experience will support amendments of the  
914 present rules. It is based on a model standing order to respond to  
915 uniform discovery requests by providing information, both favorable  
916 and unfavorable, without regard to whether the responding party  
917 plans to use the information in the case. These requests supersede  
918 the initial disclosure provisions of Rule 26(a)(1). The pilot does  
919 not allow the parties to opt out. It calls for discussion at the  
920 case-management conference. Answers, counterclaims, and crossclaims  
921 are to be filed without regard to pending motions that otherwise  
922 would defer the time for filing, although the court may suspend the  
923 obligation to file for good cause when the motion goes to matters  
924 of jurisdiction or immunity. There are separate provisions for  
925 producing electronically stored information.

926 The task of enlisting pilot courts is under way. The hope is  
927 to find five to ten districts for each; no one district would be  
928 selected for both projects. Districts of different characteristics  
929 should be involved, both large, medium, and small, in different  
930 parts of the country. Although it will be desirable to have  
931 participation by every judge on each pilot court, there is some  
932 flexibility about engaging a court that cannot persuade every judge  
933 to participate.

934 Several judges expressed optimism about engaging their courts  
in a pilot project. Others were less optimistic.

Respectfully submitted,

Edward H. Cooper  
Reporter

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# TAB 3

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**Pending Legislation**  
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| Name  | Sponsor(s)/<br>Co-Sponsor(s)  | Affected<br>Rule | Text, Summary, and Committee Report   | Actions   |
|---|---|------------------|---|---|
| <b>Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017</b> | <b>H.R. 985</b><br><i>Sponsor:</i><br>Goodlatte (R-VA)<br><br><i>Co-Sponsors:</i><br>Sessions (R-TX)<br>Grothman (R-WI) | CV 23            | <p><b>Bill Text (as amended and passed by the House, 3/9/17):</b><br/> <a href="https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf">https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</a></p> <p><b>Summary (authored by CRS):</b><br/>                     (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> <li>• in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives;</li> <li>• no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and</li> <li>• in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members.</li> </ul> <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p> | <ul style="list-style-type: none"> <li>• 3/13/17: Received in the Senate and referred to Judiciary Committee</li> <li>• 3/9/17: Passed House (220–201)</li> <li>• 3/7/17: Letter submitted by AO Director</li> <li>• 2/15/17: Mark-up Session held (reported out of Committee 19–12)</li> <li>• 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees)</li> <li>• 2/9/17: Introduced in the House</li> </ul> |

**Pending Legislation**  
**115th Congress**

| Name | Sponsor(s)/<br>Co-Sponsor(s) | Affected<br>Rule | Text, Summary, and Committee Report  | Actions |
|------|------------------------------|------------------|--|---------|
|      |                              |                  | <p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p> <p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p><b>Report:</b> <a href="https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf">https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</a></p> |         |



**Pending Legislation**  
115th Congress

| Name                                       | Sponsor(s)/<br>Co-Sponsor(s)  | Affected<br>Rule | Text, Summary, and Committee Report   | Actions  |
|--|---|------------------|---|--|
| <b>Lawsuit Abuse Reduction Act of 2017</b> | <b>H.R. 720</b><br><i>Sponsor:</i><br>Smith (R-TX)<br><br><i>Co-Sponsors:</i><br>Goodlatte (R-VA)<br>Buck (R-CO)<br>Franks (R-AZ)<br>Farenthold (R-TX)<br>Chabot (R-OH)<br>Chaffetz (R-UT)<br>Sessions (R-TX) | CV 11            | <p><b>Bill Text (as passed by the House without amendment, 3/10/17):</b><br/> <a href="https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf">https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</a></p> <p><b>Summary (authored by CRS):</b><br/>                     (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p><b>Report:</b> <a href="https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf">https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</a></p> | <ul style="list-style-type: none"> <li>• 3/13/17: Received in the Senate and referred to Judiciary Committee</li> <li>• 3/10/17: Passed House (230–188)</li> <li>• 2/1/17: Letter submitted by Rules Committees</li> <li>• 1/30/17: Introduced in the House</li> </ul> |
|  | <b>S. 237</b><br><i>Sponsor:</i><br>Grassley (R-IA)<br><br><i>Co-Sponsor:</i><br>Rubio (R-FL)   | CV 11            | <p><b>Bill Text:</b> <a href="https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf">https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</a></p> <p><b>Summary (authored by CRS):</b><br/>                     This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p>  | <ul style="list-style-type: none"> <li>• 2/1/17: Letter submitted by Rules Committees</li> <li>• 1/30/17: Introduced in the Senate</li> </ul>  |

**Pending Legislation**  
115th Congress

| Name                             | Sponsor(s)/<br>Co-Sponsor(s)   | Affected<br>Rule | Text, Summary, and Committee Report  | Actions   |
|----------------------------------|--|------------------|--|---|
|                                  |  |                  | <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p><b>Report:</b> None.</p>   |   |
| <b>Stopping Mass Hacking Act</b> | <p><b>S. 406</b><br/><i>Sponsor:</i><br/>Wyden (D-OR)</p> <p><i>Co-Sponsors:</i><br/>Baldwin (D-WI)<br/>Daines (R-MT)<br/>Lee (R-UT)<br/>Rand (R-KY)<br/>Tester (D-MT)</p> | CR 41            | <p><b>Bill Text:</b> <a href="https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf">https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</a></p> <p><b>Summary:</b><br/>(Sec. 2) “Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 10 2016.”</p> <p><b>Report:</b> None.</p> | <ul style="list-style-type: none"> <li>• 2/16/17: Introduced in the Senate</li> </ul> |

# TAB 4

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# TAB 4A

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## **RULE 23 SUBCOMMITTEE REPORT**

The Rule 23 Subcommittee met twice by conference call after the public comment period ended. Notes on its March 1 conference call are in this agenda book.

On March 17, it held a further conference call to review actions resulting from the earlier call and work through several issues of wording in the Committee Note. The only change to the rule that the Subcommittee decided to recommend during this conference call was to withdraw the recommendation that the phrase "under Rule 23(c)(3)" be added to Rule 23(e)(2). That phrase was proposed to guard against a possible risk that there might be arguments that the authorization to approve a settlement for a class action somehow could circumvent the requirement that certification be justified under Rule 23(a) and (b). That risk seemed unimportant on reconsideration, and testimony during the public comment period raised the concern that the inclusion of this phrase could itself cause confusion. The Committee Note continues to provide that "bind class members" (retained from the current rule) depends on compliance with Rules 23(a) and (b). The remaining matters covered in the March 17 conference call related to specific wording changes in the Note and accordingly notes of that call are not included in this agenda book.

The public comment period produced a number of suggestions about revisions of the Note, and these were carefully reviewed by the Subcommittee. A summary of the testimony at the three hearings and of the written comments is also included in this agenda book.

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[Below is the proposed rule and Committee Note that were published for comment reflecting the changes that the Subcommittee recommends making based on its review of the public comment. In the rule, added language is indicated by double underlining, and removed language that was originally proposed is indicated by overstriking of underlined language. In the Note, added language is indicated by underlining and removed language by overstriking. After the marked up version, there is a "clean" version showing what the rule and Note would look like after amendment as recommended.]

**Rule 23. Class Actions**

\* \* \* \* \*

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

\* \* \* \* \*

**(2) Notice.**

\* \* \* \* \*

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

\* \* \* \* \*

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

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- (1) Notice to the Class
- (A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
- (B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:
- (i) approve the proposal under Rule 23(e)(2);  
and
- (ii) certify the class for purposes of judgment on the proposal.
- (2) Approval of the Proposal. If the proposal would bind class members ~~under Rule 23(c)(3)~~, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:-
- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
- (i) the costs, risks, and delay of trial and appeal;
- (ii) the effectiveness of ~~any 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 award of attorney's fees, including timing of payment; and
- (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members ~~are treated~~ equitably relative to each other.

92 (3) Identification of Side Agreements. The parties  
93 seeking approval must file a statement identifying  
94 any agreement made in connection with the proposal.  
95

96 (4) New Opportunity to Be Excluded. If the class  
97 action was previously certified under  
98 Rule 23(b)(3), the court may refuse to approve a  
99 settlement unless it affords a new opportunity to  
100 request exclusion to individual class members who  
101 had an earlier opportunity to request exclusion but  
102 did not do so.  
103

104 (5) Class-Member Objections.  
105

106 (A) In General. Any class member may object to  
107 the proposal if it requires court approval  
108 under this subdivision (e); ~~the objection may~~  
109 ~~be withdrawn only with the court's approval.~~  
110 The objection must state whether it applies  
111 only to the objector, to a specific subset of  
112 the class, or to the entire class, and also  
113 state with specificity the grounds for the  
114 objection.  
115

116 (B) Court Approval Required for Payment In  
117 Connection With an Objection to an Objector or  
118 Objector's Counsel. Unless approved by the  
119 court after a hearing, no payment or other  
120 consideration may be provided to an objector  
121 or objector's counsel in connection with:  
122

123 (i) forgoing or withdrawing an objection, or  
124

125 (ii) forgoing, dismissing, or abandoning an  
126 appeal from a judgment approving the  
127 proposal.  
128

129 (C) Procedure for Approval After an Appeal. If  
130 approval under Rule 23(e)(5)(B) has not been  
131 obtained before an appeal is docketed in the  
132 court of appeals, the procedure of Rule 62.1  
133 applies while the appeal remains pending.  
134

135 (f) **Appeals.** A court of appeals may permit an appeal from an  
136 order granting or denying class-action certification  
137 under this rule, but not from an order under  
138 Rule 23(e)(1). if a petition for to appeal is filed A  
139 party must file a petition for permission to appeal with  
140 the circuit clerk within 14 days after the order is  
141 entered, or within 45 days after the order is entered if  
142 any party is the United States, a United States agency,  
143 or a United States officer or employee sued for an act or  
144 omission occurring in connection with duties performed on

145  
146

the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

\* \* \* \* \*

COMMITTEE NOTE

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 has been ~~is sometimes~~  
10 ~~inaccurately~~ called "preliminary approval" of the proposed class  
11 certification in Rule 23(b)(3) actions, ~~and~~ It is common to send  
12 notice to the class simultaneously under both Rule 23(e)(1) and  
13 Rule 23(c)(2)(B), including a provision for class members to decide  
14 by a certain date whether to opt out. This amendment recognizes  
15 the propriety of this combined notice practice. ~~Requiring repeat~~  
16 ~~notices to the class can be wasteful and confusing to class~~  
17 ~~members, and costly as well.~~

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

36  
37 Rule 23(c)(2)(B) is amended to take account of these changes,  
38 ~~and to call attention to them.~~ The rule continues to call for  
39 giving class members "the best notice that is practicable." It  
40 does not specify any particular means as preferred. Although it  
41 may sometimes ~~often~~ be true that electronic methods of notice, for  
42 example ~~by~~ email, are the most promising, it is important to keep  
43 in mind that a significant portion of class members in certain  
44 cases may have limited or no access to email or the Internet.

45

46           Instead of preferring any one means of notice, therefore, the  
47 amended rule relies on courts and counsel to should focus on the  
48 means or combination of means most likely to be effective in the  
49 case before the court. ~~The amended rule emphasizes that t~~The court  
50 should ~~must~~ exercise its discretion to select appropriate means of  
51 giving notice. ~~Courts should take account not only of anticipated~~  
52 ~~actual delivery rates, but also of the extent to which members of~~  
53 ~~a particular class are likely to pay attention to messages~~  
54 ~~delivered by different means.~~ In providing the court with  
55 sufficient information to enable it to decide whether to give  
56 notice to the class of a proposed class-action settlement under  
57 Rule 23(e)(1), it would ordinarily ~~may~~ be important to include  
58 details a report about the proposed method of giving notice to the  
59 class and to provide the court with a copy of each notice the  
60 parties propose to use.

61  
62           In determining whether the proposed means of giving notice is  
63 appropriate, the court should also give careful attention to the  
64 content and format of the notice and, if notice is given under both  
65 Rule 23(e)(1) and as well as Rule 23(c)(2)(B), any claim form class  
66 members must submit to obtain relief. ~~Particularly if the notice~~  
67 ~~is by electronic means, care is necessary regarding access to~~  
68 ~~online resources, the manner of presentation, and any response~~  
69 ~~expected of class members.~~

70  
71           Counsel should consider which method or methods of giving  
72 notice will be most effective; simply assuming that the  
73 "traditional" methods are best may disregard contemporary  
74 communication realities. As the rule directs, the notice should be  
75 the "best \* \* \* that is practicable" in the given case. The  
76 ultimate goal of giving notice is to enable class members to make  
77 informed decisions about whether to opt out or, in instances where  
78 a proposed settlement is involved, to object or to make claims.  
79 Rule 23(c)(2)(B) directs that the notice be "in plain, easily  
80 understood language." Means, format, and content that would be  
81 appropriate for class members likely to be sophisticated, for  
82 example in a securities fraud class action, might not be  
83 appropriate for a class made up in significant part of members  
84 likely to be less sophisticated. ~~As with the method of notice, the~~  
85 ~~form of notice should be tailored to the class members' anticipated~~  
86 ~~understanding and capabilities.~~ The court and counsel may wish to  
87 consider the use of class notice experts or professional claims  
88 administrators.

89  
90           Attention should focus also on the method of opting out  
91 provided in the notice. The proposed method should be as  
92 convenient as possible, while protecting against unauthorized opt-  
93 out notices. ~~The process of opting out should not be unduly~~  
94 ~~difficult or cumbersome.~~ ~~As with other aspects of the notice~~  
95 ~~process, there is no single method that is suitable for all cases.~~

96  
97           **Subdivision (e).** The introductory paragraph of Rule 23(e) is  
98 amended to make explicit that its procedural requirements apply in

99 instances in which the court has not certified a class at the time  
100 that a proposed settlement is presented to the court. The notice  
101 required under Rule 23(e)(1) then should also satisfy the notice  
102 requirements of amended Rule 23(c)(2)(B) for a class to be  
103 certified under Rule 23(b)(3), and trigger the class members' time  
104 to request exclusion. Information about the opt-out rate could  
105 then be available to the court when it considers final approval of  
106 the proposed settlement.

107  
108 **Subdivision (e) (1).** The decision to give notice of a proposed  
109 settlement to the class is an important event. It should be based  
110 on a solid record supporting the conclusion that the proposed  
111 settlement will likely earn final approval after notice and an  
112 opportunity to object. ~~The amended rule makes clear that the~~  
113 ~~parties must provide the court with information sufficient to~~  
114 ~~enable it to decide whether notice should be sent. At the time~~  
115 ~~they seek notice to the class, the proponents of the settlement~~  
116 ~~should ordinarily provide the court with all available materials~~  
117 ~~they intend to submit to in support of approval under Rule 23(e)(2)~~  
118 ~~and that they intend to make available to class members. That~~  
119 ~~would give the court a full picture and make this information~~  
120 ~~available to the members of the class.~~ The amended rule also  
121 specifies the standard the court should use in deciding whether to  
122 send notice -- that it likely will be able both to approve the  
123 settlement proposal under Rule 23(c)(2) and, if it has not  
124 previously certified a class, to certify the class for purposes of  
125 judgment on the proposal.

126  
127 ~~There are many types of class actions and class-action~~  
128 ~~settlements. As a consequence, no single list of topics to be~~  
129 ~~addressed in the submission to the court would apply to each case.~~  
130 ~~Instead, the subjects to be addressed depend on the specifics of~~  
131 ~~the particular class action and proposed settlement. But some~~  
132 ~~general observations can be made.~~

133  
134 One key element is class certification. If the court has  
135 already certified a class, the only information ordinarily  
136 necessary in regard to a proposed settlement is whether the  
137 proposal calls for any change in the class certified, or of the  
138 claims, defenses, or issues regarding which certification was  
139 granted. But if a class has not been certified, the parties must  
140 ensure that the court has a basis for concluding that it likely  
141 will be able, after the final hearing, to certify the class.  
142 Although the standards for certification differ for settlement and  
143 litigation purposes, the court cannot make the decision regarding  
144 the prospects for certification without a suitable basis in the  
145 record. The ultimate decision to certify the class for purposes of  
146 settlement cannot be made until the hearing on final approval of  
147 the proposed settlement. If the settlement is not approved ~~and~~  
148 ~~certification for purposes of litigation is later sought, the~~  
149 ~~parties' earlier positions submissions in regarding to the proposed~~  
150 ~~certification for settlement should not be considered if~~  
151 ~~certification is later sought for purposes of litigation in~~

152 ~~deciding on certification.~~

153  
154 Regarding the proposed settlement, ~~many a great variety of~~  
155 ~~types of information might appropriately be provided included in~~  
156 ~~the submission to the court. A basic focus is the extent and type~~  
157 ~~of benefits that the settlement will confer on the members of the~~  
158 ~~class. Depending on the nature of the proposed relief, that~~  
159 ~~showing may include details of the claims process that is~~  
160 ~~contemplated and the anticipated rate of claims by class members.~~  
161 ~~If the notice to the class calls for submission of claims before~~  
162 ~~the court decides whether to approve the proposal under~~  
163 ~~Rule 23(e)(2), it may be important to provide that the parties will~~  
164 ~~report back to the court on the actual claims experience. And~~  
165 ~~because some funds are frequently left unclaimed, it is often~~  
166 ~~important for the settlement agreement ordinarily should to address~~  
167 ~~the distribution use of those funds. Many courts have found~~  
168 ~~guidance on this subject in § 3.07 of the American Law Institute,~~  
169 ~~Principles of Aggregate Litigation (2010).~~

170  
171 ~~It is important for t~~The parties should also to supply the  
172 court with information about the likely range of litigated  
173 outcomes, and about the risks that might attend full litigation.  
174 ~~In that connection, I~~information about the extent of discovery  
175 completed in the litigation or in parallel actions may often be  
176 important. In addition, as suggested by Rule 23(b)(3)(A), the  
177 parties should provide the court information about the existence of  
178 other pending or anticipated litigation on behalf of class members  
179 involving claims that would be released under the proposal --  
180 ~~including the breadth of any such release -- may be important.~~

181  
182 The proposed handling of an award of attorney's fees under  
183 Rule 23(h) is another topic that ordinarily should be addressed in  
184 the parties' submission to the court. In some cases, it will be  
185 important to relate the amount of an award of attorney's fees to  
186 the expected benefits to the class, ~~and to take account of the~~  
187 ~~likely claims rate.~~ One method of addressing this issue is to  
188 defer some or all of the award of attorney's fees until the court  
189 is advised of the actual claims rate and results.

190  
191 Another topic that normally should be considered is any  
192 agreement that must be identified under Rule 23(e)(3).

193  
194 The parties may supply information to the court on any other  
195 topic that they regard as pertinent to the determination whether  
196 the proposal is fair, reasonable, and adequate. The court may  
197 direct the parties to supply further information about the topics  
198 they do address, or to supply information on topics they do not  
199 address. The court should ~~it must~~ not direct notice to the class  
200 until the parties' submissions show it is likely that the court  
201 will be able to approve the proposal after notice to the class and  
202 a final approval hearing.

204           **Subdivision (e) (2).** The central concern in reviewing a  
205 proposed class-action settlement is that it be fair, reasonable,  
206 and adequate. ~~This standard emerged from case law implementing~~  
207 ~~Rule 23(e)'s requirement of court approval for class-action~~  
208 ~~settlements. It was formally recognized in the rule through the~~  
209 ~~2003 amendments. By then, Courts have~~ generated lists of factors  
210 to shed light on this central concern. Overall, these factors  
211 focused on comparable considerations, but each circuit has  
212 developed its own vocabulary for expressing these concerns. In  
213 some circuits, these lists have remained essentially unchanged for  
214 thirty or forty years. The goal of this amendment is not to  
215 displace any of these factors, but rather to focus the court and  
216 the lawyers on the core concerns of procedure and substance that  
217 should guide the decision whether to approve the proposal.  
218

219           One reason for this amendment is that a lengthy list of  
220 factors can take on an independent life, potentially distracting  
221 attention from the central concerns that inform the settlement-  
222 review process. A circuit's list might include a dozen or more  
223 separately articulated factors. Some of those factors -- perhaps  
224 many -- may not be relevant to a particular case or settlement  
225 proposal. Those that are relevant may be more or less important to  
226 the particular case. Yet counsel and courts may feel it necessary  
227 to address every ~~single~~ factor on a given circuit's list in every  
228 case. The sheer number of factors can distract both the court and  
229 the parties from the central concerns that bear on review under  
230 Rule 23(e)(2).  
231

232           This amendment therefore directs the parties to present the  
233 settlement to the court in terms of a shorter list of core  
234 concerns, by focusing on the primary procedural considerations and  
235 substantive qualities that should always matter to the decision  
236 whether to approve the proposal.  
237

238           Approval under Rule 23(e)(2) is required only when class  
239 members would be bound under Rule 23(c)(3). Accordingly, in  
240 addition to evaluating the proposal itself, the court must  
241 determine whether it can certify the class under the standards of  
242 Rule 23(a) and (b) for purposes of judgment based on the proposal.  
243

244           **Paragraphs (A) and (B).** These paragraphs identify matters  
245 that might be described as "procedural" concerns, looking to the  
246 conduct of the litigation and of the negotiations leading up to the  
247 proposed settlement. Attention to these matters is an important  
248 foundation for scrutinizing the substance specifics of the proposed  
249 settlement. If the court has appointed class counsel or interim  
250 class counsel, it will have made an initial evaluation of counsel's  
251 capacities and experience. But the focus at this point is on the  
252 actual performance of counsel acting on behalf of the class.  
253

254           The information submitted under Rule 23(e)(1) may provide a  
255 useful starting point in assessing these topics. For example, the  
256 nature and amount of discovery in this or other cases, or the



257 actual outcomes of other cases, may indicate whether counsel  
258 negotiating on behalf of the class had an adequate information  
259 base. The pendency of other litigation about the same general  
260 subject on behalf of class members may also be pertinent. The  
261 conduct of the negotiations may be important as well. For example,  
262 the involvement of a neutral or court-affiliated mediator or  
263 facilitator in those negotiations may bear on whether they were  
264 conducted in a manner that would protect and further the class  
265 interests. ~~In undertaking this analysis, the court may also refer~~  
266 ~~to Rule 23(g)'s criteria for appointment of class counsel; the~~  
267 ~~concern is whether the actual conduct of counsel has been~~  
268 ~~consistent with what Rule 23(g) seeks to ensure.~~ Particular  
269 attention might focus on the treatment of any award of attorney's  
270 fees, with respect to both the manner of negotiating the fee award  
271 and its terms.

272  
273 **Paragraphs (C) and (D).** These paragraphs focus on what might  
274 be called a "substantive" review of the terms of the proposed  
275 settlement. The relief that the settlement is expected to provide  
276 to class members is a central concern. Measuring the proposed  
277 relief may require evaluation of any the proposed claims process;  
278 directing that the parties report back to the court about and a  
279 prediction of how many claims will be made; if the notice to the  
280 class calls for pre-approval submission of claims, actual claims  
281 experience may be important. The contents of any agreement  
282 identified under Rule 23(e)(3) may also bear on the adequacy of the  
283 proposed relief, particularly regarding the equitable treatment of  
284 all members of the class.

285  
286 Another central concern will relate to the cost and risk  
287 involved in pursuing a litigated outcome. Often, courts may need  
288 to forecast ~~what~~ the likely range of possible classwide recoveries  
289 ~~might be~~ and the likelihood of success in obtaining such results.  
290 That forecast cannot be done with arithmetic accuracy, but it can  
291 provide a benchmark for comparison with the settlement figure.

292  
293 If the class has not yet been certified for trial, the court  
294 may consider whether certification for litigation would be granted  
295 were the settlement not approved.

296  
297 Examination of the attorney-fee provisions may also be  
298 valuable in important to assessing the fairness of the proposed  
299 settlement. Ultimately, any award of attorney's fees must be  
300 evaluated under Rule 23(h), and no rigid limits exist for such  
301 awards. Nonetheless, the relief actually delivered to the class  
302 can be a significant ~~an important~~ factor in determining the  
303 appropriate fee award. ~~Provisions for reporting back to the court~~  
304 ~~about actual claims experience, and deferring a portion of the fee~~  
305 ~~award until the claims experience is known, may bear on the~~  
306 ~~fairness of the overall proposed settlement.~~

307  
308 Often it will be important for the court to scrutinize the  
309 method of claims processing to ensure that it facilitates filing

310 legitimate claims. A claims processing method should deter or  
311 defeat unjustified claims, but ~~unduly demanding claims procedures~~  
312 ~~can impede legitimate claims. Particularly if some or all of any~~  
313 ~~funds remaining at the end of the claims process must be returned~~  
314 ~~to the defendant,~~ the court should ~~must~~ be alert to whether the  
315 claims process is unduly demanding.  
316

317 Paragraph (D) calls attention to a concern that may apply to  
318 some class action settlements -- inequitable treatment of some  
319 class members vis-a-vis others. Matters of concern could include  
320 whether the apportionment of relief among class members takes  
321 appropriate account of differences among their claims, and whether  
322 the scope of the release may affect class members in different ways  
323 that bear on ~~affect~~ the apportionment of relief.  
324

325 **Subdivisions (e) (3) and (e) (4).** A ~~h~~Headings are ~~is~~ added to  
326 subdivisions (e)(3) and (e)(4) in accord with style conventions.  
327 ~~These~~is ~~additions~~ are ~~is~~ intended to be stylistic only.  
328

329 ~~**Subdivision (e) (4).** A heading is added to subdivision (e)(4)~~  
330 ~~in accord with style conventions. This addition is intended to be~~  
331 ~~stylistic only.~~  
332

333 **Subdivision (e) (5).** ~~Objecting class members can play a~~  
334 ~~critical role in the settlement approval process under Rule 23(e).~~  
335 ~~Class members have the right under Rule 23(e)(5) to submit~~  
336 ~~objections to the proposal. The submissions required by~~  
337 ~~Rule 23(e)(1) may provide information~~ critical ~~important~~ to  
338 decisions whether to object or opt out. Objections by class  
339 members can provide the court with important information bearing on  
340 its determination under Rule 23(e)(2) whether to approve the  
341 proposal.  
342

343 **Subdivision (e) (5) (A).** The rule is amended to remove the  
344 requirement of court approval for every withdrawal of an objection.  
345 An objector should be free to withdraw on concluding that an  
346 objection is not justified. But Rule 23(e)(5)(B)(i) requires court  
347 approval of any payment or other consideration in connection with  
348 withdrawing the objection.  
349

350 The rule is also amended to clarify that objections must  
351 provide sufficient specifics to enable the parties to respond to  
352 them and the court to evaluate them. One feature required of  
353 objections is specification whether the objection asserts interests  
354 of only the objector, or of some subset of the class, or of all  
355 class members. Beyond that, the rule directs that the objection  
356 state its grounds "with specificity." Failure to provide needed  
357 specificity may be a basis for rejecting an objection. Courts  
358 should take care, however, to avoid unduly burdening class members  
359 who wish to object, and to recognize that a class member who is not  
360 represented by counsel may present objections that do not adhere to  
361 technical legal standards.  
362

363           **Subdivision (e) (5) (B).** Good-faith objections can assist the  
364 court in evaluating a proposal under Rule 23(e)(2). It is  
365 legitimate for an objector to seek payment for providing such  
366 assistance under Rule 23(h). ~~As recognized in the 2003 Committee~~  
367 ~~Note to Rule 23(h): "In some situations, there may be a basis for~~  
368 ~~making an award to other counsel whose work produced a beneficial~~  
369 ~~result for the class, such as \* \* \* attorneys who represented~~  
370 ~~objectors to a proposed settlement under Rule 23(e)."~~  
371

372           But some objectors may be seeking only personal gain, and  
373 using objections to obtain benefits for themselves rather than  
374 assisting in the settlement-review process. At least in some  
375 instances, it seems that objectors -- or their counsel -- have  
376 sought to extract tribute to withdraw their objections or dismiss  
377 appeals from judgments approving class settlements. And class  
378 counsel sometimes may feel that avoiding the delay produced by an  
379 appeal justifies providing payment or other consideration to these  
380 objectors. Although the payment may advance class interests in a  
381 particular case, allowing payment perpetuates a system that can  
382 encourage objections advanced for improper purposes.  
383

384           The court-approval requirement currently in Rule 23(e)(5)  
385 partly addresses this concern. Because the concern only applies  
386 when consideration is given in connection with withdrawal of an  
387 objection, however, the amendment requires approval under  
388 Rule 23(e)(5)(B)(i) only when consideration is involved. Although  
389 such payment is usually made to objectors or their counsel, the  
390 rule also requires court approval if a payment in connection with  
391 forgoing or withdrawing an objection or appeal is instead to  
392 another recipient. The term "consideration" should be broadly  
393 interpreted, particularly when the withdrawal includes some  
394 arrangements beneficial to objector counsel. If the consideration  
395 involves a payment to counsel for an objector, the proper procedure  
396 is by motion under Rule 23(h) for an award of fees; ~~the court may~~  
397 ~~approve the fee if the objection assisted the court in~~  
398 ~~understanding and evaluating the settlement even though the~~  
399 ~~settlement was approved as proposed.~~  
400

401           Rule 23(e)(5)(B)(ii) applies to consideration in connection  
402 with forgoing, dismissing, or abandoning an appeal from a judgment  
403 approving the proposal. Because an appeal by a class-action  
404 objector may produce much longer delay than an objection before the  
405 district court, it is important to extend the court-approval  
406 requirement to apply in the appellate context. The district court  
407 is best positioned to determine whether to approve such  
408 arrangements; hence, the rule requires that the motion seeking  
409 approval be made to the district court.  
410

411           Until the appeal is docketed by the circuit clerk, the  
412 district court may dismiss the appeal on stipulation of the parties  
413 or on the appellant's motion. See Fed. R. App. P. 42(a).  
414 Thereafter, the court of appeals has authority to decide whether to  
415 dismiss the appeal. This rule's requirement of district court

416 approval of any consideration in connection with such dismissal by  
417 the court of appeals has no effect on the authority of the court of  
418 appeals to decide whether to dismiss ~~over~~ the appeal. It is,  
419 instead, a requirement that applies only to providing consideration  
420 in connection with forgoing, dismissing, or abandoning an appeal.  
421 ~~A party dissatisfied with the district court's order under~~  
422 ~~Rule 23(e)(5)(B) may appeal the order.~~

423  
424 **Subdivision (e) (5) (C).** Because the court of appeals has  
425 jurisdiction over an objector's appeal from the time that it is  
426 docketed in the court of appeals, the procedure of Rule 62.1  
427 applies. That procedure does not apply after the court of appeals'  
428 mandate returns the case to the district court.

429  
430 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the  
431 court should direct notice to the class regarding a proposed class-  
432 action settlement in cases in which class certification has not yet  
433 been granted only after determining that the prospect of eventual  
434 class certification justifies giving notice. This decision has  
435 been called ~~is sometimes inaccurately characterized as~~ "preliminary  
436 approval" of the proposed class certification. But it does not  
437 grant or deny class certification, and review under Rule 23(f)  
438 would be premature. This amendment makes it clear that an appeal  
439 under this rule is not permitted until the district court decides  
440 whether to certify the class.

441  
442 The rule is also amended to extend the time to file a petition  
443 for review of a class-action certification order to 45 days  
444 whenever a party is the United States, one of its agencies, or a  
445 United States officer or employee sued for an act or omission  
446 occurring in connection with duties performed on the United States'  
447 behalf. In such a case, the extension applies to a petition for  
448 permission to appeal by any party. The extension of time  
449 recognizes -- as under Rules 4(i) and 12(a) and Appellate  
450 Rules 4(a)(1)(B) and 40(a)(1) -- that the United States has a  
451 special need for additional time in regard to these matters. The  
452 extension applies whether the officer or employee is sued in an  
453 official capacity or an individual capacity; ~~the defense is usually~~  
454 ~~conducted by the United States even though the action asserts~~  
455 ~~claims against the officer or employee in an individual capacity.~~  
456 An action against a former officer or employee of the United States  
457 is covered by this provision in the same way as an action against  
458 a present officer or employee. Termination of the relationship  
459 between the individual defendant and the United States does not  
reduce the need for additional time.

"Clean" Rule and Note

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

1           **Rule 23. Class Actions**

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

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

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

9  
10           **(2) Notice.**

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

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

28  
29                                   \* \* \* \* \*

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

38  
39           **(1) Notice to the Class**

40  
41                   **(A) Information That Parties Must Provide to the**  
42                   **Court.** The parties must provide the court  
43                   with information sufficient to enable it to  
44                   determine whether to give notice of the  
45                   proposal to the class.  
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99
- (B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

    - (i) approve the proposal under Rule 23(e)(2); and
    - (ii) certify the class for purposes of judgment on the proposal.
  - (2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

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

      - (i) the costs, risks, and delay of trial and appeal;
      - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
      - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
      - (iv) any agreement required to be identified under Rule 23(e)(3); and
    - (D) the proposal treats class members equitably relative to each other.
  - (3) *Identification of Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
  - (4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to

100 request exclusion to individual class members who  
101 had an earlier opportunity to request exclusion but  
102 did not do so.

103  
104 **(5) Class-Member Objections.**

105  
106 **(A) In General.** Any class member may object to  
107 the proposal if it requires court approval  
108 under this subdivision (e). The objection  
109 must state whether it applies only to the  
110 objector, to a specific subset of the class,  
111 or to the entire class, and also state with  
112 specificity the grounds for the objection.

113  
114 **(B) Court Approval Required for Payment In**  
115 **Connection With an Objection.** Unless approved  
116 by the court after a hearing, no payment or  
117 other consideration may be provided in  
118 connection with:

119  
120 **(i)** forgoing or withdrawing an objection, or

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

125  
126 **(C) Procedure for Approval After an Appeal.** If  
127 approval under Rule 23(e)(5)(B) has not been  
128 obtained before an appeal is docketed in the  
129 court of appeals, the procedure of Rule 62.1  
130 applies while the appeal remains pending.

131  
132 **(f) Appeals.** A court of appeals may permit an appeal from an  
133 order granting or denying class-action certification  
134 under this rule, but not from an order under  
135 Rule 23(e)(1). A party must file a petition for  
136 permission to appeal with the circuit clerk within 14  
137 days after the order is entered, or within 45 days after  
138 the order is entered if any party is the United States,  
139 a United States agency, or a United States officer or  
140 employee sued for an act or omission occurring in  
141 connection with duties performed on the United States'  
142 behalf. An appeal does not stay proceedings in the  
143 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           **Subdivision (c) (2)**. As amended, Rule 23(e)(1) provides that  
5 the court must direct notice to the class regarding a proposed  
6 class-action settlement only after determining that the prospect of  
7 class certification and approval of the proposed settlement  
8 justifies giving notice. This decision has been called  
9 "preliminary approval" of the proposed class certification in  
10 Rule 23(b)(3) actions. It is common to send notice to the class  
11 simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B),  
12 including a provision for class members to decide by a certain date  
13 whether to opt out. This amendment recognizes the propriety of  
14 this combined notice practice.

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

31  
32           Rule 23(c)(2)(B) is amended to take account of these changes.  
33 The rule continues to call for giving class members "the best  
34 notice that is practicable." It does not specify any particular  
35 means as preferred. Although it may sometimes be true that  
36 electronic methods of notice, for example email, are the most  
37 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.

40  
41           Instead of preferring any one means of notice, therefore, the  
42 amended rule relies on courts and counsel to focus on the means or  
43 combination of means most likely to be effective in the case before  
44 the court. The court should exercise its discretion to select  
45 appropriate means of giving notice. In providing the court with  
46 sufficient information to enable it to decide whether to give  
47 notice to the class of a proposed class-action settlement under  
48 Rule 23(e)(1), it would ordinarily be important to include details  
49 about the proposed method of giving notice to the class and to  
50 provide the court with a copy of each notice the parties propose to  
51 use.

52  
53           In determining whether the proposed means of giving notice is  
54 appropriate, the court should also give careful attention to the  
55 content and format of the notice and, if notice is given under both  
56 Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members



57 must submit to obtain relief.

58  
59 Counsel should consider which method or methods of giving  
60 notice will be most effective; simply assuming that the  
61 "traditional" methods are best may disregard contemporary  
62 communication realities. The ultimate goal of giving notice is to  
63 enable class members to make informed decisions about whether to  
64 opt out or, in instances where a proposed settlement is involved,  
65 to object or to make claims. Rule 23(c)(2)(B) directs that the  
66 notice be "in plain, easily understood language." Means, format,  
67 and content that would be appropriate for class members likely to  
68 be sophisticated, for example in a securities fraud class action,  
69 might not be appropriate for a class made up in significant part of  
70 members likely to be less sophisticated. The court and counsel may  
71 wish to consider the use of class notice experts or professional  
72 claims administrators.

73  
74 Attention should focus also on the method of opting out  
75 provided in the notice. The proposed method should be as  
76 convenient as possible, while protecting against unauthorized opt-  
77 out notices.

78  
79 **Subdivision (e).** The introductory paragraph of Rule 23(e) is  
80 amended to make explicit that its procedural requirements apply in  
81 instances in which the court has not certified a class at the time  
82 that a proposed settlement is presented to the court. The notice  
83 required under Rule 23(e)(1) then should also satisfy the notice  
84 requirements of amended Rule 23(c)(2)(B) for a class to be  
85 certified under Rule 23(b)(3), and trigger the class members' time  
86 to request exclusion. Information about the opt-out rate could  
87 then be available to the court when it considers final approval of  
88 the proposed settlement.

89  
90 **Subdivision (e) (1).** The decision to give notice of a proposed  
91 settlement to the class is an important event. It should be based  
92 on a solid record supporting the conclusion that the proposed  
93 settlement will likely earn final approval after notice and an  
94 opportunity to object. The parties must provide the court with  
95 information sufficient to enable it to decide whether notice should  
96 be sent. At the time they seek notice to the class, the proponents  
97 of the settlement should ordinarily provide the court with all  
98 available materials they intend to submit to support approval under  
99 Rule 23(e)(2) and that they intend to make available to class  
100 members. The amended rule also specifies the standard the court  
101 should use in deciding whether to send notice -- that it likely  
102 will be able both to approve the settlement proposal under  
103 Rule 23(c)(2) and, if it has not previously certified a class, to  
104 certify the class for purposes of judgment on the proposal.

105  
106 The subjects to be addressed depend on the specifics of the  
107 particular class action and proposed settlement. But some general  
108 observations can be made.

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

127  
128 Regarding the proposed settlement, many types of information  
129 might appropriately be provided to the court. A basic focus is the  
130 extent and type of benefits that the settlement will confer on the  
131 members of the class. Depending on the nature of the proposed  
132 relief, that showing may include details of the claims process that  
133 is contemplated and the anticipated rate of claims by class  
134 members. Because some funds are frequently left unclaimed, the  
135 settlement agreement ordinarily should address the distribution  
136 of those funds.

137  
138 The parties should also supply the court with information  
139 about the likely range of litigated outcomes, and about the risks  
140 that might attend full litigation. Information about the extent of  
141 discovery completed in the litigation or in parallel actions may  
142 often be important. In addition, as suggested by Rule 23(b)(3)(A),  
143 the parties should provide the court information about the  
144 existence of other pending or anticipated litigation on behalf of  
145 class members involving claims that would be released under the  
146 proposal.

147  
148 The proposed handling of an award of attorney's fees under  
149 Rule 23(h) is another topic that ordinarily should be addressed in  
150 the parties' submission to the court. In some cases, it will be  
151 important to relate the amount of an award of attorney's fees to  
152 the expected benefits to the class. One method of addressing this  
153 issue is to defer some or all of the award of attorney's fees until  
154 the court is advised of the actual claims rate and results.

155  
156 Another topic that normally should be considered is any  
157 agreement that must be identified under Rule 23(e)(3).

158  
159 The parties may supply information to the court on any other  
160 topic that they regard as pertinent to the determination whether  
161 the proposal is fair, reasonable, and adequate. The court may  
162 direct the parties to supply further information about the topics  
163 they do address, or to supply information on topics they do not

164 address. The court should not direct notice to the class until the  
165 parties' submissions show it is likely that the court will be able  
166 to approve the proposal after notice to the class and a final  
167 approval hearing.

168  
169 **Subdivision (e) (2).** The central concern in reviewing a  
170 proposed class-action settlement is that it be fair, reasonable,  
171 and adequate. Courts have generated lists of factors to shed light  
172 on this central concern. Overall, these factors focus on  
173 comparable considerations, but each circuit has developed its own  
174 vocabulary for expressing these concerns. In some circuits, these  
175 lists have remained essentially unchanged for thirty or forty  
176 years. The goal of this amendment is not to displace any of these  
177 factors, but rather to focus the court and the lawyers on the core  
178 concerns of procedure and substance that should guide the decision  
179 whether to approve the proposal.

180  
181 One reason for this amendment is that a lengthy list of  
182 factors can take on an independent life, potentially distracting  
183 attention from the central concerns that inform the settlement-  
184 review process. A circuit's list might include a dozen or more  
185 separately articulated factors. Some of those factors -- perhaps  
186 many -- may not be relevant to a particular case or settlement  
187 proposal. Those that are relevant may be more or less important to  
188 the particular case. Yet counsel and courts may feel it necessary  
189 to address every factor on a given circuit's list in every case.  
190 The sheer number of factors can distract both the court and the  
191 parties from the central concerns that bear on review under  
192 Rule 23(e)(2).

193  
194 This amendment therefore directs the parties to present the  
195 settlement to the court in terms of a shorter list of core  
196 concerns, by focusing on the primary procedural considerations and  
197 substantive qualities that should always matter to the decision  
198 whether to approve the proposal.

199  
200 Approval under Rule 23(e)(2) is required only when class  
201 members would be bound under Rule 23(c)(3). Accordingly, in  
202 addition to evaluating the proposal itself, the court must  
203 determine whether it can certify the class under the standards of  
204 Rule 23(a) and (b) for purposes of judgment based on the proposal.

205  
206 **Paragraphs (A) and (B).** These paragraphs identify matters  
207 that might be described as "procedural" concerns, looking to the  
208 conduct of the litigation and of the negotiations leading up to the  
209 proposed settlement. Attention to these matters is an important  
210 foundation for scrutinizing the substance of the proposed  
211 settlement. If the court has appointed class counsel or interim  
212 class counsel, it will have made an initial evaluation of counsel's  
213 capacities and experience. But the focus at this point is on the  
214 actual performance of counsel acting on behalf of the class.

215 The information submitted under Rule 23(e)(1) may provide a  
216 useful starting point in assessing these topics. For example, the  
217 nature and amount of discovery in this or other cases, or the  
218 actual outcomes of other cases, may indicate whether counsel  
219 negotiating on behalf of the class had an adequate information  
220 base. The pendency of other litigation about the same general  
221 subject on behalf of class members may also be pertinent. The  
222 conduct of the negotiations may be important as well. For example,  
223 the involvement of a neutral or court-affiliated mediator or  
224 facilitator in those negotiations may bear on whether they were  
225 conducted in a manner that would protect and further the class  
226 interests. Particular attention might focus on the treatment of  
227 any award of attorney's fees, with respect to both the manner of  
228 negotiating the fee award and its terms.  
229

230 **Paragraphs (C) and (D).** These paragraphs focus on what might  
231 be called a "substantive" review of the terms of the proposed  
232 settlement. The relief that the settlement is expected to provide  
233 to class members is a central concern. Measuring the proposed  
234 relief may require evaluation of any proposed claims process;  
235 directing that the parties report back to the court about actual  
236 claims experience may be important. The contents of any agreement  
237 identified under Rule 23(e)(3) may also bear on the adequacy of the  
238 proposed relief, particularly regarding the equitable treatment of  
239 all members of the class.  
240

241 Another central concern will relate to the cost and risk  
242 involved in pursuing a litigated outcome. Often, courts may need  
243 to forecast the likely range of possible classwide recoveries and  
244 the likelihood of success in obtaining such results. That forecast  
245 cannot be done with arithmetic accuracy, but it can provide a  
246 benchmark for comparison with the settlement figure.  
247

248 If the class has not yet been certified for trial, the court  
249 may consider whether certification for litigation would be granted  
250 were the settlement not approved.  
251

252 Examination of the attorney-fee provisions may also be  
253 valuable in assessing the fairness of the proposed settlement.  
254 Ultimately, any award of attorney's fees must be evaluated under  
255 Rule 23(h), and no rigid limits exist for such awards.  
256 Nonetheless, the relief actually delivered to the class can be a  
257 significant factor in determining the appropriate fee award.  
258

259 Often it will be important for the court to scrutinize the  
260 method of claims processing to ensure that it facilitates filing  
261 legitimate claims. A claims processing method should deter or  
262 defeat unjustified claims, but the court should be alert to whether  
263 the claims process is unduly demanding.  
264

265 Paragraph (D) calls attention to a concern that may apply to  
266 some class action settlements -- inequitable treatment of some  
267 class members vis-a-vis others. Matters of concern could include

268 whether the apportionment of relief among class members takes  
269 appropriate account of differences among their claims, and whether  
270 the scope of the release may affect class members in different ways  
271 that bear on the apportionment of relief.

272  
273 **Subdivisions (e)(3) and (e)(4).** Headings are added to  
274 subdivisions (e)(3) and (e)(4) in accord with style conventions.  
275 These additions are intended to be stylistic only.

276  
277 **Subdivision (e)(5).** The submissions required by Rule 23(e)(1)  
278 may provide information critical to decisions whether to object or  
279 opt out. Objections by class members can provide the court with  
280 important information bearing on its determination under  
281 Rule 23(e)(2) whether to approve the proposal.

282  
283 **Subdivision (e)(5)(A).** The rule is amended to remove the  
284 requirement of court approval for every withdrawal of an objection.  
285 An objector should be free to withdraw on concluding that an  
286 objection is not justified. But Rule 23(e)(5)(B)(i) requires court  
287 approval of any payment or other consideration in connection with  
288 withdrawing the objection.

289  
290 The rule is also amended to clarify that objections must  
291 provide sufficient specifics to enable the parties to respond to  
292 them and the court to evaluate them. One feature required of  
293 objections is specification whether the objection asserts interests  
294 of only the objector, or of some subset of the class, or of all  
295 class members. Beyond that, the rule directs that the objection  
296 state its grounds "with specificity." Failure to provide needed  
297 specificity may be a basis for rejecting an objection. Courts  
298 should take care, however, to avoid unduly burdening class members  
299 who wish to object, and to recognize that a class member who is not  
300 represented by counsel may present objections that do not adhere to  
301 technical legal standards.

302  
303 **Subdivision (e)(5)(B).** Good-faith objections can assist the  
304 court in evaluating a proposal under Rule 23(e)(2). It is  
305 legitimate for an objector to seek payment for providing such  
306 assistance under Rule 23(h).

307  
308 But some objectors may be seeking only personal gain, and  
309 using objections to obtain benefits for themselves rather than  
310 assisting in the settlement-review process. At least in some  
311 instances, it seems that objectors -- or their counsel -- have  
312 sought to extract tribute to withdraw their objections or dismiss  
313 appeals from judgments approving class settlements. And class  
314 counsel sometimes may feel that avoiding the delay produced by an  
315 appeal justifies providing payment or other consideration to these  
316 objectors. Although the payment may advance class interests in a  
317 particular case, allowing payment perpetuates a system that can  
318 encourage objections advanced for improper purposes.

319

320 The court-approval requirement currently in Rule 23(e)(5)  
321 partly addresses this concern. Because the concern only applies  
322 when consideration is given in connection with withdrawal of an  
323 objection, however, the amendment requires approval under  
324 Rule 23(e)(5)(B)(i) only when consideration is involved. Although  
325 such payment is usually made to objectors or their counsel, the  
326 rule also requires court approval if a payment in connection with  
327 forgoing or withdrawing an objection or appeal is instead to  
328 another recipient. The term "consideration" should be broadly  
329 interpreted, particularly when the withdrawal includes some  
330 arrangements beneficial to objector counsel. If the consideration  
331 involves a payment to counsel for an objector, the proper procedure  
332 is by motion under Rule 23(h) for an award of fees.  
333

334 Rule 23(e)(5)(B)(ii) applies to consideration in connection  
335 with forgoing, dismissing, or abandoning an appeal from a judgment  
336 approving the proposal. Because an appeal by a class-action  
337 objector may produce much longer delay than an objection before the  
338 district court, it is important to extend the court-approval  
339 requirement to apply in the appellate context. The district court  
340 is best positioned to determine whether to approve such  
341 arrangements; hence, the rule requires that the motion seeking  
342 approval be made to the district court.  
343

344 Until the appeal is docketed by the circuit clerk, the  
345 district court may dismiss the appeal on stipulation of the parties  
346 or on the appellant's motion. See Fed. R. App. P. 42(a).  
347 Thereafter, the court of appeals has authority to decide whether to  
348 dismiss the appeal. This rule's requirement of district court  
349 approval of any consideration in connection with such dismissal by  
350 the court of appeals has no effect on the authority of the court of  
351 appeals to decide whether to dismiss the appeal. It is, instead,  
352 a requirement that applies only to providing consideration in  
353 connection with forgoing, dismissing, or abandoning an appeal.  
354

355 **Subdivision (e) (5) (C).** Because the court of appeals has  
356 jurisdiction over an objector's appeal from the time that it is  
357 docketed in the court of appeals, the procedure of Rule 62.1  
358 applies. That procedure does not apply after the court of appeals'  
359 mandate returns the case to the district court.  
360

361 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the  
362 court should direct notice to the class regarding a proposed class-  
363 action settlement in cases in which class certification has not yet  
364 been granted only after determining that the prospect of eventual  
365 class certification justifies giving notice. This decision has  
366 been called "preliminary approval" of the proposed class  
367 certification. But it does not grant or deny class certification,  
368 and review under Rule 23(f) would be premature. This amendment  
369 makes it clear that an appeal under this rule is not permitted  
370 until the district court decides whether to certify the class.  
371

372           The rule is also amended to extend the time to file a petition  
373 for review of a class-action certification order to 45 days  
374 whenever a party is the United States, one of its agencies, or a  
375 United States officer or employee sued for an act or omission  
376 occurring in connection with duties performed on the United States'  
377 behalf. In such a case, the extension applies to a petition for  
378 permission to appeal by any party. The extension of time  
379 recognizes -- as under Rules 4(i) and 12(a) and Appellate  
380 Rules 4(a)(1)(B) and 40(a)(1) -- that the United States has a  
381 special need for additional time in regard to these matters. The  
382 extension applies whether the officer or employee is sued in an  
383 official capacity or an individual capacity. An action against a  
384 former officer or employee of the United States is covered by this  
385 provision in the same way as an action against a present officer or  
386 employee. Termination of the relationship between the individual  
387 defendant and the United States does not reduce the need for  
additional time.

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SUMMARY OF COMMENTS  
Rule 23 Package  
2016-17

Commentary on the following issues is presented:

Overall assessment

Rule 23(c)

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

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

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

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

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

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

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

Ascertainability

Pick off

Other issues raised

## Overall assessment

### Washington D.C. hearing

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

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

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

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

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

### Phoenix hearing

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

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

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

### Written comments

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

package will improve class action practice even though they are modest.

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

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

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

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

Washington D.C. hearing

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

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

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

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The requirement of individualized notice in (b)(3) cases should be relaxed in cases involving small value claims. For example, if the claims are for less than \$100 individual notice should be unnecessary, or handled on a randomized rather than universal basis. I proposed this in a 2006 article in the NYU Law Review. But don't weaken the means

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

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

#### Phoenix hearing

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

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): We favor the expansion of means for notice. The selection of a notice method must take account of demographics. We particularly endorse the language in the draft Note recognizing that many still do not have access to a computer or the Internet. We think that the Note should highlight the need to ensure that electronic class notices are digitally accessible. And important work should be done on readability of notices. The Committee Note should be strengthened to stress readability, and stress it in terms that take account of the educational attainment of the class members. For example, graphics can be very helpful. But there is no reason to favor paper over electronic methods of giving notice. We think that the Note

should be strengthened in four ways: (1) the judge should be presented with the various forms of notice formatted exactly as the notice will appear either in print or electronically; (2) counsel should be required to make an affirmative showing that the notice is in fact readable to the vast majority of class members; (3) the Note should encourage the use of good design and infographics and, for electronic methods, hyperlinks to definitions or other clarifying materia; (4) electronic notice should be carefully vetted to ensure compliance with the obligation to ensure digital accessibility for people with disabilities. We also think that the FJC should update its Model Class Action notices. They should be build from the bottom up using suggestions and feedback from ordinary people rather than "dumbing down" dense legalese.

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

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

Paul Bland (Public Justice); We challenged the secrecy in the Remington case, but the problems there do not show that the proposal here is unwise. We support the proposed amendment. There will be settings where electronic notice is best. One



example is a case involving a defective app on iPhones. Another involved a cable company; using electronic means got more responses than would have been true with U.S. mail. Communications methods are changing at great speed. Don't presume we can guess now what will be prevalent means of communication in five or ten years. The risk of a reverse auction is overstated. Reversion provisions are rare; judges are alert to their risks. And plaintiff counsel know that judges are also alert to making sure that the notice methods will really work. Cy pres provisions can sometimes mitigate. But the reality is that the plaintiff lawyers are trying to get the money to the class members, and the judges are scrutinizing their efforts.

Dallas/Fort Worth (telephonic) hearing

Ariana Tadler (Milberg): I support the proposed amendment. It helpfully clarifies that notice can be provided by various and multiple means. In today's world, mail and print are not the go-to media for communicating. In class actions, the pertinent question is what method will provide the best notice practicable. There is a "dizzying array" of options for doing so in this digital age. One thing is abundantly clear -- one size does not fit all for this purpose. Some assert that this proposed amendment somehow prefers electronic notice, but it really does not do that. The Committee was right to take something of a "minimalist" approach in its Note. Trying to foresee future developments in electronic communications and offer a hierarchy of what is preferred would be an impossible task. Other comments assume that the amendment would somehow endorse using "banner ads" as the only means of giving notice. But that attitude fails to take account of modern realities. Unlike U.S. mail, electronic means can facilitate multiple efforts at giving notice, and also provide specific feedback on how successful the notice effort has been. Any effective notice effort must now begin by considering the best ways to reach the target audience. My family illustrates the dramatic ways in which communications habits have changed and are changing. My grandmother, born in 1916, has never used a computer. My mother, born in 1943, got her first computer in 2008, but uses no social media. My husband, born in 1966, is mainly a Facebook user, and "does not open postal mail." My two sons, though they are only three years apart in age, have dramatically different habits. The older one, born in 1997, relies primarily on Facebook and social media. He has "tens of thousands of unread emails," and checks his postal mail perhaps once a month. The younger son, born in 2000, has a Facebook account that is dormant, and presently relies mainly on Instagram and Snapchat, relying also on news feeds through these sources. He rarely and reluctantly uses email, and will use texts for his family. Therefore, for both the court and counsel, the task of designing an effective notice program must be tailored to the case. And multiple means may be the best choice. She therefore endorses the submission of AAJ on this topic. She also thinks that adding "one or more of the following" to the

last sentence in the preliminary draft could be an improvement. She was thinking of recommending that the draft be revised to say "and/or" between U.S. mail and electronic means, but recognizes that trying to do so might be inconsistent with the style of the rules.

Steven Weisbrot (Angeion Group) (testimony and CV-2016-0004-0062): I am a partner and Executive Vice President of Notice & Strategy at Angeion, which is a national class action notice and claims administration company. I support the proposed amendment to the notice provision, for it is rooted in common sense and progressive logic that mirrors the current media landscape, and remains flexible enough to accommodate the changes in technology that are currently happening and will inevitably continue to occur for years into the future. Each settlement has its own unique media fingerprint, which is what should guide the preferred dissemination of notice, including individual notice. This individual tailoring of notice programs is critical, given the breakneck speed with which advertising is changing. A "one size fits all" solution that ignores modern communication realities will not work; it is essential to maintain the level of flexibility that the proposed amendment provides. But it is also critical to recognize that the amendment will be counter-productive without more rigorous judicial analysis of any proposed notice plan during the preliminary approval process. We think that no one factor (even "reach") should be given primacy in that assessment. I recently met with representatives of the FJC and suggested a comprehensive approach to fashioning a robust class notice program at the preliminary approval stage of class litigation. The media environment has changed vastly since *Mullane* was decided in 1950, and in class actions it is often true that defendants are in regular contact with class members via email. Indeed, "U.S. mail is becoming less customary in our society." For example, in a recent Telephone Consumer Protection Act settlement, we found a significantly higher claim filing rate amongst those noticed by email compared to those noticed by traditional U.S. mail. For those noticed by email, it was relatively simple to link to the claims filing webpage and finalize a claim, as compared with the extra steps required to complete a claim via the U.S. mail notice program. But the key point is that notice programs should be evaluated one by one, using the following criteria: (1) how does the defendant typically communicate with class members; (2) what are the class member demographics; (3) what are the class members' psychographics; (4) what is the amount of the overall settlement in relation to the cost of the notice; and (5) what are the age and media habits of class members? In view of these current realities, adding the phrase "one or more of the following" to the rule-amendment proposal would be a good change. It reflects the value of repeated efforts to give notice, sometimes by multiple methods.

## Written Comments

Todd Hilsee (16-CV-E & supplemented by CV-2016-0004-080):

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

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

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

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

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

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

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

Katherine Kinsela (CV-2016-0004-0060): Based on my 24 years experience with class notice, I oppose the proposed changes regarding class notice. The changes are harmful because they (1) remove any clear standard for notice regardless of class injury; (2) equate all forms of media with individual notice; (3) evidence no understanding of the effectiveness of different forms of class communication; and (4) fail to address the most significant issue -- should all class actions be held to the same notice standard? Moreover, the changes are unnecessary, since courts have for years approved notice in hundreds of cases using media other than U.S. mail. The language of the proposal is vague and sweeps too broadly; "electronic means" can conflate email with electronic display advertising. Making this change "will likely open the floodgates to any and all notice methods." There cannot be individual notice through mass media. Due to the amendment, the "best notice practicable" may evolve into "cheapest notice possible," and usher in banner ads rather than individual mailed notice even in cases involving substantial recoveries and easy methods of identifying class members. Already, settling parties often demand the cheapest notice possible, and they sometimes enshrine an arbitrary notice budget in the settlement agreement. So-called "experts" with little or no media training routinely submit affidavits stating that a notice program meets due process standards even though a review by trained and experienced experts indicates that it does not. There has been a sea change in what is considered satisfactory reach for a notice program. Where formerly 85% or 90% reach was an ordinary goal, more recently the goal has slipped to 70% and there is a "race to the bottom." Email can work as a notice method if the email list is based on a transactional relationship between the sender and the recipient, but that is not true of all

email lists. Even with such a list, there is no reliable way to update the list and deliverability rates are low compared to U.S. mail. Moreover, the average American receives 88 emails a day but only about a dozen pieces of U.S. mail per week. The best solution would be to calibrate notice efforts with class injury. "A class action alleging false advertising regarding the organic content of a food product that settles for \$5 million is wholly different from cases alleging serious money damages." In cases involving serious money damages, the Note should make clear that in most cases with mailing data the preferred notice should be by U.S. mail. The new proposed sentence to Rule 23(c)(2)(B) should be replaced with the following:

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

Moreover, the Note should specify that notice experts should be used in most cases. Although the Note now refers also to "professional claims administrators," that is not the same thing as a class notice expert. Judges should require that testifying notice experts possess the following traits: (1) recognition by courts of expert status; (2) credentials that meet the standards of *Daubert* and *Kumho*; (3) training or in-depth experience in media planning; (4) thorough knowledge of Rule 23; (4) the ability to translate complicated legal issues into accurate plain language; (5) the ability to create effective print, Internet, radio, and television notices consistent with best advertising practices; (6) an understanding of direct notice deliverability issues; and (7) the ability to combine direct notice reach, when known, with media reach to ascertain overall unduplicated reach to class members. These requirements should be included in written guidelines and disseminated by the FJC for judicial education purposes. Otherwise the "watering down" of notice efforts will continue to occur. "In the 24 years I have designed and implemented notice programs, I have never heard a comment or seen a formal objection that a case had 'too much notice,' or that the notice was 'too expensive.' There is no ground swell of consumers clamoring for less access to their legal rights to keep costs down."

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

phone number seems more problematical because a government website would seem more secure.

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

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

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

electronic or other alternatives means of notice that are not demonstrated to be superior to mail.

Richard Simmons (Analytics) (CV-2016-0004-084): I have over 26 years of experience in designing and implementing class notification and claims programs. I can report that the use of digital notice, where appropriate, is common practice. Digital notice provides fundamentally different opportunities and challenges than traditional mailed notices. Existing practices, rules, and guidance that have been used to evaluate whether or not a notice program provides the "best practicable" notice are still necessary, but they are no longer sufficient to address the complexities of digital media. To address evolving methods of providing notice, the rules and Note should be modified to recommend that courts take account not only of the likelihood that members of the class will receive a message but also the extent to which they are likely to act in response to messages delivered by different means. The 2016 FTC orders to class action claims administrators about forms of notice is, to my knowledge, the first independent analysis of the effectiveness of alternative forms of class notice. When designing notice programs, a key question beyond initial "reach" is that the program actually prompt responses. It is possible to design a program that has great reach but actually minimizes the likelihood of claims being submitted. Digital notice is fundamentally different from traditional mailed notice because it can be targeted, calibrated, limited or expanded and because it can provide data regarding how recipients interact with the notice materials. Unfortunately, some in this business do not fully exploit the information-gathering characteristics of digital notice by gathering and reporting data on how many of the notices were actually opened, how many links were clicked, etc. Another strategy is to exploit those digital capacities to design a notice program that is actually more effective. Unfortunately, market forces in class action practice often seem to favor the lowest cost provider, while overlooking the critical questions of real effectiveness of the notice. Active management of a notice campaign, for example, often generates additional costs. In light of these realities, my view is that the amendments and Note are necessary, but no longer sufficient to deal with the advent of digital notice campaigns.

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

selecting a method of giving notice." We believe the proposed amendment will help judges do their job.



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

Washington D.C. hearing

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

Phoenix hearing

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

Written comments

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

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

Washington D.C. hearing

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

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

Phoenix hearing

James Weatherholtz: He is concerned about Note language about the standard for directing notice to the class and for approving a proposed settlement after notice to the class. One concern focuses on p. 222 of the published draft, where the Note says "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." That seems too strong. Does that mean the court may not take any action based on the expectation that the settlement will be approved? How about enjoining collateral litigation by class members? The decision to send notice should be recognized as a final judgment for some purposes (such as supporting an injunction against collateral litigation by class members). But that could be seen as inconsistent with the proposed change to Rule 23(f) regarding immediate review of decisions under Rule 23(e)(1), and might foster efforts to obtain immediate review under Rule 23(f). Another concern is that, later in the Note on p. 222 it is said that the court should concern itself with the claims rate. That should not be made dispositive, for people may have many reasons for declining to submit claims. Some may simply oppose the idea of class actions. That should not prevent approval of a settlement. Finally, the sentence citing § 3.07 of the ALI Principles on p. 223 should be removed because it seems tacitly to endorse the cy pres doctrine.

The prior sentence of the draft ("And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.") is not problematic. But the parties should be free simply agree to disposition of those funds; the court should not be involved in reviewing or rejecting that agreement.

Dallas/Fort Worth (telephonic) hearing

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

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

## Written comments

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

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

(2) Reference to attorney's fees arrangement as part of the preliminary approval decision. The draft says that the court should order notice unless the parties show that it

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

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

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

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

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

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

New York City Bar (CV-2016-0005-070): The Committee Note suggests twice that the court review claims rates in assessing settlements. We agree that such review is generally appropriate, but believe the Note should be edited to make it clear that such review is not always appropriate. We agree that is generally a good idea to assess the likely claims rates in class settlements, and to treat that information as a data point in determining whether a settlement delivers meaningful relief. Tying "actual claims experience" to fees incentivizes the parties to implement automatic distribution of settlement proceeds where possible, to

implement a robust notice program to reach class members, if automatic distribution is not possible, and to create a simple, easy-to-understand claim form. But in some cases the claims rate is difficult to determine in part because the number of class members -- the denominator -- is difficult to determine with precision. We recommend modifying the note on p. 223 as follows:

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

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

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

Defense Research Institute (CV-2016-0004-072): There are a number of references in the Note to the claims rate. Although some courts do take that into account in determining an appropriate attorney's fee award, we do not think it is an appropriate consideration in evaluating the fairness of the settlement itself. The Note should be revised to make it clear that this factor does not bear on the fairness of the settlement. To be sure, a claims process should be based on the need for information from class members to process claims. It should never be used simply to diminish payouts. But when a court determines that such a process is justified under a given settlement and finds that the notice proposed is satisfactory, the actual response should not have any bearing on the fairness of the settlement. What matters is the relief offered, not how often it is claimed. Class members may decide not to make claims for a variety of reasons. The object of such settlements is not to deter defendants from certain conduct; they have not admitted any wrongdoing. A settlement can be fair, reasonable, and adequate, and class members may nonetheless decide, for some reason, not to pursue relief. In addition, on p. 222 the Note says that the court cannot certify the class for purposes of settlement until the final hearing. That sweeping prohibition could inhibit the court from taking needed actions, such as enjoining litigation about the same claims by class members. It might also weaken efforts to regulate communications with the class if it meant that class counsel are not yet the lawyers for the class. DRI recommends softening that statement. On p. 223, the Note also refers to the ALI Principles of Aggregate Litigation. That reference introduces a substantive matter that

offers a windfall to a nonlitigant in place of relief for a litigant.

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

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

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



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

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

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

Diane Webb (Legal Aid at Work) (CV-2016-0004-086): We are a program that was founded more than 100 years ago to provide legal aid to low-wage workers. We rely on charitable gifts, foundation grants, money from the California State Bar Legal Services Trust Fund, and cy pres distributions. These sources of funding have been drying up. The State Bar trust fund, for example, has had reduced funds for a long time due to low interest rates. Currently, we rely on cy pres funds to support our Workers' Rights Clinic activities, including expanded services in rural areas of California. To save money, we rely on "virtual clinics" using video-call technology. In 2016, our Workers' Rights Clinic served more than 1200 clients. We wish to emphasize that cy pres funding is essential to our organization's mission and its continued sustainability. We believe that including a reference to the availability and appropriateness of cy pres in the Notes to the Rule 23 amendments will provide valuable guidance to litigants and the courts alike.

Washington Legal Foundation (CV-2016-0004-087): WLF believes that any proposed reference to cy pres awards should be eliminated. Cy pres is a highly controversial mechanism used to justify class actions even though the remotely situated class members cannot feasibly be identified or when identifying them would be more expensive than any potential recovery would warrant. With increasing frequency, cy pres has been utilized in

federal class actions to award unclaimed funds to one or another charities supposedly relevant in some way to the issues presented in the case. Although the Committee prudently withdrew the idea of a rule provision addressing use of cy pres, the Note at pp. 222-23 still contains a reference to cy pres and also cites the ALI Aggregate Litigation Principles on this subject. WLF believes there is no basis to enshrine cy pres in the rules. More often than not, the primary function of cy pres is to ensure that a settlement fund is large enough to guarantee substantial attorney's fees or to make the bringing of the class action economically feasible. And cy pres distributions can contribute to a significant potential conflict of interest between class counsel and class members, because class counsel has no incentive to work hard to get the recoveries to class members as a way to justify reference to the overall class "recovery" as a basis for a large attorney's fee. There are serious Article III implications of unrestrained use of cy pres, and these "awards" are akin to punitive damages, which generally are permitted only where the courts have legislative authorization for them. Instead of citing cy pres approvingly, the rule amendments should clarify that Rule 23 provides no basis whatsoever for cy pres awards.

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

Washington D.C. hearing

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

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

Phoenix hearing

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

by revising the factor:

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

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

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

Dallas/Ft. Worth (telephonic) hearing

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

Prof. Judith Resnik (Yale Law School) (testimony & CV-2016-0004-092): The amendments make a desirable effort to improve the settlement process, but more needs to be done. The key improvement is more explicit recognition of the court's responsibility for assuring that relief is really delivered to class members. I believe these changes are consistent with the proposals already made and could be added without the need for republication and a further public comment period. Already the Note to (e)(1) and (e)(2) addresses the importance of judicial scrutiny of the proposed means for giving notice and making claims. The preliminary draft also suggests that reporting back to the court on the actual claims experience is desirable, and

that the amount or timing of attorney fee payments to class counsel depend in part on the success of the claims program in delivering relief to class members. At present, the lack of court involvement in the phase after the settlement has been approved has resulted in a paucity of information on the public record about the actual success of the class action in delivering relief to the class. The rules should recognize that courts have responsibilities as "fiduciaries" of the class to ensure that class members receive the intended relief. Courts have done that in the context of structural injunctions, but not other cases. Learning about the intended methods of inviting and processing class member claims (as the current draft suggests) is desirable, but it is not enough. The rule should create a presumption that the parties file a statement about actual claims experience. Presently the Note only says that it may be important to provide that the parties do that. Courts should be directed to require that settlement agreements provide for regular reporting back to the court about distribution decisions, and also that, if conflicts about distribution across sets of claimants emerge, there is a method to return to court. Periodic reports to the court should be required, with regard to both structural relief and dollars distributed. It would also be desirable to impose sliding-scale fee awards for class counsel keyed to the success of the settlement in delivering actual relief to class members. That would build in an incentive for class counsel to make distribution a priority.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These changes are not explicit enough to achieve the desired result of ensuring that attorney fee awards are proportional to the benefits actually delivered to class members. In the 2003 amendments, the Committee Note to Rule 23(h) clearly stated that the benefits to class members should be a major factor in determining the amount of the fee award. But the reality is that the courts have too often disregarded this idea. Even after the adoption of CAFA, with its focus on coupon settlements, counsel still manage to camouflage coupons behind some other title, such as "vouchers," and justify over-large attorney fee awards by invoking the alleged total value of the coupons available to class members. The courts of appeals have split on whether courts are required to pierce these showings and make certain that the attorney fee awards do not exceed the benefits actually delivered to the class. The Seventh Circuit has been a leader in insisting that district courts make certain of proportionality. But if this amendment is adopted, that may not only fail to bring the other courts into line, but prompt the courts that heeded the Committee's advice in 2003 to back off their requirement of proportionality. Under these circumstances, the right course would be to revise the amendment and adopt the Seventh Circuit's view. To achieve this result, the Rule 23(e)(2)(C)(iii) proposal should be revised as follows:

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

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

#### Written comments

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

Gregory Joseph (CV-2016-0004-0040): The phrase "proposed to be certified for purposes of settlement" raises a question -- proposed to be settled where? Currently, if the parties want to settle a case originally filed in federal court in a state court

instead, they can dismiss the federal action because it is uncertified and refile in state court. Is this change intended to prevent that result? That seems unwarranted, and is not hinted at in the Committee Note. Does the amendment change that if the federal court decides for some reason not to approve the proposal for settlement? Again, it does not seem that the federal court has a reason to prevent the parties from seeking approval in another court.

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

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

(C) the relief provided to the class is adequate, taking into account the likelihood of success and the following:

(i) the costs, risks, and delay of further proceedings, including trial and appeal;

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

*Alternative 1*

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

*Alternative 2*

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

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

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

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

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. The number of claims submitted may not be a significant factor in cases where the award of attorney's fees is based on lodestar or is determined based on the full benefits made available by the settlement. Nevertheless,



the relief actually delivered to the class may ~~can~~ be an important factor in determining the appropriate fee award. In some cases, the Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement. (p. 227)

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

(1) Although the proposed attorney's fee award is a factor that bears on sending notice to the class, the reference to this factor on p. 223 seems unduly to stress this issue. Emphasizing this one factor, and not others, could be interpreted in limiting the courts' flexibility. Deferral of some or all attorney's fees seems to us out of place in regard to giving notice (the focus on p. 223). Even in regard to application of the 23(e)(2) approval factors, the emphasis seems unwarranted to us because it likely matters in a minority of settlements. Focusing on claims rates may overlook important deterrence and other benefits provided by the settlement. AAJ thinks that the paragraph on p. 223 so that only the first sentence remains:

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

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

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties submission to the court. In a small number of ~~some~~ cases, it may ~~will~~ be appropriate ~~important~~ to evaluate the expected benefits to the class or to take into account the likely claims

~~rate relate the amount of an award of attorney's fees when considering the settlement and the award of attorney's fees. In such cases, other consideration may predominant, such as the difficult of the work, the quality of the representation and the results obtained, deterrence of violations of the law, and appropriate use of unclaimed funds, such as cy pres awards. Further, it may be appropriate to allow for inclusion of fees for significant additional work class counsel performs after notice is disseminated. to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.~~

(2) The topic of attorney's fees comes up again in the Note on p. 227. The first two sentences of the second full paragraph on that page are accurate. But AAJ is concerned about the further discussion of "the relief actually delivered to the class" and possible deferral of fees until the claim experience is reported. This seems to reinforce the minority of cases where the settlement is a "claims made" settlement as opposed to a common fund. By referring to this special consideration, without providing other equally important factors, the Note could be interpreted as making claims rate experience both a general and exclusive concern. But some cases have low claims rates are only one factor in assessing the overall value of the case. Even if there is a low claims rate, the case may have considerable deterrent value. Other factors come into play, including whether the underlying statute has an attorney's fee provision that indicates that the legislature has determined that a fully compensatory fee should be paid somewhat without regard to compensation in the individual case. But AAJ recognizes also that listing all these factors might overburden the Note. If the Committee deems it necessary to retain reference to claims experience, it favors revising the paragraph on p. 227 as follows:

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

bear on the fairness of the overall proposed settlement.

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

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

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

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

am not convinced that the District Court will be able to devise a means of distributing the award only to injured class members."

(2) The second comment is related to the first. Proposed Rule 23(e)(2)(C)(ii) addresses in part the concern with compensating uninjured parties by requiring the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." The Note adds that the "claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims." We believe that this concern is better addressed at the class-certification stage. To illustrate, consider the recent Ninth Circuit decision in *Briseno v. ConAgra Foods*, 844 F.3d 1121 (9th Cir. 2017), where the court affirmed class certification in a case involving an allegedly misleading label claim that cooking oil was "all natural," even though many class members would likely be unable to recall what brand of cooking oil they purchased, much less whether the label claimed to be all natural. But the Ninth Circuit decision simply kicked the issue whether these class members could satisfy Article III down the road, an impractical result that could be avoided by a rigorous analysis at the class-certification stage. Since it is not resolved at the certification stage, things are kicked down the line until the settlement stage. But the proposed Note to (e)(1) and (e)(2) do little to address this problem. Instead, they only call for attention to the method of processing class member claims and concern about the "claims rate." This comes close to endorsing diversion of the defendant's money to uninjured cy pres recipients. That is a mistake. Cy pres simultaneously facilitates the flaws and in modern class actions and creates the illusion of class compensation.

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

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

The goal of this amendment is not to displace any of these factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal the case law developed by the circuits because that case law remains relevant to determining whether a

settlement meets the criteria for approval detailed in Rule 23(e)(2) itself. Because those same central concerns are embodied in the factors listed in Rule 23(e)(2), the amendment directs the parties to principally address the fairness, reasonableness and adequacy of the settlement to the court in terms that encompass the shorter list of core concerns, when all of those factors are appropriate.

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

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

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

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

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

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

Aaron D. Van Oort (CV-2016-0004-075): The provision in Rule 23(e)(2)(D) regarding equitable treatment of class members

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

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

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

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

Public Justice (CV-2016-0004-089): We have concerns about the focus of proposed Rule 23(e)(2)(C)(ii). In the first place, the rule seems to assume that class actions generally include claims systems. In our experience there are a great many class actions where every member of the class is sent a check, or receives a credit or otherwise automatically gets relief. That

reality should not be overlooked. Second, particularly when the defendant has dragged out the case, the settling class representatives and class counsel may encounter great difficulty in locating many class members. When that happens, the right solution is a cy pres use of the remaining funds that addresses the grievance raised by the suit. We know that the Note to Rule 23(e)(1) makes a brief reference to this possibility at pp. 222-23. We urge the Committee to expand on this point. In cases we have handled involving illegal debt collection practices, residual funds were properly committed to support organizations that protect the rights of debtors in the same geographic area as the class members. The inclusion of that possibility is and should be a factor in support of approval of the settlement.

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

Washington D.C. hearing

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

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

Phoenix hearing

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

If an objection applies to a specific subset of the class or to the entire class, the court may require the class member filing such an objection to make a factual showing sufficient to permit the court to find (i) that the class member is a member of the affected class or a subset of the class; (ii) that the class member will fairly and adequately represent the interests of the class; and/or (iii) that the counsel for each class member is qualified to fairly and adequately represent the interests of the class. Absent



such a finding, a court may overrule the objection without considering it further.

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

Dallas/Ft. Worth (telephonic) hearing

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

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These standards for objector submissions are going to produce harmful results. The change to the rule is unnecessary because district courts already effectively manage such submissions. Adopting more formal requirements will only encourage arguments that objections should be rejected for failure to adhere to the favored form. Presently, the courts of appeals direct district judges to provide a reasoned response to all non-frivolous objections. But suggesting that some such objections can be rejected out of hand for being in the wrong form invites district courts not to address the merits of the objections. I agree with Mr. Isaacson that -- though there may be some unjustified objections -- there is no significant problem of frivolous, bad-faith objectors. There is a much more important problem of class counsel collaborating in faux settlements that benefit them but not the class, and allow the defendant off cheaply. The goal of the amendment is to give class counsel a stick to use against the rare bad-faith objector, but what will happen is that the stick will be used against good-faith objectors. But if the Committee insists on proceeding with this rule change, it should ensure that class notice includes advising class members of these requirements. At the end of

proposed (e)(5)(A) the following should be added:

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

#### Written comments

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

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

Public Citizen Litigation Group (CV-2016-0004-081): We agree with the requirement that objections be stated specifically. In our experience, courts routinely disregard objections that are not stated specifically. But we think that the language should be modified to add the word "reasonable" between "with" and "specificity." This addition would provide support in the rule for the comment in the Note that pro se objectors should not be held to "technical legal standards." In addition, we find the rule requirement that the objection specify whether it is on behalf only of the individual class member confusing. What does it mean for an objection to "apply to" all or part of the class is unclear. Because the court can only approve the settlement as presented to it, any valid objection in some sense "applies to" the entire class because it will, if accepted, be a ground to refusal approval of the settlement. We would therefore delete that language. This would result in

(e)(5)(A) reading:

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

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

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

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

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

Washington D.C. hearing

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

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

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

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

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

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

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

#### Phoenix hearing

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

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

Annika Martin: It is good to require court approval for payments to drop an objection, or desist from making one. But there is a risk that this proposal has a loophole. Counsel may simply create a nonprofit organization that can be the recipient of the payment, thereby sidestepping the rule as presently written. Revising proposed (e)(5)(B) to add this possibility would be a good idea. Alternatively, it might be sufficient to achieve a similar result by removing words from the rule

proposal:

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

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

Dallas/Ft. Worth (telephonic) hearing

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

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): Proposed (B) and (C) should be deleted because they will only increase extortionate payments to bad-faith objectors. By requiring that payoffs be disclosed to the court and approved, it will encourage other entrepreneurial attorneys catch on. "Newcomers to the objector blackmail market will see that they too can file a boilerplate objection with conclusory allegations and be paid to go away." Moreover, class counsel can use this process to protect their bad settlements from appellate review. What should be done is to build in the right incentives by stating explicitly in the rule that objectors can recover an attorney's fee award for providing a benefit to the class. (B) should be rewritten as follows:

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

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

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

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

#### Written comments

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

Hassan Zaverreei (CV-2016-0004-0048): I am concerned that this rule will not actually deter bad faith objectors, who are unethical and unlikely to abide by its provisions. Class counsel sometimes feel they must give in to objectors in order to get relief to the class. The court approval requirement would effectively remove the decision whether to do so from class counsel's toolbox, for they would be unwilling to subject themselves to the public embarrassment of being on the record as having paid a professional objector. I am also concerned that the narrowness of retained district-court jurisdiction after an appeal has been docketed may mean that changes to the Appellate Rules are also needed. Requiring approval by the district court is contrary to traditional notions of appellate jurisdiction. To avoid these jurisdictional difficulties, a better approach would be to add something along the following lines to Rule 23(e):

*Request for Finding that Objection Was Filed in Bad Faith.*  
At the request of any party to consider whether an objection has been filed in bad faith, the court may consider all surrounding facts and circumstances -- including whether the

objector complied with Rule 23(e)(5)(A), whether the objector complied with all noticed requirements for the submission of an objection, whether grounds for the objection have legal support, conduct by the objector or objector's counsel in the instant case, and previous findings that the objector or objector's counsel has pursued an objection in bad faith -- and, if it deems it appropriate, make a finding that an objection was brought in bad faith.

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

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

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

Public Citizen Litigation Group (CV-2016-0004-081): The proposed amendment requiring court approval is along the lines we proposed in 2015. We do think two modifications would improve it. First, we think that the words "to an objector or objector's counsel" should be removed from the rule to deal with the risk that some might direct payment to third parties affiliated with the objector or lawyer. Second, we are concerned about the absence of any standard for approving payments. Courts may conclude that paying off objectors is justified to finalize the settlement without regard to the validity of their objections. We think that the Note should make it clear that this sort of reason does not justify approval. We think that the standard should be whether the payment would be approved as fair and reasonable from the standpoint of the class as a whole, which would incorporate the standard in (D) about treating class members equitably relative to each other. We propose that the following be added to (e)(5)(B):

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

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We urge that the proposed rule be revised to close a potential loophole for clever objectors and lawyers to set up entities to receive



the payment. We suggest that the phrase "directly or indirectly" be added before "to an objector or objector's counsel." We know of objectors who have demanded that payments be made to a non-profit or "think tank" by which the objector is employed. We think also that a sentence should be added to the rule requiring that any objector who withdraws an objection or appeal without compensation file a notice with the court so stating. An explicit certification requirement would give the courts a method to enforce the rule.

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

Richard Kerger (CV-2016-0004-090) (letter initially sent to Chief Judge Guy Cole of the Sixth Circuit): I understand that a rule proposal has been made to deal with the problem of professional objectors, and write to report on an experience I have encountered in an MDL proceedings in which I was involved. After four and a half years of hard-fought litigation, both the direct purchaser and the indirect purchaser classes in these cases reached settlements. The indirect purchaser settlement, on which I was working, was attacked by several objectors including a particular pro se objector. For a year or more, this objector ignored directives from the district judge and also repeatedly accused the judge and the Sixth Circuit of conspiring with counsel to approve the settlement. The settlement was for more than \$151 million, but the objector asserted (without an iota of evidence) that it was fraudulent and done solely to line the pockets of lawyers. Even though the district judge eventually imposed an appeal bond requirement, this objector appealed without paying the bond. Eventually the appeal was dismissed. The objector's conduct delayed the settlement and caused the class to lose money because one of the defendants was not obligated to make its \$43.5 million deposit into escrow until all appeals had been resolved and the settlement upheld. Finally, the district judge imposed a financial sanction on the objector. We tried to take his deposition, but he objected to the timing and then failed to appear. At this point, the district judge found him in contempt and had him arrested in Michigan at a motel and transported to the courthouse in Ohio by two marshalls. This man has been found to be a professional and serial objector and a vexatious litigator. In the past, he has received at least \$67,000 in payments for his objections. "The concern is that the history of this case is an advertisement for him as to why class counsel should cave in to professional objectors and pay them the relatively nominal amount they want to just 'go away'." Besides the current amendment proposal, other ideas occur to me: (1) insist that there be some proportionality between the amount of the class members' claim and the overall settlement; (2) amending Rule 23 to shorten the time by which a notice of appeal from denial of an objection must be filed; (3) making appellate review

of objections discretionary, as is true under Rule 23(f) for class-certification orders; and (4) some sort of deterrent to prevent frivolous objections and appeals. "No objector with a minuscule claims, such as what [this objector] has in this case or others in which he has filed objections, should be allowed to go undeterred to prevent hard-fought class action settlements to proceed to finality. Without some degree of risk imposed on serial objectors, they will continue to obstruct the judicial process and our orderly system will remain broken."

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

Washington D.C. hearing

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

Written comments

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

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

Washington D.C. hearing

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

Dallas/Ft. Worth (telephonic) hearing

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

Written comments

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

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

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

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

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

Defense Research Institute (CV-2016-0004-072): DRI has no problem with the extension of time for cases in which the government is a party. But in other cases as well, 14 days is really not enough time. That deadline is so short that it hinders the best advocacy and thus impairs the presentation to the court of appeals. Both sides of the "v" would appreciate have a bit more time. Without that needed time, the lawyers best situated to work on the petition may be unavailable due to other professional commitments (in trial, for example) when the ruling on class certification is made. A 28 day period would be much fairer, and more in keeping with what lawyers are accustomed to have for such complicated matters.

## Ascertainability

### Washington D.C. hearing

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

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

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

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

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

### Written comments

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

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

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

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

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

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

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

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

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

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

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



Pick off

Washington D.C. hearing

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

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

Written Comments

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

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

## Other issues raised

### Washington D.C. hearing

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

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

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

banned; although a residue after distribution to the class might justify a second distribution, if the class members who make claims have been fully compensated making other uses of the money is essentially punitive and beyond the authority of the procedure rules.

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

#### Phoenix hearing

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

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

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

Dallas/Ft. Worth (telephonic) hearing

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

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

Prof. Judith Resnik (Yale Law School) (testimony and CV-2016-0004-092): Amending Rule 23(f) to guarantee immediate appellate review of all class-certification orders would not be desirable. There are a lot of routes to appeal in addition to 23(f), such as mandamus. Opening more routes leads to delay for plaintiffs and burden for the courts.

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

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

#### Written comments

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

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

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

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

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Committee should monitor the issue of the no-injury class action. Many hoped that the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), would clarify the issues, but the

decision did not do so. Should the current confusion about what is a "concrete and particularized" injury continue or deepen, the Committee should consider an amendment to address the question. A bright-line rule is necessary to guide lower courts, particularly as data breach litigation has grown in importance. Those data breach cases tend to be filed so shortly after notice of a data breach that there will rarely be sufficient time for consumers to suffer actual harm. Allowing data breach plaintiffs to claim "concrete and particularized" damages before any real harm has occurred is inconsistent with much long-standing precedent, but the Spokeo decision provides little guidance for how to handle these cases.

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

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

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

- (3) the court finds that each class representative and each proposed class member suffered actual injury of the same type; that the existence, type and extent of each class member's injury, as well as the amount of monetary relief due each class members, can be accurately determined for each class member on the basis of classwide proof, without depriving the defendant of the ability to prove any fact or defense that defendant would be entitled to prove as to any class member if that class member's claims were

adjudicated in an individual trial; that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings of predominance and superiority include:

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

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

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

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

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

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

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

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

Discussion then turned to Judge Dow's six categories:

(1) Notice methods

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### (3) Citing ALI § 3.07

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

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

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

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

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

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

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

The consensus was that adding this language to the rule itself was not justified. It should be clear that the rule does not require perfection. Indeed, that is why the Note emphasizes making provision for disposition of the residue. What the Note says is that the parties should demonstrate to the court that they have employed a method of delivering relief to the class that is likely to deliver relief to the class. It does not say the method must result in 100% success on that score. But being attentive to being effective is worth emphasizing.

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

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

This passage drew the observation that this is not how things usually happen. To the contrary, given the contingencies involved, it would be very unusual for the claims process to be completed before the approval decision under Rule 23(e)(2)

occurs. Defendants will not be willing to fund the settlement until final approval has occurred. Indeed, they usually are not willing to fund the settlement until all objections and appeals are completely resolved. That's one of the reasons bad faith objectors can exert such pressure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### (6) Objector issues

An initial question was whether proposed (e)(1)(A) should direct that objectors state whether they were objecting about their own assertedly unique problems, on behalf of a subset of

the class, or on behalf of all class members. Objections to this provision have been that it (a) invites objections on behalf of others, and (b) should require that the objector satisfy something like Rule 23(a)(4) (on adequacy of representation) to represent anyone else.

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

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

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

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

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

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



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

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

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

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

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

#### Other matters

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

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

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

### Next steps

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

# TAB 5

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1 **B. RULE 5: e-FILING AND SERVICE**

2 Although public comments and testimony on Rule 5 were  
3 relatively sparse, several points were raised that warrant  
4 revisions in the published rule texts. Discussions with the other  
5 advisory committees have worked out common approaches to most of  
6 these points.

7 *Rule 5(b): Service: How Made*

8 No changes are proposed for the published text of  
9 Rule 5(b)(2)(E) on service by filing with the court's electronic-  
10 filing system. But an addition to the Committee Note may be useful  
11 to address the concern that the proposed rule might make the court  
12 responsible for making effective service when attempted service  
13 through the court's system bounces back. Apparently bouncebacks  
14 commonly involve a secondary address – the message goes through to  
15 the attorney's address, but not to an additional address (for  
16 example, for the attorney's assistant). It seems better to use  
17 enough words to set the context for failed delivery. This is  
18 proposed as a new third paragraph in the Committee Note:

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

33 *Rule 5(d)(1)(B): Certificate of Service*

34 *No Certificate of Court-system Service?*

35 Two comments suggest that proposed Civil Rule 5(d)(1)(B) is  
36 ambiguous. It says that a notice of electronic filing (NEF)  
37 constitutes a certificate of service, but it could be read to say  
38 that the NEF must be filed. That was not intended – the assumption  
39 of the proposal was that the NEF is already in the court system,  
40 and no one would think a party has a duty to tell the court what it  
41 already knows. But there are two broader points. The first is  
42 common across the different sets of rules. Proposed Appellate  
43 Rule 25(d)(1)(B) dispenses with any certificate of service for  
44 matters filed with the court's e-filing system. That sounds good,  
45 and adopting it for the Civil and Criminal Rules would achieve  
46 greater uniformity. This approach could be reflected in revised  
47 rule text as suggested by the Style Consultants:

48 (B) *Certificate of Service*. No certificate of service is  
49 required when a paper is served by filing it with  
50 the court's electronic-filing system. When a paper  
51 is served by other means, a certificate of service  
52 must be filed within a reasonable time after  
53 service or filing, whichever is later.

54 *Rule 5(d)(1)(A): Things Served but not Filed*

55 A second problem is peculiar to the Civil Rules. Proposed  
56 Rule 5(d)(1)(A) carries forward the basic command of present  
57 Rule 5(d)(1) that "Any paper after the complaint that is required  
58 to be served must be filed [- together with a certificate of  
59 service -]<sup>1</sup> within a reasonable time after service." Then comes the  
60 qualification: "But disclosures under Rule 26(a)(1) or (2) and the  
61 following discovery requests and responses must not be filed until  
62 they are used in the proceeding or the court orders filing:  
63 depositions, interrogatories, requests for documents or tangible  
64 things or to permit entry onto land, and requests for admission."

65 The brackets shown in the Rule 5(d)(1) text quoted above mark  
66 words that are deleted from proposed 5(d)(1)(A), and moved to  
67 proposed 5(d)(1)(B). The current language says that a certificate  
68 of service must be filed when previously served but unfiled  
69 materials are filed because they are used in the action or the  
70 court orders filing. Implicitly, the time is not a reasonable time  
71 after service, but with - or perhaps within a reasonable time after  
72 - filing. Proposed (d)(1)(B) as published might change that. It  
73 directs that "A certificate of service must be filed within a  
74 reasonable time after service," with the ensuing bit about a notice  
75 of electronic filing. But it seems odd to require filing a  
76 certificate of service for things that have not been filed, and  
77 often never will be filed. And it could defeat the no-filing  
78 mandate when, as seems to be common practice now, a "certificate  
79 of service" is added as the final item in the paper that is served.

80 This potential problem is resolved by the draft set out above:

81 (B) *Certificate of Service*. \* \* \* When a paper is served by  
82 other means, a certificate of service must be filed  
83 within a reasonable time after service or filing,  
84 whichever is later.

85 (One comment raised a related question about the non-filing  
86 mandate in Rule 5(d): Is a Rule 45 subpoena to produce a "request  
87 for documents or tangible things or to permit entry onto land" that  
88 is not to be filed? A similar question might be asked: is a Rule 45  
89 subpoena for a deposition a "deposition" for this purpose? The  
90 proposed rule text for Rule 5(d)(1)(A) carries forward the present  
91 rule text unchanged. The current round of amendments does not seem

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<sup>1</sup> The certificate of service requirement is relocated to Rule 5(d)(1)(B) in the published proposal.

92 an appropriate occasion for addressing these questions.)

93 *Rule 5(d)(3)(B): E-Filing by Pro Se Parties*

94 As published, Rule 5(d)(3)(B) allows a person not represented  
95 by an attorney to "file electronically only if allowed by court  
96 order or by local rule."

97 Sai, both in testimony at the November 3 Civil Rules hearing  
98 and by a written comment, CV-0074, offers powerful arguments that  
99 a pro se party should be allowed access to the court's e-filing  
100 system without prior permission. The mode of filing would be at the  
101 party's choice – filing with the court's e-filing system or on  
102 paper. The only limit would be that the pro se party must satisfy  
103 any training requirements that the court exacts of attorneys as a  
104 condition of granting "case initiation privileges." (In the  
105 Southern District of Indiana, for example, an attorney must take  
106 on-line training and be certified.)

107 The essential arguments are familiar, resonating back to early  
108 drafts of Civil Rule 5 that would have required pro se parties to  
109 file with the court's e-filing system unless the court permits  
110 paper filing. E-filing is faster, easier, and less expensive for  
111 the filer. All other parties benefit. And a pro se party likewise  
112 gains important advantages when being served by e-means. Although  
113 the in forma pauperis statute speaks only to filing fees, it  
114 reflects a policy that financial barriers to court access should be  
115 reduced for i.f.p. litigants. Sai frames the question by lamenting  
116 that "This inequity in access and delays results in two  
117 procedurally different systems," "prohibiting pro se litigants from  
118 accessing the benefits of CM/ECF on an equal basis with represented  
119 litigants."

120 The argument anticipates some of the counter-arguments. It is  
121 assumed that a pro se litigant cannot move for access to e-filing  
122 until all the work has been done to file a paper complaint,  
123 providing a "case" and thus access to motion practice. It may be  
124 that a truly savvy pro se party could figure out how to file a  
125 "miscellaneous case," and use that as a vehicle for the motion. But  
126 even if that led to permission to file the real case with the  
127 court's system, it would incur substantial delay and some added  
128 expense.

129 The core counter-argument is simple. Sai has shown, by  
130 repeated litigation, that Sai is fully competent to engage in, and  
131 benefit from, filing with the court's e-filing system. Sai can  
132 reasonably feel it is unfair to require Sai to get permission anew  
133 in each successive case, even when the same court has already  
134 granted permission in another case. There are likely to be other  
135 pro se parties who are fully able to use the court's e-filing

136 system.<sup>2</sup> But the universe of pro se parties includes many who  
137 should not be lured into an attempt to file with the court's system  
138 without advance screening by the court. Permission is likely to be  
139 given freely on a demonstration of ability to work within the  
140 court's system.

141 There is yet another legitimate concern. Sai asserts that an  
142 important reason for admitting pro se litigants to the CM/ECF  
143 system is that it enables them to receive notices of electronic  
144 filings in other cases. To the extent that this is so, it may open  
145 the way for inappropriate actions even though further steps need be  
146 taken to be allowed to file in another case. If case-specific  
147 permission is required, the court can restrict access to just that  
148 case.

149 The arguments for allowing pro se litigants a free choice  
150 whether to rely on electronic filing are attractive. But this  
151 dilemma must be resolved by heeding the wise lessons of practical  
152 experience. A common accounting is that there is at least one pro  
153 se party in about 25% of the civil cases on the federal docket. The  
154 district clerks offices cannot reasonably be expected to tutor pro  
155 se litigants in appropriate and effective use of the court's e-  
156 filing system. If it could be done, it would be good to design a  
157 process that a district could adopt for pre-filing permission to e-  
158 file for a pro se litigant who survives on-line screening. A rule  
159 could be written to authorize such processes, but cannot be written  
160 to design them.

161 Discussions with the other advisory committees have shown no  
162 support for departing from the proposal that a pro se party be  
163 allowed access to electronic filing only by court order or by local  
164 rule. The fear that inept or malign litigants will impose  
165 inappropriate burdens on the court and other parties has carried  
166 the day. No change from the published proposal is recommended.

167 *Rule 5(d)(3)(C): Electronic Signature*

168 The published text reads: "The user name and password of an  
169 attorney of record, together with the attorney's name on a  
170 signature block, serves as the attorney's signature." Public  
171 comments and further discussions among the advisory committees  
172 identified two, or perhaps three, potential problems with this  
173 language. First, it might be misread to require that the user name  
174 and password appear on the signature block. It is easy enough to  
175 revise the language to avoid that unintended reading. Second, the  
176 ever-changing world of security for electronic communications may  
177 mean that courts will move toward means of authentication more  
178 advanced than user names and logins. Thumb prints and iris scans  
179 are used in some current technology. Still more sophisticated means  
180 may become common. Third, concerns were expressed about the means

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<sup>2</sup> A likely example is provided by the proposal submitted by Robert M. Miller, Ph.D., 15-AP-G, 15-CV-JJ, 15-CR-E.



181 of becoming an attorney of record before, or with, filing the  
182 initial complaint. This revised text is offered to address these  
183 problems:

184 Revised text:

185 (C) An authorized filing [made] through a person's  
186 electronic-filing account, together with the  
187 person's name on a signature block, constitutes the  
188 person's signature.

189 Neither this text nor the published text address signatures on  
190 papers that are e-served but not filed with the court. If the  
191 person served has agreed in writing to e-service, the mode of  
192 signing can be included in the agreement; if nothing is said, it  
193 can be inferred that the name alone suffices. If the paper is later  
194 filed with the court's electronic-filing system, the filer's name  
195 on a signature block provides the filer's signature. The signatures  
196 on other papers included in the filing might be a problem – for  
197 example, a party who responded to discovery requests might file the  
198 requests and the responses together. Rather recent experience with  
199 attempting to address like problems in the Bankruptcy Rules  
200 suggests that it may be wiser not to attempt to address this issue  
201 now.

202 **REVISED RULE TEXT**

203 (The overlining and underlining in the Rule 5 text reflect the  
204 published proposal, indicating changes from present Rule 5, except  
205 where footnotes and double underlining indicate changes from the  
206 published proposal.)

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

208 \* \* \* \* \*

209 **(b) Service: How Made.**

210 \* \* \* \* \*

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

212 **(A)** handing it to the person;

213 \* \* \* \* \*

214 **(E)** sending it to a registered user by filing it with  
215 the court's electronic-filing system or sending it  
216 by other electronic means if that the person  
217 consented to in writing—in either of which events  
218 service is complete upon transmission filing or  
219 sending, but is not effective if the serving party  
220 filer or sender learns that it did not reach the

221 person to be served; or

222 \* \* \* \* \*

223 ~~(3) Using Court Facilities. If a local rule so authorizes, a~~  
224 ~~party may use the court's transmission facilities to make~~  
225 ~~service under Rule 5(B)(2)(E).~~ [Abrogated (Apr. \_\_, 2018,

226 eff. Dec. 1, 2018.)  
227 \* \* \* \* \*

228 (d) Filing.

229 (1) Required Filings; Certificate of Service.

230 (A) Papers after the Complaint. Any paper after the  
231 complaint that is required to be served ~~together~~  
232 ~~with a certificate of service~~ must be filed  
233 within a reasonable time after service. But  
234 disclosures under Rule 26(a)(1) or (2) and the  
235 following discovery requests and responses must not  
236 be filed until they are used in the proceeding or  
237 the court orders filing: depositions,  
238 interrogatories, requests for documents or tangible  
239 things or to permit entry onto land, and requests  
240 for admission.

241 (B) Certificate of Service. ~~A certificate of service~~  
242 ~~must be filed within a reasonable time after~~  
243 ~~service, but a notice of electronic filing~~  
244 ~~constitutes a certificate of service on any person~~  
245 ~~served by the court's electronic-filing system. No~~  
246 ~~certificate of service is required when a paper is~~  
247 ~~served by filing it with the court's electronic-~~  
248 ~~filing system. When a paper is served by other~~  
249 ~~means, a certificate of service must be filed~~  
250 ~~within a reasonable time after service or filing,~~  
251 ~~whichever is later.~~<sup>3</sup>

252 \* \* \* \* \*

253 (2) Nonelectronic Filing ~~How Filing is Made in General.~~ A  
254 paper not filed electronically is filed by delivering it:

255 (A) to the clerk; or

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

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<sup>3</sup> Double underlining marks changes from the published version.

259 (3) **Electronic Filing, and Signing, or Verification.** A court  
260 may, by local rule, allow papers to be filed, signed, or  
261 verified by electronic means that are consistent with any  
262 technical standards established by the Judicial  
263 Conference of the United States. A local rule may require  
264 electronic filing only if reasonable exceptions are  
265 allowed.

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

271 (B) By an Unrepresented Person—When Allowed or Required.  
272 A person not represented by an attorney:  
273 (i) may file electronically only if allowed by  
274 court order or by local rule; and  
275 (ii) may be required to file electronically only by  
276 court order, or by a local rule that includes  
277 reasonable exceptions.

278 (C) Signing. The user name and password of an attorney  
279 of record, together with the attorney's name on a  
280 signature block, serves as the attorney's  
281 signature.<sup>4</sup> An authorized filing [made] through a  
282 person's electronic filing account, together with  
283 the person's name on a signature block, constitutes  
284 the person's signature.<sup>5</sup>

285 (D) Same as a Written Paper. A paper filed  
286 electronically in compliance with a local rule is a  
287 written paper for purposes of these rules.

288 \* \* \* \* \*

289 COMMITTEE NOTE

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

298 The amended rule recognizes electronic service through the

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<sup>4</sup> The overlined sentence is the published proposal.

<sup>5</sup> The underlined material supersedes the published proposal.

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

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

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

323 ~~Subdivision (d). Amended Rule 5(d)(1) provides that a notice~~  
324 ~~of electronic filing generated by the court's electronic-filing~~  
325 ~~system is a certificate of service on any person served by the~~  
326 ~~court's electronic-filing system. Under amended Rule 5(d)(1), a~~  
327 ~~certificate of service is not required when a paper is served by~~  
328 ~~filing it with the court's electronic-filing system. But if the~~  
329 ~~serving party learns that the paper did not reach the party to be~~  
330 ~~served, there is no service under Rule 5(b)(2)(E) and there is no~~  
331 ~~certificate of (nonexistent) service.~~

332 When service is not made by filing with the court's electronic  
333 filing system, a certificate of service must be filed and should  
334 specify the date as well as the manner of service. [For papers that  
335 are served but must not be filed until they are used in the  
336 proceeding or the court orders filing, the certificate need not be  
337 filed until a reasonable time after service or filing, whichever is  
338 later.]

339 Amended Rule 5(d)(3) recognizes increased reliance on  
340 electronic filing. Electronic filing has matured. Most districts  
341 have adopted local rules that require electronic filing, and allow  
342 reasonable exceptions as required by the former rule. The time has  
343 come to seize the advantages of electronic filing by making it  
344 generally mandatory in all districts for a person represented by an  
345 attorney. But exceptions continue to be available. Nonelectronic  
346 filing must be allowed for good cause. And a local rule may allow

347 or require nonelectronic filing for other reasons.

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

371 ~~The user name and password of an attorney of record, together~~  
372 ~~with the attorney's name on a signature block, serves as the~~  
373 ~~attorney's signature. An authorized filing through a person's~~  
374 ~~electronic filing account, together with the person's name on a~~  
375 ~~signature block, constitutes the person's signature.~~

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**RULE 5: CLEAN TEXT**

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

\* \* \* \* \*

**(b) Service: How Made.**

\* \* \* \* \*

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

**(d) Filing.**

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

**(A) *Papers after the Complaint.*** Any paper after the complaint that is required to be served must be filed 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 until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

**(B) *Certificate of Service.*** No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed within a reasonable time after service or filing, whichever is later.

\* \* \* \* \*

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

415 (A) to the clerk; or

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

419 (3) ***Electronic Filing and Signing.***

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

425 (B) *By an Unrepresented Person—When Allowed or Required.*  
426 A person not represented by an attorney:  
427 (i) may file electronically only if allowed by  
428 court order or by local rule; and  
429 (ii) may be required to file electronically only by  
430 court order, or by a local rule that includes  
431 reasonable exceptions.

432 (C) *Signing.* An authorized filing [made] through a  
433 person's electronic filing account, together with  
434 the person's name on a signature block, constitutes  
435 the person's signature.

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

439 \* \* \* \* \*

440 **SUMMARY OF COMMENTS: RULE 5**

441 *In General*

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

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

446 *Rule 5(b)*

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

453 *Rule 5(d)(1)*

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

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

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



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

493 *Rule 5(d)(2)*

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

501 A pro se litigant who completes whatever training is required  
502 for an attorney to become a registered user should be allowed to be  
503 a registered user without seeking additional permission, beginning  
504 with the right to file a complaint, motion to intervene, or amicus  
505 brief. If given access the ability to file a case initiation should  
506 prove the filer's capacity. Inappropriate burdens are entailed by  
507 requiring a preliminary motion for permission, burdens that are  
508 particularly inappropriate if the filer is already a CM/ECF filer  
509 in the same court. Indeed the rule, as written, would prohibit e-  
510 filing even by a registered attorney user who appears pro se as a  
511 party. Still worse, a motion cannot be filed unless the case has  
512 already been initiated – a pro se plaintiff must always file a  
513 paper complaint. The problems that arise when a pro se litigant is  
514 not able to use the court's system effectively can be solved by  
515 finding good cause to deny e-filing. But the inevitable small  
516 problems can be fixed: "docket clerks routinely screen incoming  
517 filings and will correct clear deficiencies or errors."

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

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

533 E-filing also is important for litigants with disabilities,  
534 particularly those with impaired vision. A document scanned into  
535 the court file from a paper original is more difficult to use, in

536 some settings much more difficult. E-documents "are more readable  
537 on a screen; they can be more readily printed in large print or  
538 other adaptive formats; they preserve hyperlinks; and they permit  
539 PDF structuring, such as bookmarks for sections or exhibits."  
540 "Being required to file on paper hinders *everyone's* access to the  
541 litigant's filings \* \* \*."

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

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

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

587

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

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

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

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

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

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

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622 **C. RULES 62, 65.1: STAYS OF EXECUTION**  
623

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

644 The changes in Rule 65.1 are designed to reflect the expansion  
645 of Rule 62 to include forms of security other than a bond. Some  
646 minor style differences remain to be ironed out as the Appellate  
647 Rules Committee finishes work on the parallel changes in Appellate  
648 Rule 8(b).

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

653 It is safe to recommend that the Standing Committee approve  
654 adoption of amended Rules 62 and 65.1 as published. But style  
655 changes might be made to reduce differences between Rule 65.1 and  
656 Appellate Rule 8(b), which is being amended to reflect the changes  
657 in Rules 62 and 65.1. These changes would remove all references to  
658 "bond," "undertaking," and "surety" from Rule 65.1 ("bond" remains  
659 in Rule 62, in keeping with strong tradition). Focusing Rule 65.1  
660 only on "security" and "security provider" is clean, and avoids any  
661 possible implication that a surety is not a security provider.

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

2 **(a) Automatic Stay; ~~Exceptions for Injunctions,~~**

3 **~~Receiverships, and Patent Accountings.~~** Except

4 as provided in Rule 62(c) and (d), stated in this rule, no

5 execution ~~may issue~~ on a judgment, ~~nor may~~ and

6 proceedings ~~be taken~~ to enforce it; are stayed for 30

7 days until 14 days have passed after its entry, unless

8 the court orders otherwise. ~~But unless the court orders~~

9 otherwise, the following are not stayed after being

10 entered, even if an appeal is taken:

11 ~~(1) an interlocutory or final judgment in an action~~

12 ~~for an injunction or a receivership; or~~

13 ~~(2) a judgment or order that directs an accounting in~~

14 ~~an action for patent infringement.~~

15 ~~(b) Stay Pending the Disposition of a Motion.~~ On

16 appropriate terms for the opposing party's security,

17 the court may stay the execution of a judgment or



18           ~~any proceedings to enforce it—pending disposition of~~  
19           ~~any of the following motions:~~

20           ~~(1) under Rule 50, for judgment as a matter of law;~~

21           ~~(2) under Rule 52(b), to amend the findings or for~~  
22                           ~~additional findings;~~

23           ~~(3) under Rule 59, for a new trial or to alter or~~  
24                           ~~amend a judgment; or~~

25           ~~(4) under Rule 60, for relief from a judgment or~~  
26                           ~~order.~~

27           **(b) Stay by Bond or Other Security.** At any time after  
28                           judgment is entered, a party may obtain a stay by  
29                           providing a bond or other security. The stay takes  
30                           effect when the court approves the bond or other  
31                           security and remains in effect for the time specified in  
32                           the bond or security.

33           **(c) Stay of an Injunction, Receivership, or Patent-**  
34                           Accounting Order. Unless the court orders

35 otherwise, the following are not stayed after being  
36 entered, even if an appeal is taken:

37 (1) an interlocutory or final judgment in an action  
38 for an injunction or receivership; or

39 (2) a judgment or order that directs an accounting in  
40 an action for patent infringement.

41 **(d)** **Injunction Pending an Appeal.** While an appeal is  
42 pending from an interlocutory order or final judgment  
43 that grants, continues, modifies, refuses, dissolves,  
44 or ~~denies~~ refuses to dissolve or modify an injunction,  
45 the court may suspend, modify, restore, or grant an  
46 injunction on terms for bond or other terms that secure  
47 the opposing party's rights. If the judgment appealed  
48 from is rendered by a statutory three-judge district  
49 court, the order must be made either:

50 (1) by that court sitting in open session; or

51 (2) by the assent of all its judges, as evidenced by  
52 their signatures.

53 ~~(d) — Stay with Bond on Appeal. If an appeal is taken,~~  
54 ~~the appellant may obtain a stay by supersedeas bond,~~  
55 ~~except in an action described in Rule 62(a)(1) or (2). The~~  
56 ~~bond may be given upon or after filing the notice of appeal~~  
57 ~~or after obtaining the order allowing the appeal. The stay~~  
58 ~~takes effect when the court approves the bond.~~

59 \* \* \* \* \*

#### Committee Note

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

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

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50,

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

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

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security

that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new subdivision (b), “a party” may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

662 **Rule 65.1 as Published**

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

664 Whenever these rules (including the Supplemental Rules for  
665 Admiralty or Maritime Claims and Asset Forfeiture  
666 Actions) require or allow a party to give security, and  
667 security is given through a bond, other security, or  
668 other undertaking, with one or more sureties or other  
669 security providers, each surety provider submits to the  
670 court's jurisdiction and irrevocably appoints the court  
671 clerk as its agent for receiving service of any papers  
672 that affect its liability on the bond, or undertaking, or  
673 other security. The surety's security provider's  
674 liability may be enforced on motion without an  
675 independent action. The motion and any notice that the  
676 court orders may be served on the court clerk, who must  
677 promptly mail a copy of each to every surety security  
678 provider whose address is known.

679 **Possible Reduction to "Security" Only**

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

681 Whenever these rules (including the Supplemental Rules for  
682 Admiralty or Maritime Claims and Asset Forfeiture Actions) require  
683 or allow a party to give security, and security is given ~~through a~~  
684 ~~bond, other security, or other undertaking,~~ with one or more  
685 sureties or other security providers, each surety provider submits  
686 to the court's jurisdiction and irrevocably appoints the court  
687 clerk as its agent for receiving service of any papers that affect  
688 its liability on the ~~bond, or undertaking, or other security.~~ The  
689 ~~surety's security provider's~~ liability may be enforced on motion  
690 without an independent action. The motion and any notice that the  
691 court orders may be served on the court clerk, who must promptly  
692 mail a copy of each to every surety security provider whose address  
693 is known.

694

**Rule 65.1 Committee Note as Published**

695 Rule 65.1 is amended to reflect the amendments of Rule 62.  
696 Rule 62 allows a party to obtain a stay of a judgment "by  
697 providing a bond or other security." Limiting Rule 65.1  
698 enforcement procedures to sureties might exclude use of those  
699 procedures against a security provider that is not a surety. All  
700 security providers are brought into Rule 65.1 by these  
701 amendments.

**Summary of Comments**  
**Rule 62**

*In General*

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705  
706  
707 Hon. Benjamn C. Mizer, CV-2016-0004-0037: Says simply that  
708 the Department of Justice supports these amendments.  
709

710 Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058:  
711 The proposed revisions are reasonable.  
712

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



719

**Rule 65.1**

720

*In General*

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

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

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

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## RULE 30(b)(6) SUBCOMMITTEE REPORT

At the Committee's November, 2016, meeting, the Rule 30(b)(6) Subcommittee introduced some 16 different issues it had identified during preliminary discussions as possible methods of dealing with reported problems encountered in practice under the rule. The agenda materials for that meeting (included for reference in this agenda book) also included rather detailed workups of possible rule-amendment approaches to many of these 16 issues. As of that time, the Subcommittee had been able to examine in detail only a few of these potential issues, and it was not in a position to recommend serious attention to any of them for possible rule amendments. Instead, the November agenda memo identified several issues for further research.

Thanks to support from the Rules Committee Support Office, that initial research has been done. See the research memorandum from Lauren Gailey and Derek Webb, included in this agenda book. As reported there, "Rule 30(b)(6) seems to have become a flash point for litigation, having been cited in more than 8,000 decisions." In summary, that research shows:

(1) Literature on Rule 30(b)(6) generally speaks approvingly of the rule, and focuses not on criticizing its provisions but instead on "practice pointers" for using it.

(2) Although many districts have local rules that apply generally to depositions (specifying a minimum notice period, for example), only two (D.S.C. & D. Wyo.) have local rules that focus specifically on 30(b)(6) depositions.

(3) All states have provisions parallel to Rule 30(b)(6). Some state rules include a general time frame for the organization to designate its witnesses. New York introduced a more detailed provision for its Commercial Division in 2015, with time limits and designation requirements.

(4) Regarding the question whether statements by Rule 30(b)(6) witnesses are "judicial admissions," the strong majority rule is that they are not. But there is a minority view, and due to the importance of this question, the issue is "extensively litigated."

Meanwhile, a presentation was made to the Standing Committee at its January, 2017, meeting about the initial work done by the Subcommittee, and the same agenda memo submitted to this Committee was included in the Standing Committee's agenda book. Members of the Standing Committee did not report encountering serious problems with Rule 30(b)(6) practice. One of them, who reported reading carefully through the entire list of rule sketches, expressed the view that the "case management" provisions at the end seemed the most promising approach.

Armed with this information, the Subcommittee held a conference call on Feb. 13, 2017, and began by considering the case management approach, and then asking what more might be needed in the rules to respond to concerns about Rule 30(b)(6). Notes of that call are in this agenda book.

There was strong support from some members of the Subcommittee for the view that more is necessary to solve the Rule 30(b)(6) problems than merely adding them to the Rule 26(f) discovery plan discussion and to the Rule 16 supervision responsibilities of the judge. Also during the call (and afterwards) members of the Subcommittee identified additional issues or variations of approaches that might hold promise as rule amendments.

After that call, members of the Subcommittee were invited to suggest an initial hierarchy of issues that deserve serious consideration as possible subjects for rule amendments. Judge Ericksen circulated a "ballot" memorandum to summarize the existing options, and all members of the Subcommittee provided input on the ranking of possible rule amendment issues. Based on these exchanges, the Reporter attempted to devise a ranking of issues that seemed to reflect the level of support within the Subcommittee. But all these views are somewhat tentative, and the Reporter's tentative ranking has not been the subject of further Subcommittee discussion.

Instead, the Subcommittee hopes to elicit reactions and ideas from the other members of the Committee during the April, 2017, meeting. Below, brief descriptions of the possible rule-amendment issues are provided (rather than attempting the detail of the rule sketches included in the November agenda memo). These brief descriptions are presented in a graduated way -- those seemingly regarded as more promising or important are presented as receiving higher "grades" than those regarded as less promising. It should be emphasized that the Subcommittee has not endorsed this ranking, and that it is here used as a device to assist the Subcommittee in making choices in the future.

One more point should be made by way of introduction. The Subcommittee has received some input already from bar groups. In December, 2016, the Lawyers for Civil Justice submitted a memorandum offering comments about Rule 30(b)(6) practice (16-CV-K). More recently, the National Employment Lawyers Association submitted a letter offering its views about the rule. Both these submissions are in the agenda book. It would be fair to say that they diverge on some topics.

In addition, several members of the Subcommittee will participate in a panel discussing the rule during the Lawyers for Civil Justice Membership Meeting in Washington, D.C. on May 5. Meanwhile, several Subcommittee members are informally seeking reactions about practice under the rule from their professional contacts. So the Subcommittee is likely to get at least some additional insights from outside the Committee in the near future.



It may be, also, that further legal research would be fruitful.

For present purposes, however, the desired focus for the April meeting is on how to prioritize as the Subcommittee moves forward.

#### Initial Orientation

Before turning to the presentation of the issues under discussion, it seems worthwhile to pause for a background introduction. The Rule 30(b)(6) option was introduced in the 1970 amendment package as a way to deal with "bandying," an avoidance behavior reportedly used by some organizational litigants to make it more difficult for their litigation opponents to identify persons with knowledge and nail down organizational information. In that sense, it was a piece of a much broader package of amendments that broadened discovery in a variety of ways. It is worth keeping in mind that the rule was adopted to solve a particular problem, and was not envisioned as an all-purpose method of extracting every last piece of information from organizations. But it is also important to appreciate that bandying presented a formidable obstacle to legitimate efforts to obtain important information from organizations.

In retrospect, we can see that 1970 was a high water point for broad discovery. Since then, many things have changed. Numerical and durational limits have been placed on depositions generally, and numerical limitations have been placed on interrogatories. Proportionality has been moved up in Rule 26(b)(1) alongside relevancy. Special rule provisions have been added to deal with the vexing problems of discovery of electronically stored information. Additionally, the advent of extensive use of digital media has meant that the volume of potentially discoverable information has expanded geometrically.

Introduced in 1993, initial disclosure under Rule 26(a)(1) sought to sidestep many of the most burdensome aspects of formal discovery. At least some of what Rule 30(b)(6) seeks to elicit -- the identity of individuals with knowledge and the whereabouts of material subject to discovery under Rule 34 -- might suitably be within this initial disclosure effort. Indeed, a provision formerly included in Rule 26(b)(1) (explicitly authorizing discovery about "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") was removed in 2015 on the ground that the propriety of such discovery was so ingrained that it need no longer be explicitly mentioned in the rule.

Altogether, it may be remarkable that Rule 30(b)(6) has not been significantly modified since it was adopted in 1970. Of course, it is subject to the general discovery limitations that have been introduced since then, but it might also be viewed as something of a potential "end run" around some of them. So one approach to the rule is to appreciate that it can be a critical

method of early discovery of essential information but also that it could be used in a manner that is overreaching.

Particularly since the 2015 discovery amendments, one could say that the right way to resolve the possible tension between necessary discovery and overreaching burdens is good faith cooperation in handling 30(b)(6) practice. That is an aspiration of the 2015 amendment to Rule 1. It might be that the 2015 amendments -- though in no way specifically targeting Rule 30(b)(6) practice -- will promote more efficient use of this device. But it is also true that complaints about overreaching use of this rule have repeatedly been brought to the Committee's attention, suggesting a need to take the concerns seriously.

Against that background, the Subcommittee invites reactions from the full Committee on whether and how to evaluate possible rule changes.

#### Reporter's "Ranking" of Issues

The Subcommittee has discussed and corresponded about choosing the most promising topics for study. But it has not reached a consensus. So the "ranking" below is the Reporter's effort to provide a starting point for further discussion. The goal presently is to revise and improve on this starting point. It should be emphasized again that the Subcommittee has not concluded that any rule change is necessary, but it is convinced that ranking possible rule changes is a useful triage effort on which the full Committee can assist.

The goal, in some ways, is to have an A list and a B list, with the A list being the more promising ideas. At least at present, the A list has three subparts. A primary goal for the April meeting will be to winnow the current list. Put differently, the question is: Which items in the "A" category can be moved to the "B" category? Of course, additional ideas are welcome, as are suggestions that items presently on the "B" list be moved to the "A" list.

Should certain topics appear to justify serious study as potential amendments, the Subcommittee will need to analyze them in greater detail, as suggested by the ideas sketched in the agenda memo for the November meeting. That agenda memo is included in this agenda book as an illustration of the sorts of subsidiary issues that likely would emerge for pursuing various specific amendment ideas.

A+

Case management recognition: Rule 26(f) already directs the parties to confer and deliver to the court their discovery plan. It specifies some things that should be in the plan but does not refer specifically to 30(b)(6) depositions. Specific reference to Rule 30(b)(6) might be added to both Rule 26(f) and Rule 16(b) or

(c).

A

Judicial admissions: Although the majority rule is that statements during a 30(b)(6) deposition are not binding judicial admissions, there is arguably some disagreement in the cases about this issue, and the worry it introduces may fuel relatively obstructive behavior. Note that Fed. R. Evid. 801(b)(2)(C) should be sufficient to overcome any hearsay objection to admission of statements made in such a deposition against the organization that designated the witness to speak on its behalf.

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

Contention questions: Contention interrogatories are allowed, but given the concern about bandying that lies behind Rule 30(b)(6), it is odd that contention questions would crop up under that rule. Such questions seem to stray far from efforts to identify people with knowledge and the location of documents. The rule could say such questioning is not allowed.

Objections: An explicit provision about objections could be added to the rule. One thing that might be included would be a requirement like the one now in Rule 34(b) that objections be specific. If making an objection excused the duty to comply absent court order, a rule could (also like Rule 34(b)) direct that the objecting party specify what it will provide despite the objection.

Durational limitations: Rule 30 has general limitations on number and duration of depositions, but they are not keyed to 30(b)(6) depositions. Those depositions can complicate the application of the general rules because (a) multiple individuals may be designated by the organization, and (b) those individuals may also be subject to individual depositions in which they are not speaking for the organization. The Committee Notes accompanying those general limitations discuss the way such limitations should apply in the 30(b)(6) context (stating that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit on number of depositions no matter how people are designated to testify) but those statements in Committee Notes are not rules and those prescriptions may not be right.

A-

Providing exhibits in advance: The rule could invite or require that parties provide the witness with the exhibits to be used in advance of the deposition. Making this a requirement might prompt the designation of an avalanche of potential exhibits and/or invite obstruction when something not provided in advance is used in the deposition. But this technique could also focus the responding party in a way that is better than the current listing of matters for examination.

Notice requirements: Rule 30 does not have a minimum notice period for depositions. Some districts do have such a limitation in their local rules for all depositions, including 30(b)(6) depositions. 30(b)(6) depositions are the only ones for which a party is required to prepare the witness. That may be a special reason for a minimum notice period. One could specify that the notice must be given XX days before the date set for the deposition. If objections are added to the rule, it could also require such objections be made more than YY days before the deposition.

Forbidding questioning beyond the matters specified: Such a provision could resolve existing disputes about whether questions may go beyond the list of matters in the notice, though falling within the scope of discovery for the case. This concern might ease if the judicial admissions issue (on the A list) were resolved. Alternatively, the rule could provide that questioning beyond the listed topics is an "individual" deposition and counts as a separate deposition for purposes of the ten-deposition limit.

"Substituting" interrogatories: Regarding basic background information, one could authorize the use of "substituting" interrogatories that would not count against the maximum of 25 authorized under Rule 33. Alternatively, perhaps the rule could specify that, after notice, the parties could (should) confer about the possibility that written questions and answers be used (at least for certain matters) in place of a live deposition.

Rule 31 alternative: Rule 31 might be invoked as a "middle ground" between a free form Rule 30 deposition and a Rule 33 interrogatory. Alternatively this might be folded into the case management alternative -- the parties and the court should consider whether this method would be more efficient.

B

Requiring advance notice of identity of witness or witnesses: The rule could direct that the organization give advance notice of the identity of the person or persons who will be testifying. Such advance notice may generally occur already, and might instead be noted in regard to case management provisions added to Rules 26(f) and 16(b) or (c). That might also call for specifying how long in advance this notice is due, which might make a minimum notice

period for the deposition important.

Second deposition of organization: A rule could provide that the ordinary limitation on number of depositions of a witness does not preclude a second deposition of the organization on different topics.

Limiting to parties: If 30(b)(6) depositions are singularly burdensome, they might be available only as to parties. But nonparties need not answer interrogatories, and need not worry about the judicial admissions concern.

Identifying documents reviewed in preparing the list of matters in the notice: Alternatively or additionally, the party serving the notice might be required to identify documents reviewed in developing the list of topics in the notice.

Expanding initial disclosure: Given the basic nature of much information that may be sought through 30(b)(6) depositions, one might add requirements to Rule 26(a)(1) addressing the information that would otherwise require formal discovery.

Forbidding "duplication": The rule might provide that, once a matter has been covered in a 30(b)(6) deposition, it may not be further pursued using other discovery. But in general one is allowed to ask Witness B about topics also explored with Witness A.

Requiring specificity or limiting number of matters included in notice: The rule now requires "reasonable particularity" of matters in the notice. Perhaps a better phrase could be found to deal with the problem of poorly defined matters in a notice. Alternatively, perhaps a numerical limit on the list could be added. But that might prompt the use of more general terms in the notice.

Adding a specific reference to 30(b)(6) in Rule 37(d): Rule 37(d)(1)(A)(i) now provides that failure of a 30(b)(6) deponent to appear for a deposition is sufficient to support immediate Rule 37(b) sanctions without the need for a court order to appear. That could be expanded to include failure of a party to prepare a 30(b)(6) witness adequately.

Adding a specific reference to 30(b)(6) to Rule 37(c)(1): Failure to prepare a 30(b)(6) witness adequately might be explicitly identified as a basis for excluding evidence such as contrary testimony. This may be what the "judicial admission" cases really involve.

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No doubt there are additional amendments that might be considered, and this list is not intended to preclude consideration of such additional amendment ideas. But it should provide a starting point for discussing the ranking of amendment ideas.

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## MEMORANDUM

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

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

**DATE:** March 30, 2017

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

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

Although "[n]ormally the process operates extrajudicially," *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 79 (D.D.C. 1999), *rev'd in part on other grounds*, 271 F.3d 1101 (D.C. Cir. 2001), Rule 30(b)(6) seems to have become a flash point for litigation, having been cited in nearly 8,300 decisions.<sup>1</sup> It has appeared on the Civil Rules Advisory Committee's agenda three times in eleven years at the request of various bar groups claiming either 30(b)(6) witnesses were routinely unprepared, or the burden of preparing them was unreasonable. In 2006 and 2009, the advisory committee concluded that most of the problems complained of were attributable to behavior

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

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

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

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

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

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

## **I. Attorney Literature Review**

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

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

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

The general consensus seems to be that, on the whole, the burden-shifting framework of Rule 30(b)(6) has resulted in fairer notice to organizational defendants and better-prepared deponents. See, e.g., Nathaniel S. Boyer, *Going Rogue in a 30(b)(6) Deposition: Whether It’s Permissible, and How Defending Counsel Should Respond* 1 (A.B.A. SEC. OF LITIG. 2012 SEC. ANN. CONF., presentation materials, Apr. 18–20, 2012) (“All in all, it’s a success story for U.S. litigation efficiency.”). For example, an article in an ABA Section of Litigation publication argued that the burden-shifting regime under Rule 30(b)(6), in which both parties have certain obligations (i.e.,

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

describing with reasonable particularity in the notice, and designating and preparing a deponent), is superior to interrogatories and individual depositions because it prevents evasion and bandying among uninformed officers. Eric Kinder & Walt Auvil, *Rule 30(b)(6) at 45: Is It Still Your Friend?*, A.B.A. SEC. OF LITIG. – PRETRIAL PRAC. & DISCOVERY (Dec. 3, 2015). *But see* Joseph W. Hovermill & Jonathan A. Singer, *A Solution to Complex Problems in 30(b)(6) Depositions*, LAW 360 (July 18, 2012, 1:49 PM) (concluding that “[t]he better approach” is to require written discovery in lieu of corporate depositions “where there is simply too much information for a corporate representative to sufficiently learn”). For those reasons, “[f]orty-five years after its adoption, Rule 30(b)(6) continues to perform the role envisioned by the advisory committee in 1970. The rule remains a valuable aid in focusing discovery efforts more efficiently than would be possible in its absence.” Kinder & Auvil, *supra*; *see also* John J. Hickey, *Why the Corporate Representative May Be the Most Neglected Key Witness . . . and How They Can Make Your Case* (AM. ASS’N FOR JUST. ANN. CONV., presentation materials, July 2014).

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

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

## **B. Most Attorney Literature Concerns Practice Pointers.**

Overwhelmingly, the focus of the practical literature from both the plaintiffs’ and defense perspectives has been finding ways to make the current version of the rule serve their respective causes. Practice tips abound for attorneys drafting notices or preparing corporate deponents. Most articles and CLE presentations on the subject of 30(b)(6) depositions have been decidedly “partisan.” *See, e.g.*, Hickey, *supra* (plaintiff’s side); Mark R. Kosieradzki, *Using 30(b)(6) To Win Your Case* (TRIAL GUIDES DVD, 1st ed., Oct. 2016) (same); David R. Singh & Isabella C. Lacayo, *A Practical*

*Guide to the Successful Defense of a 30(b)(6) Deposition*, VERDICT, Spring 2009 (defense side); David J. Shuster, *Corporate Designee Depositions: A Primer for In-House Counsel*, KRAMON & GRAHAM (Oct. 2013) (same); Strang & Kottha, *Trap*, *supra* (same).

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

Much of the relevant defense bar literature focuses on narrowing the scope of the deposition notice and limiting the number of topics addressed.<sup>4</sup> *See, e.g.*, Chad Colton, *The Art of Narrowing Rule 30(b)(6) Deposition Notices*, MARKOWITZ HERBOLD; Michael S. Cryan, *The Scope of Rule 30(b)(6) in the Examination of Corporate Deponents*, L.A. LAW., Apr. 2010, at 15–16, 18; Neil Lloyd & Christina Fernandez, *Refining and Then Sticking to the Topic: Making Representative Party Depositions under Fed. R. Civ. P. 30(b)(6) Fairer and More Efficient*, 83 U.S.L.W. 1026 (2015); Merten & Kessimian, *supra*, at 15; Carter E. Strang and Arun J. Kottha, *Corporate Representative Depositions: Notice Provision of Rule 30(b)(6)*, INTER ALIA, Spring 2009, at 1, 14–15; Strang & Kottha, *Trap*, *supra*. The defense bar acknowledges, however, that this is an uphill battle, as courts have generally permitted questions that exceed the bounds of the notice as long as they remain within the scope of discovery. *See, e.g.*, Hite, *supra* (although defense counsel "often take pains to limit the scope of the testimony, . . . under the well-reasoned majority rule that effort is futile"); *see also* Merten & Kessimian, *supra*, at 17 (at best, "[f]ederal courts are split" as to whether the deponent can be questioned about matters beyond those listed in the notice). Universally, attorneys agree that instructing a witness not to answer questions outside the scope of the notice is improper in the absence of privilege. *See, e.g.*, Boyer, *supra*, at 4; Cryan, *supra*, at 15; Hite, *supra*; *accord* Kinder & Auvil, *supra* ("While defense counsel have a number of options" when plaintiff's counsel asks a question outside the scope of the deposition notice, "courts have been clear that merely instructing the witness not to answer is not one of those options.").

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

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

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

## II. The “Judicial Admissions” Issue

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

As the review of attorney literature makes clear, practitioners are keenly interested in whether a court will deem a corporate deponent’s testimony a “judicial admission.” The distinction between “judicial admissions” and “ordinary evidentiary admissions” is critical. *See* 6 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 801:26 (7th ed. 2014). “Evidentiary admissions” are statements “by a party-opponent [that] are excluded from the category of hearsay.” *See* FED. R. EVID. 801(d)(2). Practically speaking, evidentiary admissions have been “made by a party” and therefore “can subsequently be used in a trial against that party.” Ediberto Roman, “*Your Honor What I Meant To State Was . . .*”: *A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law*, 22 PEPP. L. REV. 981, 983, 985 (1995). At trial, the party can “put himself on the stand and explain his former assertion.” 4 JOHN HENRY WIGMORE ET AL., *WIGMORE ON EVIDENCE* § 1048 (3d ed. 1972).

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

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

difference is this: an evidentiary admission “is subject to contradiction or explanation,” while a judicial admission is not. MCCORMICK ON EVIDENCE, *supra*, § 254.

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

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

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

The majority of courts to decide the issue—including four courts of appeals—have concluded that a Rule 30(b)(6) deponent’s testimony should have the effect of an evidentiary admission rather than a judicial admission. In *A.I. Credit Corp. v. Legion Insurance Co.*, 265 F.3d 630 (7th Cir. 2001), the U.S. Court of Appeals for the Seventh Circuit became the first federal appellate court to weigh in on the “judicial admissions” issue. A.I. Credit, a finance company, sued a number of insurers and their representatives, claiming it had been fraudulently induced to agree to finance a struggling company that soon went bankrupt. *Id.* at 632–33. One of the representatives, William McPherson, argued in his motion for summary judgment that A.I. Credit’s evidence connecting him to the fraud was inadmissible. *Id.* at 632, 637. According to McPherson, Miles Holsworth, the bankrupt company’s controller, had testified that McPherson participated in the conference call that led to the financing agreement. *Id.* at 633, 637. However, the plaintiff’s

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

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

30(b)(6) witness, John Rago, testified that he, too, had been on the call, but also testified that he had never spoken to McPherson. *Id.*

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

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

The U.S. Court of Appeals for the Second Circuit reached the same conclusion two years later in *Keepers, Inc. v. City of Milford*, 807 F.3d 24 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016), where Rule 30(b)(6) was more squarely at issue. *Keepers* also involved a government deponent testifying in support of a challenged law (here, a municipal ordinance), but on this occasion the 30(b)(6) witness “was unable to answer various questions” rather than supplying contradictory testimony. *Id.* at 27, 32. Like the Eighth Circuit, the Second Circuit acknowledged that “the process by which [the city] ultimately answered [the challenger’s] questions was not a route that is to be preferred,” but permitted the city to supplement the deponent’s answers with an affidavit. *Id.* at 36–37. Although the challenger was correct “that an organization’s deposition testimony is ‘binding’ in the sense that whatever its deponent says can be used against the organization,” the court concluded that “Rule 30(b)(6) testimony is not ‘binding’ in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements.” *Id.* at 34. Again, the court relied on *AstenJohnson* and *A.I. Credit*, and it echoed the Seventh Circuit’s rationale for permitting an organization to offer additional evidence at trial to supplement its 30(b)(6) designee’s testimony:

Nothing in the text of the Rule or in the Advisory Committee notes indicates that the Rule is meant to bind a corporate party irrevocably to whatever its designee happens

to recollect during her testimony. Of course, a party whose testimony “evolves” risks its credibility, but that does not mean it has violated the Federal Rules of Civil Procedure.

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

Most recently, the U.S. Court of Appeals for the Tenth Circuit “agree[d] with [its] sister circuits that the testimony of a Rule 30(b)(6) witness is merely an evidentiary admission, rather than a judicial admission.” *Vehicle Mkt. Research, Inc. v. Mitchell Int’l, Inc.*, 839 F.3d 1251, 1261 (10th Cir. 2016). The case arose in the context of a proposed jury instruction stating in part, “The corporation cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative.” *Id.* at 1259. The court rejected this statement of the law and held that the district court did not abuse its discretion by striking that sentence from the proposed instruction. *Id.* The court of appeals clarified that the instruction’s proponent had mischaracterized the cases and treatises it relied on, which, properly read, “make clear that [barring contradictory evidence] is limited to the context in which an affidavit conflicts with the Rule 30(b)(6) deposition *without good reason.*” *Id.* at 1260; *see also infra* Part II-B.

The leading federal civil procedure treatises are in accord. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS ET AL., FEDERAL PRACTICE AND PROCEDURE § 2103 (3d ed. 2010) (“Of course, the testimony of the representative designated to speak for the corporation are admissible against it. But as with any other party statement, they are not ‘binding’ in the sense that the corporate party is forbidden to call the same or another witness to offer different testimony at trial.” (footnotes omitted)); 7-30 JAMES WILLIAM MOORE ET AL., MOORE’S FEDERAL PRACTICE – CIVIL § 30.25[3] (2016) (“[T]he testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not binding against the organization in the sense that the testimony can be corrected, explained and supplemented, and the entity is not ‘irrevocably’ bound to what the fairly prepared and candid designated deponent happens to remember during the testimony.” (footnotes omitted)).

## **B. Minority Position: Under Some Circumstances, a Corporation May Not Be Permitted To Contradict Its Deponent’s Statements (or Silences)**

The leading case reaching the contrary conclusion is *Rainey v. American Forest & Paper Ass’n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), in which the U.S. District Court for the District of Columbia refused to consider at summary judgment an affidavit that contradicted statements the defendant employer’s designee made during a 30(b)(6) deposition. *Id.* at 93–96. The plaintiff claimed to have been denied overtime payments as a result of being misclassified as “exempt” under the Fair Labor Standards Act. *Id.* at 86–87. The employer’s 30(b)(6) witness was unable give “an informed answer” to many questions about the plaintiff’s specific job duties, and claimed that her



job functions were “exempt in character” but could not provide details as to why; the functions he *was* able to describe supported the opposite conclusion. *Id.* at 92–93. At summary judgment, the employer tried to introduce as additional evidence of the plaintiff’s exempt status a more detailed, knowledgeable affidavit from the plaintiff’s former supervisor, whom the employer claimed it could not designate under Rule 30(b)(6) because she had since left the company. *Id.* at 93–94.

The district court held that Rule 30(b)(6) “precluded” the employer from introducing the affidavit at the “eleventh hour.” *Id.* at 94–95. The court reasoned that the employer had failed to adequately prepare its designee as the Rule requires, and interpreted the employer’s subsequent introduction of the affidavit as an attempt to “proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.” *Id.* at 94. The court viewed the employer’s later “revis[ion of] the positions taken at the 30(b)(6) depositions” by one employee with the affidavit of another as precisely the kind of “bandying” that Rule 30(b)(6) “aims to forestall.” *Id.* at 94–95. Instead, the Rule “binds the corporate party to the positions taken by its 30(b)(6) witnesses” to prevent “trial by ambush.” *Id.* at 95. The court declined to consider the affidavit for summary judgment purposes, concluding that “Rule 30(b)(6) requires such relief” because the employer failed to show “that the affidavit’s particular allegations were not ‘reasonably available’ at the time of the depositions.” *Id.* at 95–96.

Some courts have rejected *Rainey* outright. *See, e.g., A.I. Credit*, 265 F.3d at 637 (permitting 30(b)(6) witness’s testimony to be contradicted “is the sounder view”); *Whitesell Corp. v. Whirlpool Corp.*, No. 05-679, 2009 U.S. Dist. LEXIS 101106, at \*4 n.1 (W.D. Mich. Oct. 30, 2009) (concluding “the better approach” is that deeming a corporation “bound by the testimony of its designee does not also compel the conclusion that no contradictory evidence is permissible”).

Other courts declining to follow *Rainey* have noted that it does not categorically bar all evidence contradicting 30(b)(6) testimony, and its circumstances were somewhat extreme. *See, e.g., Beauperthuy v. 24 Hour Fitness U.S., Inc.*, No. 06-715, 2009 U.S. Dist. LEXIS 104906, at \*21 (N.D. Cal. Nov. 10, 2009) (“*Rainey* does not suggest that an inadequate Rule 30(b)(6) deposition may categorically preclude a party from bringing any evidence—indeed, the *Rainey* court found only that a single, specific affidavit was inappropriate, and discussed a variety of other types of evidence that Defendants offered to support their affirmative defense without suggesting that they were precluded by the inadequate deposition.”); *Mid-State Sur. Corp. v. Diversified Enter.*, No. 05-72, 2005 U.S. Dist. LEXIS 38687, at \*29–30 (S.D. W. Va. Dec. 12, 2005) (rejecting argument that *Rainey* “stand[s] for the proposition that the failure of a corporation to provide an educated witness is, in and of itself, grounds for summary judgment” and distinguishing on the grounds that “this is not the case, as it was in *Rainey*, where a corporation was trying to avoid summary judgment by introducing new evidence that was clearly contrary to the testimony of its 30(b)(6) representative”).

Another aspect of *Rainey* that limits its reach is that the court strongly suggested its true purpose in barring the affidavit was punitive. *See* 26 F. Supp. 2d at 95 (finding employer’s conduct in either designating the wrong person or failing to prepare its witness “clearly violated Rule 30(b)(6)”). *Wright, Miller & Marcus* has described the exclusion of evidence as a consequence of failing to prepare a 30(b)(6) witness as a “sanction.” *See* FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2103 (“A court might . . . sanction a party that has failed to satisfy its Rule 30(b)(6) duties by limiting the evidence it could present . . . by forbidding it from calling witnesses who would offer

testimony inconsistent with that given by the one it designated . . .”). In this sense, then, the *Rainey* court’s decision to bar the affidavit was not a true “judicial admission” at all.

Another district court decision reaching the same result as *Rainey* supports this theory. During the 30(b)(6) deposition in *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992 (E.D. La. 2000), a products liability action, the defendant manufacturer’s designee “attested under no uncertain terms” that the defendant had manufactured the hammer at issue. *Id.* at 992. More than six months later, the manufacturer submitted an affidavit and report from one of its engineers concluding that it had *not* manufactured the hammer. *Id.* The court struck the affidavit and report, reasoning that the manufacturer “should not be allowed to defeat [the plaintiff’s] motion for summary judgment based upon its self-serving abuse of a Rule 30(b)(6) deposition.” *Id.* at 993. It allowed for the possibility of an exception for “contradictory or inconsistent affidavit[s]” that are “accompanied by a reasonable explanation,” but found that it did not apply. *Id.*

The *Hyde* court found the affidavit directly contradicting the 30(b)(6) testimony was “plainly” an example of the recurring (yet ineffective) sham-affidavit tactic at summary judgment: “where the non-movant . . . submits an affidavit which directly contradicts an earlier deposition and the movant has relied upon and based its motion on the prior deposition, courts may disregard the later affidavit.” *Id.*; *accord Keepers*, 807 F.3d at 35 (“[T]he ‘sham-affidavit rule’ prevents a party from manufacturing an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant’s previous deposition testimony.”). *Hyde* therefore fits neatly into the group of Rule 30(b)(6) cases standing for the unremarkable proposition that a non-movant organization cannot create a genuine issue of material fact sufficient to defeat summary judgment by introducing affidavits that contradict its own 30(b)(6) testimony. *See Vehicle Market Research*, 839 F.3d at 1259–60 (collecting cases excluding affidavits that “conflict[] with the Rule 30(b)(6) deposition *without good reason*”); *see also* MOORE’S FEDERAL PRACTICE, *supra*, § 30.25[3] & n.15.2 (“[T]he entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know.”).

Although some have argued that *Hyde* effectively spread the *Rainey* “judicial admission” approach to the Fifth Circuit, *see, e.g.*, Greenbaum, *supra*, at 26, that conclusion is not airtight. Most obviously, *Hyde* did not cite *Rainey* at all; it primarily relied on *Taylor*, *see infra* Part II-C, and a District of Kansas sanctions case in which the 30(b)(6) “deposition reflect[ed] inadequate preparation and knowledge” as to two of the topics listed on the deposition notice. *See Hyde*, 107 F. Supp. 2d at 992–93 (citing *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999) (finding “sanctionable misconduct” where deponent “failed to make necessary inquiries about relevant topics” and “made no effort to review his own files”). In any case, even if *Hyde* could be interpreted so broadly as to suggest that it endorsed the rule read (fairly or not) into *Rainey* that a 30(b)(6) designee’s statements are judicial admissions, district courts in the Fifth Circuit do not seem to consider themselves bound by either precedent or comity to follow it. *See, e.g.*, *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 698 (S.D. Tex. 2009) (“A Rule 30(b)(6) deposition . . . is not ‘binding’ on the entity for which the witness testifies in the sense of preclusion or judicial admission.” (citing *Wright, Miller & Marcus* and *A.I. Credit*)).

### C. Other Courts Seem Reluctant To Expand the “Judicial Admissions” Approach

In the other circuits, there is either no binding appellate precedent, or the court of appeals has not given a straightforward answer to the broad question whether a 30(b)(6) deponent’s statements are “judicial admissions.” The holding in the leading Third Circuit case is more limited: the Court of Appeals in *AstenJohnson, Inc. v. Columbia Casualty Co.*, 562 F.3d 213 (3d Cir. 2009), declined to hold that a *legal conclusion* made by a designee during a 30(b)(6) deposition precluded the corporation from producing at trial evidence contradicting that position. *Id.* at 229 n.9. *AstenJohnson* found persuasive a pre-*Southern Wine* Eighth Circuit case that drew a distinction based on whether a 30(b)(6) witness’s “admissions” concerned “matters of fact [or] conclusions of law.” *See id.* (citing *R & B Appliance Parts, Inc., v. Amana Co.*, 258 F.3d 783, 787 (8th Cir. 2001)). It remains an open question whether the Third Circuit would bar evidence contradicting *facts* to which a 30(b)(6) witness had testified. *See id.*

Both before and after *AstenJohnson*, district courts in the Third Circuit have rejected the minority position that a 30(b)(6) deponent’s statements have the effect of judicial admissions. *See, e.g., Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC*, 40 F. Supp. 3d 437, 451 (E.D. Pa. 2014) (“Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness.”); *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 212 (E.D. Pa. 2008) (“[T]he testimony of a Rule 30(b)(6) representative, although admissible against the party that designates the representative, is not a judicial admission absolutely binding on that party.” (quoting *Wright, Miller & Marcus*)); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 722 n.17 (M.D. Pa. 2006) (declining to bar evidence of damages at trial where 30(b)(6) designee “was unable to fully answer questions about damages” during deposition). *But see Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 U.S. Dist. LEXIS 11320, at \*8 (E.D. Pa. Aug. 13, 1991) (holding that corporate defendant “will not be allowed effectively to change its answer by introducing evidence during trial” where designee “does not know the answer to plaintiffs’ questions”).

District courts in the Fourth Circuit have reached contrary—but reconcilable—conclusions. The influential case of *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996), adopted the position that “answers given at a Rule 30(b)(6) deposition are not judicial admissions.” *Id.* at 363. A more recent District of Maryland case used sanctions language to explain that, “depending on the ‘nature and extent of the obfuscation, the testimony given by [a] non-responsive deponent (e.g., ‘I don’t know’) may be deemed ‘binding on the corporation’ so as to prohibit it from offering contrary evidence at trial.” *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 685 (D. Md. 2012) (alteration in original) (quoting *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005)). *Wilson* in turn relied on both *Rainey* and *Taylor*. 228 F.R.D. at 530 (citing *Rainey*, 26 F. Supp. 2d at 94–95, and *Taylor*, 166 F.R.D. at 362). The takeaway from the District of Maryland cases appears to be this: a corporate deponent’s 30(b)(6) admissions will generally not preclude the introduction of contradictory evidence—unless the corporate party’s “obfuscation” demands punishment. A district court in the Eleventh Circuit is in accord. *Cont’l Cas. Co. v. First Fin. Emp. Leasing, Inc.*, 716 F. Supp. 2d 1176, 1190–91 (M.D. Fla. 2010) (“Although preclusion may be imposed as a sanction, it does not follow automatically from the nature of Rule 30(b)(6) testimony.”).

A district court in the Sixth Circuit acknowledged *Rainey*'s ambiguity and concluded that cases squarely rejecting the notion that "binding" a corporation with 30(b)(6) testimony means "no contradictory evidence is permissible" at trial "take the better approach." *Whitesell*, 2009 U.S. Dist. LEXIS 101106, at \*3–4 & n.1. The court explained:

The Federal Rules of Civil Procedure not only permit but encourage parties to revise and update information throughout the discovery process. To the extent evidence . . . offered at trial contradicts the testimony and exhibits offered during the 30(b)(6) deposition, Defendant can use that deposition testimony for impeachment purposes, and in this sense Plaintiff is "bound" by it. To the extent evidence . . . offered at trial merely clarifies and updates the testimony and exhibits offered during the 30(b)(6) deposition, no rule of evidence or civil procedure requires its exclusion on that basis alone.

*Id.* at \*4–5 (citation omitted).

A district court in the First Circuit also declined to bar testimony from being introduced. In *Neponset Landing Corp. v. Northwestern Mutual Life Insurance Co.*, 279 F.R.D. 59 (D. Mass. 2011), the designee provided testimony on thirty of the thirty-six noticed topics and "prepared for the deposition by reviewing the documents and exhibits." *Id.* at 61. Again, the court framed its decision in terms of the degree of punishment warranted: "This was not a situation where the defendant's conduct was tantamount to a complete failure of the corporation to appear at its deposition. Accordingly, there is no adequate basis for imposing the very severe sanction of precluding [the corporate party] from introducing evidence at trial." *Id.* (citation omitted).

Although the U.S. Court of Appeals for the First Circuit has yet to address the subject, it foreshadowed in different context *Neponset Landing*'s emphasis on proportionality, i.e., whether the corporation violated its duty to prepare egregiously enough to deserve so harsh a sanction as preclusion of evidence:

Because of their binding consequences, judicial admissions generally arise only from deliberate voluntary waivers that expressly concede for the purposes of trial the truth of an alleged fact. Although there is a limited class of situations where, because of the highly formalized nature of the context in which the statement is made, a judicial admission can arise from an "involuntary" act of a party, considerations of fairness dictate that this class of "involuntary" admissions be narrow.

*United States v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975) (citation omitted).

The common themes that emerge from cases in the circuits that have yet to address the Rule 30(b)(6) "judicial admissions" issue are that these courts (1) have read *Rainey* narrowly, (2) have frequently declined to adopt or extend *Rainey*'s approach, and (3) view exclusion of evidence to supplement or contradict a 30(b)(6) witness's incomplete or incorrect testimony as a sanction reserved for unusually obstructive conduct. It is clear that courts have not embraced a broad reading of *Rainey*.

Critically, no cases—even those barring supplemental, contradictory, or explanatory testimony, like *Rainey*—expressly hold that a Rule 30(b)(6) witness’s statements are judicial admissions.

### III. Surveys of Local and State Rules

For the purposes of this memorandum, systematic surveys were conducted of the procedural rules governing corporate depositions in the ninety-four federal judicial districts and all fifty states (and the District of Columbia). While, not surprisingly, more experimentation can be found at the state level than among the federal district courts’ local rules, these surveys yield few groundbreaking conclusions.

#### A. **Local Rules**

*Conclusions:* Local rules supplementing Rule 30 primarily address administrative details and only rarely prescribe additional requirements for organizational depositions. A recurring area of variance is the number of days constituting “reasonable notice.”

In addition to local analogs to Civil Rule 30, the survey of the federal jurisdictions examined *all* mentions of depositions in the district courts’ local rules and standing, general, and administrative orders. Procedures specific to individual judges were beyond the scope of this particular survey.<sup>8</sup>

Only two districts have local rules or orders specifically addressing corporate depositions. A District of South Carolina rule provides that a 30(b)(6) deposition “shall be considered as one deposition regardless of the number of witnesses presented to address the matters set forth in the notice.” D.S.C. Civ. R. 30.01. This is consistent with case law indicating that multiple deponents may be needed to satisfy the organization’s obligations under Rule 30(b)(6). *See, e.g., Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) (“[C]orporations have an ‘affirmative duty’ to make available as many persons as necessary to give ‘complete, knowledgeable, and binding’ answers on the corporation’s behalf.” (quoting *Reilly v. NatWest Mkt. Grp. Inc.*, 181 F.3d 253, 268 (2d Cir.1999))); *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) (“The designating party has a duty to designate more than one deponent if necessary to respond to questions on all relevant areas of inquiry listed in the notice or subpoena.”).

The other local rule specific to corporate depositions is a provision of District of Wyoming Rule 30.1(b):

Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about

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<sup>8</sup> Judge James Donato’s standing order setting forth procedures and expectations for 30(b)(6) depositions is perhaps the most noteworthy. Standing Order for Discovery in Civil Cases before Judge Donato ¶ 16 (N.D. Cal. Apr. 25, 2014). Other judges have also adopted chambers rules regarding corporate depositions. *See, e.g.,* Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases before Judge William Alsup ¶ 23 (N.D. Cal. Mar. 17, 2016); Discovery Order ¶ 8 (D. Md. Apr. 9, 2013) (Grimm, J.) (limiting 30(b)(6) depositions to seven hours).

which he has no knowledge, he or she shall submit, reasonably before the date noticed for the deposition, an affidavit so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action. The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness's right to seek a protective order.

No other jurisdiction requires such an affidavit.

Although few local rules directly address 30(b)(6) depositions, many jurisdictions have local rules governing depositions generally; these apply to corporate depositions as well as depositions of other witnesses. *See, e.g.*, D. ME. R. 30 (technical specifications for video depositions); S.D. TEX. R. 30.1 (“stenographic recordation” of video depositions); E.D.N.Y. R. 30.3 (who may attend depositions); N.D. OHIO CIV. R. 30.1 (conduct of participants).

A significant percentage of these general rules define what constitutes “reasonable notice.” Six jurisdictions require at least fourteen days. *See* D. COLO. CIV. R. 30.1; M.D. FLA. R. 3.02; N.D. IND. R. 30-1(b); D. MD. App. A(9)(b); D.N.M. CIV. R. 30.1; D. WYO. CIV. R. 30.1(a). Four other jurisdictions set a shorter time frame: the District of Kansas (seven days), D. KAN. R. 30.1, the Eastern District of Oklahoma (same), E.D. OKLA. CIV. R. 30.1(a)(2), the District of Delaware (ten days), D. DEL. R. 30.1, and the Eastern District of Virginia (generally eleven days), E.D. VA. R. 30(H). The longest notice period is twenty-one days, as required in the Western District of New York. *See* W.D.N.Y. CIV. R. 30(a). In other jurisdictions, the length of a “reasonable time” is a matter of geography. In the Southern District of Florida and the District of Columbia, the seven-day notice period is extended to fourteen days for out-of-state depositions and depositions taking place “more than 50 miles from the District,” respectively. S.D. FLA. R. 26.1(j); D.C. R. 30.1. The Eastern District of Virginia builds flexibility for geographical considerations into its eleven-day notice period, which “will vary according to the . . . urgency of taking the deposition . . . at a particular time and place.” E.D. VA. R. 30(H).

Local rules concerning “reasonable notice” frequently allow the parties, *see, e.g.*, N.D. IND. R. 30-1(b), the court, *see, e.g.*, D. KAN. R. 30.1, or both, *see, e.g.*, D.N.M. CIV. R. 30.1, to vary the time period. Others address counsel’s conduct in giving notice. *See, e.g.*, D. COLO. CIV. R. 30.1 (counsel “shall make a good faith effort to schedule [the deposition] in a convenient and cost effective manner” before noticing); D.N.M. CIV. R. 30.1 (“Counsel must confer in good faith regarding scheduling of depositions before serving notice of deposition.”).

There is no evidence of meaningful experimentation with Rule 30(b)(6) at the local level; even the two rules that do specifically apply to corporate depositions merely codify existing interpretations of the rule. However, there *is* some variance among local rules that define “reasonable notice” for the purpose of depositions generally (and, by extension, corporate depositions specifically).

## B. State Rules

*Conclusions:* Although state rules governing corporate depositions generally track Rule 30(b)(6) irrespective of whether a given state expressly follows the federal rules, “describ[ing] with reasonable particularity the matters for examination” is mandatory in only twenty percent of states.

Unlike the federal district courts, the states are not bound by Civil Rule 30(b)(6), and are thus less homogeneous and have more freedom to experiment. Nevertheless, a survey of the rules governing organizational depositions in all fifty states reveals many common threads—chief among which is a willingness to use Rule 30(b)(6) as a “base.” Every state has a version of Rule 30(b)(6), and thirty states track it almost exactly.

Even the twenty states that do not follow the federal rule’s organization and numbering scheme have adopted rules similar in substance to Rule 30(b)(6). For example, Iowa’s civil rule governing noticing of depositions provides, in relevant part:

A notice or subpoena may name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the witness will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

IOWA R. CIV. P. 1.707(5).

This Iowa rule also illustrates an important, and frequently-occurring, difference between Rule 30(b)(6) and many otherwise-similar state rules: whether “describ[ing] with reasonable particularity the matters for examination” in the deposition notice is mandatory or permissive. Rule 30(b)(6)’s notice provision uses mandatory language. FED. R. CIV. P. 30(b)(6) (“In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and *must* describe with reasonable particularity the matters for examination.” (emphasis added)). Only ten states, however, have adopted the federal notice requirement word for word. Forty states and the District of Columbia instead use permissive language, i.e., “may” rather than “must.” A typical formulation in these states is: “A party *may* in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.” MO. SUP. CT. R. 57.03(b)(4) (emphasis added); *see also, e.g.*, D.C. SUPER. CT. R. CIV. P. 30(b)(6) (“A party may in the party’s notice . . . describe with reasonable particularity the matters on which examination is requested.”); IOWA R. CIV. P. 1.707(5) (“A notice or subpoena may . . . describe with reasonable particularity the matters on which examination is

requested.”); PA. R. CIV. P. 4007.1(e) (“A party may in the notice . . . describe with reasonable particularity the matters to be inquired into and the materials to be produced.”).

State rules differ from Rule 30(b)(6) in other noteworthy ways. For example, two states, Indiana and Ohio, place a different—and arguably heavier—burden on organizational witnesses than the federal rule does. Those rules both provide that the organization’s designee must be able to testify about information “*known or available* to the organization.” IND. R. TRIAL P. 30(B)(6) (emphasis added); OHIO R. CIV. P. 30(B)(5) (emphasis added). Rule 30(b)(6) defines the duty more flexibly; the deponent must testify about information “known or *reasonably* available to the organization.” FED. R. CIV. P. 30(b)(6) (emphasis added). Another difference involves the time frame within which the organization must designate its witnesses. Whereas Rule 30(b)(6) does not set one, some states, such as Texas, require that the organization named in the notice must designate its witnesses within “a reasonable time before the deposition.” *See* TEX. R. CIV. P. 199.2(b)(1).

A few states have departed further from Rule 30(b)(6). One is New York, which in 2015 revised Rule 11(f) of the Rules of the Commercial Division of the Supreme Court to permit depositions of entities and require organizations to provide knowledgeable witnesses. Rule 11(f) is the most detailed and recently-revised state rule, and is reprinted in full below:

Rule 11-f. Depositions of Entities; Identification of Matters.

- (a) A notice or subpoena may name as a deponent a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
- (b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.
- (c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition
  - (1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;
  - (2) such designation must include the identity, description or title of such individual(s); and
  - (3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.
- (d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then:
  - (1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is



specified. If timely notification has been so given, such other individual shall instead be produced;

- (2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice or subpoena served upon such entity the identity, description or title of such individual; and
  - (3) if the named entity, pursuant to subsection (d)(1) of this Rule, cross-designates more than one individual, it must set out the matters on which each individual will testify.
- (e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this Rule.
  - (f) The individual(s) designated must testify about information known or reasonably available to the entity.
  - (g) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.
  - (h) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.

Although rules like this show that some states have experimented with rules governing organizational depositions, the general approach at the state level seems to be significant overlap with Civil Rule 30(b)(6)—but with potentially meaningful deviations in certain areas, such as the “reasonable particularity” requirement and the scope of the deponent’s duty to prepare.

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Notes of Conference Call  
Rule 30(b)(6) Subcommittee  
Feb. 13, 2017

On Feb. 13, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Brian Morris, Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter to the Advisory Committee), and Prof. Richard Marcus (Reporter to the Subcommittee), and Derek Webb of the Administrative Office.

The call was introduced with a report on the discussion at the Standing Committee meeting of Rule 30(b)(6) issues. The judges on that committee did not seem to think that this rule was a source of serious problems. One judge on the Standing Committee said he read through the entire packet of material in the agenda book (the agenda memo provided to the Advisory Committee for its November, 2016, meeting) and got a headache that only abated when he got to the case management ideas at the end of the agenda materials on the rule. That initially seemed to him a more sensible way to approaching these issues than a long, detailed addition to the rule.

So one way to resume the Subcommittee's work would be to shift focus to those case management ideas for revision to Rules 26(f) and 16. That sort of approach might be a "nudge" for lawyers and judges to make realistic provision for 30(b)(6) depositions early in the litigation, and the sort of case-specific tailoring such a nudge could produce might be superior to "one size fits all" default settings in a revised rule. That sort of revision to Rule 26(f) might insist on planning for some of the matters on which we have been discussing specific amendments to 30(b)(6). If that seemed promising, the question then might be whether there are specifics that nonetheless should be put into the rule. Perhaps all that is needed is a "nudge" on the case management track.

This idea prompted the reaction that focusing mainly on Rules 26(f) and 16 is not sufficient. That would only urge the parties to talk about various subjects, and could generate even more inconsistency than presently exists on some issues like the number or duration of these depositions. One problem with the case management approach is that its effectiveness depends a great deal on the energy level of the individual judge, and the judge's attitude toward this sort of activity. Some judges make intense use of Rule 16, but others are somewhat perfunctory in their attention to discovery planning at the inception of the case.

Having specifics in the rule on a number of the matters we have been discussing would be an important adjunct to invoking case management as well. A very large amount of time and energy

and money is spent arguing about things that could be addressed in specific ways in a rule. That specific starting point would save time even if the parties agree to depart from the specifics, or urge the judge to do so by order. At the Rule 26(f) stage of the case, people are often not thinking as clearly about 30(b)(6) issues as would be needed to provide specifics then.

Given these circumstances, it was suggested, the LCJ starting point seems right -- the absence of motions does not show there is not a problem. The absence of motions may be the reason judicial members of the Standing Committee did not appreciate the level of difficulty caused by the rule. But the fact judges don't see motions shows that -- after a lot of bickering -- the parties make some sort of compromise rather than filing motions. Though one might endorse this situation as a sort of "cooperation," it is actually very time-consuming. Having specifics in the rule would actually save a lot of time.

A reaction to this view was that it was an eloquent argument for going beyond a general case-management admonition and providing specifics in the rule. Another reaction was to ask whether a Committee Note to such a case-management rule could itself provide the desired specifics. The response to that question was that "rulemaking by Note" is disfavored. Moreover, at least some of the issues that might be addressed in the rule are now addressed in Notes to prior amendments. For example, the 2000 amendments included a statement in a Note that a 30(b)(6) deposition should, for purposes of the duration limitation adopted that year, be regarded as permitting one day of seven hours for each person designated by the organization. And the Note to the 1993 amendments said that, for purposes of the ten-deposition limit introduced in 1993, the 30(b)(6) deposition should be regarded as one deposition no matter how many individuals are designated to testify. Standing alone, those Note comments seemingly have not avoided problems. That may show some of the hazards of "rulemaking by Note." Those Note comments could be elevated to rule provisions, but at least some seem to think they do not strike the right balance. So a rule provision could provide the desired force and also offer revised content.

Favoring adding specifics to the rule does not mean, it was added, that all the specifics we have identified should be added. Instead, our list could probably be considerably streamlined.

A question going forward, therefore, is whether action is needed on all these issues, and whether there are further issues that might be added. One possibility mentioned by the LCJ submission is that "duplication" by 30(b)(6) deposition should be forbidden in the rule. But the ABA 2016 submission is pretty comprehensive; there probably are not a lot of additional issues beyond our original list of about 18 different issues.

Another reaction was that magistrate judges would likely be a more fruitful source of reports about 30(b)(6) issues than district or circuit judges. That drew the response that "it differs from jurisdiction to jurisdiction" because different districts use magistrate judges in very different ways. Moreover, there probably are differences among magistrate judges about active management of discovery; those who are active managers probably see fewer 30(b)(6) issues stimulating full-blown motions.

This drew a reaction from a lawyer member who had been surveying other lawyers about their 30(b)(6) experience. At least some 30(b)(6) notices include lists of matters for examination were very expansive. For example, in a patent case the matters listed were something like "(1) all your patents; (2) all affirmative defenses you have ever raised in patent infringement litigation; (3) all discovery you have ever done in patent infringement litigation; (4) your corporate structure." Probably some judges would insist that such a list be refined to a workable dimension. And it is not clear (as the ABA submission recognized) that a rule provision could improve much on the "reasonable particularity" specified in the current rule. Maybe the solution is to limit the number of matters that can be listed in a notice. But that might simply prompt parties to use even broader topic descriptions to avoid exceeding the numerical limit. Indeed, that seems to have occurred in the list of topics in the patent case described above.

Another concern might be that 30(b)(6) depositions sometimes seem to be employed as an end run around the limits on the number of interrogatories.

In terms of ways a rule amendment could improve practice, addressing judicial admissions could be helpful by reducing the risk that failure to prepare on something that the party doing discovery included in the list could have dire consequences. That drew agreement; the judicial admission issue is still a source of nervousness. There are constant objections that questions go beyond the scope of the notice because of a fear that there may be a judicial admission. This is a "key driver" of problems in these depositions.

This discussion drew the reaction that even if the case management approach is not a full solution all by itself it is still important to pare down this list. Remember how long it took the Subcommittee last September to complete its initial discussion of about half the issues. "We need to narrow this down."

It was suggested that at some point it would be desirable to get guidance from the bar. Most members of the Subcommittee intend to attend the LCJ discussion in early May. Perhaps other bar groups could offer similar opportunities for discussion of how a rule change would improve practice. Outreach to bar groups

should emphasize involvement of a broad spectrum of lawyers; it is important to appreciate how practice experience and orientation affect views on this rule. It is likely that experience is not uniform throughout the bar.

Discussion turned to which categories seemed most important for provisions in Rule 30(b)(6). One list included the notice period, the number of matters on the notice, a procedure for objecting, supplementation and questions beyond the scope of the matters on the list. Another list included a timetable, supplementation, protecting against judicial admissions, and forbidding questions beyond the scope of the notice.

Regarding the judicial admissions issue, another idea suggested was to add a reference in Rule 37(d) about failure to properly prepare the 30(b)(6) witness, which could be treated as a "failure to appear" that permits Rule 37(b) sanctions without the prerequisite of a Rule 37(a) motion to compel. But it was noted that Rule 37(c)(1) might already produce similar results in terms of forbidding use of certain evidence to contradict or supplement what was said in a 30(b)(6) deposition.

That possibility prompted the observation that the very helpful research memorandum by the Rules Law Clerks shows that the "admissions" cases are really more like sanctions decisions than real judicial admissions. The focus seems to be on bad faith conduct by the party held to have made an admission.

A question was raised about whether it is wise to get too deeply into sanctions. There may be some risk that this would be regarded as a substantive rule. But some rules (e.g., Rule 8(b)(6) on the effect of failure to deny an allegation in a complaint) have consequences like a judicial admissions decision, and that qualifies as a procedural rule. In any event, however, raising sanctions too prominently as a part of any amendment package may have negative effects by inviting gamesmanship.

Another issue that might be raised is whether to limit 30(b)(6) depositions to parties. That drew the reaction that there is a qualitative difference with nonparties. With parties, one might say that interrogatories should be preferred or at least tried first. But with nonparties interrogatories are not available. And with nonparties the judicial admission issue seems nonexistent, or virtually nonexistent.

Another question is about whether to require/permit supplementation of testimony at a 30(b)(6) deposition. There have been concerns about the "I'll get back to you on that" reaction were supplementation added to the rule. But supplementation is a general feature of the discovery rules. It is connected to the obligation to properly prepare the witness for the 30(b)(6) deposition, and failure to do that is fraught with peril. There is a duty to supplement an interrogatory answer, and in a way 30(b)(6) depositions may serve as

substitutes for interrogatories because lawyers "destroyed" the use of interrogatories for such purposes by avoidance behavior in crafting responses. Moreover, there are presently lots of cases involving asserted failure to prepare the witness adequately. Those seem to be the ones in which judicial admission treatment results. If those are really bad faith cases, does the addition of a supplementation requirement really make failure to prepare more likely? Even without it, some are not preparing adequately.

Another possible problem has been use of redundant 30(b)(6) depositions. First, the party takes the depositions of all those actively involved in the events in question, and then it notices the 30(b)(6) deposition of the organization to cover the same topics. That might be what the LCJ submission is getting at with its concern about "duplicative" 30(b)(6) discovery, although that idea seems to start with the 30(b)(6) deposition and then foresee limits on further discovery, such as depositions of the main actors in the events in question.

Yet another issue that might deserve attention is the contention question issue.

This discussion prompted the reaction "Nothing has been removed from our long list of issues." One goal of this "triage" discussion has been to shorten the list of topics that warrant mention in the rule (as opposed to a general "nudge" in the case management mode).

A reaction to this concern was that one approach would be to try to "fold 30(b)(6) into Rule 26(g)(1)." Then the court automatically has Rule 26(g)(3) sanctions available. That drew the reaction that this approach might be superior to trying to micro-manage via extensive specifics in 30(b)(6) itself. Instead, we should focus on specifics on which the rules are silent.

This approach drew support. The goal should be to identify a list of the specifics to focus upon in the rule. Indeed, we might start with our vision of what the rule is ideally designed to accomplish. Perhaps initial canvassing of the Subcommittee could be by email.

At the same time, it was noted, it is important to think about what exactly the Subcommittee wants to bring to the full Committee for its April meeting. One idea might be an A list and a B list. The A list might be illustrated with sketches. The B list might include only topics that have been considered but not included in the A list. On the other hand, the failure to include B list topics on the A list might be easier to appreciate if the difficulties of drafting were illustrated by rule sketches of those matters also.

It was noted that such an A list could co-exist with an expansion of the Rule 26(f) and Rule 16 issues to include reference to 30(b)(6) depositions as well. So section A1 might be specific rule language for the specifics that seem usefully added to 30(b)(6), and section A2 would be the case management package with a more general "nudge" to give thought to how to handle foreseeable 30(b)(6) depositions.

In addition to any sketches of specific provisions for section A1, it would be good to have a composite sketch that would show what the rule would look like overall with the additions.

Going forward, it might be desirable to see whether Subcommittee members could agree on which specific provisions should be put on the A list for the April meeting of the full Advisory Committee. Starting with the list that the Subcommittee presented at the November 2016 meeting, and adding ideas mentioned during this call, it might be useful to determine whether the Subcommittee could reach consensus on a relatively short A list -- perhaps five items or so. Then the remaining items could be placed on a B list so that the full Advisory Committee had them in the agenda book, but with a clear delineation of those the Subcommittee thought to have higher priority. A first effort at assembling such a list might be an email "ballot" that should be circulated no later than Monday, Feb. 20.

LIST OF SPECIFIC TOPICS  
FROM NOV. 2016 AGENDA BOOK

Below is a list of the various topics included as specific rule-amendment ideas in the materials presented to the Advisory Committee at last November's meeting [along with some specifics not included that might be added]. At least a few (e.g., no. (2)) replicate provisions now in the rule and presumably need not be on our A list because they are already in the rule.

Items (12) and (13) would presumably be included on the A list to provide a "nudge" to early consideration, and a portion of the specific ideas would also be A list recommendations. As noted below, depending on how one counts those items, there may be as many as 28 on our November 2016 list, and four more raised (and listed as (14) through (17) during the call:

- (1) Minimum notice period
- (2) Matters for examination stated with "reasonable particularity" (presently in rule)
  - (A) Limitation to ten or some other maximum (not included last November)
  - (B) [Limiting to scope of discovery already specified in Rule 26(b)(1)]



- (3) Objections to notice
  - (A) Permitting party seeking discovery to move under Rule 37(a) for an order compelling a response [and perhaps stating that the parties must meet and confer]
  - (B) Relieving responding party of responding at all [or only with regard to objected-to matters] pending court order.
  - (C) [and directing the court to apply proportionality limits in its order]
- (4) Explicitly inviting party seeking discovery to provide copies of exhibits a specified period before the deposition
  - (A) Explicitly requiring the witness to be prepared to provide information about those exhibits during the deposition
- (5) Requiring the responding organization to identify the persons it would present a specified time before the deposition
  - (A) Providing that if the organization designates more than one person, it also specify which matters each person will address
  - (B) Providing that designating a person certifies under Rule 26(g)(1) that the person will be prepared to provide its information on those matters
  - (C) Providing that if the designated person is unable to provide the information the organization has on a given matter the organization will designate an another person
  - (D) Providing that if the organization cannot, after good faith efforts to do so, locate responsive information or a person with responsive information, it will notify the party seeking discovery.
  - (E) Providing that if the organization gives the notice in (D) the party seeking discovery may move the court for an order under Rule 37(a)
  - (F) Providing that unless an order issues under (E) above the party seeking discovery may not inquire about the matters on which the organization gave notice under (D) [or providing that inquiry is allowed into the efforts to obtain such information]
- (6) Forbidding questioning on matters beyond those for which the witness has been designated to testify
  - (A) Providing that if questioning goes beyond those matters, the testimony is not admissible against the organization as testimony of the organization
  - (B) Providing that if the questioning goes beyond those matters, the deposition will be considered a deposition of the witness as an individual and counted as a separate deposition against the ten-deposition limit

- (7) Forbidding contention questions
- (8) Providing that the organization is allowed to offer additional evidence not provided by the witness and that the testimony is not a "judicial admission"
  - (A) Providing that the court may order, under either Rule 37(c)(1) or Rule 37(d), that the response will be treated as a "judicial admission" if the organization failed adequately to prepare the witness
- (9) Providing that the organization must supplement the witness's testimony under Rule 26(e)
  - (A) setting a specific time limit for such supplementation
- (10) Providing durational (one day of seven hours) and numerical (only one of the ten permitted depositions) for 30(b)(6) depositions [or other specifics]
- (11) Providing that another 30(b)(6) deposition of the organization may be taken, but that it would count as another of the ten depositions that can be taken without stipulation or court order.
- (12) Adding Rule 30(b)(6) as another topic to address in the discovery plan under Rule 26(f)(3) [with reference to some of the items mentioned in (1) through (11) above]
- (13) Adding Rule 30(b)(6) as a mandatory topic of a scheduling order under Rule 16(b)(3)(A) or as a permissive topic under Rule 16(b)(3)(B)

ADDITIONAL POSSIBLE TOPICS MENTIONED DURING CALL

- (14) Adding a specific reference to Rule 30(b)(6) in Rule 37(d)
- (15) Limiting 30(b)(6) depositions to parties
- (16) Adding a specific reference to Rule 30(b)(6) depositions in Rule 26(g)(1) (though that rule already refers to "every discovery request")
- (17) Forbidding discovery "duplication" by Rule 30(b)(6) deposition (though Rule 26(b)(2)(C)(i) already says the court must limit discovery that is "unreasonably cumulative or duplicative")



**LAWYERS FOR CIVIL JUSTICE**

**COMMENT**  
to the  
**ADVISORY COMMITTEE ON CIVIL RULES**

**NOT UP TO THE TASK: RULE 30(b)(6) AND THE NEED FOR AMENDMENTS THAT FACILITATE COOPERATION, CASE MANAGEMENT AND PROPORTIONALITY**

December 21, 2016

Lawyers for Civil Justice (“LCJ”)<sup>1</sup> respectfully submits this Comment to the Advisory Committee on Civil Rules (“Committee”) and its Rule 30(b)(6) Subcommittee (“Subcommittee”).

**I. INTRODUCTION**

Federal Rule of Civil Procedure 30(b)(6) governs a unique and complicated aspect of civil discovery, but it does not have the necessary mechanisms to do so effectively. Rule 30(b)(6) is unique because it requires the recipient organization to find the witnesses who are prepared to discuss “information known or reasonably available to the organization.”<sup>2</sup> Parties and practitioners who navigate Rule 30(b)(6) confront the same problems over and over again, taking time and focus away from the merits of their cases and the functioning of their organizations. The disparity between the rule’s purpose and its function is even more obvious now that other discovery rules have been amended to facilitate cooperation, case management and proportionality—concepts that are absent from the current version of Rule 30(b)(6).

An important question was asked at the Committee’s November meeting: Given the wide use of Rule 30(b)(6), does the relative infrequency of motions prove that the rule is working well? The unfortunate answer is no. Motions on 30(b)(6) issues—particularly those filed towards the end of discovery—are so unlikely to assist that lawyers seldom bother filing one. In other words, a sense of Rule 30(b)(6) “fatalism” prevails among lawyers who handle complex cases.

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<sup>1</sup> Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

<sup>2</sup> See FED. R. CIV. P. 30(b)(6).

The issues that arise under Rule 30(b)(6) can be easily addressed by several straightforward amendments to the case management rules as well as to Rule 30(b)(6). Specifically, Rule 30(b)(6) should be included in Rule 26(f) party conferences and addressed in Rule 16 pretrial conferences and scheduling orders. These changes will ensure early case management and facilitate cooperation between the parties that will reduce the number of disputes that arise later. Rule 26(e) should be amended to allow supplementation of 30(b)(6) depositions.

Rule 30(b)(6) itself should also be amended. It should include a 30-day notice requirement and a mechanism for objections. In addition, the rule should require specific delineation of topics and prohibit contention questions and questions regarding protected material. Finally, Rule 30(b)(6) notices should be expressly subject to the scope of discovery defined by Rule 26(b)(1), including the principles of proportionality; this includes a presumptive limit on the number of topics and an express acknowledgement that depositions may not be necessary where other evidence exists, e.g. through written discovery, prior depositions on the same topic or by the same witness, or where the organization has no knowledge.

Although the recurring problems with Rule 30(b)(6) are difficult, time consuming and distracting, the solutions are not complex. The amendments suggested in this Comment will provide Rule 30(b)(6) with the tools necessary to accomplish its goal while facilitating the fundamental principles this Committee has adopted with respect to discovery: cooperation, case management and proportionality.

## **II. INCORPORATING RULE 30(b)(6) EXPRESSLY INTO RULES 16 AND 26 WOULD INCREASE COOPERATION AMONG PARTIES AND FACILITATE BETTER CASE MANAGEMENT.**

### **A. 30(b)(6) Depositions Should Be an Express Component of Rule 16 and 26(f) Conferences and Included in the List of “Required Contents” of Rule 16 Scheduling Orders.**

A Rule 30(b)(6) deposition is a key element of discovery in many cases. Despite its importance, however, the substance and logistics of the 30(b)(6) deposition are typically not discussed by the parties or the court until late in the discovery process. A 30(b)(6) notice that arrives late in the discovery period and includes a short deadline and numerous poorly defined topics frequently results in disagreements about the timing, scope or location of depositions. Faced with the responsibility of finding the appropriate witnesses and investigating organizational knowledge, a responding party that cannot reach an agreement with opposing counsel has only one recourse: a motion to quash or for a protective order, which is a blunt instrument inapt for most situations.

The purposes of a Rule 16 pretrial conference include “establishing early and continuing control so that the case will not be protracted because of lack of management” and “improving the quality of the trial through more thorough preparation.”<sup>3</sup> The Committee Notes from the 1983 Amendments recognized that, “the fixing of time limits serves to stimulate litigants to narrow the

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<sup>3</sup> See FED. R. CIV. P. 16(a).

areas of inquiry and advocacy to those they believe are truly relevant and material” and force litigants to “establish discovery priorities and thus to do the most important work first.” The 2015 Committee Notes provide:

Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way.

This background is particularly pertinent to Rule 30(b)(6) depositions (although neither the rule text nor the Committee Notes provides such context). Given the amount of time that organizations invest in selecting, preparing and presenting witnesses to testify and the potential for burdensome and time-consuming motion practice, the purposes underlying Rule 16 naturally apply. Requiring the definition of topics that may be noticed in a 30(b)(6) deposition early in the discovery period will assist the parties and the court in achieving judicial economy, reducing unnecessary costs and navigating the early resolution of disputes. To that end, courts’ scheduling orders as set forth in Rule 16 and the parties’ discovery plan as provided in Rule 26(f)(3)(b) should be amended to include a reference to the timing, scope and limitations regarding Rule 30(b)(6) depositions.<sup>4</sup> Such amendments would promote early cooperation between the parties, efficient case management and reduce the overall costs of litigation.<sup>5</sup>

#### **B. Rule 26(e) Should Require Supplementation of 30(b)(6) Depositions.**

Rule 26(e) requires supplementation of written discovery including interrogatories, requests for production and requests for admission, but it does not address supplementation of Rule 30(b)(6) depositions. It would be helpful to both requesting and responding parties if 30(b)(6) depositions were expressly included in the Rule 26(e) supplementation requirement.

It is critically important to ensure that an organization’s representative is providing testimony that is accurate and complete. Indeed, one of the main purposes of discovery is to “ascertain the truth.”<sup>6</sup> It is widely recognized, however, that legal arguments and the theory of a case may change throughout the life of a case. Accordingly, the FRCP should provide a process for supplementation of Rule 30(b)(6) testimony as additional facts and legal arguments develop during the course of the litigation.

In addition, a designee’s testimony pursuant to Rule 30(b)(6) is often deemed to be binding on the organization.<sup>7</sup> If it is learned that the designee’s testimony was incomplete, inaccurate or incorrect, the organization should have the right and responsibility to supplement it with

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<sup>4</sup> See *Card v. Principal Life Ins. Co.*, No. CV 5:15-139-KKC, 2016 WL 1298723 (E.D. Ky. Mar 31, 2016). See also *Standing Order for Discovery in Civil Cases Before Judge Donato*, (2014), <http://www.cand.uscourts.gov/filelibrary/1393/2014-04-25-Standing-Order-Regarding-Civil-Disc.pdf>.

<sup>5</sup> See Rule One, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, <http://iaals.du.edu/rule-one>, (last visited Dec. 15, 2016)(In many jurisdictions around the country today, the civil justice system takes too long and costs too much.).

<sup>6</sup> *In re Certain Asbestos Cases*, 112 F.R.D. 427, 433 n. 8 (N.D. Tex. 1986).

<sup>7</sup> *State Farm Mut. Auto. Ins Co. v. New Horizont Inc.*, 250 F.R.D. 203, 212 (E.D. Pa. 2008).

corrections, replacement information or updates. Case law is inconsistent on this issue.<sup>8</sup> For example, some courts permit submission of affidavits that contradict Rule 30(b)(6) testimony where there is independent evidence already on the record or the affidavit is accompanied by a reasonable explanation as to why there is an inconsistency.<sup>9</sup> One court even found it permissible for a corporation moving for summary judgment to introduce new declarations to support its 30(b)(6) testimony.<sup>10</sup> These common sense approaches, however, are far from universal.

Amending Rule 26(e) to permit and require supplementation of a 30(b)(6) deposition when testimony is incomplete or incorrect would ensure an accurate record. Although the amendments to Rule 16 and 26 suggested above, and the 30-day notice requirement suggested below, would lessen the need for supplementation by providing more time for a full investigation of the facts, the duty to supplement is an important mechanism for ensuring an accurate record on which the parties can evaluate their case for trial, settlement or other resolution.<sup>11</sup>

### **III. RULE 30(B)(6) SHOULD REQUIRE AT LEAST 30 DAYS' NOTICE IN ORDER TO ENSURE PROPER PREPARATION, AND THE DEPOSITION SHOULD BE SCHEDULED AT A TIME AND DATE AGREEABLE TO BOTH PARTIES.**

#### **A. Reasonable Notice Is at Least 30 Days Prior to Deposition.**

Rule 30(b)(6) does not set forth how much notice a party must give an organization prior to the deposition, and this deficiency in the rule is responsible for friction between parties and allegations of lack of preparation. Some courts have held that granting reasonable notice is of paramount importance due to the complexities involved with a 30(b)(6) deposition.<sup>12</sup> The

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<sup>8</sup> *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, 792 F. Supp. 2d 958 (E.D. Ky. 2011), *aff'd sub nom. Martin Cty. Coal Corp. v. Universal Underwriters Ins. Co.*, 727 F.3d 589 (6th Cir. 2013) (corporate party whose 30(b)(6) witness testified to lack of knowledge cannot claim at trial to have knowledge on that topic). *But see Daubert v. NRA Grp., LLC*, No. 3:15-CV-00718, 2016 WL 3027826, at \*12 (M.D. Pa. May 27, 2016) (noting that “corroborating evidence may establish that the affiant was understandably mistaken, confused or not in possession of all the facts during the previous deposition”); *State Farm*, 250 F.R.D. at 213 (“[w]here the affidavit is accompanied by a reasonable explanation of why it was not offered earlier, courts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted to supplement the earlier-submitted Rule 30(b)(6) testimony.”); *Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC*, 40 F. Supp. 3d 437, 451 (E.D. Pa. 2014) (finding “Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness”).

<sup>9</sup> *See Daubert*, 2016 WL 3027826, at \*37 (noting that “corroborating evidence may establish that the affiant was understandably mistaken, confused or not in possession of all the facts during the previous deposition”); *State Farm Mut. Auto. Ins.*, 250 F.R.D. at 213 (citations omitted) (“[w]here the affidavit is accompanied by a reasonable explanation of why it was not offered earlier, courts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted to supplement the earlier-submitted Rule 30(b)(6) testimony.”); *Ozburn-Hessey Logistics, LLC*, 40 F. Supp. 3d at 451 (finding “Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness”).

<sup>10</sup> *See Joseph v. Pennsylvania, Dep't of Env'tl. Prot.*, No. CIV.A. 06-4916, 2009 WL 3849696, at \*5 (E.D. Pa. Nov. 16, 2009) (finding a moving party in a motion for summary judgment could provide affidavits of its representative to supplement its Rule 30(b)(6) testimony).

<sup>11</sup> *See Id.*

<sup>12</sup> *See Gulf Prod. Co. v. Hoover Oilfield Supply, Inc.*, No. CIV.A. 08-5016, 2011 WL 891027, at \*3 (E.D. La. Mar. 11, 2011). *See also In re Asbestos Prod. Liab. Litig. (No. IV)*, No. 11-CV-63953, 2012 WL 3104833, at \*1 (E.D. Pa. July 31, 2012) (finding that one day notice of 30 corporate designees was “unduly burdensome”).

current rule, however, does not specify that a certain number of days be provided before the notice is deemed reasonable,<sup>13</sup> and courts have taken varying approaches to what length of time is considered “reasonable.”<sup>14</sup> It is generally accepted that less than one week is not sufficient,<sup>15</sup> but in extenuating circumstances, some courts have found shorter notice periods reasonable.<sup>16</sup>

A 30-day minimum notice requirement would help parties properly prepare their witnesses and avoid potential sanctions that could be imposed if a witness is inadequately prepared.<sup>17</sup> Furthermore, defining the reasonable notice timeframe would aid parties and courts in managing and planning for discovery and eliminate the need for motion practice over the issue.<sup>18</sup>

## **B. 30 (b)(6) Depositions Should Be Scheduled at a Time and Date Agreeable to the Parties.**

The scheduling of 30(b)(6) depositions is a frequent source of dispute and gamesmanship. Courts are reluctant to intervene by granting motions to quash.<sup>19</sup> Some courts will admonish counsel “to consult with other counsel in order to find a mutually convenient date and time” for depositions,<sup>20</sup> and others will undertake an examination of whether the party seeking the deposition “demonstrated a willingness” to work with opposing counsel on the issue.<sup>21</sup> Due to the inconsistency of approaches and the lack of a clear standard, an express requirement that parties find a mutually agreeable time and date for a Rule 30(b)(6) would result in an increase of cooperation and a decrease in needless motion practice.

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<sup>13</sup> *Hart v. United States*, 772 F.2d 285, 286 (6th Cir. 1985) (“The rules do not require any particular number of days, so that reasonableness may depend on the particular circumstances.”).

<sup>14</sup> See, e.g., *Paige v. Commissioner*, 248 F.R.D. 272, 275 (C.D. Cal. Jan.18, 2008) (finding that fourteen days’ notice was reasonable); *Jones v. United States*, 720 F.Supp. 355, 366 (S.D.N.Y. 1989) (holding that eight days’ notice was reasonable); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 327 (N.D.Ill.2005) (“ten business days’ notice would seem to be reasonable”).

<sup>15</sup> See, *Gulf Prod. Co.*, 2011 WL 891027, at \*3; *Mem’l Hospice, Inc. v. Norris*, No. CIV.A. 208CV048-B-A, 2008 WL 4844758, at \*1 (N.D. Miss. Nov. 5, 2008) (citing *Donahoo v. Ohio Dept. of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002)) ; but see *P.S. v. Farm, Inc.*, No. 07-CV-2210-JWL, 2009 WL 483236, at \*4 (D. Kan. Feb. 24, 2009) (finding that five days’ notice was reasonable).

<sup>16</sup> See, e.g., *Natural Organics v. Proteins Plus, Inc.*, 724 F.Supp. 50, 52, n. 3 (E.D.N.Y. 1989) (noting that one-day notice was reasonable because the parties were on an expedited discovery schedule and the need for a deposition arose suddenly); *RPM Pizza, LLC v. Argonaut Great Cent. Ins. Co.*, No. CIV.A. 10-684-BAJ, 2014 WL 258784, at \*1 (M.D. La. Jan. 23, 2014) (due to district judge granting defendant leave to take two depositions and extending the discovery completion deadline, greater than 7 days’ notice to plaintiff would have been impossible).

<sup>17</sup> See *S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y.1992) (quoting *Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 67 (D.P.R.1981)).

<sup>18</sup> See *Tyler v. City of San Diego*, No. 14-CV-01179-GPC-JLB, 2015 WL 1956434, at \*2 (S.D. Cal. Apr. 29, 2015) (reasonable notice is used as a defense against compliance with a 30(b)(6) notice). See also *Gulf Prod. Co. v. Hoover Oilfield Supply, Inc.*, No. CIV.A. 08-5016, 2011 WL 891027, at \*2 (E.D. La. Mar. 11, 2011).

<sup>19</sup> *PNC Bank, Nat’l Ass’n v. MBS Realty Inv’rs, Ltd.*, No. CIV. A. 07-09052, 2008 WL 686886, at \*3 (E.D. La. Mar. 5, 2008) (denying motion to quash, but requiring deposition to be rescheduled at a “mutually-agreeable time”). See also *DHL Express (USA), Inc. v. Express Save Indus. Inc.*, No. 09-60276-CIV-COHN, 2009 WL 3418148, at \*5 (S.D. Fla. Oct. 19, 2009) (plaintiff ordered to produce 30(b)(6) witness, but on a date and time mutually convenient to the parties as long as the deposition occurred before a date set by the court).

<sup>20</sup> *In re Aramark Sports & Entm’t Servs. LLC*, No. 2:09-CV-637-TC-PMW, 2011 WL 5024436, at \*1 n. 3 (D. Utah Oct. 20, 2011) (citing Utah state court rule stating that “[I]awyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times”).

<sup>21</sup> *Ogbonna v. Usplabs, LLC*, No. EP-13-CV-347-KC, 2014 WL 12489696, at \*5 (W.D. Tex. Sept. 10, 2014).

#### IV. RULE 30(b)(6) SHOULD DEFINE A PRESUMPTIVE NUMBER OF TOPICS—NO MORE THAN TEN—AND REQUIRE DETAILED SPECIFICITY.

Organization representatives deposed pursuant to Rule 30(b)(6) must be “adequately prepared” to testify on the subject matters in the notice (even if the topic is beyond the personal knowledge of anyone at the organization).<sup>22</sup> Often, however, 30(b)(6) notices include an excessive number of topics with vague descriptions.<sup>23</sup>

To ensure that a deposition under Rule 30(b)(6) is sufficiently limited in scope to allow an organization’s deponent(s) to prepare adequately—and to ensure “proportionality” as required by Rule 26(b)(1)<sup>24</sup>—Rule 30(b)(6) should be amended to include a presumptive limit on the number of topics that can be covered in the organization’s deposition. That presumptive limit should be no higher than ten (a presumptive limit of five would be appropriate for most cases), subject of course to increase by agreement between the parties or by order of the court.

A presumptive limit on the number of topics is consistent with other limitations in the FRCP that have been successful in promoting proportionality, including the presumptive limits on interrogatories and depositions. A presumptive limit is especially important for 30(b)(6) depositions because, unlike other types of discovery (interrogatories, requests for admissions and requests for production), the proportionality of 30(b)(6) notices do not come before the court absent a motion to quash or for a protective order. If an organization refuses to attend a deposition with unreasonable topics and/or number of topics, it risks sanctions.

As with other limitations on discovery, presumptive limits on the number of topics to be addressed in 30(b)(6) depositions would help focus both the requesting and producing parties on the claims and defenses in the case. In conjunction with the Rule 16 and 26 amendments proposed above, a presumptive limit would result in 30(b)(6) depositions being taken when the

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<sup>22</sup> See e.g., *QBE Ins. Corp. v. Jordan Enterprises, Inc.*, 277 F.R.D. 676, 681 (S.D. Fla. 2012) (barring a company from testifying at trial on any matters on which the company’s selected deponent had been unable or unwilling to testify); *State Farm*, 250 F.R.D. at 217 (E.D. Pa. 2008) (compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition); *Wausau Underwriters Ins. Co. v. Danfoss, LLC*, 310 F.R.D. 683, 687 (S.D. Fla.), *aff’d*, 310 F.R.D. 689 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company’s selected deponent had been unable or unwilling testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. CIV.A. 08-93-ART, 2010 WL 4629761, at \*4 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was “unprepared”); *Clapper v. American Realty Investors, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company’s expense, where the deponent was unfamiliar with several areas of inquiry).

<sup>23</sup> See e.g., *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 JBA, 2007 WL 4365677, at \*3 (D. Conn. Dec. 11, 2007) (holding that a notice that listed forty separate topics and would require twenty separate company employees to be produced where only three employees were needed to explore the issues directly related to the action in question violated the “reasonable particularity” requirement); *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (involving Rule 30(b)(6) deposition dispute where plaintiff sought to cover topics involving thousands of company offices where plaintiff’s complaint was not national in scope).

<sup>24</sup> See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is . . . proportional to the needs of the case.”). See also *Patient A v. Vermont Agency of Human Servs.*, No. 5:14-CV-000206, 2016 WL 880036, \*2 (D. Vt. Mar. 1, 2016) (finding that certain topics included in a party’s Rule 30(b)(6) notice were not “proportional to the needs of the case.”); *Hooker v. Norfolk S. Ry. Co.*, 204 F.R.D. 124, 126 (S.D. Ind. 2001) (holding that Rule 26 was applicable to a dispute concerning the scope of a Rule 30(b)(6) deposition).



issues are well defined and the need for organizational information on a particular issue is clear, thus promoting proportionality by avoiding unnecessary and wasteful discovery, or discovery that is posed merely for tactical or vexatious reasons.

The presumptive limit should be accompanied by the following provisions:

- A ten-topic deposition lasting no more than seven hours should presumptively be counted as one deposition for the purposes of the presumptive limits on depositions.
- The court should have express discretion to allocate expenses where the topics exceed ten or go beyond seven hours.
- The party noticing the deposition should have the express right to provide, in advance, copies of exhibits to be used during the deposition.

In addition, requiring Rule 30(b)(6) notices to set forth topics with “reasonable particularity and detailed specificity” would facilitate cooperation, early case management and proportionality.<sup>25</sup> This is particularly true because case law is divided on whether an organization’s representative witness can be forced to answer questions beyond the scope of the deposition notice<sup>26</sup> and requesting parties often seek to punish responding organizations and their counsel for being insufficiently prepared.<sup>27</sup> A meaningful specificity requirement would serve everyone’s interests

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<sup>25</sup> See e.g., *Nippo Corp./Int'l Bridge Corp. v. AMEC Earth & Envtl., Inc.*, No. CIV.A. 09-CV-0956, 2010 WL 571771, at \*2 (E.D. Pa. Feb. 12, 2010) (holding that the “reasonable particularity” requirement “merely requires that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents.”). See also *Janko Enterprises, Inc. v. Long John Silver's, Inc.*, No. 3:12-CV-345-S, 2014 WL 11152378, at \*3 (W.D. Ky. Apr. 3, 2014).

<sup>26</sup> *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y.2009) (the stated areas of inquiry are the “minimum” about which the designated representative must speak, not the “maximum”); *Employers Ins. Co. of Wausau v. Nationwide Mut. Fire Ins. Co.*, No. CV 2005-0620(JFB)(MD, 2006 WL 1120632, at \*1 (E.D.N.Y. Apr. 26, 2006) (scope of questions to 30(b)(6) witness is not defined by the notice but by Rule 26(b)(1)); *Green v. Wing Enterprises, Inc.*, No. 1:14-CV-01913- RDB, 2015 WL 506194, at \*8 (D. Md. Feb. 5, 2015) (the scope of examination at a 30(b)(6) deposition is not limited to the areas of inquiry in the notice, but only by the scope of discovery under Rule 26, though answers to questions beyond the scope of the enumerated areas are individual testimony, not corporate testimony); *Fed. Trade Comm'n v. Vantage Point Servs., LLC.*, No. 15-CV-6S(SR), 2016 WL 3397717, at \*2 (W.D.N.Y. June 20, 2016) (a 30(b)(6) witness may provide individual testimony about additional relevant topics, with the caveat that unless the witness is also an officer or managing agent of the firm, that testimony should not normally be considered to be offered on behalf of the corporation). But see *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, No. 10 CIV. 1391 LGS JCF, 2013 WL 1286078, at \*4 (S.D.N.Y. Mar. 28, 2013) (party must notice deposition of witness personally and separately from 30(b)(6) notice if it seeks testimony in the witness’s personal capacity); *E.E.O.C. v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012) (questions beyond scope do not bind the company at all); *New Jersey Mfrs. Insurance Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at \*3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is “limited to information called for by the deposition notice”); *State Farm*, 250 F.R.D. at 216 (“If a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition . . . the witness need not answer the question.”); *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the matters described in the notice and if the deponent does not know the answer to questions outside the scope of the notice that is the examining party’s problem).

<sup>27</sup> See e.g., *QBE Ins. Corp.*, 277 F.R.D. at 700 (barring a company from testifying at trial on any matters on which the company’s selected deponent had been unable or unwilling testify); *State Farm*, 250 F.R.D. at 217 (compelling

by providing sufficient notice to the responding organization of the information sought, therefore helping ensure that appropriate witnesses are selected and prepared on each topic.<sup>28</sup>

## V. TO FACILITATE PROPORTIONALITY AND EFFICIENCY, RULE 30(b)(6) SHOULD BE AMENDED TO PROHIBIT DUPLICATION.

In many instances, Rule 30(b)(6) depositions are a supplemental tool rather than a primary means of discovery.<sup>29</sup> Indeed, if depositions of individuals with direct knowledge of the matters at issue have already been taken or if written discovery has already produced relevant and responsive information, a 30(b)(6) deposition becomes superfluous. Accordingly, 30(b)(6) depositions should not be allowed, or at a minimum should be limited, if there are more efficient ways to streamline the discovery process and avoid duplicative depositions or discovery.<sup>30</sup> An appropriate amendment to Rule 30(b)(6) could be as follows:

“A deposition should generally not be taken pursuant to this paragraph if a party has deposed individuals with direct knowledge of the matters at issue or obtained adequate discovery through other means.”

Such an amendment would be consistent with the amendments to Rules 16 and 26 suggested above, and would facilitate Rule 26(b)(1)’s requirement that discovery be “proportional to the needs of the case.”

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additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition); *Wausau Underwriters Ins. Co.* 310 F.R.D. at 687 (barring a company from testifying at trial on any matters on which the company’s selected deponent had been unable or unwilling testify); *Martin Cty. Coal Corp.*, 2010 WL 4629761 at \*12 (threatening sanctions where a deponent was “unprepared”); *Clapper v. American Realty Investors, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company’s expense, where the deponent was unfamiliar with several areas of inquiry) (citing *Brazos River Auth. V. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006)). Taken together, this has the possible effect of requiring companies and their counsel to waste time and resources over-preparing a deponent to respond to inquiries that lack specificity in order to avoid later claims of and sanctions for inadequate preparation. *See e.g., Crawford*, 261 F.R.D. at 38 (“[A] notice of deposition . . . constitutes the minimum, not the maximum, about which a deponent must be prepared to speak.”)

<sup>28</sup> *See Koninklijke Philips N.V. v. ZOLL LifeCor Corp.*, No. 2:12-CV-1369, 2014 WL 4660338, at \*4 (W.D. Pa. Aug. 22, 2014), report and recommendation adopted in part, rejected in part sub nom. *Koninklijke Philips Elecs. N.V. v. ZOLL LifeCor Corp.*, No. CIV. 12-1369, 2014 WL 4660539 (W.D. Pa. Sept. 17, 2014) (finding that a Rule 30(b)(6) deposition notice should allow the producing party “to reasonably identify the metes and bounds of the listed topics.”).

<sup>29</sup> *See e.g., Presse v. Morel*, No. 10 CIV. 2730 WHP MHD, 2011 WL 5129716, at \*2 (S.D.N.Y. Oct. 28, 2011) (holding that company deponent who had previously testified in individual capacity could be designated as company representative for purposes of Rule 30(b)(6) in order to avoid waste of re-producing the same witness). *See also Patient A*, 2016 WL 880036, at \*2 (finding that certain topics included in a party’s Rule 30(b)(6) notice were not “proportional to the needs of the case.”); *Hooker*, 204 F.R.D. at 126 (holding that Rule 26 was applicable to a dispute concerning the scope of a Rule 30(b)(1) deposition).

<sup>30</sup> *See Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D. Conn. 2010) (finding a Rule 30(b)(6) notice to be unduly burdensome where it would solicit duplicative information); *Presse*, 2011 WL 5129716, at \*2 (holding that company deponent who had previously testified in individual capacity could be designated as company representative for purposes of Rule 30(b)(6) in order to avoid waste of re-producing the same witness). *See also* FED. R. CIV. P. 26(b)(1).

**VI. RULE 30(b)(6) SHOULD ESTABLISH A CLEAR PROCEDURE FOR OBJECTING TO TOPICS ENUMERATED IN THE NOTICE AND FOR RESPONDING THAT THE ORGANIZATION HAS NO KNOWLEDGE ON A PARTICULAR TOPIC.**

Rule 30(b)(6) provides no specific means for objecting to the enumerated topics for inquiry or categories of documents requested as set forth in the deposition notice, or for responding that the organization reasonably lacks knowledge on one or more topics. In order to allow for consistency in the discovery process, Rule 30(b)(6) should be amended to include a procedure for objecting to the notice, having objections ruled upon if needed, and a means to proceed with the deposition as to those topics or issues agreed to by the parties.

Rule 45 provides an excellent model of how Rule 30(b)(6) should handle objections to a subpoena. Rule 45 sets forth the obligation of the receiving party to object within the time for compliance or within 14 days, whichever is earlier. The same timing for objections should be applicable to a 30(b)(6) notice. Rule 45 places the burden on the requesting party to move the court to compel production/compliance with the subpoena. Likewise, the party requesting a deposition under 30(b)(6) should have the burden to move the court for a ruling on any objection he or she feels is not well taken. If the requesting party does not pursue a ruling on the objections, the deposition shall proceed on the topics to which no objection is raised.

This process should also accommodate instances in which organizations have no knowledge on particular topics. Although Rule 30(b)(6) contemplates knowledge held by an organization, case law is unclear on whether the organization can be required to obtain knowledge it does not have at the time of the deposition notice by seeking out and interviewing former employees.<sup>31</sup>

Providing a process for objections relieves the party receiving the notice from the burden of filing a motion for protective order and securing a ruling on the motion before the deposition. It will therefore likely reduce the number of motions filed while still allowing objections to be preserved and the deposition to proceed on a lesser number of topics. Ultimately, the amendment would allow the parties to complete their discovery on a more proportional basis and continue to advance the case to conclusion.

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<sup>31</sup> *QBE Ins. Corp.*, 277 F.R.D. at 689 (corporation must interview former employees if no present employee has knowledge); *Great Am. Ins. Co. of N.Y. v. Vegas Const. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (that a corporation no longer employs a person with knowledge does not relieve it of the duty to prepare a properly educated Rule 30(b)(6) designee); *but see FDIC v. 26 Flamingo, LLC*, No. 2:11-cv-01936-JCM, 2013 WL 3975006, at \*6 (D. Nev. Aug. 1, 2013) (requiring entity to prepare a Rule 30(b)(6) witness as to ex-employees' knowledge of the underlying transaction was unreasonable).

## VII. RULE 30(b)(6) SHOULD EXPRESSLY EXCLUDE QUESTIONING ABOUT MATERIALS REVIEWED IN PREPARATION FOR THE DEPOSITION AND ABOUT THE PARTY’S LEGAL CONTENTIONS.

### A. Materials Reviewed in Preparation for the Deposition Are Protected and Are Not an Appropriate Subject of Questioning.

Communications between attorney and client in preparation of a legal proceeding are privileged as attorney-client communications and work product that should be protected from disclosure.<sup>32</sup> Whether a questioning party can ask Rule 30(b)(6) representatives about the documents they reviewed with counsel to prepare for their testimony, however, is not always clear.<sup>33</sup> The selection and compilation of documents by counsel in preparation for pretrial discovery is “not universally accepted” as falling within the highly protected category of opinion work product.<sup>34</sup> Rule 30(b)(6) should be clarified to state that the materials reviewed in order to prepare for a deposition pursuant to Rule 30(b)(6) are protected by the attorney-client privilege and work-product doctrine.

It is common practice in Rule 30(b)(6) depositions to question organization representatives about the precise sources of information they relied on in preparing for their deposition. Given that counsel must make informed, strategic selections of documents from the larger discovery pool in order to meet their obligation to prepare their 30(b)(6) witnesses to address the topics noticed, identification of such documents impinges upon both attorney-client privilege and attorney work product.<sup>35</sup> The objective of such questioning is not to obtain the documents themselves, as those will have already been provided in discovery, but to learn the opposing counsel’s litigation strategy and theory of the case.

Some courts have correctly recognized that work product includes not only “legal strategy . . . but also the selection and compilation of documents by counsel,” and therefore, a deposing party may not ask Rule 30(b)(6) witnesses to identify documents they reviewed in preparation for the

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<sup>32</sup> *Montgomery Cty. v. MicroVote Corp.*, 175 F.3d 296, 303 (3d Cir. 1999).

<sup>33</sup> *QBE Ins. Corp.*, 277 F.R.D. at 688 (witness is required to provide corporate contentions); *Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010) (corporate representative’s authority to testify extends beyond facts to subjective beliefs and opinions); *AMP, Inc. v. Fujitsu Microelectronics, Inc.*, 853 F. Supp. 808, 831 (M.D. Pa. 1994) (granting motion to compel a Rule 30(b)(6) deposition covering “topics [that] deal largely with the contentions and affirmative defenses detailed in [the d]efendants’ answer and counterclaim”). *But see SmithKline Beecham Corp. v. Apotex Corp.*, No. 00-CV-1393, 2004 WL 739959, at \*3 (E.D. Pa. Mar. 23, 2004) (objection to 30(b)(6) notice sustained on basis that proponent was improperly attempting to use a Rule 30(b)(6) deposition to obtain legal contentions and expert testimony where contention interrogatories would be the better discovery device); *Wilson v. Lakner*, 228 F.R.D. 524, 529 n.8 (D. Md. 2005) (contention interrogatories should be used instead of attempting to make a corporate representative testify as to legal contentions); *see also BB & T Corp. v. United States*, 233 F.R.D. 447, 448 (M.D.N.C. 2006); *Kinetic Concepts, Inc. v. Convatec, Inc.*, 268 F.R.D. 255, 256 (M.D.N.C. 2010) (granting defendants’ motion for protective order barring plaintiffs’ 30(b)(6) depositions as to topics seeking testimony regarding the basis for all of Defendants’ defenses and counterclaims”).

<sup>34</sup> *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 136 (Fed. Cl. 2007) (analyzing the Sporck rule).

<sup>35</sup> *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985) (noting respondent’s counsel sought “identification of all documents reviewed by petitioner prior to asking petitioner any questions concerning the subject matter of the deposition”).

deposition.<sup>36</sup> These courts consider preparation material work product because “[p]roper preparation of a client’s case demands that a lawyer assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”<sup>37</sup> Questions pertaining to such preparation are inevitably intended to expose that strategy.<sup>38</sup>

Clarifying that the attorney-client privilege and work-product doctrine apply to questioning about the sources of information relied upon in preparing for Rule 30(b)(6) depositions would reduce acrimony between the parties and motion practice. Such an amendment would not prevent a party from obtaining non-privileged information by other, legitimate means, but rather would appropriately address improper attempts to invade the attorney-client privilege or obtain work product by identifying which documents the corporation’s counsel, pursuant to their litigation strategy, thought sufficiently important to present to the representative.

### **B. The Bases for a Party’s Legal Contentions Are Inappropriate for Questioning.**

The purpose of Rule 30(b)(6) is to allow discovery of “information known or reasonably available to the organization.” Depositions under this rule “are designed to discover facts.”<sup>39</sup> Organization representatives should not be asked to express an opinion or contention that relates to the application of law to fact, particularly with respect to contentions in the lawsuit.

Some courts, however, permit deposing parties to seek not only facts but also legal positions, requiring organization representatives to testify to a “corporation’s position, beliefs and opinions.”<sup>40</sup> This permits deposing parties to abuse Rule 30(b)(6) to create oral contention interrogatories in the form of an “impromptu oral examination to questions that require [the corporation’s] designated witness to ‘state all support and theories’ for myriad contentions in a complex case.”<sup>41</sup> Forcing a representative to answer legal contention questions requires them to “synthesize complex legal and factual positions . . . best left to the contention interrogatories.”<sup>42</sup>

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<sup>36</sup> *Id.* at 316-17. See also *S.E.C. v. SBM Inv. Certificates, Inc.*, No. CIV A DKC 2006-0866, 2007 WL 609888, at \*22 (D. Md. Feb. 23, 2007) (finding materials created in preparation for litigation are protected under Fed. R. Civ. P. 26(b)(3)); *In re Allen*, 106 F.3d 582 (4th Cir. 1997); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986).

<sup>37</sup> *Sporck*, 759 F.2d at 316.

<sup>38</sup> See e.g. *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prod. Liab. Litig.*, No. 3:09-MD-02100-DRH, 2011 WL 2580764, at \*1 (S.D. Ill. June 29, 2011) (finding *Sporck* “is consistent with the Seventh Circuit’s view of the purpose and scope of the work-product doctrine”); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 408 (S.D.N.Y. 2009) (“The Second Circuit has [also] recognized that the selection and compilation of documents may fall within the protection accorded to attorney work product, despite the general availability of documents from both parties and non-parties during discovery.”); *Shelton*, 805 F.2d at 1329 (“the selection and compilation of documents . . . reflects [counsel’s] legal theories and thought processes, which are protected as work product.”).

<sup>39</sup> *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y. 2002) (“Fed. R. Civ. P. 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories . . .”).

<sup>40</sup> *QBE Ins. Corp.*, 277 F.R.D. at 689. See also *Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010).

<sup>41</sup> Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 652 (1999).

<sup>42</sup> James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYL. LAW REV. 938, 984 (2013).

Contention interrogatories are better suited to the task because interrogatories can receive the necessary input from both attorneys and informed individuals.<sup>43</sup> It “would be very difficult for a non-attorney witness to take a legal position with respect to certain statements in [a corporation’s] patents,” and a “better method would be for [the corporation] to respond to interrogatories because then it would be able to receive input from both its attorneys and other persons familiar with its patents.”<sup>44</sup> “Some inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues.”<sup>45</sup>

Because Rule 30(b)(6) depositions are deemed to bind the organization, the rule should not allow contention questions to non-lawyer deponents in a deposition setting.<sup>46</sup> Not only does this practice create friction between the parties and provide a wide avenue for gamesmanship, it also frequently results in depositions being extended, more expensive and invasive.<sup>47</sup> Rule 30(b)(6) should be amended to preclude questions seeking the basis for a party’s legal contentions, claims or defenses.

## VIII. CONCLUSION

We strongly support the Committee’s decision to examine Rule 30(b)(6) and the Subcommittee’s work to develop potential amendments. Rule 30(b)(6) creates frequent, recurring problems that cause acrimony, expense and delay. The remedies proposed in this Comment are straightforward and will be easy to implement. Accordingly, we encourage the Subcommittee to proceed with drafting amendments to incorporate Rule 30(b)(6) into the rules that impact management activities and to reform Rule 30(b)(6) itself. Rules 16 and 26(f) should be amended to expressly include Rule 30(b)(6) in party conferences, pretrial conferences and scheduling orders. Rule 26(e) should be amended to facilitate supplementation of 30(b)(6) depositions. In addition, Rule 30(b)(6) should be amended to require at least 30 days’ notice and the specific delineation of topics, as well as to provide a mechanism for objections. Rule 30(b)(6) should also be amended to prohibit contention questions and questions about protected materials. Rule 30(b)(6) notices should be expressly subject to proportionality, which means a presumptive limit on the number of topics—no more than ten—and an express acknowledgement that depositions may not be necessary where other evidence exists or where the organization has no knowledge. These changes will provide the tools Rule 30(b)(6) needs to accomplish its goal, and will have a dramatic impact on the cost and burdens of litigation by encouraging cooperation, proportionality and early case management.

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<sup>43</sup> See *SmithKline Beecham Corp.*, 2004 WL 739959, at \*3 ; *United States v. Taylor*, 166 F.R.D. 356, 362 (1996) aff’d, 166 F.R.D. 367 (M.D.N.C. 1996).

<sup>44</sup> *SmithKline Beecham Corp.*, 2004 WL 739959, at \*3; see also *TV Interactive Data Corp. v. Sony Corp.*, 2012 WL1413368 (N.D. Cal. Apr. 23, 2012) (holding that contention interrogatories are proper because of the technical nature of the patent claims).

<sup>45</sup> *Taylor*, 166 F.R.D. at 363 n.7.

<sup>46</sup> See *In re Neurontin Antitrust Litig.*, No. CIV.A. 02-1390 FSH, 2011 WL 253434, at \*7 (D.N.J. Jan. 25, 2011), aff’d, No. 02-1390, 2011 WL 2357793 (D.N.J. June 9, 2011) (noting a representative’s testimony is binding and that the representative should be prepared to speak as to the corporations subjective beliefs and opinions).

<sup>47</sup> *Exxon Research & Eng’g Co. v. United States*, 44 Fed. Cl. 597, 601 (1999) (holding contention interrogatories are more appropriate, in part, because “contention interrogatories should be a less expensive method and are a less invasive method of letting [defendant] learn the required information”).

March 20, 2017

**Submitted via e-mail:**

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Re: Proposed Sketch of “Stand-Alone” Rule 30(b)(6)

Dear Judge Bates and Judge Ericksen:

This letter is written on behalf of the National Employment Lawyers Association (NELA) to offer feedback on the rough sketch of a “stand-alone” Rule 30(b)(6) provided in the November 2016 Civil Rules Advisory Committee Agenda Book. NELA requests that this letter be placed in the Agenda Book for consideration at the upcoming April meeting. As outlined in our previous letter dated September 1, 2016, our view is that the current version of Rule 30(b)(6)—which has remained essentially unchanged for over 45 years—is not in need of an overhaul.

NELA is well-situated to comment on this issue because it is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA’s members litigate daily in

every federal circuit, which provides NELA with a unique perspective on how the Federal Rules of Civil Procedure actually play out on the ground.

Rule 30(b)(6) was originally added as part of the 1970 amendments to the Federal Rules of Civil Procedure. Prior to that time, organizations sometimes engaged in a tactic called “bandying,” in which each employee who was deposed would disclaim knowledge of the facts in question, explaining that a different employee would be the better person to ask. *See, e.g.*, 8A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2110 (3d ed. 2014). Rule 30(b)(6) was aimed at solving this problem, as well as other related issues.

The Advisory Committee gave three main reasons for adopting the rule. *See* Fed. R. Civ. P. 30(b)(6) advisory committee’s note. First, it would reduce the difficulty in determining whether a particular employee is the “managing agent” of a party prior to the taking of the deposition. *Id.* Second, the rule would stop the practice of bandying, described above. *Id.* Third, it would make litigation less costly and more efficient for organizational parties, preventing them from being subjected to a large number of depositions of their officers by an opposing party unsure of who has knowledge of the facts at issue. *Id.* It is our view that Rule 30(b)(6), for the most part, continues to achieve these goals, and should not be changed.

Rule 1 provides that the Civil Rules should be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Indeed, over the past decade, the Civil Rules Committee has devoted a great deal of effort to making changes to the Rules with the explicit goal of speeding up litigation and making it less expensive for both the parties and the courts. As outlined in more detail below, we believe the proposed modifications to Rule 30(b)(6) would have largely the opposite effect. For the most part, they would detract from the efficiencies envisioned by the original rule, slowing down discovery, and burdening the district courts with unnecessary motion practice. In relatively simple matters, Rule 30(b)(6) often allows a party to take only one deposition in discovery, as opposed to several depositions, thus saving the party hundreds or thousands of dollars in costs for court reporters, videographers, and the like. These costs savings accrue to all parties to the litigation. As such, even where slight tweaks might make some sense, the potential improvements would be too marginal to justify engaging in the resource-intensive process of amending the rule.

### **Minimum Notice of Deposition**

**First**, we oppose the imposition of a minimum number of days that a Rule 30(b)(6) deposition must be noticed before the date it is scheduled to take place (**subpart A**). As noted in the comments to the sketched rule, Rule 30(b)(1) already requires “reasonable written notice.” Certain Local Rules also provide more specific guidance. *See* D.C. Colo. LCivR 30.1 (“Unless otherwise ordered by the court, reasonable notice for taking a deposition shall be not less than 14 days, as computed



under Fed. R. Civ. P. 6. Before sending a notice to take a deposition, counsel . . . shall make a good faith effort to schedule it in a convenient and cost effective manner.”). In practice, our experience is that counsel handle the scheduling of Rule 30(b)(6) depositions in the same manner as other depositions, working to accommodate the schedules of the parties and the witnesses, and allowing adequate time for organizational witnesses to be identified and prepared. A separate timeframe for Rule 30(b)(6) depositions is unnecessary.

### **Matters for Examination**

**Second**, we also oppose the addition of a numerical limit on the list of topics in a Rule 30(b)(6) notice (**subpart B**). In our experience, Rule 30(b)(6) depositions are used reasonably, listing a number of topics directly tied to the issues at play in the case. We have rarely experienced disputes over the number of topics listed. Imposition of a bright-line cap could encourage counsel to make each topic broader than necessary in order stay under the limit. This would make it more difficult for witnesses to prepare, and would lead to disputes over whether the topics have been described with sufficient particularity.

### **Objections to Notice**

**Third**, we agree with the comment that imposition of a formal objection process (**subpart C**) would be “overkill.” Under the new rule, an objection to just one topic would suspend the deposition entirely, requiring the filing of a motion to compel, briefing, and a ruling by the court. Because the 30(b)(6) is often the first deposition taken in the case, this would lead to long delays—of up to several months in some jurisdictions—before the commencement of meaningful discovery. To keep the case moving, parties would likely resort to noticing the depositions of a series of fact witness with the hope of getting the information they are looking for. This is the antithesis of the goal of Rule 30(b)(6), and runs contrary to the efficiency and reduction of costs that this Committee has worked to achieve. *See* Fed. R. Civ. P. 30(b)(6) advisory committee’s note (“The provision should also assist organization which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.”). The better solution is to leave the rule as is, allowing the noticed party to take any major issues to the court, if necessary, through a motion for a protective order.

### **Disclosure of Exhibits**

**Fourth**, requiring advance identification of exhibits (**subpart D**) is unworkable for several reasons. We often use 30(b)(6) depositions because of the information asymmetry that we encounter in the early stages of a case. Thus, rather than producing exhibits that will form the basis of our examination, we use the 30(b)(6) deposition to *obtain* threshold information about the types of documents that exist so we can request their production for later use. Regardless, even in later stages of the case (as noted in the comments to the sketched rule), the proposal would likely

lead to the noticing party disclosing an overabundance of material out of concern that it might forget an important exhibit and be prevented from asking about it. Further, an exhibit disclosure requirement would effectively turn Rule 30(b)(6) depositions into a live version of interrogatories. While interrogatories serve their own purpose, it is the unscripted, unrehearsed nature of live depositions that makes them valuable.

### **Designation of Persons to Testify**

**Fifth**, while we agree that there are parts of the proposal relating to the designation of persons to testify (**subpart E**) that may have utility, the bulk of the changes are unnecessary. We agree that it might make sense to require the organization to identify its designees in advance of the deposition, along with the particular subjects that they will cover. However, our experience is that this already occurs in most cases. We view the remainder of the proposed subsection as largely unneeded. For instance, it is already commonly understood that an organization who fails to produce a prepared witness may be required to appear for a second deposition, potentially at their own expense. *See Worth Empls.’ Ret. Fund v. J.P. Morgan Chase & Co.*, 2013 WL 6439069, at \*4 (S.D.N.Y. Dec. 9, 2013) (ordering the parties to confer regarding additional witnesses or “alternative forms of evidence”); *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 401 (W.D. Tenn. 2011) (ordering additional depositions, as well as fees and costs); *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005) (ordering additional depositions and permitting a motion for fees and costs).

### **Questioning Beyond Matters Designated**

**Sixth**, the addition of an explicit statement that a witness may be questioned only about matters on which they were designated to testify (**subpart F**) will lead to motion practice, costs, and delays. As the comments to the sketch point out, it is fairly common for minor disputes to arise in the course of a Rule 30(b)(6) deposition as to whether certain questions fall within the scope of the topics in the notice. The case law has established a manner of dealing with this issue, which works well. The widely-accepted view is contained in *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). There, the court concluded that “[i]f the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed. R. Civ. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).” *Id.* at 476. “However, if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party’s problem.” *Id.*

The majority of courts appear to follow this rationale. *See, e.g., Am. Gen. Life Ins. Co. v. Billard*, 2010 WL 4367052, at \*4 (N.D. Iowa Oct. 28, 2010) (“The conclusion reached in *King* has been unanimously accepted by courts addressing the issue since that time.”). Many courts have further held that, to prevent an “ambush” or

admissions on topics for which the witness was not prepared, counsel may note on the record its contention that answers to questions beyond the scope of the notice are fact witness testimony, not 30(b)(6) testimony. *See Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) (“[C]ounsel shall state the objection on the record and the witness shall answer the question, to the best of the witness’s ability”); *see also First Fin. Bank, N.A. v. Bauknecht*, 2014 WL 949640, at \*3 (C.D. Ill. Mar. 11, 2014) (“Graymont may well wish to make clear which testimony is corporate testimony and which is not.”); *Crawford v. George & Lynch, Inc.*, 2013 WL 6504363, at \*5 (D. Del. Dec. 9, 2013) (“If the witness is called to testify at trial, then the trial judge is the proper authority to rule on objections to the scope or admissibility of the testimony.”). The proposed rule would eliminate this practical approach, encouraging objections, fights about scope, instructions not to answer, and inevitable motion practice.

### Contention Questions

**Seventh**, as we have explained in our previous letter to the Committee on these issues, whether a Rule 30(b)(6) witness may be asked to express an opinion or contention (**subpart G**) depends on the circumstances and should not be the subject of rulemaking. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C.) (“Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.”).

### Judicial Admissions

**Eighth**, the proposal attempting to clarify whether and when testimony constitutes a formal “judicial admission” (**subpart H**) will lead to confusion over the weight that such testimony should receive in a particular instance. Rule 30(b)(6) testimony is certainly “binding” on the organization. *E.g., U.S. v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996). But whether it is given the weight of a judicial admission depends on the situation. In some cases, courts have rejected declarations contradicting prior Rule 30(b)(6) testimony under rationale akin to the “sham affidavit” rule. *See, e.g., Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at \*2-3 (E.D. Mo. Dec.14, 2007) (rejecting declaration as a “sham affidavit” at summary judgment because it “directly contradict[ed]” prior Rule 30(b)(6) deposition testimony); *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at \*10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits); *see also Rainey v. Am. Forest and Paper Ass’n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (“[Rule 30(b)(6)] binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush.”). In other situations, the testimony is treated as any other deposition testimony which, if later altered, may be attacked through cross-examination, impeachment, and other means. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *Dow Corning Corp. v. Weather Shield Mfg., Inc.*, 2011 WL 4506167, at \*5 (E.D. Mich. Sept. 29, 2011); *Johnson v. Big Lots Stores, Inc.*, 2008 WL 6928161, at \*3 (E.D. La. May 2,

2008); *A&E Prods. Grp., L.P. v. Mainetti USA Inc.*, 2004 WL 345841, at \*7 (S.D.N.Y. Feb. 25, 2004). Including the proposed language would cause confusion about the difference between “binding” testimony and a formal “admission.” Allowing courts to analyze these issues on a case-by-case basis is the better approach.

### **Supplementation**

**Ninth**, although requiring formal supplementation of Rule 30(b)(6) testimony (**subpart I**) appears at first blush to be a logical approach, we agree with the comment that inserting this language would tend to encourage a “We’ll get back to you” approach, leading to delays and motion practice. Whether and when formal supplementation is necessary should be handled on a case-by-case basis.

### **Number of depositions / Additional Depositions**

**Tenth**, we oppose the proposal of counting each witness designated under Rule 30(b)(6) as a separate deposition (**subpart J**). We agree that this rule could lead to confusion and, as the comment suggests, “might produce unfortunate strategic behavior.” For instance, in some cases multiple witnesses are designated to cover different time periods. The noticing party should not be required to use an extra deposition due to the needs (or strategic decisions) of the organization.

On the other hand, we agree that it may be useful to explicitly allow multiple Rule 30(b)(6) notices to be served at different points in the case (**subpart K**). This would tend to reduce the burden on the organization because they would not be required to prepare witnesses on numerous topics at once. It would also encourage the noticing party to take Rule 30(b)(6) depositions only on the topics absolutely necessary, since there would be no risk of being barred from taking a second deposition later on.

In sum, Rule 30(b)(6)—while not perfect—works well in practice, and continues to achieve the efficiencies at which the rule was aimed. We encourage the Committee to leave the rule as is, thereby allowing the courts to handle issues that arise on a case-by-case basis.

NELA thanks the Committee in advance for its careful consideration of these important issues.

Sincerely,



Terisa E. Chaw  
NELA Executive Director

4: RULE 30(b)(6) SUBCOMMITTEE REPORT

During its April 2016 meeting, the Committee decided that a further examination of Rule 30(b)(6) was warranted. Around ten years ago, the Committee spent a considerable amount of time and energy examining a variety of Rule 30(b)(6) issues identified by bar group submissions about practice under that rule. This review process included outreach to a number of bar groups about the rule that produced a variety of thoughtful submissions.

After considerable discussion by the Discovery Subcommittee and the full Committee, the decision a decade ago was not to proceed seriously to consider changes to the rule. Although there was a possibility that the rule might sometimes be exploited in inappropriate ways, there were also concerns that it was intentionally broad in order to defeat other sorts of inappropriate behavior. Put differently, the rule contained a mixture of provisions that, together, seemed to work reasonably well. Changing some of them might upset the balance.

Despite that conclusion a decade ago, there have been repeated reports since then that abuse of the rule or difficulties in using it warrant further focus on 30(b)(6). In 2013, the Committee on Federal Courts of the New York City Bar Association submitted a proposal to provide a minimum notice period and add other protections with regard to 30(b)(6) depositions, but the Committee then decided not to pursue these ideas, in part because it had recently made a relatively thorough study of the rule.

Early in 2016, the leadership of the ABA Section of Litigation submitted a proposal that the Committee make a thorough study of the rule. This submission (16-CV-A) is included in the agenda book and was before the Committee during its April 2016 meeting. It identified a wide range of issues that might call for serious consideration of a rule amendment, although it also noted as to some that the current rule language seemed about as good as could be devised.

Since the April 2016 full Committee meeting, a Rule 30(b)(6) Subcommittee has been appointed. It has begun initial discussions of the issues examined a decade ago and the more recent submissions from the leadership of the ABA Section of Litigation and the New York City Bar Association. It met by conference call on Sept. 1 and Sept. 15. Notes of those conference calls are included in the agenda book.

During its first conference call, the Subcommittee had before it a list of approximately 16 different issues raised from various sources about practice under Rule 30(b)(6). This list, largely drawn from the ABA submission, included:

- (1) Directing that the person or persons designated to testify have personal knowledge of the matters on which

examination would focus, similar to the "most knowledgeable person" requirement under the practice of some states;

- (2) Providing for objections to the notice and suspending the obligation to respond if objections are served;
- (3) Limiting the number of matters on which examination may be sought;
- (4) Specifying in the rule the way in which the existing limits on number of depositions and duration of depositions should be applied to Rule 30(b)(6) depositions;
- (5) Forbidding questioning beyond the matters listed in the notice, or providing that questioning beyond the topics listed would count as a separate deposition for purposes of the ten-deposition limit;
- (6) Clarifying the current requirement that the list of matters for examination identify them with "reasonable particularity";
- (7) Forbidding contention questions during 30(b)(6) depositions;
- (8) Clarifying in the rule the "binding effect" of answers given, and whether they constitute judicial admissions;
- (9) Providing in the rule a method for an organization to indicate that it has no knowledge on one or more matters slated for examination, and a way of dealing with such problems;
- (10) Treating nonparty organizations differently;
- (11) Providing in the rule whether an additional 30(b)(6) examination of an entity is permitted, and how such an additional deposition should be counted toward the ten-deposition limit already in the rules;
- (12) Providing in the rule that work product protections apply in 30(b)(6) depositions;
- (13) Making the duty to prepare the witness or witnesses clearer in the rule;
- (14) Providing a duty to supplement the testimony of a 30(b)(6) witness;
- (15) Providing in the rule that the organization must identify in advance the person or persons it is designating and, if more than one person is designated,

also indicate the subjects on which each would testify;  
and

- (16) Providing in the rule whether 30(b)(6) depositions must occur early or late in the litigation.

During the Subcommittee's first conference call, there was some consensus that most or all these points had some validity. But it also seemed that many might not warrant a rule provision or that a rule provision could raise difficulties. In addition, at least one additional idea emerged -- directing that the party taking the deposition provide the documents on which examination would focus some period of time before the deposition was to occur. This procedure could ensure that the witness would be prepared to answer questions about the documents in a way that a list of matters for examination might not.

More generally, the Subcommittee's first conference call produced some consensus on the view that it could be sensible to construct a rule provision that enumerated a variety of topics for this specialized variety of deposition, rather than simply relying on the general provisions of the rules. As an analogy, Rule 45 has a relatively complete set of directives for nonparty depositions. Perhaps a "stand alone" approach to 30(b)(6) depositions would be warranted as well.

Another idea that emerged during the first conference call was that 30(b)(6) depositions are largely substitutes for interrogatories seeking to identify witnesses with pertinent information and obtain general background information on various subjects. If so, perhaps the question of nonparty 30(b)(6) depositions could be re-examined, since interrogatories presently cannot be directed to nonparties. Perhaps the solution might be to create a vehicle for directing written questions to nonparties about the identity and location of documents, electronically stored information, and witnesses. Alternatively, perhaps nonparty depositions should be limited to identifying the location of material discoverable under Rule 34 and identifying witnesses. Perhaps a variation of a Rule 31 deposition on written questions would do the job.

Before the second conference call, a rough sketch of a possible "stand alone" rule was circulated, with specific provisions dealing with many of the matters identified above. One reaction to that composite sketch was that it prompted an overwhelming "oh my God" sort of reaction. Another was that many of the sketches addressed issues that might better not be addressed in a rule, or that should be addressed differently in a rule if the rule provided for them.

At the same time, there was uneasiness about how best to obtain input from the full Committee on these issues. It was emphasized that the Subcommittee's consideration of these issues has so far been both preliminary and tentative. The concreteness

of even rule sketches might be misconstrued to suggest that the Subcommittee had reached at least a tentative decision that these sketches were promising initial drafts of rule amendments. Any such conclusion would misconstrue the extent of consideration so far. But concrete sketches are often the best way to elicit informative feedback.

Accordingly, although this memorandum presents initial sketches of possible rule amendment ideas, it should be clear from the outset that **the Subcommittee has reached no conclusion, even a tentative one, about whether any topic on its discussion list, much less any rule sketch, warrants serious consideration as an amendment idea. It is seeking reactions from the full Committee on the specific topics and on the question whether a "stand alone" or "case management" approach seems promising.**

Discussion during the two conference calls also identified several topics on which research would be informative. It is hoped that the Rules Law Clerk will be able to provide assistance on these topics. The topics identified so far are:

- (1) A literature search for articles, principally in the practicing bar literature, on current Rule 30(b)(6) practice. Although some efforts to glean such information were undertaken a dozen years ago, a more current search seems likely to provide useful information. The focus on practitioner literature rather than law review treatments recognizes that the primary concerns identified so far are about practical problems with 30(b)(6) depositions, not theoretical issues.
- (2) A review of local rules to determine whether they contain special provisions for 30(b)(6) depositions. If there are such local rules, they might either indicate what problems have already been identified in rules, or serve as models for possible national rulemaking. If possible, a collection of standing orders on the subject from individual judges could be similarly informative. The Subcommittee has already reviewed one such order (from Judge James Donato, N.D. Cal.), which sets a limit of 10 matters, specifies the duration of the deposition of each person designated, addresses the question of the deposition of the witness in an individual capacity, and specifies that 30(b)(6) testimony is never a judicial admission.
- (3) Research on the current case law about the "judicial admissions" aspect of Rule 30(b)(6) testimony. A decade ago, it appeared that cases seeming to invoke a judicial admissions attitude really were using it as a sanction (like that authorized by Rule 37(c)(1)) regarding use of information not disclosed in the



deposition.

It is not presently clear what this research will show. So in addition to the reasons mentioned above about why the Subcommittee is tentative at present about any possible amendment to the rule, it must be emphasized that **the Subcommittee will not be able to reach consensus on the wisest way forward until it is able to consider the results of the research efforts identified above.** Any guidance Committee members can provide -- particularly as to local rules or standing orders related to 30(b)(6) depositions -- would be greatly appreciated.

Accordingly, this memorandum presents sketches solely for the purpose of eliciting reactions and input from the full Committee. It begins with the "stand alone" idea that emerged from the Subcommittee's initial conference calls. That sketch contains a number of specific provisions that the Subcommittee has not had time to discuss. A review of the conference call notes for the Sept. 15 call shows which issues the Subcommittee has addressed, and that as to those issues there were significant concerns about various provisions, as well as on the overall question whether creating such a stand alone rule would be a wise direction to pursue.

The various provisions included in the sketch below are followed by notes offering some observations about them and identifying some initial questions they might raise if the Subcommittee proceeds to consider them seriously. The Subcommittee invites reactions on those specifics from the Committee, in addition to reactions to the overall idea of a stand alone treatment of these depositions. It could be that some specifics should be added to the current rule, but that others should not be included, although they might merit mention in a Committee Note attending a rule amendment addressing some specifics.

As an alternative, the Subcommittee also presents a sketch below of what might be called a "case management" approach to these issues. That would include fewer or no specifics, but could serve as a basis for a Committee Note focusing on some points that the rule does not address.

Overall, it must be emphasized that the Subcommittee's tentative initial discussions of these issues does not imply any commitment to proceed with any particular rule change ideas.

**Building a "stand-alone" Rule 30(b)(6)**

A primary thrust of the Sept. 1 conference call was to include many specifics in Rule 30(b)(6) that either are found elsewhere in the rules or not included in the rules at all. This treatment might work better as a new Rule 30.1, or something of the sort. For present discussion purposes, however, it is presented as an extensive amendment to present 30(b)(6). The Subcommittee is not urging this approach, but instead offering the following sketches to show how such a rule might appear, and also to introduce various specifics that might be added to the current rule in a less comprehensive manner than this draft presents. For ease of discussion, this presentation will treat each sub-part of the sketch separately. They could be combined, but a mix-and-match treatment is also possible.

**(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, 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. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules. When a deponent is named under this paragraph (6), the following rules apply:~~

This revision is not designed to delete the specifics now in the rule, but rather to relocate them in the sub-parts presented below.

(A) *Minimum notice of examination.* The notice or subpoena must be served [at least \_\_\_ days] {a reasonable time} before the date scheduled for the deposition.

Paragraph (A) could raise the more general question why we don't have a specific notice period for all depositions. Rule 30(b)(1) says only that there must be "reasonable written notice to every party." One answer to this question is that although there is no rule-imposed requirement to prepare for other depositions, there is an obligation under the rules to prepare the witness for this kind of deposition.

As noted below, several other sketches seem to assume a minimal notice period of some period of days to permit other actions to be taken within the defined time before the deposition. Those provisions might not be pursued, but if they are it would seem that some overall minimum notice period would follow.

An alternative to specifying a period in the rule, indicated in braces, is to say that a "reasonable time" is required. That might be explained in a Committee Note to be a sufficient time to permit the other things the new rule would require to be done to be completed, if those additional things are indeed included. But saying a "reasonable time" may be too oblique for that purpose. Putting that direction in 30(b)(6) might also seem odd because it is already in 30(b)(1).

Under the law of some states there is a specific notice period for a deposition. That period may differ in different places. Within the Civil Rules, one might note that Rule 33 provides a 30-day period for responding to interrogatories and Rule 34 sets 30 days for production of documents. Is that clearly enough time for this purpose? In any event, if other things must be done more than a certain number of days before the deposition (as provided in (D) and (E)(iii) below, for example), those requirements must be taken into account in setting the overall minimum notice period.

(B) *Matters for examination.* The notice must describe with reasonable particularity the matters for examination.

(B) attempts to carry forward the current language on specificity of the list of matters. One could also add a numerical limit on those matters. As noted below, one could alternatively make the effect on the ten-deposition limit depend on how many matters are listed. For example, if the notice listed more than ten matters, the deposition might be counted as two (or three, if more than twenty matters were listed). But as with Rule 34, it may be that there is a tension between a numerical limit and the desire for more pointed "rifle shot" designation of topics for examination. For the present, (B) does not confront these issues that are raised by subsequent sub-parts.

(C) Objections to notice. The organization may object in writing within \_\_ days of service of the notice by stating with specificity the grounds for objecting, including the reasons.

(i) Upon service of an objection, the party that served the notice or subpoena may move under Rule 37(a) for an order compelling testimony.

(ii) Testimony may be required only as directed in the order[, and the court must protect the organization against disproportionate burden or expense resulting from compliance].

(C) is designed to work like the provision in Rule 45(d)(2)(B) excusing compliance with a document subpoena on objection by the nonparty. It might be noted that those subpoenas are already subject to the 30-day rule of Rule 34(b)(2)(A), but that the objection period is only 14 days after service of the subpoena. That may be something of a trap for the unwary, but it does perhaps suggest the need to take account of the relation between specified time periods under the current rules. Presumably it is desirable to have a shorter period for the objections, so those are known before the deposition is scheduled to occur.

One topic handled only by implication is the need to meet and confer to resolve objections; invocation of Rule 37(a) seems sufficient to do that. But perhaps an explicit reminder in the rule would be desirable.

Rule 26(g)(1) already provides that making an objection certifies that the objector has a valid basis for the objection. There seems no need to repeat that here.

Another topic is proportionality. There is a small effort in (C)(ii), in brackets, to introduce that topic. Rule 33 already is limited to "any matter that may be inquired under Rule 26(b)," and Rule 34 provides for "a request within the scope of Rule 26(b)." Both those rules therefore already invoke the principles of proportionality in Rule 26(b)(1) and (2). Is there a value to re-raising them here, and if so would an invocation of Rule 26's scope provisions be sufficient? If some reference to proportionality is in order, would a statement in the Committee Note suffice?

It may be that there is no need for the rule to provide a specific method for objecting, for lawyers already know how to object. It might be that the method presented in this sketch is important because it suspends the deposition until the objection is resolved. But that could easily be overkill; an objection to only one matter on a list would suspend inquiry altogether.

*Alternative One*

- (D) Disclosure of exhibits. At least \_\_\_ days before the date scheduled for the deposition, the party noticing the deposition must provide the organization with copies of all exhibits to be used as exhibits during the deposition.

*Alternative Two*

- (D) Disclosure of exhibits. At least \_\_\_ days before the date scheduled for the deposition, the party noticing the deposition may provide the organization with copies of exhibits to be used during the deposition. If such notice is given, the witness must be prepared to provide information about [the exhibits] {the topics raised by the exhibits}.

There are two alternative approaches to the idea of providing advance specifics regarding exhibits to be used during the deposition. Alternative One may be too demanding and restrictive. Alternative Two might serve much the same purpose in a more flexible manner.

One concept behind this provision is that, because there is a preparation obligation with this sort of deposition, additional notice of the topics to be addressed is important. Too often, perhaps, the list of matters served with the notice does not adequately notify the organization about what the party serving the notice actually plans to ask about during the deposition. As a consequence, the organization may be handicapped in identifying a suitable person to designate to testify, and also in preparing that person for the deposition.

Another concept behind it is derived from some experience in very complex litigation. For example, in *In re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988), the district court imposed a deposition protocol in a litigation in which there had been massive document production and it was anticipated that around 2,000 depositions would be taken. To expedite the depositions, the district court ordered that the questioning party must provide a list of all exhibits to be used during the deposition five days before it was to occur.

The Plaintiffs' Steering Committee obtained appellate review of this order, arguing that it intruded on work product protection. Stressing the dimensions of this massive litigation and invoking Rule 16 and an earlier version of Rule 26(f), the First Circuit affirmed (*id.* at 1015):

When case management, rather than conventional discovery, becomes the hammer which bangs against the work

product anvil, logic demands that the district judge must be given greater latitude than provided by the routine striking of the need/hardship balance [under Rule 26(b)(3)((A)(ii))].

Below, a "case management" approach sketching possible changes to Rules 16 and 26(f) is offered as an alternative to either of the alternatives above. The Subcommittee's reaction to (D) is that would be a big change. Particularly if "all" were retained in Alternative One, it might result in a deluge of material from litigants who worried that they might be foreclosed from using an exhibit not provided. In addition, if the deposition included document production, such a rule provision would seem to forbid asking the witness about the documents produced at the deposition.

Alternative Two might avoid many problems that Alternative One could produce. It could provide the party noticing the deposition an opportunity to provide a manageable number of documents. One idea is that the organization has a better idea what will come up in the deposition once it sees the documents. It might also provide that supplying such advance notice has consequences for the duty to prepare. At the same time, if there is an advantage to surprise even in this sort of deposition, the interrogating party need not reveal its "surprise" exhibits. That might, of course, prompt objections to answering questions about such documents on the ground that they are "surprise" exhibits.

Whether a rule provision addressing such advance notice is a good idea remains very much open. In part, it may be that experience with such regimes could prove important in evaluating their utility. If they are only justified in extraordinary cases like the San Juan DuPont Plaza litigation, it seems dubious to include a provision in the rules for all cases. But if experience with this sort of requirement shows real benefits, it may be that those benefits could be general enough to warrant inclusion in the rules. Of course, the case management approach below could suggest, in a Committee Note, that one measure a court might include in a Rule 16 order when appropriate would be such an advance notice requirement.

It might also be noted that there is nothing now precluding a party that notices a 30(b)(6) deposition from doing what Alternative Two says, although no rule now says that providing advance notice in this manner directly affects the witness-preparation obligation. As an antidote to confronting "I don't know" answers at the deposition, it might be a very good idea.

(E) Designation of persons to testify.

(i) The organization must designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf about [information] {facts} known or reasonably available to the organization.

(ii) A subpoena must advise a nonparty organization of its duty to make this designation.

(iii) At least \_\_\_ days before the deposition, the organization must notify the party that noticed the deposition of the identity of the person or persons it has designated. If it has designated more than one person, it must also state which matters each person will address.

(iv) By designating a person or persons to testify on its behalf, the organization certifies under Rule 26(g)(1) that each witness [is capable of providing] {has been properly prepared to provide} all [information] {facts} known or reasonably available to the organization about that matter. [If the witness is unable to provide [information] {facts} on a matter, the organization must prepare the witness [or another witness] after the deposition is adjourned, and the deposition may resume at the organization's expense to address that matter.]

(v) If the organization is unable, after good faith efforts, to locate [information] {facts} on a matter for examination, or a person with knowledge of that matter, it must so notify the party that served the notice or subpoena [at least \_\_\_ days before the date scheduled for the deposition]. That party may then move the court under Rule 37(a) for an order compelling testimony on this matter, but such testimony may only be required as directed by the court.

Subparagraph (E) attempts to do a lot of things. In item (i), it tries to carry forward the current provision about designation of a witness or witnesses. Item (ii) similarly tries to carry forward the directive that a subpoena advise a nonparty of this obligation. (This provision would not be needed if 30(b)(6) depositions were limited to parties.) And item (iii)



then calls for notifying the party taking the deposition about who will actually be testifying, and (if more than one person is designated) about which topics. How much notice should be required? Is it correct that this notice should not be required until some time after the disclosure of exhibits called for by Subparagraph (D) (if that idea were to be pursued)? How much time is necessary after that designation pursuant to (D) to enable the responding organization to employ the insights derived from the exhibits to select the right person or persons to testify?

Items (iv) and (v) try to balance obligations, and to alert users of this rule of their Rule 26(g) obligations. Item (iv) offers two articulations of what is certified -- proper preparation or actual ability to answer -- that may serve to underscore the possible delicacy of the task the rule commands the organization to accomplish. Item (v) is designed to work like Subparagraph (C) when the organization claims ignorance. But won't there be many situations in which the organization has some information and the party seeking discovery wants more?<sup>1</sup>

One alternative introduced in the sketch above is whether to change from "information" to "facts." From time to time, it has been urged that inquiries in 30(b)(6) depositions should not go beyond locating facts or sources of evidence. In part, that concern may resemble the concern lying behind subparagraph (G) on contention questions. One might, in this connection, note that Rule 26(a)(2)(B)(ii) was recently changed to require disclosure of "the facts or data considered by the witness in forming [opinions]." Formerly, it had required disclosure of the "data or other information considered by the witness," and this change was designed to guard against undue intrusion into attorney/expert communications. Whether this situation is similar could be debated.

But making a change here might produce unfortunate discontinuities. Rule 26(b)(1), for example, refers to discovery of "information," not "facts." In regard to pleading requirements, there was a heated debate about what was an allegation of "fact" a century ago. Revisiting such debates would not likely be productive.

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<sup>1</sup> Note: One might somewhere try to require the organization to select the "most knowledgeable" witness, but this sketch does not do that. To do that may be a major challenge for the organization, and could also introduce the issue presented in *Wultz v. Bank of China*, 293 F.R.D. 677 (S.D.N.Y. 2013) -- what happens when that person is located overseas? If this sketch's route is adopted, it might be worth saying in a Committee Note that the organization cannot designate a person who is far away and then refuse to produce the person based on the distance limitations in Rule 45(c).

Regarding (E)(iii), it seems that something like this exchange of identities of designated witnesses happens with some frequency, which suggests that it can work. Perhaps it would work better via a party agreement or a Rule 16 court order (in the case management model introduced below). But if (F) below is also adopted (limiting questioning to listed matters), there might be complications with a person who is also a fact witness familiar with additional topics.

(E)(iv) may cause more problems than it solves. Often, it seems, parties who make a genuine effort to prepare their witnesses find that the questioning eventually reaches topics or sub-topics on which the witness has not been prepared. To suggest that the party is then in violation of Rule 26(g) seems overly strong medicine. Moreover, Rule 26(g) is basically a sanction provision. Treating all such shortfalls of preparation on something as an occasion for a sanctions motion seems like overkill and may invite gotcha litigation. Perhaps such a provision would put a premium on asking surprise questions that have a tenuous link to matters on the list. That would surely put pressure on the particularity of the list. It might be better to speak of remedies. One approach along that line might be a provision like the direction in brackets that the deposition be adjourned instead of completed, with a continuation at the organization's expense to explore the matter in question.

Regarding (E)(v), one question might be whether that is needed. It might be bolstered by a requirement that the party giving such notice also provide specifics on the efforts made to obtain responsive information or facts. If the argument is that another form of discovery -- interrogatories, for example -- would be a better way of inquiring about this topic, we already have a provision in Rule 26(b)(2)(C) that seems to speak to this situation and to specify what is to be done. Does adding a rule provision here with timing and other complications improve matters? Could a Committee Note reference to Rule 26(b)(2)(C)(i) suffice for the purpose?

Additionally, should something like (E)(v) be pursued, it is likely that the question could arise whether the entire subject is off limits during the deposition. Presumably some inquiry should be allowed about the efforts made to obtain responsive information (or facts). Moreover, the sketch seems to invite a motion to compel. Is it clear how that is to work? "You can't get blood from a stone" might be one reaction.

An alternative location for a provision about this problem, if there is reason to give serious consideration to such a provision, might be in (C), which deals with objections to the notice. But this sort of notice is not so much an objection as a report.

**(F)** Questioning beyond matters designated. A witness may be questioned only about the matters for which the witness was designated to testify.

(F) takes one position on the "questioning beyond the notice" issue. Another could be to affirm that such questioning is allowed but try to specify how that impacts either the one day of seven hours or the second deposition problem (should it later be suggested that this person should sit for an "individual" deposition). One thing such a provision would do responds to something the ABA submission raised -- it would provide an explicit basis for objecting to such questioning. But a rule of this sort may be a very blunt instrument for that purpose.

One blunt aspect of this instrument would emerge when the person designated also has personal knowledge of other topics relevant to the action. Surely there are many cases in which that is true and it would not make sense to pretend otherwise. And insisting either that the 30(b)(6) deposition count as two depositions (one organizational and the other individual), or that the witness must return another time for an "individual" deposition, seems senseless.

Another blunt instrument aspect of such a rule provision is that it may invite an even longer list of topics. One concern that has been raised is that lawyers may be using overlong lists already. But if a party must "pay" for a short list by using up two of its ten depositions, that seems an unfortunate result of such a provision.

Yet another concern is whether the dividing line between listed matters and other topics will often be unclear. Of course, that could arise again in the "judicial admissions" topic addressed next below. Moreover, if something like (D) above (about advance provision of exhibits) were adopted, would that mean the witness nonetheless could not be asked questions about what was in those exhibits unless the topic of the questions directly related to a matter on the list?

**(G)** Contention questions. The witness may not be asked to express an opinion or contention that relates to fact or the application of law to fact.

(G) is modeled on Rule 33(a)(2). A Committee Note might say that this rule provision recognizes that there is a big difference between answering a contention interrogatory and responding spontaneously in a deposition setting. What's more, Rule 33 invites deferral even of the interrogatory answer, which shows that this sort of questioning is inappropriate in the hothouse deposition setting. A Committee Note might also affirm that it is not appropriate to ask such a witness to elect between the versions of events described by other witnesses, something we have heard is sometimes attempted under current Rule 30(b)(6).

It might be noted in connection with (G) that there is no attempt in the rule sketch to say that Rule 26(b)(3) applies. There is a tension between questioning to verify that the witness has been properly prepared for the deposition and the sort of intrusion into attorney preparation that we certainly do not want to enable. A Committee Note could probably make this point, but it seems odd to say in this rule that 26(b)(3) applies to this form of discovery because it applies to all forms of discovery already.

**Note that the Subcommittee has not yet discussed (G).**

(H) *Judicial admissions.* If it finds that the witness has been adequately prepared under Rule 30(b)(6)(E)(iv), the court must not treat any answer given in the deposition as a judicial admission by the organization.

(H) deals with the judicial admission question. Whether that term is well enough understood to be used in this way in a rule might be an issue. Tying that to adequate preparation seems consistent with cases dealing with failure to prepare, or at least seemed that way a decade ago when the Committee last dealt with this rule. Adding such a qualification may be unnecessary because Rule 37(c)(1) is always there to support a court order foreclosing presentation of material that should have been disclosed, provided in response to discovery, or provided by supplementation under Rule 26(e). It might also be argued that the condition in this sketch implies that the court will use that power whenever there is a failure to prepare. Frankly, it seems that courts do not lower the boom unless the failure to prepare is fairly flagrant.

One reaction to these issues has been mentioned above -- the need for research about the existing case law on judicial admission treatment of 30(b)(6) deposition responses. Except for noting that need for research, **the Subcommittee has not yet discussed (H).**

The Subcommittee has not yet discussed the topics presented below. Accordingly, this is only a Reporter's sketch designed to facilitate discussion.

(I) *Supplementation.* An organization that has designated a person to testify on its behalf must supplement or correct the testimony given [in a timely manner] {no later than the date pretrial disclosures are due under Rule 26(a)(3)} [no more than \_\_\_ days after completion of review by the witness under Rule 30(e)] if it learns that the testimony was incomplete or incorrect in some material respect. The party that took the deposition may then retake [reopen] {resume} the deposition of the witness with regard to the supplemental information [at the expense of the organization].

(I) raises a number of issues. The first is familiar -- is this an invitation to say "We'll get back to you"? If so, it may actually weaken the duty to prepare. The stronger (E)(iv) and (H) are on the requirement to prepare the witness, the less that risk, perhaps.

But the timing feature causes difficulty. Tying the date for supplementation to the 26(a)(3) date has some appeal, in terms of preparation for trial, but it seems far too late for something that may require further discovery even if discovery is closed by then. Tying it to when the deposition transcript is completed may be too early for genuinely belated discoveries. Moreover, Rule 30(e) review occurs only in cases in which there is a request for review by the deponent or a party. Though that would likely occur most of the time for 30(b)(6) depositions, it might not occur all the time.

Another possible concern would be with matters covered by (E)(v) -- if the organization gave notice that it had no information on a given matter and later happened upon information by some fortuity, is there a duty to supplement? Were (E)(v) not pursued, this would not be an issue, but if it is pursued it could become an issue.

(J) Number and duration of depositions. For purposes of Rule 30(a)(2)(A)(i), each deposition under paragraph (6) is counted as one deposition, but for purposes of Rule 30(d)(1), the deposition of each person designated is treated as a separate deposition.

(J) sets out the deposition-counting and duration directions now in the 1993 and 2000 Committee Notes. Those could be changed. How one deals with questioning beyond the matters listed could present problems of this sort. If (F) is not adopted, questioning beyond the list could be regarded as meaning that one deposition of one individual would be counted as two depositions for the ten-deposition limit, even if it were relatively short. So being this specific in the rules could sometimes tie the parties in knots. Trying to connect the number of depositions allowed to the number of matters on the list might be included here, but might produce unfortunate strategic behaviors.

(K) Additional depositions of same organization. Notwithstanding Rule 30(a)(2)(A)(ii), any party may notice an additional deposition [or additional depositions] of the same organization on matters not listed in the notice for the first [a prior] deposition of the organization under paragraph (6). But any such deposition is counted as an additional deposition under Rule 30(a)(2)(A)(i).

(K) adopts the idea that a second deposition of the organization on different subjects is permitted, but that it counts against the ten-deposition limit. Those starting points could be changed. And there may be difficulties in deciding whether the second deposition is really on "matters not listed in the notice" for the first such deposition. That could become cloudier if questioning beyond the matters listed is allowed (as (F) says it is not).



**Focusing on Case Management As a Method  
of Regulating Rule 30(b)(6) Depositions**

As an alternative to the approach above, or to parts of it, one might instead focus mainly on case management solutions to the problems under discussion. That approach could involve considerably less detail in rules, and might be preferable. For one thing, the detail provided in the rule sketch above could be regarded as rather rigid. In a sense, it provides default positions that might be bargaining chips in the jockeying that may sometimes attend this discovery activity.

**The Subcommittee has not yet discussed these topics. At least some members of the Subcommittee are initially inclined to prefer this approach to the issues raised rather than a detailed stand-alone rule. The Subcommittee solicits input from the full Committee on these ideas.**

One approach would involve a modest addition to Rule 26(f)(3):

**(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 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 [contemplated] Rule 30(b)(6) depositions, including \_\_\_\_\_;

**~~(F)~~** 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

**(G)** any other orders that the court should issue under

Rule 26(c) or under Rule 16(b) and (c).

A question under this approach would be whether to include in the rule reference to the sorts of topics included in the very specific "stand alone" rule sketched above. (C), for example, commands the parties to include discussion of the form or forms in which electronically stored information must be provided and invites a report on any other issues the parties might have identified. Various of the items set out in the stand-alone rule might instead be mandatory topics for reporting in Rule 26(f). Whether one could be specific about those topics at that early point in the litigation is not clear, however.

Even so brief a rule provision as the one sketched above could theoretically support a very substantial Committee Note addressing many of the items included in the comprehensive sketch of an amended Rule 30(b)(6) above. But absent the force of being in the rule, much of that Note might not carry the weight we might desire. And the dimensions of such a Note might well raise eyebrows. We are to be leery of "rulemaking by Note."

In addition, Rule 16(b)(3) could be amended to highlight the utility of judicial management of Rule 30(b)(6) depositions. Building on the experience with time limits for noticing such depositions, one could amend Rule 16(b)(3)(A):

- (A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, notice Rule 30(b)(6) depositions, complete discovery, and file motions.

But that may well overemphasize this form of discovery. Alternatively, Rule 16(b)(3)(B) could be amended along the following lines:

- (B) *Permitted Contents.* The scheduling order may:
  - (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
  - (ii) modify the extent of discovery;
  - (iii) provide for disclosure, discovery, or preservation of electronically stored information;
  - (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
  - (v) include specifics about any Rule 30(b)(6)

depositions, including minimum notice of examination, limitations on the number of matters for examination, specifics on objections, disclosure of proposed depositions exhibits, questioning of witnesses beyond the matters designated in the deposition notice, supplementation of deposition testimony, duration of such depositions, or additional depositions of organizations that have already been deposed;

**(vii)** \* \* \* \* \*

Such a detailed rule change might seem excessive. Though Rule 30(b)(6) depositions are important in many cases, it is probably difficult to say that they are so important that they warrant being featured in this way in general rules about litigation management. But it is worth noting that these changes to Rules 26(f) and 16(b) might be added measures even if the detailed stand-alone rule approach were taken. Indeed, a Committee Note could advert to the long list of particulars on the stand-alone rule as possible topics for a Rule 16 scheduling order to address. The real goal is probably to cajole the parties -- in the spirit of amended Rule 1 -- to discuss and resolve these problems without the need for "adult supervision" by the court.

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Information Item: Pilot Projects

Item 8 will be an oral report.

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### III. SOCIAL SECURITY REVIEW CASES: 17-CV-D

728 Unique, subject-specific, and intricate questions are raised  
729 by 17-CV-D, a submission by the Administrative Conference of the  
730 United States "for the consideration of the Judicial Conference  
731 of the United States." The Administrative Conference "recommends  
732 that the Judicial Conference 'develop special procedural rules  
733 for cases under the Social Security Act in which an individual  
734 seeks district court review of a final administrative decision of  
735 the Commissioner of Social Security pursuant to 42 U.S.C. §  
736 405(g).'"

737

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

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

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

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

764 Setting aside for now the suggestion of consultation with  
765 Congress in developing Enabling Act Rules, the recommendation is  
766 compatible with adoption of a separate set of rules, akin to such  
767 models as the Habeas Corpus rules, or with adoption of new Civil  
768 Rules. Nor should the choice be deemed foreclosed by the study on  
769 which the recommendation is based. Professors Jonah Gelbach and  
770 David Marcus prepared for the Administrative Conference "A Study  
771 of Social Security Litigation in the Federal Courts" (July 28,  
772 2016). The Study explicitly recommends "enabling legislation to  
773 clarify the U.S. Supreme Court's authority to promulgate  
774 procedural rules for social security litigation," with

775 appointment of a social security rules advisory committee. Study,  
776 p. 148. The Study recognizes that the Enabling Act likely  
777 authorizes specific rules for social security appeals now, but  
778 prefers stand-alone rules because many Civil Rules are not suited  
779 to review on an administrative record. Something as simple as  
780 originating review by filing a complaint, Rule 3, is thought  
781 inappropriate, as are the general rules for pleading, discovery,  
782 and summary judgment. The poor fit of these rules with  
783 administrative review in turn has meant a riot of wildly  
784 disparate practices across district courts, many of them poorly  
785 suited to the task. All that need be done with the Civil Rules is  
786 to add to Rule 81(a) a new paragraph excluding cases governed by  
787 the new social-security review rules. Study, pp. 148-152.

788 The Study approaches the recommendations for review rules by  
789 establishing a richly detailed foundation in the structure and  
790 operation of the administrative proceedings that precede review  
791 in a district court. The details will command close attention  
792 when it comes time to begin framing specific review rules. They  
793 present a compelling picture of a system that, both in size and  
794 character, is quite unlike other administrative adjudications  
795 that come on for review either in a district court or in a court  
796 of appeals. One challenge will be to determine whether the many  
797 unique characteristics of this system will, in the end, have a  
798 significant bearing on the best procedures for review. One  
799 example is provided by requests for voluntary remand. Office of  
800 General Counsel staff "typically requests voluntary remand in  
801 about 15% of appeals annually" when they conclude that a case  
802 "cannot be defended." Study p. 31. Given the workloads involved,  
803 it would be good to adopt a review procedure that facilitates  
804 this practice. But it may be that this purpose can be served by  
805 rules that look a lot like the Appellate Rules for circuit-court  
806 review on an administrative record.

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

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

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

850           The model advanced by the Administrative Conference adopts  
851 the direct analogy to administrative review as an appeal  
852 procedure. Review would be initiated by a "complaint" that is  
853 "substantially equivalent to a notice of appeal." (Remember that  
854 § 405(g) directs that review be sought by a "civil action"  
855 "commenced" within 60 days; Rule 3 directs that a civil action be  
856 commenced by filing a complaint.) The next step is modeled on the  
857 provision in § 405(g) that "[a]s part of the Commissioner's  
858 answer the Commissioner of Social Security shall file a certified  
859 copy of the transcript of the record including the evidence upon  
860 which the findings and decision complained of are based." This is  
861 translated as a direction that the Commissioner "file a certified  
862 copy of the administrative record as the main component of its  
863 answer." The case would then be developed by the claimant's  
864 opening brief, the agency's response, and "appropriate subsequent  
865 proceedings and the filing of appropriate responses consistent  
866 with \* \* \* § 405(g) and the appellate nature of the proceedings."  
867 Appropriate deadlines and page limits would be added. And there  
868 would be "other rules" that promote efficiency and uniformity,  
869 "without favoring one class of litigants over another or  
870 impacting substantive rights."

871           The appeal model is the obvious starting point. What counts  
872 is framing the issues clearly through submissions that bring  
873 together each point of agreement and each point of argument. As  
874 compared to an ordinary civil action that launches a new dispute,  
875 social security review comes at the end of an elaborate and  
876 multi-stage administrative and then adjudicatory procedure. There

877 is little lost by a procedure that does not, at the time of  
878 complaint and answer, afford any idea of what the issues will be.  
879 Channeling the parties into a process that enables (or forces)  
880 them into a record-focused framing of the dispute suffices. The  
881 deadlines, word-count, and any like formal constraints can be  
882 shaped for the peculiar needs of this setting.

883 One question could be whether the benefits of this model  
884 should be generalized by adopting rules for all proceedings for  
885 review on an agency record, not for individual Social Security  
886 disputes alone. There may be reason for caution. The sheer number  
887 of Social Security review cases dwarfs all other district-court  
888 administrative review cases – there are something on the order of  
889 18,000 social security review cases a year. The special character  
890 of the underlying claims and the distinctive administrative  
891 structure and operations also may be reasons to confine new rules  
892 to social security cases, as recommended by the Administrative  
893 Conference. In addition, § 405(g) specifies part of the procedure  
894 for review. Review is obtained "by a civil action." "As part of  
895 the Commissioner's answer the Commissioner of Social Security  
896 shall file a certified copy of the transcript of the record  
897 including the evidence upon which the findings and decision  
898 complained of are based." There is a specific provision limiting  
899 review of administrative decisions based on failure to submit  
900 proof in conformity with regulations. The court may affirm  
901 modify, or reverse, with or without remand. It may remand for  
902 taking new evidence. And there is a special procedure for  
903 remanding on motion by the Commissioner.

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

917 A different possibility would be to create a new procedure  
918 specifically tailored for administrative review in a district  
919 court. Although there may be rare exceptions, in the overwhelming  
920 majority of cases review is confined to the administrative  
921 record. The court does not decide the facts, and does not decide  
922 whether there are genuine disputes as to the facts. The only  
923 question is whether, in the standard phrase, the administrative  
924 decision is supported by substantial evidence on the record  
925 considered as a whole. If there is substantial evidence, the  
926 administrative decision is affirmed. If not, the administrative  
927 decision is set aside; if further proceedings are appropriate,



928 the case is remanded to the agency. Because taking evidence is  
929 not part of the review, and for want of any obvious alternative  
930 in the Civil Rules, Professors Gelbach and Marcus report that  
931 many districts adapt summary-judgment procedures to decide  
932 social-security review cases. But they also find that this model  
933 is ill-suited. Many of the incidents of summary-judgment  
934 procedure, designed to determine whether there is a genuine  
935 dispute as to any material fact, are inapposite.

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

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

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

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# TAB 9B

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Supreme Court of the United States  
Washington, D. C. 20543COUNSELOR TO  
THE CHIEF JUSTICE\* Appropriate  
Handling

February 10, 2017

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

Dear Mr. Weiner:

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

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

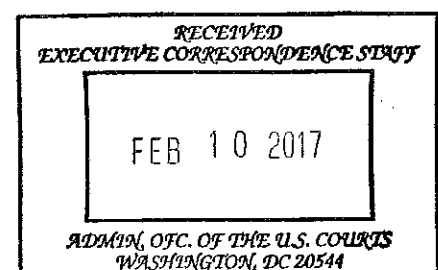
Thank you for your letter and for the analysis supplied on behalf of the Administrative Conference.

Sincerely,



Jeffrey P. Minear

Attachment



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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

January 13, 2017

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

Dear Mr. Minear:

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

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

With my best.

Sincerely yours,

Matthew Lee Wiener  
Vice Chairman and Executive Director

cc: Ms. Jill C. Sayenga  
Professor Ronald M. Levin  
Ms. Shawne McGibbon  
Mr. Reeve T. Bull  
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**Administrative Conference Recommendation 2016-3**

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

**Adopted December 13, 2016**

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

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

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

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

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





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

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

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

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

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

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



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

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

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

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

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

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

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



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

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

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

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

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



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

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

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

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<sup>13</sup> See, e.g., General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm’r of Soc. Sec.’s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order, *In re* Actions Seek. Rev. of the Comm’r of Soc. Sec.’s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.I.

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



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

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

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

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

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



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

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

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

### RECOMMENDATION

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

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



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

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

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§ 405. Evidence, procedure, and certification for payments

Effective: November 2, 2015

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**(g) Judicial review**

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

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# TAB 10

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#### IV ORDERING THE FUTURE AGENDA

961           At least four potentially major projects have found their  
962 way to early positions on the agenda. Two involve jury-trial  
963 issues – the demand procedure both for cases initially filed in  
964 federal court and for cases removed from state court, and party  
965 participation in voir dire examination of prospective jurors. The  
966 other two involve offers for judgment and the means of serving  
967 subpoenas. How much space any of them would occupy on the agenda  
968 depends on the level of ambition. A narrow approach is possible  
969 for each. Broader approaches are possible, particularly for the  
970 jury-trial and offer-of-judgment projects.

971           The task for this meeting is to set priorities, recognizing  
972 that new projects may emerge. The practical importance of the  
973 rule and the intrinsic value of reform are important parts of the  
974 calculation. But account also must be taken of the Committee's  
975 overall capacity, the difficulty of devising a better rule, the  
976 risk of unforeseen consequences, and the prospect that the  
977 potential advantages of a seemingly better rule will be  
978 diminished or even thwarted by adversarial tactics.

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# TAB 10A

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**A. RULES 38, 39, 81(c) (3)**

980 Jury trial issues have come to the agenda in stages. The  
981 first issue came in a suggestion to cure an ambiguity in the  
982 procedure for demanding jury trial after removal from state  
983 court. Preliminary discussion of that issue in the Standing  
984 Committee in June, 2016, prompted two Standing Committee members  
985 to suggest that perhaps the demand procedure should be abandoned,  
986 substituting automatic assignment of all cases for jury trial  
987 unless the parties (and perhaps the court) agree to a nonjury  
988 trial.

989 *Rule 81(c) (3): Demand after Removal*

990 Rule 81(c)(3) governs demands for jury trial in actions  
991 removed from state court. Subparagraph (c)(3)(A) provides that a  
992 party who demanded a jury trial in accordance with state law need  
993 not renew the demand after removal. It further provides that a  
994 party need not make a demand "[i]f the state law did not require  
995 an express demand." Before the Style Project amendments of 2007,  
996 this provision excused the need to make a demand if state law  
997 does not require a demand. Most courts, recognizing the  
998 convention that Style Project changes do not affect meaning,  
999 continue to read the rule to excuse a demand after removal only  
1000 if state law does not require a demand at any point. But it has  
1001 been urged that "did not" creates a new ambiguity that may  
1002 mislead a party who wants a jury trial to forgo a demand because  
1003 state law, although requiring a demand at some point after the  
1004 time of removal, did not require that the demand be made by the  
1005 time of removal.

1006 The question whether to develop an amendment of Rule 81 to  
1007 address this issue, and perhaps other questions about the effect  
1008 of removal on demands for jury trial, was discussed at the April  
1009 2016 meeting. The Minutes, set out below, describe the issues and  
1010 a decision to retain the issue on the agenda for further study.  
1011 The issue was reported to the June 2016 Standing Committee  
1012 meeting. Nothing was decided then.

1013 The removal-demand issue is clearly defined. If nothing is  
1014 done about the general demand procedure in Rule 38, the  
1015 alternatives seem fairly clear: do nothing; change back from  
1016 "did" to "does"; or apply Rule 38 procedure to all cases removed  
1017 before a jury-trial demand is made in state court, perhaps with a  
1018 longer time to make the demand after removal. If the general  
1019 demand procedure is changed, however, the choices may become more  
1020 complicated.

1021 *Excerpt from April 14, 2016 Minutes*

1022 *RULE 81(c) (3): 15-CV-A*

1023 This item was carried forward from the agenda for the  
1024 November 2015 meeting.

1025 The question was framed by 15-CV-A as a potential misstep in  
1026 the 2007 Style Project. The question is best understood in the  
1027 full frame of Rule 81(c).

1028 Rule 81(c) begins with (c)(1): "These rules apply to a civil  
1029 action after it is removed from a state court." Applying the  
1030 rules is important – a federal court could not function well with  
1031 state procedure, it would be awkward to attempt to blend state  
1032 procedure with federal procedure, and the very purpose of removal  
1033 may be to seek application of federal procedure.

1034 Rule 81(c)(3) provides special treatment for the procedure  
1035 for demanding jury trial. It begins with a clear proposition in  
1036 (3)(A): a party who expressly demanded a jury trial before  
1037 removal in accordance with state procedure need not renew the  
1038 demand after removal.

1039 A second clear step is provided by Rule 81(c)(3)(B): if all  
1040 necessary pleadings have been served at the time of removal, a  
1041 jury trial demand must be served within 14 days, measured for the  
1042 removing party from the time of filing the notice of removal and  
1043 measured for any other party from the time it is served with a  
1044 notice of removal. This provision avoids the problem that  
1045 otherwise would arise in applying the requirement of Rule  
1046 38(b)(1) that a jury demand be served no later than 14 days after  
1047 serving the last pleading directed to the issue.

1048 The third obvious circumstance departs from the premise of  
1049 Rule 81(c)(3)(B): All necessary pleadings have not been served at  
1050 the time of removal. Subject to the remaining two variations, it  
1051 seems safe to rely on Rule 81(c)(1): Rule 38 applies after  
1052 removal.

1053 The fourth circumstance arises when state law does not  
1054 require a demand for jury trial at any time. Up to the time of  
1055 the Style Project, this circumstance was clearly addressed by  
1056 Rule 81(c)(3)(A): "If the state law **does** not require an express  
1057 demand for jury trial, a party need not make one after removal  
1058 unless the court orders the parties to do so within a specified  
1059 time. The court must so order at a party's request and may so  
1060 order on its own." The direction was clear. The underlying policy  
1061 is to balance competing interests. There is a fear that a party  
1062 may rely after removal on familiar state procedure – absent this  
1063 excuse, the right to jury trial could be lost for failure to file  
1064 a timely demand under Rule 38 after removal. At the same time,  
1065 the importance of establishing whether the case is to be set for  
1066 jury trial reflected in Rule 38 is recognized by providing that  
1067 the court can protect itself by an order setting a time to demand  
1068 a jury trial, and by further providing that a party can protect  
1069 its interest by a request that the court must honor by setting a  
1070 time for a demand.

1071 The Style Project changed "does," the word highlighted  
1072 above, to "did." That change opens the possibility of a new  
1073 meaning for this fifth circumstance: "[D]id not require an  
1074 express demand" could be read to excuse any need to demand a jury  
1075 trial when state law does require an express demand, but sets the  
1076 time for the demand at a point after the time the case was  
1077 removed. The question was raised by a lawyer in a case that was  
1078 removed from a court in a state that allows a demand to be made  
1079 not later than entry of the order first setting the case for  
1080 trial. The court ruled, in keeping with the Style Project  
1081 direction, that the change from "does" to "did" was intended to  
1082 be purely stylistic. The exception that excuses any demand  
1083 applies only if state law does not require an express demand for  
1084 jury trial at any point.

1085 The question put by 15-CV-A can be stated in narrow terms:  
1086 Should the Style Project change be undone, changing "did" back to  
1087 "does"? That would avoid the risk that "did" will be read by  
1088 others to mean that a jury demand is not required after removal  
1089 if, although state procedure does require an express demand, the  
1090 time set for the demand in state court occurs at a point after  
1091 removal. There is at least some ground to expect that the  
1092 ambiguous "did" may cause some other lawyers to misunderstand  
1093 what apparently was intended to be a mere style improvement.

1094 A broader question is whether a party should be excused from  
1095 making a jury demand if, although a demand is required both by  
1096 Rule 38 and by state procedure, state procedure sets the time for  
1097 making the demand after the time the case is removed. It is  
1098 difficult to find persuasive reasons for dispensing with the  
1099 demand in such circumstances. And there is much to be said for  
1100 applying Rule 38 in the federal court rather than invoking state  
1101 practice.

1102 A still broader question is whether it is time to reconsider  
1103 the provision that excuses the need for any jury demand when a  
1104 case is removed from a state that does not require a demand. Both  
1105 the court and the other parties find it important to know early  
1106 in the case whether it is to be tried to a jury. Present Rule  
1107 81(c)(3)(A) recognizes this value in the provision that allows  
1108 the court to require a demand, and that directs that the court  
1109 must require a demand if a party asks it to do so. In effect this  
1110 rule transfers the burden of establishing whether the case is to  
1111 be tried to a jury from a party who wants jury trial to the court  
1112 and the other parties. The evident purpose is to protect against  
1113 loss of jury trial by a party that does not familiarize itself  
1114 with federal procedure even after a case is removed to federal  
1115 court. It may be that the time has come to insist on compliance  
1116 with Rule 38 after removal, just as the other rules apply after  
1117 removal.

1118 Discussion began with the question whether it would be  
1119 useful to change "did" back to "does" now, holding open for later  
1120 work the question whether to reconsider this provision. Two

1121 judges responded that it is important to know, as early as  
1122 possible, whether a case is to be tried to a jury. Rather than  
1123 approach the question in two phases, it will better to consider  
1124 it all at once.

1125 The Committee agreed to study the sketch of a simplified  
1126 Rule 81(c)(3) presented in the agenda materials:

1127 (3) *Demand for a Jury Trial*. Rule 38(b) governs a demand for  
1128 jury trial unless, before removal, a party expressly  
1129 demanded a jury trial in accordance with state law. If  
1130 all necessary pleadings have been served at the time of  
1131 removal, a party entitled to a jury trial under Rule 38  
1132 must be given one<sup>1</sup> if the party serves a demand within  
1133 14 days after:

1134 (A) it files a notice of removal, or  
1135 (B) it is served with a notice of removal filed by  
1136 another party.

1137 <sup>1</sup> This version simply tracks the current rule. It might  
1138 be shortened: "If all necessary pleadings have  
1139 been served at the time of removal, a demand must  
1140 be served within 14 days after the party \* \* \*."

1141 If there is some discomfort with the 14-day deadline, it  
1142 could be set at 21 days.

1143

*Rules 38, 39: Jury-Trial Demand*

1144           Shortly after the removal-demand question was discussed at  
1145 the June, 2016 Standing Committee meeting, Judge Gorsuch and  
1146 Judge Graber suggested that it is time to reconsider the demand  
1147 requirement. Their suggestion, 16-CV-F (set out below), is that,  
1148 as in Criminal Rule 23(a), jury trial should be the standard. A  
1149 case would be tried without a jury only if all parties waive jury  
1150 trial. Like Rule 23(a), it would be possible to require that the  
1151 court approve the waiver.

1152           Several reasons are offered for the proposal. The revised  
1153 rule might increase the number of jury trials, an outcome that is  
1154 important to those who lament "the vanishing jury trial." It also  
1155 would avoid a procedure that may be a trap for the unwary  
1156 litigant who wants a jury trial but fails to make a timely demand  
1157 and fails to persuade the court to allow an untimely demand under  
1158 Rule 39(b).

1159           The Rules Committee Support Office is undertaking research  
1160 to support further consideration of the demand procedure. It will  
1161 attempt to explore the reasons that led the original Advisory  
1162 Committee to adopt a demand procedure, and to set the time for  
1163 demand early in the action. Local federal-court rules will be  
1164 examined, and experience with the wide range of different state  
1165 procedures will be studied. An attempt will be made to find out  
1166 how often parties who want a jury trial fail to get one for  
1167 failing to make a timely demand.

1168           A different kind of practical wisdom also will be sought.  
1169 Any procedure that may lead to forfeiture of a desired practice  
1170 may be considered a "trap." But many rules have that result  
1171 because they serve important purposes. Requiring an early jury  
1172 demand may be justified by the value to the court and the parties  
1173 of knowing from the outset whether the case is to be tried to a  
1174 jury. Advice will be sought where it can be found.

1175           Many alternatives will be considered if the initial research  
1176 suggests that the demand procedure should be reconsidered. The  
1177 most modest approach would simply extend the time to make a  
1178 demand, conceivably to very close to trial. The presumption that  
1179 all cases will be tried to a jury could be implemented by a rule  
1180 that requires a joint written waiver by all parties, or by  
1181 variations that allow a single party to initiate waiver by  
1182 inviting other parties to join. As with the criminal rule, the  
1183 court's approval might be required. And some thought could be  
1184 given to the complications that arise when it is not clear  
1185 whether any part of the case falls within a statutory or  
1186 constitutional right to jury trial. The complications that arise  
1187 when only some parts of the case fall within a right to jury  
1188 trial also might be addressed.

1189           A significant amount of Committee time is likely to be  
1190 required when the jury-demand procedure is taken up. Many

1191 alternative approaches might be taken in revising the demand  
1192 procedure. As noted above, the choices will be influenced by  
1193 judgments about the importance of protecting against inadvertent  
1194 waiver of the right to jury trial. Pragmatic judgments must be  
1195 made about the actual risk of inadvertent waiver under present  
1196 practice, including a sense whether courts frequently excuse an  
1197 initial waiver. Pragmatic judgments also are needed in assessing  
1198 the effect of alternative approaches, whether by way of relaxed  
1199 demand procedures or abolition of any demand requirement. Any  
1200 eventual proposals are likely to draw close attention, and even  
1201 to stir some measure of controversy. Initial discussion by the  
1202 Committee is summarized in the Minutes for the November 3, 2016,  
1203 meeting, set out after these sketches of possible rules language:

1204 Rules 38, 39 drafts

1205 These drafts illustrate some of the many possible approaches  
1206 that could be taken to soften present Civil Rule 38 procedures  
1207 for demanding trial by jury. They begin with alternative versions  
1208 of Rule 38. The alternatives are roughly ranked, beginning with a  
1209 rule that requires jury trial of all issues affected by a right  
1210 to jury trial and flowing through increasing levels of party  
1211 responsibility for invoking the right.

1212 The decisions made as to Rule 38 will affect the parallel  
1213 changes that must be made in Rule 39 and Rule 81(c)(3).  
1214 Rule 79(a)(3) cannot be forgotten, but corresponding amendments  
1215 should be easy to draft.

1216 **Rule 38**

1217 Present Rule 38 provides:

1218 **Rule 38. Right to a Jury Trial; Demand**

- 1219 (a) RIGHT PRESERVED. The right of trial by jury as declared by the  
1220 Seventh Amendment to the Constitution – or as provided by a  
1221 federal statute – is preserved to the parties<sup>6</sup> inviolate.  
1222 (b) DEMAND. On any issue triable of right by a jury, a party may  
1223 demand a jury trial by:  
1224 (1) serving the other parties with a written demand – which  
1225 may be included in a pleading – no later than 14 days  
1226 after the last pleading directed to the issue is  
1227 served; and  
1228 (2) filing the demand in accordance with Rule 5(d).  
1229 (c) SPECIFYING ISSUES. In its demand, a party may specify the issues  
1230 that it wishes to have tried by a jury; otherwise, it is  
1231 considered to have demanded a jury trial on all issues so

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<sup>6</sup> Is there any setting in which one party has a right to jury trial but another does not? The drafts that follow avoid such tasks as drafting waiver provisions that distinguish among parties in a single case, some of whom have a right to jury trial and others of whom do not.

1232 triable. If the party has demanded a jury trial on only some  
1233 issues, any other party may – within 14 days after being  
1234 served with the demand or within a shorter time ordered by  
1235 the court – serve a demand for a jury trial on any other or  
1236 all factual<sup>7</sup> issues triable by jury.  
1237 (d) WAIVER; WITHDRAWAL. A party waives<sup>8</sup> a jury trial unless its  
1238 demand is properly served and filed. A proper demand may be  
1239 withdrawn only if the parties consent.  
1240 (e) Admiralty and Maritime Claims. These rules do not create a  
1241 right to a jury trial on issues in a claim that is an  
1242 admiralty or maritime claim under Rule 9(h).

1243 Jury Trial Presumed

1244 (b) Jury Trial.  
1245 (1) Any issue triable of right by a jury will be tried by a  
1246 jury unless all parties[, with the court's approval,]  
1247 stipulate to waive the right as to specified issues or  
1248 all issues.<sup>9</sup>  
1249 (2) A party that [has a right to jury trial and] joins the  
1250 action after [filing][approval] of a waiver [under  
1251 Rule 38(b)(1)] may demand jury trial on any or all of  
1252 the issues included in the waiver by serving the other  
1253 parties with a written demand for jury trial within 14  
1254 days after joining<sup>10</sup> and filing the demand in

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<sup>7</sup> Why does "factual" appear here? The earlier references are simply to "issues." Although it is routine to say that the right to jury trial encompasses "fact" issues, and not law issues, it is common to characterize as "fact" many issues that blend some measure of law with matters of historic fact. If we are to take on Rule 38, we may want to think about this.

<sup>8</sup> This is the point at which Bryan Garner exulted that revision of the demand procedure might support drafting that either omits waiver or uses the word in its proper sense. During the Style Project the Committee rejected the suggestion that "forfeiture" should be used to describe loss of a right by failing to follow the procedure prescribed for asserting it. Probably it would be unwise to substitute "forfeit" for "waive" if we retain a demand procedure. And it would be wise to use "waiver" if the chosen procedure relies on intentional relinquishment of a known right to jury trial.

<sup>9</sup> This could be "issue, claim, or defense." But there is some advantage in adhering to the focus on "issue" in present Rule 38.

<sup>10</sup> This could be written the other way around: The waiver fails unless the new party joins it. A time limit could be set for accepting the waiver. But on balance it seems better to promote reliance on the original waiver by retaining a demand procedure at this step.





- 1271 (1) On any issue triable of right by a jury,<sup>15</sup> any party may  
1272 waive a jury trial by:  
1273 (A) serving the other parties with a written waiver – which  
1274 may be included in a pleading – [at any time] [no later  
1275 than 14 days after the last pleading directed to the  
1276 issue is served]; and  
1277 (B) filing the waiver in accordance with Rule 5(d).  
1278 (2) Any other party can defeat a waiver [of jury trial] filed  
1279 under Rule 38(b)(1) by serving the other parties with a  
1280 written demand for jury trial and filing the demand in  
1281 accordance with Rule 5(d). The demand may be included in a  
1282 pleading and may be served by the later of 14 days after:  
1283 (A) being served with the waiver;  
1284 (B) being served with the last pleading directed to the  
1285 issue; or  
1286 (C) the party is first joined in the action.  
1287 (c) SPECIFYING ISSUES. In its waiver or demand, a party may specify  
1288 the issues that it wishes to have tried without a jury or by  
1289 a jury; otherwise, it is considered to have waived or  
1290 demanded a jury trial on all the issues so triable. If the  
1291 party has waived or demanded a jury trial on only some  
1292 issues, any other party may – within 14 days after being  
1293 served with the waiver or demand or within a shorter time  
1294 ordered by the court – serve a waiver or demand with respect  
1295 to any other or all [factual] issues triable by a jury.<sup>16</sup>  
1296 (d) WITHDRAWING WAIVER OR DEMAND. A party waives [forfeits?] a jury  
1297 trial unless it timely files and serves a demand under  
1298 Rule 38(b)(2). A waiver or proper demand may be withdrawn  
1299 only with the court's approval or the consent of all  
1300 parties.

1301 This model provides an alternative that establishes an  
1302 explicit procedure for a party that wishes to initiate waiver by  
1303 all parties. The procedure that requires a stipulation by all  
1304 parties must overcome considerable inertia. The inertia remains,  
1305 but invocation of an explicit waiver procedure may ease the way.  
1306 Once again, the details will require careful review if this model  
1307 is to be developed.

#### 1308 More Forgiving Demand Model

1309 Rule 38(b) sets a relatively early time for demanding a jury  
1310 – "no later than 14 days after the last pleading directed to the

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<sup>15</sup> Should this be amplified to mimic the "jury presumed" model: "Any issue triable of right by a jury will be tried to a jury unless \* \* \*"?

<sup>16</sup> This adaptation of present Rule 38(c) needs further thought. What should be done if Party 1 serves and files a waiver; Party 2 files a demand; Party 3 seeks to broaden the waiver or the demand? Do we need complex time limits or even explicit limits on the number of rounds of waiver and demand?

1311 issue is served." Application may not be as straightforward as  
1312 these simple words suggest. Determination whether a new issue is  
1313 raised by the last pleading in a first round of pleading may not  
1314 always be simple. For example, a reply to a counterclaim may not  
1315 include anything that bears on an issue framed by complaint and  
1316 answer. Perhaps more frequently, amended pleadings may raise new  
1317 issues, but also may not. A party may inadvertently "waive" the  
1318 right to a jury by failing to pay attention to the original  
1319 requirement or by mistakenly calculating when the time to demand  
1320 starts to run.

1321 One way to address concerns about inadvertent waiver would  
1322 be to extend the time for the demand. The most forgiving approach  
1323 would be to allow a demand at any time before trial actually  
1324 begins. Tighter limits would shade back from that. Some of the  
1325 possible choices could be:

- 1326 (1) serving the other parties with a written demand – which  
1327 may be included in a pleading – no later than
- 1328 14 days after the last pleading or amended  
1329 pleading is served
- 1330 30 days after the close of all discovery
- 1331 the earlier of 14 days before the first day of  
1332 trial or 14 days before the date set for trial by  
1333 the first order that sets a trial date
- 1334 the time set by a scheduling order [in the case]

1335 Rule 38(d): Waiver

1336 Rule 38(d) provides comforting reassurance that the present  
1337 demand procedure does not break the Rule 38(a) promise that the  
1338 right of trial by jury "is preserved to the parties inviolate."  
1339 It could be retained without change if Rule 38(b) were amended to  
1340 relax, but retain, a demand requirement:

- 1341 (d) A party waives [forfeits?] a jury trial unless its  
1342 demand is properly served and filed. A proper demand  
1343 may be withdrawn only if the parties consent.

1344 At the same time, the indirect provision for excusing a  
1345 waiver found in Rule 39(b) could be moved to Rule 38(d) to make  
1346 it more prominent, and perhaps to encourage relief from the  
1347 waiver:

- 1348 (d) A party waives [forfeits?] a jury trial unless its  
1349 demand is properly served and filed. But the court may  
1350 permit an untimely demand. \* \* \*

1351 The Committee Note could suggest that the discretion conferred by  
1352 the rule text should be exercised to respect the importance of  
1353 the Seventh Amendment and any statutory right to trial by jury.

1354 If an express waiver procedure is adopted to replace a  
1355 demand procedure, Rule 38(d) must be amended. Illustrations are  
1356 provided with the waiver drafts.

1357 Rule 39

1358 Rule 39 must be amended to reflect whatever changes are made  
1359 in Rule 38, and perhaps to integrate it better with Rule 38. That  
1360 task can be approached when tentative choices have been made  
1361 about Rule 38.

1362 The most sweeping revisions of Rule 39 would arise from the  
1363 version of Rule 38 that calls for jury trial absent waiver by all  
1364 parties. The draft set out above includes many provisions drawn  
1365 from present Rule 39. Rule 39(a) includes provisions for  
1366 stipulating to a nonjury trial, and for a determination that  
1367 there is no right to jury trial of an issue. Those provisions are  
1368 included. Rule 39(a) also includes a "jury docket" provision; see  
1369 Rule 79 below. Rule 39(b) provides for trial to the court when  
1370 there is no demand; that is reversed by the Rule 38 draft.  
1371 Rule 39(b) also allows the court, "on motion," to order a jury  
1372 trial on any issue for which jury trial might have been demanded.  
1373 Alternative versions of the presumed jury draft address  
1374 withdrawal or waiver. The Rule 39(c)(1) provision for an advisory  
1375 jury likely should be retained. The fate of Rule 39(c)(2)  
1376 allowing trial to a jury as if there were a right to jury trial,  
1377 even though there is not, will require some thought.

1378 Rule 79(a)(3)

1379 Rule 79(a)(3) links use of the word "jury" in the docket to  
1380 the demand procedure. Some adaptation may be required.

1381 Rule 81(c)(3)

1382 The part of Rule 81(c)(3)(A) that gives effect to a jury  
1383 trial demand made before removal from state court should remain,  
1384 at least so long as some states have a demand procedure. The rest  
1385 of Rule 81(c)(3)(A) and (B) should be adapted to the choices made  
1386 in Rule 38. The adaptation will not be automatic. As one example:  
1387 what should be done if removal is made after the right to jury  
1388 trial has been lost for failure of timely demand in the state  
1389 court? Should adoption of a federal procedure that requires  
1390 express waiver revive the right? It seems likely that the choices  
1391 for Rule 38 should be made independently, without adjusting for  
1392 the consequences for removed cases. Removal cases can be dealt  
1393 with after identifying the best Rule 38 procedure.

1395 Exploration of these questions will begin with research by  
1396 the Rules Committee Support Office. One question will be  
1397 historical. The Committee Note for the 1938 Rules states that the  
1398 demand procedure was adopted after looking to models in the  
1399 states and other common-law jurisdictions, and that the period  
1400 was set at 14 days after the last pleading addressed to the issue  
1401 after examining a wide range of periods adopted by other rules.  
1402 There is a reference to an article by Professor Fleming James,  
1403 who served as a consultant to the Committee; the article focuses  
1404 on administrative concerns, with a hint at concerns about  
1405 strategic behavior. Can more be found out about the reasons that  
1406 prompted both adoption of a demand procedure and an early cut-off  
1407 for the demand?

1408 A search also will be made to determine whether there are  
1409 local rules that address demand procedure. And experience under  
1410 state rules will be explored – they vary widely, but many of them  
1411 allow demands to be made later in the proceedings than Rule 38  
1412 allows, and some, as reflected in Rule 81(c)(3)(A), do not  
1413 require a formal demand at any time.

1414 The more elusive part of the research will attempt to  
1415 determine whether there is any reliable way to estimate the  
1416 number of cases in which a party who wishes a jury trial has lost  
1417 the right by failure to make timely demand and by failing to  
1418 persuade the court to allow an untimely demand under Rule 39(b).  
1419 It may be difficult to get more than anecdotal evidence on this  
1420 point.

1421 Another part of the inquiry must ask whether it is  
1422 important, or at least useful, to know early in the proceedings  
1423 whether the case is to be tried to a jury. Is it more than a  
1424 matter of convenient administrative trial-scheduling practices?  
1425 Or a concern that a party who was content to waive jury trial  
1426 early in the action may, as proceedings progress, come to want a  
1427 jury because its position does not seem to be winning favor with  
1428 the judge? (This possible concern seems likely to arise only when  
1429 a case remains with the same judge from beginning through trial;  
1430 it seems likely that practice in the 1930s was different in this  
1431 respect.)

1432 If the conclusion is that some relaxation of the demand  
1433 procedure is desirable, many drafting questions will need to be  
1434 addressed. The choices will range from abolition of any demand  
1435 requirement through a mere extension of the time when a demand  
1436 must be made. Adopting jury trial as the default that prevails  
1437 unless the parties opt out could be implemented by a procedure  
1438 that requires express written waiver by all parties; the court's  
1439 approval might also be required, as in Criminal Rule 23(a). A  
1440 further drafting choice must be made whether to complicate the  
1441 rule by addressing the problem that it is not always clear  
1442 whether there is a constitutional or statutory right to jury

1443 trial. The merger of law and equity has led to decisions that  
1444 expand the right to jury trial in comparison with pre-merger  
1445 practice, but the details may be murky. Issues common to legal  
1446 and equitable relief must be tried to the jury, and the verdict  
1447 binds the judge. But it may be difficult to untangle closely  
1448 related but separate issues. More generally, the process of  
1449 analogy to the common law of 1791 may not always yield clear  
1450 answers when asking whether a novel statutory action entails a  
1451 Seventh Amendment right to jury trial. Criminal Rule 23 does not  
1452 address such questions, but the right to jury trial in criminal  
1453 cases may be free from complications similar to those that  
1454 occasionally arise in civil actions. One resolution would be to  
1455 include rule text that recognizes the right of any party who  
1456 prefers a bench trial to raise the question whether there is a  
1457 right to jury trial.

1458 Discussion began with the observation of a judge that in  
1459 more than 20 years on the bench, he could not remember more than  
1460 2 or 3 litigants who had lost a desired right to jury trial. But  
1461 that does not diminish the value of attempting a more  
1462 comprehensive inquiry. It also might be asked whether a party who  
1463 has forfeited the right to jury trial by failing to make a timely  
1464 demand will be inclined to settle rather than face a bench trial.  
1465 There might be an independent value in adopting an all-parties  
1466 waiver provision. The question of court approval also should be  
1467 considered. One variation would be to revise Rule 39(b) to allow  
1468 the court to order a jury trial on its own.

1469 Another judge noted similar experiences – there are few  
1470 cases of inadvertent forfeiture. One way to inquire further may  
1471 be to research cases that deal with late requests, but  
1472 disposition of these requests may not often make it into reports  
1473 or electronic repositories. And a party may react to its failure  
1474 to make a timely demand by settling rather than attempting to win  
1475 permission to make an untimely demand.

1476 Turning to the question whether and why it is useful to know  
1477 early on about the mode of trial – to a judge or to a jury – a  
1478 Committee member suggested there is a lot of value in knowing.  
1479 The mode of trial impacts mediation. It also may affect summary-  
1480 judgment practice, which may be blended with "trial" when trial  
1481 is to be to the judge. Managing a jury calendar will be helped,  
1482 and trial scheduling will be helped. "I'm all for more jury  
1483 trials," but no one seems to be getting trapped in practice.

1484 Another Committee member said that "everyone demands jury  
1485 trial so they don't waive it." They may not know until later in  
1486 the case whether they really want a jury trial. It may make sense  
1487 to extend the time for demands so better-supported choices are  
1488 made and so as to avoid the complications when a party who  
1489 demanded jury trial decides to abandon a demand that other  
1490 parties may wish to enforce. The removal situation is the only  
1491 setting that is at all likely to generate inadvertent waivers,  
1492 especially on remand from an MDL court to the court where the

1493 case was initially filed. The need to demand a jury trial is  
1494 likely to get lost from sight at times. This could be addressed  
1495 by a rule provision.

1496 A judge agreed that the issue seems to arise only in MDL  
1497 proceedings. He also noted that he has had criminal cases in  
1498 which the defendant wants to waive jury trial but the government  
1499 insists on it.

## MEMORANDUM

TO: Judges Jeffrey Sutton, David Campbell, and John D. Bates

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for a jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea. Thank you.



# TAB 10B

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1500 **B. RULE 47: LAWYER PARTICIPATION IN VOIR DIRE: 17-CV-C**

1501 Expanding the right of the parties to participate in voir  
1502 dire examination of prospective jurors is proposed by 17-CV-C.  
1503 The proposal comes from the American Bar Association, based on  
1504 the ABA Principles for Juries and Jury Trials 11(B)(2), adopted  
1505 as official ABA policy on recommendation of a 2004 special  
1506 committee and reviewed in 2013. It "remains official ABA policy."  
1507 The immediate impetus for the recommendation to amend Rule 47(a)  
1508 is a resolution of the ABA Tort Trial and Insurance Practice  
1509 Section. The proposal is attached, along with 17-CV-F and 17-CV-  
1510 G, submissions from the American Board of Trial Advocates and the  
1511 American Association for Justice supporting the ABA proposal.

1512 Principle 11(b)(2) reads:

1513 Following initial questioning by the court, each party  
1514 should have the opportunity, under supervision of the  
1515 court and subject to reasonable time limits, to  
1516 question jurors directly, both individually and as a  
1517 panel. In a civil case involving multiple parties, the  
1518 court should permit each separately represented party  
1519 to participate meaningfully in questioning prospective  
1520 jurors subject to reasonable time limits and avoidance  
1521 of repetition.

1522 Specific rule language is not proposed.

1523 The supporting arguments begin with the observation that  
1524 "'federal district courts generally allow far less attorney  
1525 involvement in voir dire than state courts.'" Several reasons are  
1526 advanced to encourage a greater role for attorneys. "[A] trial  
1527 judge likely knows far less about a given case at the time of  
1528 voir dire than the lawyers. \* \* \* The potential bias of a juror  
1529 may be with respect to a particular witness, a piece of evidence  
1530 or a fact issue that might arise." A judge may be less able to  
1531 anticipate developments at trial that would raise issues of  
1532 obvious bias, and still less able to anticipate problems of  
1533 implicit bias. Jurors, moreover, are more likely to be candid and  
1534 "less likely to give merely socially desirable answers to  
1535 questions from lawyers than from judges." Many judges, of course,  
1536 may not agree with the assumptions built into these reasons.

1537 Rebuttals are offered for the opposing arguments. Lawyer  
1538 participation is not likely to add much delay to jury selection.  
1539 Nor should it be assumed that lawyers will abuse the process.  
1540 Attempts at abuse can be controlled by the judge. The opportunity  
1541 to submit written questions to the judge in advance is an  
1542 inadequate substitute for direct participation – it is difficult  
1543 to anticipate follow-up questions, or to anticipate questions  
1544 that "do not arise until voir dire is already in progress."

1545 This question comes back a shade more than 20 years after  
1546 the Committee last considered it. In 1995 the Committee published  
1547 this proposal for comment:

1548 Rule 47. Selecting ~~Selection~~ of Jurors

1549 (a) ~~Examination of~~ Examining Jurors. The court ~~may~~ shall ~~permit~~  
1550 ~~the parties or their attorneys to~~ conduct the voir dire  
1551 ~~examination of prospective jurors or may itself conduct the~~  
1552 ~~examination.~~ But the court shall also permit the parties to  
1553 orally examine the prospective jurors to supplement the  
1554 court's examination within reasonable limits of time,  
1555 manner, and subject matter, as the court determines in its  
1556 discretion. The court may terminate examination by a person  
1557 who violates those limits, or for other good cause. In the  
1558 latter event, the court shall permit the parties or their  
1559 attorneys to supplement the examination by such further  
1560 inquiry as it deems proper or shall itself submit to the  
1561 prospective jurors such additional questions of the parties  
1562 or their attorneys as it deems proper.

1563 **COMMITTEE NOTE**

1564  
1565 Rule 47(a) in its original and present form permits the  
1566 court to exclude the parties from direct examination of  
1567 prospective jurors. Although a recent survey shows that a  
1568 majority of district judges permit party participation, the power  
1569 to exclude is often exercised. See *Shapard & Johnson, Survey*  
1570 *Concerning Voir Dire* (Federal Judicial Center 1994). Courts that  
1571 exclude the parties from direct examination express two concerns.  
1572 One is that direct participation by the parties extends the time  
1573 required to select a jury. The second is that counsel frequently  
1574 seek to use voir dire not as a means of securing an impartial  
1575 jury but as the first stage of adversary strategy, attempting to  
1576 establish rapport with prospective jurors and influence their  
1577 views of the case.

1578 The concerns that led many courts to undertake all direct  
1579 examination of prospective jurors have earned deference by long  
1580 tradition and widespread adherence. At the same time, the number  
1581 of federal judges that permit party participation has grown  
1582 considerably in recent years. The Federal Judicial Center survey  
1583 shows that the total time devoted to jury selection is virtually  
1584 the same regardless of the choice made in allocating  
1585 responsibility between court and counsel. It also shows that  
1586 judges who permit party participation have found little  
1587 difficulty in controlling potential misuses of voir dire. This  
1588 experience demonstrates that the problems that have been  
1589 perceived in some state-court systems of party participation can  
1590 be avoided by making clear the discretionary power of the  
1591 district court to control the behavior of the party or counsel.  
1592 The ability to enable party participation at low cost is of  
1593 itself strong reason to permit party participation. The parties  
1594 are thoroughly familiar with the case by the start of trial.  
1595 They are in the best position to know the juror information that

1596 bears on challenges for cause and peremptory challenges, and to  
1597 elicit it by jury questioning. In addition, the opportunity to  
1598 participate provides an appearance and reassurance of fairness  
1599 that has value in itself.

1600 The strong direct case for permitting party participation is  
1601 further supported by the emergence of constitutional limits that  
1602 circumscribe the use of peremptory challenges in both civil and  
1603 criminal cases. The controlling decisions begin with *Batson v.*  
1604 *Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v.*  
1605 *Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). See also *Purkett v.*  
1606 *Elem*, 115 S.Ct. 1769 (1995). Prospective jurors "have the right  
1607 not to be excluded summarily because of discriminatory and  
1608 stereotypical presumptions that reflect and reinforce patterns of  
1609 historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These  
1610 limits enhance the importance of searching voir dire examination  
1611 to preserve the value of peremptory challenges and buttress the  
1612 role of challenges for cause. When a peremptory challenge  
1613 against a member of a protected group is attacked, it can be  
1614 difficult to distinguish between group stereotypes and intuitive  
1615 reactions to individual members of the group as individuals. A  
1616 stereotype-free explanation can be advanced with more force as  
1617 the level of direct information provided by voir dire increases.  
1618 As peremptory challenges become less peremptory, moreover, it is  
1619 increasingly important to ensure that voir dire examination be as  
1620 effective as possible in supporting challenges for cause.

1621 Fair opportunities to exercise peremptory and for-cause  
1622 challenges in this new setting require the assurance that the  
1623 parties can supplement the court's examination of prospective  
1624 jurors by direct questioning. The importance of party  
1625 participation in voir dire has been stressed by trial lawyers for  
1626 many years. They believe that just as discovery and other  
1627 aspects of pretrial preparation and trial, voir dire is better  
1628 accomplished through the adversary process. The lawyers know the  
1629 case better than the judge can, and are better able to frame  
1630 questions that will support challenges for cause or informed use  
1631 of peremptory challenges. Many also believe that prospective  
1632 jurors are intimidated by judges, and are more likely to admit  
1633 potential bias or prejudice under questioning by the parties.

1634 Party examination need not mean prolonged voir dire, nor  
1635 subtle or brazen efforts to argue the case before trial. The  
1636 court can undertake the initial examination of prospective  
1637 jurors, restricting the parties to supplemental questioning  
1638 controlled by direct time limits. Effective control can be  
1639 exercised by the court in setting reasonable limits on the manner  
1640 and subject-matter of the examination. Lawyers will not be  
1641 allowed to advance arguments in the guise of questions, to seek  
1642 committed responses to hypothetical descriptions of the case, to  
1643 assert propositions of law, to intimidate or ingratiate, or  
1644 otherwise to turn the opportunity to seek information about  
1645 prospective jurors into improper adversary strategies. The  
1646 district court has ample power to control the time, manner, and  
1647 subject matter of party examination. The process of determining  
1648 the limits continues throughout the course of each party's  
1649 examination, and includes the power to terminate further

1650 examination by a person that has misused or abused the right of  
1651 examination. Among other grounds, termination may be warranted  
1652 not only by conduct that may impair the trial jury's impartiality  
1653 but also by questioning that is repetitious, confusing, or  
1654 prolonged, or that threatens inappropriate invasion of the  
1655 prospective jurors' privacy. The determination to set limits or  
1656 to terminate examination is confided to the broad discretion of  
1657 the district court. Only a clear abuse of this discretion –  
1658 usually in conjunction with a clearly inadequate examination by  
1659 the court – could justify reversal of an otherwise proper jury  
1660 verdict.

1661 The voir dire process can be further enhanced by use of jury  
1662 questionnaires to elicit routine information before voir dire  
1663 begins. Questionnaires can save much time, and may improve in  
1664 many ways the development of important information about  
1665 prospective jurors. Potential jurors are protected against the  
1666 embarrassment of public examination. A prospective juror may be  
1667 more willing to reveal potentially embarrassing information in  
1668 responding to a questionnaire than in answering a question in  
1669 open court. Written answers to a questionnaire also may avoid  
1670 the risk that answers given in the presence of other prospective  
1671 jurors may contaminate a large group.

1672 Questionnaires are not required by Rule 47(a), but should be  
1673 seriously considered. At the same time, it is important to guard  
1674 against the temptation to extend questionnaires beyond the limits  
1675 needed to support challenges for cause and fair use of peremptory  
1676 challenges. Just as voir dire examination, questionnaires can be  
1677 used in an attempt to select a favorable jury, not an impartial  
1678 one. Prospective jurors must be protected against unwarranted  
1679 invasions of privacy; the duty of jury service does not support  
1680 casual inquiry into such matters as religious preferences,  
1681 political views, or reading, recreational, and television habits.  
1682 Indeed the list of topics that might be of interest to a party  
1683 bent on manipulating the selection of a favorable jury through  
1684 the use of sophisticated social-science profiles and personality  
1685 evaluations is virtually endless. Selection of an impartial jury  
1686 requires suppression of such inquiries, not encouragement. The  
1687 court's guide must be the needs of impartiality, not party  
1688 advantage.

#### 1689 *Reception of the 1995 Proposal*

1690 The 1995 proposal went a long way toward addressing concerns  
1691 raised by the bar in terms similar to the 2017 ABA proposal.  
1692 Public comments and testimony were sharply divided. Comments were  
1693 provided by nearly 200 judges, lawyers, and legal organizations.  
1694 Three public hearings were held. The summary of comments and  
1695 testimony presented to the Standing Committee covers 37 single-  
1696 spaced pages. The force of these reactions led the Committee to  
1697 drop the proposal at its April 1996 meeting. The first paragraphs  
1698 of the Minutes reflect the core of the disagreements:

1699 Almost all of the many federal judges who commented on  
1700 the proposal spoke in opposition. Comments from the bar

1701 were not as unanimous, but the very large majority of  
1702 bar comments supported the proposal.

1703 Discussion opened with the observation that in an  
1704 ideal world, virtually all federal judges would allow  
1705 lawyer participation in voir dire under present  
1706 Rule 47(a). The common theme of most comments by  
1707 federal judges is the fear that they will lose control  
1708 if they lose the unlimited right to deny any lawyer  
1709 participation in voir dire. There also is a hint of the  
1710 "random selection" philosophy that there is no real  
1711 value in jury selection, that any group of six or more  
1712 jurors will do as well as any other, although this view  
1713 is seldom made explicit. Many of the adverse comments  
1714 reflect direct experience with state systems in which  
1715 the right of lawyer participation has run riot.

1716 As compared to judicial comments, many lawyers say  
1717 that selection practices are inadequate in many courts.  
1718 Judges do not adequately understand the case, and fail  
1719 to appreciate the importance of direct lawyer  
1720 questioning to supplement initial questioning by the  
1721 judge. Written questions submitted to the judge simply  
1722 do not provide sufficient opportunity to follow up  
1723 answers with further questions. The lawyers recognize  
1724 that they will not be allowed an open field with the  
1725 jury.

1726 These competing visions of reality make it  
1727 difficult to write a rule.

1728 Faced with the difficulty of writing a Rule, the Committee  
1729 opted instead to encourage efforts to educate judges in the  
1730 benefits that may flow from lawyer participation in voir dire  
1731 under close judicial supervision.

1732 One way to frame the question is to ask whether the passage  
1733 of 20 years makes it useful to repeat the thorough work once done  
1734 on this debate. The lessons learned in 1995 and 1996 need not be  
1735 final. It is clear that the attitudes of the bar – at least the  
1736 organized bar – have not changed. What might be worth seeking out  
1737 is information whether the experience of federal judges has  
1738 changed.

1739 What might cause changes in judicial experience? It may be  
1740 that jury-trial lawyers have matured, perhaps in part because the  
1741 decline in federal jury trials means that fewer lawyers have  
1742 frequent opportunities to hone their techniques for influencing  
1743 jurors on voir dire. Or it may be that jury trials gravitate  
1744 toward a small number of those experienced in jury trials (in  
1745 part because they do not fear jury trials), augmenting the  
1746 prospects of successful manipulation. And it is unclear whether  
1747 even more federal judges now allow lawyer participation in voir

1748 dire, and if so, whether that would argue for or against the  
1749 proposal.

1750 On the other hand, it may be that the decline in the  
1751 frequency of jury trials has had no effect, or even has  
1752 exacerbated the behavior that many judges confronted two decades  
1753 ago. It was not clear even then that shifting the balance of  
1754 questioning between the court and lawyers had much impact on the  
1755 time required to seat a jury. But, as reflected in the draft  
1756 Committee Note, judges found that lawyers "frequently seek to use  
1757 voir dire not as a means of securing an impartial jury but as the  
1758 first stage of adversary strategy, attempting to establish  
1759 rapport with prospective jurors and influence their views of the  
1760 case." Questions may be framed in a way to elicit subconscious  
1761 commitments of jurors to the lawyer's side of the case.

1762 Other elements that may have an impact are the use of jury  
1763 consultants and the widespread opportunities to investigate  
1764 potential jurors through social media. Although some courts bar  
1765 social-media scrutiny of potential jurors, many seem to have no  
1766 policy. Use of information about individual jurors gathered by  
1767 these means could have unpredictable consequences, both for the  
1768 individual juror and for any other jurors exposed to the  
1769 questions. State-court practices also may have a bearing, and may  
1770 have changed. Lawyers accustomed to essentially unsupervised jury  
1771 questioning in state courts may carry into federal courts habits  
1772 that federal judges find inappropriate. A federal rule must be  
1773 framed in a way that supports necessary judicial supervision.

1774 Faced with these questions, a sensible first step may be to  
1775 rely on the experience of the Committee, perhaps supplemented by  
1776 informal conversations with colleagues on the bench. It may be  
1777 reason enough to leave Rule 47(a) alone if distrust of lawyer  
1778 voir dire behavior persists among a substantial number of federal  
1779 judges. Added reason would be found if practicing lawyers share  
1780 judges' concerns. But the proposal may deserve further  
1781 consideration if there is a sense that things may have changed  
1782 such that enhanced lawyer participation in voir dire is  
1783 desirable.



**Thomas M. Susman**  
Director  
Governmental Affairs Office

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January 31, 2017

Advisory Committee on Civil Rules  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544

**Re: Suggested Changes to Fed. R. Civ. P. 47(a)**

Dear Members of the Committee:

The American Bar Association (ABA) respectfully requests that the Advisory Committee recommend Fed. R. Civ. P. 47(a) be amended to require that the parties at trial or their counsel be allowed the opportunity to question prospective jurors directly during the voir dire process under the supervision of the court and subject to reasonable time limits.

**BACKGROUND INFORMATION AND REASONS  
FOR PROPOSED CHANGE**

In 2004, a special ABA committee completed an extensive study known as “The American Jury Project.” The co-chairs of that committee were the chairs of the ABA’s Criminal Justice Section, Litigation Section, and Judicial Division. Committee members included judges and members of both the plaintiffs and defense bar. Among the *Principles for Juries and Jury Trials* developed by this committee was Principle 11(B)(2), which states:

Following initial questioning by the court, each party should have the opportunity, under supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit each separately represented party to participate meaningfully in questioning prospective jurors subject to reasonable time limits and avoidance of repetition.

At its next meeting, the ABA House of Delegates adopted this precise language. It was reviewed in 2013 and currently remains official ABA policy. At its Fall 2016 meeting, the ABA’s Tort Trial and Insurance Practice Section resolved that this request to amend Rule 47(a) be initiated to seek the implementation of the Principles for Jury Trials, including Principle 11(B)(2).

Rule 47(a) presently states the court “may permit the parties or their attorneys to examine prospective jurors or may itself do so . . . .” While some federal district court judges permit direct questioning by counsel, others often exercise their discretion under the

current Rule to conduct all direct questioning themselves, precluding questioning by counsel. Citing an empirical study comparing federal judges with state court judges regarding their willingness to permit direct questioning by counsel during voir dire, Mark W. Bennett, U.S. District Court Judge for the Northern District of Iowa, has stated: “federal district courts generally allow far less attorney involvement in voir dire than state courts.” The study he refers to shows that, of the federal judges responding to a survey, 45% permitted only limited attorney involvement and 25% totally precluded counsel from questioning jurors. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 159 (2010).

#### THE IMPORTANCE OF PERMITTING COUNSEL TO QUESTION PROSPECTIVE JURORS

The Sixth Amendment of the United States Constitution provides that “the accused shall enjoy the right to . . . trial by an impartial jury.” This right to jury impartiality extends to civil cases. In *McDonough Power Equipment, Inc. v. Greenwood et al.*, 464 U.S. 548, 554 (1984), a civil action for damages based on product liability, the Supreme Court stated:

One touchstone of a fair trial is an impartial trier of fact—“a jury capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in responses to questions on voir dire may result in a juror’s being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.

It is important to recognize that a trial judge likely knows far less about a given case at the time of voir dire than the lawyers who have prepared the case for months or years. The potential bias of a juror may be with respect to a particular witness, a piece of evidence or a fact issue that might arise. Busy though diligent judges cannot be expected at the outset of trial to appreciate all the significant matters on which jurors should be examined for bias. As stated by the Fifth Circuit Court of Appeals in *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977):

[We] must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties. A judge cannot have the same grasp of the facts, the complexities of the case and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of each litigant’s case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.

The court further noted with approval that the ABA’s Commission on Standards of Judicial Administration had formally proposed affording trial counsel “reasonable

opportunity for direct questioning of jurors individually” as an important means of restoring impartiality. *Id.*

While the court’s lesser familiarity with the case at the outset of trial renders the judge less able to anticipate developments that might subject a party to obvious bias, such as prejudice based on race, gender, sexual orientation or political affiliation, the court is even less able at that time to appreciate the potential “implicit bias” of jurors that could affect the outcome of the case. Judge Bennett defines implicit bias as “the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious” of which “social scientists are convinced that we are, for the most part, unaware.” Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, at 149. He goes on to state that while judges can generally inquire about explicit biases, “For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases in jurors and determine how those biases might affect the case.” *Id.* at 150. “Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand.” Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1179 (2012).

Still another danger of judge-only juror questioning involves a recognized difference between the way jurors react to questions from the court and how they react to attorney questioning. Research shows that potential jurors respond more candidly and are less likely to give merely socially desirable answers to questions from lawyers than from judges. Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Jury Candor*, 11 LAW & HUM. BEHAV. 131 (1987).

THE PURPORTED REASONS FOR PRECLUDING DIRECT ATTORNEY  
QUESTIONING IN VOIR DIRE ARE NOT CONFIRMED AND ARE  
OUTWEIGHED BY ITS IMPORTANCE

The primary arguments against permitting counsel to directly question jurors are that: (1) questioning by both the court and counsel would take up too much trial time; (2) counsel can abuse the voir dire process by asking self-serving, argumentative questions; and (3) direct questioning is unnecessary because, under existing rules, counsel can submit written questions in advance for the court to ask.

Regarding the time used for attorney questioning, the policy adopted by the ABA referred to above and our proposed change would provide that direct questioning by counsel be “under the supervision of the court and subject to reasonable time limits.” There is credible research indicating that under court supervision attorney-conducted voir dire does not take substantially more time than when it is conducted only by the court. The National Center for State Courts and the State Justice Institute completed a study in 2007 that analyzed the time required for voir dire under various systems. The study found that voir dire conducted primarily by judges with some limited involvement by attorneys did not increase the time required for voir dire at all, and that voir dire conducted with equal participation between the judge and counsel increased the time for voir dire by approximately only forty-five minutes when compared to voir dire conducted exclusively

by a judge. GREGORY E. MIZE ET AL., *THE STATE-OF-THE STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 30* (2007), available at <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>; Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other ways to Improve the Voir Dire Process in Jury Selection*, 78 CHL.-KENT L. REV. 1179, 1196 (2003). A similar survey of one hundred and twenty-four federal judges conducted by the Federal Judicial Center showed that the extent of attorney involvement “bore no relationship to the reported amount of time typically spent on voir dire.” Hans & Jehle at 1185.

With regard to abuse of the voir dire process by counsel, it should not be assumed in advance that such conduct will occur. Experienced attorneys can appreciate that it would be counterproductive. Counsel can be advised of what is not allowed and what sanctions are available for abuse. An attentive judge monitoring counsels’ questioning can control the process accordingly. As noted in *Harold v. Corwin*, 846 F. 2d 1148, 1153 (8th Cir. 1988) (concurring op.):

If a trial judge concludes that a lawyer is abusing the process by either prejudicing the jury or abusing time limitations, the judge can effectuate reasonable rules of procedure to curtail the abuse. Proper and experienced judicial oversight is exercised continually in the course of a trial. The court provides reasonable control in discovery, in opening statements, excessive and repetitive direct examination, abusive cross-examination and in limitation of content and time of closing argument. The conduct of voir dire is no different.

The right to submit in advance questions for the court to ask does not suffice. The need to follow up on those questions would be likely, and often the reasons or occasions for important questions do not arise until voir dire is already in progress. Finally, while Rule 47(a) now states that if the court examines the jurors, it must permit counsel to make further inquiry the court “considers proper,” it gives the court the option to ask any such questions itself, precluding counsel from doing so.

#### CONCLUSION

The participation in voir dire by counsel is well within the context of existing federal rules. Permitting that participation by rule is an important aspect of a litigant’s right to reasonable protections against jury bias. Its benefits far outweigh the concerns its opponents have expressed.



cc. Committee on Rules of Practice and Procedure



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March 2, 2017

### VIA USPS FIRST CLASS

Advisory Committee on Civil Rules  
Administrative Office of the United States Courts  
1 Columbus Circle N.E.  
Washington, D.C. 20544

RE: Proposed Revision to Fed. R. Civ. P. 47(a), Docket No. 17-CV-C

Dear Committee Members:

I write this letter as president of The American Board of Trial Advocates (ABOTA) and on its behalf. We are a national association of experienced trial lawyers and judges, currently numbering 7600, with our attorney membership evenly divided between plaintiffs' counsel and defense counsel. We are advised The American Bar Association has recently submitted the above proposed revision to Fed. R. Civ. P. 47(a) seeking to have it amended to require that trial counsel be allowed to directly question prospective jurors during the voir dire process. ABOTA supports this proposed revision and respectfully requests that it be given favorable consideration.

While under Rule 47(a), in its present form, the court "may" allow counsel to directly question jurors, the court has the discretion to conduct all juror questioning itself, precluding direct questioning by counsel. In the experience of many of our members, the court often exercises that discretion, denying counsel the opportunity to question jurors.

It is recognized and confirmed by the U.S. Supreme Court that "One touchstone of a fair trial" is the litigant's right to "an impartial trier of fact" and that "voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors". See *McDonough Power Equipment, Inc. v. Greenwood et al.*, 464 U.S. 548, 554 (1984), citing *Smith v. Phillips*, 455 U.S. 209, 217

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Advisory Committee on Civil Rules  
*Proposed Revision to Fed. R. Civ. P. 47(a)*  
March 2, 2017  
Page 2

(1982). The problem is that the potential bias of jurors is often with respect to the anticipated testimony of a witness, a piece of evidence or a fact issue that might arise during trial. As compared to trial counsel who have conducted the discovery and prepared the case for trial, busy though diligent judges cannot be expected at the outset of trial to appreciate all the significant matters on which the jurors should be examined for bias. Questions submitted in advance for the court to ask often cannot suffice because of the need for follow-up questions or because the issue arises after voir dire has already begun.

Direct questioning by counsel is important and often needed as a protection against jury bias. Because, as proposed in the requested revision, it would be conducted under the supervision of the court and subject to reasonable time limits, perceived problems such as excessive delay or potential abuse of the voir dire process by counsel can be avoided. Accordingly, ABOTA believes the requested revision to Rule 47(a) is both reasonable and necessary.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'F. Kelly', written in a cursive style.

F. Dulin Kelly  
President

FDK:pmm

cc: Thomas M. Susman, Director, ABA Governmental Affairs Office

March 22, 2017

By email and U.S. mail

Rebecca A. Womeldorf, Secretary  
Advisory Committee on Civil Rules  
Administrative Office of the United States Courts  
Thurgood Marshall Bldg  
One Columbus Circle N.E.  
Washington, D.C. 20544

**RE: Suggested Change to Federal Rule of Civil Procedure 47(a),  
Docket No. 17-CV-C**

To the Members of the Advisory Committee on Civil Rules:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), hereby submits its support of the American Bar Association's recently proposed revision to Fed. R. Civ. P. 47(a) to require that trial counsel be allowed to directly question prospective jurors during the voir dire process. AAJ has thousands of trial attorney members in the United States, Canada, and abroad and is dedicated to preserving the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. A fundamental aspect of that purpose and mission is to ensure the rights of all parties to receive a fair trial before an impartial jury.

We incorporate by reference the letter of January 31, 2017 submitted by Thomas M. Susman to the Advisory Committee on Civil Rules in support of the American Bar Association's suggested change to Rule 47(a) (Docket No. 17-CV-C). Under Rule 47(a) in its present form the court "may" allow counsel to directly question jurors, but it has the discretion to conduct all juror questioning itself, precluding direct questioning by counsel. It is the experience of our members that federal trial courts too often exercise that discretion, denying counsel the opportunity to question jurors and depriving litigants of their right to a fair trial.

While it is generally recognized that civil litigants have the right to an impartial trier of fact, it must also be recognized that "Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." See *McDonough Power Equipment, Inc. v. Greenwood et al.*, 464 U.S. 548, 554 (1984), citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982). As compared to trial counsel who have conducted the discovery and prepared the case for trial, judges cannot be expected at the outset of trial to be aware of all the significant matters on which jurors should be examined for bias. Unfair jury bias can affect the outcome of a case to the detriment of the parties. Trial counsel should be allowed to ask

questions to determine a potential juror's position on the facts of a case as well as to flush out potential juror bias. *See, e.g.,* David A. Wenner, *Juror Bias*, in ch.35 *Litigating Tort Cases* (Roxanne Barton Conlin & Gregory S. Cusimano eds., West/AAJ Press 2006) (examples of how attorney-conducted voir dire can lead to the recognition of bias from the plaintiff's perspective). Questions submitted in advance for the court to ask do not afford adequate protection because of the probable need for follow-up questions or because the issue in question may arise after voir dire has already begun.

As proposed in the requested revision, direct questioning by counsel would be conducted under the supervision of the court and subject to reasonable time limits. Therefore, concerns about excessive delay or potential abuse of the voir dire process by counsel can be addressed by the court. It is in the best interests of our civil justice system to ensure litigants not be deprived of their rights to fair trials. Requiring attorney-conducted voir dire will allow for meaningful voir dire and we therefore ask that it be considered and adopted by the Advisory Committee.

If you have any questions or require additional information, please contact Anji Jesseramsing, General Counsel, American Association for Justice, at (202) 944-2822.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie Braman Kane". The signature is fluid and cursive, with a large initial "J" and "K".

Julie Braman Kane  
President, American Association for Justice

cc: Thomas M. Susman, Director, ABA Governmental Affairs Office



# TAB 10C

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1784

**C. RULE 45: SUBPOENA SERVICE ALTERNATIVES**

1785           The method of serving a subpoena under Rule 45(b)(1) remains  
1786 an open item on the agenda.

1787           Rule 45(b)(1) provides the rules for serving trial and  
1788 deposition subpoenas:

1789           (b) SERVICE.

1790           (1) *By Whom and How: Tendering Fees.* Any person who is at  
1791 least 18 years old and not a party may serve a  
1792 subpoena. Serving a subpoena requires **delivering a copy**  
1793 **to the named person** and, if the subpoena requires that  
1794 person's attendance, tendering the fees for 1 day's  
1795 attendance and the mileage allowed by law. Fees and  
1796 mileage need not be tendered when the subpoena issues  
1797 on behalf of the United States or any of its officers  
1798 or agencies.

1799           This proposal addresses the means of service. Some possible  
1800 means of service might face complications in managing the  
1801 requirement that fees be tendered, a prospect that should be  
1802 taken into account in deciding whether a particular means should  
1803 be authorized.

1804           Some potential distinctions will be noted, but not fully  
1805 developed. There may be good reasons to distinguish between trial  
1806 subpoenas and discovery subpoenas. There may be reasons to  
1807 distinguish subpoenas that name a party from those that name a  
1808 nonparty. These distinctions, and perhaps others, can be  
1809 developed further if significant changes are to be recommended.

1810           The background is familiar. The most recent agenda materials  
1811 appear in the book for the November 3, 2016, meeting. A  
1812 submission from the State Bar of Michigan Committee on United  
1813 States Courts sparked the discussion. They propose that service  
1814 of a subpoena be allowed by any of the means for serving the  
1815 initial summons and complaint authorized by Rule 4(e), (f), (g),  
1816 (h), (i), or (j). In addition, service could be made by other  
1817 means authorized by the court.

1818           Dissatisfaction with present practice arises in large part  
1819 from the perception that personal service is expensive, a source  
1820 of delay and often frustration, and occasionally dangerous. Nor  
1821 is it necessary. A subpoena to testify or produce imposes  
1822 consequences less severe than the summons and complaint that  
1823 initiate an action and expose a defendant to the full burdens of  
1824 litigation and potential liability. Why not, the reasoning runs,  
1825 allow service by the same means? And, to make doubly sure, allow  
1826 yet other means authorized by the court?

1827           A wish for uniformity provides an added reason for amending  
1828 Rule 45(b)(1). A majority of reported opinions rule that

1829 "delivering a copy" requires personal service. A significant  
1830 number of opinions, however, allow "delivery" by mail. And  
1831 occasionally some other means of delivery is accepted. At least  
1832 some present Committee members have believed that service by mail  
1833 is authorized, perhaps reflecting the differences in the  
1834 opinions. If service by  
1835 mail is undesirable, the rule could be amended to prohibit it.

1836 This is not the first time the question has come to the  
1837 Committee. A prolonged study of Rule 45 led to extensive  
1838 amendments in 2013. The means of service were considered. Support  
1839 was found for incorporating Rule 4 means of service. But in the  
1840 end the Subcommittee concluded that no change should be made. The  
1841 reasons are summarized in the Minutes for the March 2010  
1842 Committee Meeting: "The issue seems to be a theoretical point,  
1843 'not a real problem.' When service is on a nonparty, 'the drama  
1844 of personal service may be useful.'"

1845 Reconsideration after seven years is not of itself untoward.  
1846 There seems to have been little change in the course of  
1847 decisions. The division of cases reported by the Michigan Bar  
1848 committee is much the same as the division reported in an  
1849 extensive memorandum prepared by Andrea Kuperman for the earlier  
1850 Rule 45 Subcommittee. Few if any new sources of inspiration can  
1851 be found there. At the same time, continuing division suggests  
1852 that the courts will not spontaneously find their way to a  
1853 uniform answer. And the continuing dissatisfaction expressed in  
1854 the suggestion provides reason to consider possible amendments.

1855 The simplest amendment would achieve uniformity by  
1856 entrenching the current majority view: personal service is the  
1857 only authorized means of serving a subpoena. Clear and simple.  
1858 The most ambitious amendment would take up the recommendation to  
1859 adopt all of the means of service authorized by Rule 4, adding  
1860 other means authorized by the court and perhaps adding an  
1861 explicit procedure for waiving service. It would be easy to draft  
1862 that amendment. But it would present complex questions that might  
1863 better be avoided.

1864 The sketches that follow begin with simple changes, and add  
1865 gradually more ambitious changes. They are presented to stimulate  
1866 discussion, without any recommendation that any amendment should  
1867 be proposed.

1868 Personal Service Only

1869 Serving a subpoena requires personally serving a copy  
1870 on the named person.<sup>17</sup>

---

<sup>17</sup> Various combinations of "person" and "personally" are possible. Retaining "delivering" moves toward the awkward end of the range: "delivering a copy to the named person in person" probably works best. "personally delivering a copy to the named

1871 Service by Mail

1872  
1873 A subpoena may be served by [physically] delivering it  
1874 to the person named [in person] or by registered or  
1875 certified mail addressed to the person.<sup>18</sup>

1876 Calling for a form of mail (or delivery by a commercial  
1877 carrier) that is calculated to command attention would go part  
1878 way toward capturing the drama of personal service, emphasizing  
1879 the importance of the subpoena's command. (It has been a while  
1880 since discussion of e-delivery has included the observation that  
1881 the electronic equivalent of a return receipt may be on the way  
1882 to becoming as reliable as a physical return receipt. Whatever  
1883 else might be said, proof of delivery does not equal proof that  
1884 the message was opened -- the same is true of postal mail, but  
1885 the odds may be different.)

1886 "Abode" Service

1887 A subpoena may be served by:

- 1888 (A) handing it to the person;  
1889 (B) sending it to the person by registered or certified  
1890 mail; or

---

person" is ambiguous – it could mean that the serving party must personally accomplish delivery, by whatever means "delivery" includes now. "physically delivering a copy to the named person" seems precise, but might open up unforeseen arguments.

It may not sound formal enough, but the phrase in Rule 5(b)(2)(A) looks attractive: "A paper is served under this rule by: (A) handing it to the person."

<sup>18</sup> "registered or certified mail" is used in Rule 4(i)(1) and (2). Rule 4(f)(2)(C) calls for "any form of mail that the clerk addresses and sends to the individual and that requires a return receipt." Although serving a subpoena in the United States should not require mailing by the clerk, it might be better to adopt this phrase – "any form of mail that requires a return receipt." The same phrase appears in Supplemental Rule B(2)(b).

Commercial carriers could be brought in as well. Appellate Rule 25(c)(1)(C), for example, allows service "by third-party commercial carrier for delivery within 3 days." Rule 4(d)'s provision for requesting a waiver of service calls for "a prepaid means for returning the form."

A cautious approach would add "at the person's last known address."

1891 (C) leaving it at the person's dwelling or usual place of  
1892 abode with someone of suitable age and discretion who  
1893 resides there.<sup>19</sup>

1894 "Abode" service suffices for an individual defendant under  
1895 Rule 4(e)(2)(B), the source of the words borrowed for (C) above.  
1896 It might well achieve real efficiencies for serving subpoenas  
1897 without substantial loss.

1898 Means Authorized by Court

1899 Whatever the rest of the rule looks like, this can be  
1900 illustrated by adding (D) to the abode-service sketch:

1901 (D) by any means authorized by the court [*variation 1*: in  
1902 its discretion] [*Variation 2*: if service under  
1903 paragraphs (A), (B), or (C) {should not reasonably be  
1904 required}{is unreasonably difficult}]].

1905 The Committee Note could suggest a broad or narrow  
1906 interpretation, or the rule text could reflect either  
1907 encouragement or discouragement. The Note could specifically  
1908 suggest service by mail, commercial carrier, e-mail, leaving at  
1909 home, and perhaps other means if the rule text is not amended to  
1910 include them.

1911 The rule could provide for notice to the person to be  
1912 served. The notice provision could be further complicated by  
1913 adding an exception similar to Rule 65(b)(1)'s provision for a  
1914 no-notice temporary restraining order. The advantage of adding  
1915 such complications is uncertain.

1916 Distinguish Entities from Natural Persons

1917 A subpoena that commands a person that is not an  
1918 individual to produce designated documents,  
1919 electronically stored information, or tangible things  
1920 in that person's possession, custody, or control, or to  
1921 permit the inspection of premises, may be served by:  
1922 (A) any of the means authorized for serving an individual,  
1923 or  
1924 (B) delivering it to an officer, a managing or general  
1925 agent, or any other agent authorized by appointment or  
1926 by law to receive service of process and – if the agent  
1927 is one authorized by statute and the statute so  
1928 requires – by also mailing a copy to the person.

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<sup>19</sup> Apart from home, "office" could be added – "leaving it 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." This part of Rule 5(b)(2)(B)(i) has no parallel in Rule 4(e), and seems better avoided.



1967 It may not be easy to answer the empirical question whether  
1968 lawyers in fact resort to Rule 45 subpoenas when seeking a  
1969 deposition or document production by a party. If not, there is no  
1970 reason to distinguish between parties and nonparties in Rule 45.  
1971 But if Rule 45 is used, there could be powerful advantages in  
1972 allowing service on a party's attorney:

1973 (F) on a party represented by an attorney by serving  
1974 the attorney under Rule 5(b)

1975 If Rule 45 is not used in discovery from a party, service on  
1976 a party's attorney still could be desirable for trial subpoenas.

#### 1977 Distinguishing Trial from Discovery Subpoenas

1978 Rule 45 is part of Title VI, "Trials," not Title V,  
1979 "Disclosures and Discovery." Several years ago the Committee  
1980 decided that the risks of unforeseen consequences outweighed the  
1981 possible advantages of reallocating discovery subpoenas to the  
1982 discovery rules. A simple example would be to add subpoenas to  
1983 produce by a nonparty to Rule 34.

1984 No dislocation, but some complication, would accompany an  
1985 effort to distinguish between trial and discovery subpoenas in  
1986 addressing modes of service. Allowing service on a party's  
1987 attorney, as illustrated above, would be the simplest change. As  
1988 to nonparties, the distinctions might well arise only by  
1989 expanding the means of service for discovery subpoenas but not  
1990 for trial subpoenas. Present Rule 45(b)(1) would be broken up.  
1991 The clearest structure likely would create a new paragraph  
1992 dealing only with means of service. One subparagraph would deal  
1993 with discovery subpoenas, the other with trial subpoenas. The  
1994 concerns that arise whenever subparts of a rule are renumbered  
1995 would weigh against undertaking the effort. A sketch can be  
1996 prepared if the idea seems worthy of development.

#### 1997 Venturing Further Into Rule 4

1998 The Michigan Bar proposal to incorporate all the means of  
1999 service allowed by Rule 4 for the summons and complaint is  
2000 supported by the reason offered: The consequences of a subpoena,  
2001 whether served on a party or a nonparty, are less drastic than  
2002 being made a party defendant and subjected to the litigation  
2003 costs and risks of liability that follow. Why not simply carry  
2004 all of Rule 4 (d) through (j), into Rule 45?

2005 The complications of absorbing Rule 4 into Rule 45 can be  
2006 illustrated by a simple example. For individuals, Rule 4(e)  
2007 allows service by means authorized by state law, by "abode"  
2008 service, and by serving an agent. Abode service and service on an  
2009 agent are discussed above. Looking to means authorized by state  
2010 law, however, would prove complicated in some settings. Rule  
2011 45(b)(2) authorizes service of a subpoena anywhere in the United  
2012 States. Rule 4(e)(1) authorizes service of a summons "by (1)



2013 following state law for serving a summons in an action brought in  
2014 courts of general jurisdiction in the state where the district  
2015 court is located *or where service is made.*" Rule 81(d)(3)  
2016 defines "state" to include, "where appropriate, the District of  
2017 Columbia and any United States commonwealth or territory." This  
2018 proliferation of means of service may be a welcome opportunity.  
2019 The person served may have little complaint if service is made by  
2020 means authorized by local state law; subjection to the  
2021 variability of the laws of any other state where sits the federal  
2022 court entertaining the underlying action may not be as easily  
2023 defended. The party making service, on the other hand, need  
2024 explore the many potential variations only when the effort seems  
2025 worthwhile. As compared to the generally singular event of  
2026 serving the initial summons and complaint, it is a fair question  
2027 whether this part of Rule 4(e) should be imported into Rule 45.

2028 Focus on Rule 4 would require separate evaluation of the  
2029 other categories of defendants it addresses, and again of the  
2030 distinction between parties and nonparties. Rule 4(g) addresses  
2031 service on a minor or incompetent person – what might be  
2032 appropriate distinctions for serving a subpoena? Rule 4(h)  
2033 addresses service on a corporation, partnership, or association –  
2034 will it work as it is for subpoenas? Rule 4(i), for serving the  
2035 United States and its agencies, corporations, officers, or  
2036 employees, raises similar questions. So too for Rule 4(j)(2) for  
2037 serving a state or local government.

2038 Rules 4(f) for serving an individual abroad, 4(h)(2) for  
2039 serving a corporation abroad, and 4(j)(1) for serving a foreign  
2040 state, present special problems that will require careful  
2041 thought. Rule 45(b)(2) now allows service at any place within the  
2042 United States, while 45(b)(3) incorporates 28 U.S.C. § 1783 for  
2043 serving a United States national or resident who is in a foreign  
2044 country. Going beyond those limits will be a complicated task.

#### 2045 Other Questions

2046 Other questions may lurk beneath the surface. The first  
2047 question, however, is clear: Is there sufficient reason to  
2048 explore further alternative means of serving a subpoena? How  
2049 important are the problems of uncertainty and burden posed by the  
2050 current rule and its divergent interpretations? How likely is it  
2051 that improvements can be made, whether simple or more ambitious,  
2052 that will work well in practice without generating unintended  
2053 problems?

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**D. RULE 68 OFFERS OF JUDGMENT: 17-CV-A**

2055           The offer-of-judgment provisions of Rule 68 have a long  
2056 history of repeated consideration by the Committee without any  
2057 actual amendments. The history goes back more than 30 years.  
2058 Extensive materials on Rule 68 were on the agenda for the October  
2059 30, 2014 meeting. The result was a decision to carry Rule 68  
2060 forward on the agenda, looking for further research by the  
2061 Administrative Office. That decision was then carried forward at  
2062 the April 15, 2015 meeting. The research has been pursued in  
2063 stages; more urgent topics have intervened. Some familiarity with  
2064 past struggles is important in determining what priority to  
2065 assign to Rule 68 as the work goes forward.

2066           An immediate impetus is provided by Judge Jesse M. Furman's  
2067 suggestion, 17-CV-A, that a particular Rule 68 topic be  
2068 considered. This suggestion is attached below. It addresses a  
2069 problem unique to actions that require court approval of a  
2070 settlement. The immediate impetus is the aftermath of *Cheeks v.*  
2071 *Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir.2015). The  
2072 plaintiff sued for overtime wages, liquidated damages, and  
2073 attorney fees. The plaintiff and defendant agreed on a private  
2074 settlement and filed a joint stipulation and order of dismissal.  
2075 Although the Fair Labor Standards Act does not on its face  
2076 require court approval of such a settlement, the court, relying  
2077 on decisions that require court approval as a matter of FLSA  
2078 policy, ruled that court approval is required. "[T]he FLSA is a  
2079 uniquely protective statute." Court approval is required to  
2080 prevent abuses by unscrupulous employers and to remedy disparate  
2081 bargaining power. FLSA settlements thus fall within the express  
2082 qualification in Rule 41(a)(1)(A) that makes dismissal by  
2083 stipulation "[s]ubject to Rules 23(e), 23.1(c), 23.2, and 66 and  
2084 any applicable federal statute." Nothing about Rule 68 offers of  
2085 judgment was involved in the case. But Judge Furman reports that  
2086 district courts in the Second Circuit have divided on the  
2087 question whether court approval is required if the plaintiff in  
2088 an FLSA action accepts a defendant employer's Rule 68 offer. The  
2089 apparent concern is that Rule 68 could be used to avoid court  
2090 approval by negotiating a settlement that is then framed as a  
2091 Rule 68 offer, or could be used to coerce an unwilling plaintiff  
2092 to accept an inadequate offer for fear of the consequences of  
2093 failing to win a better judgment.

2094           At first blush, the subject-matter specific FLSA problem  
2095 seems the kind of problem that ordinarily is left for decision in  
2096 the common-law process of interpreting statutes, not a  
2097 continually growing series of rules provisions. But it does  
2098 underscore a more general problem. It is widely believed that  
2099 Rule 68 is most likely to be used in cases that arise under a  
2100 statute that provides attorney fees to a prevailing plaintiff as  
2101 a matter of costs. *Marek v. Chesny*, 473 U.S. 1 (1985), ruled that  
2102 a plaintiff who rejects a Rule 68 offer and then wins judgment in  
2103 an amount less than the offer is cut off from the statutory fee  
2104 award. The dissent and many later observers protested that this

2105 use of Rule 68 thwarts the special protective purposes underlying  
2106 statutory fee provisions.

2107 The specific questions of protective statutory policy  
2108 reflect a broader concern with Rule 68. Paul Bland and Leslie A.  
2109 Brueckner, writing for Public Justice, commented on Rule 68 both  
2110 in connection with "pick-off" problems in class actions and in  
2111 more general terms. 15-CV-N, pp. 11-20 (March 27, 2015). A brief  
2112 summary of their general criticism is that as an empirical matter  
2113 Rule 68 is ineffective in promoting settlements, and "has been  
2114 widely criticized for giving defendants an unfair advantage and  
2115 coercing plaintiffs to settle meritorious claims for artificially  
2116 low damages." p. 12. The recommendation to abolish Rule 68 is  
2117 repeated in a later Public Justice Comment addressed primarily to  
2118 Rule 23, 15-CV-BB, p. 7.

2119 The history of past Committee efforts and outside  
2120 suggestions reflects a different point of view. The thought that  
2121 Rule 68 will promote settlements that reduce the number of cases  
2122 that go to trial has subsided with the diminution of actual  
2123 trials. But many of the suggestions submitted and considered over  
2124 the years look for ways to make Rule 68 more effective as a means  
2125 of promoting early settlements. When Rule 68 is taken up in  
2126 earnest, the most fundamental question will be to assess the  
2127 probable balance between the advantages of early settlements – if  
2128 they can be achieved – and the disadvantages of capitulations  
2129 coerced by fear that the hazards of litigation may lead to a  
2130 judgment below an offer that seems inadequate on a reasonable  
2131 objective appraisal. The rule can be reframed in ways that change  
2132 the balance. The changes, however, may further complicate both  
2133 rule text and actual practice under the rule.

2134 The challenges that confront Rule 68 reform can be  
2135 illustrated by a sketch of the complexities that stymied the  
2136 attempt to improve Rule 68 more than twenty years ago.

2137 Two Supreme Court decisions that rested on the language of  
2138 Rule 68, not evaluations of what is the better policy, will have  
2139 to be considered. One rule is that if a plaintiff rejects an  
2140 offer and then wins a smaller judgment – even as little as one  
2141 dollar – the plaintiff is subject to Rule 68 consequences. But if  
2142 the plaintiff takes nothing, there are no Rule 68 consequences  
2143 because Rule 68(d) applies only "If the judgment that the  
2144 offerree finally obtains is not more favorable than the  
2145 unaccepted offer \* \* \*." A plaintiff who takes nothing has not  
2146 obtained a judgment. But then, the take-nothing plaintiff would  
2147 not be entitled to costs, so cutting off post-offer costs is  
2148 irrelevant. But if sanctions are expanded, it seems odd that a  
2149 defendant who wins completely should lose the benefit of  
2150 sanctions that would apply if the plaintiff had won a little  
2151 something. The other rule, noted above, is that statutory  
2152 attorney fees are cut off by failure to improve on the offer if –  
2153 but only if – the statute characterizes the fees as "costs." Here  
2154 too it is the language of the rule that controls – "the offeree

2155 must pay the costs incurred after the offer was made." Amending  
2156 Rule 68 to supersede these results would imply no disrespect,  
2157 since each turned solely on Rule 68's language.

2158         A second set of problems arises from the common argument  
2159 that Rule 68 should be made available to plaintiffs as well as  
2160 defendants. If a defendant rejects an offer and the plaintiff  
2161 wins a more favorable judgment, the argument goes, the defendant  
2162 should be liable for sanctions. The difficulty is that the  
2163 plaintiff ordinarily would be entitled to statutory costs without  
2164 regard to the offer. The solution commonly proposed is that the  
2165 plaintiff should recover post-offer attorney fees. Even that  
2166 approach does little when the plaintiff has a statutory right to  
2167 fees. And, in the spirit of bilateralism, it often leads to the  
2168 suggestion that a plaintiff who rejects a defense offer should be  
2169 liable for post-offer attorney fees incurred by the defendant.  
2170 But that approach runs headlong into the strong feelings that  
2171 surround the "American Rule" that, apart from statute, each party  
2172 bears its own attorney fees.

2173         The fee-shifting approach was developed along the lines of a  
2174 model proposed to Judge William W Schwarzer, then Director of the  
2175 Federal Judicial Center. The first step was to recognize that  
2176 post-offer fees may have contributed to the difference between  
2177 the offer and judgment. Whether or not that was so, the  
2178 difference represents a net benefit. For example, a defendant who  
2179 offered \$50,000 and then lost a judgment for \$25,000 is, to that  
2180 extent, \$25,000 better off than if the plaintiff had accepted the  
2181 offer. So post-offer fees were reduced to reflect the "benefit of  
2182 the judgment." If the post-offer fees were \$40,000, the result  
2183 would be a fee award to the defendant of \$15,000: \$40,000 in  
2184 actual fees less the \$25,000 advantage resulting from the  
2185 difference between offer and judgment. Well and good. But what if  
2186 the post-offer fees were \$80,000? Subtracting the \$25,000 benefit  
2187 of the judgment would lead to an award of \$55,000. The plaintiff  
2188 would not only lose all \$25,000 of the judgment but would remain  
2189 on the hook to pay the defendant \$30,000 in fees. That was  
2190 thought unacceptable, so a cap was imposed: the fee award could  
2191 not be greater than the amount of the judgment. The spirit of  
2192 bilateralism again appeared, so that the cap was applied to  
2193 payments by the defendant: With a plaintiff's offer of \$25,000,  
2194 judgment of \$50,000, and \$80,000 of post-offer fees incurred by  
2195 the plaintiff, the fee award against the defendant was capped at  
2196 \$50,000, less than a \$55,000 award resulting from subtracting the  
2197 \$25,000 benefit of the judgment from the full \$80,000 fees.

2198         Account also was taken of determining fee awards in  
2199 contingent-fee cases. Successive offers were allowed, with means  
2200 for calculating which offer by which party controlled the fee  
2201 award. Offers to multiple parties were included, as were partial  
2202 offers. A narrow approach was taken to offers for specific  
2203 relief, both in cases that seek only specific relief and in cases  
2204 seeking both money and specific relief. A plaintiff's offer to  
2205 accept an injunction, for example, would have no Rule 68 effect

2206 unless the actual injunction includes all the nonmonetary relief  
2207 in the offer, or substantially all the nonmonetary relief offered  
2208 and additional relief.

2209 It was more complicated than that. Even the complications  
2210 described above may be difficult to follow in the abstract. The  
2211 following excerpts from the draft Committee Note give the flavor:

2212 *Draft Committee Note: 1994*

2213 Several examples illustrate the working of this "capped  
2214 benefit-of-the-judgment" attorney fee provision.

2215 Example 1. (No shifting) After its offer to settle for  
2216 \$50,000 is not accepted, the plaintiff ultimately recovers a  
2217 \$25,000 judgment. Rejection of this offer would not result in  
2218 any award because the judgment is more favorable to the offeree  
2219 than the offer. Similarly, there would be no award based on an  
2220 offer of \$50,000 by the defendant and a \$75,000 judgment for the  
2221 plaintiff.

2222 Example 2. (Shifting on rejection of plaintiff's offer)  
2223 After the defendant rejects the plaintiff's \$50,000 offer, the  
2224 plaintiff wins a \$75,000 judgment. (a) The plaintiff incurred  
2225 \$40,000 of reasonable post-offer attorney fees. The \$25,000  
2226 benefit of the judgment is deducted from the fee expenditure,  
2227 leaving an award of \$15,000. (b) If reasonable post-offer  
2228 attorney fees were \$25,000 or less, no fee award would be made.  
2229 (c) If reasonable post-offer fees were \$110,000, deduction of the  
2230 \$25,000 benefit of the judgment would leave \$85,000; the cap that  
2231 limits the award to the amount of the judgment would reduce the  
2232 attorney fee award to \$75,000.

2233 Example 3. (Shifting on rejection of defendant's offer)  
2234 After the plaintiff rejects the defendant's \$75,000 offer, the  
2235 plaintiff wins a \$50,000 judgment. (a) The defendant incurred  
2236 \$40,000 of reasonable post-offer attorney fees. The \$25,000  
2237 benefit of the judgment is deducted from the fee expenditure,  
2238 leaving a fee award of \$15,000. (b) If reasonable post-offer  
2239 attorney fees were \$25,000 or less, no fee award would be made.  
2240 (c) If reasonable post-offer fees were \$110,000, deduction of the  
2241 \$25,000 benefit of the judgment would leave \$85,000; the cap that  
2242 limits the fee award to the amount of the judgment would reduce  
2243 the attorney fee award to \$50,000. The plaintiff's judgment  
2244 would be completely offset by the fee award, and the plaintiff  
2245 would remain liable for post-offer costs.

2246 Example 4. (Successive offers) After a defendant's \$50,000  
2247 offer lapses, the defendant makes a new \$60,000 offer that also  
2248 lapses. (a) A judgment of \$50,000 or less requires an award  
2249 based on the amount and time of the \$50,000 offer. (b) A  
2250 judgment more than \$50,000 but not more than \$60,000 requires an  
2251 award based on the amount and time of the \$60,000 offer. This



2252 approach preserves the incentive to make a successive offer by  
2253 preserving the potential effect of the first offer.

2254 Example 5. (Counteroffers) The effect of each offer is  
2255 determined independently of any other offer. Counteroffers are  
2256 likely to be followed by judgments that entail no award or an  
2257 award against only one party. The plaintiff, for example, might  
2258 make an early \$25,000 offer, followed by \$20,000 of fee  
2259 expenditures before a \$40,000 offer by the defendant, additional  
2260 \$15,000 fee expenditures by each party, and judgment for \$42,000.  
2261 The plaintiff's \$25,000 offer is more favorable to the defendant  
2262 than the judgment, so the plaintiff is entitled to a fee award.  
2263 The \$35,000 of post-offer fees is reduced by the \$17,000 benefit  
2264 of the judgment, netting an award of \$18,000. The defendant is  
2265 not entitled to any award.

2266 In some circumstances, however, counteroffers can entitle  
2267 both parties to awards. Offers made and not accepted at  
2268 different stages in the litigation may fall on both sides of the  
2269 eventual judgment. Each party receives the benefit of its offer  
2270 and pays the consequences for failing to accept the offer of the  
2271 other party. The awards are offset, resulting in a net award to  
2272 the party entitled to the greater amount. As an example, a  
2273 plaintiff might make an early \$25,000 offer, then incur  
2274 reasonable attorney fees of \$5,000 before the defendant's \$60,000  
2275 offer, after which each party incurred reasonable attorney fees  
2276 of \$25,000. A judgment for \$50,000 would support a fee award  
2277 for each party. The \$50,000 judgment is more favorable to the  
2278 plaintiff than the plaintiff's expired offer. The \$50,000 is  
2279 less favorable to the plaintiff than the defendant's expired  
2280 offer. The attorney fee award to the plaintiff would be reduced  
2281 to \$5,000 by subtracting the \$25,000 benefit of the judgment from  
2282 the \$30,000 of post-offer fees. The attorney fee award to the  
2283 defendant would be reduced first to \$15,000 by subtracting the  
2284 \$10,000 benefit of the judgment from the \$25,000 of post-offer  
2285 fees. The \$15,000 award to the defendant would be set off  
2286 against the \$5,000 award to the plaintiff, leaving a \$10,000 net  
2287 award to the defendant.

2288 Example 6. (Counterclaims) Cases involving claims and  
2289 counterclaims for money alone fall within the earlier examples.  
2290 Each party controls the terms of any offer it makes. If no offer  
2291 is accepted, the final judgment is compared to the terms of each  
2292 offer. (a) The defendant's offer to pay \$10,000 to the plaintiff  
2293 to settle both claim and counterclaim is followed by a \$25,000  
2294 award to the plaintiff on its claim and a \$40,000 award to the  
2295 defendant on its counterclaim. The result is treated as a net  
2296 award of \$15,000 to the defendant. This net is \$25,000 more  
2297 favorable to the defendant than its offer. If the defendant's  
2298 reasonable post-offer attorney fees were \$35,000, the attorney  
2299 fee award payable to the defendant is \$10,000. (b) If the  
2300 defendant's reasonable post-offer attorney fees in example (a)  
2301 had been \$45,000, the attorney fee award payable to the defendant  
2302 would be limited to the \$15,000 amount of the net award on the  
2303 merits. (c) The defendant's offer to accept \$10,000 from the

2304 plaintiff to settle both claim and counterclaim is followed by an  
2305 award of nothing to the plaintiff on its claim and a \$40,000  
2306 award to the defendant on its counterclaim. The result is  
2307 treated as a net award of \$40,000 to the defendant, which is  
2308 \$30,000 more favorable to the defendant than its offer.

2309 Contingent Fees. The fee award to a successful plaintiff  
2310 represented on a contingent fee basis should be calculated on a  
2311 reasonable hourly rate for reasonable post-offer services, not by  
2312 prorating the contingent fee. The attorney should keep time  
2313 records from the beginning of the representation, not for the  
2314 post-offer period alone, as a means of ensuring the reasonable  
2315 time required for the post-offer period.

2316 Hardship or surprise. Rule 68 awards may be reduced to avoid  
2317 undue hardship or reasonable surprise. Reduction may, as a  
2318 matter of discretion, extend to denial of any award. As an  
2319 extreme illustration of hardship, a severely injured plaintiff  
2320 might fail to accept a \$100,000 offer and win a \$100,000 judgment  
2321 following a reasonable attorney fee expenditure of \$100,000 by  
2322 the defendant. A fee award to the defendant that would wipe out  
2323 any recovery by the plaintiff could be found unfair. Surprise is  
2324 most likely to be found when the law has changed between the time  
2325 an offer expired and the time of judgment. Later discovery of  
2326 vitally important factual information also may establish that the  
2327 judgment could not reasonably have been expected at the time the  
2328 offer expired.

2329 *What Next?*

2330 Full study of Rule 68 will require a substantial commitment  
2331 of Committee resources. Those who are curious can review the  
2332 collection of Committee Rule 68 materials set out as an appendix  
2333 at the end of the other agenda materials. Past investments have  
2334 paid dividends of understanding the problems, but not much that  
2335 promises useful revision. The present purpose is more modest.  
2336 What is called for is a determination whether the time has come  
2337 to invest in undertaking a third major effort to reconsider Rule  
2338 68, or even Judge Furman's more limited proposal.


**Fw: Two suggestions for the Civil Rules Advisory Committee**

**John D. Bates** to: Frances Skillman  
Cc: Rebecca Womeldorf, coopere

01/12/2017 04:32 PM

History: This message has been replied to.

Fran:

Please log this suggestion from Judge Furman as a new Civil Rules matter under consideration.

Thanks.

John Bates

----- Forwarded by John D. Bates, [REDACTED] on 01/12/2017 04:28 PM -----

From: Jesse M Furman, [REDACTED]  
To: John D. Bates, [REDACTED]  
Date: 01/10/2017 02:38 PM  
Subject: Two suggestions for the Civil Rules Advisory Committee

John:

There are two issues that I wanted to bring to your attention for possible consideration by the Civil Rules Advisory Committee, one relating to Rule 68 offers of judgment and another relating to the growing practice of pre-motion conferences.

### **Rule 68**

There are any number of issues that could be discussed with respect to Rule 68, and I'd be inclined to think it might make sense, at some point in the near future, to revisit the Rule generally. *See, e.g., Jay Horowitz, Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 *Denv. U. L. Rev.* 485 (2010) (discussing the history of the Rule and proposing potential amendments). But, as I mentioned to you at the Rules Committee meeting last week, there is one particular issue that has arisen recently, at least in my District, that I think might warrant the Committees' attention. As you may know, in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 119, 206 (2d Cir. 2015), the Second Circuit held (as other courts have) that judicial approval is required for dismissals with prejudice under Rule 41(a)(1)(A)(ii) of claims under the Fair Labor Standards Act. The Court reached that conclusion based on the language and purpose of the FLSA and the opening phrase of Rule 41(a)(1)(A) (namely, "Subject to ... any applicable federal statute...").

Since *Cheeks*, judges in my District (and elsewhere in the Circuit, I believe) have begun seeing, with increasing frequency, settlements of FLSA claims under Rule 68 rather than Rule 41 and arguments from the parties that Rule 68 settlements do not require judicial approval. I gather - from a recent submission to me (my first personal encounter with the issue) - that at least two judges in my District have held that judicial approval is still applicable to Rule 68 settlements of FLSA claims. *See, e.g., Cantoran v. DDJ Corp.*, No. 15 Civ. 10041 (PAE), 2016 U.S. Dist. LEXIS 79353, at \*2-3 (S.D.N.Y. June 16, 2016); *Segarra v. United Hood Cleaning Corp.*, No. 15 Civ. 656 (VSB), Docket Entry 20 (S.D.N.Y. Jan. 6, 2016). The majority of judges to confront the issue, however, appear to have held that approval is *not* required - based on the absence of any "[s]ubject to . . . any applicable federal statute" language in Rule 68 and the mandatory nature of the Rule ("The clerk *must* . . . enter judgment."). *See, e.g., Khereed v. W. 12th St. Rest.*, No. 15-CV-1363 (JLC), 2016 WL 6885186, at \*1 (S.D.N.Y. Nov. 22, 2016) (citing cases). Notably, several have reached that conclusion despite express misgivings and have noted explicitly a belief that counsel are using Rule 68 to make an end run around *Cheeks* and the judicial approval requirement. As Chief Judge McMahon bluntly put it:

I am affirmed in my belief that the Rule 68 Offer of Judgment procedures gives clever

defendant-employers an aperture the size of the Grand Canyon through which they can drive coercive settlements in Fair Labor Standards Acts cases without obtaining court approval - as well as a vehicle for seriously compromising the plaintiff's lawyer-client relationship, for the reasons set forth in this court's March 31, 2016 Order (Docket # 62). However, I can see no basis for reading any exception into the absolutely mandatory language of Rule 68, which compels the Clerk of Court to enter judgment on an accepted Offer of Judgment. The *Second Circuit's decision in Cheeks v. Freeport Pancake House, Inc.*, 796 F. 3D 199 (2d Cir. 2015), which gave rise to this court's concern, rests entirely on "exceptional" language in Rule 41(a); there simply is no commensurate language in Rule 68. If Congress's concern for the rights of FLSA plaintiffs is great enough, it may want to bring Rule 68 into line with Rule 41(a); it will have to amend the Rule by eliminating FLSA cases, and perhaps other certain types of cases, from the procedure whereby Offers of Judgment will cut off the right to a recovery of "costs" (including attorneys' fees, which are denominated as costs under *Marek v. Chesney*, 473 U.S. 1, 8-9 (1985)). Until Congress does so, I anticipate that Rule 41 will cease to be a vehicle for settling FLSA cases, and that we will instead see a flood of accepted Offers of Judgment, which the Clerk of Court will have no choice but to enter.

*Baba v. Beverly Hills Cemetery Corp. Inc.*, No. 15 CIV. 5151 (CM), 2016 WL 2903597, at \*1 (S.D.N.Y. May 9, 2016).

In my opinion, this is a worthwhile issue for the Committee to review. There may be countervailing issues that warrant caution, but it strikes me as odd and concerning to allow a situation where the requirement of judicial approval (a requirement that derives from Congress's view that certain categories of cases warrant close scrutiny) would depend on how the parties structure a settlement and, in particular, on the Rule upon which they rely. (One final note: In case you were wondering, I haven't yet opined on the issue myself. In recent weeks, I have received two Rule 68 settlements. But a colleague of mine invited the Secretary of Labor to submit an amicus brief on the question (a brief that is due by next Friday), and I have deferred decision in my cases until I have had an opportunity to review that brief.)

### Pre-Motion Conferences

If I remember correctly, I had a brief chat with you about the practice of holding pre-motion conferences - or, more broadly, about requiring parties to seek approval before filing certain kinds of motions (motions to dismiss and motions for summary judgment being the big ones). I don't know how widespread that practice is, but many judges in my District have adopted it and firmly believe that it is helpful in heading off some frivolous motions or motions that can be addressed without full briefing. I myself do not have a pre-motion requirement. There are a few reasons I made that decision, but one - a view that I know is shared by some of my colleagues who have not adopted the practice either - is doubt about whether it is proper under the Rules, as nothing in the Rules would seem to allow a judge to prevent a party from filing a motion that would otherwise be proper and timely (even temporarily, pending a conference). I think it might be worth thinking about whether the Rules should be modified to make clear that judges can adopt a pre-motion conference requirement - both to put the practice on firmer footing and, perhaps, to encourage other judges/districts to think about adopting it. Rule 16(b)(3)(B)(v) gives a judge that sort of discretion with respect to discovery motions (prompted, I think, by my District's practices on that front), but query whether the Rules should be (or need to be) modified to allow for that sort of approach with respect to motions generally. (Indeed, one could argue that, given Rule 16(b)(3)(B)(v)'s explicit blessing of a pre-motion requirement for discovery motions, that the absence of a similar Rule for other motions means it is prohibited. To be clear, though, I have not seen anyone make that argument.)

Please let me know if you have any questions or want any additional information or thoughts on these subjects.

I look forward to seeing you soon.

All the best,  
Jesse

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**V. OTHER DOCKET MATTERS**

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**A. PRE-MOTION CONFERENCES: 17-CV-A**

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Judge Jesse M. Furman, a member of the Standing Committee, has submitted a suggestion that this Committee consider expanding Rule 16(b)(3)(B)(v) to include all motions.

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Rule 16(b)(3)(B)(v) provides that a scheduling order "may \* \* (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court."

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A related suggestion to expand Rule 16(b)(3)(B)(v) to include summary-judgment motions was considered at the November 5, 2015 Committee meeting. The question was held open for future consideration. The relevant portion of the Minutes is set out next as an efficient means of describing the history of recent Committee deliberations:

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Civil Rules Committee Minutes, November 5, 2015

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pages 41-43

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**Pre-Motion Conference: Rule 56**

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

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

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Similar advantages can be gained by holding a conference with the court before other motions are made. These advantages were discussed in developing the package of case-management amendments now pending in Congress. The result of those deliberations is to add a new Rule 16(b)(3)(B)(v), which provides that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." This provision was limited to discovery motions in a spirit of conservatism in adding details to the rules. It was recognized that many courts require pre-motion conferences for motions other than discovery motions, including summary-judgment motions. But it also was recognized that some judges do

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2384 not. One step was to reject any general requirement – the new  
2385 Rule 16(b) provision serves simply as a reminder and perhaps as  
2386 an encouragement.

2387 It would be easy enough to expand pending Rule  
2388 16(b)(3)(B)(v) to encompass summary-judgment motions. It would  
2389 authorize a scheduling-order provision that "direct[s] that  
2390 before moving for an order relating to discovery or for summary  
2391 judgment, the movant must request a conference with the court."  
2392 Or Rule 56(b) could be amended to mandate this procedure: "a  
2393 party may, after requesting a conference with the court, file a  
2394 motion for summary judgment at any time until 30 days after the  
2395 close of all discovery."

2396 Discussion began with a judge who requires a pre-motion  
2397 conference for "all sorts of motions." This practice has many  
2398 benefits. Recognizing that some judges would oppose a mandate,  
2399 why not expand Rule 16(b) to encompass not only discovery but any  
2400 "substantive" motion?

2401 Another judge thought the underlying idea is good. "But we  
2402 have just been through one round of amendments. We did it  
2403 carefully." We can find a way to recommend pre-motion conferences  
2404 as a best practice, but should wait before suggesting another  
2405 rule amendment. And then we will need to think about how broadly  
2406 the rule should apply. For example, is there a sufficiently clear  
2407 concept of what is a "substantive motion" to support use of that  
2408 term in rule text?

2409 A lawyer noted that the AAA rules used to provide for  
2410 summary disposition in general terms. The rules were amended to  
2411 require permission of the arbitrator before making the motion. As  
2412 an arbitrator, he has denied permission when the motion seemed  
2413 inappropriate. That is not to suggest that a judge be authorized  
2414 to deny leave to make a summary-judgment motion, but requiring a  
2415 conference would give the judge an opportunity to observe that a  
2416 motion would not have much chance of succeeding.

2417 The discussion concluded by determining to hold this  
2418 suggestion open, without moving forward now.

2419 *Discussion*

2420 Expanding the rule to include summary-judgment motions is  
2421 one of the specific illustrations offered by Judge Furman. He  
2422 also includes, as one of "the big ones," motions to dismiss.

2423 If the pre-motion conference practice is to be expanded, a  
2424 central question will ask what sorts of motions should be  
2425 included. The underlying concerns seem to arise primarily from  
2426 effective pretrial case management. Post-trial motions might well  
2427 be excluded, in part because it might prove awkward to separate  
2428 out the motions that are necessary to preserve an issue for  
2429 appellate review. If anything, it is likely more efficient to

2430 deny such motions when they are so obviously unfounded as to  
2431 invite denial of permission to move. Other post-trial motions  
2432 also may fall outside the reasons for a pre-motion conference.  
2433 One example is a motion under Rule 65.1 to enforce a surety's  
2434 liability, a motion that may be served on the court clerk, who in  
2435 turn mails a copy to the surety.

2436 All pretrial motions might be included in the rule. It is,  
2437 after all, only an explicit permission to do what the court might  
2438 do under item (vii) – the order "may \* \* \* (vii) include other  
2439 appropriate matters." Still, the suggestion that the rule might  
2440 be limited to "substantive" motions reflects concern about  
2441 routinized overuse of pre-motion conferences. A simple  
2442 illustration is provided by ex parte motions. A Rule 41(a)(2)  
2443 motion for voluntary dismissal may be similar.<sup>21</sup> Some motions may  
2444 be so urgent that a pre-motion conference would impose untoward  
2445 costs – the most obvious example is a motion for a temporary  
2446 restraining order. Another example might be a Rule 30(d)(3)  
2447 motion to terminate or limit a deposition. Flexible, case-  
2448 specific use of pre-motion practice could accommodate these  
2449 concerns. Still, care should be taken in deciding whether to  
2450 include all "pretrial" motions.

2451 Adding only motions for summary judgment or to dismiss is  
2452 less complicated. Yet motions to dismiss come in many forms. A  
2453 Rule 12(b)(6) motion to dismiss for failure to state a claim – or  
2454 a motion for judgment on the pleadings – is likely to be close  
2455 kin to a summary-judgment motion for these purposes. A motion to  
2456 dismiss for lack of subject-matter jurisdiction seems quite  
2457 different. A motion to dismiss for lack of personal jurisdiction  
2458 may fall in the middle. As a practical matter, much should turn  
2459 on the prospect that a motion will be made reflexively, as a  
2460 matter of routine litigation strategy, in circumstances that call  
2461 not for dismissal but for reasoned discussion and pruning.

2462 This sketch of an amended Rule 16(b)(3)(B)(v) may serve to  
2463 focus discussion:

2464 (B) *Permitted contents.* The scheduling order may:

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<sup>21</sup> Somewhat greater complexity may be presented by rules that explicitly authorize the court to act on motion or on its own. But it may be reasonable to bypass this wrinkle. A court contemplating entry of an order without a motion may still give notice to the parties and even invite a conference. Compare the notice requirement in Rule 56(f)(3) for granting summary judgment without a motion. More generally, the purpose of the pre-motion conference seems to be to achieve more efficient resolution of the problems by conference without the formal burdens of motion practice, and also to weed out motions that are doomed to fail. Those purposes may not be served when the court is clear enough about a matter to resolve it by whatever means of involving the parties are most effective.

2465 (v) direct that before moving to dismiss, for an  
2466 order relating to discovery, or for summary  
2467 judgment, the movant must request a  
2468 conference with the court.


**Fw: Two suggestions for the Civil Rules Advisory Committee**

**John D. Bates** to: Frances Skillman  
Cc: Rebecca Womeldorf, coopere

01/12/2017 04:32 PM

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Date: 01/10/2017 02:38 PM  
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Please let me know if you have any questions or want any additional information or thoughts on these subjects.

I look forward to seeing you soon.

All the best,  
Jesse

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**B. RULE 45 AND THE PATIENT SAFETY ACT: 17-CV-B**

2470 17-CV-B proposes that Rule 45 be amended by adding a new  
2471 subdivision (h). Subdivision (h) would be a nearly verbatim  
2472 recital of a provision of the Patient Safety and Quality  
2473 Improvement Act of 2005. There is little reason to begin  
2474 expanding the Civil Rules by adding redundant provisions that do  
2475 no more than provide notice of statutory provisions. The proposal  
2476 should be put aside.

2477 The reasons for declining this invitation seem clear without  
2478 undertaking the work needed to achieve a comprehensive  
2479 understanding of the Patient Safety and Quality Improvement Act.  
2480 The proposal provides the essentials. The aspect that bears on  
2481 the proposal is an effort to encourage health care providers to  
2482 gather and report to Patient Safety Organizations information  
2483 about events that harm patients. The Act includes a provision  
2484 that protects against compelled disclosure of such information,  
2485 42 U.S.C. § 299b-22(d)(4)(A):

2486 (i) In General

2487 A patient safety organization shall not be compelled to  
2488 disclose information collected or developed under this  
2489 part whether or not such information is patient safety  
2490 work product unless such information is identified, is  
2491 not patient safety work product, and is not reasonably  
2492 available from another source.

2493 The proposed amendment adding Rule 45(h) is strikingly  
2494 similar:

2495 (h) Patient Safety Organization; Limitation on Actions;  
2496 a Patient Safety Organization (PSO) cannot be compelled  
2497 to disclose information collected or developed pursuant  
2498 to the Patient Safety and Quality Improvement Act of  
2499 2005, 42 U.S.C. § 299b-21 et seq., whether or not such  
2500 information is patient safety work product, unless the  
2501 information is identified, is not patient safety work  
2502 product, and is not reasonably available from another  
2503 source.

2504 "Patient safety work product" is defined in 42 U.S.C. §  
2505 299b-21(7), as quoted at pp. 3-4 of 17-CV-B. Section 299b-22(a)  
2506 provides that "patient safety work product shall be privileged,"  
2507 and includes several items of protection, including (a)(2): the  
2508 information "shall not be \* \* \* (2) subject to discovery in  
2509 connection with a Federal, State, or local civil, criminal, or  
2510 administrative proceeding, including in a Federal, State, or  
2511 local civil or administrative disciplinary proceeding against a  
2512 provider." So too, the privileged information is not subject to  
2513 civil, criminal, or administrative subpoena, and cannot be  
2514 admitted in evidence.

2515           The proposal expressly recognizes the purpose "to  
2516 incorporate" in Rule 45 "other federal law governing the issuance  
2517 of subpoenas \* \* \*." p. 2. The reason, p. 6, is that "[w]ithout  
2518 the amendment plaintiff and defense lawyers may not be aware of  
2519 their procedural responsibilities under Federal law potentially  
2520 leading to unnecessary litigation and the erosion of the immunity  
2521 Congress specifically granted to patient safety work product  
2522 possessed by a PSO."

2523           The explicit rationale is to provide notice of the statute.  
2524 The notice would be improved by adding a parallel provision to  
2525 the Federal Rules of Criminal Procedure and of Evidence. That  
2526 would remain incomplete, since the privilege also applies to  
2527 state proceedings.

2528           Proposed Rule 45(h) might accomplish something. It may be  
2529 wondered whether many Patient Safety Organizations are, and will  
2530 remain, ignorant of the statutory protections. Plaintiffs,  
2531 however, may well be ignorant until their subpoenas and discovery  
2532 requests are resisted, generating unnecessary cost and delay.  
2533 Some of them might welcome a new Rule 45(h), and any comparable  
2534 provisions that might be added to other rules.

2535           The possible benefits of adopting the proposed rule,  
2536 however, are outweighed by the costs that would result from  
2537 adopting Civil Rules provisions that do no more than cross-refer  
2538 to specific statutes. Although it is no more than a pleasant  
2539 fiction to assert that every lawyer is responsible to know all of  
2540 the law, the Rules should not become a form of continuing legal  
2541 education.

SUBMITTED ELECTRONICALLY  
January 24, 2017

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, DC 20544

Re: Proposed Amendment to Federal Civil Procedure Rule 45

To Whom It May Concern:

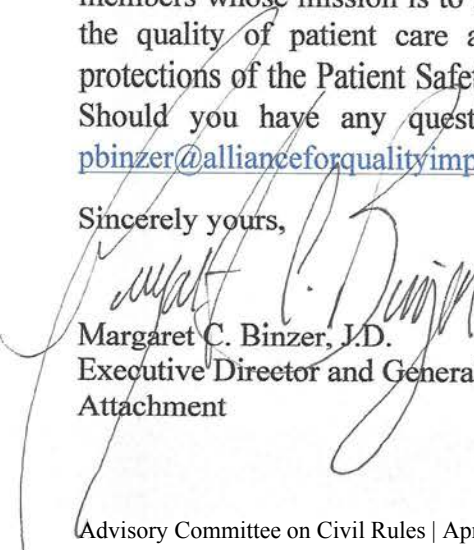
The Alliance for Quality Improvement and Patient Safety (“AQIPS”) respectfully submits the following proposed new paragraph as an amendment to Federal Civil Procedure Rule 45 – Subpoena:

(h) Patient Safety Organization - Limitation on Actions. A Patient Safety Organization (PSO) cannot be compelled to disclose information collected or developed pursuant to the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. §299b-21 et seq., whether or not such information is patient safety work product, unless the information is identified, is not patient safety work product, and is not reasonably available from any other source.

The Patient Safety and Quality Improvement Act of 2005 (42 USC §299b-21 et seq.; the “Patient Safety Act”) substantially alters federal subpoena practice in actions against PSOs by prohibiting a PSO from being compelled to disclose patient safety work product (42 U.S.C. §299b-22(d)(4)(A)(i)). This provision is unique by providing immunity to a PSO for patient safety work product in its possession while placing on the person issuing the subpoena the burden of proving that the identified information is not patient safety work product and cannot be reasonably obtained from another source. For this and other reasons explained in the attached memorandum, this amendment is necessary to secure the public policy and the public health basis that Congress intended to allow PSOs to collect health care quality data, analyze such data and provide feedback for the benefit of patients.

AQIPS is a national professional organization for PSO’s and their healthcare provider members whose mission is to foster the ability of healthcare providers to improve patient safety, the quality of patient care and patient outcomes through the privilege and confidentiality protections of the Patient Safety Act. AQIPS appreciates the opportunity to submit this petition. Should you have any questions or require additional information, please contact me at [pbinzer@allianceforqualityimprovement.org](mailto:pbinzer@allianceforqualityimprovement.org). Thank you for your consideration.

Sincerely yours,



Margaret C. Binzer, J.D.  
Executive Director and General Counsel AQIPS  
Attachment

**MEMORANDUM**

TO: United States Courts Committee on Rules of Practice and Procedure  
FROM: Alliance for Quality Improvement and Patient Safety (AQIPS)  
RE: Federal Civil Rule Amendment Proposal  
Date: January 24, 2017

**Introduction**

The Alliance for Quality Improvement and Patient Safety (AQIPS) requests approval from the Committee to submit the following proposed addition to Federal Civil Procedure Rule 45 to the Federal Rules Advisory Committee for consideration, and if accepted by the Advisory Committee, for publication and comment.

**Rule Amendment Proposal**

**Issue:** The Patient Safety and Quality Improvement Act of 2005<sup>1</sup> (the “Patient Safety Act”) substantially alters subpoena practice by setting forth a limitation on actions against a Patient Safety Organization (PSO)<sup>2</sup> for patient safety work product<sup>3</sup> and specifying three elements that a person issuing the subpoena must satisfy to compel from a PSO information that is not patient safety work product. The Patient Safety Act provides:

Limitation on Actions; a Patient Safety Organization (PSO) cannot be compelled to disclose information collected or developed under [the Patient Safety Act], whether or not such information is patient safety work product, unless the information is identified, is not patient safety work product, and is not reasonably available from any other source.<sup>4</sup>

---

<sup>1</sup> 42 USC §299b-1 et seq.

<sup>2</sup> A Patient Safety Organization (PSO) means a private or public entity or component thereof that is listed as a PSO by the Secretary in accordance with Subpart B. 42 U.S.C. §299b-24(d); 42 C.F.R. 3.20. see [www.pso.ahrq.org](http://www.pso.ahrq.org) for listed PSOs.

<sup>3</sup> 42 U.S.C. §299b-21(7); 42 C.F.R. 3.20.

<sup>4</sup> 42 U.S.C. §299b-22(d)(4)(A)(i).

This statutory provision is *sui generis* by providing immunity to a PSO for patient safety work product in its possession as a protection in addition to the privilege provided for patient safety work product to ensure that PSOs are not subject to litigation and to ensure the protected information is kept out of litigation. The Patient Safety Act is the cornerstone of the Federal effort to reduce preventable injuries and death from our health care system. Congress believed the work of a PSO to be so vital to the public health that it established special rules to limit the information that a PSO can be compelled to provide. The Patient Safety Act places the burden upon the person issuing the subpoena to prove the three elements required to demonstrate that the information is not patient safety work product rather than upon the PSO to move for a protective order. Because of the uniqueness of the statutory scheme and the importance of the public policy at stake, the amendment to the rules is manifest to alert practitioners that they should not seek issuance of the subpoena unless they can provide to the court sufficient evidence to demonstrate each element of the statutory exception. The proposed change to Fed.R.CivP. 45, which modernizes the rule, is necessary in order to incorporate other federal law governing the issuance of subpoenas, namely 42 U.S.C. § 299b-22(d)(4)(A).

**Proposed Amendment and Rationale:** A new paragraph (h) is proposed for consideration by the Federal Rules Advisory Committee as an amendment to Federal Rule Civil Procedure 45, Supoena:

(h) Patient Safety Organization; Limitation on Actions; a Patient Safety Organization (PSO) cannot be compelled to disclose information collected or developed pursuant to the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. §299b-21 et seq., whether or not such information is patient safety work product, unless the information is identified, is not patient safety work product, and is not reasonably available from any other source.

The Patient Safety Act authorized the creation of Patient Safety Organizations to improve patient safety, the quality of patient care and patient outcomes by reducing the incidence of events that adversely affect patients. Congress passed the Patient Safety and Quality Improvement Act (PSQIA) to create a ‘culture of safety’ by providing a privilege and confidentiality protection for quality information known as patient safety work product and permitting the sharing of patient safety work product to continuously improve the quality of patient care. The system was intended to “promote a learning environment that is needed to move beyond the existing culture of blame and punishment that suppresses information about health care errors to a ‘culture of safety’ that focuses on information sharing, improved patient safety and quality and the prevention of future medical errors.”<sup>5</sup> Congress designed the Patient Safety Act to foster a “learning environment” that would allow health care providers to assess their errors without fear that data and analysis will be subject to discovery in medical malpractice or enforcement actions.<sup>6</sup> The protected information is called “patient safety work product” and is defined as:

- (1) Except as provided in paragraph (2) of this definition, patient safety work product means any data, reports, record, memoranda, analysis (such as root cause analyses), or written or oral statements (or copies of any of this material)
  - (i) Which could improve patient safety, health care quality, or health care outcomes; and
    - (A) Which are assembled or developed by a provider for reporting to a PSO and are reported to a PSO, which includes information that is documented as within a patient safety evaluation system for reporting to a PSO, and such documentation includes the date the information entered the patient safety evaluation system; or
    - (B) Are developed by a PSO for the conduct of patient safety activities; or
  - (ii) Which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

---

<sup>5</sup> S. Rep. No. 108-196, at 2 (2003).

<sup>6</sup> HR Rep. 109-197 at 9 (2005).

(2) Patient safety work product does not include a patient’s medical record, billing and discharge information, or any other original patient or provider information; nor does it include information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system.<sup>7</sup>

To ensure that PSWP that is collected and analyzed for the benefit of patients is not used against providers in lawsuits, Congress granted privilege<sup>8</sup> and statutory confidentiality protections<sup>9</sup> for patient safety work product and limited actions against a PSO.<sup>10</sup> The statutory limitation prohibits actions against a PSO to compel patient safety work product. The statute provides an exception for actions against a PSO for information that is a) identified, b) is not patient safety work product, and c) is not reasonably available from any other source. The requirement that the information that is not patient safety work product be “identified” is to prevent fishing expeditions by plaintiff’s lawyers looking to collect information that could identify the analysis of the PSO, which is by definition patient safety work product. The second element of the exception clarifies that only information that is not patient safety work product may be compelled from a PSO and therefore, the person issuing the subpoena bears the burden to demonstrate that the information that they are attempting to obtain from the PSO is not patient safety work product within the meaning of the law. Therefore, only documents, under subpart (b) of the definition of patient safety work product, such as original documents that are not patient safety work product can be compelled if the third element is also satisfied; that is the information cannot be reasonably obtained from another source. Many original documents identified in the Patient Safety Act are required to be maintained by healthcare providers under state or federal

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<sup>7</sup> 42 U.S.C. §299b-21(7); 42 C.F.R. §3.20. A patient safety evaluation system means the collections, management, or analysis of information for reporting to and by a PSO. 42 USC §299b-21(6); 42 C.F.R. §3.20.

<sup>8</sup> 42 USC §299b-22(a)

<sup>9</sup> 42 U.S.C. §299b-22(b).

<sup>10</sup> 42 U.S.C. §299b-22(d)(4)(A)(i).

statute or regulation and thus, the PSQIA requires the person issuing the subpoena under the third element of the exception to obtain the information from a provider or other sources rather than the PSO.

Importantly, Congress did not intend that this limitation on action prohibit plaintiffs from redressing harm:

“The committee notes that protecting data in a reporting system as recommended in this chapter does not mean that the plaintiff in a lawsuit could not try to obtain such information through other avenues if it is important in securing redress for harm; it just means that the plaintiff would not be assisted by the presence of a reporting system designed specifically for other purposes beneficial to society.”<sup>11</sup>

The statute provides that nothing in this part shall be construed to limit information that is not patient safety work product from being discovered or admitted in a criminal, civil or administrative proceeding.<sup>12</sup> By its plain language, the Patient Safety Act prohibits an action against a PSO for patient safety work product but provides an exception to access information that is not patient safety work product provided that sufficient evidence is provided to the Court to justify each element of the statutory exception.

This proposed amendment to rule 45 is necessary to secure the important public policy and public health basis by codifying the procedural requirements provided in the Patient Safety Act. The use of PSOs is becoming commonplace as health care providers are required or permitted to report to PSOs in several Federal laws.<sup>13</sup> Moreover, the amendment comports with the goals of the Rules of Civil Procedure as set forth in Rule 1, that the rules be construed and

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<sup>11</sup> S.Rep. No. 108-196 at 5, 7.

<sup>12</sup> 42 C.F.R. §3.20 *Patient safety work product* (2)(iii)(A).

<sup>13</sup> See section 1311 of the Affordable Care Act (42 U.S.C. § 18001 et seq. (2010)) and Medicare Program; Merit-Based Incentive Payment System (MIPS) and Alternative Payment Model (APM) Incentive Under the Physician Fee Schedule, and Criteria for Physician Focused Payment Models, 81 Federal Register 77008 (November 4, 2016).



administered to secure the just, speedy, and inexpensive determination of every action and proceeding. Without the amendment plaintiff and defense lawyers may not be aware of their procedural responsibilities under Federal law potentially leading to unnecessary litigation and the erosion of the immunity Congress specifically granted to patient safety work product possessed by a PSO.

## **CONCLUSION**

AQIPS urges the Committee to submit the following proposed addition to Federal Rule Civil Procedure 45 to the Federal Rules Advisory Committee for consideration, and if accepted by the Advisory Committee, for publication and comment. The addition of the new paragraph to Rule 45 would provide a needed federal civil procedure rule for the limitation on action contained in the Patient Safety Act.

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# TAB 11C

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2542 **C. LETTER OF SUPPLEMENTAL AUTHORITIES: 16-CV-H**

2543 Appellate Rule 28(j), adopted in 1979, provides that a brief  
2544 letter may be addressed to the circuit clerk to provide  
2545 "pertinent and significant authorities" that come to the party's  
2546 attention after the party's brief has been filed or after oral  
2547 argument but before decision. Reasons must be stated, "referring  
2548 either to the page of the brief or to a point argued orally."

2549 16-CV-H, submitted by John Vail, suggests consideration of  
2550 adopting an analog provision in the Civil Rules. Without a new  
2551 rule, ambiguity surrounds "how supplemental authority is to be  
2552 filed, whether a response is permitted, whether a reply is  
2553 permitted."

2554 The analogy to Appellate Rule 28(j) is tempting. But there  
2555 is some reason for approaching it cautiously.

2556 The Civil Rules do not now create a briefing regime. The  
2557 Appellate Rules do, and it is rather strict. It would be possible  
2558 to adopt a rule for submitting additional authorities after  
2559 briefing or oral argument without creating a full structure. But  
2560 the lack of a formal structure may reflect an implicit judgment  
2561 that it is better to leave briefing requirements and procedures  
2562 to local district or individual judge practices.

2563 The analogy, moreover, is imperfect. Ordinarily an Appellate  
2564 Rule 28(j) letter cannot be used to raise new issues omitted from  
2565 the briefs or at oral argument. The reasons for limiting  
2566 appellate practice in this way do not carry over with full force  
2567 to district-court practice, where information about the  
2568 underlying facts may continue to evolve and where there are often  
2569 good reasons for recognizing new issues and legal theories as the  
2570 case develops. Appellate Rule 28(j) allows only such argument as  
2571 can be fit into 350 words that include the new citations. Greater  
2572 latitude should be allowed during pretrial proceedings, whatever  
2573 might be argued for post-trial proceedings.

2574 Appellate Rule 28(j) would be an interesting point of  
2575 departure in considering a new Civil Rule, but it does not  
2576 provide a full framework. Crafting a rule that does not impede  
2577 desirable flexibility will be easier if it stands alone, without  
2578 attempting to address other briefing practices. But even then, an  
2579 effort to preserve significant flexibility could result in a rule  
2580 that serves little purpose.

2581 No recommendation is offered, apart from these words of  
2582 caution.

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A suggestion

john vail

to:

Rules\_Support

11/02/2016 03:22 PM

Hide Details

From: john vail <j.vail5@verizon.net>

To: Rules\_Support@ao.uscourts.gov

I suggest the Committee consider adopting, for the District Courts, an analog to FRAP 28(j). Currently how supplemental authority is to be filed, whether a response is permitted, whether a reply is permitted are ambiguous, as is the timing for any of those events.

John Vail

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"Always do what is right. This will gratify some people and astonish the rest." Mark Twain

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# TAB 11D

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2584 Title VI of the Puerto Rico Oversight, Management, and  
2585 Economic Stability Act (PROMESA) establishes a procedure for  
2586 restructuring bond claims (defined to include bank debt). An  
2587 Oversight Board determines whether a "modification" qualifies.  
2588 The issuer can apply to the district court for Puerto Rico for an  
2589 order approving a qualifying modification. The provisions for  
2590 action by the district court are sketchy.

2591 16-CV-J proposes adoption of a new Civil Rule 3.1 to provide  
2592 a framework for "filing an application for approval of a  
2593 Qualifying Modification" as provided by § 601(m)(1)(D) of the  
2594 Act. The text and suggested Committee Note, set out with the  
2595 proposal, are brief.

2596 Representatives of the Bankruptcy Rules Advisory Committee  
2597 report that Title VI proceedings do not involve issues or  
2598 remedies that would make it sensible to bring them into the  
2599 Bankruptcy Rules. The District of Puerto Rico is currently  
2600 considering what procedures should be used to implement the Act.

2601 Several reasons suggest that this item should be removed  
2602 from the docket without action.

2603 There are strong reasons to resist rules provisions that  
2604 relate to specific substantive statutes. Those reasons apply with  
2605 special force when the statute applies only to one federal court,  
2606 here the District of Puerto Rico. An Enabling Act rule could  
2607 easily be based on assumptions about the answers to substantive  
2608 questions that the rules committees cannot answer. Initial  
2609 answers will be given by the district, subject to review on  
2610 appeal and perhaps certiorari.

2611 In addition, adoption of any new rule should properly  
2612 proceed through the full Enabling Act process. At best, if a  
2613 proposal were published for comment this summer, it would go to  
2614 the Supreme Court in the fall of 2018 and, if adopted, take  
2615 effect on December 1, 2019. It seems likely that Title VI  
2616 proceedings will be brought to the district court well before  
2617 then.

2618 Nor does there seem to be any real need for a new national  
2619 rule. Rule 1 directs that the Civil Rules "govern the procedure  
2620 in all *civil actions and proceedings* in the United States  
2621 district courts, except as stated in Rule 81." The Style Project  
2622 substituted "civil actions and proceedings" for the former "suits  
2623 of a civil nature." The Committee Note observes that the change  
2624 "does not affect such questions as whether the Civil Rules apply  
2625 to summary proceedings created by statute." It would be possible  
2626 to amend Rule 81(a) by adding an express statement that these  
2627 rules apply – or do not apply – to proceedings under the Act.  
2628 That question, however, likely will be addressed and answered by

2629 the District of Puerto Rico before a rule provision could become  
2630 effective.

2631 The District of Puerto Rico can act promptly to adopt any  
2632 local rules that may be useful in implementing Title VI. More  
2633 importantly, it is the only court that will become expert in  
2634 administering the Act, and knows its own procedures and  
2635 capacities better than any other court or committee can know  
2636 them. That court is confronting these questions now. It seems  
2637 better to let that process unfold than to attempt to create a  
2638 national rule for questions that are intensely local and  
2639 specifically focused on one new statute.

THOMAS MOERS MAYER  
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FAX 212-715-8000  
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Hon. David G. Campbell  
Chair of the Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
United States District Court – Phoenix Division  
Sandra Day O’Connor United States Courthouse  
401 West Washington Street, SPC 58  
Phoenix, Arizona 85003-2156

Hon. Sandra Segal Ikuta  
Chair of the Advisory Committee on Bankruptcy Rules  
United States Court of Appeals for the Ninth Circuit  
Richard H. Chambers Court of Appeals Building  
125 South Grand Avenue, Room 305  
Pasadena, California 91105-1621

Re: Suggestion of new Federal Rule of Civil Procedure to apply to cases under Title VI of the Puerto Rico Oversight, Management, and Economic Stability Act

Dear Judge Campbell and Judge Ikuta:

On June 30, 2016, President Obama signed into law the Puerto Rico Oversight, Management, and Economic Stability Act, Public Law 114-187, 130 Stat. 549 (June 30, 2016) (“**PROMESA**”) and established a federally appointed Oversight Board thereunder.

PROMESA empowers Puerto Rico (and, in the future, other territories) to restructure territorial indebtedness<sup>1</sup> under the supervision of the Oversight Board in proceedings before a United States District Court<sup>2</sup> under either Title III, PROMESA §§ 301-317, or Title VI, PROMESA §§ 601-602.

PROMESA provides that the Bankruptcy Rules apply to cases under Title III but contains no similar provision relating to Title VI. Proceedings under Title VI thus default to the Federal Rules of Civil Procedures, which are not well suited to such proceedings, as I explain below.<sup>3</sup>

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<sup>1</sup> “Puerto Rico’s indebtedness” refers to obligations of the Commonwealth of Puerto Rico itself and of its instrumentalities.

<sup>2</sup> PROMESA § 307(a) & (b) provides that a Title III case must be commenced in the United States District Court for the District of Puerto Rico or, in the absolute discretion of the Oversight Board, in a jurisdiction where the Oversight Board has an office. There is no comparable provision for commencing a case under Title VI, although Title VI does require that the order approving a modification to Puerto Rico’s indebtedness must come from the District of Puerto Rico. PROMESA § 601(m)(1)(D).

<sup>3</sup> My firm represents mutual funds and hedge funds that collectively hold over \$10 billion principal amount of Puerto Rico bonds.

**Title III: Like Bankruptcy.**

Title III incorporates almost all of Chapter 9 of the Bankruptcy Code by reference<sup>4</sup> and empowers the Commonwealth, or a Commonwealth instrumentality, to restructure all of its obligations – not just bonds or bank debt, but also pension claims, labor claims, retiree medical claims, contract claims and tort claims.

Title III provides for a case to be commenced by the filing of “a petition” in the appropriate United States District Court,<sup>5</sup> and for the prosecution of the case through the various stages of a bankruptcy proceeding, including allowance and disallowance of claims, rejection of burdensome executory contracts, obtaining “debtor-in-possession” financing, voiding preferential or fraudulent transfers (if there are any), district court approval of a disclosure statement, voting on a plan, and, finally, either dismissal of the case or confirmation of a plan of adjustment proposed by the debtor.

Title III gives the court the power to confirm a plan over the objection of a class of creditors – the “cram down” power – if the Court finds that certain conditions have been met.

Title III thus gives the Commonwealth a lot of power, but it comes at a price. The Oversight Board must first certify that the Commonwealth (or any instrumentality seeking to file a Title III) has adopted a “Fiscal Plan” that provides a “method to achieve fiscal responsibility and access to the capital markets” and meets 14 enumerated requirements, including that it must:

- “provide for estimates of revenues and expenditures in conformance with agreed accounting standards . . . ;
- “ensure the funding of essential public services;
- “provide adequate funding for public pension systems;
- “provide for the elimination of structural deficits; . . .
- “improve fiscal governance, accountability, and internal controls; . . .
- “respect the relative lawful priorities or lawful liens . . . in effect prior to the date of enactment of this Act”.<sup>6</sup>

The Oversight Board must certify that the Commonwealth, or the relevant instrumentality, has a Fiscal Plan that has been approved by the Oversight Board before it can commence a Title III case,<sup>7</sup> and it must certify that any proposed Title III plan of adjustment is consistent with an approved Fiscal Plan.<sup>8</sup>

PROMESA § 310 provides: “The Federal Rules of Bankruptcy Procedure shall apply to a case under this title and to all civil proceedings arising in or related to cases under this title.”

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<sup>4</sup> PROMESA § 301.

<sup>5</sup> PROMESA § 304(a).

<sup>6</sup> PROMESA § 201(b).

<sup>7</sup> PROMESA § 206(a)(3).

<sup>8</sup> PROMESA §§ 312(a), 104(j)(3).

**Title VI: Minimal Court Proceedings.**

Title VI is much simpler than Title III.

First, Title VI provides for restructuring “Bond Claims” (defined to include bank debt) only. No other debt can be restructured under Title VI. Unlike a bankruptcy case or a Title III proceeding, Title VI contains no provisions relating to obtaining financing, rejecting contracts or even court approval of the form of solicitation to bondholders.

Second, Title VI has no “cram down” power – it is designed to be consensual.

The Oversight Board, in consultation with the “Issuer” of Bond Claims, classifies the Bond Claims in one or more “Pools”<sup>9</sup> and agrees on a proposed restructuring, or “Qualifying Modification”, with the holders of a majority in amount of the Bond Claims in a Pool.<sup>10</sup> All Bond Claims in a Pool must have the same priority and be offered the same per-dollar-of-claim consideration.<sup>11</sup>

The Oversight Board sends the Qualifying Modification out for a vote of all Bond Claims in the Pool.<sup>12</sup>

The Qualifying Modification becomes binding if:

- the holders of two thirds in amount of the Bond Claims vote to accept the Qualifying Modification<sup>13</sup>;
- “any holder who did not accept the Qualifying Modification retains the lien securing its Bond Claim or receives on account of its Bond Claim, through deferred cash payments, substitute collateral, or otherwise, at least the equivalent value of the lesser of the amount of the Bond Claim or of the collateral securing such Bond Claim”<sup>14</sup>; and
- “*the district court for the territory . . . has, after reviewing an application submitted to it by the applicable Issuer for an order approving the Qualifying Modification, entered an order that the requirements of this section have been satisfied.*”<sup>15</sup>

(Emphasis added and discussed below).

Upon an entry of such order, the Qualifying Modification “shall be valid and binding” on all holders of Bond Claims, shall also be “binding and conclusive” as to the Commonwealth, the Issuer, all other Commonwealth instrumentalities, “and any creditors of such entities”, and

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<sup>9</sup> PROMESA § 601(d)(1).

<sup>10</sup> PROMESA §§ 104(i)(1)&(2) & 601(g)(1)(C)&(2).

<sup>11</sup> PROMESA §§ 601(d)(3) & (g)(1)(B).

<sup>12</sup> PROMESA § 601(h).

<sup>13</sup> PROMESA § 601(j).

<sup>14</sup> PROMESA § 601(m)(1)(C)

<sup>15</sup> PROMESA § 601(m)(1)(D).

“should not be subject to any collateral attack or other challenge by any such entities in any court or other forum.”<sup>16</sup>

Finally, Title VI is much easier to start. The Oversight Board does not need to certify a Fiscal Plan (which must meet, as noted above, over 14 requirements) for the Commonwealth or an instrumentality. The Oversight Board need only certify that the Qualifying Modification is in the best interests of creditors, is feasible and will leave the relevant Issuer with a sustainable level of debt.<sup>17</sup>

### **The Problem**

Title VI is set up to be easy and quick – the Issuer and majority bondholders agree on a modification which the Oversight Board certifies as meeting certain criteria, two thirds of the bonds vote to accept and the district court enters an order upholding the certification and finding that non-acceptors are receiving the required minimum consideration.

However, it is not clear how the “Issuer” (the Commonwealth or any instrumentality) commences a proceeding to obtain the requisite district court order.

Under Federal Rule of Civil Procedure 3, a civil action is commenced by filing a complaint. The Issuer could proceed by a complaint for a declaratory judgment that a Qualifying Modification complies with Section 601, but it is not clear who the complaint would name as a defendant. As noted above, a Qualifying Modification, once approved, is binding on all creditors of the Commonwealth and any of its instrumentalities – not just the holders of Bond Claims against the filing Issuer.

Title VI contains only two provisions even mentioning the district court. One is the italicized § 601(m)(1)(D) above, which provides:

the district court for the territory . . . has, after reviewing *an application* submitted to it by the applicable Issuer for an order approving the Qualifying Modification, entered an order that the requirements of this section have been satisfied.

(Emphasis added).

I submit that the use of the italicized word “application” shows that Congress did not intend to require a declaratory judgment to implement Title VI.

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<sup>16</sup> PROMESA § 601(m)(2).

<sup>17</sup> PROMESA §§ 104(i)(1)(B), 601(g)(1)(C).



The other provision is PROMESA § 601(n):

(n) JUDICIAL REVIEW.—

(1) The district court for the territory . . . shall have original and exclusive jurisdiction over civil actions arising under this section.

(2) Notwithstanding section 106(e), there shall be *a cause of action* to challenge unlawful application of this section.

(3) The district court shall nullify a Modification and any effects on the rights of the holders of Bonds resulting from such Modification if and only if the district court determines that such Modification is manifestly inconsistent with this section.

(Emphasis added).

Section 106(e) provides that no district court shall have jurisdiction to “review challenges to the Oversight Board’s certification determinations under this Act.” Since the Oversight Board must make various certifications before an Issuer can proceed under Title VI (such as certifying that the debt level under a proposed Qualifying Modification is sustainable), Section 601(n)(2)’s exclusion of Section 106(e) appears to provide parties with an opportunity to challenge that certification even before the Issuer seeks district court approval of a Qualifying Modification under Section 601(m)(1)(D).

The use of the phrase “cause of action” could be read to indicate that Congress did expect that challenges to certification be instituted by complaint for a declaratory judgment. However, a complaint seeking a declaratory judgment that the Oversight Board and Issuer have failed to meet the requirements of Section 601 has two identified defendants, unlike a complaint seeking a declaratory judgment that the requirements of Section 601 have been met.

Civil rules applicable to *in rem* proceedings are not applicable to a Title VI proceeding since the “*res*” would be the Issuer, who would then be required to file a complaint against itself,

### **Proposed Solution**

I respectfully submit that it does not make sense for the commencement of court review of a PROMESA Title VI Qualifying Modification to follow the existing civil rules applying to declaratory judgments or to *in rem* proceedings.

I therefore suggest the adoption of a new Rule 3.1 to the Federal Rules of Civil Procedure that would provide that the filing of an application for approval of a Qualifying Modification be treated like the filing of a bankruptcy petition.

A proposed form of such Rule, and an Advisory Note explaining the Rule, is attached.


I understand that few rules are adopted without extensive notice and comment, and that the process usually takes at least three years.

However, Title VI will be used soon, probably in six months to a year. It is my hope that your Committees can find a way to consider the proposed rule, or some other solution to this problem, on an expedited schedule.

I understand that when the Bankruptcy Abuse Prevention and Consumer Protection Act was enacted in 2005, the Supreme Court promulgated interim rules to be adopted by district courts. I note that PROMESA § 601(m)(1)(D) requires an order be entered by “the district court for the territory.” Thus the only district that would need to adopt an interim rule now would be the District of Puerto Rico, although the rule might be adopted by the Districts of the Virgin Islands, Guam and Hawaii<sup>18</sup> if PROMESA were extended to apply to other territories in the future.<sup>19</sup>

I thank you for your consideration of this matter.

Sincerely,

By:   
Thomas Moers Mayer  
Partner

cc: Professor Elizabeth S. Gibson  
Reporter, Advisory Committee  
on Bankruptcy Rules

---

<sup>18</sup> If a territory does not have its own district court, PROMESA provides for jurisdiction in the United States District Court for the District of Hawaii. PROMESA § 106(A).

<sup>19</sup> PROMESA may apply to territories other than Puerto Rico only if the legislature of the territory adopts a resolution signed by the territory’s governor requesting the establishment of an Oversight Board. PROMESA § 3(b).

Proposed Federal Rule of Civil Procedure 3.1

**RULE 3.1 COMMENCING AN ACTION UNDER TITLE VI OF THE PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT**, Public Law 114-187, 130 Stat. 549 (June 30, 2016).

A civil action for relief under Section 6.01(m)(1)(D) of the Puerto Rico Oversight, Management, and Economic Stability Act is commenced by filing an application for approval of a Qualifying Modification as defined in such Act and as provided under such section. The application shall be filed with the clerk of the court in which the action is commenced and the clerk shall open a docket for such action as if the application were a petition opening a case under Chapter 9 of the Bankruptcy Code.

**Advisory Committee Note:**

The Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) provides that Puerto Rico or one of its instrumentalities may negotiate a “Qualifying Modification” of a bond or bank debt with the holders of a majority of that debt. The Qualifying Modification becomes effective when holders of two thirds of the debt have agreed and the district court has entered an order approving it.

In order to have the district court consider a Qualifying Modification, the filing of an “application” as required by PROMESA will be treated like the filing of a bankruptcy petition.

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# TAB 11E

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2640 **E. DISCLAIMER OF FEAR OR INTIMIDATION: 16-CV-G**

2641 16-CV-G suggests "a judicial procedure requiring a judge  
2642 disclaim fear or intimidation influence the judgment being  
2643 written (e.g., 'This judgment is unaffected by fear or  
2644 intimidation') to serve as reciprocal check."

2645 The perceived need for the procedure draws from methods of  
2646 intimidation that do not involve physical presence or action. The  
2647 example offered is the use of a "horn antenna" with a microwave  
2648 oven Magnetron as a beam-forming wireless energy device.

2649 An example of the need for "justice unaffected by fear or  
2650 intimidation" is offered in a case filed by the author and  
2651 dismissed by an order characterizing the complaint as fiction.

2652 This suggestion does not warrant further development.

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## Rules of Practice and Procedure suggestion

**Suresh S.** to: Rules\_Support

Cc: usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs

09/28/2016 10:27 PM

History: This message has been forwarded.

Dear Sir/Ma'am.

Concerning use of fear and intimidation, I understand the presence of legal statute (<https://www.law.cornell.edu/uscode/text/18/115>) to hold a perpetrator accountable. I am writing to suggest a judicial procedure requiring a judge disclaim fear or intimidation influence the judgment being written (e.g., "This judgment is unaffected by fear or intimidation") to serve as reciprocal check. The rationale for this suggestion, a spoken/written word has a powerful influence on preserving integrity.

Such disclosure is relevant because, though rule of law has been able to place limits on traditional forms of intimidation involving physical presence/action, methods without physical presence/action are not limited. For instance, powerful beam-forming/focused wireless energy has been used for intimidation without physical contact ("Microwaving Embassy Moscow", <http://adst.org/2013/09/microwaving-embassy-moscow/>). Such a method that was privy to a few in the 1970s is ubiquitous and boundless in civil society since anyone can combine a Horn antenna to focus energy from a Magnetron\* (microwave energy generator in a microwave oven) and use it for crime in the United States and elsewhere.

Please clarify if the suggested civil procedure is necessary to render justice unaffected by fear or intimidation\*\*.

Faithfully Yours,  
Suresh Kalkunte  
<http://sskalkunte.info>

[\*] "Designing a Horn antenna for 2.45GHz",  
[http://www.arrl.org/files/file/QEX\\_Next\\_Issue/Jan-Feb\\_2011/QEX\\_1\\_11\\_PASKVAN.pdf](http://www.arrl.org/files/file/QEX_Next_Issue/Jan-Feb_2011/QEX_1_11_PASKVAN.pdf)

and other sources on the Internet provide step-by-step sheet-metal work instructions to combine a Magnetron (operating at 2.45GHz) with a Horn antenna. Such combinations are published for use in termite control (via Internet search for "horn antenna magnetron termite control"), however, no limits are set by law when it is used against fellow being since such a combination used at close range using a priori information (where one sits at office, place where one sleeps etc.) is capable of physical harm as <http://www.eng-tips.com/viewthread.cfm?qid=172987> describes subject matter experts express injury when working with a microwave oven's Magnetron.

[\*\*] In my case "Kalkunte v. United States Department of Justice et al", [https://www.pacermonitor.com/public/case/8540782/Kalkunte\\_v\\_United\\_States\\_Department\\_of\\_Justice\\_et\\_al](https://www.pacermonitor.com/public/case/8540782/Kalkunte_v_United_States_Department_of_Justice_et_al), the judge characterized my complaint as fiction. The outcome would be different if the judge extended the courtesy of checking with:  
- A senior law enforcement professional like LTG. Steven H. Blum (ret.), United States Army who responded to my email in June 2015 after this case got dismissed on 23 June 2016 indicating law lags technology. You may verify my communication with LTG. Blum via [blumhs@aol.com](mailto:blumhs@aol.com).

- The FCC who clarified before I filed the above case in June 2015 that its jurisdiction of regulation/enforcement does not cover criminal use of components used in wireless communication infrastructure. The Office of Engineering and Technology at the FCC can be contacted at [oetinfo@fcc.gov](mailto:oetinfo@fcc.gov) to verify if FCC has jurisdiction to prevent criminal use of components emitting potent wireless energy.

# TAB 11F

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**F. "NATIONWIDE INJUNCTIONS": 17-CV-E**

2654 Professor Samuel Bray suggests this addition to Rule 65(d),  
2655 supported by a draft of an article to appear in Volume 131 of the  
2656 Harvard Law Review:

2657 **Rule 65. Injunctions and restraining orders**

2658 \* \* \* \* \*

2659 (d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

2660 \* \* \* \* \*

2661 (3) *Scope.* Every order granting an injunction and every  
2662 restraining order must accord with the historical  
2663 practice in federal courts in acting only for the  
2664 protection of parties to the litigation and not  
2665 otherwise enjoining or restraining conduct by the  
2666 persons bound with respect to nonparties.

2667 Both the article and the specific rule proposal raise  
2668 complex questions about the contemporary role of federal courts,  
2669 in relation both to other federal courts and to the other  
2670 branches of our government. These questions are sketched below as  
2671 an introduction to issues of great intrinsic interest. But it is  
2672 wise to begin with a strong caution. There are powerful reasons  
2673 to forgo any attempt to address such fundamental matters in an  
2674 Enabling Act rule, either now or perhaps ever. The article extols  
2675 the advantages of having several courts consider important  
2676 questions that affect many interests. There may be equal or  
2677 greater advantages in leaving it to the courts to work out the  
2678 breadth of remedies for unlawful action, public or private, in  
2679 the continually maturing development of judicial review. This  
2680 proposal might well be dropped from the agenda.

2681 The proposed rule runs beyond the article, which focuses on  
2682 injunctions against "federal defendants," apparently meaning  
2683 government officials who are restrained from enforcing a statute,  
2684 regulation, or order held invalid on the merits. Two recent  
2685 examples are given: a district court in Texas, affirmed by the  
2686 Fifth Circuit, issued a preliminary injunction restraining  
2687 enforcement of orders issued by President Obama that, for  
2688 purposes of various federal laws, recognized the lawful status of  
2689 undocumented immigrants. The injunction barred enforcement  
2690 anywhere, as to anyone. And a district court in Washington,  
2691 affirmed by the Ninth Circuit, issued a preliminary injunction  
2692 prohibiting enforcement anywhere, against anyone, of an order  
2693 issued by President Trump that restricted entry into the United  
2694 States of persons coming from seven listed countries.

2695 The proper scope of the injunctions, as maintained in the  
2696 article, would have been to protect the specific state  
2697 plaintiffs, and no others, and only against the burdens that  
2698 created standing, such as the expense of issuing drivers licenses

2699 to undocumented immigrants, or to protect only students and  
2700 faculty having relationships with the plaintiff Universities of  
2701 Washington and Minnesota.

2702 The article cites a wealth of supporting materials and is  
2703 cogently argued. A brief summary, however, may capture the  
2704 essence of it. To summarize is not to agree. The question whether  
2705 courts should limit injunctions as Professor Bray contends need  
2706 not be faced if other concerns counsel against answering the  
2707 question in the Civil Rules.

2708 A starting point is that federal courts should limit use of  
2709 equitable remedies by looking to the traditional use of equitable  
2710 remedies. The Judiciary Act of 1789 has been understood to limit  
2711 federal equity remedies to traditional equity practice. But some  
2712 adaptation is required. There was one Chancery and one Chancellor  
2713 for all of England. Injunctions did not run against the King.  
2714 Issuing an injunction against other defendants that ran  
2715 throughout the realm followed. The federal courts, on the other  
2716 hand, have had multiple "chancellors" from the beginning –  
2717 although law and equity were not merged until 1938, each federal  
2718 judge had equitable powers.

2719 Several consequences may flow from recognizing the authority  
2720 of a single district judge, or a single circuit, to restrain  
2721 enforcement of a law against people who are not parties to the  
2722 action before the court: "forum-shopping, worse judicial  
2723 decision-making, a risk of conflicting injunctions, and tension  
2724 with other doctrines of federal courts." The forum-shopping  
2725 concern is patent. Worse judicial decision-making stems from a  
2726 single decision, by a single (forum-shopped) judge and circuit,  
2727 often on nothing more than a preliminary-injunction record.  
2728 Contributions from other courts are cut off. The opportunity for  
2729 issues to percolate among the circuits, leading either to  
2730 convergence or the illumination provided by a circuit split, is  
2731 defeated. Conflicting injunctions are undesirable – at the worst,  
2732 a federal defendant might face simultaneous commands to enforce  
2733 and not to enforce a challenged law. Doctrinal tensions are found  
2734 in several places: the rule that nonmutual offensive issue  
2735 preclusion does not apply against the government; the  
2736 availability of a Rule 23(b)(2) class action to provide suitable  
2737 procedural protections in seeking nationwide relief; the awkward  
2738 role of nonparties who, although benefited by the injunction,  
2739 cannot seek enforcement by contempt; and the rule that a district  
2740 judge cannot establish precedent binding on any other judge, even  
2741 within the same district.

2742 So how did courts come to depart from the principle that an  
2743 injunction should protect only a party to the action? The analogy  
2744 to the "bill of peace," which dealt with groups of plaintiffs  
2745 bound together by relatively clear ties of place and events, was  
2746 not picked up. Until the middle of the Twentieth Century, courts  
2747 seem to have limited injunctions to the parties before them, as a  
2748 matter of course. But in 1963 the Court of Appeals for the

2749 District of Columbia Circuit, relying on no precedent, wrote that  
2750 if a ruling by the Secretary of Labor was invalid, the Secretary  
2751 should be enjoined from applying it to any business in the  
2752 affected industry, not merely the three plaintiffs. Four  
2753 advantages were seen: consistency among cases; the risk that  
2754 enforcement as to some firms but not others would confer  
2755 competitive disadvantages; the provision in the Administrative  
2756 Procedure Act instructing a court to "hold unlawful and set  
2757 aside" invalid agency actions; and the principle that an invalid  
2758 order or regulation, or unconstitutional statute, is invalid as  
2759 to all persons similarly situated.

2760 From this early beginning, federal courts gradually worked  
2761 their way to growing use of injunctions that bar enforcement of  
2762 invalid rules against anyone, not only the parties. But the  
2763 various remedial doctrines that limit resort to such injunctions  
2764 provide no real guidance. The most common is the "complete  
2765 relief" doctrine that allows the sweeping injunction only when  
2766 necessary to provide complete relief among the parties. But each  
2767 of the theories invokes judicial discretion, whose exercise is  
2768 reviewed only for abuse of discretion.

2769 The justifications for the practice that has emerged are  
2770 found wanting by Professor Bray. The dangers predominate. There  
2771 should not be "such a concentration of powers in the hands of a  
2772 single judge."

2773 All of this makes interesting reading. Before deciding  
2774 whether something should be done to guide courts back to party-  
2775 only injunctions, however, it must be decided whether the Rules  
2776 Enabling Act provides a suitable mechanism for exploring these  
2777 questions.

2778 The article itself suggests that the principle that  
2779 "injunctions should not protect non-parties" "should be  
2780 articulated by the federal courts. If it is not, it could be  
2781 enacted by statute." The proposal submitted as 17-CV-E, on the  
2782 other hand, clearly calls for adopting the principle into Rule  
2783 65(d).

2784 One ground for caution is found in a separate line of  
2785 argument advanced in the article, drawn from the "judicial power"  
2786 established by Article III. "This is a power to decide a case for  
2787 a particular claimant." It not only defines who may invoke the  
2788 judicial power, but also limits judicial remedies. "Once a  
2789 federal court has given an appropriate remedy to the plaintiffs,  
2790 there is no longer any case or controversy left for the court to  
2791 resolve. The parties have had *their* case or controversy resolved.  
2792 There is no other." So the plaintiff's standing, it is concluded,  
2793 must be "specifically correlated with the requested injunction."

2794 If the question involves the limits of Article III standing,  
2795 seeking definition in a Civil Rule may not be appropriate. The  
2796 Enabling Act does not authorize rules that define federal-court

2797 jurisdiction. Rule 82 confirms that the rules do not extend or  
2798 limit the jurisdiction of the district courts. It would be at  
2799 best difficult to attempt to refine potential Article III limits  
2800 into rule text that does not seem to authorize injunctions  
2801 outside the Article III limits, or to prohibit injunctions within  
2802 them. As one simple illustration, suppose a plaintiff seeks to  
2803 protect a racially diverse neighborhood by an injunction against  
2804 realtors' "blockbusting" tactics. To be effective, the injunction  
2805 must reach beyond acts directed at the plaintiff alone. Does such  
2806 an injunction violate the proposed rule to act "only for the  
2807 protection of parties to the litigation"? No, because it is the  
2808 only way to protect the plaintiff? Yes, because it also protects  
2809 others in the neighborhood?

2810 Further difficulties beset the Article III analysis. As  
2811 stated, it seems to imply that the Supreme Court cannot issue,  
2812 and cannot direct a district court to issue, an injunction that  
2813 reaches beyond the parties before it. The declaratory force of a  
2814 Supreme Court decision is nearly overwhelming, but not as useful  
2815 as an injunction. Currently established third-party standing  
2816 practice, further, would require some facile development of the  
2817 "plaintiff-only" concept. The Sierra Club, for example,  
2818 frequently achieves standing to challenge nationwide practices by  
2819 invoking the standing of individual members – a nationwide  
2820 injunction could be said to benefit the Sierra Club because it  
2821 has members in every state. Or a statute is held invalid for  
2822 overbreadth, even though it could be valid as applied to the  
2823 party challenging it, for the purpose of protecting nonparties  
2824 whose rights would be impaired.

2825 Apart from that, the article recognizes at several points  
2826 that remedies are rooted in the underlying substantive rights. A  
2827 general rule could easily be interpreted in ways that "abridge,  
2828 enlarge[,] or modify" the substantive rights. Courts have a  
2829 common-law (and equity) power to recognize substantive rights –  
2830 including constitutional rights – that have previously gone  
2831 unrecognized. For more than fifty years, federal courts have  
2832 shaped remedies to enforce substantive rights more broadly than  
2833 needed to protect the parties before them. It may be, as  
2834 Professor Bray suggests, that one motivating factor lies in a  
2835 change of perspective in viewing invalid government acts. In  
2836 earlier days, the perspective was defense-oriented: invalidity is  
2837 recognized by providing a defense against enforcement efforts,  
2838 including an anticipatory defense by way of an injunction or  
2839 declaration. That perspective seems to center on the individual  
2840 litigant. But courts have come to take an affirmative protective  
2841 approach: their role is to "strike down" the invalid rule.  
2842 Invalidation by a higher law leaves the rule a nullity. If that  
2843 is an element in the rise of the nationwide injunction, is it not  
2844 so far part of the underlying rights that it should not be  
2845 abridged or modified by an Enabling Act rule?

2846 One possible tactic would be to look to Rule 23(b)(2) rather  
2847 than Rule 65. Class-action procedure is designed to protect



2848 people who are "parties" only in the sense that they are included  
2849 in a certified class. Rule 23(b)(2) might be amended to provide  
2850 that an injunction that benefits unnamed parties can issue only  
2851 in a class action. One consequence would be that the class is  
2852 bound if the claim is lost, a one-action, one-court phenomenon.  
2853 And there would remain cases with too few affected persons to  
2854 satisfy the numerosity prerequisite. Nor is it entirely clear  
2855 that shoehorning a new rule into the familiar confines of Rule 23  
2856 is a satisfactory answer to the Enabling Act questions.<sup>22</sup>

2857 If this question is to be pursued, one early step will be to  
2858 choose the scope of a new rule. The proposed text is general,  
2859 applying to all litigation in a district court, no matter who the  
2860 parties are. It would reach far beyond injunctions that rest on  
2861 the invalidity of a governmental act. Limiting a new rule to  
2862 cases affected with a general and perhaps broad public interest,  
2863 on the other hand, could generate difficult definitional  
2864 problems. So too, it is difficult to cast in more precise terms  
2865 the concept of issuing only injunctions that "accord with the  
2866 historical practice in federal courts in acting only for the  
2867 protection of parties to the litigation and not otherwise  
2868 enjoining or restraining conduct by the persons bound with  
2869 respect to nonparties."

2870 The scope of a possible rule raises other questions as well.  
2871 The article focuses on nationwide invalidation of federal laws.  
2872 But what, for example, of state laws? Suppose a circuit court of  
2873 appeals holds a state statute preempted by federal law. The  
2874 district courts in that state are bound by the appellate ruling.  
2875 The "law of the circuit" approach embraced by most circuits binds  
2876 subsequent circuit panels as well. There is at most a slight  
2877 prospect that other federal courts will have occasion to confront  
2878 the same question. Why not recognize a declaration or injunction  
2879 against all enforcement?

2880 Apart from problems of authority and execution, the  
2881 underlying question also must be considered. Are the federal  
2882 courts indeed wrong to have moved in the direction they have

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<sup>22</sup> A narrow view of nationwide classes under Rule 23(b)(2) is advanced in Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, forthcoming in 97 B.U.L. Rev. 611 (2017). Much of the argument is similar to Professor Bray's concerns: allowing a single district court or court of appeals to resolve the validity of a statute or administrative rule for the entire country is inconsistent with the rules that deny stare decisis effect to district-court judgments and that limit appellate stare decisis by the geographic limits that define the circuit. Nationwide relief against the United States is also inconsistent with the rule that nonmutual issue preclusion is not available against the United States. The Supreme Court's approval of nationwide classes is in tension with these other principles.

2883 taken? Rather than look to 1789 practices in Chancery, is it  
2884 better to recognize that equity and equitable remedies are a  
2885 living, growing enterprise? Much of the early work of Chancery  
2886 was to grant relief against the inadequacies of the common law  
2887 and the procedures of common-law courts. Equity won that battle.  
2888 The matters governed by injunctions have expanded dramatically,  
2889 in tandem with expansions of substantive rights. It is difficult  
2890 to imagine that in 1789 injunctions would have issued to govern  
2891 prison conditions, or legislative districting, or public school  
2892 financing, or direct admission of even a single immigrant from  
2893 another country. And if a statute lodges direct review of an  
2894 administrative regulation in a court of appeals, the court can  
2895 nullify it for all applications. The high stakes and sensitive,  
2896 even elusive, judgments required on both substance and remedy  
2897 often call for restraint in shaping an injunction.



SAMUEL L. BRAY  
PROFESSOR OF LAW

17-CV-E

SCHOOL OF LAW  
405 HILGARD AVENUE  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
Phone: (310) 825-8632  
Fax: (310) 825-6023  
email: Bray@law.ucla.edu

March 1, 2017

BY ELECTRONIC MAIL

Advisory Committee on Rules of Civil Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544  
Rules\_Support@ao.uscourts.gov

Re: Amendment to Rule 65

To Whom It May Concern:

I am writing to respectfully propose an amendment to Rule 65 regarding the scope of injunctions given by federal courts. Increasingly, federal district courts are issuing injunctions that constrain the national government's conduct toward everyone, even non-parties. National injunctions in non-class actions are a departure, however, from the traditional practice in the federal courts, and they are inimical to the proper functioning of the federal judicial system. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. forthcoming (attached).

I therefore propose adding a provision like the following to Rule 65(d):

(3) SCOPE. Every order granting an injunction and every restraining order must accord with the historical practice in federal courts in acting only for the protection of parties to the litigation and not otherwise enjoining or restraining conduct by the persons bound with respect to nonparties.

Thank you very much for your consideration.

March 1, 2017

Page 2

Sincerely,

A handwritten signature in black ink that reads "Samuel Bray". The signature is written in a cursive style with a large, prominent 'S' and 'B'.

Samuel L. Bray  
Professor of Law  
UCLA School of Law

# TAB 11G

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**G. RULE 7.1: SUPPLEMENTAL DISCLOSURE STATEMENTS**

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In 2016 the Criminal Rules Committee published a proposal amending Criminal Rule 12.4(a)(2) on disclosures as to any organizational victim of alleged criminal activity. The Appellate Rules Committee is considering a parallel amendment of Appellate Rule 26.1(d). Those changes do not affect the Civil Rules.

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The Criminal Rule 12.4 amendments also reach subdivision (b)(2), which currently directs that a party must "promptly file a supplemental statement upon any *change* in the information that the statement requires." Civil Rule 7.1(b)(2) says the same thing, in fewer words: a party must "promptly file a supplemental statement if any required information changes." The published proposal to amend Criminal Rule 12.4(b) requires a supplemental statement "if the party learns of any additional required information or any changes in required information." The Committee Note explains that this change is intended to make it clear that a supplemental statement is required not only when disclosed information changes, "but also when a party learns of additional information that is subject to the disclosure requirements."

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The question is whether the proposed change in Criminal Rule 12.4(b)(2) requires that Civil Rule 7.1(b)(2) be amended, either because it does not adequately provide for the later discovery of information that existed at the time of the original statement or because of the wish for uniformity.

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The Appellate Rules Committee is considering possible changes to Appellate Rule 26.1(b) to match Criminal Rule 12.4(b)(2). The memorandum framing the question describes the suggestion advanced below that the "additional information" amendment serves little purpose. But if amendment of the Appellate Rule is recommended, the stake in uniformity is enhanced.

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Civil Rule 7.1(b)(2) – and the pre-amended version of Criminal Rule 12.4(b)(2) – should be understood to mean just what the Criminal Rule amendment proposes. The required information "changes" when a party learns of information that, although it existed at the time of an earlier disclosure statement, was not included. But if clarification seems called for, it could be provided with fewer words. Borrowing from the duty to supplement discovery responses provided by Rule 26(e), for example, Rule 7.1(b)(2) could direct a party to file a supplemental statement "if the party learns that the statement is incomplete or incorrect." But the prospect that Criminal Rule 12.4(b)(2) will be approved for adoption this June makes it difficult to iron out style differences – the differences do not seem important enough to ask that adoption of the Criminal Rule be postponed. It might be possible to recommend adoption of an amended Rule 7.1(b)(2) that adopts the Criminal Rule verbatim, as a mere technical amendment adequately supported by scrutiny of

2947 the Criminal Rule during the public comment period. But that  
2948 would be more useful if Appellate Rule 26.1 were advanced for the  
2949 same amendment now, rather than wait through the next cycle of  
2950 publication.

2951 The question, then, is most likely whether to add to the  
2952 agenda a proposal to revise Civil Rule 7.1(b)(2) to parallel  
2953 Criminal Rule 12.4(b)(2) and perhaps Appellate Rule 26.1. The  
2954 positions of the other advisory committees will be clearer by the  
2955 time of the Civil Rules meeting.



# APPENDIX

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**APPENDIX: RULE 68 IN COMMITTEE HISTORY**

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**APRIL 9, 2015 AGENDA, P. 223 OFFER OF JUDGMENT: RULE 68**

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The Minutes for the October meeting reflect extensive discussion of the offer-of-judgment provisions in Rule 68. Past efforts to revise Rule 68 have collapsed. Proposals published for comment in 1983 and 1984 met bitter resistance. A proposal developed some 20 years ago eventually fell under its own weight as the draft was revised to reflect a continually growing number of complications.

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A nearly constant feature of perennial suggestions for reform is to impose liability for attorney fees as a sanction for failing to improve on a rejected offer. Work to explore the theoretical consequences of this potentially significant departure from "the American Rule" has been considered, but not yet undertaken.

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The conclusion last October was that it would be useful to survey the experience with state offer-of-judgment rules and parallel rules on offers to settle or on paying into court. The Administrative Office staff has been asked to undertake this work, but the competing demands on staff time during a period of transition have impeded progress. Jon Rose did some helpful preliminary research. His message describing the overall results is attached, along with an outline of state provisions and a Rule 68 bibliography.

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These questions will remain on the active agenda.

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**APRIL 15, 2015 MINUTES, P. 17:**

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**RULE 68**

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Judge Campbell summarized the discussion of Rule 68 at the October 2014 meeting. Rule 68 was the subject of two published amendment proposals in 1983 and 1984. The project was abandoned in face of fierce controversy and genuine difficulties. Rule 68 was taken up again early in the 1990s and again the project was abandoned. Multiple problems surround the rule, including the basic question whether it is wise to maintain any rule that augments natural pressures to settle. But, aside from all the discovery rules taken together, Rule 68 is the most frequent subject of public suggestions that amendments should be undertaken. Most of the suggestions seek to add "teeth" to the rule by adding more severe consequences for failing to win a judgment better than a rejected offer. The Committee decided in October that the most fruitful line of attack will be to explore practices in state courts to see whether there are rules that in fact work better than Rule 68. Jonathan Rose undertook preliminary research that produced a chart of state rules, comparing their features to Rule 68. He also provided a bibliography. It was hoped that the Supreme Court Fellow at the

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3002 Administrative Office could make time to explore these materials,  
3003 and perhaps to look for state-court decisions. There have been  
3004 too many competing demands on his time, however, and little  
3005 progress has been made. This work will be pursued, aiming at a  
3006 report to the meeting next November.

3007 These brief statements reflect discussion at the October 30-  
3008 31, 2014, meeting. The central part of the materials for that  
3009 meeting is set out below, followed by Minutes of the Committee  
3010 discussion. The materials after the 2014 Minutes reflect  
3011 Committee deliberations from 1994 through 2008. The draft rule  
3012 text and Committee Note from the 1990s illustrate the  
3013 complexities that arise from attempts to address directly a  
3014 significant number of the complications that are identified by  
3015 close examination of an offer-of-judgment procedure.

3016 It is not inevitable that these questions be approached by  
3017 working on Rule 68. It might be discarded entirely and replaced  
3018 by something quite different. A procedure for payment into court  
3019 might be considered, although it might be difficult to provide a  
3020 comparable procedure for a plaintiff who prefers to settle. Still  
3021 other possibilities may emerge.

3022 **EXCERPTS FROM OCTOBER 30, 2014 AGENDA MATERIALS, PP. 225 ET SEQ.**

3023 **Rule 68: Dockets 13-CV-B, C, D, and More**

3024 This memorandum frames a broad question that has persisted  
3025 on the agenda for many years: Has the time come to undertake a  
3026 thorough study of the offer-of-judgment provisions of Rule 68?  
3027 The study would embrace the multitude of suggestions for  
3028 amendment and the astonishingly complex questions they raise. But  
3029 it also would ask whether the best choice is to abrogate Rule 68.  
3030 Any proposals that might emerge would be highly controversial. A  
3031 sanguine view would be that the controversy would emerge from the  
3032 belief that Rule 68 works well now. Less comforting views would  
3033 emphasize the belief that Rule 68 is largely innocuous because it  
3034 is seldom used outside cases where an offer can cut off a right  
3035 to statutory attorney fees, and is not routinely used even in  
3036 those cases; the compelling need to reconsider the rulings in two  
3037 Supreme Court cases;<sup>23</sup> and the great difficulties of addressing

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<sup>23</sup> One ruled that a Rule 68 offer cuts off any right to statutory attorney fees if the plaintiff wins, but wins less than the offer – but only if the fee statute characterizes the award as "costs." *Marek v. Chesny*, 473 U.S. 1 (1985). That ruling has been criticized because it seems directly at odds with the congressional purpose to favor some categories of claims by providing for fee awards. It also can be criticized on the ground that there is little reason to suppose that fee statutes are always drafted with an eye to the effect the choice of words has on Rule 68. The other decision ruled that if the plaintiff wins nothing after rejecting

3038 the questions raised by the most common proposals for reform –  
3039 extending the rule to offers by claimants and increasing the  
3040 incentives to accept an offer by augmenting the adverse  
3041 consequences for a party who rejects an offer and then fails to  
3042 win a judgment more favorable than the offer.

3043 The persistence of "mailbox" suggestions to revise Rule 68  
3044 is reflected in the number that have been carried forward on the  
3045 agenda without further action. They include at least 13-CV-B, 13-  
3046 CV-C, 13-CV-D, 10-CV-D, 06-CV-D, 04-CV-H, 03-CV-B, and 02-CV-D.  
3047 The Committee has considered 06-CV-D and the three earlier  
3048 suggestions and carried them forward for further consideration.  
3049 The more recent four suggestions have not been considered.

3050 These notes will begin by describing the suggestions that  
3051 remain pending on the docket. Then come a variety of materials  
3052 that describe past Committee work, going back to extensive work  
3053 that was done twenty years ago. These materials include excerpts  
3054 from Committee Minutes for October 20-21, 1994. The final  
3055 paragraph of those Minutes expresses the conclusion that "the  
3056 time has not come for final decisions on Rule 68. \* \* \* It was  
3057 agreed that the motion to repeal would be carried to the next  
3058 meeting, or until such time as there is additional information to  
3059 help appraise the effects of the present rule or the success of  
3060 various alternative state practices." Interest in revising Rule  
3061 68 has emerged spontaneously from the bar at regular intervals in  
3062 the ensuing 20 years. But it seems fair to observe that the  
3063 suggestions do not develop answers to the difficulties that arise  
3064 in attempting to address the complexities that inevitably follow.

3065 *The Pending Suggestions*

3066 13-CV-B: This proposal emerges from experience in defending  
3067 "patent troll" litigation. The purpose is to redress a perceived  
3068 imbalance: "plaintiffs have no risk and minimal investment in  
3069 bringing lawsuits, and \* \* \* defendants are forced to pay  
3070 millions of dollars in legal fees, discovery and expert witness  
3071 fees \* \* \*. The plaintiffs extort settlements based on this  
3072 asymmetrical advantage." Suggested rule language is included. The  
3073 suggestion would allow claimants to make Rule 68 offers. The  
3074 proposed rule language describes an offer "exclusive of attorney  
3075 fees"; provision to make an offer limited to a specific claim or  
3076 claims; explicit statement of any prospective effect of the offer  
3077 – such as whether the offeror obtains a paid-up license, a  
3078 running royalty license, or a permanent injunction; allowing Rule  
3079 68 awards to a defendant who wins outright; and requiring an  
3080 offeree who does not better the judgment to pay "reasonable  
3081 attorney fees incurred by the offeror related to the claim, or  
3082 claims, in the offer after the offer was made."

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a Rule 68 offer, the defendant is not eligible for a Rule 68 award because the plaintiff has not obtained a judgment. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981).

3083 13-CV-C: The proposal itself is only that Rule 68 allow for  
3084 offers by plaintiffs. The New Jersey rule allows plaintiffs to  
3085 make offers, and it is "very effective in forcing the defendant  
3086 to take a realistic view of the value of a case \* \* \*." New  
3087 Jersey Rule 4:58 is attached. The rule addresses several  
3088 questions not addressed by Rule 68 text. The rule is limited to  
3089 cases in which "the relief sought by the parties \* \* \* is  
3090 exclusively monetary in nature." There are detailed provisions  
3091 for offers, and counter-offers and successive offers. There is a  
3092 20% safety zone: a plaintiff wins sanctions only on recovering  
3093 120% or more of the offer, while a defendant wins only if  
3094 judgment for the plaintiff is 80% of the offer or less.  
3095 "Allowances" for failing to improve on the offer by the  
3096 prescribed margin include "all reasonable litigation expenses  
3097 incurred following non-acceptance," augmented interest, and "a  
3098 reasonable attorney's fee for such subsequent services as are  
3099 compelled by the non-acceptance." But allowances are not awarded  
3100 if they would impose undue hardship. Allowances to defendants are  
3101 denied if the claim is dismissed, a no-cause verdict is returned,  
3102 only nominal damages are awarded, or "a fee allowance would  
3103 conflict with the policies underlying a fee-shifting statute or  
3104 rule of court."

3105 13-CV-D: This submission by the New York City Bar starts off on a  
3106 seemingly modest note, but in fact is an ambitious exploration of  
3107 many different Rule 68 issues. The only explicit recommendation  
3108 is that offers by plaintiffs be brought into the rule. "[T]he  
3109 Committee could not reach consensus on recommending drastic  
3110 changes \* \* \* such as including attorneys' fees within the costs  
3111 awarded under it \* \* \*." The cover letter recognizes that  
3112 including plaintiffs' offers without adding a provision for fee  
3113 awards would have little impact, but notes that an alternative  
3114 such as a multiplier of recoverable costs might add some force to  
3115 a plaintiff's offer.

3116 One implicit theme is worth noting. The emphasis is not on  
3117 promoting settlement – almost all cases settle if they are not  
3118 otherwise disposed of before trial. The purpose of Rule 68  
3119 instead is seen as promoting early settlement, avoiding pretrial  
3120 costs that now are incurred before the parties feel driven to  
3121 settle or achieve the mutual information basis needed to support  
3122 settlement.

3123 The discussion of using awards of attorney fees as an  
3124 incentive to accept an offer provides both sides of the debate.  
3125 Fee awards "would deter plaintiffs from pursuing marginal claims  
3126 beyond the point where the costs of litigation outstrip any  
3127 potential recovery, and – if the rule were made symmetrical –  
3128 deter defendants from using superior resources to 'wear out'  
3129 plaintiffs."<sup>24</sup> The risk of unjust results could be met by

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<sup>24</sup> These effects are likely to be more complex and less easily calibrated than this summary suggests, but the tendencies are real.

3130 allowing discretion to reduce or deny a fee award. Two state  
3131 rules, from Alaska and California, are offered as illustrations.  
3132 A margin of error may be introduced, denying fees if the judgment  
3133 is within, for example, 10% of the offer. Adjustments may be made  
3134 to reflect the complexity of the litigation, the reasonableness  
3135 of the claims and defenses pursued by each side, "bad faith," the  
3136 risk that onerous fees would deter future litigants, the  
3137 reasonableness of the offeree's failure to accept, the closeness  
3138 of the questions of law and fact, the offeror's unreasonable  
3139 failure to disclose relevant information, whether the case  
3140 included a question of significant importance not yet addressed  
3141 by the courts, what relief might reasonably have been  
3142 anticipated, the amount of damages and other relief sought, the  
3143 efforts made to settle, and a range of factors commonly  
3144 considered in making fee awards for other reasons. It is  
3145 recognized that if a plaintiff prevails but fails to improve on  
3146 the offer, an award of fees to the defendant might be tempered or  
3147 denied if the plaintiff's claim is made under a statute that  
3148 allows fees to a prevailing plaintiff. And to make the rule truly  
3149 symmetrical, a plaintiff entitled to a statutory fee award would  
3150 have to be awarded a premium on the statutory fees award.

3151 The arguments against fee awards begin with the fear of  
3152 exerting undue pressure on plaintiffs to accept low offers rather  
3153 than risk the outcome of trial. Inconsistency with "the American  
3154 Rule" is an obvious concern. Going beyond that, it is urged that  
3155 although settlement is important as a practical matter, "one of  
3156 the rights of Americans is to have their disputes decided by an  
3157 impartial judge." A plaintiff, moreover, may sue for reasons  
3158 beyond damages or even an injunction: "A fair amount of  
3159 litigation is brought, or defended, for purposes of obtaining  
3160 vindication, to act as a test case, or for other legitimate  
3161 purposes." Fee awards would, "in effect, fine them for exercising  
3162 their right to obtain their legitimately sought objectives  
3163 through the litigation system." Consider libel plaintiffs, or  
3164 civil rights plaintiffs. The court system exists to decide cases;  
3165 "[t]he main purpose of courts is to do justice."<sup>25</sup> Discretion to  
3166 mitigate the harshness of fee awards in particular cases is not a  
3167 workable solution – it will aggravate the problem by generating  
3168 costly satellite litigation. And a fee-award system may "increase  
3169 the acrimony of cases that don't settle, because litigants then  
3170 need not only to win, but also to 'beat the spread.'"

3171 After making these central points, the memorandum adds  
3172 observations on many others. The rule that a defendant gets no  
3173 Rule 68 award if the plaintiff takes nothing is often criticized  
3174 as perverse, but others argue that defendants should not be able

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<sup>25</sup> These considerations closely parallel an avalanche of comments on the proposal to incorporate proportionality into the Rule 26(b)(1) scope of discovery. It is fair to suggest that a wide swath of the bar would react in similar ways to a proposal to add attorney fees to the catalogue of Rule 68 sanctions.

3175 to make a nominal offer in the hope that it will defeat the  
3176 court's discretion to deny defense costs even when the plaintiff  
3177 loses.

3178 Another possibility is to attach consequences "to every  
3179 settlement offer," without requiring a formal offer process. The  
3180 offer is to settle, not for entry of judgment. Some settlements  
3181 are not easily reduced to judgment, as confidential settlements  
3182 and those that involve conditional obligations. But such a rule  
3183 also could lead to a refusal even to discuss settlement in the  
3184 early stages of a case. And cases with multiple possible outcomes  
3185 on multiple claims may make it difficult to determine whether the  
3186 outcome is better than the settlement offer. And this approach  
3187 could deter settlement when a plaintiff insists on entry of  
3188 judgment and a defendant specifically wants no judgment. If a  
3189 plaintiff rejects the offer and obtains less money by judgment,  
3190 still the value of an explicit judgment for the plaintiff may add  
3191 up to something more favorable than the offer of money alone.

3192 Finally, it is noted that many courts refuse to include the  
3193 expenses incurred to retrieve and review electronically stored  
3194 information as statutory costs of copying. It has been suggested  
3195 that adding these expenses as Rule 68 sanctions could add real  
3196 force to the rule. But opponents of this approach urge that the  
3197 result could be to encourage unnecessary e-discovery in hopes of  
3198 coercing settlement, and that here too the result would be  
3199 extensive and costly satellite litigation.

3200 10-CV-D: The central proposition here is that Rule 68 should not  
3201 be available when a plaintiff claims nominal damages. A defendant  
3202 need only offer \$1.01, or \$10, to be able to recover all post-  
3203 offer costs if the plaintiff wins what is asked, \$1. So too Rule  
3204 68 should not be available on a claim for punitive damages –  
3205 punitive damages are not calculable and are imposed for social  
3206 purposes. A further suggestion is that the plaintiff should be  
3207 able to file a defendant's offer with the court for purposes  
3208 other than a determination of costs, compare Rule 68(b). One  
3209 purpose might be to seek relief from a bad-faith offer, here  
3210 illustrated by the \$1.01 offer that may frighten the plaintiff  
3211 into abandoning the case, or settling for something less than  
3212 vindication by judgment. A further related suggestion is that a  
3213 Rule 68 offer is not a confidential settlement communication, cf.  
3214 Evidence Rule 408.

3215 06-CV-D: This is the Second Circuit opinion discussed in one of  
3216 the attachments, "Rule 68: A Progress Report," which was the  
3217 basis for earlier Committee discussion.

3218 04-CV-H: Proposes expanding Rule 68 to allow plaintiffs to make  
3219 offers. Section 998 of the California Code of Civil Procedure is  
3220 attached as an illustration. The California statute allows an  
3221 award of expert witness fees as a sanction for failing to beat  
3222 the rejected offer; the award does not appear to be limited to  
3223 fees incurred after the offer.



3224 03-CV-B: This is a letter from Judge A. Wallace Tashima,  
3225 suggesting that plaintiffs should be authorized to make Rule 68  
3226 offers, pointing to the California statute. It includes a  
3227 response by Judge David F. Levi, describing the Committee's  
3228 earlier struggles with Rule 68: "In the end we were not able to  
3229 develop a proposal that we had confidence in."

3230 02-CV-D: This is a report "narrowly approved" by the Committee on  
3231 Federal Procedure of the Commercial and Federal Litigation  
3232 Section of the New York State Bar Association. It offers  
3233 interesting variations on familiar themes: Rule 68 should include  
3234 offers by claimants; sanctions should be expanded to include  
3235 expenses other than attorney fees, subject to reduction in the  
3236 court's discretion; sanctions should be available against a  
3237 claimant-offeree who loses all claims on dispositive motion or at  
3238 trial.

3239 The report begins with an explanation of the reasons why  
3240 Rule 68 is little used. Quoting the Seventh Circuit, it "'bites  
3241 only when the plaintiff wins but wins less than the defendant's  
3242 offer of judgment.'" And even then the bite does not hurt much  
3243 because offers often are made after most costs have been incurred  
3244 – the post-offer costs are likely to be relatively small.

3245 Suggestions that sanctions should be expanded to include  
3246 attorney fees are resisted. That approach would cut too deeply  
3247 into the American Rule. The suggestion instead is to award post-  
3248 offer expenses, excluding attorney fees, for such things as  
3249 "photocopying, deposition transcripts, travel and lodging for  
3250 attorneys, witnesses, and other personnel, fees of testifying  
3251 experts and other expert expenses recoverable under Fed.R.Civ.P.  
3252 26(b)(4)(C), and office services such as electronic imaging and  
3253 storage." [If the report were written today, it might include  
3254 post-offer expenses incurred in responding to ESI discovery  
3255 demands.]

3256 The award of expenses would be a matter of discretion. The  
3257 court would consider:

3258 (1) the relation of the claim to any other claim in the  
3259 action, (2) the relation of the expenses to the claim,  
3260 (3) the reasonableness of the offer, (4) the burden on  
3261 the offeree in paying the expenses, (5) the resources  
3262 of the offeror, (6) the importance of the claim, and  
3263 (7) the reasonableness of the rejection of the offer.

3264 A final suggestion is not much explained. The circumstance  
3265 is that an accepted Rule 68 offer and ensuing judgment may  
3266 include fewer than all claims among all parties. Rule 54(b) seems  
3267 to mean that the judgment is not final. So Rule 68 would be  
3268 amended to provide that the judgment, "if with respect to fewer  
3269 than all claims or all parties, shall nonetheless be considered  
3270 an appealable final judgment." There is no explanation of the  
3271 reasons why either offeror or offeree would have grounds, or even  
3272 standing, to appeal.



3323 this provides quite a bit of reading. It does not support any  
3324 immediate Rule 68 proposals. But it should provide a solid  
3325 foundation for determining whether to take these questions back  
3326 for sustained, even arduous, work.

3327 Notes on the 1983 and 1984 proposals

3328 The 1983 proposal is readily found at 98 F.R.D. 337, 361-  
3329 367.

3330 The latest time for the offer is set at 30 days before trial  
3331 begins, not 10 days. Rather than an offer for judgment, it would  
3332 be an offer "to settle a claim and to enter into a stipulation  
3333 dismissing the claim or to allow judgment to be entered  
3334 accordingly." The offer must remain open for 30 days. Evidence of  
3335 the offer would be admissible in a proceeding to enforce a  
3336 settlement. Both plaintiffs and defendants could make offers. If  
3337 the judgment is not more favorable to the offeree than the offer,  
3338 the starting point is that the offeree must pay expenses,  
3339 including reasonable attorney fees, incurred by the offeror after  
3340 making the offer. If the offer was made by a claimant, interest  
3341 on the amount of the claimant's offer would be added if not  
3342 otherwise included in the judgment. The court would have  
3343 authority to reduce the award of expenses and interest found to  
3344 be "excessive or unjustified under all of the circumstances. Nor  
3345 would costs, expenses, or interest be awarded if the offer was  
3346 made in bad faith (the Committee Note uses a \$1 offer as an  
3347 example). The language of the text is revised to allow an award  
3348 to a defendant when the judgment is for the defendant. Finally,  
3349 class and derivative actions under Rules 23, 23.1, and 23.2 are  
3350 excluded from Rule 68. The Committee Note explains that this is  
3351 in part because the court must approve settlements under those  
3352 rules, and also because a representative party should not be  
3353 exposed to a risk of heavy liability for costs and expenses – a  
3354 prospect that could lead to a conflict of interests.

3355 The 1984 proposal is readily found at 102 F.R.D. 432-437. It  
3356 is different in many ways, some dramatic. Timing is changed: the  
3357 offer may be made at any time more than 60 days after the service  
3358 of summons and complaint on a party, but not less than 90 days  
3359 (or 75 days for a counter-offer) before trial. The offer "shall  
3360 remain open for 60 days unless sooner withdrawn." If an offer is  
3361 not accepted, a subsequent offer can be made.

3362 The most dramatic changes in the 1984 proposal are in the  
3363 provisions for sanctions. These provisions obviously reflect the  
3364 comments on the 1983 proposal.

3365 The first step is to provide for a sanction. Sanctions  
3366 depend on finding "that an offer was rejected unreasonably,  
3367 resulting in unnecessary delay and needless increase in the cost  
3368 of the litigation." This determination depends on "all of the  
3369 relevant circumstances at the time of rejection." Six examples  
3370 are provided: (1) the apparent merit or lack of merit of the  
3371 claim; (2) "the closeness of the questions of fact and law at

3372 issue, (3) whether the offeror had unreasonably refused to  
3373 furnish information necessary to evaluate the reasonableness of  
3374 the offer, (4) whether the suit was in the nature of a 'test  
3375 case,' presenting questions of far-reaching importance affecting  
3376 non-parties, (5) the relief that might reasonably have been  
3377 expected if the claimant should prevail, and (6) the amount of  
3378 the additional delay, cost, and expense that the offeror  
3379 reasonably could be expected to incur if the litigation should be  
3380 prolonged."

3381 The next step, if a sanction is ordered, is to determine the  
3382 amount. In addition to the factors considered in determining to  
3383 award a sanction, the court is to "take into account (1) the  
3384 extent of the delay, (2) the amount of the parties' costs and  
3385 expenses, including any reasonable attorney's fees incurred by  
3386 the offeror as a result of the offeree's rejection, (3) the  
3387 interest that could have been earned at prevailing rates on the  
3388 amount that a claimant offered to accept \* \* \*; and (4) the  
3389 burden of the sanction on the offeree."

3390 These flexible sanctions provisions might have had a  
3391 significant effect in reducing the risk that Rule 68 can be a  
3392 device that enables a defendant to take advantage of a risk-  
3393 averse plaintiff or a plaintiff who has valid reasons for  
3394 preferring judgment on the merits to settlement. But the work  
3395 involved in implementing them is apparent.

3396 **MINUTES, OCTOBER 30, 2014 MEETING, PP. 25-29**

3397 Rule 68, dealing with offers of judgment, has a long history  
3398 of Committee deliberations followed by decisions to avoid any  
3399 suggested revisions. Proposed amendments were published for  
3400 comment in 1983. The force of strong public comments led to  
3401 publication of a substantially revised proposal in 1984. Reaction  
3402 to that proposal led the Committee to withdraw all proposed  
3403 revisions. Rule 68 came back for extensive work early in the  
3404 1990s, in large part in response to suggestions made by Judge  
3405 William W Schwarzer while he was Director of the Federal Judicial  
3406 Center. That work concluded in 1994 without publishing any  
3407 proposals for comment. The Minutes for the October 20-21 1994  
3408 meeting reflect the conclusion that the time had not come for  
3409 final decisions on Rule 68. Public suggestions that Rule 68 be  
3410 restored to the agenda have been considered periodically since  
3411 then, including a suggestion in a Second Circuit opinion in 2006  
3412 that the Committee should consider the standards for comparing an  
3413 offer of specific relief with the relief actually granted by the  
3414 judgment.

3415 Although there are several variations, the most common  
3416 feature of proposals to amend Rule 68 is that it should provide  
3417 for offers by claimants. From the beginning Rule 68 has provided  
3418 only for offers by parties opposing claims. Providing mutual  
3419 opportunities has an obvious attraction. The snag is that the  
3420 sanction for failing to better a rejected offer by judgment has

3421 been liability for statutory costs. A defendant who refuses a  
3422 \$80,000 offer and then suffers a \$100,000 judgment would  
3423 ordinarily pay statutory costs in any event. Some more forceful  
3424 sanction would have to be provided to make a plaintiff's Rule 68  
3425 offer more meaningful than any other offer to settle. The most  
3426 common proposal is an award of attorney fees. But that sanction  
3427 would raise all of the intense sensitivities that surround the  
3428 "American Rule" that each party bears its own expenses, including  
3429 attorney fees, win or lose. Recognizing this problem, alternative  
3430 sanctions can be imagined – double interest on the judgment,  
3431 payment of the plaintiff's expert-witness fees, enhanced costs,  
3432 or still other painful consequences. The weight of many of these  
3433 sanctions would vary from case to case, and might be more  
3434 difficult to appraise while the defendant is considering the  
3435 consequences of rejecting a Rule 68 offer.

3436 Another set of concerns is that any reconsideration of Rule  
3437 68 would at least have to decide whether to recommend departure  
3438 from two Supreme Court interpretations of the present rule. Each  
3439 rested on the "plain meaning" of the present rule text, so no  
3440 disrespect would be implied by an independent examination. One  
3441 case ruled that a successful plaintiff's right to statutory  
3442 attorney fees is cut off for fees incurred after a rejected offer  
3443 if the judgment falls below a rejected Rule 68 offer, but only if  
3444 the fee statute describes the fee award as a matter of "costs."  
3445 It is difficult to understand why, apart from the present rule  
3446 text, a distinction should be based on the likely random choice  
3447 of Congress whether to describe a right to fees as costs. More  
3448 fundamentally, there is a serious question whether the strategic  
3449 use of Rule 68 should be allowed to defeat the policies that  
3450 protect some plaintiffs by departing from the "American Rule" to  
3451 encourage enforcement of statutory rights by an award of attorney  
3452 fees. The prospect that a Rule 68 offer may cut off the right to  
3453 statutory fees, further, may generate pressures on plaintiff's  
3454 counsel that might be seen as creating a conflict of interests  
3455 with the plaintiff. The other ruling is that there is no sanction  
3456 under Rule 68 if judgment is for the defendant. A defendant who  
3457 offers \$10,000, for example, is entitled to Rule 68 sanctions if  
3458 the plaintiff wins \$9,000 or \$1, but not if judgment is for the  
3459 defendant. Rule 68 refers to "the judgment that the offeree  
3460 finally obtains," and it may be read to apply only if the  
3461 plaintiff "obtains" a judgment, but the result should be  
3462 carefully reexamined.

3463 The desire to put "teeth" into Rule 68, moreover, must  
3464 confront concerns about the effect of Rule 68 on a plaintiff who  
3465 is risk-averse, who has scant resources for pursuing the  
3466 litigation, and who has a pressing need to win some relief. The  
3467 Minutes for the October, 1994 meeting reflect that "[a] motion to  
3468 abrogate Rule 68 was made and seconded twice. Brief discussion  
3469 suggested that there was support for this view \* \* \*." Abrogation  
3470 remains an option that should be part of any serious study.

3471 Finally, it may be asked whether it is better to leave Rule  
3472 68 where it lies. It is uniformly agreed that it is not much  
3473 used, even in cases where it might cut off a statutory right to  
3474 attorney fees incurred after the offer is rejected. It has become  
3475 an apparently common means of attempting to defeat certification  
3476 of a class action by an offer to award complete relief to the  
3477 putative class representative, but those problems should not be  
3478 affected by the choice to frame the offer under Rule 68 as  
3479 compared to any other offer to accord full relief. Courts can  
3480 work their way through these problems absent any Rule 68  
3481 amendment; whether Rule 23 might be amended to address them is a  
3482 matter for another day.

3483 Discussion began with experience in Georgia. Attorney-fee  
3484 shifting was adopted for offers of judgment in 2005, as part of  
3485 "tort reform" measures designed to favor defendants. "It creates  
3486 enormously difficult issues. Defendants take advantage." And it  
3487 is almost impossible to frame a rule that accurately implements  
3488 what is intended. Already some legislators are thinking about  
3489 repealing the new provisions. If Rule 68 is to be taken up, the  
3490 work should begin with a study of the "enormous level of activity  
3491 at the state level."

3492 Any changes, moreover, will create enormous uncertainty, and  
3493 perhaps unintended consequences.

3494 Another member expressed fear that the credibility of the  
3495 Committee will suffer if Rule 68 proposals are advanced, no  
3496 matter what the proposals might be. Debates about "loser pays"  
3497 shed more heat than light.

3498 A judge expressed doubts whether anything should be done,  
3499 but asked what effects would follow from a provision for  
3500 plaintiff offers? One response was that the need to add "teeth"  
3501 would likely lead to fee-shifting, whether for attorneys or  
3502 expert witnesses.

3503 It was noted that California provides expert-witness fees as  
3504 consequences. But expert fees are variable, not only from expert  
3505 to expert but more broadly according to the needs for expert  
3506 testimony in various kinds of cases.

3507 The value of undertaking a study of state practices was  
3508 repeated. "I pause about setting it aside; this has prompted  
3509 several suggestions." State models might provide useful guidance.

3510 Another member agreed – "If anything, let's look to the  
3511 states." When people learn he's a Committee member, they start to  
3512 offer Rule 68 suggestions. Part 36 of the English Practice Rules  
3513 – set in a system that generally shifts attorney fees to the  
3514 loser – deals with offers in 22 subsections; this level of  
3515 complication shows the task will not be easy. There is ground to  
3516 be skeptical whether we will do anything – early mediation

3517 probably is a better way to go. Still, it is worthwhile to look  
3518 to state practice.

3519 A member agreed that "studies do little harm. But I suspect  
3520 a review will not do much to help us." It is difficult to measure  
3521 the actual gains and losses from offers of judgment.

3522 One value of studying offers of judgment was suggested:  
3523 Arguments for this practice have receded from the theory that it  
3524 increases the rate of settlement – so few cases survive to trial  
3525 that it is difficult to imagine any serious gain in that  
3526 dimension. Instead, the argument is that cases settle earlier. If  
3527 study shows that cases do not settle earlier, that offers are  
3528 made only for strategic purposes, that would undermine the case  
3529 for Rule 68.

3530 Another member suggested that in practice the effect of  
3531 Rule 68 probably is to augment cost and delay. In state courts  
3532 much time and energy goes into the gamesmanship of statutory  
3533 offers. "Reasonable settlement discussion is unlikely. The Rule  
3534 68 timing is wrong; it's worse in state courts."

3535 It also was observed that early settlement is not  
3536 necessarily a good thing if it reflects pressure to resolve a  
3537 case before there has been sufficient discovery to provide a good  
3538 sense of the claim's value. This was supplemented by the  
3539 observation that early mediation may be equally bad.

3540 Another member observed that a few years ago he was struck  
3541 by the quagmire aspects of Rule 68, by the gamesmanship, by the  
3542 fear of unintended consequences from any revision. There is an  
3543 analogy to the decision of the Patent Office a century ago when  
3544 it decided to refuse to consider any further applications to  
3545 patent a perpetual motion machine. "The prospect of coming up  
3546 with something that will be frequently utilized to good effect is  
3547 dim." There is an unfavorable ratio between the probability of  
3548 good results and the effort required for the study.

3549 A judge responded that the effort could be worth it if the  
3550 study shows such a dim picture of Rule 68 that the Committee  
3551 would recommend abrogation.

3552 The Department of Justice reported little use of Rule 68,  
3553 either in making or receiving offers. When it has been used, it  
3554 is at the end, when settlement negotiations fail. In two such  
3555 cases, it worked in one and not the other.

3556 A member observed that if Rule 68 is little used, it is  
3557 essentially inconsequential, "we don't gain much by abrogating  
3558 it." He has used it twice.

3559 The discussion closed by concluding that the time has not  
3560 come to appoint a Subcommittee to study Rule 68, but that it will

3561 be useful to undertake a study of state practices in time for  
3562 consideration at the next meeting.



3563

**EXCERPTS FROM APRIL 28-29, 1994 MINUTES**

3564

*Rule 68*

3565

Discussion of Rule 68 began with presentation by John Shapard of the preliminary results of the Federal Judicial Center survey of settlement experience. The survey was divided into two parts. The first part drew from 4 matched sets of 200 cases each, 100 of which settled and 100 of which went to trial. The effort was in part an attempt to learn more about the factors that foster or thwart settlement, and in part to learn the reactions of practicing attorneys to possible changes in Rule 68. The questions to be tested were whether there is reason to cling to the hope that strengthened consequences might make Rule 68 an effective tool to increase the number of cases to settle, to advance the time at which cases settle, and to reduce misuse of pretrial procedures lest the misuser be forced to pay attorney fees incurred by the adversary. The concerns about strengthened consequences also were tested in an effort to determine whether the rule might force unfair settlements on financially weak parties or might cause trial of some cases that now settle. The second part of the survey used a different questionnaire for 200 civil rights cases, in which present Rule 68 has real teeth because of its effect on recovery of statutory attorney fees.

3585

The questionnaire used in the general survey took two approaches. One, and likely the more useful, was to ask counsel about what happened and what might have happened in their actual cases. The second was to ask counsel for general opinions. It is an important caution that only first-round responses are available, with a 30-35% response rate. As an illustration of a strengthened Rule 68, the questionnaire posited a sanction of one-half of post-offer attorney fees. At this stage of response, there is evidence that approximately 25% of the attorneys responding for cases that went to trial believed that a strengthened Rule 68 might have led to settlement, and approximately 25% of the attorneys responding for cases that settled believed that a strengthened Rule 68 might have led to earlier settlement.

3599

In specific cases, there was a wide variation of plaintiff and defendant settlement demands. In tried cases in which counsel for both sides responded – a total of 22 cases – there were three that apparently should have settled because of overlap between the demands of plaintiff and defendant. The problem may have been failure of communication-negotiation, or it may have been divergence between the settlement views of counsel and clients.

3607

The answers for the civil rights cases were comparable to other cases on many questions. But there was polarization on some questions. Defendants want Rule 68 strengthened, and plaintiffs would be happy to abolish it. These answers reflect the fact that defendants and plaintiffs both understand the way

3612 Rule 68 works today in litigation under attorney fee-shifting  
3613 statutes.

3614 The information about expenses incurred in responding to  
3615 pretrial requests is one important result of the survey.

3616 Mr. Shapard responded to a question by stating that if he  
3617 were writing the rule, he would try to give it teeth for both  
3618 sides, without upsetting the fee-shifting statutes. He would be  
3619 encouraged by the survey responses to proceed on a moderate basis  
3620 to allow offers by both plaintiffs and defendants, with greater  
3621 consequences such as shifting 50% of post-offer attorney fees.  
3622 Although it would be more effective to avoid any cap on fee-  
3623 shifting, it is a political necessity to adopt a cap that  
3624 protects a plaintiff against any actual out-of-pocket liability  
3625 for an adversary's attorney fees.

3626 Another question asked about the element of gamesmanship  
3627 that might be introduced by increasing Rule 68 consequences,  
3628 leading to strategic moves designed to control or exploit this  
3629 new element of risk rather than to produce settlement. Mr.  
3630 Shapard recognized the risk, but observed that we can create a  
3631 new set of game rules. Although there are cases that the parties  
3632 do not wish to compromise, most cases settle because of the  
3633 economics of the situation. A changed game will only lead to  
3634 getting better offers on the table.

3635 Mr. Shapard also suggested that this survey will provide  
3636 about 90% of what might be learned by empirical research. There  
3637 is a growing body of theoretical research as well. Some states  
3638 have rules that might be considered in the effort to gain  
3639 additional empirical evidence of the effects of enhanced  
3640 consequences.

3641 It was asked what might be done to generate positive  
3642 incentives for plaintiffs in fee-shifting cases, since they get  
3643 fees if they win without regard to Rule 68. Mr. Shapard replied  
3644 that this was uncertain, although expert witness fees might be  
3645 used as a consequence if they are not reached by the fee-shifting  
3646 statute. Another possibility would be to allow an increment  
3647 above the statutory fee.

3648 It was observed that some lawyers would like to abolish Rule  
3649 68. Mr. Shapard suggested that this would be of little  
3650 consequence in comparison to present practice, apart from  
3651 statutory fee-shifting cases, since Rule 68 is little used. In  
3652 civil rights fee-shifting cases, on the other hand, the survey  
3653 shows that Rule 68 was used or had an effect in about 20% of the  
3654 cases.

3655 Mr. Shapard also noted that it may be possible to correlate  
3656 the answers on the reasons for not settling with other answers  
3657 about the nonsettling cases to learn more about the possible  
3658 consequences of strengthening Rule 68. There still are cases

3659 that go to trial, and they are not all contract litigation  
3660 between large enterprises.

3661 Discussion turned to the relationships between Rule 68 and  
3662 attorney-fee arrangements. The "cap" in the current draft would  
3663 avoid the problem of liability for defense attorney fees in an  
3664 action brought by a plaintiff under a contingent-fee arrangement.  
3665 Without the cap, it would be necessary to determine whether the  
3666 plaintiff or the attorney should be responsible for this out-of-  
3667 pocket cost. Plaintiff liability would have a dramatic effect on  
3668 the character of contingent-fee representation. The effect on  
3669 fee-shifting statutes also was noted. This effect extends beyond  
3670 "civil rights" litigation to reach any fee-shifting statute  
3671 characterized in terms of "costs." The view was expressed that  
3672 using Rule 68 to cut off the right to post-offer statutory fees  
3673 violates the Rules Enabling Act, notwithstanding the contrary  
3674 ruling in *Marek v. Chesny*, and that the violation cannot be cured  
3675 by the semantic device of referring to the result as a  
3676 "sanction." There is no preexisting procedural duty to settle  
3677 that supports denial of a fee award. We should not continue the  
3678 violation of the Enabling Act in an amended Rule 68. Similar  
3679 doubts were expressed about Enabling Act authority to adopt  
3680 attorney-fee shifting as a sanction in more general terms.

3681 More general discussion followed. One view was that there  
3682 is little reason to suppose that it is desirable to foster  
3683 earlier and more frequent settlements by means of Rule 68.  
3684 Litigants with vast resources have too many advantages in our  
3685 system, and their advantages would be entrenched and exacerbated  
3686 by strengthening Rule 68. A supporting view was that the  
3687 Judicial Center survey does not change the case against expanding  
3688 the rule. On the other hand, it might be an undesirable symbol  
3689 to abrogate the rule.

3690 One possible problem with the survey was suggested: many of  
3691 those who did not respond may have been worried about their  
3692 freedom to answer the questions. Even with pledges of anonymity,  
3693 client permission should be sought, and there is still some  
3694 concern about loss of confidentiality. Another concern is that  
3695 the first question about alternative sanction systems did not  
3696 provide for indicating second choices.

3697 Experience with the California practice was again recalled.  
3698 California includes "costs" in the offer-of-judgment sanctions,  
3699 and costs commonly include expert witness fees. The rule seems  
3700 to exert a real influence on settlement. It also is helpful in  
3701 effecting settlement pending appeal because the cost award is a  
3702 useful bargaining item. One conclusion was that the Committee  
3703 should find out more about the actual operation of the California  
3704 practice as a more modest means of encouraging acceptance of  
3705 offers.

3706 Mr. Sherk was asked to describe experience with Arizona  
3707 Rule 68. Starting with a rule like Federal Rule 68, the Arizona

3708 rule was first amended to make it bilateral. Then, noting that  
3709 an award of costs does not provide a meaningful benefit to a  
3710 plaintiff who has prevailed to the extent of doing better than  
3711 its offer of judgment, stiffer sanctions were adopted. The rule  
3712 has become more complicated, and is difficult to administer.

3713 Professor Rowe described his ongoing research of the effects  
3714 of different attorney fee sanctions by means of a computer  
3715 simulation exercise sent to practicing attorneys. One of the  
3716 hypotheses is that significant sanctions will smoke out more  
3717 realistic offers, which will ease the path to settlement.  
3718 Another concern to be tested is the effect of "low-ball" offers  
3719 on risk-averse and poorly financed parties. One preliminary  
3720 result of the research is that in a significant minority of cases  
3721 there also can be a "high-ball" effect in which significant  
3722 sanctions encourage defense attorneys to accept high plaintiff  
3723 demands. The explanation may be that a defending lawyer hates to  
3724 have to tell the client that the client must pay the plaintiff's  
3725 attorney fees. Another effect is that substantial sanctions give  
3726 poor plaintiffs the means to bring claims that are strong on the  
3727 merits for relatively small amounts.

3728 The observation that present Rule 68 can operate to distort  
3729 relations between attorneys and clients in statutory fee-shifting  
3730 cases led to the question whether a system that allows for offers  
3731 by plaintiffs as well as by defendants might lead to arrangements  
3732 in which clients insist that lawyers bear the cost of Rule 68  
3733 sanctions.

3734 Note was made of a quite different sanction possibility.  
3735 Founded on the premise that many contingent-fee cases do not  
3736 involve any significant risk that the plaintiff will take  
3737 nothing, this suggestion would limit plaintiffs' attorneys to  
3738 hourly rates for post-offer work that leads to recovery of less  
3739 than a Rule 68 offer.

3740 The conclusions reached after this discussion were, first,  
3741 that the current draft proposal should not now be presented to  
3742 the Standing Committee. Second, Rule 68 should remain under  
3743 consideration, including study of the effects on fee-shifting  
3744 statutes, alternative sanctions such as awards of expert witness  
3745 fees or restrictions on contingent fees, and abrogation of Rule  
3746 68. The Federal Judicial Center study will be completed and  
3747 considered further. The Committee expressed its great  
3748 appreciation for the work and help of the Judicial Center.

3749 **EXCERPTS FROM OCTOBER 20-21, 1994 MINUTES**

3750 *Rule 68*

3751 Rule 68 has been before the Committee for some time. At the  
3752 April, 1994 meeting, it was concluded that further action should  
3753 await completion of the Federal Judicial Center study of Rule 68.  
3754 John Shapard, who is in charge of the study, put it aside over

3755 the summer for the purpose of completing the survey of practices  
3756 surrounding attorney participation in voir dire examination of  
3757 prospective jurors. See the discussion of Rule 47(a) above.

3758 An informal survey of California practice was described.  
3759 California "section 998" uses costs as an offer-of-judgment  
3760 sanction, but costs commonly include expert witness fees in  
3761 addition to the more routine items of costs taxed in federal  
3762 courts. Generally this sanction is seen as desirable, although  
3763 respondents generally would like more significant sanctions.  
3764 Most thought the state practice was more satisfactory than Rule  
3765 68. There was no strong feeling against the state practice. One  
3766 lawyer thought the state practice restricts his freedom in  
3767 negotiating for plaintiffs. This state practice seems preferable  
3768 to the complicated "capped benefit-of-the-judgment" approach  
3769 embodied in the current Rule 68 draft.

3770 Another comment was that Rule 68 becomes an element of  
3771 gamesmanship in fee-shifting cases. It is like a chess game – an  
3772 extra shield and tool in civil-rights litigation. It is working  
3773 close to a casino mentality. But Rule 68 has meaning only in  
3774 cases where attorney fees are thus at stake. It would be better  
3775 to abandon it.

3776 Professor Rowe described his ongoing empirical work with  
3777 Rule 68, investigating the consequences of adding attorney-fee  
3778 sanctions. The work does not answer all possible questions. An  
3779 offer-of-judgment rule may have the effect of encouraging strong  
3780 small claims that otherwise would not support the costs of suit;  
3781 this hypothesis has not yet been subjected to effective testing.  
3782 There does seem to be an effect on willingness to recommend  
3783 acceptance of settlement offers, and perhaps to smoke out earlier  
3784 offers. Results are mixed on the question whether such a rule  
3785 may moderate demands or, once an offer is made, encourage the  
3786 offeror to "dig in" and resist further settlement efforts in  
3787 hopes of winning sanctions based on the offer. And there is a  
3788 possible "high-ball" effect that encourages defendants to settle  
3789 for more, just as there may be a "low-ball" effect that  
3790 encourages plaintiffs to settle for less.

3791 John Frank reminded the Committee of the reactions that met  
3792 the efforts in 1983 and 1984 to increase Rule 68 sanctions. At  
3793 the time, he had feared that efforts to pursue those proposals  
3794 further might meet such protest as to bring down the Enabling Act  
3795 itself. He also noted that there are other means of encouraging  
3796 settlement, and imposing sanctions, that involve less  
3797 gamesmanship and more neutral control. "Michigan mediation,"  
3798 which was recognized as a form of court-annexed arbitration with  
3799 fee-shifting consequences for a rejecting party who fails to do  
3800 almost as well as the mediation award, was described. The view  
3801 was expressed that this and other alternate dispute resolution  
3802 techniques have made Rule 68 antique in comparison.

3803           Some members of the Committee suggested that the best  
3804 approach would be to rescind Rule 68. It might work well between  
3805 litigants of equal sophistication and resources, but it is not  
3806 fair in other cases, even if it is made two-way. A motion to  
3807 abrogate Rule 68 was made and seconded twice. Brief discussion  
3808 suggested that there was support for this view, but also support  
3809 for an attempt to provide more effective sanctions in a form less  
3810 complicated than the present draft.

3811           Alfred Cortese noted that Rule 68 has been "studied to  
3812 death." An ABA committee looked at it but could not reach any  
3813 consensus. Most lawyers are adamantly opposed to fee-shifting  
3814 sanctions.

3815           After further discussion, it was concluded that the time has  
3816 not come for final decisions on Rule 68. It has significant  
3817 effect in actions brought under attorney fee-shifting statutes  
3818 that characterize fees as costs. Repeal would have a  
3819 correspondingly significant effect on such litigation. Even if  
3820 the present rule seems hurtful, there should be a better idea of  
3821 the consequences of repeal. It was agreed that the motion to  
3822 repeal would be carried to the next meeting, or until such time  
3823 as there is additional information to help appraise the effects  
3824 of the present rule or the success of various alternative state  
3825 practices.

3826 **Rule 68. Offer of Settlement**

3827 (a) Offers. A party may make an offer of settlement to another  
3828 party.

- 3829 (1) The offer must:
- 3830 (A) be in writing and state that it is a Rule 68  
3831 offer;
  - 3832 (B) be served at least 30 days after the summons and  
3833 complaint if the offer is made to a defendant;
  - 3834 (C) [not be filed with the court] {be filed with the  
3835 court only as provided in (b)(2) or (c)(2)};
  - 3836 (D) remain open for [a stated period of] at least 21  
3837 days unless the court orders a different period;  
3838 and
  - 3839 (E) specify the relief offered.
- 3840 (2) The offer may be withdrawn by writing served on the  
3841 offeree before the offer is accepted. [Withdrawal  
3842 nullifies the offer for all purposes.]

3843 (b) Acceptance; Disposition.

- 3844 (1) An offer made under (a) may be accepted by a written  
3845 notice served [on the offeror] while the offer remains  
3846 open.
- 3847 (2) A party may file {the} [an accepted] offer, notice of  
3848 acceptance, and proof of service. The clerk or court  
3849 must then enter the judgment specified in the offer.  
3850 [But the court may refuse to enter judgment if it finds  
3851 that the judgment is unfair to another party or  
3852 contrary to the public interest.]

3853 (c) Expiration.

- 3854 (1) An offer expires if it is not withdrawn or accepted  
3855 before the end of the period set under (a)(1)(D).
- 3856 (2) Evidence of an expired offer is admissible only in a  
3857 proceeding to determine costs and attorney fees under  
3858 Rule 54(d).

3859 (d) Successive Offers. A party may make an offer of settlement  
3860 after making [, rejecting,] or failing to accept an earlier  
3861 offer. A successive offer that expires does not deprive a  
3862 party of {remedies} [sanctions] based on an earlier offer.

- 3863 (e) {Remedies}[Sanctions]. Unless the final judgment is more  
3864 favorable to the offeree than an expired offer the offeree  
3865 must pay a {remedy} [sanction] to the offeror.
- 3866 (1) If the offeree is not entitled to a statutory award of  
3867 attorney fees, the {remedy} [sanction] must include:
- 3868 (A) costs incurred by the offeror after the offer  
3869 expired; and
  - 3870 (B) reasonable attorney fees incurred by the offeror  
3871 after the offer expired, limited as follows:
    - 3872 (i) the monetary difference between the offer and  
3873 judgment must be subtracted from the fees;  
3874 and
    - 3875 (ii) the fee award must not exceed the money  
3876 amount of the judgment.
- 3877 (2) If the offeree is entitled to a statutory award of  
3878 attorney fees, the {remedy} [sanction] must include:

- 3879 (A) costs incurred by the offeror after the offer  
3880 expired; and  
3881 (B) denial of attorney fees incurred by the offeree  
3882 after the offer expired.  
3883 (3) (A) The court may reduce the {remedy}[sanction] to  
3884 avoid undue hardship [or because the judgment  
3885 could not reasonably have been expected at the  
3886 time the offer expired].  
3887 (B) No {remedy may be given} [sanction may be imposed]  
3888 on disposition of an action by acceptance of an  
3889 offer under this rule or other settlement.  
3890 (4) (A) A judgment for a party demanding relief is more  
3891 favorable than an offer to it:  
3892 (i) if the amount awarded – including the costs,  
3893 attorney fees, and other amounts awarded for  
3894 the period before the offer {was served}  
3895 [expired] – exceeds the monetary award that  
3896 would have resulted from the offer; and  
3897 (ii) if nonmonetary relief is demanded and the  
3898 judgment includes all the nonmonetary relief  
3899 offered, or substantially all the nonmonetary  
3900 relief offered and additional relief.  
3901 (B) A judgment is more favorable to a party opposing  
3902 relief than an offer to it:  
3903 (i) if the amount awarded – including the costs,  
3904 attorney fees, and other amounts awarded for  
3905 the period before the offer {was served}  
3906 [expired] – is less than the monetary award  
3907 that would have resulted from the offer; and  
3908 (ii) if nonmonetary relief is demanded and the  
3909 judgment does not include [substantially] all  
3910 the nonmonetary relief offered.

3911 (f) Nonapplicability. This rule does not apply to an offer made  
3912 in an action certified as a class or derivative action under  
3913 Rule 23, 23.1, or 23.2.

3914 *Fee statute alternative*

- 3915 (e) {Remedies}[Sanctions]. Unless the final judgment is more  
3916 favorable to the offeree than an expired offer the offeree  
3917 must pay a {remedy}[sanction] to the offeror.  
3918 (1) The {remedy}[sanction] must include:  
3919 (A) costs incurred by the offeror after the offer  
3920 expired; and  
3921 (B) reasonable attorney fees incurred by the offeror  
3922 after the offer expired, limited as follows:  
3923 (i) the monetary difference between the offer and  
3924 judgment must be subtracted from the fees;  
3925 and  
3926 (ii) the fee award must not exceed the money  
3927 amount of the judgment.  
3928 (2) (A) The court may reduce the {remedy}[sanction] to  
3929 avoid undue hardship [or because the judgment



3930 could not reasonably have been expected at the  
3931 time the offer expired].  
3932 (B) No {remedy may be given}[sanction may be imposed]:  
3933 (i) against a party that otherwise is entitled to  
3934 a statutory award of attorney fees;  
3935 (ii) on disposition of an action by acceptance of  
3936 an offer under this rule or other settlement.

3937 (e)(2)(B)(i) might take less protective forms: No remedy may be  
3938 given:  
3939 *Costs but not fee shifting*  
3940 (i) that requires payment of attorney fees by a  
3941 party that is entitled to a statutory award  
3942 of attorney fees; or  
3943 *Statutory fees not affected*  
3944 (i) that affects the statutory right of a party  
3945 to an award of attorney fees;

## COMMITTEE NOTE

3947 Former Rule 68 has been properly criticized as one-sided and  
3948 largely ineffectual. It was available only to parties defending  
3949 against a claim, not to parties making a claim. It provided  
3950 little inducement to make or accept an offer since in most cases  
3951 the only penalty suffered by declining an offer was the  
3952 imposition of the typically insubstantial taxable costs  
3953 subsequently incurred by the offering party. Greater incentives  
3954 existed after the decision in *Marek v. Chesny*, 473 U.S. 1 (1985),  
3955 which ruled that a plaintiff who obtains a positive judgment less  
3956 than a defendant's Rule 68 offer loses the right to collect post-  
3957 offer attorney fees provided by a statute as "costs" to a  
3958 prevailing plaintiff. The decision in the Marek case, however,  
3959 was limited to cases affected by such fee-shifting statutes. It  
3960 also provoked criticism on the ground that it was inconsistent  
3961 with the statutory policies that favor special categories of  
3962 claims with the right to recover fees.

3963 Earlier proposals were made to make Rule 68 available to all  
3964 parties and to increase its effects by authorizing attorney fee  
3965 sanctions. These proposals met with vigorous criticism.  
3966 Opponents stressed the policy considerations involved in the  
3967 "American Rule" on attorney fees. They emphasized that the  
3968 opportunity of all parties to attempt to shift fees through Rule  
3969 68 offers could produce inappropriate windfalls and would create  
3970 unequal pressures and coerce unfair settlements because parties  
3971 often have different levels of knowledge, risk-averseness, and  
3972 resources.

3973 The basis for many of the changes made in the amended Rule  
3974 68 is provided in an article by Judge William W. Schwarzer, *Fee-  
3975 Shifting Offers of Judgment – an Approach to Reducing the Cost of  
3976 Litigation*, 76 *Judicature* 147 (1992).

3977 The amended rule allows any party to make a Rule 68 offer.  
3978 The incentives for early settlement are increased by increasing  
3979 the consequences of failure to win a judgment more favorable than  
3980 an expired offer. A plaintiff is liable for post-offer costs  
3981 even if the plaintiff takes nothing, a result accomplished by  
3982 removing the language that supported the contrary ruling in *Delta  
3983 Air Lines, Inc. v. August*, 1981, 450 U.S. 346. Post-offer  
3984 attorney fees are shifted, subject to two limits. The amount of  
3985 post-offer attorney fees is reduced by the difference between the  
3986 offer and the judgment. In addition, the attorney fee award  
3987 cannot exceed the amount of the judgment. A plaintiff who wins  
3988 nothing pays no attorney fees. A defendant pays no more in fees  
3989 than the amount of the judgment.

3990 A plaintiff's incentive to accept a defendant's Rule 68  
3991 offer includes the incentive that applies to all offers – the  
3992 risk that trial will produce no more, and perhaps less. It also  
3993 includes the fear of Rule 68 consequences; the defendant's post-

3994 offer attorney fees may reduce or obliterate whatever judgment is  
3995 won, leaving the plaintiff with all of its own expenses and the  
3996 defendant's post-offer costs. A defendant's incentive to accept  
3997 a plaintiff's Rule 68 offer is similar: not only must it pay a  
3998 larger judgment, but it can be held to pay post-offer costs and  
3999 the plaintiff's post-offer attorney fees up to the amount of the  
4000 judgment.

4001 Attorney fee shifting is limited to reflect the difference  
4002 between the offer and the judgment. The difference is treated as  
4003 a benefit accruing to the fee expenditure. If fees of \$40,000  
4004 are incurred after the offer and the judgment is \$15,000 more  
4005 favorable than the offer, for example, the maximum fee award is  
4006 reduced to \$25,000.

4007 Subdivision (a). Several formal requirements are imposed on  
4008 the Rule 68 offer process. Offers may be made outside of Rule 68  
4009 at any time before or after an action is commenced. The  
4010 requirement that the Rule 68 offer be in writing and state that  
4011 it is made under Rule 68 is designed to avoid claims for awards  
4012 based on less formal offers that may not have been recognized as  
4013 paving the way for an award.

4014 A Rule 68 offer is not to be filed with the court until it  
4015 is accepted. The offeror should not be influenced by concern  
4016 that an unaccepted offer may work to its disadvantage in later  
4017 proceedings.

4018 The requirement that an offer remain open for at least 21  
4019 days is intended to allow a reasonable period for evaluation by  
4020 the recipient. Consequences cannot fairly be imposed if  
4021 inadequate time is allowed for evaluation. Fees and costs are  
4022 shifted only from the time the offer expires; see subdivision  
4023 (e)(1) and (2). A party who wishes to increase the prospect of  
4024 acceptance may set a longer period. The court may order a  
4025 different period. As one example, it may not be fair to require  
4026 a defendant to act on an offer early in the proceedings, under  
4027 threat of Rule 68 consequences, without more time to gather  
4028 information. If the court orders that the period for accepting  
4029 be extended, the offer can be withdrawn under paragraph (2). The  
4030 opportunity to withdraw is important for the same reasons as the  
4031 power to extend – developing information may make the offer seem  
4032 less attractive to the plaintiff just as it may make the offer  
4033 seem more attractive to the defendant. As another example, the  
4034 21-day period may foreclose offers close to trial; the court can  
4035 grant permission to shorten the period to make an offer possible.

4036 Paragraph (2) establishes power to withdraw the offer before  
4037 acceptance. This power reflects the fact that the apparent worth  
4038 of a case can change as further information is developed. It  
4039 also enables a party to retain control of its own offer in face  
4040 of an order extending the time for acceptance. Withdrawal  
4041 nullifies the offer – consequences cannot be based upon a  
4042 withdrawn offer.

4043           Subdivision (b). An offer can be accepted only during the  
4044 period it remains open and is not withdrawn. Acceptance requires  
4045 service on the offeror. An acceptance is effective  
4046 notwithstanding an attempt to withdraw the offer if the  
4047 acceptance is served on the offeror before the withdrawal is  
4048 served on the offeree. If it is uncertain whether acceptance or  
4049 withdrawal was served first, the doubt should be resolved by  
4050 giving effect to the withdrawal, since the parties remain free to  
4051 make successive Rule 68 offers or to settle outside the Rule 68  
4052 process.

4053           Once an offer is accepted, judgment may be entered by the  
4054 clerk or court according to the nature of the offer. Ordinarily  
4055 the clerk should enter judgment for money or recovery of clearly  
4056 identified property. Action by the court is more likely to be  
4057 required for entry of an injunction or declaratory relief.

4058           The court has the same power to refuse to enter judgment  
4059 under Rule 68 as it has to refuse judgment on agreement of the  
4060 parties in other settings. An injunction may be found contrary  
4061 to the public interest, for example, if it requires the court to  
4062 enforce terms that the court feels unable to supervise. A  
4063 settled decree may affect public interests in broader terms,  
4064 particularly in actions such as those to control the conduct of  
4065 public institutions, protect the environment, or regulate  
4066 employment practices. The parties cannot force the court to  
4067 adopt and enforce a decree that defeats important interests of  
4068 nonparties. A Rule 68 judgment also might be unfair to other  
4069 parties in a multiparty action. An extreme illustration of  
4070 unfairness would be an agreement to allocate all of a limited  
4071 fund to one party, excluding others. Less extreme settings also  
4072 might justify refusal to enter judgment.

4073           Subdivision (c). An offer expires if it is not withdrawn or  
4074 accepted.

4075           An expired offer may be used only for the purpose of  
4076 providing remedies under subdivision (e). The procedures of Rule  
4077 54(d) govern requests for costs or attorney fees.

4078           Subdivision (d). Successive offers may be made by any party  
4079 without losing the opportunity to win remedies based on an  
4080 earlier expired offer, and without defeating exposure to remedies  
4081 based on failure to accept an offer from another party. This  
4082 system encourages the parties to make early Rule 68 offers, which  
4083 may promote early settlement, without losing the opportunity to  
4084 make later Rule 68 offers as developing familiarity with the case  
4085 helps bring together estimates of probable value. It also  
4086 encourages later Rule 68 offers following expiration of earlier  
4087 offers by preserving the possibility of winning remedies based on  
4088 an earlier offer.

4089           The operation of the successive offers provision is  
4090 illustrated by Example 4 in the discussion of subdivision (e).

4091           Subdivision (e). Remedies are mandatory, unless reduced or  
4092 excused under paragraph (3).

4093           Final judgment. The time for determining remedies is  
4094 controlled by entry of final judgment. In most settings finality  
4095 for this purpose will be determined by the tests that determine  
4096 finality for purposes of appeal. Complications may emerge,  
4097 however, in actions that involve several parties and claims. A  
4098 final judgment may be entered under Rule 54(b) that disposes of  
4099 one or more claims between the offeror and offeree but leaves  
4100 open other claims between them. Such a judgment can be the  
4101 occasion for invoking Rule 68 remedies if it finally disposes of  
4102 all matters involved in the Rule 68 offer. It also is possible  
4103 that a Rule 54(b) judgment may support Rule 68 remedies even  
4104 though it does not dispose of all matters involved in the offer.  
4105 A plaintiff's \$50,000 offer to settle all claims, for example,  
4106 might be followed by a \$75,000 judgment for the plaintiff on two  
4107 claims, leaving two other claims to be resolved. Usually it will  
4108 be better to defer the determination of remedies to a single  
4109 proceeding upon completion of the entire action. If there is a  
4110 special need to determine remedies promptly, however, an interim  
4111 award may be made as soon as it is inescapably clear that the  
4112 final judgment will be more favorable than the offer.

4113           Costs and fees. Remedies are limited to costs and attorney  
4114 fees. Other expenses are excluded for a variety of reasons. In  
4115 part, the limitation reflects the policies that underlie the  
4116 limits of attorney fee awards discussed below. In addition, the  
4117 limitation reflects the great variability of other expenses and  
4118 the difficulty of determining whether particular expenses are  
4119 reasonable.

4120           Costs for the present purpose include all costs routinely  
4121 taxable under Rule 54(d). Attorney fees are treated separately.  
4122 This provision supersedes the construction of Rule 68 adopted in  
4123 *Marek v. Chesny*, 473 U.S. 1 (1985), under which statutory  
4124 attorney fees are treated as costs for purposes of Rule 68 if,  
4125 but only if, the statute treats them as costs.

4126           Several limits are placed on remedies based on attorney fees  
4127 incurred after a Rule 68 offer expired. The fees must be  
4128 reasonable. The award is reduced by deducting from the amount of  
4129 reasonable fees the monetary difference between the offer and the  
4130 judgment. To the extent that the judgment is more favorable to  
4131 the offeror than the offer, it is fair to attribute the  
4132 difference to the fee expenditure. This reduction is limited to  
4133 monetary differences. Differences in specific relief are  
4134 excluded from this reduction because the policy underlying the  
4135 benefit-of-the-judgment rule is not so strong as to support the  
4136 difficulties frequently encountered in setting a monetary value  
4137 on specific relief.

4138           The attorney fee award also is limited to the amount of the  
4139 judgment. A claimant's money judgment can be reduced to nothing

4140 by a fee award, but out-of-pocket liability is limited to costs.  
4141 A defending party's exposure to fee shifting is made symmetrical  
4142 by limiting the stakes to the money amount of the judgment. If  
4143 no monetary relief is awarded, attorney fee remedies are not  
4144 available to either party. This result not only avoids the  
4145 difficulties of setting a monetary value on specific relief but  
4146 also diminishes the risk of deterring litigation involving  
4147 matters of public interest.

4148 Several examples illustrate the working of this "capped  
4149 benefit-of-the-judgment" attorney fee provision.

4150 Example 1. (No shifting) After its offer to settle for  
4151 \$50,000 is not accepted, the plaintiff ultimately recovers a  
4152 \$25,000 judgment. Rejection of this offer would not result in  
4153 any award because the judgment is more favorable to the offeree  
4154 than the offer. Similarly, there would be no award based on an  
4155 offer of \$50,000 by the defendant and a \$75,000 judgment for the  
4156 plaintiff.

4157 Example 2. (Shifting on rejection of plaintiff's offer)  
4158 After the defendant rejects the plaintiff's \$50,000 offer, the  
4159 plaintiff wins a \$75,000 judgment. (a) The plaintiff incurred  
4160 \$40,000 of reasonable post-offer attorney fees. The \$25,000  
4161 benefit of the judgment is deducted from the fee expenditure,  
4162 leaving an award of \$15,000. (b) If reasonable post-offer  
4163 attorney fees were \$25,000 or less, no fee award would be made.  
4164 (c) If reasonable post-offer fees were \$110,000, deduction of the  
4165 \$25,000 benefit of the judgment would leave \$85,000; the cap that  
4166 limits the award to the amount of the judgment would reduce the  
4167 attorney fee award to \$75,000.

4168 Example 3. (Shifting on rejection of defendant's offer)  
4169 After the plaintiff rejects the defendant's \$75,000 offer, the  
4170 plaintiff wins a \$50,000 judgment. (a) The defendant incurred  
4171 \$40,000 of reasonable post-offer attorney fees. The \$25,000  
4172 benefit of the judgment is deducted from the fee expenditure,  
4173 leaving a fee award of \$15,000. (b) If reasonable post-offer  
4174 attorney fees were \$25,000 or less, no fee award would be made.  
4175 (c) If reasonable post-offer fees were \$110,000, deduction of the  
4176 \$25,000 benefit of the judgment would leave \$85,000; the cap that  
4177 limits the fee award to the amount of the judgment would reduce  
4178 the attorney fee award to \$50,000. The plaintiff's judgment  
4179 would be completely offset by the fee award, and the plaintiff  
4180 would remain liable for post-offer costs.

4181 Example 4. (Successive offers) After a defendant's \$50,000  
4182 offer lapses, the defendant makes a new \$60,000 offer that also  
4183 lapses. (a) A judgment of \$50,000 or less requires an award  
4184 based on the amount and time of the \$50,000 offer. (b) A  
4185 judgment more than \$50,000 but not more than \$60,000 requires an  
4186 award based on the amount and time of the \$60,000 offer. This  
4187 approach preserves the incentive to make a successive offer by  
4188 preserving the potential effect of the first offer.

4189           Example 5. (Counteroffers) The effect of each offer is  
4190 determined independently of any other offer. Counteroffers are  
4191 likely to be followed by judgments that entail no award or an  
4192 award against only one party. The plaintiff, for example, might  
4193 make an early \$25,000 offer, followed by \$20,000 of fee  
4194 expenditures before a \$40,000 offer by the defendant, additional  
4195 \$15,000 fee expenditures by each party, and judgment for \$42,000.  
4196 The plaintiff's \$25,000 offer is more favorable to the defendant  
4197 than the judgment, so the plaintiff is entitled to a fee award.  
4198 The \$35,000 of post-offer fees is reduced by the \$17,000 benefit  
4199 of the judgment, netting an award of \$18,000. The defendant is  
4200 not entitled to any award.

4201           In some circumstances, however, counteroffers can entitle  
4202 both parties to awards. Offers made and not accepted at  
4203 different stages in the litigation may fall on both sides of the  
4204 eventual judgment. Each party receives the benefit of its offer  
4205 and pays the consequences for failing to accept the offer of the  
4206 other party. The awards are offset, resulting in a net award to  
4207 the party entitled to the greater amount. As an example, a  
4208 plaintiff might make an early \$25,000 offer, then incur  
4209 reasonable attorney fees of \$5,000 before the defendant's \$60,000  
4210 offer, after which each party incurred reasonable attorney fees  
4211 of \$25,000. A judgment for \$50,000 would support a fee award  
4212 for each party. The \$50,000 judgment is more favorable to the  
4213 plaintiff than the plaintiff's expired offer. The \$50,000 is  
4214 less favorable to the plaintiff than the defendant's expired  
4215 offer. The attorney fee award to the plaintiff would be reduced  
4216 to \$5,000 by subtracting the \$25,000 benefit of the judgment from  
4217 the \$30,000 of post-offer fees. The attorney fee award to the  
4218 defendant would be reduced first to \$15,000 by subtracting the  
4219 \$10,000 benefit of the judgment from the \$25,000 of post-offer  
4220 fees. The \$15,000 award to the defendant would be set off  
4221 against the \$5,000 award to the plaintiff, leaving a \$10,000 net  
4222 award to the defendant.

4223           Example 6. (Counterclaims) Cases involving claims and  
4224 counterclaims for money alone fall within the earlier examples.  
4225 Each party controls the terms of any offer it makes. If no offer  
4226 is accepted, the final judgment is compared to the terms of each  
4227 offer. (a) The defendant's offer to pay \$10,000 to the plaintiff  
4228 to settle both claim and counterclaim is followed by a \$25,000  
4229 award to the plaintiff on its claim and a \$40,000 award to the  
4230 defendant on its counterclaim. The result is treated as a net  
4231 award of \$15,000 to the defendant. This net is \$25,000 more  
4232 favorable to the defendant than its offer. If the defendant's  
4233 reasonable post-offer attorney fees were \$35,000, the attorney  
4234 fee award payable to the defendant is \$10,000. (b) If the  
4235 defendant's reasonable post-offer attorney fees in example (a)  
4236 had been \$45,000, the attorney fee award payable to the defendant  
4237 would be limited to the \$15,000 amount of the net award on the  
4238 merits. (c) The defendant's offer to accept \$10,000 from the  
4239 plaintiff to settle both claim and counterclaim is followed by an  
4240 award of nothing to the plaintiff on its claim and a \$40,000  
4241 award to the defendant on its counterclaim. The result is

4242 treated as a net award of \$40,000 to the defendant, which is  
4243 \$30,000 more favorable to the defendant than its offer.

4244 Contingent Fees. The fee award to a successful plaintiff  
4245 represented on a contingent fee basis should be calculated on a  
4246 reasonable hourly rate for reasonable post-offer services, not by  
4247 prorating the contingent fee. The attorney should keep time  
4248 records from the beginning of the representation, not for the  
4249 post-offer period alone, as a means of ensuring the reasonable  
4250 time required for the post-offer period.

4251 Hardship or surprise. Rule 68 awards may be reduced to avoid  
4252 undue hardship or reasonable surprise. Reduction may, as a  
4253 matter of discretion, extend to denial of any award. As an  
4254 extreme illustration of hardship, a severely injured plaintiff  
4255 might fail to accept a \$100,000 offer and win a \$100,000 judgment  
4256 following a reasonable attorney fee expenditure of \$100,000 by  
4257 the defendant. A fee award to the defendant that would wipe out  
4258 any recovery by the plaintiff could be found unfair. Surprise is  
4259 most likely to be found when the law has changed between the time  
4260 an offer expired and the time of judgment. Later discovery of  
4261 vitally important factual information also may establish that the  
4262 judgment could not reasonably have been expected at the time the  
4263 offer expired.

4264 Statutory Fee Entitlement. Rule 68 consequences for a party  
4265 entitled to statutory attorney fees have been governed by the  
4266 decision in *Marek v. Chesny*, 473 U.S. 1 (1985). Revised Rule 68  
4267 continues to provide that an otherwise existing right to a  
4268 statutory fee award is cut off as to fees incurred after  
4269 expiration of an offer more favorable than the judgment. The  
4270 only additional Rule 68 consequence for a party entitled to  
4271 statutory fees is liability for costs incurred by the offeror  
4272 after the offer expired. The fee award provided by subdivision  
4273 (e)(1)(B) for other cases is not available. These rules  
4274 establish a balance between the policies underlying Rule 68 and  
4275 statutory attorney fee provisions. It is desirable to encourage  
4276 early settlement in cases governed by statutory attorney fee  
4277 provisions just as in other cases. Effective incentives remain  
4278 important. The award of an attorney fee against a party  
4279 entitled to recover statutory fees, however, could interfere with  
4280 the legislative determination that the underlying claim deserves  
4281 special protection. The balance struck by Rule 68 does not  
4282 address the question whether failure to win a judgment more  
4283 favorable than an expired offer should be taken into account in  
4284 determining whether any particular statute supports an award for  
4285 fees incurred before expiration of the offer.

4286 Settlement. All potential effects of a Rule 68 offer expire  
4287 upon acceptance of a successive Rule 68 offer or other  
4288 settlement. This rule makes it easier to reach a final  
4289 settlement, free of uncertainty as to the prospect of Rule 68  
4290 consequences. The prospect of Rule 68 consequences remains,



4291 however, as one of the elements to be considered by the parties  
4292 in determining the terms of settlement.

4293 Judgment more favorable. Many complications surround the  
4294 determination whether a judgment is more favorable than an offer,  
4295 even in a case that involves only monetary relief. The  
4296 difficulties are illustrated by the provisions governing offers  
4297 to a party demanding relief. The comparison should begin with  
4298 the exclusion of costs, attorney fees, and other items incurred  
4299 after expiration of the offer. The purpose of the offer process  
4300 is to avoid such costs. Costs, attorney fees, and other items  
4301 that would be awarded by a judgment entered at the expiration of  
4302 the offer, on the other hand, should be included. An offer that  
4303 matches only the award of damages is not as favorable as a  
4304 judgment that includes additional money awards. Beyond that  
4305 point, comparison of a money judgment with a money offer depends  
4306 on the details of the offer, which are controlled by the offeror.  
4307 An offer may specify separate amounts for compensation, costs,  
4308 attorney fees, and other items. The total amount of the offer  
4309 controls the comparison. There is little point in denying a Rule  
4310 68 award because the offer was greater than the final judgment in  
4311 one dimension and smaller – although to no greater extent – in  
4312 another dimension. If the offer does not specify separate  
4313 amounts for each element of the final judgment and award, the  
4314 same comparison is made by matching any specified amounts and  
4315 treating the unspecified portion of the offer as covering all  
4316 other amounts. For example, a defendant's lump-sum offer of  
4317 \$50,000 might be followed by a \$45,000 judgment for the  
4318 plaintiff. The judgment is more favorable to the plaintiff than  
4319 the offer if costs, attorney fees, and other items awarded for  
4320 the period before the offer expired total more than \$5,000.

4321 Comparison of the final judgment to successive offers  
4322 requires that the judgment be treated as if entered at the time  
4323 of each offer and adjusted to reflect any Rule 68 award that  
4324 would have been made had judgment been entered at that time. To  
4325 illustrate, a plaintiff's \$25,000 offer might be followed by  
4326 reasonable attorney fees of \$15,000 before a defendant's \$35,000  
4327 offer, followed by a \$30,000 judgment. The judgment is more  
4328 favorable to the plaintiff than the offer because a \$30,000  
4329 judgment at the time of the offer would have supported a \$10,000  
4330 fee award to the plaintiff. The judgment and fee award together  
4331 would have been \$40,000, \$5,000 more than the offer.

4332 Nonmonetary relief further complicates the comparison  
4333 between offer and judgment. A judgment can be more favorable to  
4334 the offeree even though it fails to include every item of  
4335 nonmonetary relief specified in the offer. In an action to  
4336 enforce a covenant not to compete, for example, the defendant  
4337 might offer to submit to a judgment enjoining sale of 30  
4338 specified items in a two-state area for 15 months. A judgment  
4339 enjoining sale of 29 of the 30 specified items in a five-state  
4340 area for 24 months is more favorable to the plaintiff if the  
4341 omitted item has little importance to the plaintiff. Any attempt

4342 to undertake a careful evaluation of significant differences  
4343 between offer and judgment, on the other hand, would impose  
4344 substantial burdens and often would prove fruitless. The  
4345 standard of comparison adopted by subdivision (e)(4)(A)(ii)  
4346 reduces these difficulties by requiring that the judgment include  
4347 substantially all the nonmonetary relief in the offer and  
4348 additional relief as well. The determination whether a judgment  
4349 awards substantially all the offered nonmonetary relief is a  
4350 matter of trial court discretion entitled to substantial  
4351 deference on appeal.

4352 The tests comparing the money component of an offer with the  
4353 money component of the judgment and comparing the nonmonetary  
4354 component of the offer with the nonmonetary component of the  
4355 judgment both must be satisfied to support awards in actions for  
4356 both monetary and nonmonetary relief. Gains in one dimension  
4357 cannot be compared to losses in another dimension.

4358 The same process is followed, in converse fashion, to  
4359 determine whether a judgment is more favorable to a party  
4360 opposing relief.

4361 There is no separate provision for offers for structured  
4362 judgments that spread monetary relief over a period of time,  
4363 perhaps including conditions subsequent that discharge further  
4364 liability. The potential difficulties can be reduced by framing  
4365 an offer in alternative terms, specifying a single sum and  
4366 allowing the option of converting the sum into a structured  
4367 judgment. If only a structured judgment is offered, however, the  
4368 task of comparing a single-sum judgment with a structured offer  
4369 is not justified by the purposes of Rule 68, even when a  
4370 reasonable actuarial value can be attached to the offer. If  
4371 applicable law permits a structured judgment after adjudication,  
4372 however, it may be possible to compare the judgment with a single  
4373 sum offer. Should a structured judgment offer be followed by a  
4374 structured judgment, it seems likely that ordinarily the  
4375 comparison should be made under the principles that apply to  
4376 nonmonetary relief, since the elements of the structure are not  
4377 likely to coincide directly.

4378 Multiparty offers. No separate provision is made for offers  
4379 that require acceptance by more than one party. Rule 68 can be  
4380 applied in straight-forward fashion if there is a true joint  
4381 right or joint liability. An award should be made against all  
4382 joint offerees without excusing any who urged the others to  
4383 accept the offer; this result is justified by the complications  
4384 entailed by a different approach and by the relationships that  
4385 establish the joint right or liability. Rule 68 should not apply  
4386 in other cases in which an offer requires acceptance by more than  
4387 one party. The only situation that would support easy  
4388 administration would involve failure of any offeree to accept,  
4389 and a judgment no more favorable to any offeree. Even in that  
4390 setting, a rule permitting an award could easily complicate  
4391 beyond reason the already complex strategic calculations of Rule

4392 68. Offers would be made in the expectation that unanimous  
4393 acceptance would prove impossible. Acceptances would be tendered  
4394 in the same expectation. Apportioning an award among the  
4395 offerees also could entail complications beyond any probable  
4396 benefits.

4397 Subdivision (f). Rule 68 does not apply to actions  
4398 certified as class or derivative actions under Rules 23, 23.1, or  
4399 23.2. This exclusion reflects several concerns. Rule 68  
4400 consequences do not seem appropriate if the offeree accepts the  
4401 offer but the court refuses to approve settlement on that basis.  
4402 It may be unfair to make an award against representative parties,  
4403 and even more unfair to seek to reach nonparticipating class  
4404 members. The risk of an award, moreover, may create a conflict  
4405 of interest that chills efforts to represent the interests of  
4406 others.

4407 The subdivision (f) exclusions apply even to offers made by  
4408 class representatives or derivative plaintiffs. Although the  
4409 risk of conflicting interests may disappear in this setting, the  
4410 need to secure judicial approval of a settlement remains. In  
4411 addition, there is no reason to perpetuate a situation in which  
4412 Rule 68 offers can be made by one adversary camp but not by the  
4413 other.

4414

## Rule 68: A Progress Report

4415 Rule 68 has provoked regular suggestions for reform.  
4416 Substantial efforts early in the 1980s and again a decade later  
4417 in the early 1990s did not result in proposals for amendment.  
4418 This memorandum discusses whether the time has come to reopen  
4419 Rule 68.

4420  
4421 In *Reiter v. MTA New York City Transit Authority*, 2d Cir.  
4422 July 20, 2006, Docket No. 04-5420-cv, the Second Circuit  
4423 recommended to the Standing and Advisory Committees that the  
4424 Advisory Committee examine the offer-of-judgment provisions of  
4425 Rule 68 to "address the question of how an offer and judgment  
4426 should be compared when non-pecuniary relief is involved." This  
4427 opinion was included in the agenda book for the October 2006  
4428 meeting and is included again to preserve the proposal for rule  
4429 amendment for the Committee's consideration.

4430  
4431 The *Reiter* case offers a relatively straightforward  
4432 illustration of the questions raised by demands for specific  
4433 relief and offers of judgment. The plaintiff, a high-ranking  
4434 official in the New York City Transit Authority, won a jury  
4435 verdict finding that he had been demoted in violation of Title  
4436 VII in retaliation for filing a charge with the EEOC. His  
4437 complaint requested both money damages and equitable relief  
4438 returning him "to his prior position, along with all the benefits  
4439 of that position." The Rule 68 offer was for \$20,001; it said  
4440 nothing about specific relief. The verdict awarded \$140,000 for  
4441 emotional suffering. The court ordered a remittitur to \$10,000,  
4442 which the plaintiff accepted. The court also granted an  
4443 injunction restoring the plaintiff to his former position with  
4444 all of its perquisites, including an office, confidential  
4445 secretary, and "Hay points" indicating the importance of the  
4446 position. The parties agreed that a magistrate judge would  
4447 decide the plaintiff's motion for attorney fees. The magistrate  
4448 judge concluded that the right to fees terminated at the time the  
4449 plaintiff rejected the Rule 68 offer because the reinstatement  
4450 order was "of limited value." The Second Circuit reversed the  
4451 conclusion that the Rule 68 offer of \$20,001 was better than the  
4452 judgment for \$10,000 and reinstatement. It accepted the basic  
4453 approach taken by the magistrate judge – the question was whether  
4454 the equitable relief was worth more than the \$10,001 difference  
4455 between the Rule 68 offer and the judgment damages. This  
4456 question was approached as one of fact, reviewed only for clear  
4457 error. But the court also noted that the offeror, who "alone  
4458 determines the provisions of the offer," "bears the burden of  
4459 showing that the Rule 68 offer was more favorable than the  
4460 judgment." The court began by observing that "equitable relief  
4461 lies at the core of Title VII." Then it compared the great  
4462 importance of the plaintiff's former job to the demotion job.  
4463 Apparently the pay was the same for both jobs. But in the former  
4464 job the plaintiff headed a department with a budget that  
4465 "exceeded one billion dollars, eight senior executives reported  
4466 directly to him, and he headed a staff of more than 900

4467 employees. After his demotion \* \* \*, he had no staff, no direct  
4468 reports, no corner office, no Hay Points and found himself in one  
4469 of the NYCTA's smallest departments with ten employees." The  
4470 court readily concluded that the differences between the jobs  
4471 made reinstatement more valuable than the \$10,001 difference  
4472 between offer and judgment damages.

4473 The Second Circuit's conclusion is persuasive. The  
4474 approach, however, is a self-fulfilling demonstration of the  
4475 difficulty of comparing specific relief to dollars. It is easy  
4476 to imagine ever finer distinctions between original job and  
4477 demoted job, blurring the comparison. Beyond that, the opinion  
4478 seems to imply that the comparison is made by considering broader  
4479 social values – specific relief is specially valued in Title VII  
4480 cases "because this accomplishes the dual goals of providing  
4481 make-whole relief for a prevailing plaintiff and deterring future  
4482 unlawful conduct." The comparison might come out differently if  
4483 the claim were only for breach of contract.

4484 Other specific-relief cases compare Rule 68 offers to  
4485 judgments in a variety of settings. See 12 Federal Practice &  
4486 Procedure: Civil 2d, § 3006.1. Comparison of an offer for  
4487 specific relief with the judgment may be easy. The offer is for  
4488 a one-year injunction; the judgment is a two-year injunction,  
4489 clearly more favorable, or a one-year injunction on the same  
4490 terms, clearly not more favorable. The comparison may be  
4491 muddled, however, if the offer does not spell out the full terms  
4492 of the injunction. *Andretti v. Borla Performance Indus., Inc.*,  
4493 6th Cir.2005, 426 F.3d 824, 837-838, is an example. The offer  
4494 was for an injunction forever barring the defendant from  
4495 disseminating any advertisement or promotional material  
4496 containing a specific quotation from the plaintiff. The actual  
4497 injunction was broader, barring any act to pass off any good or  
4498 service as authorized or sponsored by the plaintiff. The court,  
4499 however, concluded that the offer was understood by the plaintiff  
4500 to embrace all of the terms of the outstanding preliminary  
4501 injunction that was simply transformed by the judgment into a  
4502 permanent injunction. It may be wondered whether Rule 68 offers  
4503 of injunctive or declaratory relief commonly include full  
4504 decrees, and whether arguments about the framing of an eventual  
4505 decree should be shaped by the parties' concerns for the Rule 68  
4506 consequences.

4507 But what if an offer of a one-year injunction is followed by  
4508 a two-year injunction that is not [quite] as broad? An offer  
4509 that the defendant will put five named customers off limits to an  
4510 employee hired away from the plaintiff is followed by an  
4511 injunction barring two of those customers and three or four  
4512 others? Should courts be forced to the work of evaluating these  
4513 differences?

4514 Yet another complication can arise if an offer for specific  
4515 relief is followed by self-correction in circumstances that  
4516 persuade the court to deny specific relief as unnecessary or even

4517 moot. The defendant offers to submit to an injunction limiting  
4518 the activities of the plaintiff's former employee. As the case  
4519 approaches trial and the defendant views its prospects with  
4520 alarm, the defendant fires the employee, who goes to work  
4521 elsewhere. There is no occasion for a "judgment" dealing with  
4522 this element of the demand for relief or the offer. Surely the  
4523 practical outcome should be factored into the assessment.

4524 The comparison of specific relief to dollars aggravates the  
4525 difficulties. The offer in the Second Circuit *Reiter* case  
4526 provided no specific relief at all. Why should the defendant –  
4527 who predicted completely wrong in this dimension – be allowed to  
4528 force the court through the comparison, even by saddling the  
4529 defendant with the burden of showing that the judgment is not  
4530 more favorable than the offer?

4531 The question raised by the Second Circuit would arise in  
4532 many cases if Rule 68 were used extensively. The Federal  
4533 Judicial Center undertook a study of Rule 68 practice to support  
4534 the Advisory Committee's most recent undertaking. See John E.  
4535 Shapard, *Likely Consequences of Amendments to Rule 68*, Federal  
4536 Rules of Civil Procedure (FJC 1995). The survey included a  
4537 question asking what type of relief was sought, anticipating the  
4538 very question addressed by the Second Circuit: "The problem is  
4539 illustrated by trying to compare an offer to settle for \$100,000  
4540 with a judgment awarding reinstatement and back pay of \$40,000.  
4541 The percentage of cases involving exclusively monetary relief  
4542 varied from 95% in tort cases to 47% in the 'other' category, and  
4543 the percentage of cases involving 'significant' nonmonetary  
4544 relief varied from 35% in the 'other' category to 3% in tort  
4545 cases." *Id.*, p. 24.

4546 The Rule 68 work in the 1990s was stimulated by a proposal  
4547 to encourage more offers of judgment. The project was abandoned,  
4548 in part because of the growing complexity of attempts to  
4549 implement the limited "benefit-of-the-judgment" approach and – at  
4550 least to some participants – because of growing doubts about the  
4551 value of Rule 68. One issue is the interpretation of the rule  
4552 that a successful offer cuts off a prevailing plaintiff's right  
4553 to statutory attorney fees if the statute refers to the fee award  
4554 as "costs," but not if the statute does not characterize the  
4555 award as "costs." Even that specific question will reopen the  
4556 Enabling Act question that divided the Supreme Court when it  
4557 adopted this interpretation – it is not at all apparent why a  
4558 rule that cuts off a statutory fee right does not abridge a  
4559 "substantive" right. And of course broader questions are nearly  
4560 unavoidable: why should plaintiffs not be enabled to make Rule 68  
4561 offers – is it only because of reluctance to provide sanctions  
4562 greater than statutory costs, which a prevailing plaintiff  
4563 ordinarily wins without regard to Rule 68? If some meaningful  
4564 sanction is created to facilitate a rule that allows plaintiff  
4565 offers, should a similar sanction be provided so that a judgment  
4566 for the defendant carries Rule 68 consequences?

4567           Apart from such large questions, the *Reiter* case itself  
4568 illustrates an interesting wrinkle. The plaintiff's rejection of  
4569 the \$20,001 offer proved an accurate anticipation of the jury  
4570 verdict for \$140,000. The Rule 68 comparison, however, is not to  
4571 the verdict but to the judgment. Should the plaintiff's decision  
4572 whether to accept a remittitur to \$10,000 be complicated by the  
4573 Rule 68 consequences – here loss of the right to statutory fees  
4574 after the offer? For that matter, is it right that Rule 68  
4575 sanctions should apply at all in an area as indeterminate as a  
4576 court's estimate of the maximum reasonable jury award for  
4577 emotional distress? Remember that the court of appeals found  
4578 reinstatement clearly worth more than \$10,001, the plaintiff  
4579 faced a retrial if the remittitur were rejected, and acceptance  
4580 of the remittitur waives the right to appeal the money award.  
4581 Thorough reconsideration of Rule 68 will involve a great deal of  
4582 work.

4583           Professors Thomas A. Eaton and Harold S. Lewis, Jr., have  
4584 completed an invaluable interview survey of practicing lawyers,  
4585 reflected in part in the Symposium transcript and papers,  
4586 *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate*  
4587 *Incentives for Fair, Early Settlement of Fee-Recovery Cases?*,  
4588 2006, 57 Mercer L. Rev. 717-855. What distinguishes their work  
4589 from many articles is that it draws from intensive interviews  
4590 with 64 attorneys selected to represent, in even numbers,  
4591 plaintiff-side and defense-side practice in employment  
4592 discrimination and "civil rights" litigation. They picked these  
4593 practice fields for two reasons. First, Rule 68 is more likely  
4594 to be used when statutes provide attorney fees for successful  
4595 plaintiffs – an offer that jeopardizes the right to recover post-  
4596 offer fees is more likely to be considered seriously. Second,  
4597 these fields together account for a significant share of the  
4598 federal civil docket. Each federal circuit was covered by  
4599 interviewing at least one set of four attorneys. The attorneys  
4600 were not chosen at random, but instead by seeking leads to those  
4601 with long and extensive experience in their areas of practice.

4602           The underlying purpose began with the perception that Rule  
4603 68 offers are relatively rare even in these fields of practice.  
4604 The questions pursued were first an effort to understand why Rule  
4605 68 is not routinely used and then to learn whether Rule 68 can be  
4606 amended to encourage greater use. Although greater use might not  
4607 contribute much by causing a still greater number of potential  
4608 civil trials to "vanish," it might encourage earlier and  
4609 therefore less costly disposition by settlement.

4610           As the first of two articles, this one focuses on the  
4611 reactions of the lawyers to various proposals to amend Rule 68.  
4612 For present purposes, it suffices to provide a sketch of the  
4613 proposals:

4614           Change to Offer of Settlement: Many lawyers agreed that  
4615 defendants are deterred by the need to offer a "judgment." The

4616 collateral consequences of being recorded as a judgment loser are  
4617 important, particularly to individual defendants.

4618 Require Plaintiffs to Disclose Accrued Fees When Asked: Some  
4619 defense lawyers find it difficult to estimate a reasonable offer  
4620 because they do not know what is a proper amount for pre-offer  
4621 fees in a fee-award regime. Many plaintiff lawyers resist  
4622 disclosure for fear of yielding strategic information –  
4623 particularly that they are not yet heavily invested and thus by  
4624 inference are not yet well prepared.

4625 Extend Rule 68 To Award Sanctions When Defendant Wins: One  
4626 explanation of the paucity of offers is that – particularly in  
4627 employment cases in many courts – defendants believe, quite  
4628 realistically, that they are going to win on the merits, often by  
4629 summary judgment. Being confident that they will win, the rule  
4630 that Rule 68 sanctions are not available if the plaintiff loses  
4631 dissuades them from making offers. More offers might be made if  
4632 the Delta Air Lines decision were reversed.

4633 Incorporate Rule 68 into Early Judicial Interventions and  
4634 Mediating: There was some support for explicitly requiring  
4635 discussion of Rule 68 at the Rule 26(f) conference, or in  
4636 mediation of judicially supervised conferences. The idea is that  
4637 this would give defense counsel a lever to persuade the defendant  
4638 that an offer is a good thing.

4639 Address Fee Consequences in Rule: These lawyers were richly  
4640 experienced. Among them they handled more than 13,000 civil  
4641 rights or employment discrimination cases in the 5 years before  
4642 the interviews. Some of them were not aware that Rule 68 can cut  
4643 off post-offer fee awards. Amending Rule 68 to flag this issue –  
4644 even to specify which fee statutes carry this effect [!] – would  
4645 help.

4646 Two-Way Rule: If plaintiffs can make demands under Rule 68, the  
4647 result might well be more settlements – a defendant's offer is  
4648 met with a cross-demand, a plaintiff's demand is met with a  
4649 counter-offer, and so on. Several variations were explored. (1)  
4650 A two-way "pressure" model would impose sanctions on a party who  
4651 rejected an offer unless the party beat the offer by some margin  
4652 – for example, a plaintiff who rejected a \$100,000 offer would  
4653 suffer Rule 68 consequences unless the judgment was at least  
4654 \$125,000. As a two-way rule, the same would hold for defendants.  
4655 Defendants did not much like this rule. (2) A two-way "cushion"  
4656 model would deny sanctions if the party rejecting the offer  
4657 achieved a respectable portion – a plaintiff rejecting a \$100,000  
4658 offer, for example, would incur Rule 68 sanctions only if the  
4659 judgment was less than \$80,000. Plaintiffs' lawyers liked this.  
4660 But the survey asked a different question, working on the  
4661 assumption that there are so few Rule 68 offers now that  
4662 defendants would make even fewer offers if a plaintiff could  
4663 avoid sanctions by simply coming close to the rejected offer.  
4664 This one-way cushion version applied to benefit a defendant who



4665 rejects a plaintiff's demand, but not to a plaintiff who rejects  
4666 an offer. Plaintiffs did not like this. In the end, plaintiffs'  
4667 civil rights lawyers liked two-way offer rules; defense lawyers'  
4668 reactions were more complicated. Plaintiffs' employment  
4669 discrimination lawyers liked the idea.  
4670

4671 Separate problems are recognized if sanctions are expanded  
4672 in a two-way rule. If a plaintiff loses entirely, and is  
4673 presumptively liable for defense costs, the most likely  
4674 meaningful sanction is a multiple of costs or defense post-offer  
4675 fees. If a plaintiff wins entirely and is entitled to costs and  
4676 statutory fees, the defendant could be made liable for multiple  
4677 costs or increased fees.

4678 Prior proposals for amending Rule 68 are set out below.

4679  
4680 **Excerpts from 1992-1994 Rule 68 Drafts**

4681 *Rule 68(e)(4)*

4682 **(4) (A)** A judgment for a party demanding relief is more favorable  
4683 than an offer to it:

4684 **(I)** if the amount awarded – including the costs,  
4685 attorney fees, and other amounts awarded for the  
4686 period before the offer {was served}[expired] –  
4687 exceeds the monetary award that would have  
4688 resulted from the offer; and

4689 **(ii)** if nonmonetary relief is demanded and the  
4690 judgment includes all the nonmonetary relief  
4691 offered, or substantially all the nonmonetary  
4692 relief offered and additional relief.

4693 **(B)** A judgment is more favorable to a party opposing relief  
4694 than an offer to it:

4695 **(I)** if the amount awarded – including the costs,  
4696 attorney fees, and other amounts awarded for the  
4697 period before the offer {was served} [expired] is  
4698 less than the monetary award that would have  
4699 resulted from the offer; and

4700 **(ii)** if nonmonetary relief is demanded and the judgment  
4701 does not include [substantially] all the  
4702 nonmonetary relief offered.

4703 *Committee Note*

4704 Nonmonetary relief further complicates the  
4705 comparison between offer and judgment. A judgment can  
4706 be more favorable to the offeree even though it fails  
4707 to include every item of nonmonetary relief specified  
4708 in the offer. In an action to enforce a covenant not  
4709 to compete, for example, the defendant might offer to  
4710 submit to a judgment enjoining sale of 30 specified  
4711 items in a two-state area for 15 months. A judgment

4712 enjoining sale of 29 of the 30 specified items in a  
4713 five-state area for 24 months is more favorable to the  
4714 plaintiff if the omitted item has little importance to  
4715 the plaintiff. Any attempt to undertake a careful  
4716 evaluation of significant differences between offer and  
4717 judgment, on the other hand, would impose substantial  
4718 burdens and often would prove fruitless. The standard  
4719 of comparison adopted by subdivision (e)(4)(A)(ii)  
4720 reduces these difficulties by requiring that the  
4721 judgment include substantially all the nonmonetary  
4722 relief in the offer and additional relief as well. The  
4723 determination whether a judgment awards substantially  
4724 all the offered nonmonetary relief is a matter of trial  
4725 court discretion entitled to substantial deference on  
4726 appeal.

4727 The tests comparing the money component of an  
4728 offer with the money component of the judgment and  
4729 comparing the nonmonetary component of the offer with  
4730 the nonmonetary component of the judgment both must be  
4731 satisfied to support awards in actions for both  
4732 monetary and nonmonetary relief. Gains in one  
4733 dimension cannot be compared to losses in another  
4734 dimension.

4735 The same process is followed, in converse fashion,  
4736 to determine whether a judgment is more favorable to a  
4737 party opposing relief.

4738 This provision was included in a rule that was far more  
4739 complicated than present Rule 68. The rule authorized offers by  
4740 claimants as well as defendants, and explicitly authorized  
4741 successive offers by the same party. It provided attorney-fee  
4742 sanctions, subject to complicated offsets and limits. But even  
4743 then, the Committee Note – after providing a dizzying series of  
4744 illustrations of increasingly complex calculations involving  
4745 successive offers by both parties – did not address successive  
4746 offers for specific relief.

4747 The standard of comparison suggested in this draft was  
4748 simpler than the approach taken by the Second Circuit in the  
4749 *Reiter* case. If nonmonetary relief is demanded, the judgment is  
4750 more favorable than the offer if it either includes all of the  
4751 nonmonetary relief offered or includes substantially all the  
4752 nonmonetary relief offered and additional relief. The drafting  
4753 should be improved, but the intended answer for the *Reiter* case  
4754 is clear: There is no Rule 68 sanction because the offer included  
4755 no nonmonetary relief, while the judgment awarded monetary  
4756 relief. There is no occasion to compare the difference between  
4757 the money judgment and the money offer with the judgment's  
4758 nonmonetary relief.

4759 Among possible alternatives, the simplest would be a rule  
4760 that explicitly requires the offeror to prove that the judgment

4761 was not more favorable than the offer. The Committee Note could  
4762 note the difficulties presented by demands, offers, and judgments  
4763 for specific relief. Other alternatives would expressly  
4764 authorize one or both of two weighing approaches. Comparison of  
4765 the offer and judgment for specific relief could be addressed in  
4766 open-ended terms that direct the court to determine whether the  
4767 overall effect of the judgment is more favorable than the offer.  
4768 This comparison could be made without reference to the money  
4769 elements of offer and judgment. Or the comparison could be  
4770 complicated by adding a second dimension: if the claimant wins  
4771 more money than the offer, the court weighs a shortfall in  
4772 specific relief against the gain in money, while a judgment for  
4773 less money than the offer would require the court to weigh the  
4774 money shortfall against the gain in specific relief.

4775 How much complication is appropriate depends on the overall  
4776 value of Rule 68 offers of judgment. This assessment can be made  
4777 either in the context of the present rule, otherwise unchanged,  
4778 or in the quite different context of imagining a thoroughly  
4779 revised Rule 68. Limited revision of the present rule will not  
4780 be easy, but it may not be a major undertaking. Thorough  
4781 reconsideration of Rule 68, however, will be a major undertaking.

4782 **Minutes, April 2007 Civil Rules Meeting, p. 45**

4783 **RULE 68**

4784 The agenda materials include a brief memorandum reporting on  
4785 survey research on Rule 68 offers of judgment being done by  
4786 Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Rule 68  
4787 escaped revision in each of two lengthy Advisory Committee  
4788 undertakings in the 1980s and 1990s. But suggestions for  
4789 revision regularly appear on the agenda, fueled by a desire to  
4790 find ways to encourage earlier settlements reached before  
4791 unnecessary litigation costs are incurred. Completion of the  
4792 articles reporting on this research and making recommendations  
4793 supported by it may provide an occasion to return once again to  
4794 Rule 68.

4795 **MINUTES, NOVEMBER 2007 CIVIL RULES MEETING, P. 46**

4796 *Rule 68*

4797 The Committee was reminded that proposals to "put teeth"  
4798 into the Rule 68 offer-of-judgment provisions continue to arrive  
4799 "in the mail box" at rather regular intervals. Rule 68 was  
4800 studied, and revisions were published for comment, in the 1980s.  
4801 These proposals may have been the origin of the warnings that one  
4802 proposal or another will generate a firestorm of protest. They  
4803 did. Rule 68 was studied again in the 1990s in response to an  
4804 elegant "capped benefit-of-the-judgment" proposal advanced by  
4805 Judge Schwarzer. The FJC undertook a study of Rule 68 practice  
4806 to support the work. That undertaking led to an increasingly  
4807 complicated draft and eventually to abandonment of the project  
4808 without publishing any proposal. Last year the Second Circuit  
4809 published an opinion explicitly inviting revision of Rule 68 to  
4810 address the problems presented by cases that involve specific  
4811 relief. Recent empirical work investigating the use of Rule 68  
4812 offers in fee-shifting cases involving employment discrimination  
4813 and civil rights has been undertaken by Professors Thomas A.  
4814 Eaton and Harold S. Lewis, Jr.. Specific proposals will emerge  
4815 from their work.

4816 It was noted that Pennsylvania state courts use added  
4817 interest awards as an incentive to accept an offer of judgment.  
4818 It may be possible to rely on enhanced costs or interest awards  
4819 to make Rule 68 more effective without intruding on the  
4820 traditional attorney-fee rules that apply outside the realm of  
4821 statutory fee shifting.

4822 It was agreed that Rule 68 can remain on the agenda for  
4823 possible future consideration.

4825

*Rule 68*

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Judge Kravitz introduced the Rule 68 discussion by noting a recent article by Professor Robert Bone. The article provides a great discussion of the history. Rule 68 was designed not so much to encourage settlement as to deal with recalcitrant plaintiffs. The conclusion is that if promoting settlement has become an important goal, the present rule should be scrapped in favor of starting over.

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Four options are presented in the agenda materials: Do nothing; abrogate the rule; undertake relatively modest revisions; or undertake a thorough revision.

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Connecticut state courts have a rule that allows offers by plaintiffs as well as defendants, and that imposes big penalties for guessing wrong in the form of prejudgment interest at high rates. The interest award can easily double a jury verdict. The rule "has turned into a game." A plaintiff with a \$1,000,000 claim will make an offer of \$750,000 before the defendant's attorney even knows what the action is about. The inevitable ignorance-induced rejection then opens the way for further bargaining in the shadow of rule-based sanctions. One challenge will be whether it is possible to develop a rule that is much used without becoming the occasion of gamesmanship.

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The history of Committee efforts to address Rule 68 in the 1980s and 1990s was reviewed. The proposal to adopt strong sanctions in the 1980s led to the proverbial firestorm of protest. One concerned and thoughtful observer of the Enabling Act process, John P. Frank, feared that continued pursuit of the subject might lead Congress to alter or abandon the Enabling Act process. The effort in the 1990s made a serious attempt to address many of the complexities that could be foreseen. The work was supported by Federal Judicial Center research. In the end the draft became so complex as to be abandoned. The discussions led several members to the view that abrogation might be the best solution, but the question was never put to a vote.

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It is common ground in Rule 68 discussions that offers are seldom made. Even in fee-shifting cases empirical studies have repeatedly shown that offers are made in only a relatively small minority of cases. Recent empirical work by Professors Eaton and Lewis shows that attorneys with long experience in civil rights and employment-discrimination litigation, where offers can cut off statutory fee rights, agree that ADR mechanisms are more effective than Rule 68 in promoting early settlement. It also is common ground that no possible version of Rule 68 could do much to increase the number of cases that actually settle; the most that might be hoped is that cases that settle will settle earlier and at lower cost.

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The list of topics that might be addressed by a modest revision has a way of expanding. One obvious candidate is the ruling that a plaintiff who fails to better a rejected Rule 68 offer loses the right to statutory attorney fees incurred after the offer if – but only if – the fee statute refers to fees as "costs." Turning the consequence on the happenstance of

4877 statutory language seems a puzzling use of "plain meaning"  
4878 interpretation – no plausible reason can be advanced for  
4879 believing that the wording choice of fee statutes is made with an  
4880 eye to invoking, or rejecting, Rule 68 consequences. More  
4881 fundamentally, it is difficult to agree that Rule 68 should  
4882 become a vehicle for cutting off fee rights established for  
4883 prevailing plaintiffs enforcing specially favored rights. This  
4884 effect seems to abridge or modify important substantive statute-  
4885 based rights. The fear of losing statutory fees, moreover, may  
4886 create at least a tension between the interests of counsel and  
4887 the party's interests.

4888 Another seemingly modest change would be to provide an  
4889 opportunity for plaintiffs to make offers. The difficulty is  
4890 that sanctions would be available only when the defendant loses  
4891 more than the offer. The plaintiff would be entitled to  
4892 statutory costs in any event, so a Rule 68 sanction would have to  
4893 be something additional. The most common suggestion is to award  
4894 attorney fees, a manifestly sensitive prospect. Multiple costs  
4895 might be provided instead. California provides expert witness  
4896 fees. Finding the right sanction might not be easy, but at least  
4897 it would make the rule seem more fair if all parties can make  
4898 offers. Of course expanding the opportunities to offer would  
4899 also expand the opportunities for strategic game playing.

4900 Other relatively modest changes could begin by changing the  
4901 procedure to one offering settlement, not judgment. The lawyers  
4902 surveyed by Eaton and Lewis often said that they do not make  
4903 offers of judgment because their clients do not want the career-  
4904 blighting effects of an adverse judgment. The time to consider  
4905 the offer could be extended from the 14 days available under the  
4906 day-counting approach of the present rule or the explicit  
4907 provision of the Time Project revision. Extending the time to  
4908 consider would be an obvious occasion to answer a question that  
4909 has divided the courts by allowing retraction of an offer before  
4910 acceptance. Class actions might be removed from Rule 68's reach.

4911 The Second Circuit has asked for consideration of the  
4912 complications that arise when offer or judgment include specific  
4913 relief as well as money. The draft that was put aside in 1994  
4914 offered a relatively simple solution to what could be an  
4915 enormously complicated comparison – judgment and offer are  
4916 compared by recognizing a judgment for a plaintiff as more  
4917 favorable than the offer only if it includes all of the  
4918 nonmonetary relief offered, or substantially all of the offered  
4919 relief and additional relief as well.

4920 More thorough revision would address such questions as  
4921 offers made to multiple parties; the opportunity to make  
4922 successive offers – which could greatly complicate not only the  
4923 rule, but also the consequent strategic use of the rule; and  
4924 adoption of a margin of error, hoping to reduce the problems of  
4925 uncertainty by invoking sanctions only if the offer beats the  
4926 judgment by a factor of 20% or 25%.

4927 Dissatisfaction with Rule 68 at its core arises in part from  
4928 the unpredictability of litigation. Imposing sanctions – and  
4929 particularly imposing sanctions severe enough to create  
4930 meaningful incentives – may seem unfair when a party simply

4931 guesses wrong within an often wide range of plausible outcomes.  
4932 More fundamental concerns focus on risk aversion and endowment.  
4933 A poorly endowed plaintiff, in great need of some remedy and  
4934 unable to bear the risk of relief, may be pressured to accept an  
4935 offer well below the reasonable range.

4936 Discussion began with the suggestion that one approach would  
4937 be to amend Rule 68 to provide only § 1920 cost consequences.  
4938 Overruling statutory fee-shifting consequences would be the next  
4939 closest thing to abrogation, leaving the rule to wallow in  
4940 obscurity.

4941 It was noted that Indiana has a bilateral rule that "is not  
4942 much used." Proposals to add greater sanctions have proved  
4943 controversial. Calling it settlement rather than judgment might  
4944 make a difference, but the more likely guess is that if the  
4945 dollars are right the existence or nonexistence of an offer-of-  
4946 judgment (settlement) provision will not much affect the parties'  
4947 ability to settle.

4948 Another member noted that Florida has a procedure that can  
4949 be used effectively.

4950 An observer noted that six years ago New Jersey adopted  
4951 attorney fee sanctions, with a 20% safety margin of difference.  
4952 Use of the rule "has become complex." The rule was amended to  
4953 exclude nonmoney judgments and statutory fee shifting. The rule  
4954 can be useful in addressing the obstinate party who clings to a  
4955 meritless position.

4956 A member noted that Rule 68 offers are made on rare  
4957 occasions in class actions, usually in a seeming attempt to moot  
4958 the individual claim of the class representative. The offer is  
4959 inherently coercive. And it creates a conflict between attorney  
4960 and client. If it is carried forward, class actions should be  
4961 explicitly excluded from its reach.

4962 Another member suggested that it will be very difficult and  
4963 controversial to make Rule 68 effective. Even small changes will  
4964 open up controversy.

4965 A judge noted that lawyers very seldom use Rule 68.

4966 Another judge thought it may be worthwhile to explore the  
4967 option of changing from an offer of judgment to an offer of  
4968 settlement. An attorney replied that it was difficult to imagine  
4969 that Rule 68 would make a difference; "if you're talking, you're  
4970 talking."

4971 A motion to do nothing now carried unanimously. Rule 68  
4972 will be carried forward on the agenda, perhaps for more detailed  
4973 consideration in the fall of 2009.