ADVISORY COMMITTEE
ON
CIVIL RULES

Philadelphia, PA
April 10, 2018

TABLE OF CONTENTS

AGENDA

Meeting of the Advisory Committee on Civil Rules
April 10, 2018

1. Opening Business

   A. Report on the January 2018 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 2017 meeting of the Advisory Committee on Civil Rules

3. **Information Item**: Legislation

   A. Class-Action, MDL Legislation

   B. Other Legislation

4. **ACTION ITEM**: **Rule 30(b)(6)** Subcommittee Report

5. **Information Item**: **MDL** Subcommittee Report

6. **Information Item**: **Social Security Review** Subcommittee Report

7. **ACTION ITEM**: **Rule 71.1(d)(3)(B)(i)** Newspaper Publication

8. **Information Item**: **Rule 4(k)** Expanded National Contacts Jurisdiction

9. **Information Item**: **Rule 73(b)(1), (2)**: Consent to Magistrate Judge Trial

10. **Information/ACTION Items**: **Other Docket Matters**

    A. Rule 5(b)(2)(C): Return Receipt

    B. Rule 55(a): Duty to Enter Default

    C. Rule 8: Simplified Complaints

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON CIVIL RULES

Chair, Advisory Committee on Civil Rules	**Honorable John D. Bates** United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
Reporter, Advisory Committee on Civil Rules	**Professor Edward H. Cooper** University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Associate Reporter, Advisory Committee on Civil Rules	**Professor Richard L. Marcus** University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
Members, Advisory Committee on Civil Rules	**John M. Barkett, Esq.** Shook, Hardy & Bacon L.L.P. 3200 Miami Center 201 S. Biscayne Blvd. Miami, Florida 33131 **Honorable Robert Michael Dow, Jr.** United States District Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street, Room 1978 Chicago, IL 60604 **Honorable Joan N. Ericksen** United States District Court United States Courthouse 300 South Fourth Street, Room 12W Minneapolis, MN 55415 **Parker C. Folse, Esq.** Susman Godfrey LLP 1201 Third Avenue, Suite 3800 Seattle, WA 98101 **Honorable Sara Lioi** United States District Court John F. Seiberling Federal Building and United States Courthouse Two South Main Street, Room 526 Akron, OH 44308

Members, Advisory Committee on Civil Rules (*cont'd*)	**Honorable Scott M. Matheson, Jr.** United States Court of Appeals Wallace F. Bennett Federal Building 125 South State Street, Room 5402 Salt Lake City, UT 84138 **Honorable Brian Morris** United States District Court Missouri River Courthouse 125 Central Avenue West, Suite 301 Great Falls, MT 59404 **Honorable David E. Nahmias** Supreme Court of Georgia Room 512, State Judicial Building Atlanta, GA 30334 **Honorable Chad A. Readler** Acting Assistant Attorney General (ex officio) United States Department of Justice, Civil Division 950 Pennsylvania Ave., N.W., Suite 3601 Washington, DC 20530 **Virginia A. Seitz, Esq.** Sidley Austin LLP 1501 K Street, N.W. Washington DC 20005 **Honorable Craig B. Shaffer** United States District Court Alfred A. Arraj United States Courthouse 901 19th Street, 4th Floor Denver, CO 80294 **A. Benjamin Spencer** Earle K. Shawe Professor of Law University of Virginia Law School 580 Massie Road Charlottesville, VA 22903 **Ariana J. Tadler, Esq.** Milberg LLP One Pennsylvania Plaza, 50th Floor New York, NY 10119
Liaison Members, Advisory Committee on Civil Rules	**Peter D. Keisler, Esq.** *(Standing)* Sidley Austin, LLP 1501 K Street, N.W. Washington DC 20005

Liaison Members, Advisory Committee on Civil Rules *(cont'd)*	**Honorable A. Benjamin Goldgar** *(Bankruptcy)* United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 638 Chicago, IL 60604
Clerk of Court Representative, Advisory Committee on Civil Rules	**Laura A. Briggs** Clerk of Court United States District Court 105 Birch Bayh Federal Building and U.S. Courthouse 46 East Ohio Street Indianapolis, IN 46204
Secretary, Standing Committee and Rules Committee Chief Counsel	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

ADVISORY COMMITTEE ON CIVIL RULES

				Start Date	End Date
John D. Bates Chair	D	District of Columbia	Member: Chair:	---- 2015	---- 2018
John M. Barkett	ESQ	Florida		2012	2018
Robert Michael Dow, Jr.	D	Illinois (Northern)		2013	2019
Joan N. Ericksen	D	Minnesota		2015	2018
Parker C. Folse	ESQ	Washington		2012	2018
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
Chad A. Readler*	DOJ	Washington, DC		N/A	N/A
Virginia A. Seitz	ESQ	Washington, DC		2014	2020
Craig B. Shaffer	M	Colorado		2014	2020
A. Benjamin Spencer	ACAD	Virginia		2017	2020
Ariana J. Tadler	ESQ	New York		2017	2020
Edward H. Cooper Reporter	ACAD	Michigan		1992	Open
Richard Marcus Associate Reporter	ACAD	California		1996	Open

Principal Staff: Rebecca Womeldorf (202) 502-1820

* Ex-officio - Acting Assistant Attorney General, Civil Division

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	**Judge Frank Mays Hull**	***(Standing)***
	Judge Pamela Pepper	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge Susan P. Graber**	***(Standing)***
Liaisons for the Advisory Committee on Civil Rules	**Peter D. Keisler, Esq.**	***(Standing)***
	Judge A. Benjamin Goldgar	***(Bankruptcy)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge Jesse Furman**	***(Standing)***
	Judge Sara Lioi	***(Civil)***
	Judge James C. Dever III	***(Criminal)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

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

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

Scott Myers
Attorney Advisor (Bankruptcy)
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1913 Fax 202-502-1755
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-240
Washington, DC 20544
Phone 202-502-1313 Fax 202-502-1755
Bridget_Healy@ao.uscourts.gov

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

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

FEDERAL JUDICIAL CENTER LIAISONS

<table>
<tr><td colspan="2">Honorable Jeremy D. Fogel
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 6-100
Washington, DC 20002
Phone 202-502-4160
Fax 202-502-4099</td></tr>
<tr><td>Tim Reagan
(Rules of Practice & Procedure)
Senior Research Associate
Federal Judicial Center
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E., Room 6-436
Washington, DC 20002
Phone 202-502-4097
Fax 202-502-4199</td><td>Marie Leary
(Appellate Rules Committee)
Senior Research Associate
Research Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4069
Fax 202-502-4199
mleary@fjc.gov</td></tr>
<tr><td>Molly T. Johnson
(Bankruptcy Rules Committee)
Senior Research Associate
Research Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 315-824-4945
mjohnson@fjc.gov</td><td>Emery G. Lee
(Civil Rules Committee)
Senior Research Associate
Research Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4078
Fax 202-502-4199
elee@fjc.gov</td></tr>
<tr><td>Laural L. Hooper
(Criminal Rules Committee)
Senior Research Associate
Research Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4093
Fax 202-502-4199
lhooper@fjc.gov</td><td>Timothy T. Lau
(Evidence Rules Committee)
Research Associate
Research Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4089
Fax 202-502-4199
tlau@fjc.gov</td></tr>
</table>

THIS PAGE INTENTIONALLY BLANK

TAB 1

THIS PAGE INTENTIONALLY BLANK

TAB 1A

THIS PAGE INTENTIONALLY BLANK

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 4, 2018 | Phoenix, Arizona

TABLE OF CONTENTS

ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting at the JW Marriott Camelback Inn in Scottsdale, Arizona, on January 4, 2018. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Daniel C. Girard, Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Judge Jack Zouhary

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Gregory E. Maggs, Reporter

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

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

* Elizabeth J. Shapiro, Deputy Director of the Department of Justice's Civil Division, represented the Department on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve (by telephone)	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Julie Wilson (by telephone)	Attorney Advisor, RCS
Scott Myers (by telephone)	Attorney Advisor, RCS
Bridget Healy (by telephone)	Attorney Advisor, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He introduced the Committee's new members, Judge Srinivasan of the U.S. Court of Appeals for the District of Columbia, Judge Kuhl of the Los Angeles Superior Court, and attorney Bob Giuffra of Sullivan & Cromwell's New York Office, as well as other first-time attendees supporting the meeting.

He announced that Chief Justice Roberts appointed Cathie Struve Associate Reporter to the Standing Committee and that Dan Coquillette will retire as Reporter to the Standing Committee at the end of 2018. Dan Coquillette will continue to serve as a consultant to the Standing Committee. Judge Campbell thanked Professor Coquillette for his tremendous support and guidance throughout the years.

Judge Campbell also welcomed Judge Livingston as the new Chair of the Advisory Committee on Evidence Rules. He also informed the Standing Committee that Professor Greg Maggs was nominated to the U.S. Court of Appeals for the Armed Forces, and once confirmed, Professor Maggs will be ineligible to continue as Reporter to the Advisory Committee on Appellate Rules. He thanked Professor Maggs for his service.

For the new members, Judge Campbell explained the division of agenda items at the Standing Committee's January and June meetings. The January meeting tends to be an informational meeting with few action items, which is true for today's meeting. The January meeting typically serves to get the Standing Committee up to speed on what is happening in the advisory committees so that the Standing Committee is better prepared to make decisions at its June meeting, where proposals are approved for publication or transmission to the Supreme Court. The Committee's January meeting also serves to provide feedback to the advisory committees on pending proposals. Judge Campbell encouraged all Committee members to speak up on issues and topics raised by the advisory committees.

Rebecca Womeldorf directed the Committee to the chart, included in the Agenda Book, that summarizes the status of current rules amendments in a three-year cycle. This chart shows

the breadth of work underway in the rules process, whether technical or substantive rules changes. The chart also details proposed rules pending before the U.S. Supreme Court that, if approved, would become effective December 1, 2018. Between now and May 1, 2018, the Committee will receive word if the Supreme Court has approved the rules. If so, the Court and the Committee will prepare a package of materials for Congress. Around the end of April, there will be an order on the U.S. Supreme Court's website noting that the proposed rules have been transmitted to Congress. If Congress takes no action, this set of rules becomes effective December 1, 2018.

The chart also notes which proposed rules are published for comment and public hearings, whether in D.C. or elsewhere in the country. If there is insufficient interest, the public hearings are cancelled. So far, we have not had requests to testify about these published rules, but have received some written comments. These rules will most likely come before the Committee for final approval in June 2018.

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 12-13, 2017 meeting.**

TASK FORCE ON PROTECTING COOPERATORS

Judge Campbell and Judge St. Eve updated the Committee on the Task Force on Protecting Cooperators. Judge Campbell began by reviewing the origins of the Cooperators Task Force, from a letter by the Committee on Court Administration and Case Management ("CACM") detailing various recommendations to address harm to cooperators to Judge Sutton's referral of CACM's recommendation for various rules-related amendments to the Criminal Rules Committee. Director Duff also formed a Task Force on Protecting Cooperators to address various practices within the judiciary, the Bureau of Prisons ("BOP"), and the Department of Justice ("DOJ") that might address the problem in a comprehensive way.

Judge St. Eve provided an overview of the Task Force, noting that Judge Kaplan serves as Chair. She explained that the Task Force has explored what is driving harm to cooperators and what the Task Force can do to address the problem. There are four separate working groups within the Task Force – namely, a BOP Working Group, a CM/ECF Working Group, a DOJ Working Group, and a State Practices Working Group. Judge St. Eve reviewed the work completed or underway by each working group. The State Practices Working Group explored and did not identify any state practices that could be adopted by the federal courts to address harm to cooperators.

One challenge the Task Force faces is the variety of policies and procedures used by federal district courts across the country to reduce harm to cooperators, from the District of Maryland to the Southern District of New York. The DOJ Working Group is trying to synthesize and identify commonalities among disparate local policies and procedures.

The BOP Working Group found consistent themes and issues, and Judge St. Eve noted that BOP has been incredibly cooperative throughout this process. The BOP does not collect statistics documenting the extent of the harm to cooperators. Harm is occurring, primarily at high and medium security prisons, not low security facilities. Within these high and medium security prisons, prisoners are often forced by other inmates to "show their papers," such as sentencing transcripts and plea agreements, to demonstrate that they are not cooperators. These papers can be electronically accessed through PACER and CM/ECF.

As a result of these findings, the BOP Working Group will recommend that the BOP make these sentencing-related documents contraband within the prisons. Because some prisoners need access to these documents, BOP will work with wardens to establish facilities within the prisons where prisoners can securely access these documents. The Group is also recommending that BOP punish individuals for pressuring and threatening cooperators. Some recommended changes will require approval from BOP's union prior to implementation.

Another major issue is developing other types of limitations to place on PACER and CM/ECF to reduce the identification of cooperators, consistent with First Amendment and other concerns. On January 17, the CM/ECF Working Group will meet in Washington D.C. to hear from federal public defenders on this issue. The full Task Force meets on January 18.

Judge Campbell noted that the Committee does not have jurisdiction over BOP Policy or CM/ECF remote access. However, the question for the Committee is whether and what rules-based changes can be made to further help address this problem.

Judge Bates asked whether the Task Force has received any feedback from the defense bar about limiting incarcerated individuals' access. Judge St. Eve noted that a federal defender is on the Task Force and that federal defenders support limiting access within BOP so long as prisoners can still access their documents when necessary for appeals and other court proceedings.

Professor Coquillette asked why the BOP cannot collect empirical data, and Judge St. Eve responded that the Task Force considered proposing such a recommendation. The Task Force decided against this recommendation after the BOP voiced concerns that collecting the data will create more harm than good. Judge Campbell noted the FJC survey, which provides anecdotal evidence in which judges reported over 500 instances of harm to cooperators, including 31 murders, and that much of this harm stemmed from the ability to identify cooperators from court documents. This FJC survey was a major impetus for the CACM letter. One committee member noted that he believes that the problem of harm to cooperators is better addressed by the BOP, instead of through rules changes. Judge St. Eve emphasized that BOP officials – especially BOP staff working at high and medium security facilities – know that harm to cooperators is a problem and are committed to better addressing it.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy provided the report of the Advisory Committee on Criminal Rules, focusing largely on the Advisory Committee's decision to oppose adopting CACM-recommended rules to reduce harm to cooperators. As noted earlier, CACM recommended that the Standing Committee amend various criminal rules to reduce harm to cooperators. The Committee referred the CACM recommendation to the Criminal Rules Committee, which created the Cooperator Subcommittee, also chaired by Judge Kaplan.

At the Advisory Committee meeting in October 2017, the Cooperator Subcommittee presented its research and recommendations about CACM-based rules amendments. In drafting rule amendments consistent with CACM's proposal, the Subcommittee balanced competing interests – namely, transparency and First Amendment concerns with harm reduction concerns. After many meetings, the Subcommittee concluded that amendments to Criminal Rules 11, 32, 35, 47, and 49 would be required to implement CACM's recommendations, and the Subcommittee drafted these amendments for further discussion.

The Subcommittee's draft amendments engendered a lively discussion at the Advisory Committee meeting. Judge Kaplan and the DOJ abstained from voting. The Advisory Committee as a whole voted on two questions. First, the Advisory Committee unanimously agreed that the draft rules amendments would implement CACM's proposals. Second, the Advisory Committee agreed, albeit with two dissenting votes, not to recommend these amendments.

With this overview, Judge Molloy sought discussion about whether the Committee agreed with Advisory Committee's decision. To assist the Committee, Professors Beale and King provided an overview of the various proposed amendments to Criminal Rules 11, 32, 35, 47, and 49, that had been considered.

One Committee member questioned how defense bar advocacy is impaired when plea agreements are sealed on a case-by-case basis because defense attorneys are not losing any information that they otherwise would have. Professor King noted that sealing practices vary district-by-district, and so, a rule about sealing on a case-by-case basis would not reduce access to that information in districts that rarely or never seal. Professor King also noted that the defense bar indicated that the terms of plea agreements are important, that they need this information in order to assess their client's proposed plea agreement, and that sealing plea agreements in every case would impair their ability to do this. Another member asked about whether sealing the plea agreements in every case would prevent others from identifying cooperators. Professor Beale responded that it would prevent others from identifying cooperators through plea agreements, but that there are other ways to learn about cooperators – through lighter sentences, Brady disclosures, etc. She articulated that the Advisory Committee did not think that Rule 11 was an effective response to the problem, especially given that this rule change would be a transition to secrecy.

One member asked whether constitutional challenges have been raised in districts that have implemented aggressive sealing tactics in order to protect cooperators. Judge St. Eve noted that she is not aware of any constitutional challenges. This may reflect that these districts have received

buy-in as to sealing practices from prosecutors, defenders, and judges prior to implementation. Professor Beale noted that some instances of constitutional challenges by an individual do exist.

Judge Campbell interjected to respond to a few comments raised by committee members. First, he stated that there is no way to absolutely prevent cooperator identity from becoming known but that this does not mean steps cannot be taken that will reduce the dissemination of such information. Moreover, there seem to be ways to reduce the identification of cooperators without increased sealing, whether by changing the appearance of the docket on CM/ECF or adopting the "master sealed event" approach implemented in the District of Arizona. Judge Campbell emphasized that the Advisory Committee should not give up on amendments that would not result in more secrecy.

More generally, many Committee members asked questions about the overall implications of CACM-based rules changes. One member inquired whether these rules changes would (negatively) affect non-cooperators who would no longer be able to demonstrate their non-cooperation status. Professor King noted that this is a tricky issue and that the effect of rule-based changes on non-cooperators is one reason why the defense bar has no unanimous position on this topic. Another member asked whether the CACM-based rules changes would encourage more cooperation. From the Task Force perspective, Judge St. Eve said it is not part of the Task Force's mission to consider whether rules or policy changes would encourage more cooperation. The Task Force's charter focuses on ways to reduce harm to cooperators. One member voiced support for more judicial education on how to reduce harm to cooperators.

Another member noted that harm to cooperators has been occurring long before CM/ECF and that cooperator information can be learned from many sources other than CM/ECF. This member asked whether the Task Force believed that there would be some benefit from a national policy instead of the disparate local policy approach. Judge St. Eve stated that the Task Force thinks a national policy is the best option, and the DOJ is considering a national approach as well. However, due to local variation, the Task Force is facing the challenging question of what that national policy should be. Professor Capra noted that in 2011 a Joint CACM/Rules Committee considered this issue and determined that a national policy or approach is not feasible. Judge St. Eve stated that the Task Force is aware of this 2011 conclusion. Professor Beale noted one advantage to a rules-based change is that proposed rules would be published for public comment. In addition, rules promulgated through the Rules Enabling Act process would also obviously have national enforcement effect.

In light of this discussion, Judge Campbell asked whether the Committee agreed with the Advisory Committee's decision not to adopt the CACM rules-based changes. Before soliciting feedback, Judge Campbell noted that the DOJ did not take a position on these CACM rules-based amendments because DOJ wants to wait until the Task Force concludes its work. He also stated that some Advisory Committee members questioned whether the Advisory Committee could revisit rules changes depending on the outcome of the Task Force's work. Unless the Committee disagrees with the decision not to adopt the CACM rules-based changes at this time, the Advisory Committee opted, if necessary, to revisit these rules after the Task Force concludes its work.

Many members voiced agreement with the Advisory Committee's decision to reject the CACM rules-based amendments. One member supported the District of Arizona's approach, and another noted that, without empirical data about the causes of the problem, the Advisory Committee's position seemed wise. This member also stated that CM/ECF seems to be a problem and that CM/ECF should be changed. Another member thought consideration of any rules changes should wait until the CM/ECF Working Group makes its recommendations. One member suggested that achieving a national policy is difficult and the source of the problem stems from the BOP. This member believed that the harms from rules-based changes exceed the benefits.

Judge Molloy concluded his report by providing updates about the Advisory Committee's other work. After the mini-conference on complex criminal litigation, the Advisory Committee recommended that the FJC prepare a Manual on Complex Criminal Litigation, which would parallel the Manual on Complex Civil Litigation. The Advisory Committee is also considering a few new rules amendments. First, the Cooperator Subcommittee is considering amending Rule 32(e)(2) to remove the requirement to give the PSR to the defendant. This change could help address one aspect of the cooperator identification problem. Second, the Advisory Committee rejected a proposal to amend Rule 43 to permit sentencing by videoconference. Third, the Advisory Committee is considering re-examining potential changes to Rule 16 regarding expert disclosure in light of an article by Judge Paul Grimm. Lastly, the Advisory Committee is considering changes to Rule 49.2, which would limit remote access in criminal cases akin to the remote access limitations imposed by Civil Rule 5.2. However, the Advisory Committee is holding in abeyance its final recommendation on this rule change until after the Task Force concludes its work.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates presented the report of the Advisory Committee on Civil Rules, which included only informational items and no action items.

Rule 30(b)(6): The Subcommittee on Rule 30(b)(6) began with a broad focus, but it has narrowed the issues under consideration, primarily through examination and input from the bar. There is little case law on this topic in part because these problems are often resolved before judicial involvement or with little judicial involvement. The Subcommittee received more than 100 written comments on its proposed amendment ideas, and the feedback revealed strong competing views, often dependent upon whether the commenter typically represents plaintiffs or defendants.

Based on this input, the Subcommittee on Rule 30(b)(6) is focusing on amending Rule 30(b)(6) to require that the parties confer about the number and description of matters for examination. The Subcommittee is, however, still tinkering with the language. The Subcommittee is also receiving additional input on some select topics, including whether to add language to Rule 26(f) listing Rule 30(b)(6) depositions as a topic of consideration.

In terms of timeline, the Subcommittee will make a recommendation to the Advisory Committee at its April 2018 meeting. Its recommendation, if any, will be presented to the Standing Committee in June 2018.

One member asked why the judicial admissions issue was eliminated as an issue to be addressed. The Subcommittee concluded that there is little utility to a rules-based approach to this problem. Although tension in the case law exists, the cases are typically sanction-based cases related to bad behavior. The Subcommittee is concerned that a rule change directed to the judicial admissions issue could create more problems than it would solve.

Some members voiced support for adding a "meet and confer" element to Rule 30(b)(6), noting that it would help encourage parties to agree on the topics of depositions before the deposition and thereby reduce litigation costs. Others were skeptical that the parties would actually meet and confer to flesh out topics for the depositions. One member suggested that the benefit of this rule change would not exceed the work necessary to change the rule. Judge Campbell noted that this is a unique problem for a frequently used discovery tool. The Advisory Committee investigated this problem ten years ago and concluded that it was too difficult to devise a rule change to reduce the problem. Based on the comments raised, Judge Campbell wondered whether education of the bar, through a best practices or guidance document for Rule 30(b)(6), may be a better solution than a rule change.

Social Security Disability Review: The Administrative Conference of the United States ("ACUS") proposed creating uniform procedural rules governing judicial review of social security disability benefit determinations by the Social Security Administration. The Social Security Administration supports ACUS's proposal. The Advisory Committee is in the early stages of considering this proposal, and in November 2017, it met with representatives from ACUS, the Social Security Administration, the DOJ, and claimants' representatives. At this meeting, it became clear that a rules-based approach would not address the major issues with respect to social security review, including the high remand rate, lengthy administrative delays, and variations within the substantive case law governing social security appeals.

The Advisory Committee created a Social Security Subcommittee to consider the ACUS proposal. The Subcommittee will focus on potential rules governing the initiation of the case (e.g., filing of a complaint and an answer) and electronic service options. The Subcommittee will not consider discovery-based rules because this does not appear to be a major issue.

Some broad issues remain for the Subcommittee's determination, including the kind of rules it would devise, the placement of the rules (e.g., within the Civil Rules), concerns relating to substance-specific rulemaking, and whether to devise procedural rules for all administrative law cases. The Subcommittee thus far is not inclined to draft procedural rules for all types of administrative law cases, which can vary greatly. Although the Social Security Administration would like rules regarding page limits and filing deadlines, the Civil Rules do not typically include such specifications. The Subcommittee will provide an update to the Advisory Committee at its April meeting and to the Standing Committee in June.

One member asked about trans-substantivity, noting that the admiralty rules do not fit well within the Civil Rules and that rules governing judicial review of one administrative agency seem to raise even greater trans-substantivity concerns because such rules would be less general. This member asked whether the Subcommittee has considered that procedural rules for all administrative law cases would seem to raise fewer trans-substantive concerns than social security rules alone. Judge Bates said that the Subcommittee has not considered this issue yet but will be considering trans-substantivity concerns. Professor Cooper raised an empirical question about the extent to which all administrative law review cases focus primarily or solely on the administrative record.

One member encouraged the Subcommittee to consider Appellate Rules 15 and 20 when devising particular rules governing review of social security benefits decisions. Professor Struve seconded this suggestion. Another member asked about how the specialized rules for habeas corpus and admiralty came about under the Rules Enabling Act. Professors Cooper and Marcus provided an overview of the formation of these rules and noted that the habeas corpus rules are a good analogy for creating specialized rules for social security decisions.

Another member asked whether the Subcommittee is considering the patchwork of local district court rules governing social security review. The Subcommittee is looking at the panoply of local rules and how these rules impact the time for review at the district court level. Professor Cooper noted that there is not a wide divergence in the amount of time it takes courts to review social security decisions. Judge Campbell noted that 52 out of 94 district courts have their own procedural rules and that, according to the Social Security Administration's estimates, uniform rules would save the agency around 2-3 hours per case. Because the Social Security Administration handles around 18,000 cases per year, uniform rules would result in significant cost savings for the agency.

Multidistrict Litigation ("MDL") Proceedings: The Advisory Committee has received some proposals to draft specialized rules governing MDL proceedings, some of which parallel legislation pending in Congress such as HR 985. The business and defense interests have submitted these proposals, and none is from the plaintiff side. Judge Bates provided an overview of these various proposals, noting the focus on mass tort litigation.

The Advisory Committee has created a MDL Subcommittee, headed by Judge Bob Dow (who also headed the Class Action Subcommittee). The Subcommittee has a significant amount to learn. The Subcommittee has received written comments from the defense bar but it has yet to hear from the plaintiffs' bar, the Judicial Panel on Multidistrict Litigation, judges who have handled significant numbers of MDLs, and the academic community. The Subcommittee is currently creating a reading list as well as identifying research projects. The Subcommittee also has to explore how it wants to proceed, and given these factors adoption of rules, if any, will be a long and careful process. The Subcommittee will take six to twelve months of information gathering. Judge Campbell clarified that the Rules Enabling Act process guarantees that it would take at least three years before any rules are adopted (assuming any are proposed), but that these proposals are receiving careful attention.

Some members noted that this an important and valuable area to investigate given that MDLs comprise a significant portion of the federal docket. Because these cases often require considerable flexibility, innovation, and discretion, others expressed skepticism about the necessity or ability to devise a specialized set of rules for MDL proceedings. Another member noted that devising such rules may be difficult given that mass tort MDLs raise different issues and problems than antitrust MDLs, for example.

One member suggested that the Subcommittee consider the process for appointing lead counsel in light of Civil Rule 23(g)'s objective standard and how lead counsels are appointed under the Private Securities Litigation Reform Act. Another member recommended speaking with experienced MDL litigators. Other members recommended attending a variety of MDL conferences occurring around the country in 2018 as well as considering the best practices materials complied by the MDL Panel.

Third-Party Litigation Finance: The Advisory Committee has received a proposal which would require automatic disclosure of third-party litigation financing agreements under Rule 26(a)(1)(A)(v). Although this proposal does not pertain only to MDLs, the MDL Subcommittee is charged with exploring it. The Advisory Committee considered similar proposals in 2014 and 2016 but did not recommend any changes to the Civil Rules. Like the previous proposals, this proposal presents a definitional problem regarding what constitutes third-party litigation financing. It is also controversial, with a clear division between the plaintiff and defense bars, and it presents significant ethical questions. It is not clear that the Advisory Committee would have reconsidered this proposal again so soon, but because third-party litigation financing issues were raised within the MDL proposals, the Advisory Committee decided to examine the issue further as part of the rulemaking proposals for MDLs.

Other Proposals: The Advisory Committee received a proposal to amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The Advisory Committee will further explore this proposal, and the Department of Justice has indicated that it does not have a problem with eliminating the preference. The Advisory Committee wants to further explore the implications of eliminating the preference.

Another proposal received by the Advisory Committee was to amend Rule 16 so that a judge assigned to manage and adjudicate a case could not also serve as a "settlement neutral." The Advisory Committee removed this matter from its agenda because it is not clear that there is a problem that a rule amendment could or should solve.

The Advisory Committee was also asked to explore the initial discovery protocols for the Fair Labor Standards Act – a request which parallels earlier efforts regarding initial discovery protocols for employment cases alleging adverse action. The Advisory Committee hopes judges consider these protocols favorably, but it did not think the Advisory Committee should endorse these protocols. The Advisory Committee concerns itself with rules adopted through the Rules Enabling Act process and does not endorse work developed by other entities outside the rulemaking process.

Pilot Project Updates: Two courts, the District of Arizona and the Northern District of Illinois, have enlisted in the Mandatory Initial Discovery project. It is too early to report feedback on its results. Judge Campbell noted that the project has been going well in the District of Arizona, stating that initial feedback has been positive and that the district has experienced fewer issues than expected. He suspects, however, that problems may arise during summary judgment and trial phases for cases filed after May 1 when parties request that district judges exclude evidence not disclosed during the mandatory initial discovery periods. The district judges in Arizona are anticipating this and are prepared to handle the problems as they arise. Judge Campbell also applauded the FJC's efforts with developing and implementing this project. Judge St. Eve reported that the Mandatory Initial Discovery project rolled out very smoothly in the Northern District of Illinois and that the district has received positive feedback thus far.

The Expedited Procedures project has been stalled for want of participating district courts. The Advisory Committee has enlisted Judge Jack Zouhary to spearhead its efforts to drum up participation. The Advisory Committee has found courts often indicate initial support for the pilot, but ultimately decline to participate. Their support typically wanes due to vacancies, caseloads, or lack of unanimous participation by judges within a district. The project's requirements have been modified to permit more flexibility and to allow for less than unanimous participation by district judges within a given district.

Judge Zouhary noted his district agreed to participate in the Expedited Procedures project because his district already had similar rules in place, albeit using different terminology. A letter of endorsement for the project has been drafted, and some organizations, including the American College of Trial Lawyers, the Federal Bar Association, the FJC, the NYU Civil Jury Project, and the American Board of Trial Advocates, have expressed excitement for the project and are considering joining the letter.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta gave the report of the Advisory Committee on Bankruptcy Rules. At its September 2017 meeting, the Advisory Committee recommended publishing changes to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because the proposed amendments relate to a bankruptcy rule and an appellate rule that were published in August 2017, however, the Advisory Committee is waiting to review any comments before finalizing proposed language. The Advisory Committee plans to present the proposed changes at the Committee's June meeting.

Judge Ikuta discussed four additional information items: (1) withdrawal of a prior proposal to amend Rule 8023 (Voluntary Dismissals), (2) updates to national instructions for bankruptcy forms, (3) a suggestion to eliminate Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals), and (4) preliminary consideration of a proposal to restyle the bankruptcy rules.

The Advisory Committee decided to withdraw its prior recommendation to amend Rule 8023. Judge Ikuta said the proposed amendment was intended to be a reminder that a bankruptcy trustee who is party to an appeal may need bankruptcy court approval before seeking to dismiss the appeal. The Advisory Committee's Department of Justice representative raised a concern, however, that the change would be difficult for appellate clerks to administer. The Advisory Committee agreed that the proposed amendment could cause confusion, which outweighed the benefit of the proposed change. It therefore voted to withdraw the proposal from consideration.

The Advisory Committee updated national instructions for certain forms. Judge Ikuta explained that the December 1, 2017 amendments to Rule 9009 (Form) restricted the ability of bankruptcy courts to modify official forms, with certain exceptions. One exception allows for modifications that are authorized by national instructions. After learning the courts routinely modify certain notice-related forms to provide additional local court information, and that model court orders included as part of some official forms are often modified by courts to provide relevant details, the Advisory Committee approved national instructions that would permit these practices to continue.

The Advisory Committee is also looking into a suggestion from a bankruptcy clerk that it should eliminate or amend Rule 2013. The intent of the rule is to avoid cronyism between the bankruptcy bar and the courts. It requires the bankruptcy clerk to maintain a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and to provide an annual report of such fees to the United States trustee. The suggestion stated that compliance with this rule is spotty, and because a report regarding fees can be generated and provided on request, there is no need to keep systematic records. Judge Ikuta said that the Advisory Committee, with help from the FJC, will gather more information about current compliance with the rule before taking any steps. It expects to consider the issue at its spring 2018 meeting.

Finally, the Advisory Committee is considering whether it should commence the process of restyling the Bankruptcy Rules. The Advisory Committee is taking a phased approach before making this big decision. First, it is studying whether any restyling is warranted, given the close connection of the Bankruptcy Rules to the Bankruptcy Code and the use of many statutory terms throughout the rules. The Advisory Committee will also consider the views of its stakeholders, and it has asked the FJC to help it obtain input from users of the Bankruptcy Rules regarding the pros and cons of restyling. Because any input would be more meaningful and valuable if bankruptcy judges and practitioners could consider some exemplars of restyled rules, the Advisory Committee has asked the Committee's style consultants to assist in developing such exemplars from the eight rules in Part IV of the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston provided the report for the Advisory Committee on Evidence Rules. The Advisory Committee met on October 26 and 27, 2017, at the Boston College Law School, where the law school and Dean Vincent Rougeau were gracious hosts. She advised that she had no action items to report, but that there were several information items.

The Advisory Committee held a symposium in connection with its meeting. The symposium focused on forensic expert testimony, Rule 702, and Daubert. The topics discussed included the 2016 President's Council of Advisors on Science and Technology's ("PCAST") report on forensic science in criminal courts and a potential "best practices" manual. The conference participants shared an interest in ensuring that expert testimony comported with Rule 702, but the focus was not on potential amendments to Rule 702, but instead, the applications of the rule. Some conference attendees suggested that a best practice manual might be more helpful than potential rule amendments. Judge Livingston stated that the Advisory Committee will discuss the findings from the conference at its spring 2018 meeting.

Judge Campbell noted that a panel of judges and lawyers at the Boston College event also raised concerns about possible abuses of Daubert motions in civil cases, and he suggested that the Civil Rules Advisory Committee be apprised of these concerns. Dan Capra noted a potential circuit split related to the admissibility of forensic evidence.

Next, Judge Livingston advised that the Advisory Committee published a proposed amendment to Rule 807, and that the public comment period is open until mid-February. The Advisory Committee will discuss all comments at its meeting in the spring.

The Advisory Committee is also considering a possible amendment to Rule 801(d)(1)(A). It sought informal input on a possible amendment in the fall of 2017, and it also obtained results from a survey conducted by the FJC. The Advisory Committee will consider the input at its spring meeting. A committee member noted that one possible area of consideration for the Advisory Committee is jury instructions regarding prior consistent statements.

The Advisory Committee is considering a possible amendment to Rule 404(b); however, disagreement exists within the Advisory Committee regarding a circuit split between the Third and Seventh Circuits. There is further disagreement about how the rule is being employed, and the Advisory Committee has discussed the three principal purposes of the rule, including the chain of reasoning, the balancing test, and additions to the notice provision. Judge Campbell noted the similarities to the discussion surrounding Rule 30(b)(6), where there is a disagreement regarding whether an amendment is needed. Another member added that while much of the discussion is about criminal cases, any changes would impact civil cases as well.

Other items that will be considered by the Advisory Committee at its spring meeting include possible amendments to Rule 606(b) (in light of the Supreme Court's decision in *Pena-Rodriguez v. Colorado*) and to Rules 106 and 609(a)(1).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares provided the report for the Advisory Committee on Appellate Rules, which included several informational items and one discussion item. First, as to the discussion item, Judge Chagares reviewed the proposed amended rules pending before the Supreme Court for consideration, including the proposed amendments to Rule 25(d). The proposed amendment to Rule 25(d) would eliminate the requirement of proof of service when a document is filed through a court's electronic-filing system, replacing "proof of service" with "filed and served." Given the

pending amendment to Rule 25(d), the Advisory Committee decided that references to "proof of service" in Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) should be removed. Judge Chagares explained that these proposed amendments are technical and that the Advisory Committee did not believe publication of the technical changes was necessary.

During this discussion, several committee members raised concerns about the use of "filed and served" in Rule 25(d), suggesting elimination of the term "and served." Judge Campbell noted that while a document filed electronically is served automatically, those not filed electronically need the instruction in the rule. Committee members made suggestions for various stylistic edits to the proposed rule amendments, and the Committee's style consultants offered their views on the proposed language and edits, including present versus past tense. One committee member raised concerns about eliminating the proof of service language in Rule 39, given the subject-matter of the rule. Judge Campbell suggested adding to the committee notes an instruction regarding service and a reference to Rule 25. The group discussed possible language for the committee notes, and Judge Campbell recommended that the Advisory Committee consider these comments and present the revised package of rules and committee notes to the Committee in June, after consideration of the discussion at the meeting.

Following this meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d) from the Supreme Court's consideration. The Advisory Committee will consider the comments made at the Standing Committee meeting regarding Rule 25(d), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and it will present an amended set of proposed rule amendments for the Committee's consideration at its June 2018 meeting.

Judge Chagares reviewed several information items. The Advisory Committee considered at its November 2017 meeting a suggestion to amend Rule 29 to permit cities and Indian tribes to file amicus briefs without leave of court. The Advisory Committee considered but deferred action on the proposal five years ago, and after discussion at its November 2017 meeting, the Advisory Committee decided to take no further action. It is a problem that rarely, if ever, arises in litigation. Judge Campbell noted that most Indian tribes appear before federal court via private firms, not through government lawyers, and this could cause more recusal issues.

Judge Chagares advised that the Advisory Committee considered several other issues at its November 2017 meeting. These included a proposal to amend Rule 3(c)(1)(B), which as currently drafted may present a potential trap for the unwary. After discussion, a subcommittee was formed to study the issue. The Advisory Committee also considered a suggestion to amend Rules 10, 11, and 12 in light of advances made with electronic filing and the impact on the record on appeal. After discussion, the Advisory Committee determined that most clerks' offices have procedures to manage these issues, and that with upcoming upgrades to CM/ECF, some issues raised may be resolved. The Advisory Committee thus determined to remove the suggestion from its agenda. The Advisory Committee discussed a potential issue related to Rule 7 and whether attorney fees are "costs on appeal" under the rule. The Advisory Committee determined to refer the issue to the Civil Rules Committee and to form a subcommittee to monitor any developments.

Finally, Judge Chagares noted several items that the Advisory Committee may consider at upcoming meetings, including concerns about judges deciding issues outside of those addressed in briefing, the use of appendices, and the dismissal of appeals after settlement agreements. A Committee member raised a concern that the dismissal issue could be substantive rather than procedural, and Judge Chagares stated that this concern would be considered by the Advisory Committee when the issue is discussed.

REPORT OF THE ADMINISTRATIVE OFFICE

Rebecca Womeldorf provided the report from the Rules Committee Staff ("RCS"). The Standing Committee reviewed Scott Myers' report regarding instances where committees need to coordinate regarding proposed rule changes which implicate other rules. Ms. Womeldorf added that treatment of bonds for costs on appeal under Appellate Rule 7 and treatment of the proof of service references across the Appellate and Civil Rules will continue to require coordination between these various committees.

Julie Wilson provided an overview of congressional activity implicating the Federal Rules. In general, Ms. Wilson noted that, although the RCS is monitoring many pending bills, not much movement has occurred in the past few months. Ms. Wilson first briefly reviewed pending congressional legislation which would directly amend the Federal Rules. The Senate Judiciary Committee held in November 2017 a hearing on "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators," which focused on a variety of bills which would directly amend the Federal Rules, including the Lawsuit Abuse Reduction Act ("LARA"). No action, however, has occurred regarding these pieces of legislation, including LARA, since that hearing. The RCS continues to monitor these bills for further development.

The RCS has also offered mostly informal feedback and comments to Congress on other bills which would not directly amend but rather require review of the Federal Rules by the Standing Committee. This includes the Safeguarding Addresses from Emerging (SAFE) at Home Act, which was introduced in September 2017 by Senator Roy Blunt and would require federal courts and several agencies to comply with state address confidentiality programs. This proposed legislation raises concerns about service under the Federal Rules, and RCS communicated this feedback to Senator Blunt's staffer but has not heard anything in response. Representative Bob Goodlatte also introduced in October 2017 the Article I Amicus and Intervention Act, which would limit federal courts' authority to deny Congress's ability to appear as an amicus curiae. The RCS communicated its concern to congressional staffers that this legislation would lengthen the time of appeals.

A few developments occurred in the past month as well. On November 30, 2017, the House Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on "The Role and Impact of Nationwide Injunctions by District Courts." Although the hearing did not concern a specific piece of legislation, Rep. Goodlatte reiterated his interest in this issue, and Professor Samuel Bray, who submitted a proposal to the Civil Rules Committee earlier this year regarding nationwide injunctions, spoke at this hearing. The RCS will continue to monitor for the introduction of any specific pieces of legislation regarding nationwide injunctions.

The Committee lastly considered what advice it could provide to the Executive Committee regarding which goals and strategies outlined in the *Strategic Plan for the Federal Judiciary* should receive priority attention over the next two years. After discussion, the Committee authorized Judge Campbell to report the sense of the Committee on these issues to the Judiciary's Planning Coordinator.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the Committee members and other attendees for their participation. The Committee will next meet on June 12, 2018, in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1B

THIS PAGE INTENTIONALLY BLANK

Agenda E-19 (Summary)
Rules
March 2018

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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 on January 4, 2018. All members were present.

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

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter (by telephone); Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff (by telephone); Patrick Tighe, Law Clerk to the Standing Committee; and Dr. Tim Reagan and

Dr. Emery G. Lee III, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on November 9, 2017, and discussed the following items.

Proposal to Amend Rules to Address References to "Proof of Service"

A proposed amendment to Appellate Rule 25(d) that eliminates the requirement of proof of service when a party files a paper using the court's electronic filing system was approved by the Conference at its September 2017 session. (JCUS-SEP 17, p. 3) The advisory committee subsequently identified references to "proof of service" in Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1), that require corresponding amendments. The advisory committee determined after discussion that the proposed corresponding changes to remove or revise references to "proof of service" in each of these rules are properly seen as technical corrections for which publication for additional comments is unnecessary.

Upon further review of the proposed amendment to Appellate Rule 25(d) discussed above, and subsequent to its meeting on November 9, 2017, the advisory committee identified a wording change to the pending amendment that will clarify the intent of the rule change. This is a technical change for which publication for additional comments is unnecessary. To permit this change to be made prior to Supreme Court approval of the pending amendment to Rule 25(d), and to allow all Appellate Rule amendments addressing proof of service to proceed together, the advisory committee determined by e-mail vote to recommend withdrawing the proposed amendment to Rule 25(d) now pending before the Supreme Court and the Standing Committee agreed. The advisory committee intends to submit proposed amendments to Rules 5(a)(1),

21(a)(1) and (c), 25(d), 26(c), 32(f), and 39(d)(1), for approval at the Standing Committee's June 12, 2018 meeting, and ask the Judicial Conference to approve the withdrawal and new proposed amendments at its September 2018 session. The Committee agreed with all of the advisory committee's recommendations.

Revisiting Proposals to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs Without Leave of Court or Consent of the Parties

Rule 29(a) allows federal and state governments to file amicus briefs without leave of court or consent of the parties. At its April 2012 meeting, the advisory committee considered a suggestion to permit Indian Tribes and cities to file amicus briefs without leave of court or consent of the parties. The advisory committee determined to take no action on the suggestion, with an explanation that the advisory committee would revisit the item in five years. The advisory committee did so at its fall 2017 meeting, and determined that there remained no evidence that Indian Tribes or cities had been denied opportunity to file amicus briefs under the existing rule. Absent such evidence, and given the potential complications and ramifications of a rule change, the advisory committee decided to take no further action on the suggestion.

Rule 3(c)(1)(B) and the Merger Rule

Appellate Rule 3(c)(1)(B) requires a notice of appeal to "designate the judgment, order, or part thereof being appealed." In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. The advisory committee received a suggestion to revise the rule to eliminate the possible "trap for the unwary" reflected in the Eighth Circuit's interpretation of Rule 3(c)(1)(B). Following discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to study this issue to determine if any action should be taken on the suggestion.

Circuit Split on Whether Attorney's Fees Are "Costs on Appeal" Under Rule 7

A circuit split has arisen on the question of whether attorney's fees are "costs on appeal" for purposes of calculating the amount of a bond under Appellate Rule 7. After discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to investigate this issue, and will consult with the Civil Rules Advisory Committee on any resulting rule proposal.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Information Items

The Advisory Committee on Bankruptcy Rules met on September 26, 2017, and discussed the following items.

Rules 2002(h) and 8012

The advisory committee considered amendments to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Both proposals relate to other proposed amendments currently published for public comment. Because the related rules have not yet been finalized, the advisory committee plans to present the proposed amendments to Rules 2002(h) and 8012 at the Standing Committee's June 2018 meeting.

Withdrawal of Proposed Amendment to Rule 8023 (Voluntary Dismissal)

In August 2016, the advisory committee published for public comment a proposed amendment to Rule 8023, which governs voluntary dismissal of an appeal. The proposed amendment added a cross-reference to Rule 9019, which requires a bankruptcy trustee to get bankruptcy court approval of a compromise or settlement. The advisory committee recommended the amendment in response to a suggestion that appellate courts might be unaware that a bankruptcy trustee's ability to seek the dismissal of an appeal may be subject to bankruptcy court approval.

Although no comments addressing the proposed amendment were filed, the Department of Justice expressed concern at the advisory committee's spring 2017 meeting that the proposed amendment might create administration difficulties because it seemed to require the clerk or the appellate court to determine the applicability of Rule 9019 with respect to every voluntary dismissal of a bankruptcy appeal. The advisory committee considered the Department of Justice's concerns over the summer. After surveying the case law and finding no decision addressing the circumstance of a trustee voluntarily dismissing an appeal without complying with Rule 9019, the advisory committee decided an amendment to Rule 8023 was not needed and could cause confusion.

Approval of National Instructions Authorizing Alterations

The 2017 amendments to Rule 9009 restrict authority to make alterations to Official Bankruptcy Forms and provide as a general matter that "[t]he Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration." The rule was amended to ensure that a form, such as the Chapter 13 Plan Form, which is intended to provide information in a particular order and format, is not altered.

Rule 9009 includes exceptions to the general prohibition against altering Official Forms. One of those exceptions allows for alterations as provided in the "national instructions for a particular Official Form." In response to suggestions from several bankruptcy courts, the advisory committee approved national instructions for certain forms that would allow for limited modifications such as the cost-saving practice of adding local court information to the official form notice of a bankruptcy case.

Suggestion to Amend Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals)

The advisory committee received a suggestion from a bankruptcy clerk questioning the need for Rule 2013. The rule requires the bankruptcy clerk's office to compile and maintain a

public record of all fees awarded by the court to trustees, attorneys, and other professionals, and transmit the record to the U.S. trustee's office. The clerk asserts that CM/ECF has eliminated the need for the type of records Rule 2013 was designed to produce because reports about fee awards can now be generated on demand. The advisory committee is working with the FJC and will seek information from the U.S trustee's office to evaluate the current compliance with and the need for Rule 2013.

Exploration of Whether the Bankruptcy Rules Should be Restyled

Over the past two decades, each set of federal rules other than the Federal Rules of Bankruptcy Procedure have been comprehensively restyled. In the past, concerns have been raised that restyling of the Bankruptcy Rules should not be undertaken because of their close association with statutory text. For example, the Bankruptcy Rules continue to use the now disfavored word "shall" in order to be consistent with the Bankruptcy Code's use of that term. Nevertheless, incremental restyling has occurred, and in the process of revising Part VIII of the bankruptcy rules, which address bankruptcy appeals, and other individual rules, the new style conventions from other rule sets generally have been incorporated.

In response to suggestions from the style consultants that the time has come to comprehensively restyle the Bankruptcy Rules, the advisory committee has established a subcommittee to explore the advisability of such a project. The subcommittee anticipates that it will make at least a preliminary report to the advisory committee at its spring 2018 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The advisory committee met on November 7, 2017. Discussion focused primarily on its ongoing consideration of possible amendments to Rule 30(b)(6), a suggestion from the Administrative Conference of the United States regarding social security review cases,

suggestions urging rules for multidistrict litigation (MDL) proceedings, and a suggestion that Rule 26 be amended to require disclosure of third party litigation financing agreements.

Rule 30(b)(6) (Depositions of an Organization)

The advisory committee continued its consideration of Rule 30(b)(6), the rule addressing deposition notices or subpoenas directed to an organization. As previously reported, in May 2016, the Rule 30(b)(6) subcommittee solicited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision for objections to Rule 30(b)(6) deposition notices; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

The advisory committee posted an invitation for comment on the federal judiciary's rulemaking website and asked for submission of any comments by August 1, 2017. In addition, members of the subcommittee participated in two conferences focused on the rule in an effort to receive additional input from the bar.

The input received revealed significant disagreements as to what are the most serious problems with the rule. One set of concerns focused on perceived over-reaching in use of the rule, sometimes leading to overbroad or overly numerous topics for interrogation, or strategic use of the judicial admission possibility. A competing set of concerns focused on organizations'

preparation of their witnesses; some say organizations too often evade their responsibilities and that enforcement of the duty to prepare is too lax.

Positive comments were also received. It was reported that very often, after notice of a Rule 30(b)(6) deposition is given, the parties engage in constructive exchanges that produce improvements from the perspective of both the noticing party and the organization and that facilitate an orderly inquiry. Based on input from the bar on the six amendment ideas, the subcommittee determined that proceeding with any of them would likely produce controversy rather than improve practice. At the same time, it seemed that a rule amendment that prompts, or even requires, parties to communicate about recurrent problem areas might be the best approach for improving practice. Initially, the subcommittee focused on possible amendments to Rule 16(c) (to require the court to consider including provision for Rule 30(b)(6) depositions in a case management order) or Rule 26(f) (to direct the parties to discuss the matter during their discovery planning conference). Ultimately, however, the subcommittee returned to Rule 30(b)(6) itself, drafting language that adds the requirement that the parties communicate about Rule 30(b)(6) depositions when a party proposes to take such a deposition.

At the fall 2017 meeting, the advisory committee discussed the draft language. Members provided helpful feedback, including the following: (1) any amendment should make clear that there is a bilateral obligation to confer; (2) the organization should be expected to discuss the identity of the person to be offered as its designee as well as the matters for examination; and (3) the inclusion in the draft that the parties "attempt" to confer might be problematic. There was also discussion about whether an amendment to Rule 26(f) would in fact be helpful.

Since the meeting, the subcommittee has continued to work on a draft proposed amendment. It plans to present a proposed amendment for publication to the advisory committee at its meeting in April 2018.

Social Security Disability Review Cases

As previously reported, the advisory committee has added to its agenda the consideration of a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." The suggestion was referred to the advisory committee, as it is the appropriate committee to study and to advise about rules for civil actions in the district courts.

A subcommittee was formed to consider the ACUS suggestion and to gather additional data and information from the various stakeholders. As a first step, government and claimant representatives were invited to a meeting on November 6, 2017. Participants included the Vice Chair/Executive Director of the ACUS; the General Counsel of the Social Security Administration; the Counsel to the Associate Attorney General, Department of Justice; the Deputy Director of Government Affairs of the National Organization of Social Security Claimants' Representatives; and a representative of the American Association for Justice. The meeting began with formal statements and developed through open give-and-take discussion that substantially focused, and seemed to narrow, the issues.

At its meeting the next day, the advisory committee engaged in a lengthy discussion of the ACUS suggestion. A similarly robust discussion occurred at the January 2018 meeting of the Standing Committee. No final decision has been made regarding the ACUS suggestion; questions and concerns remain regarding the advisability of promulgating rules for specific types of cases and whether any such rules would be effective. However, the advisory committee through its subcommittee is committed to thoroughly considering the suggestion and anticipates several additional months of information gathering before deciding whether to pursue draft rules.

MDL Proceedings

At its fall 2017 meeting, the advisory committee formed a subcommittee to consider three proposals for specific rules for MDL proceedings – actions transferred for "coordinated or consolidated pretrial proceedings" under 28 U.S.C. § 1407. Two of the proposals suggested amendments to the Civil Rules to add provisions applicable to all MDL proceedings. Several of these proposed amendments are born of a common concern: large MDL proceedings often attract claimants whose purported claims have no foundation in fact, and there is no effective means for screening them out early. Other proposed amendments address bellwether trial practice and an expansion of the opportunities for interlocutory appellate review.

A third proposal would only apply to those MDL proceedings (about 20) involving more than 900 individual cases. It proposes that after discovery has been completed and the bellwether cases selected, the remaining work would be divided among five judges "to decide whether to dispose of a case on motion, settle, or remand." Judges from other districts could have intercircuit assignments to sit with the MDL court for these purposes.

The advisory committee engaged in a preliminary discussion of these suggestions at its fall 2017 meeting. It was the consensus of the advisory committee that more information is needed, especially input from the plaintiffs' bar and experienced MDL judges, as all of the proposals submitted thus far are from representatives of the defense bar. The subcommittee has begun information gathering. In considering whether there is an opportunity to improve MDL practice by amending current rules or adopting new rules, the subcommittee will coordinate closely with the Judicial Panel on Multidistrict Litigation.

Third Party Litigation Financing Agreements

The advisory committee has received a suggestion to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The advisory committee considered and declined to act upon similar proposals in 2014 and again in 2016. At its fall 2017 meeting, the advisory committee recognized that the issue is complicated and that any consideration must include input from both proponents and opponents of disclosure. The committee referred the issue to the MDL subcommittee, since one of the MDL proposals discussed above explicitly calls for disclosure of third party financing agreements. Additionally, such funding agreements are often used in MDL proceedings. The subcommittee will study the issue in an effort to determine whether it is something that should be pursued.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The advisory committee met on October 24, 2017. Among the topics for discussion were the consideration of the final report of the cooperator's subcommittee, a suggestion to amend Rule 32, and the development of a manual on complex criminal litigation.

Cooperator's Subcommittee

The main topic of discussion at the fall 2017 meeting was a report from the cooperator's subcommittee which was tasked with developing amendments to the Criminal Rules to address concerns regarding dangers to cooperating witnesses posed by access to information about cooperation in case files. The rules committees were asked to develop possible rule amendments

to implement the recommendations of the Judicial Conference Committee on Court Administration and Case Management (CACM) in its guidance issued in June 2016.

The subcommittee presented its final report detailing its comprehensive study of the issue, its development of several packages of rules proposals, and its recommendations to the full advisory committee. The report included the development of rules amendments to implement the CACM guidance, as well as four alternative approaches and related rules amendments: (1) amendments omitting the requirement in the guidance for bench conferences in every case during the plea and sentencing hearings; (2) amendments omitting the bench conferences and sealing the entirety of various documents that may refer to cooperation, rather than requiring bifurcation and the filing of sealed supplements to each document; (3) amendments omitting the bench conferences and directing that cooperation-related documents be submitted directly to the court and not filed, rather than filed under seal; and (4) amendments designed to implement the CACM guidance and to supplement it with additional rules amendments that might be deemed necessary or desirable to carry out the CACM Committee's approach and objectives. The subcommittee also reported that it had begun, but not completed, consideration of a new draft Criminal Rule 49.2 that would limit remote access to categories of documents that frequently refer to cooperation, but would allow full access to those documents at the courthouse.

The subcommittee reported that in its view the package of rules amendments developed to implement the CACM guidance would fully do so. However, the subcommittee reported that it did not recommend adoption of that rules package or any of the other alternative sets of rules amendments it developed.

After robust discussion, the advisory committee agreed with the subcommittee's recommendation that no rules amendments on this issue be pursued at this time. All members agreed that the threat of harm to cooperators is a serious problem that should be addressed, but

the advisory committee determined that rules amendments were not the best way to address the problem at this time. Various concerns were expressed, including the notion that the proposed amendments would make judicial proceedings less transparent, and that the amendments would result in sweeping changes that may not be necessary. Members were also of the view that other changes (*e.g.*, possible recommendations by the Task Force on Protecting Cooperators that changes be made by the Bureau of Prisons and to the CM/ECF system) should be implemented before embarking on rules amendments.

The advisory committee also decided to hold in abeyance any final recommendation on the subcommittee's alternative approach of limiting remote public access, reflected in its working draft of new Rule 49.2, but provided feedback to the subcommittee on its working draft.

Rule 32(e)(2) (Sentencing and Judgment–Disclosing the Report and Recommendation)

Also at the fall 2017 meeting, the advisory committee decided to add to its agenda a suggestion to amend Rule 32(e)(2) which states: "The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period." Probation officers often receive requests from defendants for copies of their presentence reports (PSRs). There is concern that this provision might contribute to the problem of threats and harm to cooperators. These requests may be the result of pressure from other inmates to provide materials that could reveal whether there was cooperation. Rule 32(e)(2) deliberately grants the right to receive the PSR to the defendant in order to increase the chances that incorrect information would be identified and corrected. At present, however, PSRs are often served only on counsel, not on the defendant. Given this reality and the concern that providing PSRs directly to defendants might contribute to the problem of threats and harm to cooperators, the question of whether to amend Rule 32(e)(2) was referred to the cooperator's subcommittee for consideration.

Manual on Complex Criminal Litigation

The Rule 16.1 subcommittee has been charged with exploring the possibility of developing a manual on complex criminal litigation that would parallel the Manual on Complex Civil Litigation. With input from the subcommittee, the FJC has agreed to develop a special topics page on its website focused exclusively on complex criminal litigation. The page will initially include existing relevant materials. No decision has been made yet whether all of the materials originally prepared for judicial use will be available to the public. Going forward, the FJC will spearhead the development of a manual, including obtaining input on topics from a broader group.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 26, 2017. In conjunction with this meeting, the advisory committee convened a group of experts to discuss topics related to forensic expert testimony, Rule 702, and *Daubert*.

Conference on Forensic Expert Testimony, Rule 702, and *Daubert*

The conference consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether Evidence Rules amendments could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel consisted of judges and practitioners, and discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The conference provided much material for the advisory committee to evaluate.

Possible Amendment to Rule 801(d)(1)(A)

Rule 801(d)(1)(A) currently provides that prior inconsistent statements of a testifying witness, made under oath at a formal proceeding, may be admitted for substantive purposes. The

advisory committee continued its consideration of an amendment that would expand the rule to allow for substantive admissibility of prior inconsistent statements that are audiovisually recorded. At the advisory committee's request, the FJC prepared and issued surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. In addition, at the invitation of the advisory committee, several comments were submitted. At its next meeting, the advisory committee will consider this input, and decide whether or not to proceed with an amendment to Rule 801(d)(1)(A).

Possible Amendments to Rule 404(b)

The advisory committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. The advisory committee has resolved not to propose an amendment that would add an "active contest" requirement to Rule 404(b), concluding that such a requirement would be too rigid and should be left to the court's assessment of probative value and prejudicial effect. The advisory committee will continue to consider other possible amendments to Rule 404(b).

Possible Amendment to Rule 106

The advisory committee is considering whether Rule 106, the rule of completeness, should be amended to provide that a completing statement is admissible over a hearsay objection, and to provide that the rule – which currently is limited to written or recorded statements – should be expanded to cover oral statements as well.

Possible Amendment to Rule 609(a)(1)

The advisory committee is considering a suggestion to abrogate Rule 609(a)(1), which provides for admissibility (subject to a balancing test) of a witness's prior criminal convictions that did not involve dishonesty or a false statement. The reason for the suggestion is a reliance on principles of "restorative justice," i.e., that a person who has been convicted and released into

society should not be saddled with the opprobrium of a prior conviction, and that non-falsity convictions as a class are of very limited probative value and are highly prejudicial. The suggestion was considered with the knowledge that Rule 609(a)(1) and its applicable balancing tests are the result of a compromise following extensive congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The advisory committee will continue its consideration of Rule 609 at its spring meeting.

Rule 606(b) and the Supreme Court's Decision in *Pena-Rodriguez v. Colorado*

The advisory committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. In that case, the Court held that application of Rule 606(b), which bars testimony of jurors regarding deliberations, violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. The advisory committee previously declined to pursue an amendment due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. At its spring 2018 meeting, the advisory committee will revisit the issue of a possible amendment, but notes that continued review of the case law indicates that the lower courts are adhering to (and not expanding) the *Pena-Rodriguez* holding. The goal of any amendment would be to assure that Rule 606(b) would not be subject to unconstitutional application.

JUDICIARY STRATEGIC PLANNING

The Standing Committee considered the request to comment on two questions related to the *Strategic Plan for the Federal Judiciary*, and has provided a response to Chief Judge Carl Stewart, the judiciary's planning coordinator.

Respectfully submitted,

David G. Campbell, Chair

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

TAB 1C

THIS PAGE INTENTIONALLY BLANK

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentifcation that would allow certain electronic evidence to be authenticated by a certifcation of a qualified person in lieu of that person's testimony at trial.	

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to CV 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provison similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C).	FRAP 4, 25

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limites, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to “supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8

Rules	Summary of Proposal	Related or Coordinated Amendments
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant's initial appearance; revise the rule to refer to "later" rather than "supplemental" filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

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

THIS PAGE INTENTIONALLY BLANK

TAB 2

THIS PAGE INTENTIONALLY BLANK

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7, 2017

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7, 2017. Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad Readler; Virginia A. Seitz, Esq.; Judge Craig B. Shaffer (by telephone); Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter, and Professor Catherine T. Struve, Associate Reporter (by telephone), represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated (by telephone). The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the Administrative Office. Judge Jeremy D. Fogel and Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Dennis Cardman, Esq. (ABA); David Epps (ABA); Thomas Green, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Joseph Garrison, Esq. (NELA); Chris Kitchel, Esq.; Henry Kelston, Esq.; Robert Levy, Esq.; Ted Hirt, Esq.; John Vail, Esq.; Susan H. Steinman, Esq.; Brittany Schultz, Esq.; Janet Drobinkske, Esq.; Benjamin Gottesman, Esq.; Jerome Kalina, Esq.; Jerome Scanlan, Esq. (EEOC); Leah Nicholls, Esq.; and Andrew Pursley, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that two members have joined the Committee. Ariana Tadler has attended many past meetings and participated actively as an observer; she is well known. Professor Spencer, of the University of Virginia, has substantial rules experience and has written widely on rules subjects.

Judge Bates reported that in June the Standing Committee approved for adoption amendments of Rules 5, 23, 62, and 65.1, basically as they were published and recommended for adoption. In September these amendments were approved by the Judicial Conference without discussion as consent calendar items. They have been transmitted to the Supreme Court. If the Court prescribes them by May 1, 2018, they will go to Congress and take effect on December

1, 2018, unless Congress acts to delay them.

April 2017 Minutes

The draft minutes of the April 2017 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the Legislative Report. Little has changed since the April meeting. She noted that while the Administrative Office tracks and often offers comments on many legislative proposals that affect court procedure, the agenda materials include only bills that would operate directly on court rules — for this Committee, the Civil Rules. There is little new since the April meeting. H.R. 985 includes provisions aimed at class actions and multidistrict litigation. It passed in the House in March, and remains pending in the Senate. The Lawsuit Abuse Reduction Act of 2017, H.R. 720, renews familiar proposals to amend Rule 11. It has passed in the House. A parallel bill has been introduced in the Senate, where it and the House bill are lodged with the Judiciary Committee. She also noted that AO staff will attend a hearing on the impact of frivolous lawsuits on small businesses that is not focused on any specific bill.

Rule 30(b)(6)

Judge Ericksen delivered the Report of the Rule 30(b)(6) Subcommittee. She began by describing the "high-quality input" from the bar that has informed Subcommittee deliberations. An invitation for comments was posted on the Administrative Office website on May 1. There were more than 100 responses. Subcommittee representatives attended live discussions with Lawyers for Civil Justice and the American Association for Justice. The many responses reflect deep and sometimes bitter experience. These comments helped to shape what has become a modest proposal. Three main sets of observations emerged:

First, there has not been enough time for the new discovery rules that took effect on December 1, 2015 to bear on practice under Rule 30(b)(6).

Second, there is a deep divide between those who represent plaintiffs and those who represent defendants. Examples of bad practice are presented by both sides. Plaintiffs encounter poorly prepared witnesses. Defendants encounter uncertainty, vague requests, and overly broad and burdensome requests. All agree that courts do not want to become involved with these problems. These divisions urge caution, invoking the first principle to do no harm.

Third, most of the issues get worked out. But the problem is that there is no established process for working them out before expending a great deal of time and cost. These reports are

consistent with the common observation that judges seldom encounter these problems – the problems are there, but are resolved, often at high cost, without taking them to a judge.

These and other observations led to substantial trimming of the proposals that the Subcommittee had considered. When the Subcommittee reported to the April meeting, it had an "A List" of six proposals, supplemented by a "B List" of many more. All but one of the A list proposals have been discarded, including those addressing the use of Rule 30(b)(6) testimony as judicial admissions, the opportunity or obligation to supplement Rule 30(b)(6) testimony, the use of "contention" questions, a formal procedure for objections, and applying the general provisions governing the number of depositions and the duration of a single deposition.

What remained was a pair of proposals aimed at encouraging early discussion of potential Rule 30(b)(6) problems, most likely through Rule 16 pretrial conference procedures or through the Rule 26(f) party conference. There has been hope that substantial relief can be had by encouraging the parties to anticipate problems with Rule 30(b)(6) depositions and to discuss them in the Rule 26(f) conference. But in many cases it is not feasible to anticipate the timing or subjects of these depositions as early as the 26(f) conference – often they come after substantial other discovery has been had and digested. A central question has been whether a way can be found to engage the parties in direct discussions when the time is ripe.

During Subcommittee discussions, Judge Shaffer suggested that encouraging discussion between the parties is more likely to work if a new provision is lodged in Rule 30(b)(6) itself. That is where the parties will first look for guidance. The Subcommittee developed this proposal into the version presented in the agenda materials:

> (6) *Notice of Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. Before [or promptly after] giving the notice or serving a subpoena, the party must [should] in good faith confer [or attempt to confer] with the deponent about the number and description of 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 matter on which each person designated will testify. * * *

In addition, the Subcommittee also considered adding a direction in Rule 26(f)(2) that in conferring the parties should "consider the process and timing of [contemplated] depositions under Rule 30(b)(6)." It recommends the Rule 30(b)(6) proposal for further development. The Rule 26(f)(2) proposal bears further discussion, but may be put aside as unnecessary.

Professor Marcus added that the basic questions presented are "wordsmithing" with the Rule 30(b)(6) text and whether adding to Rule 26(f) a reference to Rule 30(b)(6) would be useful. The Rule 16 alternative to Rule 26(f) is only an alternative; the Subcommittee does not favor it. Some of the rule text questions are identified by brackets in the proposal. Choices remain to be made, but it may be that the rule text should include "or promptly after," carry forward with "must" rather than "should," and recognize that "attempt to confer" should be retained to prevent intransigence from blocking a deposition.

Judge Ericksen explained that providing for conferring promptly after giving notice or serving a subpoena facilitates discussions informed by actually knowing the number and description of the matters for examination. Professor Marcus added that with a subpoena to a nonparty, it may be difficult to arrange to confer before the subpoena is served.

Judge Ericksen further explained that "must" confer is more muscular than "should," and may prove important in making the conference requirement work. So it has proved useful to recognize in Rule 37 that an attempt to confer may be all that can be required, an insight that may also be useful here.

Judge Ericksen repeated the advice that the Committee should consider the possibility of adding a cross-reference to Rule 30(b)(6) in Rule 26(f)(2), but that it may be better to drop this possibility. The concern that lawyers often cannot look ahead to Rule 30(b)(6) problems at the time of the Rule 26(f) conference is offset by the information that Rule 30(b)(6) depositions often are sought at the beginning of discovery in individual employment cases. But it seems awkward to refer to only one specific mode of discovery in the list of topics to be addressed at the conference.

A Subcommittee member stated that the Rule 26(f) proposal is not a bad idea, but it is not necessary. The present general language of Rule 26(f) calling for a discovery plan covers Rule 30(b)(6) along with other discovery questions; it is indeed odd to

single out one particular subdivision of one discovery rule for specific attention. He does support the 30(b)(6) proposal.

Another Subcommittee member was slightly in favor of adopting the Rule 26(f) cross-reference, but thought the question is "not to die for." A second Subcommittee member shared this view.

Discussion turned to the draft Committee Note. A Subcommittee member noted that the Note reflects some of the problems that the Subcommittee had struggled with but decided not to address in rule text. Discussion of the Note will help the Subcommittee.

This suggestion was supplemented by another Subcommittee member. The Subcommittee spent a lot of time on these ideas and the comments directed to them. It proved difficult to address them in rule language. The issues are better resolved by discussion among the lawyers, acting in the spirit of Rule 1 (which is being invoked by a number of courts around the country). Judges can help when necessary. "We hope for reasonable responses." "Reasonable" appears more than 75 times in the Rules, and more than 25 times in Rules 26 and 37. But "there are a lot of emotional responses to Rule 30(b)(6) on both sides."

A Committee member suggested that some of the statements in the third paragraph of the draft Committee Note, remarking on notices that specify a large number of matters for examination, or ill-defined matters, or failure to prepare witnesses, seem "extreme" in some ways. These are the kinds of issues that will be addressed by the Subcommittee as it goes ahead. Committee members should send their suggestions to Judge Ericksen and Professor Marcus.

Judge Bates raised a different question: We continually hear that judges do not often encounter Rule 30(b)(6) disputes. Is there a prospect that requiring lawyers to confer will lead to more litigation about the disputes, so judges will see more of them? Judge Ericksen and Professor Marcus responded that while there might be a flurry of activity during the early days of an amended rule, the long-term goal is to reduce the occasions to go to the judge. Still, "judge involvement can be good." Something like the proposed process happens now, without generating much work for judges.

A Subcommittee member agreed. "Good lawyers do this now." It is hard to expect that making it more general will bring problems to judges more often. Lawyers are very reluctant to do that.

Attention turned to the question whether the rule should be satisfied by an attempt to confer. A judge observed that a

suggestion in a rule will help only if it encourages lawyers to talk early. "I've been impressed by the ability of lawyers to avoid conferring." A rule provision that requires conferring may lead to protracted avoidance. A Subcommittee member agreed that "lawyers are really good at avoiding conferring." Does that mean that a lawyer will be able to stymie a deposition by avoiding a conference? And what of a nonparty deponent — it may be especially difficult to get it to confer before a subpoena is served.

Judge Ericksen observed that these problems do come to magistrate judges. Part of the goal is to get a better result when you do have to go to the court. Repeated unsuccessful attempts to confer will help persuade the judge that it is useful to become involved.

A Subcommittee member agreed that the Committee should carefully consider the parallel to the "attempt to confer" provision in Rules 26(c) and 37.

Professor Marcus explained that the idea in Rule 37 is that you have to certify at least an attempt to confer to get to court with a motion. It shows there is a need for judicial involvement. But it is important to be satisfied with a good-faith attempt, lest a motion be defeated by evading a conference. The draft Rule 30(b)(6) is not exactly the same — it does not expressly say that you cannot proceed with the deposition absent a conference or attempt to confer. In response to a question, he elaborated that the Rule 30(b)(6) provision is not framed as a precondition to a motion. "It addresses a different sort of event, and analogizes."

A Subcommittee member suggested that the problem is often simple. One party may try hard to confer, while the other may not.

A judge agreed that it is a judgment call whether to include "attempt," or to rely directly on mandatory language alone. Why not put the obligation to initiate a conversation on the party or nonparty deponent?

Another question was raised: should the conference include discussion of who the witnesses will be? The draft Committee Note suggests this may be useful; should it be added to rule text? A Subcommittee member said that the Subcommittee had considered this, as well as other subjects addressed in the Note — how many witnesses there will be for the deponent, and how much time for examination. A Committee member agreed that it is useful to discuss who the witnesses will be. That can lead to discussions whether this is an appropriate witness — indeed the party noticing the deposition may already have documents or other information suggesting that a different witness would be more appropriate. Or

it may be that discussion will show that a proposed witness should be deposed as an individual, not as a witness for an organization named as deponent.

Another Committee member suggested that the point of the proposal is to encourage bilateral discussion. Burying important parts of the discussion in the Committee Note is not enough. It may be better to add more to the rule text. What are the obligations of the noticing party, or of the deponent, in conferring? This might be easier if the text is rearranged a bit: the first two sentences of the present rule could remain as they are, identifying the opportunity and obligations of the party noticing the deposition and then the obligations of the organization named as deponent. The new text, identifying a new obligation to confer that is imposed on both, could come next, and perhaps provide greater detail without interfering with the flow of the rule text.

Judge Ericksen responded that the Subcommittee has considered that an obligation to confer is inherently bilateral, but it will consider further how much should be in the rule text.

Judge Bates said that the Committee had had a good discussion. There is more work ahead for the Subcommittee. The Rule 26(f) proposal "remains alive." All agree that amending Rule 16 is out of the picture. The goal will be to draft a proposal for the April meeting, based on this discussion. Thanks are due to Judge Ericksen, Professor Marcus, and the Subcommittee for their work.

Social Security Disability Claims Review

Judge Bates introduced the proposal by the Administrative Conference of the United States (ACUS) that explicit rules be developed to govern civil actions under 42 U.S.C. § 405(g) to review denials of individual disability claims under the Social Security Act.

The Standing Committee has decided that this subject should be considered by the Civil Rules Committee. The work has started. An informal Subcommittee was formed. Initial work led to a meeting on November 6 with representatives of several interested groups. The meeting resembled a hearing. Matthew Wiener, Executive Director and acting Chair of the Administrative Conference, made the initial presentation. Asheesh Agarwal, General Counsel of the Social Security Administration, followed. Kathryn Kimball, counsel to the Associate Attorney General, represented the Department of Justice. And Stacy Braverman Cloyd, Deputy Director of Government Affairs, the National Organization of Social Security Claimants' Representatives, presented the perspective of claimant representatives. Susan Steinman, from the American Association for

Justice, also participated. Professor David Marcus, co-author with Professor Jonah Gelbach of a massive study that underlies the ACUS proposal, participated and commented by video transmission.

Social Security disability review annually brings some 17,000 to 18,000 cases to the district courts. The national average experience is that 45% of these cases are remanded to the Social Security Administration, including about 15% of the total that are remanded at the request of the Social Security Administration.

Here, as generally, there is some reluctance about formulating rules for specific categories of cases. But such rules have been adopted. The rules for habeas corpus and § 2255 proceedings are familiar. Supplemental Rule G addresses civil forfeiture proceedings. A few substance-specific rules are scattered around the Civil Rules themselves, including the Rule 5.2(c) provisions for remote access to electronic files in social security and some immigration proceedings. It is important to keep this cautious approach in mind, both in deciding whether to recommend any rules and in shaping any rules that may be recommended.

One problem leading to the request for explicit rules is that a wide variety of procedures are followed in different districts in § 405(g) cases. Some districts have local rules that address these cases. The rules are by no means consistent across the districts. Other districts have general orders, or individual judge orders, that again vary widely from one another. The result imposes costs on the Social Security Administration as its lawyers have to adjust their practices to different courts — it is common for Administration lawyers to practice in several different courts. The disparities in practice may raise issues of cost, delay, and inefficiency. As essentially appellate matters, these cases are in some ways unique to district-court practice, and there are many of them. These considerations may support adoption of specific uniform rules that displace some of the local district disparities.

At the same time, most of the problems that give rise to high remand rates lie in the agency. Delays are a greater issue in the administrative process than in the courts. And there are great disparities in the rates of remands across different districts, while rates tend to be quite similar among different judges in the same district, and also to cluster among districts within the same circuit. There is sound ground to believe that these disparities arise in part from different levels of quality in the work done in different regions of the Social Security Administration.

The people who appeared on November 6 did not present a uniform view. The Administrative Conference believes that a uniform national rule is desirable. The Social Security Administration

strongly urges this view. But discussion seemed to narrow the proposal from the highly detailed SSA rule draft advanced to illustrate the issues that might be considered. There was not much support for broad provisions governing the details of briefing, motions for attorney fees, and like matters. Most of the concern focused on the process for initiating the action by a filing essentially equivalent to a notice of appeal; service of process — the suggestion is to bypass formal service under Rule 4(i) in favor of electronic filing of the complaint to be followed by direct transmission by the court to the Social Security Administration; and limiting the answer to the administrative record. There has been some concern about how far rules can embroider on the § 405(g) provision for review by a "civil action" and for filing the transcript of the record as "part of" an answer.

Beyond these initial steps, attention turned to the process of developing the case. It was recognized that there are appropriate occasions for motions before answering — common occasions are problems with timeliness in filing, or filing before there is a final administrative decision. Apart from that, the focus has been on framing the issues in an initial brief by the claimant, followed by the Administration's brief and, if wished, a reply brief by the claimant.

Discovery was discussed, but it has not really been an issue in § 405(g) review proceedings.

Discussion also extended to specific timing provisions and length limits for briefs. These are not subjects addressed by the present Civil Rules. And the analogy to the Appellate Rules may not be perfect.

Professor Marcus added that the Conference and other participants agreed that adopting uniform procedures for district-court review is not likely to address differences in remand rates, differences among the circuits in substantive social-security law, or the underlying administrative phenomena that lead to these differences. There was an emphasis on different practices of different judges. Local rules and individual practices must be consistent with any national rule that may be developed, but reliance must be placed on implicit inconsistency, not on explicit rule language forbidding specific departures that simply carry forward one or many of the present disparate approaches.

Further initial discussion elaborated on the question of serving notice of the review action. The Social Security Administration seems to be comfortable with the idea of dispensing with the Rule 4(i) procedure for serving a United States agency. Direct electronic transmission of the complaint by the court is

more efficient for them. This idea seems attractive, but it will be necessary to make sure that it can be readily accomplished by the clerks' offices within the design of the CM/ECF system. Some claimants proceed pro se in § 405(g) review cases, and are likely to file on paper even under the proposed amendments of Rule 5. The clerk's office then would have to develop a system to ensure that electronic transmission to the Administration occurs after the paper is entered into the CM/ECF system.

This presentation also suggested that the question whether it is consistent with § 405(g) to adopt the simplified complaint and answer proposals may not prove difficult. The Civil Rules prescribe what a complaint must do, and that is well within the Enabling Act. Prescribing what must be done by a complaint that initiates a "civil action" under § 405(g) seems to fall comfortably within this mode. So too the rules prescribe what an answer must do. A rule that prescribes that the answer need do no more than file the administrative record again seems consistent both with § 405(g) and the Enabling Act. The rules committees are very reluctant to exercise the supersession power, for very good reasons. But there is no reason to fear supersession here.

A member of the informal Subcommittee noted that none of the stakeholders in the November 6 meeting suggested that uniform procedures would affect the overall rate of remands or the differences in remand rates between different districts. The focus was on the costs of procedural disparities in time and expense.

Another Subcommittee member said that the meeting provided a good discussion that narrowed the issues. The focus turned to complaint, answer, and briefing. Remand rates faded away.

Yet another Subcommittee member noted that she had not been persuaded at first that there is a need for national rules. But now that the focus has been narrowed, it is worthwhile to consider whether we can frame good rules. As one of the participants in the November 6 discussion observed, good national rules are a good thing. Bad national rules are not.

Professor Coquillette provided a reminder that there are dangers in framing rules that focus on specific subject-matters. Transsubstantivity is pursued for very good reasons. The lessons learned from rather recent attempts to enact "patent troll" legislation provide a good example. It would be a mistake to generate Civil Rules that take on the intricacy and tendentiousness of the Internal Revenue Code. But § 405(g) review proceedings can be addressed in a way that focuses on the appellate nature of the action, distinguishing it from the ordinary run of district-court work. Even then, a rule addressed to a specific statutory provision

runs the risk that the statute will be amended in ways that require rule amendments. And above all, the Committee should not undertake to use the supersession power.

A judge suggested that this topic is worth pursuing. Fifteen to twenty of these review proceedings appear on his docket every year. These cases are an important part of the courts' work. Both the Administrative Conference and the Social Security Administration want help.

Another judge agreed. A Civil Rule should be "very modest." The Federal Judicial Center addresses these cases in various ways. They are consequential for the claimants. The medical-legal issues can be complicated. Better education for judges can help. The problems mostly lie in the administrative stages. But it is worthwhile to get judges to understand the importance of these cases.

Another judge observed that the importance of disability review cases is marked by the fact that they are one of the five categories of matters included in the semi-annual "six month" reports. The event that triggers the six-month period occurs after the initial filing, so a case is likely to have been pending for nine or ten months before it must be included on the list, but the obligation to report underscores the importance of prompt consideration and disposition. There is at least a sense that the problems of delay arise in the agency, not in the courts.

A Committee member observed that § 405(g) expressly authorizes a remand to take new evidence in the agency. "This is different from the usual review on the administrative record." This difference may mean that at times discovery could be helpful. "We should remember that this is not purely review on an administrative record."

A judge noted that the discussion on November 6 suggested that discovery has not been an issue in practice.

A Committee member observed that other settings that provide for adding evidence not in the administrative record include some forms of patent proceedings and individual education plans. In a different direction, she observed that the emphasis on the annual volume of disability review proceedings in arguing for uniform national rules sounds like the questions raised by the agenda item on multidistrict litigation. If we consider this topic, we should consider how it plays out across other sets of problems.

Another judge renewed the question: Do the proposals for uniform rules deviate from the principle that counsels against

substance-specific rules?

Judge Bates responded that neither the Administrative Conference nor the Social Security Administration have linked the procedure proposals to the remand rate. They are concerned with the inefficiencies of disparate procedures.

A Committee member asked whether it is possible to adopt national rules that will really establish uniformity. Local rules, standing orders, and individual case-management practices may get in the way.

A judge responded that one reason to have local rules arises from the lack of a national rule. The Northern District of Illinois has a new rule for serving the summons and complaint in these cases. "It's all about consent; the Social Security Administration consents all the time." But "local rules are antithetical to national uniformity." If national rules save time for the Social Security Administration, that will yield benefits for claimants and for the courts. Another judge emphasized that local rules must be consistent with the national rules, but it can be difficult to police. At the same time, still another judge noted that the Federal Judicial Center can educate judges in new rules. And a fourth judge observed that local culture makes a difference, but "some kind of uniformity helps."

Judge Bates concluded the discussion by stating that the Committee should explore these questions. A start has been made. The Subcommittee will be formally structured, and will look for possible rule provisions. We know that the Southern District of Indiana is working on a rule for service in disability review cases.

Third-Party Litigation Financing

Judge Bates introduced the discussion of disclosing third-party litigation financing agreements by noting that additional submissions have been received since the agenda materials were compiled. One of the new items is a letter from Representative Bob Goodlatte, Chair of the House Committee on the Judiciary.

The impetus for this topic comes from a proposal first advanced and discussed in 2014, and discussed again in 2016. Each time the Committee thought the question important, but determined that it should be carried forward without immediate action. The Committee had a sense that the use of third-party financing is growing, perhaps at a rapid rate, and that it remains difficult to learn as much as must be learned about the relationships between third-party financers and litigants. It is difficult to develop

comprehensive information about the actual terms of financing agreements. The questions have been renewed in a submission by the U.S. Chamber Institute for Legal Reform and 29 other organizations.

The specific proposal is to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

Detailed responses have been submitted by firms engaged in providing third-party financing, and by two law professors who focused on the ethical concerns raised by the proponents of disclosure.

The first point made about the proposal is that it does not seek to regulate the practice or terms of third-party financing. It seeks nothing more than disclosure of any third-party financing agreement.

Many arguments are made by the proponents of disclosure. They are summarized in the agenda materials: "third-party funding transfers control from a party's attorney to the funder, augments costs and delay, interferes with proportional discovery, impedes prompt and reasonable settlements, entails violations of confidentiality and work-product protection, creates incentives for unethical conduct by counsel, deprives judges of information needed for recusal, and is a particular threat to adequate representation of a plaintiff class."

These arguments are countered in simple terms by the financers: None of them is sound. They do not reflect the realities of carefully restrained agreements that leave full control with counsel for the party who has obtained financing. In addition, it is argued that disclosure is actually desired in the hope of gaining strategic advantage, and in a quest for isolated instances of overreaching that may be used to support a campaign for substantive reform.

The questions raised by the proposal were elaborated briefly in several dimensions.

The first question is the familiar drafting question. How would a rule define the arrangements that must be disclosed? Inevitably, a first draft proposal suggests possible difficulties. The language would reach full or partial assignment of a

plaintiff's claim, a circumstance different from the general focus of the proposal. It also might reach subrogation interests, such as the rights of medical-care insurers to recover amounts paid as benefits to the plaintiff. It rather clearly reaches loans from family or friends. So too, it reaches both agreements made directly with a party and agreements that involve an attorney or law firm.

Parts of the submissions invoke traditional concepts of champerty, maintenance, and barratry. It remains unclear how far these concepts persist in state law, and whether there is any relevant federal law. There may be little guidance to be found in those concepts in deciding whether disclosure is an important shield against unlawful arrangements.

Proponents of disclosure make much of the analogy to Rule 26(a)(1)(A)(iv), which mandates initial disclosure of "any insurance agreement under which an insurance business may be liable" to satisfy or indemnify for a judgment. This disclosure began with a 1970 amendment that resolved disagreements about discovery. The amendment opted in favor of discovery, recognizing that insurance coverage is seldom within the scope of discovery of matters relevant to any party's claims or defenses but finding discovery important to support realistic decisions about conducting a litigation and about settlement. It was transformed to initial disclosure in 1993. At bottom, it rests on a judgment that liability insurance has become an essential foundation for a large share of tort law and litigation, and that disclosure will lead to fairer outcomes by rebalancing the opportunities for strategic advantage. The question raised by the analogy is whether the same balancing of strategic advantage is appropriate for third-party financing, not only as to the fact that there is financing but also as to the precise terms of the financing agreement.

Much of the debate has focused on control of litigation in general, and on settlement in particular. The general concern is that third-party financing shifts control from the party's attorney to the financer. Financers and their supporters respond that they are careful to protect the lawyer's obligation to represent the client without any conflict of interest. Indeed, they urge, their expert knowledge leads many funding clients to seek advice about litigation strategy, and to seek funding to enjoy this advantage.

The concern with influence on settlement is a variation on the control theme. The fear is that litigation finance firms will influence settlements in various directions. At times the pressure may be to accept an early settlement offer that is unreasonably inadequate from the litigant's perspective, but that ensures a safe and satisfactory return for the lender. An alternative concern is that at other times a lender will exert pressure to reject an early

and reasonable settlement offer in hopes that, under the terms of the agreement, it will win more from a higher settlement or at trial. Funders respond that it is in their interest to encourage plaintiffs to accept reasonable settlement offers. They avoid terms that encourage a plaintiff to take an unreasonable position.

Professional responsibility issues are raised in addition to those presented by the concerns over shifting control and impacts on settlement. Third-party financing is said to engender conflicts of interest for the attorney, and to impair the duty of vigorous representation. Special concern is expressed about the adequacy of representation provided by a class plaintiff who depends on third-party financing. Fee splitting also is advanced as an issue.

A different concern is that a judge who does not know about third-party funding is deprived of information that may be necessary for recusal. A response is that judges do not invest in litigation-funding firms, and that it reaches too far to be concerned that a family member or friend may be involved with an unknown firm that finances a case before the judge. In any event, this concern can be met, if need be, by requiring disclosure of the financer's identity without disclosing the terms of the agreement.

Yet another concern is that the exchanges of information required to arrange funding inevitably lead counsel to surrender the obligation of confidentiality and the protection of work product.

Disclosure also is challenged on the ground that it may interfere with application of the rules governing proportionality in discovery. Rule 26(b)(1) looks to the parties' resources as one factor in calculating proportionality. The concern is that a judge who knows of third-party financing may look to the financing as a resource that justifies more extensive and costly discovery, and even may be inclined to disregard the terms of the financing agreement by assuming there is a source of unlimited financing.

Finally, it is urged that third-party financing will encourage frivolous litigation. The financers respond that they have no interest in funding frivolous litigation — their success depends on financing strong claims.

All of these arguments look toward the potential baneful effects of third-party financing and the reasons for discounting the risks.

There is a more positive dimension to third-party funding. Litigation is expensive. It can be risky. Parties with viable claims often are deterred from litigation by the cost and risk.

Important rights go without redress. Third-party financing serves both immediate private interests and more general public interests by enabling enforcement of the law. It should be welcomed and embraced, no matter that defendants would prefer that plaintiffs' rights not be enforced.

The abstract arguments have not yet come to focus, clearly or often, on the connection between disclosing third-party financing agreements and amelioration of the asserted ill effects that it would foster. One explicit argument has been made as to settlement — a court aware of the terms of a financing agreement can structure a settlement procedure that offsets the risks of undue influence. More generally, a recent submission has suggested that "if a party is being sued pursuant to an illegal (champertous) funding arrangement, it should be able to challenge such an agreement under the applicable state law — and certainly should have the right to obtain such information at the outset of the case." This argument relies on an assumption of illegality that may not be supported in many states (some states have undertaken direct regulation of third-party financing), and leaves uncertainty as to the consequences of any illegality on the conduct and fate of the litigation.

Professor Marcus suggested that it is important to recognize that proponents of disclosure may have "collateral motives." He noted that third-party financing takes many forms, and that the forms probably will evolve. Financing may come to be available to defendants: how should a rule reach that? More specific points of focus should be considered. Rule 7.1 could be broadened to add third-party financers to the mandatory disclosure statement. Rule 23(g)(1)(A)(iv) already requires the court to consider the resources that counsel will commit to representing a proposed class; it could be broadened to require disclosure of third-party funding. Third-party financing also might bear on determining fees for a class attorney under Rule 23(h).

Professor Marcus continued by observing that there may be a need to protect communications between funder and counsel for the funded client. And he asked whether the jury is to know about the existence, or even terms, of a funding arrangement?

The local rule in the Northern District of California was noted. It provides only for disclosure of the fact of funding, not the agreement, and it applies only to antitrust cases. Including patent cases was considered but rejected.

A judge suggested that third-party funding seems to be an issue primarily in patent litigation and in MDL proceedings.

Professor Coquillette offered several thoughts.

First, he observed that the common-law proscriptions of maintenance, barratry, and champerty have essentially disappeared. "We keep tripping over the ghosts and their chains." State regulation has displaced the ghosts, in part because these are politically charged issues.

Second, he urged that even coming close to regulating attorney conduct raises sensitive issues for the Civil Rules. The rules do approach attorney conduct in places, such as Rule 11 and regulation of discovery disputes. The prospect of getting into trouble is reflected in the decision to abandon a substantial amount of work that was put into developing draft Federal Rules of Attorney Conduct. That effort inspired sufficient enthusiasm that Senator Leahy introduced a bill to amend the Enabling Act to quell any doubts whether the Act authorizes adoption of such rules. But there was strong resistance from the states and from state bar organizations.

Third, Professor Coquillette noted that third-party funders argue that the relationships are between a lay lender and a lay litigant-borrower. The lawyer, they say, is not involved. "I do not believe that lawyers are not involved." Lawyers are involved on both sides, dealing with each other. "There are major ethical issues." These issues are the focus of state regulation. Here, as before, the Committee should anticipate that proposals for federal regulation will meet substantial resistance from the states.

A Committee member identified a different concern about conflicts of interest. Often she is confident that there is funding on the other side. The risk is that her firm has a conflict of interest because of some involvement with the lender. She also noted that she believes that some judges have standing orders on disclosure. A judge agreed that there are some. Patrick Tighe, the Rules Committee Law Clerk, stated that many courts have local rules that supplement Rule 7.1 by requiring identification of anyone who has a financial interest in an action. But it is not clear whether these rules are interpreted to include third-party financing.

A Committee member stated that he has worked with third-party financing in virtually every patent case he has had in the last five years. He is not confident, however, that his experiences and the agreements involved are representative of the general field.

His first observation was that disclosure of insurance is unlike the general scope of discovery in Rule 26(b)(1). There are reasons to question whether disclosure of third-party funding should be treated as a phenomenon so much like insurance as to

require disclosure. "We need to know exactly what we're dealing with." Third-party funding creates risks, including ethical risks. The duty of loyalty may be affected. The lawyer still must let the client make the decision whether to settle, but third-party financing may generate pressures that make settlement advice more complex. Disclosure, of itself, will not bear on these problems. Many steps must be taken from the disclosure to make any difference.

"Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all. In present practice, defendants seek discovery about financing. Objections are made. The law will evolve, and may come to allow routine discovery. There are settings in which funding can become relevant, as in the class-action context noted earlier. There may be guidance in decisional law now, but "I'm not aware of it."

Another Committee member responded that case law is emerging. Financing agreements are listed on privilege logs. Motions are made for in camera review. State decisions deal with work-product protection for communications dealing with third-party financing. Something depends on how the agreement is structured. Some courts say third-party funding is not relevant. For that matter, how about disclosure of contingent-fee arrangements? The Committee has never looked at that. Disclosure of third-party funding is increasingly required in arbitration, because of concerns about conflicts of interest, and also because of concerns that a party who depends on third-party financing may not have the resources required to satisfy an award of costs.

The Committee member who described experiences with third-party funding suggested that disclosure of the existence of funding may be less problematic than disclosing the terms of the agreement.

A Committee member suggested that ethics issues "are not our job." At the same time, it seems likely that there will be an increase in local rules.

A judge suggested that care should be taken in attempting to define the types of agreements that must be disclosed. A variety of forms of financing may be involved in civil rights litigation, in citizen group litigation, and the like. One example is litigation challenging election campaign contributions and activities. "We need to think about the impact." Another judge suggested that in state-court litigation it is common to encounter filing fees borrowed from family members, and many similar instances of

friendly financing, with explicit or implicit understandings that repayment will depend on success.

A third judge suggested that it would be useful to know about financing in appointing lead counsel, and also in settlement. He can "ask and order" to get the information when it seems desirable.

These questions about defining the kinds of arrangements to be disclosed prompted a suggestion that some help might be found in the analogy to insurance disclosure, which covers only an insurance agreement with an insurance business. Other forms of indemnity agreements, and business or personal assets, are not included. Although further refinement would be needed, it might help to start by thinking about disclosure, more or less extensive, of financing agreements with enterprises that engage in the business of investing in litigation.

A judge said that he had encountered various forms of funding arrangements on the defense side. Others who are interested in the outcome, directly or precedentially, may help fund the defense. Joint defense agreements often address cost sharing, and contributions may be set by making rough calculations of likely proportional liability. The prospect of such arrangements, and perhaps investments by firms that now engage in funding plaintiffs, should be considered in shaping any disclosure proposal that might emerge.

The Committee member who has dealt with third-party funding in patent litigation responded to questions by noting that he has clients who can fund their own patent litigation. But patent cases have become increasingly costly. The cost increase is due in part to an increasing number of hurdles a plaintiff must surmount to get to verdict and then through the Federal Circuit. The pendulum has shifted in patent law, making it more difficult to get to trial. In the old days, his firms and others could pay the expenses. But "as costs rose, and risks, we became less willing to cover the expenses." Third-party financing is replacing law firms as the source of financing.

Professor Coquillette observed that "we need to learn more." If work goes forward, it will be important to learn what states are doing about third-party financing. The states are better equipped than the federal courts are to deal with ethical issues such as conflicts of interest and control.

A judge suggested that it may not be useful to require disclosure of information when the courts are not equipped to do anything with the information. An example is suggested by litigation in which a defendant, after a number of unfavorable

rulings, retained as additional counsel a law firm that included the judge's spouse. Rather than countenance this attempt at judge shopping, the chief judge ordered that the new firm could not play any role in the litigation. Something comparable might happen with third-party financing, without the opportunity for an analogous cancellation of the financing agreement. It does not seem likely that judges will invest in enterprises that engage in third-party financing, but there may be a risk, especially with networks of related interests. Judge Bates noted that similar concerns had emerged with filing amicus briefs on appeal.

Judge Bates summarized the discussion by suggesting that a sense of caution had been expressed. Further discussion might be resumed in the discussion of MDL proposals, one of which explicitly adopts the disclosure proposal that prompted this discussion.

Rules for MDL Proceedings

Judge Bates opened the discussion of the proposals for special Multidistrict Litigation Rules by suggesting that two of the proposals are essentially the same, while the third is distinctively different.

All three proposals agree that MDL proceedings present important issues. They account for a large percentage of all the individual cases on the federal court docket. The Civil Rules do not really address many of the issues encountered in managing an MDL proceeding. Proponents of new rules suggest that courts often simply ignore the Civil Rules in managing MDL proceedings. And Congress has shown an interest. H.R. 985, which has been passed in the House, includes several amendments of the MDL statute, 28 U.S.C. § 1407.

The major concerns focus on cases with large numbers of claimants. The perception is that many of the individual claimants have no claim at all, not even any connection with the events being litigated by the real claimants. The concern is that there is no effective means of screening out the fake claimants at an early stage in the litigation. Many alternative means of early screening are proposed. But it is not clear what differences may flow from early screening as compared to screening at the final stages of the litigation if the MDL leads to resolution on terms that dispose of the component actions. Apart from the several proposals for early screening, concerns also are expressed about pressures to participate in bellwether trials and about the need to expand the opportunities to appeal rulings by the MDL court.

Several different early screening proposals are advanced. Some of them interlock with others.

An initial proposal is that Rule 7 should be amended to expressly recognize master complaints and master answers in consolidated proceedings, and also to recognize individual complaints and individual answers. Subsequent proposals focus on requirements for individual complaints or supplements to them.

A direct pleading proposal is that some version of Rule 9(b) particular pleading requirements should be adopted for individual complaints in MDL proceedings. An alternative is to create a new Rule 12(b)(8) motion to dismiss for "failure to provide meaningful evidence of a valid claim in a consolidated proceeding." The court must rule on the motion within a prescribed period, perhaps 90 days; if dismissal is indicated, the plaintiff would be allowed an additional time, perhaps 30 days, to provide "meaningful evidence." If none is provided the dismissal will be made with prejudice.

A related proposal addresses joinder of several plaintiffs in a single complaint. The suggestion is that Rule 20 be amended by adding a provision for a defense motion to require a separate complaint for each plaintiff, accompanied by the filing fee.

The next proposal is for three distinct forms of disclosure. One would require each plaintiff in a consolidated action to file "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant’s conduct or product." The second disclosure tracks the disclosure of third-party financing agreements as proposed in the submission already discussed. The third would require disclosure of "any third-party claim aggregator, lead generator, or related business * * * who assisted in any way in identifying any potential plaintiff(s) * * *." This proposal reflects concern that plaintiffs recruited by advertising are not screened by the recruiters, and often do not have any shade of a claim.

Turning to bellwether trials, the proposal is that a bellwether trial may be had only if all parties consent through a confidential procedure. In addition, it is proposed that a party should not be required to "waive jurisdiction in order to participate in" a bellwether trial. This proposal in part reflects concern with "Lexecon waivers" that waive remand to the court where the action was filed and also waive "jurisdiction." (Since subject-matter jurisdiction cannot be waived, the apparent concern seems to be personal jurisdiction in the MDL court.)

Finally, it is urged that there should be increased opportunities to appeal as a matter of right from many categories of pretrial rulings by the MDL court. The concern is both that review has inherent values and that rulings made unreviewable by the final-judgment rule result in "an unfair and unbalanced

mispricing of settlement agreements."

A quite different proposal was submitted by John Rabiej, Director of the Center for Judicial Studies at the Duke University School of Law. This proposal aims only at the largest MDL aggregations, those consisting of 900 or more cases. At any given time, there tend to be about 20 of these proceedings. Combined, they average around 120,000 individual cases. There are real advantages in consolidated pretrial discovery proceedings. But when the time has come for bellwether trials, the proposal would split the aggregate proceeding into five groups, each to be managed by a separate judge. Separate steering committees would be appointed. The anticipated advantage is that dividing the work would increase the opportunities for individualized attention to individual cases, although the large numbers involved might dilute this advantage.

One concern that runs through these proposals is that MDL judges are "on their own." Judicial creativity creates a variety of approaches that are not cabined by the Civil Rules in the ways that apply in most litigation.

Addressing rules for MDL proceedings "would be a big undertaking. It is a complex and broad project to take on." And it is a project affected by Congressional interest, as exhibited in H.R. 985, which includes a number of proposals that parallel the proposals advanced in the submissions to the Committee.

Professor Marcus reported that Professor Andrew Bradt has worked through the history of § 1407. The history shows a tension in what the architects thought it would come to mean for mass torts. The reality today presents "hard calls. The stakes are enormous, the pressures great. Judges have provided a real service."

Judge Bates predicted that a rulemaking project would bring out "two clear camps. We will not find agreement."

The appeals proposals were the last topic approached in introducing these topics. The suggestions in the submissions to this Committee are no more than partially developed. It is clear that the proponents want opportunities to appeal from pretrial rulings on *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in bellwether trials, and "any ruling that the FRCP do not apply to the proceedings." It is not clear whether all such rulings could be appealed as a matter of right, or whether the idea is to invoke some measure of trial-court discretion in the manner of Civil Rule 54(b) partial final judgments. Nor is it clear what criteria might be provided to guide any discretion that might be recognized. One of the amendments of

§ 1407 embodied in H.R. 985 would direct that the circuit of the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the ultimate termination of one or more civil actions in the proceedings." The proviso clearly qualifies the "shall permit" direction, but the overall sense of direction is uncertain. The Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that define what are final judgments for purposes of § 1291 and to create new categories of interlocutory appeals. If the Committee comes to consider rules that expand appeal jurisdiction, it likely will be wise to coordinate with the Appellate Rules Committee.

The first suggestion when discussion was opened was that these questions are worth looking into. The Committee may, in the end, decide to do nothing. "Some of the ideas won't fly." But it is worth looking into.

Judge Bates noted that almost all of the input has been from the defense side. The Committee has yet to hear the perspectives of plaintiffs, the Judicial Panel on Multidistrict Litigation, and MDL judges.

A Committee member noted that his experience with MDL proceedings has mostly been in antitrust cases, "on both sides of the docket," and may not be representative. "The challenges for judges are enormous." Help can be found in the Manual for Complex Litigation; in appointing special masters; in seeking other consultants; and in adaptability. Still, judges' efforts to solve the problems may at times seem unfair. It is difficult to be sure about what new rules can contribute. If further information is to be sought before deciding whether to proceed, where should the Committee seek it?

Judge Bates suggested that it may be difficult to arrange a useful conference of multiple constituencies in the course of a few months or even a year. The Committee can reach out by soliciting written input. It can engage in discussions with the Judicial Panel. It can reach out to judges with extensive MDL experience. Judge Fogel noted that the FJC and the Judicial Panel have scheduled an event in March. "The timing is very good." That could provide an excellent opportunity to learn more.

Another judge suggested that judges that have managed MDL proceedings with large numbers of cases might have useful ideas about what sort of rules would help. "We have nowhere near the information we would need to have" to work toward rules proposals. At least a year will be required to gather more information.

A Committee member echoed this thought. "We're far from being

ready to think about this." She is not opposed to looking into these questions, "but we must hear from all sides."

Another judge noted that she has an MDL proceeding with more than 4,000 members. She has 17 *Daubert* hearings scheduled. "It's a lot of pressure" to get things right. We should think about working with the Appellate Rules Committee. Another judge described an MDL proceeding with 3,200 claimants and 20 *Daubert* hearings.

A Committee member asked whether the Judicial Panel has accumulated information about MDL practices.

Judge Campbell described resources available to MDL judges. The Judicial Panel has a web site with a lot of helpful information and forms. The Judicial Panel staff attorneys are very helpful about model orders. The Manual for Complex litigation is useful. There are annual conferences for MDL judges. And lawyers "bring a lot to the table." Experienced MDL lawyers reach agreement much more often than they disagree. But the question of appeal opportunities is important and should be explored. It would be very hard to manage an MDL if there are multiple opportunities to appeal. As an example, in one massive securities case a § 1292(b) appeal was accepted from an order entered in August, 2015. The appeal remains pending. The case has been essentially dead while the appeal is undecided. "Managing with appeals is a tough balance."

Judge Campbell continued by taking up the question of means for early procedures to weed out frivolous cases. In his 3,200-claimant MDL four new claims are filed every day. It is impossible in this setting to have evidential showings for each claimant. It would be all the more impossible in cases with 15,000 claimants and 20 new claimants every day. The lawyers seem to know there are frivolous cases, and bargain toward settlement with this in mind. They often establish a claims process that weeds out frivolous claims. What is the need to weed them out at an earlier stage? The flow of new cases has no effect on discovery, on the day-to-day life of the case. It will be useful to learn why early screening is important.

Another judge seconded these observations. "I don't think it makes a difference to sort out the frivolous cases at the beginning. We know they're there. Weeding them out takes effort. Weeding them out before discovery is especially doubtful."

An observer from a litigation funder asked what is the overlap between MDL procedures and third-party financing? Judge Bates noted that one of the MDL submissions expressly incorporates the disclosure proposal advanced for third-party financing.

John Rabiej described his proposal. The Center for Judicial Studies has been holding conferences since 2011. Data bases show that a large share of all the federal-court case load is held by 20 judges. "This holds over time. There is a business model that will endure for the foreseeable future." They are planning a conference for April, asking lawyers to address problems in practice. The Center has prepared a set of best practices guidelines that are being updated. It is a mistake to underestimate the burden that frivolous claims impose on defendants. The problem is the frivolous cases, not the "gray-area" cases. Reliable sources suggest that in big MDLS of some types 20% or more of the claims are "zeroed out."

There is some momentum in practice for providing some minimum information about each claimant at the outset. In drug and medical products cases, for example, the information would show a prescription for the medicine, and a doctor's diagnosis.

MDL proceedings are a big part of the caseload. "The Civil Rules are not involved." Judges like the status quo because they like the discretion they have. "Plaintiffs are basically happy, although they recognize there is room for rules on some topics such as the number of lawyers on a steering committee. "The Civil Rules Committee should be involved in this."

Judge Bates agreed that the Committee needs to learn more about the basis for the positions taken than the simple facts of what plaintiffs say, what defendants say, what MDL judges say.

Responding to a question, John Rabiej said that he has not found anyone who wants to talk about third-party financing in the MDL setting. It would be difficult for the Center to devise best practices for third-party financing. "It does come up in MDL proceedings — funders even direct attorneys where to file their actions."

Susan Steinman noted that most American Association for Justice members work on contingent-fee arrangements. "They have no incentive to take cases that are not meritorious." Third-party financing is not an issue to be addressed in the Civil Rules. "It is a business option some members choose." There may be some areas of disagreement among plaintiffs, but they tend to have negative views of disclosure.

Alexander Dahl said that weeding out frivolous claims is an important part of the system. "Rules 12 and 56 are designed for this." In MDL proceedings, the weeding-out function is still more important. "It is numbers that make them complex." The numbers are inaccurate in ways that we do not know. "Numbers raise the stakes and pressures." "Some courts see MDL proceedings as a mechanism for

settlement, not truth-seeking. Settlements require a realistic understanding of what the case is worth." And there is an important regulatory aspect. A publicly traded company has to disclose litigation risks. If it loses a bellwether trial, it has to disclose the 15,000 other cases, even though many of them are bogus, inflating the exposure to risk of many losses.

Alexander Dahl also provided a reminder that the proposal to disclose litigation-financing agreements calls only for disclosure. There is no need to resolve all the mysteries that have been identified in discussing third-party financing.

A judge asked whether a "robust fact sheet" would satisfy the need for early screening? She requires them. A defendant can look at them. Alexander Dahl replied that there are a lot of cases where that does not happen. When it does happen, it can work well. What is important is uniformity of practice.

A Committee member observed that not all MDL proceedings involve drugs or medial devices.

Another Committee member asked what is the "simple disclosure" of litigation-funding that is proposed? Alexander Dahl replied that the proposal seeks the funding agreement, although "the existence of funding is the most important" thing.

Judge Campbell noted that he understands the argument for early screening. In his big MDL there is a master complaint. Each plaintiff files a fact sheet. The defendant carefully tracks the fact sheets and identifies suspect cases. "But I never see them." The defendants identify the suspect cases in bargaining. "How is it feasible for the judge to screen them"? Alexander Dahl responded that the use of fact sheets varies. Compliance varies. "Often defendants have to gather the information on their own." Defendants eventually bring motions to dismiss where that is important. Again, "uniformity in practice is important," including uniform standards for dismissal." Further, we need to know what ineffectual judges are doing. The rulemaking process would be beneficial to all sides. Rules can allow sufficient flexibility while still providing guideposts for cases where guidance is needed.

John Rabiej described an opinion focusing on a proceeding with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used in many of these cases. That is why lawyers are devising procedures to get some kind of fact information. That is all they need.

A Committee member asked why is it necessary to consider particularized pleading, or motions to dismiss for want of meaningful evidence? Why is it not sufficient to apply the pleading

standards established by the Twombly and Iqbal decisions?

Judge Bates summarized the discussion by stating that the Committee needs to gather more information. Valuable information has been provided, but it is mostly from one perspective. The Committee has learned a lot from the comments provided this day. But the Committee needs more, particularly from the Judicial Panel. The Committee should launch a six- to twelve-month project to gather information that will support a decision whether to embark on generating new rules. A Subcommittee will be appointed to develop this information. For the time being, third-party financing will be part of this, at least for the MDL framework.

Rule 16: Role of Judges in Settlement

A proposal to amend Rule 16 to address participation by judges in settlement discussions is made in Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St.L.J. 73 (2017). The proposal calls for a structural separation of two functions – the role of "settlement neutral" and the role of the judge in "management and adjudication." The judge assigned to manage the case and adjudicate would not be allowed to participate in the settlement process without the consent of all parties obtained by a confidential and anonymous process. The managing-adjudicating judge could, however, encourage the parties to discuss settlement and point them toward ADR opportunities. A different judge of the same court could serve as settlement neutral, providing the advantages of judicial experience and balance.

The proposal reflects three central concerns. The judge's participation may exert undue influence, at times perceived by the parties as coercion to settle. Effective participation by a settlement neutral usually requires information the parties would not provide to a case-managing and adjudicating judge. If the judge gains the information, it will be difficult to ignore it when acting as judge. In part for that reason, the parties may not reveal information that they would provide to a different settlement neutral, impairing the opportunities for a fair settlement.

The proposal recognizes contrary arguments. The judge assigned to the case may know more about it, and understand it better, than a different judge. The parties may feel that participation by the assigned judge gives them "a day in court" in ways not likely with a different judge or other settlement neutral. And the assigned judge may be better able to speak reason to unreasonably intransigent parties.

These questions are familiar. Professor Deason notes that

after exploring these problems both the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges adopted principles that simply forbid coercing a party to surrender the right to judicial decision.

These questions are regularly explained in the Federal Judicial Center's educational programs for judges, including the programs for new judges. Discussion at those programs shows that many judges prefer to avoid any involvement with settlement discussions. Some, however, believe that they can play an important role in facilitating desirable settlements. It may well be that judges who have this interest and aptitude play important roles.

Judge Bates followed this introduction by noting that this suggestion has not come from the bar. "Judges do have a variety of perspectives. I would guess that most judges work hard to avoid involvement in settlements." Judges often refuse active participation, but do encourage the parties to explore settlement.

Judge Fogel noted that some judges do become involved in settlements, usually with the parties' consent. Some, on the other hand, refuse to become involved even if the parties ask for help from the judge. Judges divide on the question whether it is even appropriate to urge the parties to consider settlement. "Judges have different temperaments and skill sets." The Code of Conduct gives pretty good guidance on the need to avoid coercion. "We should educate judges to be alert to uses of 'soft power.'" It is difficult to see how a court rule could improve on the present diversity of approaches.

Another judge fully agreed. "The key is coercion, and judges need to be aware of subtle pressure." Most often the judge assigned to the case assigns settlement matters to a magistrate judge. But as a case comes close to trial, and at the start of trial, the judge knows a lot about the case, and can really help the parties reach settlement. The proposed rule "would have my colleagues up in arms."

A Committee member described one case in which, before a jury trial, the judge told one party that something bad would happen if the case were not settled. Other than that, he had never encountered a judge who pressed one party to settle. "But as it gets closer to trial — often a jury trial — there may be pressure on both sides."

A judge suggested that it is easy to abide by the command of Criminal Rule 11(c)(2) that the judge not participate in discussions of plea agreements. "But for civil cases, where lawyers want the judge to talk to them, it is hard to draft a rule that

would not make me nervous."

Another judge observed that there are different pressures in bankruptcy and other bench trials.

The discussion concluded by deciding to remove this proposal from the agenda.

Publication Under Rule 71.1(d)(3)(B)(i)

This proposal is easily illustrated, but then should be fit into the full context of Rule 71.1(d). Rule 71.1(d)(3)(B)(i) directs that when notice is published in a condemnation action, the notice be published:

> in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located.

The proposal would eliminate the preference for a newspaper published in the county where the property is located, calling only for publication "in a newspaper with general circulation [in the county] where the property is located."

Under Rule 71.1 the complaint in a proceeding to condemn real or personal property is filed with the court. A "notice" is served on the owners. The notice provides basic information about the property and condemnation, and information about the procedure to answer or appear. Service of the notice must be made in accordance with Rule 4. But the notice is to be served by publication if a defendant cannot be served because the defendant's address remains unknown after diligent inquiry within the state where the complaint is filed, or because the defendant resides outside the places where personal service can be made. Notice must be mailed to a defendant who has a known address but who cannot be served in the United States.

The suggestion to delete the preference for publication in a newspaper published in the county where the property is located picks up from other rules for publishing notice that require only that the newspaper be one of general circulation in the county. Several provisions of the Uniform Probate Code are cited, along with New Mexico court rules. The New Mexico rules add a further twist. Federal Rule 4(e)(1) and (h)(1), incorporated in Rule 71.1(d)(3)(B)(i), allow service by "following state law." The New Mexico rule allowing service by publication in a newspaper of general circulation in the county, when incorporated in Rule 4, creates a conflict with the Rule 71.1(d)(3)(B)(i) priority for a

newspaper published in the county.

This suggestion raises empirical questions that cannot easily be answered. It is easy to point to counties that are the place of publication of intensely local newspapers that have limited circulation. And it is easy to point to out-of-county newspapers that have much broader circulation within the county. In many counties there may be more than one out-of-county newspaper of "general" circulation — one question might be whether a rule should attempt to require publication in the newspaper of broadest circulation. But a different empirical question follows. Where will people interested in local legal notices look? Does it make sense to recognize publication in a newspaper of nationwide circulation, or is it highly unlikely that a resident of Sanillac County, Michigan, would look to USA Today for local legal notices? A participant looked at the current issue of a local Sanillac County newspaper and found eight legal notices. Perhaps readers indeed will look first at a locally published newspaper.

A second question is part theoretical, part empirical. In adapting the rules to the displacement of paper by electronic communication, the Committee has avoided many issues similar to the questions raised by this modest proposal. What counts as a "newspaper"? Should some form, or many forms, of electronic media be recognized? And where is a newspaper "published," particularly those that appear daily in electronic form but only one or two days a week in paper form? What should be done with a newspaper that is published daily on paper, and also — perhaps continually updated — on an electronic platform? Should a rule direct publication in both forms, direct one form or the other, or leave the choice to the government?

It would be possible to recommend the proposed amendment without addressing these broader questions. But they must at least be considered in the process of framing a recommendation.

The Department of Justice does not object to the proposal.

A Committee member asked whether the proposed change raises due process problems. The Supreme Court has recognized that as compared to other means of notice, publication is a mere feint. But publication is recognized in circumstances that make better notice impracticable. So it is for a defendant in a condemnation action who has no known address. Rule 71.1(d)(3)(B)(i) begins the compromise by demanding that an address be sought only by diligent inquiry within the state where the complaint is filed. Publication is required only for "at least 3 successive weeks." The test is nicely expressed by asking what would satisfy a prudent person of business, counting the pennies but anxious to accomplish notice. In

this setting, this simply returns the inquiry to the empirical questions: are there knowable advantages so general as to illuminate the choice between locally published newspapers and others that have general local circulation?

A judge expressed reluctance to change the rule. "You know to look to the local newspaper for legal notices," even when a newspaper published in a nearby county has broader circulation in the county.

These exchanges prompted a broader question: Should the Committee look at broader questions of publication by notice "in the world we live in"? The Committee agreed that the time has not come to address these questions.

Judge Bates summarized the discussion by suggesting that he and the Reporters will consider this proposal further. The present rule language is clear. The question is the wisdom of its choices. And it may be difficult to answer the empirical questions that underlie the choice, perhaps prompting a decision to do nothing.

IAALS FLSA Initial Discovery Protocol

The Institute for the Advancement of the American Legal System has submitted for consideration "and hopeful endorsement" the INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS.

The Protocols were developed by the people and process that developed the successful Initial Discovery Protocols for Employment Cases Alleging Adverse Action. IAALS was the overall sponsor. The drafting group included equal numbers of lawyers who typically represent plaintiffs and lawyers who typically represent defendants. Joseph Garrison headed the plaintiff team, while Chris Kitchel headed the defendant team. Judge John Koeltl and Judge Lee Rosenthal again participated actively.

The FLSA protocols appear to be headed for successful adoption by individual judges, just as the individual employment protocols have proved successful. The question for the Committee is whether to find some means of supporting and encouraging adoption.

The Committee can act officially only in its role in the Rules Enabling Act process by recommending rules to the Standing Committee. Formal endorsement of worthy projects does not fit within this framework, just as the Committee cannot revise earlier Committee Notes without proposing an amendment of rule text.

Judge Bates echoed this introduction, noting that rulemaking

is not called for and asking how can the Committee approve or encourage this project?

Judge Campbell noted that with the individual employee protocols, the judges on the Committee "took them home," using them and encouraging other judges to use them. "I would encourage our judges to do this again."

Professor Coquillette agreed that there are many problems with acting officially. "Judge Campbell's suggestion is practical and gets results."

Joseph Garrison reported that plaintiffs' attorneys in Connecticut have changed their preference for state courts since the federal court adopted the individual employee protocols. They now prefer federal court because they get a lot of early discovery, often leading to early settlements. Participation by judges is important. It would be good to have this Committee's members, and members of the Standing Committee, pursue the new protocols enthusiastically. These protocols will be more important in individual FLSA cases than in individual employment cases because FLSA cases tend to involve small claims and benefit from prompt closure. Protracted litigation generates problems with attorney fees.

Brittany Kauffman, for IAALS, expressed the hope that the Federal Judicial Center will publish the FLSA protocols. Working with IAALS to get the word out will be helpful.

A Committee member noted that the 30-day timeline in the FLSA protocols will prove difficult for the Department of Justice.

Judge Bates thanked the participants in the FLSA protocols for putting them together. The advice provided by Judge Campbell and Professor Coquillette is wise.

Pilot Projects

Judge Bates reported on progress with the two Pilot Projects.

The Mandatory Initial Discovery project has been launched in two courts. It became effective in the District of Arizona on May 1, 2017. Most judges in the Northern District of Illinois adopted it, effective on June 1, 2017. The pilot discovery provisions require answers that reveal unfavorable information that a party would not use in the case. And they require detailed information be provided without waiting to be asked. The provisions are thoroughly developed.

Judge Campbell reported that Judge Grimm oversaw the effort of developing the Mandatory Initial Discovery project. It is great work. It was adopted in the District of Arizona by general order. The time to provide the initial responses, 30 days, is not deferred by motions except for those that go to jurisdiction. The court did a lot of work to make sure the CM/ECF system would record the events, supporting research by Emery Lee that will assess the effects of the pilot. Dr. Lee also will ask lawyers in closed cases to respond to a brief survey about their experiences, about how mandatory initial discovery affected their cases. The Arizona bar is used to sweeping initial disclosure, so implementing initial discovery has gone smoothly. Almost all Rule 26(f) reports reflect compliance. The District's judges met in September and modified the general order to address some problems. The only downside has been that the District has had to suspend its adoption of the individual employment discovery protocols because they are inconsistent with the pilot project.

Judge Dow reported that the judges in the Northern District of Illinois have followed in the wake of the District of Arizona. Between 16 and 18 active judges, one senior judge, and all magistrate judges are participating in the pilot; collectively they account for about 80% of the cases in the District. The project is progressing smoothly. Lawyers have rarely had questions. And there have been few problems. When it is not feasible to complete the mandatory initial discovery in the prescribed time, additional time is allowed. "We aren't asking for production of 30 terabytes in 30 days." Some general counsel have been uncomfortable with a new practice — signing their filings. As compared to Arizona, the project will begin differently in Illinois because the lawyers are not accustomed to this kind of initial disclosure or discovery. For the judges, Judge Dow and Judge St. Eve provide guidance. "If the culture changes so lawyers do early case evaluations after they get the discovery responses, we will have made a difference." In response to a question, he said that lawyers do cooperate.

Judge Campbell noted that Arizona judges report that most issues with their sweeping initial disclosure rule arise on summary judgment or at trial, when objections are made to evidence that was not disclosed. "If you allow the evidence rather than exclude it, word gets out fast." In Arizona as in Illinois, more time to make the initial discovery is allowed in cases that involve massive information. In turn that prompts more active case management.

A Committee member expressed a hope that the experience in Arizona and Illinois can be used to leverage the project for adoption in other districts. Judge Dow noted that Arizona and Illinois have already "ironed out a lot of bugs." It will be a lot easier for other districts to sign on.

Judges Bates and Campbell responded that although the initial experience may help, "we have tried." Personal approaches have been made to about 40 districts. "It is not always a tough sell initially, but when it gets to discussion by a full court, issues arise." Work load, vacancies, and local culture are obstacles.

Judge Bates turned to the Expedited Procedure Pilot. This project is designed simply to expand adoption of practices that many judges follow now. But no district has yet adopted the project. Again, problems arise from the culture of the bar or court, work load, and like obstacles. A concerted effort is being made to enlist some districts. Judge Sutton — former Chair of the Standing Committee — has engaged in the quest, and Judge Zouhary — a member of the Standing Committee — has joined the effort. They are prepared to consider more flexibility in the deadlines set by the project, and to accept participation by a district that cannot enlist all of its judges. In addition, the Federal Judicial Center study will be expanded to look at experience in districts that already are using practices like the pilot. And a group of leading lawyers are being enlisted to join a letter encouraging judges to participate.

Subcommittees

Judge Bates stated that the Social Security Review Subcommittee would be formally established, with Judge Lioi as chair.

Another Subcommittee will be established to consider the proposals for MDL rules, and also to consider the proposal for disclosure of third-party litigation financing agreements that is adopted in one of the MDL proposals. This Subcommittee's work will extend for at least a year, and perhaps more. If the task of framing actual rules proposals is taken up, the work will extend for years beyond that.

Next Meeting

The next meeting will be held on April 10, 2018. The place has not yet been fixed, but Philadelphia is a likely choice.

Respectfully submitted,

Edward H. Cooper
Reporter

January 8, 2018 draft

TAB 3

THIS PAGE INTENTIONALLY BLANK

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	**H.R. 985** *Sponsor:* Goodlatte (R-VA) *Co-Sponsors:* Sessions (R-TX) Grothman (R-WI)	CV 23	**Bill Text (as amended and passed by the House, 3/9/17):** https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf **Summary (authored by CRS):** (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless: · 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; · no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and · 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. 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. 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. 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. 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.	· 3/13/17: Received in the Senate and referred to Judiciary Committee · 3/9/17: Passed House (220–201) · 3/7/17: Letter submitted by AO Director (sent to House Leadership) · 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) · 2/15/17: Mark-up Session held (reported out of Committee 19–12) · 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 2/9/17: Introduced in the House

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			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. 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. Appeals courts must permit appeals from an order granting or denying class certification. (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. 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. (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. **Report:** https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf	

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	**H.R. 720** *Sponsor:* Smith (R-TX) *Co-Sponsors:* Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	**Bill Text (as passed by the House without amendment, 3/10/17):** https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf **Summary (authored by CRS):** (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. 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. Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf	· 3/13/17: Received in the Senate and referred to Judiciary Committee · 3/10/17: Passed House (230–188) · 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 1/30/17: Introduced in the House
	S. 237 *Sponsor:* Grassley (R-IA) *Co-Sponsor:* Rubio (R-FL)	CV 11	**Bill Text:** https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf **Summary (authored by CRS):** 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. 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.	· 11/8/17: Senate Judiciary Committee Hearing held – "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators" · 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** None.	
Stopping Mass Hacking Act	**S. 406** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf **Summary:** (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, 2016." **Report:** None.	· 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 1110 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf (Sec. 2) "(a) In General.—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, 2016. (b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant." **Summary (authored by CRS):** This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances. **Report:** None.	· 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations · 2/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Back the Blue Act of 2017	**S. 1134** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	· 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 2437 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	· 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations · 5/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Report: None.	

TAB 4

THIS PAGE INTENTIONALLY BLANK

TAB 4A

THIS PAGE INTENTIONALLY BLANK

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

The Rule 30(b)(6) Subcommittee proposes that the full Committee recommend publication of the Rule 30(b)(6) amendment in this report to the Standing Committee. It also presents a possible amendment to Rule 26(f) but does not recommend publication of this amendment proposal.

At the November 2017 Advisory Committee meeting, the Rule 30(b)(6) Subcommittee presented its pending draft amendment proposal for Rule 30(b)(6). Initially, the Subcommittee had considered adding many specifics to Rule 30(b)(6) and also calling for inclusion of specifics in the Rule 16 scheduling order or in a pretrial order regarding these depositions. After discussion, it shortened its list of possible amendment ideas and invited public comment on six of those ideas. The comments received were very helpful in focusing the Subcommittee's thoughts, and based on that helpful input the Subcommittee developed the proposal it put before the full Committee last November.

That proposal was to amend Rule 30(b)(6) to require that the noticing party confer with the named organization about the number and definition of matters for examination before the deposition occurred. The idea was that in many cases good lawyers already did what the proposed amendment would require in all cases, and that many potential disputes were ultimately resolved by such conferences. That reality partly explains why courts do not often see motions directed to Rule 30(b)(6) depositions.

As presented to the Advisory Committee, the proposal contained several drafting choices. One was whether the requirement should be that the conference occur before the notice of deposition or subpoena is served, or whether it would suffice if the conference occurred "promptly after" service. A second was whether the rule should say the conference "must" occur, or that it "should" occur. A third was whether the command should be to confer or "attempt to confer."

These drafting choices were discussed during the Advisory Committee's November 2017 meeting. On the first question, it was noted that permitting the conference to occur promptly after the service of the notice or subpoena would build in needed flexibility. Particularly with nonparty organizational deponents, it would likely be difficult to arrange such a conference before service of a subpoena. With any deponent, it would likely be more productive to confer about the list of topics for examination after the serving party had presented its list, rather than as a more abstract topic for a conference.

As to the second question, the discussion suggested that "must" would be a preferable verb in a rule. As to the third question, there was discussion of the striking facility of lawyers to avoid conferring when they don't want to do so, and the possibility that saying one need only "attempt to confer" would

unduly weaken the rule.

Members of the Advisory Committee also raised questions during the November 2017 meeting about other topics. One was why the rule did not explicitly make the obligation to confer bilateral. As initially drafted, the amendment imposed an explicit duty to confer only on the serving party, though the draft Note said that the named organization was also expected to confer in good faith. Making the named organization's duty to confer explicit might be particularly important with nonparty deponents. Although the rule might be seen as imposing an additional burden on them, the conference might be a very effective way to avoid or reduce burdens that might befall them in the absence of conferring.

A second question that arose during the Advisory Committee meeting was whether the conference requirement should be expanded to include another topic - the identity of the person or persons designated to testify for the organization. Although the rule ultimately gives the organization the right to pick its designee, conferring about that in advance might avoid later controversy.

In addition, it was suggested that if the obligation to confer is bilateral, the language about the duty to confer might better be inserted after the existing rule provision directing that the organization designate a person or persons to testify on its behalf.

After the Advisory Committee's meeting, the Subcommittee met again by conference call. See Notes of Nov. 28 conference call, included in this agenda book. At that time, it concluded (1) that "or promptly after" should be retained for needed flexibility, (2) that "must" was preferable rule language to "should," and (3) that "or attempt to confer" should not be included in the amendment proposal.

The Subcommittee also concluded that the rule itself should explicitly impose a duty to confer on the named organization as well as the noticing party. And in light of that revision, the amendment was moved after the sentence regarding the organization's duty to designate a person or persons to testify.

It was also agreed that a further small amendment should direct that when a nonparty organization is subpoenaed the subpoena must notify it of the duty to confer as well as notifying it of the duty to designate a person or persons to testify on its behalf.

More difficult issues arose about how the rule and Note should approach subjects to be discussed during the conference. For example, there was concern about whether the noticing party might insist that under the amended rule the organization must agree to designate the person desired by the noticing party. Similarly, there was concern about whether the rule should, in addition to commanding that the parties discuss the designation of witnesses, also direct that the organization specify which topics each witness

would address if more than one person were to be designated. On the latter point, it was noted that the rule already says that the organization "may set out the matters on which each person designated will testify," so a requirement that it do so seemed out of step with what the rule now says.

At the Standing Committee's January 2018 meeting, the Advisory Committee representatives presented the new approach to 30(b)(6) issues that was before the Advisory Committee in November, while also reporting on the Subcommittee discussion that occurred later in November. The presentation noted that drafting refinements were under study, but forecast that a formal proposal to publish for public comment would be before the Standing Committee at its June 2018 meeting.

Members of the Standing Committee were generally receptive to the revised approach of requiring a conference rather than inserting specifics into the rule. Some thought such a requirement would not significantly change practice in some districts, because such conferences already occur pretty regularly, and meet-and-confer sessions may be required before any motion is presented to the court.

Some members of the Standing Committee raised the possibility of adding mandatory discussion subjects. The draft amendment requires discussion only of the topic list and the identity of the designated persons. Among the additional subjects mentioned were judicial admissions, the problem of questioning beyond the topic list if the witness had personal knowledge on other relevant topics, and the possibility that sometimes interrogatories would be a more effective vehicle for obtaining certain information than questioning a person in a deposition setting.

After the Standing Committee meeting, the Subcommittee met again by conference call. See Notes of Jan. 19, 2018, conference call, included in this agenda book. This call addressed the considerations raised during the Standing Committee meeting and also recent submissions about Rule 30(b)(6) from the Lawyers for Civil Justice and the American Association for Justice. Copies of these recent submissions are also included in this agenda book.

The Subcommittee discussion in January about adding specific mandatory topics to the conference requirement raised concerns that such additions might actually generate disputes rather than smooth the deposition process. There was concern that included topics might be regarded as commands to agree on those subjects. There was also discussion about whether it might be possible to direct the parties to discuss the "logistics" of the deposition - such things as time and place. Those subjects can generate disputes also, but it seemed that they would likely come up rather naturally from a discussion of the topics to be addressed and the persons to be designated to address those topics. In addition, these "logistical" issues were not particularly distinctive in regard to 30(b)(6) depositions, as compared to other depositions.

The general concern about adding required subjects for discussion to the rule was that, at least in highly adversarial litigation, there is a risk that specifics can become weapons in a negotiation. Indeed, at least some things in the draft Note as presented to the full Advisory Committee raised concerns of that sort. For example, the draft Note seemed to command that if the conference occurs before the notice or subpoena is served the serving party must deliver a draft list of topics to the organization before the conference. Might that prompt a named organization to refuse to confer until it received such a list?

Another concern that arose was that we are only gradually seeing the effect of the 2015 amendments to the discovery rules, and that those amendments may also reduce disputes in connection with Rule 30(b)(6) notices and depositions. Adding specifics might be out of step with letting the 2015 amendments run their course in improving practice.

Based on this discussion, the Subcommittee consensus was that the draft rule amendment should remain as it had evolved in light of the Advisory Committee's discussion. The Committee Note, meanwhile, should be shortened and simplified.

After the second conference call, a revised and simplified Note was circulated to the Subcommittee by email. Members offered reactions and the Note was further simplified. Ultimately, the Subcommittee resolved to propose that the following proposed amendment to Rule 30(b)(6) and accompanying Committee Note be published for public comment.

The Subcommittee also discussed whether to propose publication of a draft amendment to Rule 26(f). Ultimately it resolved to present this possibility to the full Committee, but not to recommend publication. Discussion of Rule 26(f) follows the presentation of the Rule 30(b)(6) proposal below.

Proposed Rule 30(b)(6) Amendment
For publication for public comment

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements

* * * * *

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then

designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

Draft Committee Note

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served, regarding the number and description of matters for examination and the identity of persons who will testify. At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition at least some of the documents it intends to use during the deposition, thereby alerting the organization about the topics on which the witness must be prepared. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate one or more witnesses to testify. It provides for collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designee, discussion about the identity of persons to be designated to testify may avoid later disputes. It may be productive also to discuss “process” issues, such as the timing and location of the deposition.

The amended rule directs that the conference occur either before or promptly after the notice or subpoena is served. If the conference occurs before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined during the conference.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. [An amendment to Rule 26(f) notes that Rule 30(b)(6) depositions may be a suitable topic for discussion during that conference for planning discovery.[1]] [In some cases, discussion at the Rule 26(f) conference may itself satisfy the Rule 30(b)(6) requirement that the serving party confer with the named organization.[2]] In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

Rule 26(f) approach

When the Subcommittee initially identified many possible specific changes for Rule 30(b)(6), it also considered the possibility that a "case management" approach might be a more fruitful way of addressing the difficulties that can be presented by this sort of deposition. Initially, that discussion focused on Rule 16, with the idea that specifics could be devised for given cases through the Rule 16 discovery plan evolution.

Much of the public comment received about specific amendment ideas for Rule 30(b)(6) emphasized that at the time the Rule 16 scheduling order is entered the parties are likely not to be in a position to be specific about the need for 30(b)(6) depositions, much less about specifics like the topics to be covered or the witnesses who would be most useful. There was also considerable concern that efforts to arrive at specifics on such topics so early in the case might actually harm rather than help, particularly if they were included in a Rule 16 scheduling order.

At the same time, it may well be that, at least in a significant number of cases, there is a very high likelihood that a 30(b)(6) deposition will be held, and perhaps that it will be one of the first pieces of discovery. One kind of litigation in which those circumstances might exist is employment litigation, which is a significant piece of the federal caseload.

Given these competing possibilities, the Subcommittee is uncertain whether mentioning 30(b)(6) depositions in Rule 26(f) would produce benefits or harms. There certainly is nothing in the rule now that precludes attention to this form of deposition in a discovery plan emerging from a Rule 26(f) conference. As with any other depositions, 30(b)(6) depositions may in some cases be

---

[1] If the Rule 26(f) amendment idea is not recommended for publication, this sentence would be dropped.

[2] Would including this sentence potentially create problems? It might be cited to weaken or nullify the duty to confer we are introducing in cases in which the parties mentioned 30(b)(6) depositions in passing during their Rule 26(f) conference.

natural topics to address in a discovery plan. Placing special emphasis on this form of discovery might draw undue attention to it at a time when most parties would be ill-equipped to engage in meaningful discussion.

Though uncertain whether to include a change to Rule 26(f) in an amendment package presenting the proposed amendment to 30(b)(6), the Subcommittee is also uncertain whether the public comment period itself might shed valuable light on the utility of adding something to Rule 26(f). Unless the Rule 26(f) possibility is included in the public comment package, however, it is unlikely it could be added later without republication (or, in terms of the Rule 26(f) change, initial publication).

Under these circumstances, the Subcommittee brings the following possible change to Rule 26(f) before the full Committee but does not recommend that it be published. If the full Committee believes this proposal should be published, the Subcommittee suggests that the invitation for public comment make it clear that the Advisory Committee is not recommending that this rule change occur, but only inviting comment on whether it would be a useful addition were the 30(b)(6) amendment made.

A bracketed sentence in the Note to the 30(b)(6) proposal above takes account of this possible rule change but the brackets recognize that the Rule 26(f) change may not occur even if it is published for public comment. In addition, the word "contemplated" appears in brackets in the proposed rule below because the Subcommittee is uncertain whether it should be included in a published invitation for comment.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery

* * * * *

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; must make or arrange for the disclosures required by Rule 26(a)(1); must discuss any issues about preserving discoverable information; may consider issues regarding [contemplated] depositions under Rule 30(b)(6); and must develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the

plan. The court may order the parties or attorneys to attend the conference in person.

Draft Committee Note

Rule 30(b)(6) is amended to require that, before or promptly after service of the notice or subpoena, the serving party and the organization subject to the notice or subpoena confer about the matters for examination and the identity of each person who will testify.

Rule 26(f) is amended to recognize that, in some cases, Rule 30(b)(6) depositions may already be contemplated by the time this discovery-planning conference occurs. If so, it may be productive to begin the discussion of the matters for examination and the identity of persons to testify during this conference. It may even be possible to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3). In some cases, the discussion during the Rule 26(f) conference may satisfy the Rule 30(b)(6) conference requirement.

This amendment does not require the parties to discuss Rule 30(b)(6) depositions during their Rule 26(f) conference. [It is limited to "contemplated" Rule 30(b)(6) depositions.] Whatever initial discussion of those depositions occurs during that conference, it will be important for the parties to recognize that later developments in the case may bear significantly on the need for such depositions, the matters for examination, and the appropriate person or persons to address those matters. Accordingly, any reference to Rule 30(b)(6) depositions in the discovery plan should recognize the possible importance of later developments in the case.

TAB 4B

THIS PAGE INTENTIONALLY BLANK

Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference call, Jan. 19, 2018

On Jan. 19, 2018, 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 of the Advisory Committee), Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Subcommittee).

The call began with a report on the Standing Committee meeting. There was discussion at that meeting of the evolution of the Rule 30(b)(6) proposal from the original ideas discussed with the Standing Committee during its Jan., 2017, meeting, when this Subcommittee had begun considering a large number of very specific provisions for possible inclusion in the rule.

Since January 2017 the Subcommittee's focus and ambition had narrowed, and accordingly the list of possible amendment ideas in its May 1, 2017, request for comments was narrower than the one presented to the Standing Committee in January 2017. The many responses to that invitation for comment further emphasized the difficulties that could attend adopting specifics to govern the wide variety of situations and cases in which the rule now plays a central role. Accordingly, the Standing Committee was presented with a less ambitious current proposal this year.

The Standing Committee reaction was generally supportive. In particular, the idea of explicitly making the obligation to confer in good faith bilateral in the rule received support, and adding the identify of the persons to be designated to testify also received support.

At the same time, some members of the Standing Committee suggested that making this rule change would not really change practice much in some districts. In at least one district, the parties must certify that they have met and conferred about any matter that might be the subject of a motion before bringing a motion before the court. That means that when Rule 30(b)(6) depositions produce disagreement that might lead to a motion there already is an obligation to meet and confer.

Other comments favored adding items to the mandatory topics listed in the rule. Possible specifics suggested included judicial admissions, the problem of questioning on topics not on the list for the deposition, and using interrogatories instead of depositions in some instances.

In addition, the Subcommittee had before it recent submissions from the Lawyers for Civil Justice and the American Association for Justice concerning the desirability to adding some specifics to the rule.

The Subcommittee discussed the question whether to add specifics to the list of required topics contained in the draft rule circulated after the Nov. 28 conference call. There was concern that injecting more specifics into the rule could actually generate disputes rather than avoid them. In addition, it was noted that during the Nov. 28 conference call there was concern that parties might argue that the specific discussion topics in the rule really were implicit commands about how those specifics should be handled, or at least that the parties must resolve them by agreement, not only commands to discuss those specifics.

A different approach emerged: Perhaps there would be a way to require that the parties discuss what might be called the "logistics" of the deposition. This category of issues might include the timing and location of the deposition. One reaction was that those types of issues seem likely to be pertinent to many other depositions, not only 30(b)(6) depositions. Indeed, since the organization has fairly complete latitude in selecting the person to testify it would probably be in a better position to select a person able to testify at a given time and place than in a situation when the witness is selected by the party seeking discovery.

One reaction to this idea was that, although this kind of deposition does not seem terribly different from other kinds of depositions in regard to such matters, there nonetheless might be a value to trying to make such a point. There is some reason to think that magistrate judges see such disputes fairly frequently. but concern was expressed that, if a capacious word like "logistics" were a mandatory topic of discussion in the rule it would open the door to many disputes. "That seems contrary to the direction in which we're going."

Discussion focused on whether something like "the process for the deposition" could usefully be added to the draft rule language before the Subcommittee. But that raised the concern about a somewhat ambiguous word being part of a command in the rule. Instead, it was suggested, the best approach would probably be to introduce the idea in the Committee Note. That received support. Discussion will often naturally lead to such matters even if it begins focused on the specifics now included in the draft amendment.

That comment prompted a reaction to the Committee Note draft before the group. One sentence jumped out: "If the conference occurs before service of the notice or subpoena, the noticing party should ordinarily provide a draft of the proposed list of matters for examination, making it clear that the list is subject to refinement during the required conference." That sounds a lot like a command. Can a Committee Note issue such a command? Another participant had a similar reaction: "I highlighted that sentence when I got to it."

There followed a discussion of the proper balance between what's in the rule and what's in the Note. We have been admonished not to engage in "rulemaking by Note." On the one hand, the Note is meant to be read to explain the rule, so very specific directives in the Note may be given effect though not in the rule. On the other hand, some courts may regard the Note as akin to legislative history and very separate from the rule language, which is what was really adopted. So a strong specific might need to be put into the rule to ensure that it received appropriate attention. And it does appear that a considerable proportion of the lawyers rarely or never look at the Note.

One idea was that this particular sentence probably should be softened. It could instead say something like "It is often a good idea" to provide a list in advance, that "The conference is likely to be more productive if" a list is provided in advance. That gets out the idea but seems less of a command. Could an organization now say, for example, that its duty to confer in good faith does not apply until the list is supplied? That might well be counterproductive.

The same sort of treatment could be used for raising other specifics. For example: "Parties may well wish to discuss . . ." As to some things, however, that might seem odd. For example, how would one deal with post-deposition supplementation at that point? Why should the parties presume, before the deposition, that there will be a need to supplement?

Concerns were reiterated about being too prescriptive in either the rule or the Note. Prescriptions can be used as weapons in the negotiation. Putting in too many specifics, or pressing them too forcefully, could reinforce the sort of confrontational behavior that now frustrates discovery in general and sometimes 30(b)(6) depositions in particular.

The discussion shifted to efforts to emphasize the importance of the 2015 amendments in the Note. The changes to Rule 1 and Rule 26(b)(1), stressing both cooperation and proportionality, should appear at the outset. That could tie in with urging the parties to resolve "process issues" in a cooperative manner.

One more point was raised: At least one member of the Subcommittee has heard recently of frustration about the application of the Committee Note to the 2000 amendment to Rule 30 imposing a one day of seven hours limit on depositions, as applied to 30(b)(6) depositions. That Note says that the time limit for each person designated should be a full seven hours. At least in one case, that worked as something of an added burden on an organization that designated two persons. On the other hand, if an organization designates six people that may present real challenges for the party seeking discovery in deciding how much time to spend with the first or the second person so designated. That might be particularly difficult if there is no

advance disclosure which witness will address which topic, and more so if some of the people designated possess information about relevant issues not on the topic list for the 30(b)(6) deposition.

A reaction was that this kind of timing issue is not at all unusual. But usually the parties work these matters out. Another reaction was that this experience illustrates the role of the Committee Note. The specific from 2000 was in the Note, not in the rule, but the judge said that would be treated as being the meaning of the rule.

Another possible topic to mention in the Note was raised -- should the Note tell lawyers when they should go to the judge? We don't want to encourage them to reach impasse and require judicial mediation, but we also don't want them to persist too long in confrontational behavior before seeking judicial guidance. The reaction was that such advice is not needed. The lawyers know that the judge is the ultimate arbiter and also that they are expected to work out things on their own. Moreover, the question is likely to vary from case to case, and perhaps from judge to judge.

A reaction was that the 2015 Committee Note to Rule 26(b)(1) addresses fairly specifically the issue when the parties should go to the judge. But that discussion emerged in large measure from objections during the public comment period that the rule amendment commanded the party seeking discovery to demonstrate that the discovery sought was not a disproportionate burden on the responding party. So that discussion is not so much about the question of timing as it is about what one might call the burden of proof.

More generally, a caution was added: The more detailed we make the rule, the more we may build in delay. If there's a long list of mandatory or semi-mandatory topics for discussion, that can be a recipe for delay.

On the other hand, it was noted, there is a different risk if things are left to fester -- there may be a need to reopen the deposition once those details are resolved, perhaps by the court. "It is a lot more effective to get them resolved at the front end."

The reality seems to be that lawyers sometimes think it is tactically better to go to the judge only after what one might call a "failed deposition," rather than going before the deposition when concerns may seem overblown.

There was agreement about frequent lawyer attention to such tactics, but a caution that generalizing is almost impossible. One thing that is almost certainly true almost all the time is that a meet and confer session will make the trip to court more productive. But it is not particularly productive to make a trip

to court when one really is not needed. That is also a major purpose of meet and confer requirements -- to avoid judicial intervention unless it is really needed.

The consensus emerged that the current draft rule amendment should remain as in the draft for this call, and that Prof. Marcus should attempt to work up revised Note language to address the concerns discussed during this call. To facilitate that effort, it would be very useful for Subcommittee members to send in suggestions about ways the current draft could be improved. That could be done by email, with copies to all involved. At present, it does not seem that a further conference call will be needed before the April full Committee meeting. If it is needed, it should occur well in advance of the date on which agenda materials must be submitted for the April meeting.

One point was made about the revision of the Note: The Note refers to the "noticing party," but the rule speaks of the "serving party." It would be good to use the term from the rule in the Note.

One more topic came up: During the Nov. 28 call, the possibility of making a parallel change to Rule 45 was mentioned, and the Reporter was to look into that. That review leads to the conclusion that no change to Rule 45 is needed. Our amendment does propose adding a requirement that the subpoena inform the nonparty of the duty to confer about the things listed in the amendment to the rule. The clearly bilateral rule language we have drafted makes that clear.

But adding that requirement for the subpoena does not mean that there need be a change to Rule 45. Rule 30(b)(6) already requires that the subpoena alert the nonparty organization that it is required to select a person to testify on its behalf. That required notice in the subpoena is nowhere mentioned in Rule 45, but the failure to mention it in Rule 45 has not produced any difficulties. So there is no need to worry about adding something to Rule 45 about what we are adding to Rule 30(b)(6).

Rule 26(f)

Discussion shifted to the question whether to bring to the Advisory Committee the possibility of a change to Rule 26(f) in addition to the change just discussed to Rule 30(b)(6).

Based on the discussion on Nov. 28, Prof. Marcus had presented four alternatives for such a Rule 26(f) change. Among those four alternatives, the consensus was that if a change were brought before the Advisory Committee it should be Alternative 1.

But the policy question was "Do we have to do this?" Several members of the Subcommittee are unconvinced that making a change to Rule 26(f) would be productive. The Rule 26(f) conference is usually much too early to delve into any details of

a 30(b)(6) deposition. Any change should make clear, at least in the Note, that early arrangements about such depositions are subject to revision later in light of developments in discovery in the case. Although there may be a few categories of cases in which one can state with confidence (perhaps near certainty) at the outset that 30(b)(6) depositions will occur, and perhaps also speak with some confidence about what issues they should cover, that will not be true in most cases.

The argument in favor of bringing the 26(f) idea forward is that unless it is included in a published package it will almost surely not be possible to add it afterwards even if public comment shows that it would be a valuable addition. On the other hand, it would not be difficult to include this idea is an invitation for comment on the 30(b)(6) proposal while making it clear that the Advisory Committee is not urging the adoption of such a change to Rule 26(f) but only inviting comment on whether it should be adopted along with the 30(b)(6) change if that goes forward after public comment. Such an invitation could even note that there is concern that in many cases such discussion would be premature at the 26(f) stage.

For the present, the question is only whether to bring this issue to the Advisory Committee. If we do, we should frame the possibility in the best possible way. We need not tell the full Advisory Committee that the Subcommittee strongly favors amending Rule 26(f) or, perhaps, even that it strongly favors including the possibility in the package put out for public comment.

The consensus was to carry forward the 26(f) idea for the Advisory Committee meeting.

A question was raised about leaving in the word "contemplated" in the draft. It is in brackets now. Retaining that word may be a way to emphasize awareness that 26(f) conferences occur early enough in the case that often the idea of a 30(b)(6) deposition arises only later. On the other hand, including it may invite everyone to say "Oh, I hadn't thought about it yet, so it was not contemplated." Surely we do want people to consider this issue if it's in the cards from the outset.

The resolution was to leave "contemplated" in the draft, but also to leave it in brackets.

Prof. Marcus should try to draft a brief Committee Note for the 26(f) change, which should explain that this change somewhat parallels the change to Rule 30(b)(6) and (perhaps in brackets) that it is intended only to urge discussion of such depositions when they are reasonably contemplated at the time the conference occurs.

Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference Call
Nov. 28, 2017

On Nov. 28, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair of the Advisory Committee), Judge Brian Morris, Judge Craig Shaffer, John Barkett, Parker Folse, Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Reporter of the Subcommittee).

The call focused on a redraft of the Rule 30(b)(6) proposal put before the full Committee during its Nov. 7 meeting. A copy of this redraft proposal is attached as an Appendix.

The starting point was to observe that the redraft resolved some issues that were presented to the full Committee as open for later resolution: (1) retaining "or promptly after" in the amendment draft; (2) using "must" instead of "should"; and (3) removing "or attempt to confer" as a qualifier for the new obligation to confer. There was no dissent from these changes in light of the full Committee discussion.

Imposing a duty on the responding organization

The revised draft imposes a bilateral obligation. The named organization, even if it is a nonparty, is obliged to confer. It was noted that a subpoena imposes what can be very onerous obligations on a nonparty, and that the required conference may be an effective way to minimize that burden. There was no dissent from the proposal to make the obligation to confer bilateral.

Subjects on which conference is required

There was considerable discussion of the ways in which these issues should be handled. One concern was that in line 20 of the redraft the phrase "the witness or witnesses" was used. But in the previous sentence (in the current rule) there is a reference to "each person." The consensus was that the description "each person" was preferable.

A more basic problem was raised –- this amendment will probably be read to require the named organization to do the things listed as topics for discussion. True, the rule only says that the organization must "confer in good faith," but parties issuing such notices will take the position that the rule commands the responding organization to identify the person or persons who will testify during the conference and also specify which person will address which matter. The reality is that may sometimes be asking too much. "If it's just one person, that's

easy. But what if I plan to designate three people to testify for my client. I may not be comfortable deciding which witness will address which topics until shortly before the deposition occurs."

Agreement was expressed. In many cases, this will not be a problem. Maybe one could say that these disputes are localized in the "problem" cases with high degrees of adversarial behavior. But that is where the position that the rule is mandatory will be taken; we should be alert to whether we want to promote that.

It was also noted that the rule already says that, in addition to designating a person to testify, the named organization "may set out the matters on which each person designated will testify." That seems to cut against reading the new language to compel something that the existing language says is not required.

It was noted that, during the full Committee meeting, fairly strong support was expressed for including designation of the matters to be addressed by each person in the rule. A reaction was that the noticing party "always wants to know who the witness or witnesses will be. That makes it easier to prepare." But that is not quite the same thing as knowing long in advance exactly which topics each witness will address. There is not much reason to hide the ball on who will be testifying, but there may be reason to leave open the question which exact subjects which witnesses will address.

It was objected that the rule only says that the parties must confer; it does not in terms impose an obligation to agree to anything or to do more than confer. A response was that the rule will be read as requiring designation long before the deposition. "As the attorney for the organization, I want to get the topics straightened out first. But the other side will say that the rule requires that I commit well in advance to which person will address which topic."

That prompted the comment that making this a requirement is at least in tension with the prior sentence (now in the rule) that the organization "may set out the matters," not that it must.

Yet another point was that this interaction is not necessarily or ordinarily one "conference." "There is more than one conversation involved."

The consensus was to drop "and the matters on which each will testify." In addition, "each person" would be substituted for "the witness or witnesses."

The nonparty problem

New language at lines 23-24 of the redraft directs that a nonparty organization be advised of its duty to confer. A footnoted alternative offered a different order of presentation.

The question of whether to add to the obligations on the nonparty was introduced with the observation that objections regarding burdening the subpoenaed nonparty seemed obvious, but also that, on balance, the nonparty had more to gain than lose by conferring. The burden argument should not prevent us from directing nonparties to confer. The footnoted version was to be dropped, but the word "to" was to be added before "confer" in lines 23-24. Assuming this obligation is to be imposed on the nonparty, there is no harm to include it in the subpoena as well.

A different question was raised. Should we not look at Rule 45 and see whether any changes are needed there? Presently Rule 45(e) addresses "Duties in Responding to a Subpoena," but it does not seem to have anything to do with Rule 30(b)(6) depositions. How do the additional requirements of Rule 30(b)(6) fit into Rule 45?

A reaction was that the current arrangement and content of Rule 45 were the subject of extensive work that was completed about five years ago, involving considerable reorganization of that rule. But that rule seems presently not to make any reference to the duties imposed by Rule 30(b)(6). The conclusion was that Rule 45 should be looked at in terms of how it fits with Rule 30(b)(6). Perhaps some change to Rule 45 is needed, but it may well be that since 1970 there has been no specific attention to 30(b)(6) in 45, and that the command in 30(b)(6) suffices without adding anything to 45. The Reporter is to look at this question.

Rule 26(f)

Discussion shifted to the question whether a change to Rule 26(f) should continue to receive consideration. Originally the idea had been a possible addition to Rule 26(f)(3) regarding the discovery plan. But there was considerable concern that in most cases trying to devise specifics on 30(b)(6) depositions would be premature at the time of the 26(f) conference. Rule 26(f)(3) says that the discovery plan "must state the parties' views and proposals on" listed topics. Adding 30(b)(6) to that list seemed unduly demanding for the majority of cases, in which the need for a 30(b)(6) deposition may arise only after considerable other discovery has been completed.

The starting point for discussion was that this additional change may not be helpful, but that it probably makes sense to keep the option of adding this change alive in case it turns out to be of value. This view drew support. Usually the parties don't know enough at the time of the Rule 26(f) conference to

come up with any specifics about such depositions, certainly not to delve into the sorts of specifics that should be the stuff of conferring as required by our amendment to Rule 30(b)(6).

Nonetheless, there may be a significant number of cases in which such early discussion can be helpful. Employment discrimination cases, particularly class actions in which there is limited time for discovery, might benefit from discussion of 30(b)(6) right up front. "Sometimes the parties don't want anything to slow up the process."

That drew the observation that in such cases it's not clear that a reminder in Rule 26(f) would be important. There is certainly nothing to keep the parties from bringing up 30(b)(6) during their 26(f) conference. How will this be helpful in the cases where addressing 30(b)(6) early is important?

A different point was made. The verb in Rule 26(f)(2) is "must" -- the parties "must consider" 30(b)(6) depositions right up front. That certainly seems inconsistent with the idea that they will only rarely be in a position to do so. Why say "must"? Shouldn't it be "may"?

And if it's "may," why is 30(b)(6) singled out? Wouldn't other depositions more often be better suited to early discussion? We already have changed Rule 34 to permit early Rule 34 requests. Won't those requests more often be the focus of useful discussion during the 26(f) conference? Yet they are not singled out. Among all the discovery tools, why is 30(b)(6) singled out by this amendment?

Acknowledging these points, one reaction was that unless a 26(f) proposal is published with a 30(b)(6) proposal there would be no way to add it after the public comment period. And it has happened that the Committee has published a possible amendment with, in essence, a "disclaimer" -- that it is not inclined to add the provision unless the public comment provides a strong reason for doing so.

So for present purposes the consensus was to continue discussing the possibility of a 26(f) rule change. But then the question arose about how it could be softened so it did not command the parties to address something that will, in most cases, not be ripe for consideration in any detail. Why should this topic be on the "must" list?

One idea was to move the reference to 30(b)(6) to the end, and say that although the parties "must" consider all the other topics, they "may" consider this one. That idea drew the reaction that it might seem odd to put that after the discovery plan in the sequence.

Another idea was to break 26(f)(2) into (A) and (B), with (A) including the "must" provisions and (B) referring to 30(b)(6) with a "may" provision.

Yet another reaction was that the (A) (B) approach would still leave the discovery plan before 30(b)(6). Does that imply this topic should not be in the discovery plan even if discussed and partly resolved? An alternative would be (A), (B), and (C).

The resolution was that Prof. Marcus would try to draft alternatives and circulate them. At the same time, that drafting issue should not distract attention from the question whether there is any value to adding this to Rule 26(f) at all, and why this one form of deposition discovery should be highlighted there.

The plan, then, would be for Prof. Marcus to try to circulate an initial redraft in the near future, ideally within a week, and that the Subcommittee confer sometime soon to discuss what should be brought to the full Committee during its April meeting.

Appendix
Redraft considered during Nov. 28 conference call

Rule 30. Depositions by Oral Examination

* * * * *

(b) NOTICE OF THE DEPOSITION; OTHER FORMAL REQUIREMENTS

* * * * *

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

* * * * *

AMERICAN ASSOCIATION for JUSTICE

18-CV-C

January 17, 2018

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Honorable Joan N. Ericksen
United States District Judge
Chair, Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

RE: Rule 30(b)(6), A Response to Lawyers for Civil Justice Comment 17-CV-HHHHHH

Dear Judge Bates and Judge Ericksen:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), submits these comments in response to a comment submitted by Lawyers for Civil Justice ("LCJ") on December 15, 2017, on Rule 30(b)(6) and catalogued as 17-CV-HHHHHH. AAJ, with members in the United States, Canada, and abroad, exists to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including those litigating against corporate defendants, receive their constitutional right to their day in court under fair, just, and reasonable rules of procedure and evidence.

I. Seek A Fair, Balanced Approach

AAJ was cautiously optimistic about the proposed amendments and discussion regarding Rule 30(b)(6) by the Advisory Committee at its November 2017 meeting. In suggesting the rule change to create a 30(b)(6) deposition conference, it seems clear that the Advisory Committee carefully weighed the competing interests of plaintiffs and corporate defendants and sought a middle ground—one in which parties disclose basic information about the goals of the deposition and topics to be covered so that a party deponent can properly provide and prepare for a 30(b)(6)

deposition. Likewise, the notice would also serve to avoid a common problem encountered by AAJ members—an unprepared deponent who knows nothing and can provide no answers.[1]

The suggestions provided by LCJ would take this reasonable, balanced approach by the Advisory Committee and tilt it in favor of corporate deponents. Individual plaintiff litigants already face major hurdles in accessing the information and data held by corporations in many types of litigation, including employment discrimination, civil rights litigation, nursing home negligence, products liability, aviation, railroad, and other transportation crashes as well as many other areas.[2] LCJ's proposal would reinforce the hurdles plaintiffs face with an asymmetrical information imbalance. For instance, plaintiffs are seeking the information because the defendant controls the employment records, the corporate structure and ownership of a nursing home, information about the composition and manufacturing processes of its product, and the vehicle involved at a crash site.[3]

II. Presumptive Limits Create New Problems and Inefficiencies

LCJ proposes a ten-topic presumptive limit for a 30(b)(6) deposition. AAJ asks the Committee to reject this proposition outright. If a presumptive limit were adopted, it would have several negative consequences. First and most obvious, deponents would not be better prepared for

---

[1] *See Pioneer Drive, LLC v. Nissan Diesel America, Inc.*, 262 F.R.D. 552, 559-61 (D. Mont. 2009) (noting that a corporate deponent was unprepared for their deposition, which warranted sanctions where corporate defendant knew that deposition was going to involve questions about particular subject areas); *Harris v. New Jersey*, 259 F.R.D. 89, 93 (D.N.J. 2007) (finding that Rule 30(b)(6) deponent was unprepared and unresponsive); *Federal Deposit Ins. Corp. v. Butcher*, 116 F.R.D. 196, 201-02 (E.D. Tenn. 1986) (finding that corporate deponents were unprepared and ordering corporation to redesignate witnesses).

[2] *See Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 64 (E.D. Mo. 1995) (granting plaintiff's motion to compel discovery in employment discrimination case); *In re Estrada*, 143 P.3d 731, 735 (N.M. 2006) (finding that attorney representing pharmacy misled the court by falsely denying plaintiff's request for admission of fact); *Bollard v. Volkswagen of America, Inc.*, 56 F.R.D. 569, 583 (W.D. Mo. 1971) ("Experience has shown that, for some reason, possibly to avoid class actions, defendants in motor vehicle products liability cases…have been unusually evasive and loath to make discovery."); *Cason-Merenda v. Detroit Med. Ctr.*, 2008 WL 4901095, at *4-5 (E.D. Mich. 2008) (overruling defendant's discovery objections and ordering production of requested documents where defendants made general objections to plaintiff's specific document requests). *See also* David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, Public Citizen Congress Watch (July 1997), available at https://www.citizen.org/article/discovery-abuse-how-defendants-products-liability-lawsuits-hide-and-destroy-evidence ("Product liability defendants often respond incompletely or not at all to plaintiffs' discovery requests. They will wait until plaintiffs go to court asking the presiding judge to order the disclosure or to impose sanctions. Or a corporate defendant will refuse to hand over documents until the court actually rules on the plaintiff's motion and orders the defendant to do so. Sometimes defendants will release some of the requested documents to create the appearance of cooperation. Sometimes they will bury relevant documents within huge stacks of irrelevant documents the plaintiff never requested.").

[3] Defendants' control of this information creates additional hurdles for plaintiffs. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012), available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2889&context=facpub ("Defendants can exploit the broad relevance standard under Federal Rule of Civil Procedure 26(b) by inundating plaintiffs with information. This exploitation is particularly likely to be acute in situations in which plaintiffs need discovery the most because they do not know enough about the defendant's internal workings or documents to draft narrower requests. Many plaintiffs may simply buckle under the sheer volume of information and the costs of sifting through it.").

depositions.[4] If topics were to be limited, plaintiffs would be forced to list the topics very broadly. Not only would this defeat the purpose of a meaningful consultation,[5] it would drag out a relatively short consultation into a potentially lengthy delay.[6] Second, the broad topics can lead to gamesmanship, with deponents objecting that the presumptive limit is not being followed, and ultimately require judicial intervention.[7] The proposed amendment should be designed to make litigation more efficient,[8] not to take up more judicial resources. Finally, delay and gamesmanship also lead to increased litigation costs.[9] Since many plaintiff attorneys work under a contingency fee, they have a built-in incentive to reduce litigation costs, as do many companies looking at their bottom line.

AAJ also believes that presumptive limits would hinder the purpose of the Committee's proposed 30(b)(6) conference requirement. LCJ suggests that having too many topics is a problem for corporate deponents, yet the thorough topic outline provided for in the Committee's proposed 30(b)(6) conference amendment provides a road map for discussion and helps remove items from the deposition that can be addressed in another format. Not only would broad topic categories – a near-certain outcome created by presumptive limits – make it more difficult for parties to figure out how to select and prepare a designee deponent, but it would also defeat the purpose of a meaningful consultation.[10]

III. The Consultation Should Not Be Longer or More Involved than the Deposition

LCJ has also recommended that certain subject-matter issues must be addressed during the Committee's proposed consultation amendment, and lists nine different issues that "should" be addressed. This proposal is unnecessary, would prolong pre-trial discovery, and would create more motions practice between the parties. The list of nine topics LCJ proposes to confer about would result in widespread inefficiency because it would make the confer period much longer

---

[4] For example, defendants have argued that they cannot prepare witnesses for depositions when deposition topics are broad. *See, e.g., Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 700 (N.D. Ga. 2010) ("Defendants argue that the vague, broad nature of the…topics make it impossible to designate and prepare witnesses to testify. The Court agrees, and Defendants' objections are sustained.").

[5] Regarding meet and confer requirements, courts have explained that "The purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement *or at least narrow and focus the matters in controversy* before judicial resolution is sought." *F.D.I.C. v. 26 Flamingo, LLC*, 2013 WL 2558219, at *1 (D. Nev. 2013) (emphasis original) (citing *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993). *See also Dienstag v. Bronsen*, 49 F.R.D. 327, 328-29 (S.D.N.Y. 1970) (stating that the purpose of civil discovery rules such as Rule 30 "is to make possible fair and expeditious preparation of cases, minimizing to extent possible trial time spent in wasteful sparring unrelated to merits of case.").

[6] Plaintiffs who issue overbroad deposition notices have been required to spend time narrowing their inquiries. *See, e.g., Murphy v. Kmart Corp.*, 255 F.R.D. 497, 505-06 (D.S.D. 2009).

[7] This scenario should not be promoted as "[t]he rules of discovery were not designed to encourage procedural gamesmanship, with lawyers seizing upon mistakes made by their counterparts in order to gain some advantage." *Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1988).

[8] This result is the antithesis of the purpose of these rules. "The purpose of [rules 30 and 26] is to liberalize greatly the scope of permissible examination by depositions for purpose of effecting just, speedy, and inexpensive termination of every action." *State of Maryland, for Use of Montvila v. Pan-American Bus Lines*, 1 F.R.D. 213, 214 (D.Md. 1940).

[9] *See Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993) (noting that defendants' bad faith discovery practices unnecessarily delayed litigation and increased the costs of litigation for the parties).

[10] *See* cases cited *supra* notes 5 and 6.

and more contentious than need be. Indeed, a rule that creates the potential for a longer "confer" period than an actual deposition is not aligned with the goals of Rule 1 to create the "just, speedy, and inexpensive determination of every action and proceeding."[11]

Furthermore, the determination of what exact issues should be addressed during the consultation are better left to the discretion of the trial judge whom, being more familiar with the case, can more appropriately decide whether certain issues are relevant to the case at hand and the requested 30(b)(6) deposition.[12] Mandating that nine total subject-matter issues be addressed may very well contradict the better judgment of the trial judge.

IV. One Rule Change is Sufficient

Lastly, LCJ has proposed that the Committee add references to the suggested Rule 30(b)(6)'s conference to both Rules 16 and 26. This suggestion is unnecessarily redundant, and AAJ believes that the best place for an amendment on a 30(b)(6) consultation is in the rule itself. Saying the same thing multiple times does not make it more of a rule than just saying it once. If anything, it makes it seem to implicate that a relatively modest rule change is of greater importance than a rule change that is made only once.

Further, it is hard to imagine what interest of justice these additional references would serve. Additional references would certainly not promote rule compliance more than the rule change itself. LCJ suggests that these other references would "spark early judicial oversight." However, in some cases, the need for a 30(b)(6) deposition may not be apparent until the end of the discovery period, after other methods of discovery failed to produce important information or possibly raise additional unforeseen relevant information.[13] Inducing an "early spark" seems ill-fit to such cases. Perhaps the intention of additional reference in Rules 16 and 26 may be to create some improper procedural gamesmanship, such as to preclude 30(b)(6) depositions that are not apparent at the start of discovery.

AAJ appreciates the opportunity to submit this additional comment on Rule 30(b)(6). If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at susan.steinman@justice.org.

Sincerely,

Kathleen L. Nastri
President
American Association for Justice

---

[11] Fed. R. Civ. P. 1.

[12] American Association for Justice, Archived Rule Suggestion 17-CV-SSSSS, Aug. 10, 2017.

[13] *See Scott Hutchinson Enterprises, Inc. v. Cranberry Pipeline Corp.*, 318 F.R.D. 44, 56 (S.D.W.Va. 2016) ("In regard to the Rule 30(b)(6) deposition, if Defendants had properly responded to the interrogatory requests, Plaintiff may not have required a Rule 30(b)(6) deposition to explain the relevance of the documents. The manner in which Defendants supplied the pipeline file created confusion, and that confusion resulted in the Rule 30(b)(6) deposition.").

COMMENT
to the

RULE 30(b)(6) SUBCOMMITTEE
of the
ADVISORY COMMITTEE ON CIVIL RULES

GIVE THEM SOMETHING TO TALK ABOUT: DRAFTING A RULE 30(b)(6) CONSULTATION REQUIREMENT WITH SUFFICIENT PARAMETERS TO ENSURE MEANINGFUL RESULTS

December 15, 2017

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Rule 30(b)(6) Subcommittee ("Subcommittee") of the Advisory Committee on Civil Rules ("Committee").

I. INTRODUCTION

The Subcommittee's decision to draft a directive requiring consultation at the time of a Rule 30(b)(6) deposition notice holds promise to curtail some of the well-known abuses of the rule. As the Subcommittee members observed, a provision that encourages meaningful discussion about the key details of a 30(b)(6) deposition could reduce the contentiousness that is too often associated with practice under this rule. Without more, however, a bare requirement of consultation will not achieve the Subcommittee's goals. That's because the consultation will not be meaningful unless both the sender and recipient of the notice have reason to engage seriously in a negotiation. The present rule, which fails to establish any parameters other than "reasonable particularity," does not provide an environment for the parties to engage in meaningful dialogue as to what might be discussed. If, for example, consultation involves a recipient suggesting that 140 topics is excessive for the needs of the case, the sender can end the "consultation" by simply

[1] 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 30 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. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

disagreeing and proceed with the deposition because there is no standard, presumptive or otherwise, that such a large number of topics is too many. For this reason, the Subcommittee should draft and propose specific language listing key topics to be covered during the consultation so all parties to the consultation have reason to be at the table. In addition, establishing presumptive limits on the number of topics would provide guidance for the parties to ensure the tenets of proportionality and cooperation are met.

II. ESTABLISHING PRESUMPTIVE LIMITS ON THE NUMBER OF TOPICS WOULD ENSURE PRODUCTIVE TWO-WAY CONSULTATION.

A common dispute concerning Rule 30(b)(6) concerns the number of topics included in a notice. A high number of topics frequently leads to back-and-forth finger pointing about too many poorly defined topics on the one hand, and inadequate preparation of witnesses on the other. Notices with more than 50 topics are commonplace.[2]

Because Rule 30(b)(6) contains no presumptive limits on the number of topics, parties to a consultation about a particular notice have little if any reason to reach an agreement as to the appropriate number of topics. There is nothing new or untested about presumptive limits, which are widely accepted and helpful in other categories of discovery. In fact, the same concerns that led the Committee to impose a presumptive numerical limit on interrogatories apply equally here.[3] A presumptive limit on the number of deposition topics would foster meaningful consultation while still allowing additional inquiry where appropriate. The presumptive limit should be 10.[4]

Defining Rule 30(b)(6)'s presumptive limit on topics would foster helpful discussions more broadly than on the discrete question alone. Case law is divided on whether an organization's representative witness can be forced to answer questions beyond the scope of the deposition notice,[5] and disputes about scope frequently result in rancor and efforts to punish responding

---

[2] *See, e.g.*, *Mondares v. Kaiser Found. Hosp.*, No. 10-CV-2676-BTM WVG, 2011 WL 5374613, at *1 (S.D. Cal. Nov. 7, 2011) (220 topics); *Nester v. Textron, Inc.*, No. A-13-CV-920 LY, 2014 WL 12631817, at *1 (W.D. Tex. Dec. 5, 2014) (110 topics); *Kingery v. Quicken Loans, Inc.*, No. 2:12-cv-01353, 2014 WL 1017180, at *1 (S.D. W. Va. Mar. 14, 2014) (93 topics); *Furminator, Inc. v. Munchkin, Inc.*, No. 4:08CV00367 ERW, 2009 WL 1176285, at *1 (E.D. Mo. May 1, 2009) (at least 85 topics); *Lenard v. Sherwin-Williams Co.*, No. 2:13-CV-2548 KJM AC, 2015 WL 854752, at *3 (E.D. Cal. Feb. 26, 2015) (more than 80 topics); *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2013 WL 655014, at *1 (N.D. Tex. Feb. 21, 2013) (80 topics).

[3] The same concerns of costliness, harassment, and curbing excessive discovery, which the advisory committee identified for the old Rule 33, are present here. *See* FED. R. CIV. P. 33(a) advisory committee's note (1993) ("[B]ecause the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2). . . . The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.").

[4] *See* Lawyers for Civil Justice, "*Advantageous to Both Sides": Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for All Parties* 5-8 (July 5, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_response_to_invitation_for_comment_on_rule_30_b__6__7-5-17.pdf, and Lawyers for Civil Justice, *Not Up To the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality* 6-8 (Dec. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b__6__12-21-2016.pdf.

[5] *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"); *Emps. 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,

organizations and their counsel for being insufficiently prepared.[6] Navigating and negotiating the parameters of the deposition would reduce such disputes by encouraging both parties to focus on the information relevant to the merits of claims and defenses.

III. SPECIFYING THE TOPICS TO BE ADDRESSED IS NECESSARY TO ENSURE MEANINGFUL CONSULTATION.

To be effective, a consultation requirement should include the specific issues to be addressed. Absent a particularized list, a new consultation requirement will leave practitioners without sufficient guidance about the goals and expectations. The following key subject matters should be included:

(1) the scope of corporate representative deposition topics;

(2) the length and timing of the depositions;

(3) the staging of the deposition relative to other discovery;

2006) (scope of questions to 30(b)(6) witness is not defined by the notice but by Rule 26(b)(1)); *Green v. Wing Enters., 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. Ins. 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 Mut. Auto. Ins. Co. v. New HorizonT, Inc,*, 250 F.R.D. 203, 216 (E.D. Pa. 2008) ("[I]f 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).

[6] *See e.g.*, *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 700 (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 testify); *State Farm*, 250 F.R.D. at 217 (compelling 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. 683, 687 (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. 08-93-ART, 2010 WL 4629761, at *12 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was "unprepared"); *Clapper v. Am. Realty Inv'rs, 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.").

(4) the availability of alternative methods of discovery in lieu of a corporate representative deposition that is less burdensome and more efficient for the parties;

(5) numerical limits on corporate representative topics beyond the presumptive limit (if drafted by the Subcommittee);

(6) an objection or motion procedure for resolving disputes;

(7) the discoverability of materials reviewed in preparation for the deposition;

(8) supplementation following the corporate representative deposition;

(9) reducing or eliminating depositions that will produce redundant or cumulative testimony.

Including these subjects in the rule will significantly raise the likelihood that consulting parties will confer about the most important aspects of the deposition, and will also provide the court, if needed, a measuring stick by which to gauge cooperation and compliance.

IV. ADDING A REFERENCE TO RULE 30(b)(6) IN RULES 16 AND 26 WOULD ADD MATERIALLY TO A CONSULTATION REQUIREMENT BY ENABLING EARLY JUDICIAL INVOLVEMENT.

Even though the Subcommittee has preliminarily concluded that Rule 30(b)(6) is the appropriate location for a new consultation requirement, it should revisit the modest idea of including a reference to Rule 30(b)(6) in rules 16 and 26 in order to invite early judicial involvement as appropriate. Rule 30(b)(6) depositions are an important component of many discovery plans. Even though they can occur at different points in different cases, a rule change that adds 30(b)(6) to Rules 16 and 26 could serve spark early judicial oversight and preclude later disputes—ideas that are consistent with the 2015 FRCP amendments, which were "a major stride toward a better federal court system."[7]

V. CONCLUSION

A bare consultation requirement in Rule 30(b)(6) will fail to achieve the Subcommittee's goals unless it is accompanied by sufficient parameters that give both the sender and recipient a stake in the consultation. Presumptive limits on the number of topics would be a modest, well-accepted tool to foster meaningful discussions. A targeted list of key topics to be discussed is also vital to ensuring serious participation. And, although the Subcommittee is focused on helping parties to work out 30(b)(6) issues without the court, adding a reference to 30(b)(6) in rules 16 and 26 is a simple and effective way to open the door to early judicial management where appropriate.

[7] CHIEF JUSTICE JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2015).

TAB 5

THIS PAGE INTENTIONALLY BLANK

TAB 5A

THIS PAGE INTENTIONALLY BLANK

5. MDL Subcommittee Report

Since the November meeting of the full Committee, the MDL/TPLF Subcommittee has gathered much information and begun the task of identifying issues on which rule changes might focus.

The Subcommittee held two extensive conference calls - on Jan. 16 and Feb. 28, 2018 - that are reflected in notes included in this agenda book. But it must be emphasized at the outset that it has reached no conclusions about whether any rule changes should be seriously considered, much less which ones. The range of issues is very broad, and forming a sufficient information base for serious consideration of rule amendments on any of them will be challenging.

The Subcommittee has received valuable help from the Judicial Panel on Multidistrict Litigation, which included a speech by Judge Sarah Vance, Chair of the Panel, at a Duke conference. We have obtained permission to include this speech in this agenda book as well, on the understanding that Judge Vance did not have time during the conference to address all the topics mentioned in the written version of the presentation. Nonetheless, this speech summarizes the contemporary procedures of the Panel in ways that may be useful to the full Committee, as it was for the Subcommittee.

In addition, under date of Feb. 22, 2018, the American Association for Justice submitted a brief reaction to the Subcommittee's work (18-CV-I) that is included in this agenda book.

The Subcommittee has also gathered a considerable amount of information about the Third Party Litigation Funding topic. Patrick Tighe, the Rules Law Clerk, reviewed the local rules of federal courts of appeals and district courts and compiled information on those rules in the report also included in this agenda book. In summary, he found that six courts of appeals have local rules that call for identifying litigation funders, seemingly to address recusal concerns. Some 24 district courts also require disclosure of litigation funders. Beyond that, state statutes in about eight states regulate litigation funding, largely from what could be called a consumer protection perspective. Patrick's Feb. 7, 2018, memorandum (included in this agenda book) summarizes his research, and likely suffices to identify his findings. For Committee members who wish to delve deeper, this agenda book also includes some of the attachments to that memorandum.

Finally, AAJ also submitted comments on the TPLF subject (18-CV-B), which are included in this agenda book.

The Subcommittee's basic objective for the upcoming Advisory Committee meeting has not been to generate reading for the full Committee so much as to receive guidance on which issues initially seem most worthy of study, and also whether there are methods for generating information about these topics beyond what the

Subcommittee is already contemplating. In pursuing this objective, the Subcommittee seeks to draw on the experience of Committee members. Below is a listing of ten issues that the Subcommittee has identified to date, along with some of the questions already raised about them. More detail can be found in the notes of the Feb. 28 and Jan. 16 conference calls. But before turning to those topics, it is useful to note initiatives that are already under way.

Outreach to Judicial Panel

As noted above, the Judicial Panel on Multidistrict Litigation has already been extremely helpful to the Subcommittee. Outreach to the Panel will continue in various ways. Two of the members of the Subcommittee are transferee judges in MDL proceedings, and representatives of the Subcommittee have attended and will be attending events organized by the Panel.

Other outreach

The Rule 23 Subcommittee found it very helpful to hear from bar groups about issues it was considering. That effort began when that Subcommittee's focus was more evolved than this effort is now. Nonetheless, the Subcommittee has identified at least five events during 2018 - the first later in April - that should deepen its understanding of the issues involved.

Current issues list

The various submissions that prompted the appointment of this Subcommittee, and the Subcommittee's own discussions reflected in the notes of its conference calls, have generated a list of ten possible topics for study of rule amendments that are listed below. The focus of the April full Committee discussion will be on this list - Are there topics that should be added? Is there an initial sense among Committee members about which seem promising topics for rulemaking?

(1) Scope: The question of scope of application for any rule amendments probably can't be fully explored until it is determined what those amendments might be. But it also seems worth identifying at the outset. The range of possible applications is fairly large. The rules could apply only to those matters centralized by the Judicial Panel (or only some of them based on number of claimants or some other criterion), or only to actions of a certain type (e.g., "mass" personal injury) and perhaps of a certain size. Whether one of these criteria would be useful is not clear. Should the Subcommittee also consider some other criteria to define the scope of application for any rule amendments?

The selection of a criterion might bear on when it could be determined whether these rules apply. For example, if they apply only after the Panel has granted a petition to centralize, that event will often occur long after some individual actions have been

filed. And there might also be the question whether the rules become inapplicable after remand by the Panel (though remand presently happens only in a small proportion of cases).

(2) Master complaints and answers: Submissions have urged that the Civil Rules explicitly address these documents. Rule provisions that do so might specify standards for evaluating their adequacy. If these are pleadings in the Rule 7 sense, they are presumably subject to Rule 12(b) motions to dismiss and Rule 12(f) motions to strike. They also presumably serve as guideposts for the scope of discovery and summary-judgment motions. Are they used only in MDL proceedings? Are they commonly treated as superseding the pleadings in individual actions? Would addressing them separately in the Civil Rules provide benefits, or raise risks? Have Committee members found that the current provisions of the Civil Rules do not adequately deal with master complaints and answers, or that some additional guidance would hold promise?

(3) More particularized pleading/"fact sheets": An abiding concern with some MDL litigation might be called the "Field of Dreams" concern - if you build it they will come. And allegedly a lot of them (plaintiffs who file actions after MDL centralization) don't really have claims. But that sort of failing may be obscured in the mass of MDL filings and discovery staging (topic (5) below), which may impede efforts to "weed" out these claims. One reaction in some cases is to enter a *Lone Pine* order or to require all claimants to fill out "fact sheets" (sometimes quite extensive). For judges, trying to evaluate hundreds or thousands of such submissions could be extremely onerous.

Have Committee members found the "fact sheet" approach useful? Would a Civil Rules provision foster the use of such methods in a helpful way? Have the current provisions of the rules interfered with use of such methods in cases where they might be useful? Would something like the pleading requirements for fraud cases under Rule 9(b) provide useful guidance for district judges considering this route? Could such a rule provide a template for a useful fact sheet?

(4) Rule 20 joinder and filing fees: To the extent that some attorneys (perhaps with the assistance of "lead generators" - see topic (6) below) file actions without sufficiently scrutinizing the validity of the claims asserted, it might be that requiring payment of a filing fee for each plaintiff could be a practical cure to a practical problem. It seems that 28 U.S.C. § 1914(a) presently requires one filing fee for a "civil action," no matter how many parties there are.

Rule 20 is broadly permissive regarding joinder of parties, so in conjunction with § 1914, it permits the filing of a single case on behalf of a large number of plaintiffs (and against a large number of defendants). See, e.g., Avila v. Willits Environmental Remediation Trust, 633 F.3d 828 (9th Cir. 2011) (action for environmental contamination on behalf of more than 1,000 individual

plaintiffs).

A defendant can move to separate a mass litigation into multiple separate actions, but to do that seemingly requires a finding that the claims do not arise out of the same "transaction or occurrence, or series of transactions or occurrences." That has been interpreted broadly in many cases. Should there be consideration of amending Rule 20(a) to narrow its application?

Unless a Rule 20(a) challenge succeeds, the action remains as filed although Rule 20(b) permits orders, including an order for separate trials, that protect parties against undue prejudice. But the problem addressed here does not seem of that sort, and a Rule 20(b) order ordinarily would not occur early in the litigation.

It seems that requiring every plaintiff properly joined under Rule 20(a) to pay a separate filing fee would overreach. Is the problem of "phantom" claims a serious one? If so, is that true only in MDL proceedings? Is a response that focuses on filing fees promising? It may be that the PLRA takes such a course with regard to prisoner litigation. Is that a model to follow? Are there other examples? And if such a requirement were imposed, could the Clerk's office readily determine how many filing fees to require in a given case? (Counting 1,000 plaintiffs could be a chore.)

If across-the-board per capita filing fees are not advisable, would such a requirement be useful if handled by court order? What standards should govern a motion for such an order?

If the separate fee example is promising, should a defendant seeking to remove a multi-plaintiff action from state court be required to pay a per-plaintiff filing fee? Should intervenors on the plaintiff side also have to pay per capita filing fees?

(5) Sequencing discovery: In general, complex litigation often benefits from orders sequencing discovery. One could say that a "fact sheet" approach is a version of that sort of thing; presumably plaintiffs normally have to satisfy this requirement before they are allowed to proceed with their cases. As a matter of rulemaking, would a prescribed sequence of discovery be more promising than a rule requiring plaintiffs in certain actions always to submit such detailed support for their claims? If there is to be a master complaint, should that be completed before the detailed discovery or disclosure is required from plaintiffs?

Have Committee members found that discovery sequencing is helpful? Is that subject discussed in Rule 26(f) conferences and/or addressed in Rule 16(b) scheduling orders? Is that technique limited to MDL proceedings, or more useful in those proceedings? Does it tend to impede attention to claims involving "outlier" defendants who may be restricted in their ability to explore grounds for summary judgment with regard to claims against them? (The notion of "outlier" defendants is that often such non-

central actors are also named as defendants in actions subject to an MDL order. See Katz v. Realty Equities Corp., 521 F.2d 1354, 1361 (2d Cir. 1975), referring to "actors on the periphery of the main activities who must defend against claims having but a remote relation to the principal issues." Do these approaches offer more promise than the "heightened" pleading ides in (3) above?

(6) TPLF and "lead generators": These topics may not intrinsically be linked, but may generate useful discussion during the April meeting. As noted in the introduction, the local rules identified in federal district courts and courts of appeals seem designed principally to focus on recusal issues. Putting that concern aside, a variety of other concerns have been urged as justifying disclosure or some other response to reportedly growing use of TPLF. Many of these could be characterized as raising "ethical" issues or conflict of interest problems that seemingly lie behind the call for inquiry into "lead generators."

In the experience of Committee members, are "lead generators" or third party funding the source of significant "ethical" issues? Would disclosure be a positive response to those issues? In class actions, in particular (often included in mass tort MDL proceedings), should this concern be more pronounced? Under Rule 23(g) is it a topic on which the court should expect to receive information? If disclosure would be a positive response, what should the court do with the information disclosed? If there is a role for such disclosure, is it important outside the "mass tort" area?

(7) Bellwether trials: Concern has been raised about undue pressure in obtaining agreement to submit to bellwether trials. Whether rulemaking on this subject would be useful is unclear. What is the experience of Committee members with such trials? Are they only used in MDL proceedings? Is it sufficiently clear what a "bellwether" trial is to permit a rule to prescribe regulations for them? Though it is true that such a trial is intended as a guide to settlement value and non-trial resolution, does that not happen without the "bellwether" designation? If issue preclusion results from a trial outcome (presumably against a defendant), does that depend on whether the case was labelled a "bellwether"?

Perhaps a more general inquiry would be whether MDL transferee judges try too hard to resolve these cases without the need for a remand. Certainly the remand rate of around 5% is rather low, but so is the trial rate for ordinary cases. Should the Subcommittee be concerned about undue pro-settlement pressure in MDL proceedings? If so, is that a matter to be addressed in a Civil Rule? Note that Rule 16(c) now authorizes the court to raise settlement issues in all cases. Should that invitation exclude MDL proceedings?

Perhaps relatedly, it has also been suggested that, when the time to try cases arrives, additional judges should be recruited to preside over those trials. The Panel did once make such a

suggestion. See In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (J.P.M.L 1991) (suggesting creation of "a nationwide roster of senior district or other judges available to follow actions remanded back to heavily impacted districts"). Are Committee members familiar with experience under such a "shared responsibility" regime? Would that hold promise for the concerns raised?

(8) Facilitating appellate review: Submissions have urged measures to facilitate interlocutory review. A starting point is to recognize that there already exist methods of obtaining such review. See, e.g., Rule 23(f) and 28 U.S.C. § 1292(b). None of those provides an absolute right to such review, however. It is likely that a Civil Rule could expand the circumstances for such review and, perhaps, mandate it under some circumstances. (If serious attention focuses on these issues, it will be important to involve the Appellate Rules Committee.)

Have Committee members found that the existing methods do not suffice for appropriate access to interlocutory review? Note that under § 1292(b), certification by the district judge is required but not sufficient (given court of appeals discretion not to grant review). It seems that certain rulings that in individual litigation might be regarded as "ordinary" could assume much greater importance in MDL or other multiparty litigation. How would a rule identify such orders? Could a court of appeals meaningfully discern whether a given order was of that variety? Would broadening interlocutory appellate review unduly delay MDL cases?

(9) Coordination between "parallel" federal- and state-court actions: There have been instances of highly productive cooperation and collaboration between federal- and state-court judges handling related matters. Indeed, some states (e.g., California and New Jersey) have centralization mechanisms similar to the Panel for related actions pending in their courts. Such collaboration has been around for a generation. See, e.g., Schwarzer, Weiss & Hirsch, Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689 (1992).

Have Committee members found such collaboration between state and federal judges productive? Have the Civil Rules impeded such collaboration? Would revisions to the Civil Rules provide a helpful impetus or mechanism for such activity? It may be that this is another aspect of individualized case management that cannot effectively be governed by rule. On the other hand, this might carry forward the notion of shared efforts among federal judges mentioned in (7) above.

One particular issue that might relate is the question of ruling on motions to remand to state court. These motions in individual cases may seem distant from the "central" issues of an MDL proceeding. Have Committee members found that it is difficult

to obtain rulings on such motions? Would it be preferable to have the transferor judge rule on such a motion before a case (particularly a tag-along) is sent to the transferee district? (Given that remand is generally controlled by statute, and timing of transfer in actions transferred by the Panel is governed by Panel order, it is not clear how a rule change could affect remands to state court.)

(10) PSC formation and common fund directives: There is no rule directive like Rule 23(g) about appointment of lead or liaison counsel or the members of the PSC. Common fund contribution orders (particularly when combined with fee caps) may generate hostility among some counsel. In addition, there has been concern about the diversity of membership on such committees, which some judges have mentioned. See, e.g., JP Morgan Chase Cash Balance Litigation, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) (describing "this court's diversity requirement"); compare Martin v. Blessing, 134 S.Ct. 402 (2013) (Alito, J., regarding denial of certiorari, raising question about a judge who "insists that class counsel 'ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics'").

Have Committee members found that these issues of appointment of the PSC have created problems? Would rules improve practice? Manual for Complex Litigation (4th) § 10.244 offers guidance to judges. Would something more detailed or prescriptive be helpful?

(11) Other issues: As noted at the outset, besides seeking guidance about the issues it has already identified, the Subcommittee also would appreciate suggestions from the Committee about additional issues that could be added to this list.

* * * *

In conclusion, it should again be emphasized that this inquiry is at a very early stage. The series of questions above are presented only to prompt commentary, and should not be taken to indicate what the Subcommittee will ultimately recommend to the Committee. It remains a real possibility that it will recommend that no rule changes be pursued. But it can only reach such a recommendation (or a recommendation of some specific rule changes) after completing a careful educational and analytical process. Beyond discussion at the April meeting, therefore, the Subcommittee invites Committee members to submit further thoughts.

THIS PAGE INTENTIONALLY BLANK

TAB 5B

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Civil Rules
MDL Subcommittee
Conference call, Feb. 28, 2018

On Feb. 28, 2018, the MDL Subcommittee held a conference call. The participants included Judge Robert Dow (Subcommittee chair), Judge John Bates (Advisory Committee Chair), Judge Joan Ericksen, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), and Rebecca Womeldorf (Secretary, Standing Committee).

The call was introduced as designed to identify issues for discussion during the full Committee's April meeting, and also to consider further information-gathering that can be undertaken.

Upcoming Events

Several upcoming events were discussed. It is expected that Subcommittee representatives will be participating in each of these events, and that each event will provide valuable insights into the issues the Subcommittee is to address. The following events have been identified:

Duke Law Conference on Documenting and Seeking Solutions to Mass-Tort MDLs, April 26-27, Atlanta, Ga. This event will include six panels that should bear on many of the topics the Subcommittee has under discussion.

AAJ Annual Convention, July 7-10, Denver. Presently nothing is scheduled, but contact has been made with AAJ and there may be an opportunity to receive input on concerns with multidistrict litigation.

Emory Law School Institute of Complex Litigation and Mass Claims Conference, Aug. 8-10. The exact focus of this event is not yet finalized, but it is likely to focus in part in issues the Subcommittee has found important.

Lawyers for Civil Justice event: A time and place for this possible session has not been set, but discussions have occurred. The goal is to hear from LCJ members about their concerns.

George Washington Law School Roundtable on Third Party Legal Funding: This event is likely to happen in D.C. just before or just after the Advisory Committee's Fall meeting.

There was some discussion of these upcoming events. No other events were mentioned.

JPML Outreach and Help

An ongoing concern is to gather information from the Judicial Panel on Multidistrict Litigation and to connect with the Panel on ideas for addressing the issues the Subcommittee is studying.

Initial outreach to the Panel has been very helpful to the Subcommittee. The Panel has compiled and shared with the Subcommittee what one Subcommittee member described as a "treasure trove" of material. Subcommittee members are studying this material.

At the same time, the Panel seems to have some understandable skepticism about whether rule changes would materially improve MDL practice. Panel members are open to work on shared concerns, but may be inclined to think that distinctive aspects of different MDLs make some overarching set of new rules hard to imagine.

It was mentioned that it is not clear that large segments of the bar favors developing special rules either. There surely has been considerable criticism of MDL practice among academics, particularly during the last five years or so. But the recent submission from AAJ, a major plaintiff-side organization, shows no strong enthusiasm for developing rules for these litigations. Some defense-side organizations have submitted proposed rules, but it is not clear that there is widespread enthusiasm on the defense side for special rulemaking for MDL proceedings either.

Triage of Possible Issues

The remainder of the call was occupied with what might be described as "triage" -- an effort to identify all issues that seem presently to warrant attention and to begin considering whether they should be "front burner" or "back burner" issues.

It is far too early to make decisions about which issues should be the subject of intense study. It is likely that, as the Subcommittee moves forward, the focus and emphasis on various issues will change. In addition, during the April full Committee meeting it will be important to solicit input from the full Committee on these issues and any others that seem worth adding. As one member mentioned, however, informal canvassing of experienced lawyers did not identify additional issues.

(1) Scope of application of any rules: In general, the Civil Rules apply to all civil cases in federal court. But some (e.g., the Supplemental Rules in Admiralty) apply only to certain categories of cases.

It is not clear how one would best define the category of cases to which these rule ideas would apply. It seems to be assumed that such rules would not apply to all civil cases, but

also that their application would not depend on substantive case type or the like. One possibility would be to direct that they apply to all cases subject to an MDL transfer order. That might be a suitable method, but might also seem odd in that those cases became subject to the new rules only upon JPML transfer order. It may be that such an order works a fundamental transformation of the nature of litigation, however. For example, such a centralization order may itself operate as something of a magnet for the filing of dubious claims, one of the concerns repeatedly raised by critics of current MDL practice.

Alternative approaches might not key on action by the Panel, or might include additional screening devices. One suggestion, for example, was that new rules apply only when there is a Panel order and another ingredient, such as having a certain number of claimants.

One possible example might be the "mass action" under 28 U.S.C. § 1332(d)(11) (part of CAFA) which says that a mass action is an action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly." If so, such a case is a "class action" for purposes of CAFA. Maybe a similar definition could be used for application of any rule provisions resulting from this project. Would 100 be an appropriate number for our purposes? Is this idea a sensible way of defining scope for such rules?

After discussion, the conclusion was that this is a background issue that will continue to be important, but not one that can be addressed in the abstract. What will matter is to consider this issue once we have hit upon the sorts of rules we think warrant study. Then the problem will be to decide how and when those additional rules should apply.

(2) Master complaints: This topic was introduced as presenting at least questions about whether such complaints should be treated as genuinely superseding pleadings. If they are merely administrative convenience measures, they might not be subject to Rule 12 motions and the like. But to the extent they are subject to such motions, or form the basis for rulings on the scope of discovery, it may seem odd to think that individual actions will revert to their original pleadings after the centralized pretrial proceedings are completed. Would that mean summary judgment granted on some claims included in the master complaint would be inapplicable to similar (or even identical) claims asserted in individual complaints?

An initial reaction was that master complaints generally do not come into existence until after there has been a lot of motion practice, so that motions to dismiss will probably have been resolved before a master complaint is drafted. Similarly, a master complaint usually would not come into existence until something like the Plaintiffs' Steering Committee (PSC) has been appointed. After all, somebody has to draft the master

complaint. Indeed, a good master complaint is likely to clarify and focus the claims asserted. But it may also tend toward an "everything but the kitchen sink" kind of pleading; drafters may be reluctant to exclude theories favored by some plaintiff counsel even if not embraced by a majority.

Another reaction was that master complaints can be very useful. But that does not mean that they should be the subject of a special rule provision. Perhaps the right place to provide advice about using master complaints is in the Manual for Complex Litigation. But it is worth noting that the master complaints may be very important for a variety of reasons, ranging from class definitions to questions of waiver of certain claims or defenses (assuming a master answer as well).

A different question was raised -- Are master complaints subject to the pleading requirements of *Twombly* and *Iqbal*? At least one judge has said that the "plausibility" standard does not apply to master complaints. Should a rule address that possibility?

Another point was raised -- For the Clerk's office, having master pleadings may make life much simpler. But is that true? In an era of electronic filing, it may be less true than in the past, when huge volumes of paper would arrive if separate filings were necessary in each case.

A further point was that use of master complaints may foster a problem that recurs in consolidated litigation -- what might be called the "bystander" problem. Particularly for defendants on the periphery of the litigation (not the central defendants), it may seem that actual litigation activity -- particularly discovery -- is focused on and limited to the main issues, rather than the issues important to these defendants. If the sequencing of discovery defers attention to the issues important to these peripheral parties, they may feel that they are in a sense "trapped in" the litigation, or "frozen out" of the litigation.

The consensus was that these issues should be kept on the agenda.

(3) Early streamlining devices: This topic somewhat overlaps with topic (5), on sequenced discovery. It also ties in with topic (2) on master complaints because it relates to the extent that such master complaints may prove an obstacle to focusing attention on the adequacy of individual claims and screening out those that are unsupported.

A key problem mentioned by many is the proliferation of claims by those who really don't have claims because they haven't used the product, have not suffered injury, etc. In a sense, then, this topic also connects with topic (6) on "lead generators," for the phenomenon is that some lawyers acquire large inventories of claims that they don't scrutinize very

carefully. People on the defense side are very concerned about this possibility, as are at least some on the plaintiff side.

A reaction was that judges have employed a variety of approaches to this set of problems. *Lone Pine* orders originated 30 years ago in the New Jersey state courts and something like that, or a "plaintiff fact sheet," is often an important organizing tool to determine what's really involved in the case. H.R. 985 has a particularly hard-edged requirement along these lines, which seems to impose a burden on courts to rule on the adequacy of such plaintiff submissions that could be crippling in some cases. How does a judge make such determinations in regard to hundreds or thousands of claimants in a short period of time? That seems impossible.

Despite those difficulties, it was emphasized, this topic must remain on the list as we go forward. There are simply too many claims "parked" in MDL proceedings that would never be presented, or survive early motion practice, as individual actions. This concern relates to the extent that specifics are required up front under the "plausibility" pleading standard and perhaps sometimes also Rule 9(b). It may also relate to the desirability of keying new rules to an MDL centralization order, if that serves as a magnet for such claims.

It was also noted that *Lone Pine* orders can work, but a problem surfaces when plaintiffs do not comply with them. What happens then? Perhaps the sanction of dismissal (with or without prejudice) will follow rather automatically, but that may lead to numerous appeals. And a rule compelling a court to dismiss, even without prejudice, might unduly restrict the court's authority to manage the action.

Another reaction was that there surely are problems along this line. At the same time, "atomizing all the cases" won't work. Indeed, it's inconsistent with the basic thrust of MDL combination, which is to handle large numbers of claims together. Given that, this seems like "a classic instance of individualized case management." There are already rules in place that permit judges to do this sort of thing when needed, and in a way tailored to the case before the court.

The consensus was to keep this topic on the agenda, but to recognize also that it may prove difficult or impossible to devise rules that move significantly beyond what we now have.

(4) Rule 20 and filing fees: This topic responds to suggestions that the problem of "parking" dubious claims in the sprawling MDL proceeding could be partly solved by making each plaintiff pay a separate filing fee (perhaps in addition to filling out a "fact sheet").

The starting assumption is that, as things currently stand, the filing fee need be paid only for the overall action, and that

the number of parties does not affect the amount of the filing fee. In that sense, having dozens or hundreds of plaintiffs could reduce the per-plaintiff filing fee a great deal. One might even view the idea of "unbundling" by requiring separate filing fees from each plaintiff as an income-generating measure for the courts.

In at least some kinds of litigation, there has been a focus on requiring individual payment of filing fees. Prisoner litigation is an example. But this concept pushes in the opposite direction from the broad joinder orientation reflected in Rule 20. Surely that orientation applies in lots of cases that would not be subject to any new rules we might propose. Notably also, joinder of many defendants under Rule 20 does not increase the required filing fee.

Instead, it seems that this idea stems from the same sort of concern that lies behind the "fact sheet" approach -- a desire to force lawyers to think more carefully about the individual claims before filing them. "If you have to pay for each one, you will think more carefully about each one."

One question that came up was whether the Clerk's offices would care about this. There might be something of a policing problem if the clerk has to determine how many filing fees are due based on some sort of scrutiny of the complaint. Does the Clerk's office receive special guidelines on handling MDL proceedings? That might be worth investigating.

Another point made was that a rule imposing this requirement could direct that the assessment of a per-plaintiff filing fee might depend on a motion. That would seem to mean that the Clerk's office would not need to determine how many filing fees must be paid. But it might pose new challenges for the court. What exactly would be the standards for ruling on such a motion? Perhaps the motion would have to be supported by a showing that some sort of random sampling of hordes of claims indicates that a percentage above *X* seems groundless. Making such a showing would be difficult, however.

But if it were introduced as a motion, it might be added to Rule 20(b), which already has a provision for ordering "separate trials" to deal with problems caused by overbroad joinder of parties. Perhaps that rule should also authorize directing that a case initially filed by or against many parties be split into separate cases. But if this requirement depended on a court order prompted by a motion, it would defer the assessment of additional filing fees until a good deal later in the litigation. And what would be the consequence of failure to pay at that time? Dismissal with prejudice seems unduly severe.

The consensus was that this idea should go forward, but that it presently seems less promising than some of the other ideas.

(5) Sequenced discovery and early disclosure: This topic ties in with topic (3) above. The notion is that in MDL or "mass" litigation there should be a clear roadmap for the sequence of discovery. One approach might be to focus discovery first on defendants, because that discovery would ordinarily bear on most or all plaintiffs' claims. (As noted above, that might be regarded as excluding attention to "bystander" parties.) Alternatively, one might prefer to go first with discovery regarding individual plaintiffs. But it might seem odd to say that because there are many allegedly injured people defendants need not face discovery until plaintiffs have provided discovery.

In a sense, then, this approach raises issues of staying discovery until other events have occurred. With *Lone Pine* orders, for example, perhaps it is assumed that defendants need not respond to discovery until plaintiffs have satisfied their obligations under the "fact sheet" order. But unless one assumes that none of the plaintiffs will satisfy the *Lone Pine* requirements, is there a reason to put plaintiffs' discovery on hold? Should defendants be permitted to do discovery during that period? Before 1970, a practice emerged under which a party that first served deposition notices obtained "priority" to complete those depositions before the other side could take discovery. That priority was rejected in the 1970 amendments. This approach might signal something of a return, though as an aspect of case management.

Altogether, this set of issues seemed unlikely to yield a "one size fits all" rule-based solution. The consensus was that this topic ties in with early screening devices, topic (3), and that they should "move forward together."

(6) TPLF and "lead generators": These are discrete topics, but often treated together. These topics create tension "on both sides of the v."

Regarding TPLF, we have a large body of material concerning local district and court of appeals rules and state statutory regulation. It is not immediately obvious that further information would be helpful at this point.

One reaction is that TPLF is coming up more and more frequently, and not just in MDL cases. It is "building up to be a big battleground." Indeed, it seems that innovative techniques have made something like this available on the defense side also.

There seem to be somewhat discrete TPLF settings. One is the individual claimant with what may be a high-value claim that also involves high litigation costs. That is probably not the MDL norm, and certainly not the issue that generates attention to *Lone Pine* orders or "fact sheet" requirements. Another involves a plaintiff who has already secured a big judgment that is on appeal, and seeks support during the time needed to resolve the appeal. Then there are instances in which lenders support

"inventories" of cases, which might be closer to the MDL situation.

The question was asked whether this issue is specific to MDL proceedings. A response was that it probably is not, but it has assumed particular significance in some MDL situations. Often those involve class actions, and would thus be subject to the N.D. Cal. disclosure order applicable in class actions. There seems to be a growing interest in third party funding in MDL proceedings as well, though it is not so clear that these arrangements occur frequently at present. It is a field in flux, and in a few years the panorama may look quite different from the way it looks today.

One participant reported having done a substantial amount of research on the question. It seems that there is a major difference between requiring disclosure of the existence of third party funding and requiring disclosure of the details about it. In international arbitration, one sometimes gets into the terms for such funding arrangements because costs follow the event, and include attorney fees. When one side shows that there is good reason to suspect the other side will not be able to pay costs if it loses, the arbitrators can order the posting of bond. In that situation, there is a need for details on their party funding to determine whether there is a need to require a bond. But in U.S. litigation that reason does not appear to apply.

So it seems that the main or only reason for disclosure in the U.S. is to deal with recusal issues. That appears to be the motivation behind the required disclosure in many courts of appeals. There does not seem at present to be a reason to get into the details, but perhaps that case can be made.

The consensus was to keep these issues on the agenda.

(7) Bellwether trials: The topic was introduced as involving something not currently covered in the rules. Indeed, it is not entirely clear what a "bellwether" trial is. When some cases come to trial and other related cases are not tried, the earlier outcomes are not legally binding in the later ones (except to the extent a common defendant may face issue preclusion). Even in the absence of MDL centralization, the parties are likely to gauge their settlement positions with reference to trial outcomes, among other things. So when does something become a "bellwether" trial?

One answer in the MDL situation is that it presents special problems when trial can occur only if the parties consent to trial in the transferee jurisdiction. Some claim that judges resort to unduly vigorous arm-twisting to obtain such consent. H.R. 985 has a provision that reflects that concern.

For the present, the consensus was to retain this topic. It has received a great deal of attention, and can play an important

part in the overall resolution of an MDL matter.

(8) Appellate review: An immediate question was whether the Appellate Rules Committee is aware we have been asked to think about this topic. The answer was that the former Reporter was aware, and that as soon as a new Reporter is appointed the new Reporter will be alerted. The Chair of the Appellate Rules Committee is also generally aware of the focus of the Civil Rules Committee.

H.R. 985 has provisions about required appellate review of "important" rulings in MDL matters. It may indeed be important to offer such review on occasion, but determining when such an occasion is presented is perplexing. One serious question is why the existing provisions of 28 U.S.C. § 1292(b) don't suffice; that statute makes the district judge the first arbiter of the importance of interlocutory review. In a sense, then, any further proposal would likely assume that the district judge should not make the call in the first instance. Perhaps an alternative would be rely on district-court discretion under a set of standards different from the ones spelled out in § 1292(b).

§ 1292(b) also gives the court of appeals discretion to decline interlocutory review even if the district judge certifies the issue. So another question might be whether to try to require the court appeals to undertake immediate review. The Supreme Court has made clear that a final judgment in any one case in an MDL proceeding is a final judgment subject to immediate review as a matter of right. Perhaps district-court certification under a new set of standards could make appeal a matter of right also.

Arguably, the desire for enhanced appellate review results in part from a general queasiness that MDL transferee judges have too much power because of the latitude they have in administering these cases.

For the present, the consensus was to retain this issue on the agenda.

(9) Coordination between "parallel" state court and federal court cases: This was introduced as having practical importance. Federal and state court judges presently confer together on occasion about shared litigation issues. Indeed, there may be concerns about such "ex parte" communication among judges without involvement of counsel. Sometimes federal- and state-court judges even sit together to address related issues in their cases. Some MDL settlements (such as VIOXX) resulted from such collaboration between federal and state court judges.

A somewhat related issue was suggested in the recent AAJ submission -- promptly addressing remand motions in the transferor court before giving effect to an MDL transfer order.

Some urge that MDL transferee judges focusing on the "central" issues in their combined litigation may decline to address these issues that affect only a few of the cases. In a sense, this could be viewed as similar to the "bystander" party issues mentioned above. These are "bystander" issues in that they are not central to the centralized cases. They bear on the state-federal mix because remand can return cases to the state courts.

The consensus was that this topic should remain on the list. It was also noted that topic (9) can have links to topic (7) on bellwether trials. Creative collaboration with state courts can produce advantages for all.

(10) PSC formation and common fund issues: This topic includes a variety of somewhat distinct issues. One has to do with the selection of individual attorneys to serve on the PSC or similar entity. Some urge that standards like the ones in Rule 23(g) be applied. There is no rule that currently so requires. But it was noted that most MDLs involving "mass" claims include class actions, so Rule 23(g) will apply. And the reality seems to be that judges are actually employing standards like Rule 23(g) in evaluating potential PSC members without any rule requiring them to do so.

A different problem might be called the "old boy" problem. Too often, according to some, judges go with prominent well-established lead counsel. Pressure has built to increase the diversity of lawyers appointed. The idea here is not that incompetent people are getting appointed, but that many highly talented people are not getting the call. As one participant put it, "People work hard to become lead counsel." It does not seem that the incompetent are getting the call, but it may be that outreach would produce benefits. At least some judges mention diversity in making decisions on lead counsel.

Another pressure point is the growing importance of common fund arrangements. From the perspective of some lawyers not designated to serve on committees, this results in taking money out of their fees to pay the lawyers favored by the judge. As some of them might say, they are the ones who have the actual clients, but their fees are often capped (sometimes on the "quasi class action" notion) and also taxed for the common benefit fund.

A reaction was that, among the things discussed during the call, this seems least likely to be addressed effectively through a rule. The Manual for Complex Litigation already has provisions about appointment of counsel, and it is not likely we will be able to improve on that. Almost inevitably, tensions among lawyers will arise in some cases.

The consensus was that this topic should remain on the agenda but that, along with topic (4) it presently seems less promising as a topic for rulemaking.

Other issues: Having completed discussion of the current list of issues, participants were invited to suggest any other issues that could profitably be identified for the full Committee at its April meeting. None were suggested.

Next steps

For the present, the Subcommittee is at an early fact-gathering stage. The various events noted above should provide important additional insights over the coming months. For the full Committee meeting in April, the goal will be to introduce the issues identified so far and invite Committee members to offer reactions to this list, both whether all issues appear sufficiently promising to warrant continued attention and whether there are other issues that should be added. Questions about how to gather information about these issues can be addressed as well.

In a closing note, the work of the Rule 23 Subcommittee was recalled because it showed that the agenda evolves over time and with study. That study produced a series of what seemed to be "front burner" issues in 2012, but by the time actual proposals were put forth (some years later and after extensive outreach) that list had changed a great deal. That same sort of evolution may happen with this effort.

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Civil Rules
MDL Subcommittee
Conference call, Jan. 16, 2018

On Jan. 16, 2018, the MDL Subcommittee held a conference call. The participants included Judge Robert Dow (Subcommittee chair), Judge John Bates (Advisory Committee Chair), Judge Joan Ericksen, John Barkett, Parker Folse, Virginia Seitz, Ariana Tadler, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), Rebecca Womeldorf (Secretary, Standing Committee), and Patrick Tighe (Rules Law Clerk).

The conference began with a review of upcoming events from which Subcommittee members can glean insights. In April, Duke Law School will sponsor such an event, and John Rabiej is receptive to including a focus on topics of importance to the Subcommittee. The Emory Law School Institute for Complex Litigation and Mass Claims has working groups that, under director Jamie Dodge, are planning an event on Aug. 8-10 that may also shed light on our topics. In addition, there has been an overture from Lawyers for Civil Justice, which is seemingly happy to try to assist in any way it can. In addition, the American Association for Justice has an event in Denver from July 7 to 10 that might be a good place to gather information.

On the general subject of outreach, it was noted that the Subcommittee should strive for balance in the views it receives. Some organizations may have a particular slant to their general inclinations -- for example, either defendant or plaintiff oriented -- and it will be important to keep this balance consideration in mind.

A general question, however, is whether or when the Subcommittee will be in a position to identify with some confidence its “front burner” issues. With Rule 23, for example, that Subcommittee actually began work in 2011 and had an initial list of issues by Spring 2012, but that list was reviewed and revised several times before the Subcommittee began its series of “outreach” meetings with bar groups. By then the list had shifted considerably, and it continued to be shaped by input that came in.

A question was raised -- Has the Advisory Committee ever before considered rulemaking on a subject such as this? It does seem to cross a number of frontiers and possibly come under the authority of a number of other organizational actors.

One possible parallel was the 1998-99 work of the Ad Hoc Mass Torts Working Group, which produced a fairly lengthy report in 1999. The effort built on the work that the Advisory Committee began in 1991 on Rule 23. Its report recommended that the issues examined be studied by Congress, the Judicial Conference, the Judicial Panel on Multidistrict Litigation and

the Federal Judicial Center. But it also concluded that "its members and the Civil Rules Advisory Committee represent the best source of experience and expertise to coordinate this effort." Report on Mass Tort Litigation (Feb. 15, 1999) at 67. It therefore recommended creation of an Ad Hoc Committee on Mass Torts to consist of members drawn from a variety of sources, in addition to representatives of the Advisory Committee. The Report noted the possibility of involving the following or their designees (id. at (69-70):

> The Standing Committee Chair;
> The Chair of the Committee on the Administration of the Bankruptcy System;
> The Chair of the Committee on Court Administration and Case Management
> The Chair of the Committee on Federal-State Jurisdiction
> The Chair of the Judicial Panel on Multidistrict Litigation and one other judge with extensive multidistrict litigation experience
> A representative of the Conference of Chief Justices
> Three additional lawyers, one experienced in prosecuting mass tort cases individually, one experienced in prosecuting class actions, and one experienced in mass torts form the defendants' point of view.

This Ad Hoc Committee was not formed. The current effort is probably different from the 1998-99 effort.

Another way of looking at the situation in terms of rulemaking was suggested -- focusing on the difficulties presented by devising rules that are not transsubstantive. One way of looking at this question is not exactly substantive. One could, as has been suggested by some submissions, develop rules that are specifically designed for all clusters of cases centralized under § 1407. Cases of different substantive sorts are subject to § 1407 orders, but this may be a distinctive set of cases in the federal judicial system.

Taking the § 1407 designation as an example, it is at least arguable that there would be difficulty devising a rule that does some of the things some submissions seem to address. With class actions, we begin with something significantly created by Rule 23, and that rule recognizes that court approval can be required for settlement (and the binding effect that settlement can produce under Rule 23(c)(3)). It is less clear that there should be rulemaking authority over settlement of cases subject to a § 1407 transfer order. In individual cases, for example, the norm is that the parties need not get the judge's permission to settle.

Perhaps things are significantly different when one deals with the reality of MDL litigation today. Truly mass settlements seem to occur that involve much effort by the judge and to depend on some pressure on some lawyers and parties. There is presently

no rule-based architecture that cabins these efforts, but perhaps rules could be designed that provide such guidance.

At the same time, it is worth noting that § 1407(f) says that "The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." The Panel has prescribed a set of rules. Careful review of those rules might pinpoint topics on which a Civil Rule could be in tension with a Panel rule, though that probably is not presently a concern. And one could ask whether the Panel's "conduct of its business" extends to what transferee judges do with the cases assigned to them.

Customary procedure ordinarily allows no appeal to the Panel regarding rulings of the transferee judge. And usually the Panel says it will not consider remanding cases so transferred to the transferor districts (which might be taken as a response to such transferee rulings) unless the transferee judge so recommends. Although there may have been some occasions in its early years when the Panel engaged in a form of "oversight" over the handling of transferred cases, that appears not to be among its normal undertakings nowadays. In short, the Panel does not review or otherwise take cognisance of orders entered by the transferee judge in the conduct of the transferred case.

Consistent with that orientation, the handling of appellate review of orders in the conduct of the transferred actions suggests that the Panel is not responsible for them. The responsibility for such review rests instead with the court of appeals with authority over the transferee district.

The problem we have heard about is that most such orders are not often appealable under 28 U.S.C. § 1291. As the Supreme Court recently decided, a final decision in one of a collection of cases transferred under § 1407 is subject to immediate review in the court of appeals with authority to review the decisions of the transferee district court even though all the other cases remain pending before the district court. The pertinent unit for appellate review is therefore the individual transferred case, not the entire MDL collection of cases. See Gelboim v. Bank of America Corp., 135 S.Ct. 897 (2015). So it can be said that the basic authority for handling litigation, and reviewing that handling on appeal, is not different for cases transferred under § 1407.

Against that background, one can see that it would be possible to add something tailored to § 1407 cases to Rule 8, or perhaps to Rule 9. There could also be a new Rule 23.3. Other topics might not fit so readily in the current rules. Consider, for example, *Lexecon* waivers. They do not seem to be parallel to other matters before district courts in other litigation, or to other things regulated by the Civil Rules. Another possible topic might be common benefit funds, which those might be likened to some issues that can arise under Rule 23(g) or (h).

Discussion returned to the basic question -- Does the rules process have authority to develop rules for such situations? Is this analogous to class actions? All recognize that class actions are within the rulemaking power although some aspects might be beyond that power, as was urged upon us during our recent study of Rule 23.

A reaction was that one can much more readily locate authority over class actions in the rulemaking background than finding in that background a basis for rulemaking specific to MDL proceedings. The original Rule 23, which went into effect in 1938, recognized the authority of the rulemakers to deal with such cases. And it was derived from Rule 38 of the Equity Rules, which had been around for a long time. That equity rule, in turn, built on several centuries of English (and American) experience. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987).

§ 1407 has a very different lineage. As explored in Bradt, "A Radical Proposal": The Multidistrict Litigation Act of 1968, 165 U.Pa.L.Rev. 831 (2016), the framers of the Act gave serious consideration to proceeding through the rulemaking process and met with Reporter Benjamin Kaplan and Associate Reporter Al Sacks. But they decided not to go that route, preferring the legislative route. That history has not been well known until very recently, and it is surely true that there have been huge changes to both class action and multidistrict litigation in the last 50 years. (Indeed, one might say that very important changes have occurred with multidistrict litigation within the last decade or two.) So it is hardly true that we are bound by this history.

Another issue, already mentioned, that may raise serious questions about authority involves court review of proposed settlements. The MDL proceeding may provide a context that fosters aggregate settlements, and judges may be considerably involved in confecting some of those settlements, but it may be difficult to find a role for rulemaking. Certainly there has been resistance to the "quasi class action" attitude adopted by some judges to support authority to modify the fee terms of lawyer-client contracts, and a Civil Rule that did something like that would probably confront Enabling Act challenges.

This discussion led to the conclusion that one thing the Subcommittee needed was research on the Enabling Act limitations as they applied to topics it is discussing. Patrick Tighe has already done outstanding work on REA authority for rulemaking affecting review of denial of Social Security benefits under 42 U.S.C. § 405(g). It would be desirable if he could provide a similar report to this Subcommittee.

On another level, whatever the conclusion about REA authority, it will surely be important at an appropriate point to reach out to the Judicial Panel. There has been some

communication. On some topics, the members of the Panel have given much thought to things that this Subcommittee may focus upon. But because this Subcommittee is only at the beginning of its efforts it seems premature to reach out to the Panel just now. Later on, it will be important for representatives of this Subcommittee to meet with members of the Panel. For one thing, it seems that members of the Panel think that the actual MDL process has been much more successful and much fairer than some of its most strenuous critics believe.

In addition, it might be very helpful to collect together the "best practices" that the Panel has identified over the years. Doing that would be very useful, but we probably are not yet at that point. One might think of that as a "second phase project."

The annual conference for transferee judges that the Panel holds in Florida often involves a considerable dose of "best practices," particularly for first-time transferee judges. That suggests that there may be materials already available that would be instructive for members of this Subcommittee. The Panel's website has a variety of such materials -- sample orders, etc. Although there is no "baby judges' school" for new transferee judges, the Panel offers them a variety of helpful guides.

One way that this process of gathering existing experience could be done would be for Rebecca Womeldorf to contact staff at the Panel to see what they would recommend we review. It will be important to avoid seeming to be interlopers. There is much reason to think that the MDL process generally works well, despite some of the more vigorous academic (and other) criticism it has received. There is sometimes something of a "wild west" aspect, and it may be comforting to some that we are looking at it even if we ultimately conclude that there is no rulemaking action to be taken.

That prompted a caution -- it may be hard to take small rulemaking steps. There may be something of a slippery slope aspect to this topic. We should pause and think carefully before we start down that slope.

For now, one immediate focus is to try to determine what are the big problems with MDL practice. It is not clear that anyone has really generated a thoughtful list. With such a list, one can more reasonably evaluate the possibility that a rule change would promise positive effects.

To identify and evaluate problems, what we need are data. Usually, one would think of FJC Research as a source of such data, but in this instance the Panel is probably the best source. For one thing, it would help us to know how many cases are subject to transfer orders and what kind of cases they are. Various types of cases may exhibit very different problems. Most of what we have heard seems to be about mass tort cases. There

are surely significant other categories. Examples include data breach cases, antitrust cases, securities cases, etc. Are there really shared problems in all these kinds of cases? If securities cases present problems that are specific and particular to them, that sharpens the concern with non-transsubstantive rules, and also raises questions about whether MDL securities cases are really so different from other securities cases not subject to an MDL order that they should be governed by a special set of rules.

In addition, it is useful, at least initially, to try to identify issues that seem at the forefront, at least with regard to some types of MDL litigation. It might be said that some of these issues are important only in a single sort of MDL proceeding.

(1) Screening out frivolous or groundless claims: One recurrent theme in submissions received so far is that Rule 8 or Rule 9 or Rule 26(a) should be revised to make it more possible to screen out claims that really should not be in the aggregate proceeding because these plaintiffs did not use the product, etc. This phenomenon is sometimes called the "Field of Dreams" problem -- if you build it they will come. The 1999 Mass Torts report made the "sardonic observation" that "the aggregation process itself may induce claims representing not 20% of instances of actual liability, as is supposed to be the case with individualized tort claims, but 120%." (Report at 16-17.)

This problem raises serious concerns with many on the defense side, because it impedes meaningful discussions of the dimensions of possible liability and hobbles settlement efforts. But it was noted that it may also harm plaintiff interests. For example, at a point in the asbestos personal-injury experience there was considerable tension on the plaintiff side between the "retailers" and the "wholesalers." The former had individual plaintiffs with mesothelioma or other terminal conditions. The latter seemed to have hordes of pleural thickening cases that were crowding the docket and impeding the prosecution of the actions brought by those who were deathly ill.

Dealing with this problem could impose huge burdens on the transferee judge. One reaction would be to accelerate discovery designed to pinpoint these "free rider" cases. But practice may be evolving without any rule changes to address it. At least some indications from state courts in California suggests that various sorts of *Lone Pine* orders can go a long way toward weeding out claims in aggregate proceedings.

But *Lone Pine* orders probably are not an all-purpose panacea. Indeed, in one recent MDL proceeding, a federal judge and a state court judge had parallel proceedings, sometimes holding court together. But eventually what happened was that the state court judge granted defendants' motion for summary judgment while the federal judge denied a similar motion.

(2) Interlocutory review of some orders: It probably is true that pretrial orders in MDL cases can be more significant than in individual litigation. Of course, there is the possibility of review pursuant to a § 1292(b) certification, but perhaps that is not sufficient. Designing a rule to solve this problem could present great drafting challenges, but it would likely be within the rulemaking authority under 28 U.S.C. § 2072(c).

(3) State-federal overlap: The example just given of parallel cases in state and federal court has occurred several times. Judge Fallon, in *Vioxx*, convened settlement discussions involving state-court judges from California and New Jersey, and ultimately a $4.85 billion settlement resulted (with fairly aggressive provisions to "encourage" plaintiffs to accept the deal). The ALI Complex Litigation Project proposed over 20 years ago that legislation be adopted to permit more cases from state court to be part of consolidated proceedings in federal court, or perhaps even to permit cases initially filed in federal court to be consolidated in state courts with cases pending in those courts. That sort of thing could not emerge from the rules process; to the extent it seems important to deal with current problems another vehicle would be necessary.[1]

(4) Focusing only on a subset of MDL proceedings: One of the submissions suggested that only MDL proceedings with at least 900 individual cases should be the focus of any rules. Another way to go about it might be by case type, as in H.R. 985 -- personal injury cases. There are likely different ways to define the category of cases subject to the added rules, introducing some variant of the transsubstantivity concern.

(5) Bellwether trials: This concern may be limited to personal injury cases, but the requirement that there be consent has been prominent in some submissions. That has generally been from the defense side, but one can imagine a strong argument from the plaintiff side. "I filed my case in California, where I live, and I don't see how somebody can force me to submit to a trial in Philadelphia." Can a rule deal with this sort of issue? Ordinarily judges can set cases for trial and plaintiffs cannot

[1] Some of the topics that have been mentioned as possibly suitable for rulemaking could be complicated by the state-federal overlap. For example, in In re Showa Denko K.K. L-Tryptophan Prod. Liabil. Litig., 953 F.2d 162 (4th Cir. 1992), the MDL court was found not to have authority to require contribution from plaintiffs in state court to the common benefit fund for the federal litigation even though many were represented by lawyers also before the MDL court. Contrast In re Three Additional Appeals Arising Out of the San Juan Dupont Plaza Fire Litig., 93 F.3d 1 (1st Cir. 1996), holding that three insurer defendants added to the MDL litigation late in the proceedings could be required to contribute to the defense common benefits fund even though they said they preferred to "go it alone."

refuse to go along. "Consent" may be a relative concept. Compare Rule 73 on consent to proceed before a magistrate judge for all purposes. That may be another issue if we go down this road.[2]

Another possibility is to "transfer the judge." The transferee judge may hold trial in a courtroom in the transferor district. By that time the transferee judge knows much more about the cases, and asking a judge regularly assigned to that district to handle the trial may be unwarranted.[3]

---

[2] At least sometimes, issues of this "plaintiff consent" sort have arisen in MDL litigation in the past. See In re Formaldehyde Prod. Liability Litig., 628 F.3d 157 (5th Cir. 2010), which is probably not analogous to the hypo in the notes above. In that case, a plaintiff scheduled for a bellwether trial asked to be excused from the role because he was a single father with heavy parental duties, and also could not afford to miss so much work. The district court dismissed with prejudice, and he appealed, arguing that he should have been permitted to remain in the overall litigation although unwilling to go to trial. The court of appeals was unpersuaded (id. at 163):

> Bell wanted to have his cake and eat it by withdrawing from a bellwether trial and then sitting back to await the outcome of another plaintiff's experience against the appellees. When a plaintiff files any court case, however, sitting back is no option. He must be prepared to undergo the costs, psychological, economic, and otherwise, that litigation entails. That the plaintiff becomes one of a mass of thousands pursuing defendants lends urgency to this reality. Courts must be exceedingly wary of mass litigation in which plaintiffs are unwilling to move their cases to trial. Any individual case may be selected as a bellwether, and no plaintiff has the right to avoid the obligation to proceed with his own suit, if so selected.

Probably this plaintiff had filed in this district, meaning that the question of forcing a plaintiff to go to trial in another district was not presented. The fact that § 1407 seems to guarantee return of the case to the transferor district may also mean that only those plaintiffs who file in the transferee district can be forced to trial there. But limiting bellwether trials to cases filed in the transferee could limit their utility.

[3] The path of intercircuit transfer may not always be smooth, however. In In re Motor Fuel Temperature Sales Practices Litigation, 711 F.3d 1050 (9th Cir. 2013), Chief Judge Kozinski refused to approve the intercircuit transfer of Judge Vratil (D.Kan.) to try three remanded cases she had overseen as MDL transferee judge. Invoking the Guidelines for the Intercircuit Assignment of Article III Judges, Chief Judge Kozinski declined to approve the assignment of Judge Vratil on the ground that there was no "judicial emergency" creating a need for assignment of a judge from outside the circuit. Id. at 1053.

Chief Judge Kozinski quoted Judge Motz (D.Md.), then Chair of the Panel, as encouraging intercircuit assignments to promote efficiency. But he also quoted Judge Gorton (D. Mass.) for the view such transfer

As these issues were under discussion, it was noted that only a relatively limited percentage of the federal district judges are assigned MDL proceedings. It is a higher percentage than ten or twenty years ago, but much smaller than all judges. And among lawyers, the percentage with extensive MDL experience is much, much smaller. Indeed, it seems that on the defense side something like 40% of all MDL cases involve lawyers also involved in other MDL proceedings. It should be possible to get useful input from these people.

Another point came up -- in 2009 the Judicial Panel had a working group that developed some ideas that should be looked at. In addition, in mid-March there is a workshop on Complex Litigation in Washington, D.C. But that event is probably too soon for this group to benefit from it. Some members of this group will be there for that event, so reporting back will be possible without any more "official" involvement.

One source of information from which we have not yet received much input is the plaintiff side. It would be good to reach out to those lawyers soon. Probably they will have different ideas based on their focus. Personal injury cases are not the same as data breach cases, and securities cases are different from both. Antitrust cases are probably yet another

---

would be a form of "self assignment" forbidden by *Lexecon*, which he read as recognizing the right of the parties to have the case returned to a judge in the transferor circuit. See id. Defendants argued that "allowing the MDL judge to follow the cases back after the conclusion of pre-trial proceedings resuscitates the self-referral practice that the Supreme Court unanimously repudiated in *Lexecon*." But Judge Kozinski did not find this argument convincing, viewing *Lexecon* as focusing entirely on venue, not the use of judicial personnel.

Nevertheless, he also concluded that he could not sign the Certificate of Necessity required to effect the intercircuit transfer. Noting that each of the cases was previously assigned to a Ninth Circuit district judge, he observed (id. at 1054):

> I would, in effect, be removing the judges to whom the cases were originally assigned and transferring them to an out-of-circuit judge. I'm aware of no authority empowering the chief judge of the circuit to re-assign cases pending before other judges, or to remove cases from the district's assignment wheel. Only if the presiding judge is recused or unable to serve, and the local district is unable to reassign the case according to its local procedures, will the chief judge of the circuit be called upon to bring in a judge from outside the district. For me to sign a Certificate of Necessity in the absence of such circumstances would constitute a serious encroachment on the autonomy of the district courts and also interfere with the random assignment of cases.

So there may sometime be difficulties using this solution under the current arrangements.

category. Consumer cases may be another category.

One reason why we have not heard much yet from the plaintiff bar is that these lawyers probably stay in their "lanes of practice," perhaps corresponding to some of these categories of cases. There is an AAJ convention in February, and perhaps some initial canvassing can be done then. It will be good to reach out to AAJ to see about that. But our group is not in a position to be specific yet about things it has under serious consideration. That uncertainty looks likely to continue for some time.

For the present, it seems that there are two basic goals: (1) Take a careful look at the limits of Enabling Act authority to address these issues. Patrick Tighe will try to do that. (2) Gather together materials that will acquaint members with what exists now. Rebecca Womeldorf will reach out to people at the Panel to assemble a sensible set of reading materials.

One more thing that might be of use is to check with Emery Lee of the FJC to see whether he has information that would be of use to us. He is at work on a new version of the Manual for Complex Litigation. The Manual (First) was published by the Judicial Panel in 1969.

The plan for this Subcommittee, then, is to have another conference call in about a month. This interval should allow time to gather more information, and also provide enough time before the due date for agenda materials for the next meeting of the Advisory Committee so we can submit a report for inclusion in those materials.

Duke Law Conference
October 8, 2015

I. Introduction

I would like to give the Panel's perspective on the growth in mass tort MDLs - what is driving it and how we have responded to it. Let me begin by explaining what I refer to as "mass tort MDLs." I am referring to products liability and common disaster MDLs with more than 1,000 cases pending in the docket. There are 21 of these cases today, and there have been 53 of them since 1968, when Section 1407 was enacted. These 21 large cases make up 90% of the cases pending in all 268 MDL dockets and 35% of the pending federal case load at the end of FY 2015.

Before I focus on the mass tort dockets, I should put these statistics in context. The statistic that MDL mass tort cases make up 35% of the federal docket is a snapshot of the total docket, representing what has accumulated over time. This does not mean that the Panel sent 35% of newly filed cases to MDLs in 2015. Only about 10% of the new cases filed in federal court in 2015 went into MDLs, either by direct filing or Panel transfer, and the average since 2004 has been 10.6%.

Until 2003, there were relatively few mass tort MDLs. From 1968 through 2003, there were never more than 4 mass tort MDLs pending in any year, and the number did not reach 4 until the late

1990s. The first mass tort case did not appear until 1975, the *Dalkon Shield IUD* litigation. After 2004, the number of pending mass tort MDLs increased almost uninterruptedly from 7 in 2004, to 21 in 2015.

This increase parallels an increase in the number of motions to create products liability MDLs coming before the Panel. From 1968 to 2003, the average number of products liability motions per year was 3. Since 2004, the average is 15 per year–a fivefold increase. Products liability motions, as a percentage of all centralization motions, have likewise increased over this period. The percentage of products liability motions that the Panel granted has gone

down on average in the past five years compared to the previous decade.

II. What accounts for this increase in mass tort activity?

Mass tort filings are driven by a number of developments that are beyond the control of the MDL Panel.

In 1977, the Supreme Court legalized lawyer advertising. Since then, plaintiffs' lawyers have developed massive advertising campaigns that are increasingly targeted to potential plaintiffs. The plaintiffs' bar has also become more and more sophisticated in its ability to finance large scale litigation.

Products are mass produced, sold nationally, and distributed to millions of consumers. This exponentially increases the harms that a single instance of negligence can cause. Further, we have seen the rise of direct-to-consumer marketing, and uniform, nationwide marketing campaigns. These developments have led to more potential plaintiffs and to efficiencies in litigating failure to warn claims in a single form. Scientific developments have made it easier to show or to assert causal relationships between exposures and alleged harms. In addition, the publicity surrounding government investigations, product recalls, and drug label changes also drives large scale litigation.

Legal developments have likewise contributed to this trend. The impact of the Supreme Court's 1997 *Amchem* decision, which disapproved of personal injury settlement classes under Rule 23, has worked its way through the system. Added to that, the Class Action Fairness Act of 2005 made access to state court class certification much more difficult in the mass torts context. Thus, MDL centralization has become one of the few options left for parties who seek aggregation of mass tort personal injury claims in a single forum. Further, the perceived effectiveness of MDLs as a vehicle for centralized mass tort litigation has probably increased resort to the MDL process.

III. How has the Panel responded to the increase in mass tort activity and has its response been appropriate?

The Panel has responded to this activity first by performing its statutory duty of deciding the motions before it under the criteria established by Section 1407. In each of these mass tort cases, the Panel had to answer whether centralization of cases pending in more than one district that shared one or more common issues of fact would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the actions.

The 21 mass torts cases satisfied the statutory criteria. Two of these cases were mass disaster cases, the *Deepwater Horizon Oil Spill Litigation*

and the *Du Pont C-8 Litigation*. The latter involves contaminated drinking water allegedly caused by a single industrial plant. Centralization of these cases was broadly supported by plaintiffs and defendants. It was justified by the sheer volume of pending and anticipated actions traceable to the common disaster. To quote Judge Carl Barbier, who presides over the *Oil Spill Litigation*, in the absence of centralization, "there would have been chaos." The other 19 mass tort MDLs are products liability MDLs involving widely used products, usually prescription drugs or medical devices. Almost two-thirds of these cases were triggered by regulatory recalls or warnings about product safety issues. The

existence of such regulatory action is typically a precursor to a large wave of tort claims. The pelvic mesh cases are a good example. The Panel centralized four of these cases in 2012. These devices saw increasing use after 2004, with about 300,000 of them surgically implanted in 2010 alone. By 2012, there had been more than one official warning about unacceptably high complication rates. In fact, the FDA estimated that of the 100,000 devices implanted for a major use of these products in 2010, there was a failure rate of 10%. There are now 73,000 pelvic mesh cases in MDL dockets, which make up 55% of all MDL cases. This is the largest mass tort MDL phenomenon since asbestos. The asbestos MDL at

one time had 192,000 cases and now has fewer than 1,000 cases.

The Panel centralized these products liability MDLs because the question of product defect involved complex issues of fact that were common to the cases, and the alleged injury was the widespread. The number of cases, districts, and lawyers involved also supported our decision. In almost 95% of these cases, there were also parallel cases in state courts. The Panel acknowledged that there were individualized issues about plaintiffs' injuries. But it determined that on balance, the potential efficiency and convenience benefits from centralized proceedings justified the creation of an MDL. These included preventing

duplicative discovery, motion practice and Daubert hearings, avoiding inconsistent ruling on pretrial issues, and avoiding scheduling conflicts in proceedings before multiple courts.

In just over half of these cases, there was either support for or no opposition to some form of centralization from both plaintiffs and defendants. In five cases, defendants opposed centralization, arguing "build it they will come," or that centralization itself will drive the filing of dubious claims. It is undeniable that aggregation can encourage the filing of claims, but the extent that it will spur dubious claims is a question that typically cannot be answered on a Section 1407 motion. This argument would arguably foreclose

the creation of MDLs in any product liability or mass disaster cases. The Panel has not denied centralization when this is the only argument against it, and the other factors suggest that centralization will result in significant efficiencies and convenience for both sides. In these instances, the Panel has directed defense counsel to work with the transferee judge to identify ways to eliminate meritless claims.

In choosing judges to preside over these mass tort MDLs, the Panel looked for judges who had the experience, ability, and willingness to handle these cases in the districts where we determined that the matters could be conveniently litigated. All of the judges we chose had substantial judicial

experience, and all but one had prior MDL experience.

Since centralization, the Panel has monitored the progress of these 21 cases, as it does all pending MDLs, based on reports from MDL judges. Currently, there are over 119,000 cases pending in these 21 mass tort MDLs. None of the non-pelvic mesh MDLs approaches the pelvic mesh cases in terms of case volumes. The next biggest case has about 6% of all MDL cases and the rest have less than 4% each. Over half these MDLs have settlements that cover most or a substantial number of the cases. This is often not reflected in the pending statistics because settlement administration is required to process payments in

individual cases before they can be dismissed. For example, a settlement of almost 20,000 claims in the pelvic mesh litigation was announced about a year ago, but there has not been a commensurate reduction in the docket numbers. Similarly, the *Nuva Ring* MDL was settled a year ago. While the docket reflects 1,700 pending cases, Judge Rod Sippel informed me that there are only 10 cases left that have not been settled.

These settlements usually did not come without substantial case development. In *Oil Spill*, for one, there were 300 depositions, and Judge Barbier and the assisting magistrate judge decided over 2,600 motions, and spent 1,800 hours in conferences, hearings, and trials. Judge

Barbier dismissed about 19 defendants on the merits, and spent 48 days in 3 bench trials. There have been approximately 40 appeals, and the judge has almost always been affirmed.

The other half of the mass tort dockets reflects that the judges are actively managing these cases. They have appointed counsel, entered common benefit fund orders, and ordered plaintiffs to file fact sheets providing basic data on their claims. They have also ruled on numerous discovery motions, motions to dismiss, and summary judgment motions, as well as conducted or scheduled bellwether trials. Bellwether trials were part of the case management scheme in three-fourths of the 21 cases.

IV. What are the legal parameters governing how MDL judges manage mass tort MDLs and what is the Panel's role post-centralization?

Once the Panel creates an MDL, it obviously has no authority to impose rules or procedures for how the judge must manage it, or to review the decisions of transferee judges. But transferee judges do not operate in a legal vacuum. MDL judges are governed by the Federal Rules of Civil Procedure, and they have the same authority to manage these cases that district judges do generally in managing their dockets. Their decisions are subject to the usual rules of review and appeal. If a transferee judge resolves a single case on the merits in an MDL consisting of many cases, that decision is appealable like any other

final judgment. Further, fee awards, which are often the subject of contention, are reviewable on appeal.

MDL mass tort cases, like other complex MDL litigation, are not cookie cutter cases subject to a one size fits all formula for fair and efficient management. The *Oil Spill Litigation* is a different animal from a defective drug or medical device case, and those cases are not uniform either. Nevertheless, the Panel does offer MDL judges education and guidance on case management best practices in the form of written guides, educational programs, model orders, and a list of judges to consult for advice. For example, in 2011, the FJC and the Panel published a guide

on managing MDL product liability cases. This Guide offers a comprehensive discussion of recurring management issues at every stage of these types of proceedings, and it offers strategies to address them. Management issues like counsel selection, structuring discovery, bellwether trials, expert discovery, settlement, and attorneys fee awards are also frequently addressed at the Panel's annual educational conference for MDL judges. Recently, the Panel and the FJC sponsored an educational conference open to all district and magistrate judges on managing complex litigation including MDLs. Judges and lawyers participated in panels beginning with counsel appointments and ending with settlement

and remand. For the first time this year, the Panel will get input from lawyers at our annual educational conference.

The Panel is also working with the FJC to update the Manual for Complex Litigation, a source cited in judicial opinions no less than 2,600 times. The Panel has recently partnered with the FJC to survey all district judges concerning their interest in and qualifications to take MDL cases to broaden our knowledge of qualified candidates for MDL assignments.

In general, the Panel's guidance to transferee judges has stressed the need for active case management, prompt decision making, and transparency. The appointment as transferee

judge is not for life, and the judge should have an end game for completing pretrial discovery and motion practice. The goal is to create a process where the parties can efficiently obtain the information they need through discovery, motion practice and sample trials, if feasible, to evaluate whether to settle or to go back to their originating districts for trial. We have stressed that a judge is a not a failure if the cases do not result in global settlements and are sent back trial-ready to their home districts.

Having said that, it is nevertheless true that mass tort cases have usually resulted in settlements, and there have been relatively few remands to originating districts. As every judge in

the room knows, the great majority of all civil cases result in settlements. The law favors settlement, and Rule 16 of the Federal Rules specifically encourages judges to facilitate settlement. It should not be surprising then that the same pattern of settlements holds true in MDL cases. The Panel has emphasized that the best way to facilitate settlement is to make decisions that refine issues, set deadlines, and structure the proceedings to give the parties the information they need to evaluate their positions. Nevertheless, having all of the cases before one judge, where the parties can see the big picture is a unique opportunity, and if the parties are interested in settlement, it is a positive thing for

the transferee judge to facilitate settlement through mechanisms that the parties agree to.

The Panel and transferee judges are acutely aware that aggregating mass tort cases raises the stakes and brings its own set of problems. Judges are confronted with hundreds of lawyers representing thousands of clients in separate cases against one or more common defendants. This requires a constant balancing act to advance the goals of efficiency and economy without jeopardizing the fairness to the parties. This problem is inherent in aggregate litigation where it is impossible for every plaintiff's lawyer to run his or her own case and for the defendants to focus on each plaintiff one at a time. In this

context, the stakes are enormous, and judges have to make hard decisions and set priorities that will not make everyone happy. But the important thing is that the judges make the decisions.

For example, the balancing act I referred to is especially difficult in appointing leadership counsel in mass tort cases. This is a recurring topic at our educational conferences and in published materials. In appointing counsel, our guidance has stressed the same types of factors that Rule 23 identifies for the appointment of class counsel – experience in managing complex litigation, the availability of resources to finance the needs of the case, and subject matter expertise. There is also the need to choose

lawyers who do not have conflicts that could prevent them from fairly representing the various interests among the plaintiffs. Finally, there is the need for leadership counsel to command respect from their colleagues and to work cooperatively with opposing counsel and the court to advance the case. But we have also noted our concern that the need for experience and ability to finance this type of litigation narrows the pool of lawyers qualified to hold leadership positions, which has resulted in repeat appointments of the same powerful and accomplished players.

In response, judges are trying to include new and more diverse lawyers in leadership roles, lawyers who may not have a stable of clients or

deep pockets, but who can contribute to the common effort in terms of skill or ability. Judges recognize that adding diverse skill sets and view points can lead to innovation and better overall representation. Another way that judges have tried to expand the pool of potential leadership counsel is to encourage leadership lawyers to allow non-leadership counsel to perform necessary common benefit work. This allows them to gain experience and resources so that they can assume leadership roles in the future. Finally, we have also stressed transparency and openness in the counsel selection process so that all attorneys have the opportunity to present their

qualifications and positions on who should be on the leadership team.

V. Conclusion

In sum, the difficulty and work involved in managing mass tort MDLs cannot be overstated. In the 53 mass tort MDLs since 1968, the judges terminated 354, 535 cases and remanded 13,008 others. The MDL process is not perfect, and there is always room for improvement. But the actions of the Panel in this arena reflect its continuing belief and experience that centralizing mass tort cases under Section 1407 can foster efficiency, convenience, and the just conduct of the actions, which are the purposes of Section 1407.

Memorandum

To: Judge Robert Dow and Members of the MDL Subcommittee

From: AAJ's MDL Working Group

Re: Preliminary Provisional MDL Suggestions

Date: February 22, 2018

Introduction

AAJ has only begun preliminary discussion on this topic, so the suggestions herein do not reflect the plaintiff's bar as a whole, or even the perspective and variety of AAJ practice areas. Gathering such broad-based opinion would take a significant amount of time. AAJ understands that the MDL Subcommittee welcomes initial thoughts from the plaintiff's bar, and we provide some here with the caveat that this is not a complete or fully-vetted set of MDL issues.

Plaintiff lawyers have deep reservations that amendments to the civil rules are not the appropriate mechanism for improving the operation of MDLs. Thus, AAJ cautions that MDLs may not be a good fit for rule-making, as MDLs are so case-specific[1] that "one size fits all" rules do not make sense. Judges need to remain empowered to exercise broad discretion in any particular case rather than be constrained by formalistic preconceptions of what a vocal minority consider to be "best practices." AAJ believes that it would be more practical to focus on a specific set of topics that could improve the operation of MDLs. To have a productive discussion about what works and what does not work, AAJ, in drafting this preliminary memorandum, was not focused solely on the rules amendment process, but rather on identifying *issues* that commonly arise in MDLs where improvements may be warranted or useful. Therefore, AAJ suggests some topics that could potentially be explored, but that the appropriate vehicle for solutions to these topics – for example via rules, statutory changes, or recommendations in the Manual for Complex Litigation, etc. – could be determined later.

[1] A review of the MDL pending docket confirms an array of practice areas including air disasters and other common disasters, antitrust, data and security breaches, pharmaceutical and other product liability claims, consumer claims, intellectual property, employment practices, securities, and other torts.
http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Type-February-15-2018.pdf

AAJ's position is that the Federal Rules of Civil Procedure are not the appropriate vehicle for addressing MDL practice issues. However, recognizing that there has been a call for revisions pertaining to MDLs, AAJ suggests that the following areas may be worth exploring.

1. **Examine motions to remand; opt-out provisions; transferee court authorization**. Regarding these subjects, problems from the plaintiff's perspective are that: 1) some cases are inappropriately transferred to the MDL transferee court, and it takes a long time to get the claims remanded; and 2) some cases are included in the MDL that initially seem like they belong, but then the court and/or the PSC focus on other types of claims or theories of liability. There should be a later mechanism for claims to be remanded if the litigation will not address the claims or theories premised on the initial transfer order or complaints.

    a. ***When a potential tag-along is filed in state court and then removed to federal court, a pre-existing motion to remand the case back to state court should be decided by the would-be transferor court before a conditional transfer order may issue***. To facilitate this practice, the MDL transfer should be delayed until the time period permitted for filing a motion to remand has expired.

    b. ***Assuming that there is no "global resolution" in the MDL, cases should be rapidly transferred back to transferor courts, assuming the transferee court has engaged in some resolution process or engaged in some trial practice.*** While the varying facts and dynamics unique to each MDL defy the establishment of an across-the-board "rule" regarding such remands, any discussion about remand should include a discussion about when cases should be sent back to the transferor courts for individualized resolution or trial.

2. **Scope of Duties; Appointments.** ***The transferee judge should spell out in the Appointment Order the scope of duties and responsibilities that are delegated to leadership positions.*** The court could be encouraged to specifically enumerate responsibilities for Lead, Liaison, Executive Committee and Plaintiff Steering Committee rather than simply appointing the positions without in any way defining what that means and the duties it entails. This enumeration should also outline the outer limits of responsibilities, such as the limitation on the PSC's ability to enter into binding substantive stipulations without hearing, opportunity to object, and court approval. It might be useful to provide a list of duties and responsibilities appropriate for delegation to MDL leadership/committees. Also, enumeration of responsibilities should be expressed in broad, flexible terms so that litigation strategy and efficient prosecution of the case is not impeded.

3. **Restrictions on Protective Orders.** For the protection of the public at large, it is imperative that branded drug manufacturers or other defendants maintain transparency throughout the litigation process. When requests for, and issues regarding, protective orders are not addressed early in litigation, these matters disrupt the discovery schedule and cause significant delay. Thus, to ensure that transparency is maintained, to assist defendants in rapidly responding to

document requests, and to eliminate delays in discovery, manufacturers should be precluded from obtaining protective orders for any documents other than highly sensitive trade materials. AAJ contemplates that Federal Rule of Civil Procedure 26(c) would need to be modified to reflect this change. A specific exception could be carved out in Rule 26(c) stating in detail that manufacturers be precluded from obtaining protective orders in MDLs, except in the case of trade materials, which could be defined further in the rule's Note. When broad claims of confidentiality are permitted, courts are tasked with substantial administrative burdens dealing with filings under seal and concomitant procedures and tasks.

4. **MDL trials.** Where trials that are non-binding on the rest of the MDL group are utilized to give parties a sense of the merits of the case and potential size of verdicts, the case selection process should begin with a detailed categorization of cases, where cases are grouped by similarity of allegations, damages claims, and types of evidence that may be presented to a jury. It is important that selection of bellwether cases is not premature, so that selected cases represent categories of filed cases.

    a. From the categories established, a pool of cases amendable to trial in the MDL – and close to being trial ready – would be selected to be considered for bellwether trials based on proposals to the transferee court from both plaintiff and defense counsel. The cases selected would be set on a fast track for case-specific discovery.

    b. At the conclusion of discovery[2], a predetermined number of cases that have completed case-specific discovery would be selected for trial. The pool of cases eligible for this process should be larger than the predetermined number so that those cases that have not yet developed into a representative sample of its category could be dropped from the bellwether list, without prejudice so that a selected client that is not representative may be removed without effecting the other cases selected for bellwether treatment. In addition, priority should be accorded to cases most likely to inform trends within the litigation and support an ultimate disposition of the litigation.

    c. Lawyers for Civil Justice previously suggested adding a subparagraph (c) in Federal Rule of Civil Procedure 42. The proposed addition seeks, in part, to eliminate any requirement that parties be required to waive jurisdiction in order the participate in bellwether trials, and to allow the transferee judge assigned to the MDL to remand select cases for trial in the transferor courts. While a majority of this proposal would be viewed unfavorably by AAJ members, consideration should be given to allowing an

[2] The scope of discovery appropriate for a PSC's request would be substantially greater than the same request propounded in a single event case. Frequently, transferee courts into which the cases are consolidated do not consciously look beyond a hypothetical single event case when disputes arise concerning the scope of discovery. This failure compromises the underlying public policy served by consolidation, and prejudices Plaintiffs by applying the lowest common denominator to the scope of discovery applicable to their claims.

MDL transferee judge to preside over bellwether trials outside the court's vicinage without need for prior authority of his or her Circuit's presiding judge. This would eliminate the roadblocks of *Lexecon*, the 1998 U.S. Supreme Court case that held that MDL transferee judges cannot try cases that were filed in courts other than the transferee district.

Ongoing Discussions

AAJ reiterates that these suggestions are based on preliminary discussions only and do not reflect the views of the entire plaintiffs' bar. MDLs include a cross-section of practice areas represented by the plaintiff's bar, and it would take a significant amount of time to have meaningful dialogue and consensus about areas where improvements may be warranted or useful. AAJ generally does not agree that "one size fits all" rule-making is the appropriate way to change MDL proceedings. We will continue to discuss MDL issues with our members and provide additional information to the Subcommittee.

MEMORANDUM

TO: Ed Cooper, Dan Coquillette, Rick Marcus, Cathie Struve

FROM: Patrick A. Tighe, Rules Law Clerk

DATE: February 7, 2018*

RE: Survey of Federal and State Disclosure Rules Regarding Litigation Funding

This memorandum surveys federal and state rules and laws relevant to the disclosure of litigation financing arrangements in civil litigation. To date, no federal rule requires automatic disclosure of litigation funding agreements in every civil case. This supports Bentham IMF's contention that such agreements and related documents are "ordinarily not discoverable." *See* Letter from Bentham IMF, No. 17-CV-YYYY, at 16 (Sept. 6, 2017) *available at* http://www.uscourts.gov/rules-policies/archives/suggestions/bentham-imf-17-cv-yyyyy-see-also-17-cv-o-suggestion-us-chamber [hereinafter *Bentham Letter*]. However, roughly half of all federal circuit courts and a quarter of all federal district courts require disclosure of the identity of (some) litigation funders for judicial recusal and disqualification purposes, indicating that such information is relevant for the just determination of a civil action by a neutral decision-maker. *But see id.* at 4–5, 12–13 (arguing that the identification of litigation funders is irrelevant, unnecessary, and inappropriate in order to avoid judicial conflicts of interest).

At the state level, no state court rules relevant to the disclosure of litigation funders or litigation funding agreements in civil litigation were identified. That said, eight states have enacted legislation regulating third-party litigation finance. Not one, however, requires disclosure of the identity of litigation funders or their agreements in any civil action. But three states have enacted statutes ensuring that litigation funding arrangements do not undermine legal privileges, including the work product doctrine and the attorney-client privilege.

My research findings are presented in three categories: local circuit court rules; local district court rules; and state-based regulations and laws.

A. Local Circuit Court Rules

Six U.S. Courts of Appeals have local rules which require identifying litigation funders. *See* Appendix A. No local rule, however, requires the disclosure or production of the litigation finance agreement itself. *Id.* No circuit court has an order or local form concerning litigation funding. *Id*.

The six circuits that require the identification of litigation funders use local rules to expand disclosure beyond Federal Rule of Appellate Procedure 26.1, which concerns corporate disclosure statements. Appellate Rule 26.1 provides that "[a]ny nongovernmental party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation." The

* All research is current as of November 30, 2017, and any local rule or order amendments made thereafter are not reflected in this memo.

circuits that expand the disclosure statement required under Appellate Rule 26.1 generally require a party to disclose "all persons" or "other legal entities" that "are financially interested in the outcome of the litigation." *See, e.g.*, 5th Cir. L. R. 28.2.1. Some circuits rename the corporate disclosure statement as a "certificate of interested persons." *Id.* If a party has an agreement with a litigation funder in which the funder receives an agreed share of any recovered proceeds, then the funder presumably has a financial interest in the outcome of the litigation. Consequently, under local rules requiring disclosure of "interested persons," parties should disclose the name of any third-party litigation funder in its disclosure statement.[1] The extent to which parties do so, however, is unclear. As evidenced by the Fifth Circuit's local rule, the stated justification for such a broad disclosure requirement is to help judges assess recusal and disqualification. *See id.* (stating that the "certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue").

The local variations of Rule 26.1 are not uniform. Some circuits require only parties to the appeal to file a disclosure statement whereas other circuits mandate that amicus curiae also must file such disclosure statements. *Compare* 3rd Cir. L. R. 26.1.1(b) *with* 11th Cir. L. R. 26.1-1(a)(1). Some circuits require identifying only publicly traded corporations with a financial interest in the outcome of the litigation.[2] *See, e.g.*, 3rd Cir. L. R. 26.1.1(b). Other circuits, however, require disclosing all "legal entities" with a financial interest in the outcome of the litigation. *See, e.g.*, 5th Cir. L. R. 28.2.1. Some circuits limit disclosure statements to certain types of appeals, such as civil but not criminal appeals. *See, e.g.*, 4th Cir. L. R. 26.1(2)(B). Others only require disclosure if the legal entity has a "direct" or "substantial" financial interest, as opposed to any financial interest, in the outcome of the litigation.[3] *Compare* 3rd Cir. L. R. 26.1.1(b) (requiring "a financial interest"), *with* 4th Cir. L. R. 26.1(2)(B) (requiring " a direct financial interest"), *and* 6th Cir. L. R. 26.1(b)(2) (requiring "a substantial financial interest"). And finally, some circuits require parties not only to identify the entities with a financial interest in the outcome of the litigation, but to describe the nature of the interest. *See, e.g.*, 3rd Cir. L. R. 26.1.1(b).

B. Local District Court Rules

No U.S. District Court requires automatic disclosure of litigation finance agreements in every civil action. That said, out of the 94 federal district courts in the United States, 24 – or roughly 25% of all U.S. District Courts – require disclosure of the identity of litigation funders in a civil case. *See* Appendix B. Some require parties to describe the nature of the litigation funder's interest in the case. *Id.* These district courts mandate such disclosure using different procedural mechanisms. Out

[1] Burford acknowledges that such local rules do extend to litigation funders. *See infra* note 5.

[2] Such a rule would encompass some litigation finance companies. Bentham Capital LLC is the U.S. operating subsidiary of Bentham IMF, an Australian Securities Exchange-listed company. Burford Capital LLC is the U.S. operating subsidiary of Burford Capital Limited, a London Stock Exchange-listed company.

[3] The use of the term "substantial" financial interest may stem from the use of "substantial" in the Code of Conduct for United States Judges. *See* Canon 3C(1)(c), Code of Conduct for United States Judges (requiring judges to disqualify themselves in a proceeding in which they have "a financial interest . . . or any other interest that could be affected *substantially* by the outcome of the proceeding" (emphasis added)); *see also* Fed. R. Civ. P. 7.1, Advisory Committee Notes to 2002 Adoption (noting that Rule 7.1 is based off of F.R.A.P. 26.1, which reflects Canon 3C(1)(c) of the Code of Conduct for United States Judges).

of the 24 district courts, 14 have local rules requiring the identification of litigation funders in a civil case, 2 have standing orders, and 10 have local forms.[4] *Id.*

Most notably, in 2016, the U.S. District Court for the Northern District of California considered a proposal to amend its Civil Local Rule 3-15. Local Rule 3-15 at the time required each party to a case to disclose the identity of any entity with "a financial interest" in the outcome of the litigation or with "any other kind of interest" that could be "substantially affected by the outcome of the proceeding." *See* N.D. Cal. L. R. 3-15. The proposal under consideration would have explicitly named "litigation funders" as one type of entity with a financial interest that the parties would have to identify in every civil action. *See* U.S. District Court for the Northern District of California, *Draft Revision of Civil Local Rule 3-15*, http://www.cand.uscourts.gov/news/23. The court rejected the proposal, opting not to single out any particular entity with a financial interest, such as "litigation funders," in Local Rule 3-15.[5] *See* U.S. District court for the Northern District of California, *Notice Regarding Civil Local Rule 3-15*, http://www.cand.uscourts.gov/news/210. By standing order, however, the Northern District of California expressly requires parties to "any proposed class, collective, or representative action" to disclose "any person or entity that is funding the prosecution of any claim or counterclaim." *See* Standing Order for All Judges of Northern District of California – Contents of Joint Case Management Statement, at 2 (eff. Jan. 17, 2017), http://cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges _1.17.2017.pdf. Thus, although the plain language of Local Rule 3-15 already requires disclosure of litigation funders in every civil action, the court made explicit that parties must identify litigation funders in class action lawsuits. Other districts may consider similar local rule revisions in light of the Northern District of California's amendment. *See* Ben Hancock, *Bentham Hires Yetter Coleman Partner as It Expands to Texas*, Texas Lawyer (Feb. 21, 2017), https://www.law.com/texaslawyer/almID/1202779591965/ ("After the [Northern District of California] disclosure rule was announced, Ron Clark, chief judge

---

[4] The Northern District of California has both a local rule and a standing order, and the Northern District of Ohio has both a local rule and local form. Hence, the double counting.

[5] In opposing the proposed amendment to the Northern District of California's Civil Local Rule 3-15, Burford asserted that revising Local Rule 3-15 to expressly require the identification of "litigation funders" was unnecessary because the plain language of the local rule already required parties to identify litigation funders. *See* Letter from Burford to Susan Y. Soong Regarding Response to Proposed Revision to Civil Local Rule 3-15, at 2 (July 22, 2016), http://www.cand.uscourts.gov/filelibrary/2879/Comments-Received-On-Draft-CLR-3-15.pdf ("Local Rule 3-15 already requires broader disclosure than the Federal Rule. The existing rule already requires disclosure of litigation funders (*e.g.*, as entities that have an interest that could be substantially affected by the outcome of the proceeding) . . . Instead, the rule should be left as is, relying on the existing definition to require disclosure of entities with a financial interest in the litigation.").

Despite Burford's concession, the scope of Local Rule 3-15 remains murky. The Northern District Court of California may have declined to revise Local Rule 3-15 for reasons other than the one advanced by Burford. Moreover, a trial court order in *Gbarabe v. Chevron Corp*. may shed some doubt on Burford's contention. There, a trial court in the Northern District of California ordered the plaintiff to produce its third-party litigation finance agreement to the defense because the plaintiff conceded that the funding agreement was relevant to the class certification adequacy determination and provided no sufficient reason as to why it should not be disclosed. *See Gbarabe v. Chevron Corp.*, No. 14-cv-00173-IS, Dkt. No. 159, at 3 (N.D. Cal. Aug. 5, 2016). The defense sought to require the plaintiff to comply with Civil Rule 3-15, which required a party to disclose any entity with a financial interest in the outcome of the litigation. *Id.* The Court declined to reach this issue for prudential reasons, noting that: 1) disclosure of the agreement itself would identify the third-party litigation funder; 2) the district court was considering amending its local rule to explicitly state "litigation funders"; and 3) no case law interpreting Local Rule 3-15 in regards to third-party litigation funder could be found. *Id.* at 4 n.3. The third-party litigation funder in that case, however, was Therium Capital Management Limited.

of the Eastern District of Texas, told Texas Lawyer that jurists in his division may follow the Northern District of California's lead and consider similar measures.").

No other district court has (yet) followed the Northern District of California's lead to identify expressly class action lawsuits as a civil action in which the disclosure of litigation funders is required. But, 23 other district courts already mandate that parties identify litigation funders in any civil action under local rules related to Federal Rule of Civil Procedure 7.1. *See* Appendix B. Federal Civil Rule 7.1 provides in relevant part that any "nongovernmental corporate party must file 2 copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or states that there is no such corporation." Twenty-three districts have promulgated local rules broader in scope than the Federal Civil Rule 7.1. Like the circuit courts, these districts typically require disclosure of any person or entity (other than the parties to the case) that has a "financial interest in the outcome of the proceeding." *See, e.g.*, Md. L. R. 103.3(b) (requiring party to file a statement including the "identity of any . . . other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of the litigation, and the nature of its financial interest."). The plain language of these local rules encompasses litigation funders because a litigation funder will receive proceeds from the settlement or judgment if the contracting party prevails. Some districts go even further than requiring identification of litigation funders and direct parties to describe the nature of litigation funder's financial interest. *See, e.g.*, S.D. Iowa L. R. 7.1 (requiring "the names of all entities that . . . have a direct or indirect pecuniary interest in the plaintiff's outcome in the case" and "a description of its connection to or interest in the litigation"). Even these rules do not require disclosure of the litigation finance agreement itself.

Five additional observations about these local rules are of note. First, out of the 24 district courts that require disclosure of litigation funders, one jurisdiction does not mandate disclosure under a local variation of Civil Rule 7.1. Instead, in the Western District of Texas, a party may use interrogatories to ascertain if there is any corporation with a financial interest in the outcome of the litigation and the nature of the financial interest. *See* W.D. Tex. L. R. CV-33. Some quick Westlaw research did not identify any case law interpreting and applying this rule in regards to litigation funders. Beyond Civil Rule 7.1 and Civil Rule 26(a)(1)(A), this is another way to approach the disclosure of litigation funders.

Second, district courts impose the enhanced disclosure obligation in a variety of ways. Most – 14 courts to be exact – have local rules promulgated pursuant to 28 U.S.C. § 2071 which impose broader disclosure obligations than those required under Federal Civil Rule 7.1. *See* Appendix B. Two district courts – the Northern District of California and the Middle District of Florida – have standing orders which mandate such disclosure under Civil Rule 7.1. *Id.* However, in the Middle District of Florida, the broader disclosure requirement applies only to parties appearing before select judges; so, in other words, the disclosure requirements are not uniform within the jurisdiction. *Id.*

Interestingly, 9 of the 24 district courts have no local rule or order mandating a broader disclosure statement. *Id.* Instead, in these districts, the local form – typically titled the Corporate Disclosure Statement – requires parties to identify the litigation funder and the nature of the funder's financial interest. *See, e.g.*, U.S. District Court for the District of Arizona, Corporate Disclosure Statement Form (requiring a party to list the identity of any "[p]ublicly held corporation, not a party

to the case, with a financial interest in the outcome" and "the nature of the financial interest"). It is unclear on what basis a federal court can require broader disclosure under a local form than what the national rule, local rule, or local order requires.[6]

Third, the stated purpose for these broader local rules is to assist judges with assessing possible recusal or disqualification. *See, e.g.*, C.D. Cal. L. R. 7.1-1 (imposing broader disclosure requirements "[t]o enable the Court to evaluate possible disqualification or recusal"). One district even expressly states that its broader local rule is based on the local circuit court rule imposing the same disclosure requirement. *See* E.D. Mich. L. R. 83.4 (noting in its comment that the local rule "is based on 6th Cir. R. 26.1"). Bentham IMF argues that such amendments to Rule 7.1 are inappropriate because it "expand[s] that rule beyond its carefully crafted scope." *See Bentham Letter* at 12. However, a quarter of district courts have concluded otherwise, finding that a broader scope is appropriate in order to ensure that a judge's "impartiality might [not] reasonably be questioned." *See* 28 U.S.C. § 455(a).

Fourth, it is unclear to what extent parties comply with this disclosure obligation even when the plain language of these rules, orders, and forms clearly encompass litigation funders. One indication of compliance exists. For example, in *Realtime Adaptive Streaming LLC v. Hulu, LLC*, the plaintiff applied ex parte to file under seal the "Certification and Notice of Interested Parties" required by Local Rule 7.1-1[7] because the litigation funding agreement specifically provided that the identities of the parties to the agreement was confidential and "public disclosure of the identities of [the litigation funders] would undermine the confidential nature of those [litigation finance] agreements." *See* Proposed Order & Declaration of Reza Mirazaie, *Realtime Adaptive Streaming LLC v. Hulu, LLC*, No. 2:17-cv-07611-SJO-FFM, Dkt. No. 4 (C.D. Cal. Oct. 18, 2017). The district court denied the application, finding no good cause to restrict public access to court records. *See* Order Denying Ex Parte Application to File Document Under Seal, *Realtime Adaptive Streaming LLC v. Hulu, LLC*, No. 2:17-cv-07611-SJO-FFM, Dkt. No. 16 (C.D. Cal. Oct. 20, 2017). Consequently, the plaintiff filed an unredacted version of its "Certification and Notice of Interested Parties" with the court, which identified its litigation funder and characterized the funder's interest as the plaintiff's investor. *See* Notice of Interested Parties, *Realtime Adaptive Streaming LLC v. Hulu, LLC*, No. 2:17-cv-07611-SJO-FFM, Dkt. No. 18 (C.D. Cal. Oct. 24, 2017).

Corporate litigation funders themselves disagree about the extent of disclosure obligations. As discussed above, Burford concedes that local rules in some contexts can require disclosing the identities of litigation funders despite the fact that these rules do not explicitly mention litigation funders. *See supra* note 5. Bentham IMF, however, argues that courts should not require the automatic disclosure of the identity of litigation funders without a showing of relevance. *See Bentham Letter* at 4 & n.9. In support of this position, Bentham cites to three cases: *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016), *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015), and

[6] Not all local district court rules expressly require parties to use an existing broader-in-scope local corporate disclosure form. *Compare* Ariz. L.R. Civ. 7.1.1 (requiring parties to use its broader-in-scope local Corporate Disclosure Form provided by the Clerk) *with* W.D. Michigan Local Civil Rules (imposing no obligation to use its local yet broader Corporate Disclosure Form).

[7] The Central District of California's Local Rule 7.1-1 provides that all non-governmental parties "shall list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations, clearly identified as such) that may have a pecuniary interest in the outcome of the case . . . ." *See* C.D. Cal. L. R. 7.1-1.

Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014). *See id.* Interestingly, none of these cited jurisdictions has local rules, orders, or forms requiring the parties to list the names of any entity with a financial interest in the outcome of the litigation. *See* Appendix B.

Compliance with these local rules is difficult to ascertain because district courts have not drafted their Local Rule 7.1 in a uniform manner. That is, some only require a disclosure statement if the party to the action is a corporation. *See, e.g.*, E.D. Mich. L. R. 83.4 (requiring a disclosure statement only from "all corporate parties to a civil case"). So, if the plaintiff in a civil action is a natural person, that person would not have to disclose the identity of a litigation funder even though the local rule would require a corporate party to do so. Other district courts, on the other hand, require all parties – corporate or not – to file such disclosure statements. *See, e.g.*, E.D.N.C. L. R. 7.3 (requiring the filing of a financial interest disclosure statement by "[a]ll parties to a civil or bankruptcy case, whether or not they are covered by the terms of Fed. R. Civ. P. 7.1").

Similarly, district courts vary in the type of financial interest that parties must disclose. Some require identifying any entity with "a financial interest" whereas others require disclosing only those entities with a "direct financial interest" or a "substantial financial interest."[8] *Compare* C.D. Cal. L. R. 7.1-1 (stating "a pecuniary interest in the outcome of the case"), *and* N.D. Ga. L. R. 3.3 (stating "a financial interest in or other interest which could be substantially affected by the outcome of this particular case"), *with* E.D. Mich. L. R. 83.4 (stating "a substantial financial interest in the outcome of the litigation"), *and* W.D. N.C. Form, Entities with a Direct Financial Interest in Litigation (stating "a direct financial interest in the outcome of the litigation").

Additionally, district courts differ in their approach to whose financial interest must be disclosed. Some require disclosing all entities with a financial interest whereas others mandate disclosure only of publicly traded companies with a financial interest in the outcome of the litigation. *Compare* N.D. Cal. L. R. 3-15 (requiring disclosure of "any persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities other than the parties themselves" with a financial interest in the outcome of the litigation) *with* N.D. Ohio L. Civ. R. 3.13(b) (requiring identification of "[a]ny publicly held coroporation or its affiliate that has a substantial financial interest"). Lastly, as noted earlier, some district courts have no local rule or order mandating this broader disclosure obligation; instead, in these jurisdictions, the courts accomplish this through a local form. If a local form is not required but just recommended, a party may not disclose the identity of a litigation funder if the party elects not to use the recommended form.[9]

The diversity of approaches indicates three relevant factors district courts consider when crafting local disclosure rules. First, courts consider who has to file a disclosure statement (*e.g.*, all parties or only corporate parties). Second, courts consider what type of interest must be disclosed (*e.g.*, any financial interest, a substantial interest, or a direct financial interest). And third, courts consider whose interest in the litigation must be disclosed (*e.g.*, any entity or only publicly traded

[8] The use of the term "substantial" may stem from the use of the term "substantial" in the Code of Conduct for United States Judges. *See supra* note 3. The Committee Notes to Rule 7.1 assert that the "information required by Rule 7.1(a) reflects the 'financial interest' standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges." *See* Fed. R. Civ. P. 7.1, Advisory Committee Notes to 2002 Adoption.

[9] Not all district courts mandate using the local forms. *See supra* note 6.

corporations). How district courts decide these questions affect the extent to which the identity of litigation funders are disclosed in a given jurisdiction.

Fifth, and finally, this research is not comprehensive. Disclosure requirements could not be ascertained in a few jurisdictions. Two jurisdictions – namely the District of Oregon and the Western District of Oklahoma – require parties to complete a disclosure statement form electronically through CM/ECF. In these courts, no local form appears on the court's website; a party must use CM/ECF to answer disclosure questions. Although these districts do not have a local rule or order mandating the identification of litigation funders, I could not verify if the disclosure questions a party must answer on CM/ECF were broader than what the local rule or order required. Because many local forms deviate from the local rule or order, such deviations are possible. Moreover, this research only considered civil disclosure requirements. Some local criminal rules and forms require similar disclosure of litigation funders. *See, e.g.*, District of Nebraska Criminal Form, Disclosure of Corporate Affiliations, Financial Interest, and Business Entity Citizenship (requiring, pursuant to Fed. R. Crim. P. 12.4, any nongovernmental corporate party to identify "[a]nother publicly held corporation or another publicly held entity [that] has a direct financial interest in the outcome of the litigation" and "the nature of their interest"). To the extent amendments to Civil Rule 7.1 are considered, similar amendments to Federal Rule of Criminal Procedure 12.4 may be necessary.

C. State Regulations

No state court has prescribed procedural rules regarding the disclosure of litigation funders or their agreements. Moreover, unlike the federal circuit and district courts, no state court requires parties to identify litigation funders in corporate disclosure statements or the like. That said, eight states have enacted legislation regulating litigation funding. *See* Appendix C & Table 1. None of these laws requires automatic disclosure of the identity of litigation funders or litigation funding agreements in civil litigation. *Id.* Three states, however, have enacted statutes ensuring that litigation funding arrangements do not undermine legal privileges, including the work product doctrine and the attorney-client privilege. *Id.* One state law also specifically prohibits a litigation funder from "[m]ak[ing] a decision relating to the conduct, settlement, or resolution of the underlying legal claim," thereby ensuring that litigation funders do not control the litigation. *See* Okla. Stat. tit. 14-A, § 3-814(7). These regulations seem principally aimed at consumer litigation finance, not commercial litigation finance.

In general, when regulating litigation finance, the states face two primary questions: First, are litigation agreements enforceable? If so, how should litigation finance companies and agreements be regulated, if at all?

In regards to the enforceability of litigation finance agreements, state legislative, executive, and judicial branches have pursued a patchwork of approaches. For instance, some state courts have determined that public policy doctrines such as maintenance, champerty, or barratry prohibit such agreements and render such agreements unenforceable. *See, e.g.*, *WFIC, LLC v. LaBarre*, 148 A.3d 812, 818–19 (Pa. Super. Ct. 2016) (finding litigation finance agreement unenforceable because agreement was champertous). In some states, such as New York, the legislature has passed laws exempting any transaction in excess of $500,000 from the prohibition against champerty. *See* N.Y. Jud. Law § 489(2). Consequently, litigation finance agreements in excess of $500,000 are not

subject to the doctrine of champerty. In other states, state bars have reached various conclusions about the permissibility of litigation finance arrangements. *See, e.g.*, Utah Bar Ethics Opinion 06-03 (finding a particular litigation agreement ethically impermissible but concluding that a non-recourse litigation agreement in which it is "mathematically impossible for the lawyer to be able to reduce the lawyer's losses by obtaining no recovery for the client" to be ethically permissible). Professors Nieuwveld and Shannon surveyed this question and concluded that courts in 31 states "would uphold classic third-party funding arrangements . . . so long as the litigation is not frivolous, the motive is not improper, and the funder is not controlling either the representation or any possible settlement." Lisa Bench Nieuwveld & Victoria Shannon, Third-Party Funding in International Arbitration 145 (Wolters Kluwer, 1st ed. 2012). They also concluded that in 19 states and the District of Columbia "a classic third-party funding contract may violate statutes, case law, or public policy . . . ." *Id.* Because this first question is beyond the scope of this memorandum, please see Appendix D, which reproduces Professors Nieuwveld and Shannon's findings.

If litigation funding agreements are enforceable in a given state, the question remains how to regulate, if at all, these arrangements. Again, states have adopted disparate approaches. Some state courts have construed litigation funding agreements as traditional consumer loans subject to interest rate caps, state usury laws, and Truth in Lending requirements. *See, e.g., Oasis Legal Fin. Grp., L.L.C v. Coffman*, 361 P.3d 400, 401 ¶ 4 (Colo. 2015) (holding that a litigation finance agreement constituted a "loan" subject to Colorado's Uniform Consumer Credit Code). At the executive level, some state agencies have likewise regulated litigation funding arrangements by construing them as loans subject to the same interest rate caps imposed on other consumer loan products. *See, e.g.*, Administrative Interpretation: Legal/Litigation Funding Transactions, South Carolina Department of Consumer Affairs (Nov. 14, 2014) (concluding that legal funding agreements are "loans" under South Carolina's Consumer Protection Code). In New York, the State Attorney General entered a consent decree with numerous litigation funding companies, which in essence set forth the basic disclosure requirements litigation funding companies must follow when contracting in New York. *See* American Legal Finance Association Agreement, Assurance of Discontinuance Pursuant to Executive Law § 63(15), New York State Attorney General (Feb. 17, 2005). Notably, in both instances, the South Carolina Department of Consumer Affairs and the New York State Attorney General acted without a direct legislative mandate to regulate litigation funding.

Many state legislatures have considered proposed legislation regulating litigation funding. *See* Heather Morton, *Litigation or Lawsuit Funding Transactions 2015 Legislation*, National Conference of State Legislatures (Jan. 8, 2016), http://www.ncsl.org/research/financial-services-and-commerce/litigation-or-lawsuit-funding-transactions-2015-legislation.aspx. But to date, only eight states have enacted litigation funding regulations. *See* Appendix C. Generally, the state legislatures have enacted one of two regulatory models: a disclosure model or a registration model. *See* Richard A. Blunk, "Have the States Properly Addressed the Evils of Consumer Litigation Finance," *A Model Litigation Finance Contract* (Jan. 20, 2014), http://litigationfinancecontract.com/have-the-states-properly-addressed-the-evils-of-consumer-litigation-finance/. A disclosure model seeks to prevent consumers from entering litigation agreements they do not understand, and the states typically require: a) disclosure of key financial terms, including the total amount to be advanced, all the fees, the annual percentage rate, the imputed interest, etc.; b) disclosure of the non-recourse nature of the advance; and c) the use of various disclaimers. *Id.*

A registration model, on the other hand, couples the aforementioned consumer disclosure protections with additional regulations. *Id.* These regulations range from requiring funders to register with a state executive agency and paying annual registration fees to prohibiting the use of false advertising to requiring that all lending be done from the location specified in the funder's application. *Id.* In addition to adopting either a disclosure or registration model, some states impose caps on fees and rates funders can charge. *Id.* What annual rate cap a state legislature imposes is a hotly contested special interest issue because low caps can effectively force litigations funders to exit a state market. *See, e.g.*, Andrew G. Simpson, *Litigation Financing Firm Exits Tennessee as New Law Goes into Effect*, Insurance Journal (July 3, 2014), https://www.insurancejournal.com/news/southeast/2014/07/03/333772.htm.

Table 1 below lists the states which have enacted legislation regarding litigation funding, classifies the state's approach according to the aforementioned typology, and identifies features of the regulatory scheme.

Table 1. *State Statutory Approaches to Regulating Third-Party Litigation Funders*

STATE	STATUTES	Summary
Arkansas	Ark. Code Ann. §§ 4-57-104, 4-57-109.	-Disclosure Model -Cap on Rates/Fees (17%)
Indiana	Ind. Code §§ 24-4.5-1-201.1, 24-4.5-1-301.5, 24-4.5-3.-110, 24-4.5-3-110.5, 24-4.5-3-202, 24-4.5-3-502, 24-12 et. seq.	-Registration Model -Cap on Rates/Fees (36%) -Legal Privileges Protection
Maine	Me. Rev. Stat. tit. 9-a, §§ 12-101 - 107	-Registration Model -No Cap on Rates/Fees, but Shall Not Assess Fees for Period Exceeding 42 months
Nebraska	Neb. Rev. St. § 25-3301-3309	-Registration Model -No Cap on Rates/Fees, but Shall Not Assess Fees for Period Exceeding 36 months -Legal Privileges Protection
Ohio	Ohio Rev. Code § 1349.55	-Disclosure Model
Oklahoma	Okla. Stat. tit. 14-A, §§ 3-801 - 3-817	-Registration Model -Prohibits funder from controlling litigation
Tennessee	Tenn. Code §§ 47-16-101 – 110	-Registration Model -Cap on Rates/Fees (10%)
Vermont	Vt. Stat. tit. 8, §§ 2251-2260	-Registration Model -Legal Privileges Protection

THIS PAGE INTENTIONALLY BLANK

Appendix A*: Local Circuit Court Rules Regarding Disclosure of Third-Party Litigation Finance Arrangements*

Circuit Court	Local Rule or Order	Text
3rd Circuit	3rd Cir. L. R. 26.1.1(b)	"Every party to an appeal must identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. The form must be completed only if a party has something to report under this section."
4th Circuit	4th Cir. L. R. 26.1(2)(B)	"A party in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel." "A party must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation."
5th Circuit	5th Cir. L. R. 28.2.1	"Certificate of Interested Persons. The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in FED. R. APP. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by FED. R. APP. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes."

		"Each certificate must list all persons known to counsel to be interested, on all side of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court."
6th Circuit	6th Cir. L. R. 26.1(b)(2)	"With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants." "Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall a dvise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation." Local Form asks the following question: "Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:"
10th Circuit	10th Cir. L. R. 46.1(D)	(D)(1): "Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal." (D)(2): "The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation. For corporations, *see* Fed. R. App. P. 26.1."
11th Circuit	11th Cir. L. R. 26.1-1(a)(1); 11th Cir. L. R. 26.1-2(a)	26.1-1(a)(1): "Every party and amicus curiae ("filers") must include a certificate of interested persons and corporate disclosure statement ("CIP") within every motion, petition, brief, answer, response, and reply filed."

		16.1-2(a): "A CIP must contain a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party."

THIS PAGE INTENTIONALLY BLANK

Appendix B: ***Local District Court Rules Regarding Disclosure of Third-Party Litigation Finance Arrangements***

District Court	Local Rule, Order, or Form	Text
Arizona	Form - Corporate Disclosure Statement; No local rule or order	Form asks the filing party to declare if there is a "[p]ublicly held corporation, not a party to the case, with a financial interest in the outcome." If so, the party must list the identity of the corporation and the nature of the financial interest.
C.D. California	C.D. Cal. L. R. 7.1-1	The local rule provides as follows: "To enable the Court to evaluate possible disqualification or recusal, counsel for all non-governmental parties shall file with their first appearance a Notice of Interested Parties, which shall list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations, clearly identified as such) that may have a pecuniary interest in the outcome of the case, including any insurance carrier that may be liable in whole or in part (directly or indirectly) for a judgment in the action or for the cost of defense." It further provides that "[c]ounsel shall be under a continuing obligation to file an amended Notice if any material change occurs in the status of interested parties, as through merger or acquisition or change in carrier that may be liable for any part of a judgment."
N.D. California	N.D. Cal. L. R. 3-15; Standing Order for All Judges of the N.D. Cal. (1/17/2017)	**L. R. 3-15:** "Upon making a first appearance in any proceeding, each party must file with the Clerk a 'Certification of Interested Entities or Persons' pursuant to this Rule. The Rule does not apply to any governmental entity or its agencies. (1) The Certification must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." The local rule also states that the term "financial interest" has the meaning assigned by 28

		U.S.C. § 455 (d)(4). **Standing Order, Paragraph 19:** "Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the 'Certification of Interested Entities or Persons' required by Civil Local Rule 3-15. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."
M.D. Florida	Interested Persons Order for Civil Cases (6/14/2013) (only applies to some judges); No local rule or order applicable to all district court judges	Some judges require parties to complete a form, which mandates that parties disclose "the name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings."
N.D. Georgia	N.D. Ga. L. R. 3.3	"In order to enable judges and magistrate judges of this court to evaluate possible disqualification or recusal, counsel for all private (non-governmental) parties in civil cases must at the time of first appearance file with the clerk a certificate containing: (1) A complete list of the parties and the corporate disclosure statement required by FRCP 7.1. (2) A complete list of other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case."
S.D. Georgia	S.D. Ga. L. R. 7.1	"The disclosure statement required by Federal Rule of Civil Procedure 7.1 shall be furnished by counsel for all private (non-government) parties, both plaintiffs and defendants, and shall be filed with the

		Complaint and Answer. It shall certify a full and complete list of all parties, all officers, directors, or trustees of parties, and all other persons, associations of persons, firms, partnerships, subsidiary or parent corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case, including any parent or publicly-held corporation that holds ten percent (10%) or more of a party's stock. Should a merger or acquisition occur during the pendency of litigation, counsel shall so notify the Court thereof in writing. The form to be used to comply with the provisions of this rule is in Appendix of Forms to this section of these Local Rules."
N.D. Iowa	N.D. Iowa L. R. 7.1	Requires each nongovernmental plaintiff or defendant that is not a natural person to file a statement containing: 1) "The names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the plaintiff as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the plaintiff's outcome in the case; and" 2) "With respect to each such entity, a description of its connection to or interest in the litigation."
S.D. Iowa	S.D. Iowa L. R. 7.1	Requires each nongovernmental plaintiff or defendant that is not a natural person to file a statement containing: 1) "The names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the plaintiff as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the plaintiff's outcome in the case; and" 2) "With respect to each such entity, a description of its connection to or interest in the litigation."
Maryland	Md. L. R. 103.3(b)	Requires counsel shall file a statement containing the following information: "The identity of any corporation, unincorporated association, partnership, or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of the litigation, and the nature of its financial interest. The term 'financial interest in the outcome of the litigation' includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case. Any notice given to the Clerk under

		this Rule shall not be considered as an admission by the insurance company or other person that it does in fact have an obligation to defend the litigation or to indemnify a party or as a waiver of any rights that it might have in connection with the subject matter of the litigation."
E.D. Michigan	E.D. Mich. L. R. 83.4	Applies to "all corporate parties to a civil case" "Whenever, by reason of insurance, a franchise agreement, lease, profit sharing agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the case, has a substantial financial interest in the outcome of the litigation, counsel for the party whose interest is aligned with that of the publicly owned corporation or its affiliate must file the statement of disclosure provided in (c) identifying the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation." "COMMENT: LR 83.4 is based on 6th Cir. R. 26.1."
W.D. Michigan	Form - Corporate Disclosure Statement; No local rule or order	Form asks: "Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? If yes, identify entity and nature of interest:"
Nebraska	Form - Corporate Disclosure Statement; No local rule or order	Pursuant to Fed. R. Civ. P. 7.1, the form asks if "[a]nother publicly held corporation or another publicly held entity has a direct financial interest in the outcome of the litigation. If yes, identify all corporations or entities and the nature of their interest:"
Nevada	Nev. L. R. 7.1-1	"Unless the court orders otherwise, in all cases except habeas corpus cases, pro se parties and attorneys for private non-governmental parties must identify in the disclosure statement all persons, associations of persons, firms, partnerships or corporations (including parent corporations) that have a direct, pecuniary interest in the outcome of the case."
E.D. North Carolina	E.D. N.C. L. R. 7.3	"All parties to a civil or bankruptcy case, whether or not they are covered by the terms of Fed. R. Civ. P. 7.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not

		apply to the United States or to state and local governments in cases in which the opposing party is proceeding without counsel." The statement shall include: "All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement;"
M.D. North Carolina	Form - Disclosure of Corporate Affiliations; No local rule or order	The recommended form asks: "Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. If yes, identify entity and nature of interest:"
W.D. North Carolina	Form - Entities with a Direct Financial Interest in Litigation Form; No local rule or order	The form asks: "Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? If yes, identify entity and nature of interest."
N.D. Ohio	N.D. Ohio L. Civ. R. 3.13(b); Form - Corporate Disclosure Statement	**L. R. 3.13(b):** Requires "[a]ny non-governmental corporate party to a case" to file a corporate disclosure statement identifying "[a]ny publicly held corporation or its affiliate that has a substantial financial interest in the outcome of the case by reason of insurance, a franchise agreement or indemnity agreement." **Form** asks a slightly different question: "Is there a publicly owned corporation, not a party to the case, that has a financial interest in the outcome?"
S.D. Ohio	S.D. Ohio L. R. 7.1.1	Extends disclosure requirements to "entities appearing amici curiae" "In addition to the disclosures required under Fed. R. Civ. P. 7.1, nongovernmental corporate parties and parties appearing amici curiae shall disclose the identity of any publically held corporations or their affiliates that are not parties to the case or appearing amici curiae that have substantial financial interests in the outcome of the litigation by reason of insurance, a franchise agreement, or an indemnity agreement.

		The nature of that substantial financial interest shall also be disclosed."
E.D. Oklahoma	Form - Corporate Disclosure Statement; No local rule or order	Form asks: "Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? If YES, identify entity and nature of interest:"
N.D. Oklahoma	Form - Corporate Disclosure Statement; No local rule or order	Form asks: "Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? If YES, identify entity and nature of interest:"
N.D. Texas	N.D. Tex. L. R. 3.1(c), 3.2(e), 7.4, 81.1	**L. R. 3.1(c), 3.2(e):** A complaint must be accompanied by: "a separately signed certificate of interested persons—in a form approved by the clerk—that contains—in addition to the information required by Fed. R. Civ. P. 7.1(a)—a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary." **L. R. 7.4:** "The initial responsive pleading that a defendant files in a civil action must be accompanied by a separately signed certificate of interested persons that complies with LR3.1(c) or 3.2(e). If the defendant concurs in the accuracy of another party's previously-filed certificate, the defendant may adopt that certificate." **L. R. 81.1:** These rules apply to the party or parties that remove a civil action from state court.
W.D. Texas	W.D. Tex. L. R. CV-33	"A party that serves written interrogatories under Federal Rule of Civil Procedure 33 may use any of the following approved interrogatories," including "If [name of party to whom the interrogatory is directed] is a partner, a partnership, or a subsidiary or affiliate of a publicly owned corporation that has a financial interest in the outcome of this lawsuit, list the identity of the parent corporation, affiliate, partner, or partnership and the relationship between it and [the named party]. If there is a publicly owned corporation or a holding company not a party

		to the case that has a financial interest in the outcome, list the identity of such corporation and the nature of the financial interest."
W.D. Virginia	Form - Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation; No local rule or order	The form asks: "Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? If yes, identify all such owners:"
W.D. Wisconsin	Form - Disclosure of Corporate Affiliations and Financial Interest; No local rule or order	The form asks: "Is there a publicly owned corporation, not a party to this case, that has a financial interest in the outcome? If the answer is YES, list the identify of such corporation and the nature of the financial interest to the named party:"

THIS PAGE INTENTIONALLY BLANK

AMERICAN ASSOCIATION for JUSTICE

January 17, 2018

18-CV-B

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Third-Party Litigation Funding

Dear Ms. Womeldorf:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), hereby submits these comments in response to the numerous requests for rule-making on third-party litigation financing ("TPLF") and, in particular, the request for mandatory disclosure of third-party litigation agreements presented in the U.S. Chamber's Institute for Legal Reform ("ILR")'s most recent submission. See 17-CV-O and 17-CV- GGGGGG. This proposal is the most recent in a long chain of one-sided proposals directed towards the plaintiffs' bar regarding TPLF. AAJ, with members in the United States, Canada and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including employees, consumers, patients, families, shareholders and businesses injured by corporations, receive proper access to the courts under fair, just, and reasonable rules of procedure.

I. Background.

AAJ generally opposes proposals to limit TPLF funding and access to capital for members of the plaintiffs' bar. Many plaintiffs' attorneys avail themselves of third-party litigation funding over the course of their professional lives. While AAJ is unable to quantify numbers or percentages of AAJ members that use funding, AAJ can say that some attorneys use TPLF frequently while others use it occasionally or not at all. Additionally, TPLF takes many different forms and one-size does not fit all. Indeed, the Committee previously noted the lack of universal definition of TPLF and recognized the need to ensure a narrowly crafted definition in any potential rulemaking to prevent an overbroad rule. AAJ agrees that this is a legitimate concern with these proposals.[1]

[1] Minutes of the Civil Rules Committee October 2014 Meeting, Agenda Book of the Advisory Committee on Civil Rules, page 49 (April 2015) ("It is not clear just what forms of financial assistance to a lawyer or to a party might be included under this label, nor is it clear whether the label itself should be adopted. Many ads offering financial

While AAJ recognizes that the rise of TPLF is seen as a "phenomenon" in the last several years, its arrival and growth is not surprising to AAJ. The reason that TPLF exists is because traditional access to financing and capital, particularly post-recession, often was not available to members of the plaintiffs' bar, whose business model was considered too uncertain by traditional banks to extend lines of credits or other types of commercial loans.[2] However, other types of financial institutions, particularly those with in-depth knowledge of how litigation works, did find an interest in providing plaintiffs' firms with adequate financing. Access to adequate financing when litigating against a corporate defendant that has comparatively far more resources became instrumental in the success of many plaintiffs' lawsuits.[3] As success of this type of financing grew, other types of institutions have taken interest in financing plaintiffs' lawyers, and the types (individuals, banks, hedge funds, etc.) and models of litigation financing (be it individual cases, firms or portfolios of cases) continue to evolve.[4]

ILR's most recent submission should be familiar to the Advisory Committee. In April 2014, ILR and similarly-interested groups submitted a remarkably similar proposal to require mandatory disclosure of TPLF under Rule 26. Given the novelty of TPLF and contentious debate surrounding the alleged concerns over TPLF, the Advisory Committee decided in October 2014 that rulemaking on the proposal was "premature."[5]

ILR's most recent submission on this subject reiterates the same alleged concerns contained in its 2014 comments, and ILR has requested that the Committee reopen its consideration due to "several relevant noteworthy developments."[6] These new developments mainly appear to be data on financial success of a few TPLF entities, the alleged "expansion" of TPLF funding models, and the recent standing order of one district court to require TPLF funding in class/mass actions.[7]

---

support to lawyers seem to involve general loans to the firm, or to be ambiguous on the relationship between possible financing terms and specific individual litigation.").

[2] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-1285 (2010-2011), *available at* http://www.minnesotalawreview.org/wp-content/uploads/2012/03/Steinitz_PDF.pdf.

[3] *Id.* at 1305 ("One-shotters' (i.e., individual plaintiffs') bargaining positions will be most radically transformed by litigation funding as plaintiffs are transformed from one-shotters to modified repeat players. By allying themselves with repeat-player funders, these plaintiffs will now reap the benefits of economies of scale, accumulated expertise, and a limited ability to play for rules, in addition to gaining access to justice."); *see also* Jan Wolfe, *Got Your Back*, The American Lawyer, 13-14 (Feb. 2014), *available at* http://www.americanlawyer-digital.com/americanlawyer-ipauth/201402ip?pg=13#pg13.

[4] *See* Burford Capital, 2017 Litigation Finance Survey (2017), *available at* http://www.burfordcapital.com/wp-content/uploads/2017/09/Burford-2017-Litigation-Finance-Research-Whitepaper.pdf.

[5] Minutes of the Civil Rules Committee October 2014 Meeting, Agenda Book of the Advisory Committee on Civil Rules, page 54 (April 2015)("But third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now. . . There has been a flurry of articles. 'The authors are all over the place.' Some, highly respected, have suggested that the concerns reflected by this proposal are premature. The Committee decided not to act on these issues now.").

[6] U.S. Chamber Institute for Legal Reform, Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A) 17-CV-O (June 1, 2017).

[7] *Id.*

AAJ would contest of the novelty of some of these "developments." Also, data on whether certain TPLF entities are lucrative or not hardly justify a new discovery rule, and the Committee reporters have similarly questioned the relevance of this information.[8] Furthermore, one district court's experimentation with disclosure – one much more limited than that suggested by ILR – does not justify rulemaking either. On the other hand, it incentivizes a wait-and-see approach as courts (and state ethics commissions) experiment with different approaches.

Nevertheless, none of these "developments" justify reconsideration of the Committee's reasonable decision that rulemaking on this matter is premature. Most importantly, ILR's substantive reasons to justify the rulemaking have not changed.[9] ILR argues that disclosure is necessary so that the court and parties can identify the real party of interest in the litigation and disclose conflicts of interest. While AAJ disagrees with ILR's assessment of TPLF and the role it plays in litigation, AAJ mainly questions the true motivations of this proposal. If identification of potential conflicts of interest is the overarching concern of a rulemaking, then why not suggest an amendment to Rules 17(a) or 7.1, as the Committee reporter has suggested on this issue?[10] These repetitive proposals' insistence on an amendment to the discovery rules perhaps shows their true motivation, which may be to make the litigation so expensive and so impossible to bring for plaintiffs – even when adequately financed by a third party – that ultimately a meritorious case will not be brought.[11] It must be alarming to corporate defendants to face more well-financed plaintiffs when lack of funding denied so many of these injured plaintiffs a day in court before the advent of TPLF.[12]

---

[8] Rule 26(a)(1)(A) Reporters Memorandum and Suggestion 14-CV-B, Agenda Book of the Advisory Committee on Civil Rules, page 121 (October 2014) ("Perhaps relatedly, the submission seems to suggest that TPLF arrangements are somehow improper. Not only does it describe TPLF companies as 'lucrative," . . . How this factor should affect a determination about the parties' resources under amended Rule 26(b)(1) (if it is amended effective Dec. 1, 2015) is uncertain . . .'[C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that '[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party whether financially weak or affluent'" (citing Committee Note).).

[9] *Compare* U.S. Chamber Institute for Legal Reform, Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A) 14-CV-B (April 9, 2014) *with* U.S. Chamber Institute for Legal Reform, Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A) 17-CV-O (June 1, 2017).

[10] Rule 26(a)(1)(A) Reporters Memorandum and Suggestion 14-CV-B, Agenda Book of the Advisory Committee on Civil Rules, page 120 (October 2014) ("Finally, it might be noted that if the objective is to identify those with a real stake in the litigation, some revision of Rule 17(a) on real party in interest might be in order."); id. at page 118 ("Whether that would make information about this subject discoverable under Rule 26 is uncertain. It might be that the right focus would be on Rule 7.1 disclosure statements.').

[11] *See, e.g.*, Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), *available at* http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all ("The rise of lending to plaintiffs and their lawyers is a result of the high cost of litigation. Pursuing a civil action in federal court costs an average of$15,000, the Federal Judicial Center reported last year. Cases involving scientific evidence, like medical malpractice claims, often cost more than $100,000. Some people cannot afford to pursue claims; others are overwhelmed by corporate defendants with deeper pockets. A review by The New York Times and the Center for Public Integrity shows that the inflow of money is giving more people a day in court and arming them with well-paid experts and elaborate evidence. It is helping to ensure that cases are decided by merit rather than resources, echoing and expanding a shift a century ago when lawyers started fronting money for clients' lawsuits.").

[12] *Id.*

II. ILR's One-Sided Proposal.

ILR's proposal can be found on page 33 of their 17-CV-O submission.[13]

The proposed amendment would add the following to Rule 26(a)(1)(A):

> "(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."[14]

As in the versions before, the disclosure requirement as drafted by the ILR is completely one-sided. It only applies to the plaintiffs' bar, even though the biggest funding companies provide funding for both plaintiffs and defendants. The disclosure requirement applies to all types of funding, including traditional sources of funding as well as third-party litigation funding. No definition of "agreement" is provided in the proposal. Finally, the draft requiring disclosure under Rule 34 does not solve the problems raised by ILR, mainly that TPLF may raise potential conflicts of interest. While AAJ disagrees with ILR's purported reasons for rulemaking, if indeed control of the litigation were actually a problem, the mere disclosure of a funding arrangement would not solve the problem.

III. The ILR Proposal is Not a True Federal Rules Amendment.

As seen with other amendment proposals, AAJ suspects that this latest proposal is a result of failed lobbying efforts in Congress. Congress has not passed the disclosure requirement, nor should the Advisory Committee. ILR may feel that the threat of Congressional overreach would incentivize Committee action. AAJ acknowledges that there may be times when Congress does step on the Advisory Committee's toes, particularly when circumventing the Rules Enabling Act, but TPLF disclosure is not one of those times.

In his comment (17-CV-FFFFFF), the Chairman of the House Judiciary Committee, Rep. Bob Goodlatte, states that the House included a disclosure requirement for class action cases in H.R. 985, the Fairness in Class Action Litigation Act, and urges the Committee to give careful consideration of 17-CV-O and ultimately support it.[15] H.R. 985 passed the House in March 2017 without any hearings or any support from the minority party. The bill has not gained traction in the Senate, and there is no guarantee that the bill would get considered by the next Congress. Moreover, rules of procedure and evidence should never be dictated by the political whims of Congress. That is why jurists universally approved of the Rules Enabling Act – to remove the creation of rules regarding the administrative of justice away from politicians.

---

[13] U.S. Chamber Institute for Legal Reform, *supra* note 6, at 33.
[14] *Id.*
[15] Rep. Bob Goodlatte, Comment 17-CV-FFFFFF (Nov. 1, 2017).

Above all else, the most appropriate body to consider TPLF ethical concerns and potential disclosure requirements is state ethics commissions, not any federal body. While the ILR continues to lobby for third party litigation funding in Congress, ILR has once again asked the Advisory Committee to address a potential state-created ethical problem. AAJ questions whether true ethical concerns can even be addressed by a federal rule change when ethical and conflicts of interest issues are efficiently and effectively regulated by state rules of professional responsibility and licensing.[16]

As ILR's proposal concedes, this is a state issue. In explaining their reasoning for "the need for disclosure," ILR argues that "[t]he funding agreements may violate ***state*** champerty and maintenance laws, as well as ethical canons. . ." (emphasis added).[17] AAJ agrees that if TPLF agreements have any ethical implications at all, they are based on state ethics rules. State ethics commissions would be the appropriate body to consider the ethical implications of TPLF.

The regulation of litigation funding is fundamentally a state issue because it is so closely tied to the rules of professional conduct. The duties an attorney owes to his or her client are also defined by state law and state ethical rules, so issues like disclosure, conflicts of interests, and confidentiality are already regulated by the states.[18] There is simply no need for federal intervention into state rules involving ethics, contracts, and licensing. AAJ would ask the Committee to reject this proposal outright to allow states to continue their work in the evolving world of TPLF.

IV. Attorneys Make Their Own Litigation and Strategy Decisions.

While AAJ disagrees with many statements and notions in ILR's proposal, AAJ wishes to highlight and reiterate AAJ's prior assertions that litigation funders do not interfere with litigation decisions. There is no evidence that the financing company dictates the litigation strategy or decisions. Indeed, legal ethical rules prohibit such interference.[19] There is no reason that an attorney would listen to or take direction from a person or company that has no litigation or trial experience and risk a violation of state ethics rules in the process. Since the proposed amendment from ILR is simply a proposal, AAJ declines to respond to all the points raised in their comments. However, two points require a specific response.

A. Myth: Litigation Funding Deters Settlement.

---

[16] *See, e.g.*, State Adoption of the ABA Model Rules of Professional Conduct, ABA Center for Professional Responsibility (2018), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html; *see generally* MODEL RULES OF PROF'L CONDUCT (2016).

[17] U.S. Chamber Institute for Legal Reform, *supra* note 6, at 9.

[18] *See* note 16, *supra*.

[19] Victoria Shannon, *Harmonizing Third-Party Litigation Funding*, 36 CARDOZO LAW REV. 861, 872 (2016) ("According to attorney ethical rules in most states within the United States, the funder must not exercise any control over the legal representation or the attorney. The lawyer representing the underlying client in the case must adhere to any rules of professional responsibility or ethics of the jurisdiction(s) in which she is licensed to practice and may be subject to specific ethical rules of the dispute resolution venue as well.").

ILR alleges that TPLF can delay and distort the settlement process because a party that must repay a TPLF entity a percentage of the proceeds may reject a fair settlement offer and hold out for securing a larger sum of money. The argument is nonsensical. First and foremost, the plaintiffs' attorneys sole concern considering a settlement is the best interest of the client.[20] Even if we were to accept ILR's notion that a plaintiff's attorney unethically considered his or her own interest in repayment over the interest of a client, then because the funding must be repaid, the attorney would arguably be more incentivized to settle at the earliest possible point in the litigation.

ILR's reasoning is not in line with the practical workings of plaintiffs' lawyers. Plaintiffs' lawyers must already weigh the cost and efficiency of trial under the contingency fee system under which most members of the plaintiffs' bar regularly operate. Under the contingency fee system, the plaintiff's attorney must efficiently manage his or her cases. Inefficiency and delay mean that it takes longer for the client to receive compensation, or it may drain the lawyer of their resources to properly bring their case to trial. In contrast, defense attorneys, who charge billable hours, get paid regardless of whether the case is quickly resolved or dragged out and thus do not weigh the cost of continuing litigation to the same extent that a plaintiff's attorney would.

In short, dragging out the settlement process is not financially advantageous to any plaintiffs' attorneys or their clients, and TPLF does not incentivize a plaintiff to reject an early settlement offer. On the other hand, TPLF does ensure that the plaintiff has enough resources to take on a well-heeled defendant. Further, TPLF ensures that a lawyer does not have to accept a low-ball settlement offer or take a complex case to court before it has been fully developed merely because they are running out of litigation resources.[21]

B. Myth: Litigation Funding Undermines Attorney-Client Privilege.

ILR alleges that TPLF raises confidentiality concerns because the attorney may be required to disclose privileged information to the funder. AAJ is amused that that ILR cares whether privilege is violated between injured parties and members of the plaintiffs' bar, when ILR does not represent these interests and offers no examples citing disclosure of privilege or harm to actual clients. A plaintiff's attorney, who is licensed by the state and must follow state ethics rules,[22] is not going to risk censure or the loss of a license by allowing a third party to interfere with the attorney-client relationship. Again, there is no evidence to suggest that current third-party financing practices have breached the obligation for an attorney to zealously represent the client's interests.

---

[20] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2, R. 1.3 COMMENT (2016)

[21] *See, e.g.*, Appelbaum, *supra* note 11 (detailing the story of a plaintiff who, when facing an appeal after winning her sexual harassment lawsuit, "needed money for living expenses or she would be forced to take a smaller settlement."); s*ee generally* Jason Krause, *Third-party financing is growing, and lawyers are big players*, ABA Journal (July 2016).

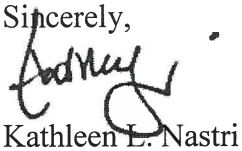
[22] Shannon, *supra* note 20.

V. Conclusion.

AAJ strongly believes that the case for regulation of third-party financing has not been established and that ILR's proposal is just an attempt to unbalance the playing field. There is simply resentment and oftentimes backlash when the plaintiffs' bar secures capital to bring complex cases that are expensive to develop. If any regulation is needed—and there is no evidence that there is—the highest state courts are perfectly capable of performing this function.

AAJ appreciates the opportunity to submit this comment on third-party litigation funding. If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at susan.steinman@justice.org.

Sincerely,



Kathleen L. Nastri
President
American Association for Justice

THIS PAGE INTENTIONALLY BLANK

TAB 6

THIS PAGE INTENTIONALLY BLANK

TAB 6A

THIS PAGE INTENTIONALLY BLANK

6. Social Security Review Subcommittee Report

The Administrative Conference of the United States adopted its Recommendation 2016-3 on December 13, 2016. It recommends that the Judicial Conference of the United States develop a uniform set of procedural rules "for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." The Standing Committee has determined that the Civil Rules Committee is the appropriate body to consider this recommendation.

This topic was on the agendas for the April and November 2017 Committee meetings. An informal group of Committee members held a meeting on November 6 to gather information from a number of interested people. The results of that meeting are sketched in the Minutes for the November meeting. The Committee concluded that further work must be done before deciding whether it makes sense to draft special rules for Social Security review cases. The informal group has been reconstituted as a Subcommittee. The Subcommittee has not yet determined whether to recommend formal development of social-security review rules. Nor has it determined whether any proposed rules should be added directly to the Federal Rules of Civil Procedure. Any rules might instead be developed as a set of Supplemental Rules.

The argument for special rules is direct. Individual social security review actions are a significant part of the federal docket, running around 17,000 to 18,000 new cases annually in recent years. They are inherently appellate in character, involving review on the administrative record. Little about them calls for routine application of the normal pre-trial procedures that look toward trial as the final event. In part because most of the civil procedure rules are essentially irrelevant to most of these cases, widespread differences have emerged in the procedures employed in different districts. Some of these local procedures provide promising models for shaping uniform national rules. Others may seem questionable. Regardless of intrinsic worth, disuniformity exacts a substantial price. The Social Security Administration is represented by United States Attorneys in the actions for review, but much of the work is frequently done by agency legal staff. It takes time to become comfortable with practice in any district, and the lawyers have precious few hours available for any particular case. It is not just that regional offices cover many districts, but that individual lawyers often work in different districts. A uniform national procedure could support better overall representation for the Administration. The same holds true for claimants represented by attorneys who have a regional or national practice. Further, it is reasonable to expect that uniform rules developed through the Enabling Act process would be good rules.

The argument against adopting substance-specific rules through the Enabling Act was explored at the November meeting, as described in the Minutes. General transsubstantive rules are commonly drafted

in open-ended terms that leave room for adaptation to the needs of specific substantive disputes as a matter of judicial discretion. Substance-specific rules require detailed knowledge of the ways in which procedure should be shaped by the underlying substantive law and, in the setting of Social Security review, knowledge of the administrative structure and process. The more specific the rules, the greater the risk that the safety valve of discretionary adaptation will fail. The risk grows over time as the substantive law and agency realities evolve. And the ever-present prospect that new rules of procedure will be perceived to favor plaintiffs or defendants is more sharply focused when a discrete substantive topic is in play.

The Subcommittee's initial work has been supported by a survey of local district rules and standing orders undertaken by Patrick Tighe, the Rules Committee Law Clerk. It also has been supported by a continuation of the consultation begun last November. The National Organization of Social Security Claimants' Representatives launched a survey that gathered responses from 71 members. The American Association for Justice conducted an informal survey of its members, including discussion with members at the AAJ's winter convention. Responding to questions asked by the Subcommittee, the Social Security Administration submitted a letter that "strongly supports a national uniform set of procedural rules for Social Security cases." The Administration also provided a draft of extensive and detailed rules that is attached below. And the Executive Office for United States Attorneys provided a draft local rule.

The Subcommittee met by conference call on March 9. The call considered a "bare bones" draft of Supplemental Rules. The draft was designed to stimulate discussion by presenting concise versions of suggestions received from several sources. The overall approach sought two goals that may prove incompatible. One goal is to simplify and expedite the procedures used to resolve most cases that seek review under § 405(g). These cases present a single claimant's claim for substantial-evidence review on the administrative record. The Commissioner of Social Security is the only defendant. No attempt is made to seek discovery or otherwise go outside the administrative record. The draft pursued the goal of simplification by establishing a procedure for electronic service of the summons and complaint by the court on the Commissioner. That provision found widespread acceptance. Other means of simplification did not fare so well in Subcommittee discussion. Paring down the complaint to resemble a notice of appeal was not much questioned. But limiting the answer to filing the administrative record raised many questions. A parallel provision designed to exclude motions for summary judgment and to limit the grounds for motions to dismiss encountered similar difficulties. Another rule designed as a gentle reminder that Rule 16 pretrial procedures may often be bypassed also was challenged. The procedure for framing the request for review primarily in the plaintiff's brief was questioned.

The second goal of the draft was to provide for cases that include claims beyond direct review on the administrative record. The major challenge presented by this goal is to integrate the record-review provisions with provisions for applying the full sweep of civil procedure to claims that extend beyond the administrative record. Such actions may be relatively rare. But there are reports of various complications. Perhaps the most obvious complication is presented by cases that seem to call for discovery of information outside the administrative record. More troubling complications arise from the need to avoid multiple deadlines. One example asks whether the time to answer by filing the administrative record should be suspended by a motion directed to parts of the action that go beyond review on the administrative record. Filing the record may provide substantial advantages for the plaintiff and the court even in addressing the motion. But the result could be a later deadline for filing an answer (or amended answer) that addresses other issues. Another example is presented by the Social Security Administration's proposal that the rules exclude class actions. There have been at least a few class actions associated with § 405(g) cases, but it is not yet clear whether the very terms of § 405(g) are compatible with class actions.

The challenges to the first draft served a purpose. A substantially revised draft has been prepared. It appears below in three versions. The first provides clean rule text and Committee Notes. The second identifies many of the questions that need to be addressed in deciding whether it is useful to develop any rules at all, whether any rules should be confined to cases that present nothing more than a claim for review on the administrative record, and how any rules that extend beyond those simple cases might be integrated with the Civil Rules as a whole. The questions are not easy. The hope is that presenting these questions for examination by those who regularly engage in social security review litigation will provide guidance for further Subcommittee deliberations. Guidance will be valuable, even if it either shows that the enterprise itself is ill-considered or shows that totally different approaches are required.

Much work remains before the Subcommittee will be in a position to recommend what course should be followed in acting on the Administrative Conference recommendation. The current draft of Supplemental Rules can be presented for examination by those who are deeply familiar with social security litigation. The draft would be accompanied by explicit caveats emphasizing that it is too early to advance any recommendations even on the value of working to adopt uniform national rules, much less on the worth of the draft as anything more than a prod to provoke further advice.

Engagement with outside groups will generate many suggestions to revise the draft. The Subcommittee hopes to be free to sketch tentative revisions that test the suggestions.

The Subcommittee recommends that this draft of Supplemental Rules be used as a basis for continuing to explore the issues that

surround the proposal for special social security review rules. The organizations that have already helped frame the issues will be asked for further work. They include the Social Security Administration, the Department of Justice, NOSSCR, and AAJ. Efforts will be made to enlist other organizations that may be able to help.

With luck and hard work, these further efforts may soon put the Subcommittee in a position to make recommendations on at least these questions: (1) Should any specific rules be adopted for § 405(g) review actions? (2) If specific rules are to be recommended, should they be framed as a separate and fully self-contained set of Supplemental Rules, as a separate set of Supplemental Rules integrated with the Civil Rules, or as newly numbered Civil Rules?[1] (3) How detailed should any rules be? The Social Security Administration draft rules are developed in great detail, and cover many points omitted from the illustrative draft. Is it appropriate to set page or word limits for briefs in the Civil Rules — that works in the Appellate Rules, but the differences in local circumstances may be greater among the district courts than among the circuits. Are special provisions for attorney fees useful? Detail may prove mistaken at the time of adoption, and may become obsolete in relatively short order.

[1] At this stage, the Subcommittee does not think it likely that these questions should be approached by making social-security specific amendments to many of the Civil Rules. Many rules would be involved, and the focus would be dulled by the need to read widely within the rules to identify the special provisions.

TAB 6B

THIS PAGE INTENTIONALLY BLANK

Supplemental Rules Governing Actions Under 42 U.S.C. § 405(g)

Rules with Committee Notes

Rule 1. Scope

(a) Section 405(g). These Supplemental Rules apply to an action brought by an individual or personal representative to obtain review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).

(b) Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure also apply to a proceeding under these Supplemental Rules, except to the extent that they are inconsistent with these Supplemental Rules.

Committee Note

These Supplemental Rules establish a simplified procedure that recognizes the essentially appellate character of claims to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g).

Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as the sole defendant and seek only review on the administrative record as provided by § 405(g). All aspects of such cases are governed directly by these Supplemental Rules and the compatible general provisions of the Civil Rules.

Some actions, however, may join more than one plaintiff, or more than one claim for review on the administrative record, or more than one defendant. The Civil Rules apply directly to the parts of such actions that seek relief not provided by § 405(g). These Supplemental Rules apply to the § 405(g) parts of the action.

Rule 2. Initiating the Action; Complaint; Service; Answer

(a) Commencing the Action. An action for review under [42 U.S.C.] § 405(g) is commenced by filing a complaint with the court.

(b) The Complaint. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf — or on whose wage record — the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State that the plaintiff [has exhausted all administrative remedies,] that the Commissioner has reached a final decision, and that the action is timely filed;

(5) State [generally {and without reference to the record}] that the final administrative decision is not supported by substantial evidence or [rests on] [must be reversed for] errors of [substantive or procedural] law;

(6) State any other ground for relief; and

(7) State the relief requested.

(c) Serving the Complaint. The court must notify the Commissioner [of Social Security] of the commencement of the action by [electronic transmission of]{electronically transmitting} the complaint to the Commissioner at [the]{an} address established by the Commissioner for this purpose. [No other service is required.]

(d) The Answer; Motion; Voluntary Remand; Time. The time for the Commissioner [of Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules of Civil Procedure], or a motion to remand is as follows:

(1) An answer must be served on the plaintiff within 60 days after notice of the action is given under Supplemental Rule 2(c) unless a later time is provided by [Supplemental Rule 2] (d)(4). The answer must include a certified copy of the [complete] administrative record.

(2) A motion under [Civil] Rule 12 must be made within 60 days after notice of the action is given under Supplemental Rule 2(c).

(3) A motion to voluntarily remand the case to the Commissioner may be made at any time.

(4) Unless the court sets a different time or a later time is provided by [Supplemental Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters the time to answer as provided by [Civil] Rule 12(a)(4).

Committee Note

Section 405(g) provides for review of a final decision "by a civil action." Civil Rule 3 directs that a civil action is commenced by filing a complaint. In an action that seeks only review on the administrative record, however, the complaint can closely resemble a notice of appeal. The elements specified in Supplemental Rule 2(b) plead the grounds for the court's jurisdiction under § 405(g) and the grounds that bring the action within § 405(g), including the provisions of the Social Security

Act underlying the claim. Paragraph (7) provides for pleading the nature of relief sought from review on the administrative record. In an action that seeks relief outside the limits of § 405(g), Supplemental Rules 2(b)(6) and (7) support pleading the claim under the Civil Rules — including, if appropriate, the grounds for subject-matter jurisdiction — and pleading the relief requested.

When the complaint names only the Commissioner as defendant, Supplemental Rule 2(c) provides a means for serving the complaint that supersedes Civil Rule 4(i)(2) — there is no need to serve the Attorney General or the United States Attorney. The Commissioner must establish an address for electronic service by the court. The address may include, by general reference, an electronic address for the United States Attorney for the district where the action is brought. Any defendant other than the Commissioner should be served with the complaint and a summons under Civil Rule 4.

Supplemental Rule 2(d) incorporates the general provisions of Civil Rules 8 and 12 for answers, including affirmative defenses, and motions. It also reflects this part of § 405(g): "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 made."

The Commissioner at times seeks a voluntary remand for further administrative proceedings before the action is framed for resolution by the court on the administrative record. Supplemental Rule 2(d) recognizes that the Commissioner may move to remand before or after filing and serving the record.

Rule 3. Plaintiff's Motion for Relief; Briefs

(a) Plaintiff's Motion for Relief and Brief. The plaintiff must file and serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief[, with references to the record], within [30] days after the record is filed or 30 days after the court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever is later. [The accompanying brief must support arguments [assertions? statements?] of fact by references to the record.]

(b) Defendant's [Response] Brief. The defendant must file and serve on the plaintiff, within [30] days of service of the plaintiff's motion and brief, a response brief[, supported by references to the record]. [The brief must support arguments [assertions? statements?] of fact by references to the record.]

(c) Reply Briefs. The plaintiff may, within 15 days of service of the defendant's brief, file a reply brief and serve it on the defendant.

Committee Note

Supplemental Rule 3 addresses the procedure for bringing on for decision a § 405(g) review action that has not been remanded to the Commissioner before review on the record. The plaintiff files a motion for the relief requested in the complaint or any amended complaint. The motion sets out the grounds of fact and law that require relief from the Commissioner's decision. The motion is supported by a brief that is similar to a brief supporting a motion for summary judgment, pointing to the parts of the administrative record that underlie the argument that the final decision is not supported by substantial evidence in the administrative record. The Commissioner responds. A reply brief is allowed. The times set for these briefs may be revised by the court when appropriate.

316 **Supplemental[1] Rules Governing Actions Under 42 U.S.C. § 405(g)**

[1] "Supplemental" follows the model of the admiralty rules, and emphasizes that the Civil Rules apply to all matters not specifically addressed by these rules.

Identifying the proper scope for a set of Supplemental Rules remains a difficult question. At least two distinctive sets of questions make it so.

One set of questions asks how far the full sweep of the Civil Rules should be available in actions under § 405(g). The information now available suggests that most of these actions do not involve, and do not need, the pretrial rules so important in other civil actions. When review is confined to examination of the administrative record, there are few occasions for Rule 16 conferences and discovery. Some courts rely on summary judgment as the vehicle for focusing on the parts of the record that show whether the Commissioner's decision is supported by substantial evidence, and that may be needed to decide questions of law. Much of Rule 56 is irrelevant to review on an administrative record, however, including the standard for decision. Summary judgment must be denied if the case could go either way. The administrative decision must be affirmed if the case could go either way.

Pure § 405(g) review actions may nonetheless provide some occasions for discovery, pretrial management, and other general procedures. [Discovery, for example, may be appropriate if the decision is challenged for bias of the administrative law judge, or ex parte communications, or pressure from the administration to reduce the frequency of benefit awards, or omissions from the record.] And a great many more formal rules cannot be disregarded. [Examples begin at least with Rule 5 filing, Rule 6 time computation, Rule 7 on motions, and on through such matters as voluntary dismissal, entry of a partial final judgment, formal entry of judgment on a separate document, references to or trial with a magistrate judge, responsibilities of the clerk's office, and so on.]

The other set of questions arise when a plaintiff seeks to join additional claims or parties in an action that includes § 405(g) review. These questions include whether two or more plaintiffs may join in a single petition — for example if both raise the same question of law? Apparently some plaintiffs have attempted to combine class-action claims with individual § 405(g) review — without deciding whether that combination should be allowed in a single action, what happens if a separate class action raising the same issues is filed on a different jurisdictional foundation and consolidated with the § 405(g) action? Variations on these questions are likely to depend on deep knowledge of the underlying substantive law. A claimant, for example, may seek to advance a claim that a Social Security Administration rule is invalid under the Administrative Procedure Act on substantive or procedural grounds. Are such claims properly part of the § 405(g) review itself? If they are, they may well call for reliance on the general Civil Rules. So too, may there be circumstances in which it is proper to join a defendant in addition to the Commissioner?

The need to avoid confusing or even conflicting procedural requirements puts a pragmatic twist on these questions. There should be no room for doubt, for example, about the application of Civil Rule 8 to

318 **Rule 1. Scope**

319 (a) Section 405(g). These Supplemental Rules apply to an action
320 brought by an individual[2] or personal representative to obtain
321 review of a final decision of the Commissioner of Social
322 Security[3] under 42 U.S.C. § 405(g).[4]

---

any claim for relief that goes beyond the proper scope of an action that seeks no more than § 405(g) review. The same holds true for the times allowed for subsequent pleadings and motions. The court's overriding authority to manage the action cannot be left in doubt.

These difficulties do not obviously defeat the quest for uniform national rules for § 405(g) cases. But they do demand careful consideration.

[2] "[A]n individual" is the statutory term. Emphasis could be added to reflect the SSA's concern that the rule should explicitly exclude actions with multiple plaintiffs and class actions: "brought by only one plaintiff"; "no more than one plaintiff"; "a single plaintiff"; or something else. So too, rule text could add "only to obtain review." But this seems better left for the Committee Note.

There may be smaller technical issues, bound up with substantive law. Suppose a claimant dies somewhere along the line: can the claim survive if disability is found before death? Presumably a representative would be an individual plaintiff, even if two people function jointly as representative. (It seems likely that survivor benefits are not influenced by disability before death, although it would be good to be sure of that.)

[3] The SSA draft explicitly excludes actions that include defendants "other than" the Commissioner. There is no need to use more words if the idea is to exclude actions that do not name the Commissioner as defendant. If the idea is to prohibit adding any defendant in addition to the Commissioner, the statute cannot be relied on — the negative implication from providing for review of the Commissioner's final decision is not sturdy enough.

As with the question of multiple plaintiffs, we would need to learn more to address multiple defendants. There might be good reason to invoke the provisions for review on the record for all claims under § 405(g), particularly if the rules recognize case management under Civil Rule 16.

[4] Two questions arise from the statutory reference. Other social security statutes invoke § 405(g): need they be listed? The three examples cited by SSA directly provide for review under § 405(g). If there are no others, or all directly invoke § 405(g), they might be listed in the Committee Note. But it may be better to make only a generic reference to other statutes that expressly incorporate § 405(g).

And how about actions that include both a § 405(g) claim for review on the record and some other claim? The SSA rules draft excludes them. But there may be advantages in invoking these rules for the part of the

(b) Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure also apply to a proceeding under these Supplemental Rules, except to the extent that they are inconsistent with these Supplemental Rules.

Rule 2. Initiating the Action; Complaint; Service; Answer

(a) Commencing the Action. An action for review under [42 U.S.C. § 405(g) is commenced by filing a complaint[5] with the court.[6]

(b) The Complaint. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf[7] — or on whose wage record[8] — the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State that the plaintiff [has exhausted all administrative remedies,] that the Commissioner has reached a final decision, and that the action is timely filed;[9]

---

action that invokes § 405(g) review. See note 1 above.

[5] The SSA model rule calls it a petition for review. That is consistent with the terminology used by Appellate Rule 15(a)(1). "Complaint," however, is consistent with the § 405(g) provision for review by commencing a civil action, and avoids the need to amend Rule 7(a) to define a petition for review as a pleading.

[6] This does not address the time for filing, set by § 405(g) as "within sixty days after the mailing to [the plaintiff] of notice of such [final] decision or within such further time as the Commissioner of Social Security may allow." Appellate Rule 15(a)(1) provides for filing "within the time prescribed by law." That is better than copying the statute into the rule, but perhaps not necessary because this rule applies only to this single statutory provision. The Commissioner can raise the question by a motion to dismiss.

[7] The "on whose behalf" phrase is drawn directly from the form in the SSA rule appendix.

[8] Is this an appropriate term?

[9] Some of the NOSSCR responses suggested that timeliness can be an issue that calls for explanation.

(5) State [generally {and without reference to the record}][10] that the administrative decision is not supported by substantial evidence or [rests on] [must be reversed for] errors of [substantive or procedural] law;

(6) State any other ground for relief;[11] and

(7) State the relief requested.[12]

(c) Serving the Complaint. The court must notify the Commissioner [of Social Security] of the commencement of the action by [electronic transmission of]{electronically transmitting} the complaint to the Commissioner at [the]{an} address established by the Commissioner for this purpose. [No other service is required.][13]

---

[10] The SSA does not want anything beyond these bare bones. Its draft Rule 2(b) says that the petition "must not include any attachments or evidence, nor may it include argument or allegations as to the substance of the administrative decision that is the subject of the petition." This position may reflect the belief that scarce government attorney resources are best used by preparing a single response to a single statement of the plaintiff's arguments of fact and law.

The incentive to provide an elaborate statement in the complaint may be limited if the plaintiff anticipates that the answer will be limited to filing the administrative record. But even then there may be some value in omitting any explicit limits of the sort proposed in the SSA draft — a cogent statement in the complaint might lead to voluntary remand. Draft Rule 2(d), as § 405(g) itself, contemplates an answer that goes beyond filing the administrative record. The occasion for answering with more than the administrative record is likely to be a complaint that includes claims that extend beyond review on the record. This draft applies the ordinary Civil Rules both to that part of the complaint and the corresponding part of the answer.

[11] This paragraph could be eliminated if the foundation in the opening of Supplemental Rule 2(a) were changed to something like this: "A plaintiff pleading a claim for review [on the record] under § 405(g) must plead only * * *."

[12] These elements abbreviate the more elaborate provisions in the draft SSA rule. Any can be expanded.

[13] Rule 4(i)(2) directs that when an officer of the United States is sued in an official capacity service be made on the United States, with a copy mailed to the officer. The bracketed provision that "no other service is required" is designed to exclude separate service on the United States. That approach might be offset by adding to this Supplemental Rule one part of Rule 4(i)(1)(A)(i) for serving the United States, directing that a copy of the complaint be delivered "to the United States Attorney for the district where the action is brought." Whether or not the rule should direct service on the United States Attorney, service on the Attorney General seems unnecessary.

(d) The Answer; Motion; Voluntary Remand; Time. The time for the Commissioner [of Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules of Civil Procedure], or a motion to remand is as follows:

(1) An answer must be served on the plaintiff within 60 days after notice of the action is given under Supplemental Rule 2(c) unless a later time is provided by [Supplemental Rule 2] (d)(4). The answer must include a certified copy[14] of the [complete][15] administrative record.

(2) A motion under [Civil] Rule 12 must be made within 60

There are great advantages in establishing a single electronic mailbox to receive notice of every § 405(g) action. Surely the established CM/ECF system, now or "next gen," should be able to accomplish this easily when the complaint is e-filed. More work will be required with a paper complaint, scanning into an e-record, but the court will do that anyway.

It would be possible to add a paragraph to the Committee Note to provide comfort for district clerks when the system falters.

[14] The SSA draft rules provide that the transcript and all other filings are exempt from any redaction requirements. Rule 5.2(b) exempts the record of an administrative or agency proceeding from its redaction requirements. That does not reach "all other filings." The SSA model complaint requires only the last four digits of the social security number. It is not clear what other redaction requirements may trouble the SSA, nor whether the rule should defeat the court's authority to order redaction in specific circumstances. Consider, for example, the address of a plaintiff who has a fictitious address to protect against harassment.

A C.D.Wash. local rule requires that the administrative record be filed under seal. That seems flatly inconsistent with Rule 5.2(c)(2), which provides that "any other person may have electronic access to the full record at the courthouse."

[15] The record should include both hearing transcripts and what comments describe as "case documents." "Complete" addresses complaints that the Commissioner does not always file a complete record. One example appears to be a rule that allows the Administrative Law Judge to exclude evidence not proffered five days before the hearing. Apparently the excluded evidence is not made part of the record. Perhaps it is better to avoid rule text that undertakes to define the contents of the administrative record. Section 405(g) says only that the Commissioner must "file a certified copy of the transcript of the record including the evidence on which the findings and decision complained of are based." There may be administrative regulations that refine this definition. "Transcript" is omitted from the rule text for now because it may be read too narrowly. Adding "complete" is an open-ended attempt to compromise. More might be added. See Appellate Rule 16, an all-agencies review provision that does define the record, and that authorizes the court to direct that a supplemental record be prepared and filed.

days after notice of the action is given under Supplemental Rule 2(c).

(3) A motion to voluntarily remand the case to the Commissioner may be made at any time.[16] [17]

(4) Unless the court sets a different time or a later time is provided by [Supplemental Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters the time to answer as provided by [Civil] Rule 12(a)(4).[18]

Rule 3. Plaintiff's Motion for Relief; Briefs

(a) Plaintiff's Motion for Relief and Brief. The plaintiff must file and serve on the Commissioner a motion for the relief

---

[16] The sixth sentence of § 405(g) begins like this: "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 * * *." "Before" clearly belongs in rule text. But the motion for voluntary remand often should be supported by the transcript, in part so the plaintiff can respond. Adding "after" seems useful; see note 17 below. Perhaps the rule text should also provide for a motion to defer filing the transcript [for no more than X days] to allow time to decide whether to move for voluntary remand.

[17] There was some discussion of timing in the comments. The view that the Commissioner may not have an idea of the grounds for voluntary remand before filing the record seems cogent. Adding "after" seems useful. But one horrified look at the record may persuade the Commissioner to seek a voluntary remand before preparing a complete record.

[18] Rule 2 does not address Rule 16 pretrial procedures. It has been urged that § 405(g) actions should be exempted from pretrial procedures. But there may be occasions when Rule 16 is useful. One example arises in the relatively rare situations in which discovery is requested. It does not seem necessary to have a draft rule that confirms the role of Rule 16 — Supplemental Rule 1 does that. But if there is a risk that the question will be disputed, a rule provision might look like this:

~~**Rule 3 Case Management**~~

~~The [special]{appellate} character of review on an administrative record should guide management of the action under Rule 16.~~

~~Committee Note~~

~~Supplemental Rule 3 serves to remind the parties and the court that review on the administrative record under § 405(g) is essentially an appeal.~~ It does not support inferences for the procedure in actions for review on an administrative record outside § 405(g). ~~There may be circumstances in which management under Civil Rule 16 is useful, but it seems unlikely that extensive management will often be needed.~~

requested in the complaint and a [supporting] brief,[19] [with references to the record,] within [30] days after the record is filed or 30 days after the court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever is later. [The accompanying brief must support arguments [assertions? statements?] of fact[20] by references to the record.[21] [22]]

(b) Defendant's [Response] Brief.[23] The defendant must file and serve on the plaintiff, within [30] days of service of the plaintiff's motion and brief, a response brief[, supported by references to the record]. [The brief must support arguments [assertions? statements?] of fact by references to the

---

[19] Filing a motion may provide reassurance that the CM/ECF system notices about the progress of the action are more effective.

The analogy to appellate review, however, may suggest that a brief alone suffices:

(a) Plaintiff's [Merits] Brief. The plaintiff must file and serve on the Commissioner a brief supporting the complaint, with references to the record, within 30 days after the record is filed or within [X] days after the court disposes of all motions filed under [Supplemental] Rule 2(d)(2) or (d)(3), whichever is later.

[20] Is it useful to require references to the transcript to support arguments of law? To show that they were made in the agency?

[21] The plaintiff's motion for relief and the supporting brief function in ways similar to the summary-judgment procedure now used by some courts in § 405(g) cases. The motion identifies the evidentiary or legal failures that justify setting aside the Commissioner's decision. The brief points to the parts of the record that support the arguments. But the analogy to summary judgment is imperfect because summary judgment cannot be granted if a case could be decided either way, while the Commissioner's decision must be affirmed if the case could be decided either way.

[22] The SSA draft rules include this: "all page references to the transcript shall be to the transcript page number and not to the docket page number created by the CM/ECF system upon filing the transcript." It seems better to avoid this sort of system-dependent provision.

[23] This draft does not provide for a motion by the Commissioner to affirm. The plaintiff is in the better position to identify the ways in which the Commissioner's decision is not supported by substantial evidence on the record or errs on questions of law. A motion by the Commissioner before the plaintiff has identified the plaintiff's claims may impose on the plaintiff unnecessary burdens to respond.

It would be possible to reverse the sequence of the briefs, so that the first brief is filed by the Commissioner with citations to the record showing the substantial evidence that supports the decision. But it may be difficult to anticipate the arguments that will be made to show the decision is not supported by substantial evidence.

record.]

(c) Reply Brief. The plaintiff may, within 15 days of service of the defendant's brief, file a reply brief and serve it on the defendant.[24]

[24] The SSA draft rule directs that the reply brief "must be limited to responding to Defendant's brief and shall not raise new issues." This limit may be so well understood in practice that it can be omitted. Compare Appellate Rule 28(c). (There has not been any discussion of cross-appeals by the Commissioner.)

Supplemental Rules Governing Actions Under 42 U.S.C. § 405(g)

"Clean" Rules

Rule 1. Scope

(a) Section 405(g). These Supplemental Rules apply to an action brought by an individual or personal representative to obtain review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).

(b) Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure also apply to a proceeding under these Supplemental Rules, except to the extent that they are inconsistent with these Supplemental Rules.

Rule 2. Initiating the Action; Complaint; Service; Answer

(a) Commencing the Action. An action for review under [42 U.S.C.] § 405(g) is commenced by filing a complaint with the court.

(b) The Complaint. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf – or on whose wage record – the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State that the plaintiff [has exhausted all administrative remedies,] that the Commissioner has reached a final decision, and that the action is timely filed;

(5) State [generally {and without reference to the record}] that the administrative decision is not supported by substantial evidence or [rests on] [must be reversed for] errors of [substantive or procedural] law;

(6) State any other ground for relief; and

(7) State the relief requested.

(c) Serving the Complaint. The court must notify the Commissioner [of Social Security] of the commencement of the action by [electronic transmission of]{electronically transmitting} the complaint to the Commissioner at [the]{an} address established by the Commissioner for this purpose. [No other service is required.]

(d) The Answer; Motion; Voluntary Remand; Time. The time for the Commissioner [of Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules of Civil Procedure], or a motion to remand is as follows:

(1) An answer must be served on the plaintiff within 60 days after notice of the action is given under Supplemental Rule 2(c) unless a later time is provided by [Supplemental Rule 2] (d)(4). The answer must include a certified copy of the [complete] administrative record.

(2) A motion under [Civil] Rule 12 must be made within 60 days after notice of the action is given under Supplemental Rule 2(c).

(3) A motion to voluntarily remand the case to the Commissioner may be made at any time.

(4) Unless the court sets a different time or a later time is provided by [Supplemental Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters the time to answer as provided by [Civil] Rule 12(a)(4).

Rule 3. Plaintiff's Motion for Relief; Briefs

(a) Plaintiff's Motion for Relief and Brief. The plaintiff must file and serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief[, with references to the record], within [30] days after the record is filed or 30 days after the court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever is later. [The accompanying brief must support arguments [assertions? statements?] of fact by references to the record.]

(b) Defendant's [Response] Brief. The defendant must file and serve on the plaintiff, within [30] days of service of the plaintiff's motion and brief, a response brief[, supported by references to the record]. [The brief must support arguments [assertions? statements?] of fact by references to the record.]

(c) Reply Briefs. The plaintiff may, within 15 days of service of the defendant's brief, file a reply brief and serve it on the defendant.

Social Security Review Subcommittee

Notes on March 9, 2018 Conference Call

The Social Security Review Subcommittee met by conference call on March 9, 2018. The meeting was attended by Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.. Professor Edward H. Cooper and Professor Richard L. Marcus participated as Reporters. Joshua Gardner, Esq. represented the Department of Justice. Participants from the Administrative Office included Rebecca A. Womeldorf, Esq.; Julie Wilson, Esq.; and Patrick Tighe, Esq..

Judge Lioi opened the meeting with a reminder that the Subcommittee is exploring the question whether to recommend that the Committee approve development of uniform national Enabling Act Rules to govern review under 42 U.S.C. § 405(g) of administrative decisions denying Social Security disability or like claims. The Subcommittee has received information from a survey conducted by the National Organization of Social Security Claimants' Representatives, an informal survey conducted by the American Association for Justice, a letter from the Social Security Administration Office of the General Counsel, and a model local rule prepared by the Executive Office of United States Attorneys. Patrick Tighe, the Rules Law Clerk, has gathered examples of local rules and standing orders setting review procedures. A "bare bones" draft of supplemental rules has been prepared to illustrate the questions that must be asked. The immediate question is whether this draft can be developed into a model, still quite preliminary, that can be used to stimulate further input from the Social Security Administration and groups of lawyers who bring actions for review.

The bare bones draft was introduced with a further reminder of the preliminary nature of present Subcommittee work. The central question remains: Should any effort be made to develop a set of uniform national Enabling Act Rules to govern actions for review under § 405(g)? If rules are to be developed, should they be framed as amendments of some of the present rules — most obviously, Rule 8? Or should they instead be developed as supplemental rules, in the model of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions? The draft is framed as a set of Supplemental Rules, but that is only for purposes of illustration.

The most important challenge facing the draft is reflected in Supplemental Rule 1. The draft is drawn to encompass actions that are more complicated than the simple model encountered in most § 405(g) cases: one plaintiff seeks nothing more than review on the administrative record, naming only the Commissioner of Social Security as defendant. Even in the simple action, the Civil Rules provide an essential framework within which the Supplemental Rules operate. But rules that extend beyond the simple action generate

complicated issues of integrating procedure for the additional parts of the action with the procedure for the § 405(g) review on the record. The draft sets out a model that includes two channels. One channel, for § 405(g) review, directs a pared-down complaint, provides that the Commissioner's answer is to be nothing more than the complete administrative record, seeks to limit the grounds that can be urged by a motion to dismiss, eliminates summary judgment, provides a reminder that Rule 16 pretrial conferences should be displaced as unnecessary or limited because § 405(g) review is essentially appellate in character, and establishes a briefing procedure that is the first occasion for specific examination of the asserted lack of substantial evidence to support the administrative decision. The other channel essentially invokes the ordinary course of the Civil Rules for all parts of the action that raise claims beyond § 405(g) review.

It also was noted that widespread reviews endorse the Supplemental Rule 2 provision for bypassing Civil Rule 4(i) procedures for serving the summons and complaint in favor of electronic service on the Commissioner by the court.

Discussion began with an expression of concern about the interplay between the provisions that limit the answer to the administrative record and those that limit the grounds for motions to dismiss. Is there a risk that these limits would abridge substantive rights? More specifically, is there a risk of forced waiver through Rule 8? It is hard to think of illustrations outside the grounds for dismissal in draft Supplemental Rule 3 — timely filing, failure to exhaust administrative remedies or the lack of a final administrative decision, or filing in the wrong court. But it remains a matter for concern. What reason is there to tie the Commissioner's hands by foreclosing any ground that may be available for dismissal? Suppose the complaint shows on its face that the claim is unsupportable, for example by advancing an untenable legal theory?

One reason to allow the Commissioner to advance any ground for dismissal is to avoid the burden of preparing and submitting the administrative record. The limited grounds for dismissal identified in the draft rule may be only a subset of other grounds that might even be more common. On the other hand, it can be important to get the record on file. The claimant can present the arguments on review more effectively when the full record is available.

An alternative suggestion was offered to protect against the burden of filing the administrative record. The answer could be opened up to the usual scope, supporting presentation of issues that could lead to dismissal before the record is filed.

A different perspective was offered to question the draft ruleon motions. A pro se litigant is likely to find the entire notion of motions confusing, even though the rule is addressed in the first instance to the Commissioner.

The next suggestion was that although the draft may achieve efficiencies in some dimensions, it may create inefficiencies in others. Limiting the answer to the administrative record, and limiting the grounds for moving to dismiss, may mean that some issues come into the case in disorderly fashion, later than should be, causing delay and confusion.

Limiting the answer also raises concerns about affirmative defenses. Two that come to mind are res judicata and estoppel — it is difficult to assert estoppel against the government, but not impossible. Other affirmative defenses also might be available; the question should be pursued further, beginning with the Department of Justice. The draft may need to be revised to make express provision for pleading affirmative defenses.

Yet a different question was asked about the time to answer. If the provision for electronic service on the Commissioner were adopted, should that affect the time to answer? The Department of Justice could explore that question.

Turning to summary judgment, similar questions were asked. What reason is there to oust summary judgment, even when the motion is addressed to the presence or absence of substantial evidence in the administrative record?

A distinct question was prompted by the question about summary judgment. District judges are required to report on the disposition of motions. There is no reporting requirement attached to briefs. The draft procedure that establishes briefing as the central means of bringing the case on for decision creates a risk that a case may be lost from sight. But this might be addressed by combining the procedures in a motion for the relief requested in the complaint, supported by a brief that addresses any legal issues and relies on specific references to the record to show the absence of substantial evidence.

A related question was whether a similar motion should be provided for the Commissioner. It could be a motion to affirm, supported by a brief pointing to the parts of the record that show substantial support for the Commissioner's decision. The motion would be similar to a motion for judgment on the pleadings because the answer includes the administrative record, and also similar to a motion for summary judgment. The question is whether it is useful to allow the Commissioner to take the lead before the plaintiff has had an opportunity to frame the issues.

The problems of integrating special § 405(g) review procedures with the general Civil Rules were raised by pointing to the failure of the draft rules to provide for suspending the time to answer by filing the administrative record when a motion is made that, under Rule 12, would suspend the time to answer. To be sure, it may be useful to get the administrative record on file, particularly for the plaintiff's benefit. The benefit could begin with better support for arguing against the motion. But the prospect remains

that there would be two deadlines for answering — one for the answer addressed to the § 405(g) claim, which is only the administrative record, and the other for the rest of the answer. That could generate more complication than should be visited on the Commissioner's lawyers. There might even be arguments that a first answer confined to filing the administrative record waives all other defenses because they were not included in the "answer."

Discussion turned to draft Supplemental Rule 4: "The [special][appellate] character of review on an administrative record should guide management of the action under Rule 16." Doubts were expressed about the need for this reminder. District judges understand the nature of the review process, and at the same time it seems awkward to refer to the civil action prescribed by § 405(g) as an appeal. The rule, moreover, might generate negative implications for the many actions for review on an administrative record under the Administrative Procedure Act. This problem can be fixed by dropping Rule 4. The Committee Notes might somewhere include a reminder that the appellate review characteristics of these actions shape the Supplemental Rules.

Supplemental Rule 5(c)(2) also was questioned. It may be better to omit any provision for sur-reply briefs. There are few occasions that warrant them, and the court remains free to accept one without need for a rule that may encourage inappropriate requests.

Alternatives to pursuing this project at present were noted. The Executive Office of United States Attorneys has prepared a model local rule for social security review cases. It may be hoped that several districts will adopt this model, even some districts that already have local rules. The model local rule could be treated as a pilot project, generating information that in a few years could show whether there is anything to be gained by national rules. Of course relying on this local rule as a pilot will defer action for a few years, but the gains might be worth it.

The discussion concluded by suggesting the elimination of the draft Supplemental Rule 3 that limits motions to dismiss and motions for summary judgment, and also Rule 4 on pretrial management. Rule 5 should be revised to include a motion by the plaintiff for the requested relief, combined with a brief that states the fact issues in detail.

Although substantial revisions in the draft will be required, it makes sense to present a revised draft to the Committee in April. The recommendation would be that the revised draft be used as a heuristic device to stimulate advice from experienced social security litigators on all sides. The necessary caveats should be stated explicitly, both in the recommendation to the Committee and in subsequent requests for outside advice. The first caveat is that the purpose of seeking advice is to help decide whether to move toward preparation of rules that might be recommended for publication and comment. Seeking advice on an illustrative draft

does not represent any commitment to an eventual recommendation to adopt uniform national rules. The second caveat is that the draft is presented solely to stimulate critical examination. If there are to be uniform national rules, they may look quite different from the draft. The only purpose is to learn more — much more — about what procedures might be useful for these cases.

THIS PAGE INTENTIONALLY BLANK

Excerpt from the November 2017 Minutes: Social Security Disability Claims Review

Judge Bates introduced the proposal by the Administrative Conference of the United States (ACUS) that explicit rules be developed to govern civil actions under 42 U.S.C. § 405(g) to review denials of individual disability claims under the Social Security Act.

The Standing Committee has decided that this subject should be considered by the Civil Rules Committee. The work has started. An informal Subcommittee was formed. Initial work led to a meeting on November 6 with representatives of several interested groups. The meeting resembled a hearing. Matthew Wiener, Executive Director and acting Chair of the Administrative Conference, made the initial presentation. Asheesh Agarwal, General Counsel of the Social Security Administration, followed. Kathryn Kimball, counsel to the Associate Attorney General, represented the Department of Justice. And Stacy Braverman Cloyd, Deputy Director of Government Affairs, the National Organization of Social Security Claimants' Representatives, presented the perspective of claimant representatives. Susan Steinman, from the American Association for Justice, also participated. Professor David Marcus, co-author with Professor Jonah Gelbach of a massive study that underlies the ACUS proposal, participated and commented by video transmission.

Social Security disability review annually brings some 17,000 to 18,000 cases to the district courts. The national average experience is that 45% of these cases are remanded to the Social Security Administration, including about 15% of the total that are remanded at the request of the Social Security Administration.

Here, as generally, there is some reluctance about formulating rules for specific categories of cases. But such rules have been adopted. The rules for habeas corpus and § 2255 proceedings are familiar. Supplemental Rule G addresses civil forfeiture proceedings. A few substance-specific rules are scattered around the Civil Rules themselves, including the Rule 5.2(c) provisions for remote access to electronic files in social security and some immigration proceedings. It is important to keep this cautious approach in mind, both in deciding whether to recommend any rules and in shaping any rules that may be recommended.

One problem leading to the request for explicit rules is that a wide variety of procedures are followed in different districts in § 405(g) cases. Some districts have local rules that address these cases. The rules are by no means consistent across the districts. Other

districts have general orders, or individual judge orders, that again vary widely from one another. The result imposes costs on the Social Security Administration as its lawyers have to adjust their practices to different courts — it is common for Administration lawyers to practice in several different courts. The disparities in practice may raise issues of cost, delay, and inefficiency. As essentially appellate matters, these cases are in some ways unique to district-court practice, and there are many of them. These considerations may support adoption of specific uniform rules that displace some of the local district disparities.

At the same time, most of the problems that give rise to high remand rates lie in the agency. Delays are a greater issue in the administrative process than in the courts. And there are great disparities in the rates of remands across different districts, while rates tend to be quite similar among different judges in the same district, and also to cluster among districts within the same circuit. There is sound ground to believe that these disparities arise in part from different levels of quality in the work done in different regions of the Social Security Administration.

The people who appeared on November 6 did not present a uniform view. The Administrative Conference believes that a uniform national rule is desirable. The Social Security Administration strongly urges this view. But discussion seemed to narrow the proposal from the highly detailed SSA rule draft advanced to illustrate the issues that might be considered. There was not much support for broad provisions governing the details of briefing, motions for attorney fees, and like matters. Most of the concern focused on the process for initiating the action by a filing essentially equivalent to a notice of appeal; service of process — the suggestion is to bypass formal service under Rule 4(i) in favor of electronic filing of the complaint to be followed by direct transmission by the court to the Social Security Administration; and limiting the answer to the administrative record. There has been some concern about how far rules can embroider on the § 405(g) provision for review by a "civil action" and for filing the transcript of the record as "part of" an answer.

Beyond these initial steps, attention turned to the process of developing the case. It was recognized that there are appropriate occasions for motions before answering — common occasions are problems with timeliness in filing, or filing before there is a final administrative decision. Apart from that, the focus has been on framing the issues in an initial brief by the

claimant, followed by the Administration's brief and, if wished, a reply brief by the claimant.

Discovery was discussed, but it has not really been an issue in § 405(g) review proceedings.

Discussion also extended to specific timing provisions and length limits for briefs. These are not subjects addressed by the present Civil Rules. And the analogy to the Appellate Rules may not be perfect.

Professor Marcus added that the Conference and other participants agreed that adopting uniform procedures for district-court review is not likely to address differences in remand rates, differences among the circuits in substantive social-security law, or the underlying administrative phenomena that lead to these differences. There was an emphasis on different practices of different judges. Local rules and individual practices must be consistent with any national rule that may be developed, but reliance must be placed on implicit inconsistency, not on explicit rule language forbidding specific departures that simply carry forward one or many of the present disparate approaches.

Further initial discussion elaborated on the question of serving notice of the review action. The Social Security Administration seems to be comfortable with the idea of dispensing with the Rule 4(i) procedure for serving a United States agency. Direct electronic transmission of the complaint by the court is more efficient for them. This idea seems attractive, but it will be necessary to make sure that it can be readily accomplished by the clerks' offices within the design of the CM/ECF system. Some claimants proceed pro se in § 405(g) review cases, and are likely to file on paper even under the proposed amendments of Rule 5. The clerk's office then would have to develop a system to ensure that electronic transmission to the Administration occurs after the paper is entered into the CM/ECF system.

This presentation also suggested that the question whether it is consistent with § 405(g) to adopt the simplified complaint and answer proposals may not prove difficult. The Civil Rules prescribe what a complaint must do, and that is well within the Enabling Act. Prescribing what must be done by a complaint that initiates a "civil action" under § 405(g) seems to fall comfortably within this mode. So too the rules prescribe what an answer must do. A rule that prescribes that the answer need do no more than file the administrative record again seems consistent both with § 405(g) and the Enabling Act. The rules committees are very reluctant to exercise the supersession power, for very good reasons.

But there is no reason to fear supersession here.

A member of the informal Subcommittee noted that none of the stakeholders in the November 6 meeting suggested that uniform procedures would affect the overall rate of remands or the differences in remand rates between different districts. The focus was on the costs of procedural disparities in time and expense.

Another Subcommittee member said that the meeting provided a good discussion that narrowed the issues. The focus turned to complaint, answer, and briefing. Remand rates faded away.

Yet another Subcommittee member noted that she had not been persuaded at first that there is a need for national rules. But now that the focus has been narrowed, it is worthwhile to consider whether we can frame good rules. As one of the participants in the November 6 discussion observed, good national rules are a good thing. Bad national rules are not.

Professor Coquillette provided a reminder that there are dangers in framing rules that focus on specific subject-matters. Transsubstantivity is pursued for very good reasons. The lessons learned from rather recent attempts to enact "patent troll" legislation provide a good example. It would be a mistake to generate Civil Rules that take on the intricacy and tendentiousness of the Internal Revenue Code. But § 405(g) review proceedings can be addressed in a way that focuses on the appellate nature of the action, distinguishing it from the ordinary run of district-court work. Even then, a rule addressed to a specific statutory provision runs the risk that the statute will be amended in ways that require rule amendments. And above all, the Committee should not undertake to use the supersession power.

A judge suggested that this topic is worth pursuing. Fifteen to twenty of these review proceedings appear on his docket every year. These cases are an important part of the courts' work. Both the Administrative Conference and the Social Security Administration want help.

Another judge agreed. A Civil Rule should be "very modest." The Federal Judicial Center addresses these cases in various ways. They are consequential for the claimants. The medical-legal issues can be complicated. Better education for judges can help. The problems mostly lie in the administrative stages. But it is worthwhile to get judges to understand the importance of these cases.

Another judge observed that the importance of disability review cases is marked by the fact that they

are one of the five categories of matters included in the semi-annual "six month" reports. The event that triggers the six-month period occurs after the initial filing, so a case is likely to have been pending for nine or ten months before it must be included on the list, but the obligation to report underscores the importance of prompt consideration and disposition. There is at least a sense that the problems of delay arise in the agency, not in the courts.

A Committee member observed that § 405(g) expressly authorizes a remand to take new evidence in the agency. "This is different from the usual review on the administrative record." This difference may mean that at times discovery could be helpful. "We should remember that this is not purely review on an administrative record."

A judge noted that the discussion on November 6 suggested that discovery has not been an issue in practice.

A Committee member observed that other settings that provide for adding evidence not in the administrative record include some forms of patent proceedings and individual education plans. In a different direction, she observed that the emphasis on the annual volume of disability review proceedings in arguing for uniform national rules sounds like the questions raised by the agenda item on multidistrict litigation. If we consider this topic, we should consider how it plays out across other sets of problems.

Another judge renewed the question: Do the proposals for uniform rules deviate from the principle that counsels against substance-specific rules?

Judge Bates responded that neither the Administrative Conference nor the Social Security Administration have linked the procedure proposals to the remand rate. They are concerned with the inefficiencies of disparate procedures.

A Committee member asked whether it is possible to adopt national rules that will really establish uniformity. Local rules, standing orders, and individual case-management practices may get in the way.

A judge responded that one reason to have local rules arises from the lack of a national rule. The Northern District of Illinois has a new rule for serving the summons and complaint in these cases. "It's all about consent; the Social Security Administration consents all the time." But "local rules are antithetical to national

uniformity." If national rules save time for the Social Security Administration, that will yield benefits for claimants and for the courts. Another judge emphasized that local rules must be consistent with the national rules, but it can be difficult to police. At the same time, still another judge noted that the Federal Judicial Center can educate judges in new rules. And a fourth judge observed that local culture makes a difference, but "some kind of uniformity helps."

Judge Bates concluded the discussion by stating that the Committee should explore these questions. A start has been made. The Subcommittee will be formally structured, and will look for possible rule provisions. We know that the Southern District of Indiana is working on a rule for service in disability review cases.

Rules for District Court Review of a Final Administrative Decision of the Commissioner of Social Security

1. *Scope*. These Rules shall apply to actions under the Social Security Act brought by an individual Plaintiff seeking district court review of a final administrative decision of the Commissioner of Social Security (Defendant) pursuant to 42 U.S.C. § 405(g). These Rules shall also apply to a claim brought under other sections of the Social Security Act that incorporate the judicial review procedures in 42 U.S.C. § 405(g) by reference.[1] These Rules shall not apply to any other action, for example (1) actions that include claims against the Commissioner of Social Security in addition to, or other than, those brought pursuant to 42 U.S.C. § 405(g); (2) actions that include multiple plaintiffs or a class action; or (3) actions that include defendants other than the Commissioner of Social Security.[2]

2. *Commencing an action*. To commence an action under 42 U.S.C. § 405(g) to review a final administrative decision of Defendant, Plaintiff shall file with the court a petition for review, and the court's Case Management and Electronic Case Files (CM/ECF) system will generate a notice of suit to the Social Security Administration's Office of the General Counsel.

    a. *Service of petition for review.*[3] Unless otherwise ordered, no service of initial process (i.e., summons and complaint) is required. Defendant shall treat notification of suit through the CM/ECF system as proper service, but nothing in these Rules shall be deemed to be a waiver of service under the Federal Rules of Civil Procedure.

    b. *Contents and form of petition for review.*[4] Use of the model "Petition for Review of Social Security Administration Decision" that appears at Appendix A is strongly encouraged. If the model is not used, the petition must be in substantially the same form and include the same content as the model. The petition for review must not include any attachments or evidence, nor may it include argument or allegations as to the substance of the administrative decision that is the subject of the petition.

[1] Each of these provisions incorporates 42 U.S.C. § 405(g) by reference: 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III).

[2] *See, e.g.*, General Order #18(B) (N.D.N.Y.); L.Civ.R. 9.1(a) (D.N.J.); Amended General Order 04-15 (W.D. Wash.).

[3] *See, e.g.*, General Order #18(B) (N.D.N.Y.); NDIL LR 4(b) (N.D. Ill.); Amended General Order 04-15 (W.D. Wash.); GO-17-10 (N.D. Okla.); *see also* CDIL-LR 8.1(C) (C.D. Ill.) (with respect to plaintiffs proceeding in forma pauperis but requiring traditional service on Attorney General).

[4] *See, e.g.*, Local Rule 3 (D. Me.); W.D. Va. Gen. R. 4(b)(1) (W.D. Va.); LR 9.2 (E.D. La.); Local Civil Rule 9(b) (M.D. La.); Form re Appeal of Social Security Administration Decision (W.D. La.); Procedures In Social Security Disability Appeals (a) (E.D. Wis.); N.D. Ind. L.R. 7-3(a) (for pro se plaintiffs); Local Rule 83.6(b) (D. Wyo.).

3. *Defendant's response to Plaintiff's petition for review*

   a. *Filing and service of Defendant's response.* Within 60 days[5] after receiving notification of suit through the court's CM/ECF system, Defendant must file with the court and serve on Plaintiff either:

      i. a dispositive motion[6] (see Rule 5(b) of these Rules); or

      ii. a certified copy of the transcript of the administrative record (transcript), which shall be deemed an answer to Plaintiff's petition for review.[7] If an electronic copy of the transcript is available, no separate paper copy shall be required. In any filings before the court, all page references to the transcript shall be to the transcript page number and not to the docket page number created by the CM/ECF system upon filing the transcript.

   b. *Redaction.*[8] The transcript and all other filings are exempt from any redaction requirements.

   c. *Defects.*[9] If a party discovers a material omission from, improper submission within, or other similar defect in the transcript, the party must promptly notify the court and the opposing party. When appropriate, Defendant will file a supplemental or amended certified copy of the transcript, and the briefing deadlines set out in Rule 4(b) of these Rules will be calculated from the filing of the supplemental or amended transcript. If the omission or other defect cannot be cured by filing a supplemental or amended transcript within 60 days from the date the court is notified, Defendant will file a motion to remand in accordance with Rule 5(c) of these Rules.

4. *Briefing requirements*

   a. *No separate motion or proposed order/judgment.* The briefs identified below shall not be accompanied by a separate motion or proposed order or judgment.[10]

[5] *See, e.g.*, L.R. 9(a)(1) (D. Vt.); L.Civ.R. 9.1(c) (D.N.J.); LR Civ P 9.02 (N.D.W. Va.).

[6] *See, e.g.*, General Order #18(C) (N.D.N.Y.); LR Civ P 9.5(a) (S.D.W. Va.).

[7] *See, e.g.*, Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); Administrative Order 2006-1 (D. Md.); Procedures In Social Security Disability Appeals (a) (E.D. Wis.); S.D. Ohio Civ. R. 8.1 (S.D. Ohio); LR 8.1(b) (N.D. Ill.); N.D. Ind. L.R. 7-3(a); GO-16-09 (N.D. Okla.); Local Rule 83.6(b) (D. Wyo.).

[8] *See, e.g.*, LR Civ P 9.3(c) (S.D.W. Va.).

[9] *See, e.g.*, LR Civ P 9.3(e) (S.D.W. Va.); Local Rule 9.1(c)(1) (W.D. Mo.); D. Kan. Rule 83.7.1(b)(2) (D. Kan.).

[10] *See, e.g.*, LR 16.4(a) (N.D. Ill.).

b. *Deadlines and content of briefs*

i. *Plaintiff's opening brief.* Plaintiff shall file and serve on Defendant an opening brief, which shall be titled "Plaintiff's Opening Brief," within 60 days[11] of service of the transcript.

1. Plaintiff's opening brief may, but need not, include a table of contents, a table of citations,[12] and a statement of the facts relevant to the issues raised in the brief. If Plaintiff includes a statement of facts, it must include citations supporting each assertion.[13]

2. Plaintiff's opening brief shall set out, on page one, the relief requested and the errors alleged. The rest of the brief shall contain separate headings for each argument and the related arguments and errors alleged underneath each heading.[14]

3. Absent exceptional circumstances, a request for remand under sentence six of 42 U.S.C. § 405(g) shall be made in (and supporting evidence shall be submitted with) Plaintiff's opening brief.

ii. *Defendant's response brief.* Defendant shall file and serve on Plaintiff a response brief, which shall be titled "Defendant's Response Brief," within 60 days[15] of service of Plaintiff's opening brief. Defendant's response brief may, but need not, include a table of contents, a table of authorities,[16] and a statement of facts.[17] If Defendant includes a statement of facts, it must include citations supporting each assertion. The omission of a

[11] *See, e.g.*, L.R. 9(a)(2) (D. Vt.); Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); L.R.Civ.P. 5.5(b) (W.D.N.Y.).

[12] *See, e.g.*, LR Civ P 9.4(b) (S.D.W. Va.).

[13] *See, e.g.*, General Order #18(C)(1)(b) (N.D.N.Y.); LR 83.40.4(b) (M.D. Pa.); Social Security Briefing Order (3), 3:16MC198 (W.D.N.C.); General Order No. 2015-05 (2)(c) (D. Neb.); LRCiv 16.1(a)(3) (D. Ariz.).

[14] *See, e.g.*, General Order #18(C)(1)(c) (N.D.N.Y.); General Order 13-7 (3)(b) (E.D. Ky.); Administrative Order No. 10-074 (W.D. Mich.); General Order No. 2015-05 (2)(d) (D. Neb.); LRCiv 16.1(a)(4) (D. Ariz.).

[15] *See, e.g.*, L.R. 9(a)(3) (D. Vt.); Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); L.R.Civ.P. 5.5(b) (W.D.N.Y.).

[16] *See, e.g.*, LR Civ P 9.4(b) (S.D.W. Va.).

[17] *See, e.g.*, General Order #18(C)(2) (N.D.N.Y.); L.Civ.R. 9.1(e)(6) (D.N.J.); LR 83.40.5 (M.D. Pa.); Standing Order for Disposition of Social Security Appeals (Sept. 2, 1994, W.D. La.); LRCiv 16.1(b) (D. Ariz.).

statement of facts shall not be deemed an admission of the accuracy or completeness of any statement of facts in Plaintiff's opening brief.

iii. *Reply briefs*

1. Plaintiff may file and serve on Defendant a reply brief, which shall be titled "Plaintiff's Reply to Defendant's Response Brief," within 15 days[18] of service of Defendant's response brief. Plaintiff's reply brief must be limited to responding to Defendant's brief and shall not raise new issues.[19]

2. Upon leave of court, Defendant may file and serve on Plaintiff a surreply brief, which shall be titled "Defendant's Reply to Plaintiff's Reply Brief," within 15 days of service of Plaintiff's reply brief, if any.

iv. *Citations and exhibits.* All arguments must include citations to the transcript and to the relevant legal authority for each argument.[20] Materials, including unpublished cases or agency policies, that are publically available, including through online resources such as Westlaw or Lexis, need not be attached as exhibits.[21]

c. *Page limits*

i. Unless the court grants a motion for leave to exceed these page limits, opening and response briefs shall not exceed 15 double-spaced pages[22] in Times New Roman 12-point font with one-inch margins, and reply briefs, if any, shall not exceed 10 double-spaced pages[23] in Times New Roman 12-point font with one-inch margins.

[18] *See, e.g.*, L.Civ.R. 9.1(e)(3) (D.N.J.); S.D. Ohio Civ. R. 8.1(b) (S.D. Ohio); LRCiv 16.1(d) (D. Ariz.).

[19] *See, e.g.*, Social Security Briefing Order (6), 3:16MC198 (W.D.N.C.); General Order No. 2015-05 (4) (D. Neb.); DUCivR 7-4(b)(1)(C) (Utah).

[20] *See, e.g.*, General Order #18(C) (N.D.N.Y.); LR 83.40.4 (M.D. Pa.); LR Civ P 9.02(g) (N.D.W. Va.); LR Civ P 9.4(b) (S.D.W. Va.); Standing Order for Disposition of Social Security Appeals (Sept. 2, 1994, W.D. La.); General Order 13-7 (3)(c) (E.D. Ky.); Standing Order Number 4 (S.D. Ala.).

[21] *Cf.* Standing Order Number 4 (S.D. Ala.).

[22] *See, e.g.*, LR 83.40.7 (M.D. Pa.); LR Civ P 9.02(e) (N.D.W. Va.); General Order 13-7 (1) (E.D. Ky.); E.D.Mo. L.R. 56 – 9.02 (E.D. Mo.); Standing Order Number 4 (S.D. Ala.).

[23] *See, e.g.*, Social Security Procedural Order (4) (D. Mass.); LR 83.40.7 (M.D. Pa.); LR Civ P 9.4(b) (S.D.W. Va.); E.D.Mo. L.R. 56 – 9.02 (E.D. Mo.); DUCivR 7-4(b)(2) (Utah).

ii. Parties must obtain leave of the court to exceed these page limits. A motion for leave to exceed the page limits must include a statement of the reasons additional pages are needed and specify the number required. The court will grant such requests only for a showing of exceptional circumstances that justify the need to exceed the specified page limits.[24] If the court grants such a request for Plaintiff's opening brief, Defendant will automatically receive the same page-length enlargement for the response brief.

d. *Failure to comply*. The court shall, on its own initiative or upon the motion of either party, strike any brief that does not comply with this rule. If the court strikes a brief, the party whose brief was struck must, within seven days, refile a brief that complies with the court's order and these Rules.

5. *Motion practice*

a. *Extensions of time.* On request, the court shall grant a 30-day extension of the deadline to file Defendant's response to Plaintiff's petition for review and of either party's first briefing deadline.[25] Any other extension requests may be granted at the court's discretion. If the court grants an extension of time for any brief or motion under these Rules, the opposing party will automatically receive an extension of the same amount of time to file a responsive brief or motion.[26] A party may request an extension at any time, including on the original due date.

b. *Dispositive motions prior to filing the transcript.*[27] Within the time to file and serve Defendant's response to Plaintiff's petition for review, Defendant may file and serve on Plaintiff a dispositive motion in accordance with the Federal Rules of Civil Procedure. Plaintiff may respond within 30 days of service of Defendant's motion. If the court denies such a motion, Defendant must file the transcript in accordance with Rule 3(a)(ii) of these Rules within 60 days of such denial.

c. *Motions for remand*.[28] If Defendant files a motion for remand for further administrative action, Defendant must serve the motion on Plaintiff and state whether Plaintiff consents to the remand. If Plaintiff has not given consent,

[24] *See, e.g.*, DUCivR 7-4(b)(2) (Utah); Administrative Order No. 10-074 (W.D. Mich.).

[25] *See, e.g.*, Local Civil Rule 9.3 (M.D. Ga.); D.Ak. L.R. 16.3(d).

[26] *See, e.g.*, LR Civ P 9.02(f) (N.D.W. Va.).

[27] *See, e.g.*, General Order #18(C) (N.D.N.Y.); LR Civ P 9.3(a), 9.5(a)(1) (S.D.W. Va.).

[28] *See, e.g.*, W.D. Va. Gen. R. 4(c)(4) (W.D. Va.); *see also* General Order #18(C) (N.D.N.Y.); LR Civ P 9.5(a) (S.D.W. Va); LR 4000-6 (D. Or.).

Plaintiff must file a reply with the grounds for objection within 15 days of service of Defendant's motion, or the court will assume that Plaintiff consents to remand. Any deadlines pending when such a motion is filed will be held in abeyance while the court considers the motion and reply, if any.

6. *Fees and costs*

   a. *Petitions for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412*

      i. Petitions for fees and expenses under the EAJA are governed by the requirements and procedures set forth in that Act.[29] Unless stipulated, a petition for fees and expenses under 28 U.S.C. § 2412(d) shall not be filed before the judgment at issue is final and not appealable (i.e., a petition not agreed upon shall not be filed before the 61st day after entry of judgment). Unless stipulated, the court will strike any premature petition as improperly filed.

      ii. Defendant must file any objection to a petition for fees and expenses under the EAJA within 30 days of service of the petition. If Defendant does not object, no response is required.

   b. *Requests for costs under 28 U.S.C. §§ 1920 and 2412(a)*. Requests for costs under 28 U.S.C §§ 1920 and 2412(a) must be separately itemized from attorney's fees and expenses sought under 28 U.S.C. § 2412(d).

   c. *Petitions for attorney's fees under 42 U.S.C. § 406(b)*

      i. *Timing of petition.*[30] Plaintiff's counsel may file a petition for attorney's fees under 42 U.S.C. § 406(b) no later than 60 days after the date of the final notice of award sent to Plaintiff's counsel of record at the conclusion of Defendant's past-due benefit calculation stating the amount withheld for attorney's fees. The court will assume that counsel representing Plaintiff in federal court received any notice of award as of the same date that Plaintiff received the notice, unless counsel establishes otherwise.

      ii. *Service of petition.* Plaintiff's counsel must serve a petition for fees on Defendant and must attest that counsel has informed Plaintiff of the request.

[29] *See, e.g.*, LR Civ P 9.6 (S.D.W. Va.); LCivR 54.2(a) (W.D. Mich.).

[30] *See, e.g.*, LR 4000-8 (D. Or.) (providing for 60 days); Local Civil Rule 7.1(d) (E.D.N.C.) (65 days); Local Civ. Rule 83.VII.07(A) (D.S.C.) (60 days); *see also* LR Civ P 9.6 (S.D.W. Va.) (motion must be filed "promptly"); S.D. Ohio Civ. R. 54.2(b) (45 days); LCivR 54.2(a) (W.D. Mich.) (35 days); LR 54.2 (E.D. Mich.) (14 days); LR 7.2(e) (D. Minn.) (30 days); Order No. 6:12-MC-124-ORL-22 (M.D. Fla.) (30 days).

iii. *Contents of petition.*[31] The petition for fees must include:

1. a copy of the final notice of award showing the amount of retroactive benefits payable to Plaintiff (and to any auxiliaries, if applicable), including the amount withheld for attorney's fees, and, if the date that counsel received the notice is different from the date provided on the notice, evidence of the date counsel received the notice;

2. an itemization of the time expended by counsel representing Plaintiff in federal court, including a statement as to the effective hourly rate (as calculated by dividing the total amount requested by the number of hours expended);

3. a copy of any fee agreement between Plaintiff and counsel;

4. statements as to whether counsel:

    a. has sought, or intends to seek, fees under 42 U.S.C. § 406(a) for work performed on behalf of Plaintiff at the administrative level;

    b. is aware of any other representative who has sought, or who may intend to seek, fees under 42 U.S.C. § 406(a);

    c. was awarded attorney's fees under the EAJA in connection with the case and, if so, the amount of such fees; and

    d. will return the lesser of the EAJA and 42 U.S.C. § 406(b) awards to Plaintiff upon receipt of the 42 U.S.C. § 406(b) fee award.

5. any other information the court would reasonably need to assess the petition.

iv. *Response.*[32] Defendant may file a response within 30 days of service of the petition, but such response is not required.

[31] *See, e.g.*, Local Civ. Rule 83.VII.07(B) (D.S.C.); LCivR 54.2(b)(iii) (W.D. Mich.); LR 54.2 (E.D. Mich.); LR 4000-8 (D. Or.).

[32] *See, e.g.*, Local Civ. Rule 83.VII.07(C) (D.S.C.); LCivR 54.2(v) (W.D. Mich.); Order No. 6:12-MC-124-ORL-22 (M.D. Fla.).

7. *Conferences, discovery, alternate dispute resolution, oral argument, and written orders and judgments*

    a. Actions subject to these Rules are exempt from any pre-trial conference procedures, including requirements that parties meet and confer about the issues in the case, discuss settlement, or prepare joint briefs or joint statements of facts.

    b. Discovery is not permitted in actions covered by these Rules.[33]

    c. Actions subject to these Rules, including related attorney fee matters, are not eligible for alternative dispute resolution such as arbitration or mediation.

    d. The court will decide actions subject to these Rules on the pleadings and briefs without oral argument, unless the court determines that the facts and legal arguments are not adequately presented in the briefs and transcript or that oral argument will significantly aid the decisional process.[34] If oral argument is held, counsel for either party shall be permitted, upon request, to appear via telephone or, if available, video conference.[35]

    e. In every case, the court shall issue a written order setting forth the basis for its decision and, where judgment is entered, a separate judgment. If the court orders remand, the court shall specify whether the remand is pursuant to sentence four or sentence six of 42 U.S.C. § 405(g).

8. *Other rules*

    a. Any procedural issues not addressed by these Rules continue to be governed by the Federal Rules of Civil Procedure.

    b. The provisions of these Rules take precedence over the provisions of any other local rule in conflict.[36]

[33] *See, e.g.*, LR Civ P 9.3(d) (S.D.W. Va.).

[34] *See, e.g.*, General Order #18(C) (N.D.N.Y.); L.Civ.R. 9.1(f) (D.N.J.); LR Civ P 9.8 (S.D.W. Va.); Social Security Briefing Order (7), 3:16MC198 (W.D.N.C.); W.D. Va. Gen. R. 3(c)(2) (W.D. Va.); Procedures In Social Security Disability Appeals (d) (E.D. Wis.); LR 7.2(c)(2) (D. Minn.); Local Rule 9.1(d)(1) (W.D. Mo.); General Order No. 2015-05 (6) (D. Neb.); LRCiv 16.1(e) (D. Ariz.); Civil L.R. 16-5 (N.D. Cal.); D. Kan. Rule 83.7.1(d) (D. Kan.); Local Rule 83.6(c) (D. Wyo.).

[35] *See, e.g.*, W.D. Va. Gen. R. 3(c)(2) (W.D. Va.).

[36] *See, e.g.*, LR Civ P 9.9 (S.D.W. Va.); Local Rule 9.1(e) (W.D. Mo.).

Appendix A – Model Petition for Review

IN THE UNITED STATES DISTRICT COURT
FOR THE _____

_____,	)	
	)	
Plaintiff,*	)	
	)	
v.	)	Civil Action No. _____
	)	
_____,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

Petition for Review of Social Security Administration Decision

1. Plaintiff's name* is: _____.
   Plaintiff also uses or has used the following other name(s) (if applicable):
   _____.
   Plaintiff lives in _____ (name of State),
   in _____ (name of city or town),
   in _____ County.

2. The last four digits of the social security number of Plaintiff (and of the person on whose behalf Plaintiff is bringing this petition, or of the relevant wage earner, as applicable) are _____.

3. Defendant is the Commissioner of Social Security.

4. Plaintiff is bringing this action under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to review a final decision of the Commissioner of Social Security as to a claim (or claims) under:
   (check the box that applies)
   ☐ title II (for claims relating to a period of disability and disability insurance benefits),
   ☐ title XVI (for claims relating to supplemental security income),
   ☐ both title II and title XVI, or
   ☐ other title(s)
   of the Social Security Act. Plaintiff has exhausted all administrative remedies. An ALJ issued a decision on _____. (If applicable) The Appeals

* If Plaintiff is filing this case on behalf of someone else, include that other person's full name as well, unless the other person is under age 18, in which case, use that other person's initials and include, in paragraph 2, the last four digits of the minor's social security number.

Council denied Plaintiff's request for review or granted Plaintiff's request for review and issued a decision on _____.

5. Plaintiff disagrees with the decision in this case because it is not supported by substantial evidence or contains errors of law.

6. Plaintiff asks that the Commissioner's final decision be reviewed and set aside and that the case be remanded for a new hearing and decision, modified, or reversed for a calculation of benefits, and for any other relief as the Court deems appropriate.

Date: _____

If Plaintiff is unrepresented:

Signature: _____

Printed name: _____

Plaintiff's address: _____

_____

Plaintiff's telephone: _____

Plaintiff's email address: _____

If Plaintiff is represented:

Name of attorney: _____

Attorney's address: _____

_____

Attorney's telephone: _____

Attorney's fax: _____

Attorney's email address: _____

[redacted]

Ms. Stacy Braverman Cloyd
National Organization of Social Security Claimants' Representatives (NOSSCR)
Deputy Director of Government Affairs
1025 Connecticut Avenue, NW, Suite 709, Washington, DC 20036

Ms. Sue Steinman
Senior Director of Policy & Senior Counsel American Association for Justice
777 6th Street NW, Suite 200, Washington, DC 20001

Dear Ms. Cloyd and Ms. Steinman:

Thank you for your participation in the November 6, 2017 meeting of a subcommittee of the Advisory Committee on Civil Rules convened to consider whether uniform national rules should be developed for review of decisions of the Commissioner of Social Security ("Commissioner") by district courts pursuant to 42 U.S.C. § 405(g). As chair of the subcommittee considering this issue, I write to accept your offer to survey your members about best practices that might be suitable as a basis for general rules of procedure.
Specifically, the subcommittee is exploring whether the development of rules could achieve efficiencies in the administration of these cases that would benefit claimants, the government, and the courts.

In order to work from a common point of reference, I ask that you consider eliciting feedback regarding concepts in the proposed rules developed by the Social Security Administration that were discussed at the meeting. For ease of reference, the proposed rules are attached.

While the subcommittee would welcome the thoughts of your members regarding any possible helpful procedural rules, at this time the subcommittee is particularly interested in feedback on the following possible rule topics:

1. Initiating the civil action in the district court. Specifically, the contents of the complaint/petition for review/notice of appeal.

2. Service of the complaint/petition for review/notice of appeal. Specifically, whether a procedure could be developed for service of the complaint/petition for review/notice of appeal on the Commissioner through CM/ECF, thereby obviating the need for any other form of service.

3. Initial response by the Commissioner to the complaint/petition for review/notice of appeal.

   a. Motion to dismiss (untimely, failure to exhaust, improper venue);

   b. Answer (consisting solely of the administrative record);

   c. Motion to remand (pursuant to 42 U.S.C. § 405(g) sentence six.

4. The order, length, and timing of briefing on the merits.

Additionally, the subcommittee is interested in learning whether your members believe that national uniform rules would facilitate the efficient administration of social security cases filed in the district courts pursuant to 42 U.S.C. § 405(g).

Finally, although the subcommittee is unaware of any such cases, the subcommittee is interested in receiving information regarding any experience of your members in civil actions pursuant to 42 U.S.C. § 405(g) that have involved any of the following:

1. A case in which discovery in the district court action was appropriate, or was asked for or allowed even though it was not appropriate;

2. A case with more than one plaintiff (the claimant) or more than one defendant (the Commissioner);

3. A case in which class action allegations were asserted.

Please forward your survey feedback by noon on February 16, 2018 to:

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
[redacted]

If you have any questions, please feel free to contact me.

Thank you for your consideration of this request.

Sara Lioi

United States District Judge
United States District Court for the Northern District of Ohio
526 United States Courthouse
2 South Main Street
Akron, Ohio 44308-1813
[redacted]

(See attached file: SSA Draft Rules for District Court Review.pdf)

[redacted]

Asheesh Agarwal, Esq.
Office of the General Counsel
6401 Security Blvd.
Baltimore, MD 21235
Mailstop 617 Altmeyer
Asheesh.Agarwal@ssa.gov

David V. Foster, Esq.
Office of Analytics, Review, and Oversight
Room 311 Altmeyer Building
6401 Security Blvd.
Baltimore, MD 21235
David.V.Foster@ssa.gov

Kathryn A. Kimball, Esq.
Office of the Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Kathryn.Kimball@usdoj.gov

Dear Mr. Agarwal, Mr. Foster and Ms. Kimball:

Thank you for your participation in the November 6, 2017 meeting of a subcommittee of the Advisory Committee on Civil Rules convened to consider whether uniform national rules should be developed for review of decisions of the Commissioner of Social Security ("Commissioner") by district courts pursuant to 42 U.S.C. § 405(g). As chair of the subcommittee considering this issue, I have written to representatives of the National Organization of Social Security Claimants' Representatives and the American Association for Justice to accept their offer to survey their members about best practices that might be suitable as a basis for general rules of procedure. Specifically, I advised them that the subcommittee is exploring whether the development of rules could achieve efficiencies in the administration of these cases that would benefit claimants, the government, and the courts.

In order to work from a common point of reference, I asked them to consider eliciting feedback regarding concepts in the proposed rules developed by the Social Security Administration that were discussed at the meeting.

I indicated that, while the subcommittee would welcome the thoughts of their members regarding any possible helpful procedural rules, at this time the subcommittee is particularly interested in feedback on the following possible rule topics:

1. Initiating the civil action in the district court. Specifically, the contents of the complaint/petition for review/notice of appeal.

2. Service of the complaint/petition for review/notice of appeal. Specifically, whether a procedure could be developed for service of the complaint/petition for review/notice of appeal on the Commissioner through CM/ECF, thereby obviating the need for any other form of service.

3. Initial response by the Commissioner to the complaint/petition for review/notice of appeal.

a. Motion to dismiss (untimely, failure to exhaust, improper venue);

b. Answer (consisting solely of the administrative record);

c. Motion to remand (pursuant to 42 U.S.C. § 405(g) sentence six.

4. The order, length, and timing of briefing on the merits.

Additionally, the subcommittee is interested in learning whether their members believe that national uniform rules would facilitate the efficient administration of social security cases filed in the district courts pursuant to 42 U.S.C. § 405(g).

Finally, although the subcommittee is unaware of any such cases, I advised them that the subcommittee is interested in receiving information regarding any experience of their members in civil actions pursuant to 42 U.S.C. § 405(g) that have involved any of the following:

1. A case in which discovery in the district court action was appropriate, or was asked for or allowed even though it was not appropriate;

2. A case with more than one plaintiff (the claimant) or more than one defendant (the Commissioner);

3. A case in which class action allegations were asserted.

Although you addressed some of these issues during the November 2016 meeting, I

now write to invite you to share any additional thoughts that you believe would be helpful to the subcommittee relative to the identified issues.

Please forward your comments by noon on February 16, 2018 to:

Rebecca A. Womeldorf

Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
[redacted]

If you have any questions, please feel free to contact me.

Sara Lioi
United States District Judge
United States District Court for the Northern District of Ohio
526 United States Courthouse
2 South Main Street
Akron, Ohio 44308-1813
[redacted]

From: "Steinman, Susan" [redacted]

Subject: RE: Proposed Rules Suggestions

Thanks, Rebecca.

At the November meeting, Judges Campbell and Bates separately asked if AAJ could submit something in writing to the Social Security Subcommittee. I have attached it here. Not sure that it should be docketed like the others, but I do want them to know that we are responsive when asked to comment. We have not had an in-person meeting with our Social Security Section since the November meeting, and we find that we receive more information at in person meetings than with conference calls. That being said, I hope this information will be helpful to the Subcommittee.

Best,
SS

AMERICAN ASSOCIATION for JUSTICE

January 17, 2018

Honorable Judge David G. Campbell
United States District Judge
Chair, Committee on Rules of Practice and Procedure
United States District Court for the District of Arizona
Sandra Day O'Connor Courthouse
401 West Washington Street, SPC 58
Phoenix, AZ 85003

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue NW
Washington, DC 20001

RE: Invitation for Comment on Proposed Social Security Rules

Dear Judges Campbell and Bates and Members of the Social Security Subcommittee:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), submits these comments in response to an invitation to comment on the *Special Procedural Rules for Social Security Litigation in District Court* (hereinafter *Special Procedural Rules*) recommended by the Administrative Conference of the United States ("ACUS") for development by the Judicial Conference of the United States. AAJ, with members in the United States, Canada and abroad, exists to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including those seeking disability benefits, receive their constitutional right to their day in court under fair, just and reasonable rules of procedure and evidence.

AAJ offers 18 practice sections, including a Social Security Disability Law Section, to enhance trial techniques and train attorneys to provide their clients with the best possible representation. Members of AAJ's Social Security Disability Law Section have taken a notable special interest in the *Special Procedural Rules* and has helped provide the content for AAJ's comments. It is important to note that, unlike many plaintiff attorneys, AAJ members representing Social Security claimants usually have a highly-specialized practice that is primarily focused on disability law, and while highly-specialized, these attorneys typically represent clients with a

www.justice.org 777 6th Street, NW • Suite 200 Washington, DC 20001 • 202-965-3500

variety of disability claims, including ERISA, workers' compensation, Social Security Disability Insurance, Supplemental Security Income, and Veterans' Administration benefits.

I. New Rules Will Not Decrease the Remand Rate, Nor Should They

AAJ strongly submits that a change in the national remand rate should not be a marker of efficient and fair rules of procedure. While rightfully absent from the ACUS's justifications for the *Special Procedural Rules,* at the June 2017 meeting, the Advisory Committee alluded that the "high remand rate" might be a "problem" justifying a potential rulemaking. AAJ believes that the current 45% remand rate shows fairness in the current process, and should not be considered "high" or abnormal.

Further, many of the attorneys specializing in Social Security cases believe that none of ACUS's suggestions will decrease the remand rate, a sentiment shared by the authors of the report that prompted the *Special Procedural Rules.*[1]

There is a deeply held belief among AAJ member attorneys that addressing these procedural issues at the district court level will fail to address the real problems with Social Security cases, which start long before cases are reviewed by a district court judge. Many improvements are inherently substantive and can only be addressed by Congress. Nevertheless, with regard to procedural changes, it is important to recognize that disability cases are extremely time-consuming for disabled persons waiting for relief. Only the most tenacious of plaintiffs have enough stamina to wade through the grueling process to reach district court. Further, considering that most of these disability cases are for relatively low-dollar amounts, most attorneys only take the cases in which they have the greatest likelihood to prevail on appeal. The current fee structure incentivizes Social Security claimants' attorneys to only accept the strongest cases.

AAJ submits that the reason for the 45% remand rate is due to the highly-specialized nature of these cases. Plaintiffs' attorneys have become experts at screening for which cases have the best chances of being remanded.

Second, a remand rate of 45% generally translates into claimants winning slightly less than half of the cases in district court, which seems a fair rate. It is important to remember that at the district court level, these cases are essentially appeals. No lawyer is going to take an appeal unless they have a 50/50 chance of success. Recognizing the rate changes in different districts and circuits, an overall 45% national average remand rate seems fair and is to be expected.

---

[1] Jonah Gelbach and David Marcus, *A Study of Social Security Litigation in the Federal Courts*, page 8, n. 6 (July 28, 2016), available at: https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20-%20A%20Study%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf (hereinafter Gelback and Marcus Study') ("It is possible that the overall remand rate would not change much—or perhaps even would rise—if such compositional changes were great enough.")

Third, AAJ would highlight the findings of Jonah Gelbach and David Marcus' *Study of Social Security Litigation in Federal Courts* that "[a]t first blush, this rate might seem quite high . . . the remand rate, viewed statically, says little meaningful about the strictness of judicial review or the quality of agency decision-making."[2] There are many different considerations that go into a decision to remand, and it is not prudent to make any generalizations about Social Security cases based on this average national rate alone.

Lastly, AAJ members believe that an average remand rate of 45% remaining constant for over the past several decades shows its inherent fairness. The concept of a stagnant remand rate is reinforced in the Gelbach and Marcus study. As the authors of the study try to explain why this rate has remained so "stagnant":

> *A stagnant remand rate could possibly mask a more robust record of agency success in the federal courts. As noted, ALJ allowance rates have declined significantly, while Appeals Council agree rates have increased. The agency maintains that this change has resulted from an improvement in ALJ performance. Assuming that this explanation is accurate, it still leaves a larger set of potential appeals from which claimant representatives can pick their cases. The ALJ allowance rate has dropped from 70% to 45%. Even if ALJs now correctly deny four out of every five claims that would have been allowed previously, the 20% error rate could increase the number of flawed ALJ decisions to challenge by thousands. If the Appeals Council does not catch all of these errors, and if the private social security bar cannot expand to keep pace with the increased number of potential appeals, then the strength of each appeal to the federal courts, on average, could increase. If federal judges are applying the same standard of review as they were applying, say, five years earlier, and assuming that the entire pool of claims has not changed significantly in its composition, then the remand rate should be higher than 45%.*[3]

In short, a remand rate around 50% is to be expected in Social Security cases, and a decades-constant national average remand rate of 45% seems fair and reasonable. A decrease or change in the national remand rate should not be an objective or goal of any potential rulemaking.

II. What Is the Compelling Reason to Treat Social Security Cases Differently?

While Social Security cases may make up a greater percentage of the federal docket than appeals from other government programs, AAJ questions the notion that these cases require special rules more than other sorts of cases, including other types of benefit denial cases. Concern over increased dockets is not a compelling justification for specialized changes in federal procedure, and AAJ would highlight the concern that such specialized rules inherently "give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends," an illegitimate use of rules amendments as recognized by ACUS in making its recommendations.

AAJ encourages the Social Security Subcommittee to have an in-depth discussion about the specific goals of any potential rulemaking. Specifying the objectives will help ensure carefully

[2] Gelback and Marcus Study at page 44.
[3] *Id.* at 54.

and narrowly crafted rules. Is the goal of the recommended rules to lower the docket load of the district courts? To create efficiency to the court and to the parties? To lower the remand rate (a justification AAJ would reject out-right)? To create uniformity and reduce "localized procedures" in handling the cases by the district courts? Or is it some combination of goals?

If uniformity is the true goal, AAJ would ask the Subcommittee to review the arguments for specialized rules for the courts not only in terms of efficiency for one type of case but also consider the best course of action overall for claimants who have been denied government benefits beyond Social Security benefits, such as veterans' benefits. Is there only to be uniformity or specialized rules for Social Security claims because it includes a large volume of the caseload? Does that make sense from both a claimant's perspective and a judicial management perspective?

To help clarify the specific goals and objectives for this potential rulemaking, AAJ suggests that the Subcommittee consider other research beyond the Gelbach and Marcus Study. While empirical data are certainly hard to come by, and the Gelbach and Marcus Study was quite extensive, AAJ encourages the Committee to review recent data from Professors Alexandra Lahav and Peter Siegelman from the University of Connecticut School of Law. The working draft of their paper, which is currently undergoing peer review and available on SSRN, is entitled, "The Curious Incident of the Falling Win Rate," and looks at the overall win rates for plaintiffs in federal court.[4] In short, the study finds, "[f]or 40 quarters starting in 1985, the plaintiff win rate in adjudicated civil cases in Federal courts fell almost continuously, from 70 percent to 35 percent, where it remained—albeit with increased volatility—for the next 15 years. We explore, and largely reject, several possible explanations for this surprising finding,"[5]

This research suggests that some of the concerns that gave rise to this suggested rulemaking may be part of a larger phenomena. The authors' study specifically includes data on Social Security cases in district courts. The authors write that part of what is driving the drop in overall win rates for plaintiffs in federal court is the "falling success rate for claims brought against the U.S. government,"[6] which would include Social Security benefit cases.

The study has some important data on Social Security cases. The researchers found a declining win rate[7] for Social Security cases, from 63 percent in 1984 to only about 10 percent by 1996; after that point, however, Social Security win rates trend back up to about 35 percent.

In 1985, there were 1,189 Social Security Disability cases in federal district court and plaintiffs had a win rate of 44.8%. In 2009, the number of cases had risen to 1,644, an increase of 38%, but the win rate had declined to 23.8%, contributing to an overall decline in the plaintiffs' win

---

[4] The dataset is the Administrative Office of the U.S. Courts (AO) Civil Terminations dataset, and the win rate is defined as the set of all adjudicated cases.

[5] Alexandra Lahav and Peter Siegelman, "*The Curious Incident of the Falling Win Rate*", Draft as of July 1, 2017, available on SSRN.

[6] *Id.* at p. 19.

[7] It is important to note that the authors believe that the data in their study is orthogonal to the Gelbach and Marcus study.

rate of 47.0%.[8] While win rates in some types of litigation declined by higher percentages, of the 28 categories of cases measured in the study, only six categories of cases had higher declines in the win rate than Social Security Disability cases.[9] As the researchers note:

> *The bottom line is that Social Security cases "explain" part of the overall story of declining win rates, but since they constitute such a small share of all adjudications, there must be much more going on than just a drop in the success rate of Social Security plaintiffs.*[10]

Importantly, Lahav and Siegelman reject the idea that a decline in the quality of cases has resulted in a decline in the win rate, stating, "*We also reject the idea that a reduction in the quality of filed cases over time explains the decline and subsequent volatility in win rates.*"[11] While the researchers are unable to conclude what exactly is causing lower plaintiff-win rates overall, they do dismiss certain explanations, and their collected data and observations (and also their calls for more specific research on the causes of plaintiffs' falling win rates) may be helpful to the Subcommittee in exploring the goals and objectives of any potential rulemaking.

Upon further reflection of the goals of rulemaking, AAJ is optimistic that the Advisory Committee will come up with a proposal that can serve the needs of all parties in the system. Many of the existing problems are systemic requiring changes unrelated to rules amendments.

III. AAJ Does Not Oppose Some Additional Uniformity

While AAJ requests clarification on the exact purpose, objectives, and goals of any rulemaking, AAJ does not generally oppose some of ACUS's proposed recommendations. While specific details on the proposed changes may change AAJ's position, many AAJ members believe that several of the recommendations would be fairly easy to implement and may potentially benefit Social Security litigants, including:

- A rule requiring the claimant to file a notice of appeal instead of a complaint;
- A rule requiring the agency to file the certified administrative record instead of an answer;
- A rule requiring the parties to exchange merits briefs instead of motions; and
- A rule establishing deadlines and page limits.

However, AAJ does have concerns regarding whether it makes sense to establish strict page limits for Social Security cases when potential limits may well be different for other cases, even cases involving appeals of benefit denials from other agencies, often in the same district courts. AAJ would ask the Subcommittee to consider these Social Security-specialized-rules in light of the litigant who may have other disability benefits pending in the same court.

---

[8] *Supra.* at 27.
[9] Those case categories are Disability Insurance (58.1%), Prisoner Civil Rights (63.1%), Other Civil Rights (52.3%), Other Personal Injury (50.3 Percent), and Bankruptcy and Appeals (50.2%).
[10] *Id.* at 21.
[11] Id. at 4.

IV. Other Considerations Regarding Uniformity and Simplification

Simplification has its own potential downsides. While no one is arguing for a complicated process, the current rules ensure that the number of *pro se* litigants is low. The current process is lengthy, complicated to navigate, and thus, serves as a screening function. If that screening function is eliminated and the number of benefit denials continues to be high, the courts may very well have uniformity and an uptick in the number of *pro se* litigants and "appeals" to federal court. Many AAJ member attorneys are convinced that some of the proposed changes to "simplify" filings may result in an increased number of case filings in district court, because it would become easier for claimants to represent themselves in "appeals," resulting in an increase in district court cases. These claims are less likely to be brought to district court under the current regime merely because lacking an attorney, these plaintiffs choose to not challenge the agency decision. In short, AAJ members believe that the current system results in greater screening of district court claims, and AAJ asks the Subcommittee to consider how simplifying some of these rules may increase the number of *pro se* litigants in district court.

Additionally, there is a general sense of concern that if some of these suggestions are adopted, a new push for additional rules would follow. While some clarification or uniformity may well be useful, providing rules for every aspect of Social Security disability cases would undermine judicial independence, result in cookie-cutter handling of cases, and could undermine the specialized training and representation provided by the members of the Social Security plaintiff's bar.

Of particular concern is the effect that the draft model rules from the Social Security Administration (SSA), found in the Advisory Committee on Civil Rules November 2017 Agenda Book, would have on Social Security cases, such as on routine extension requests and the filing of Equal Access to Justice Act (EAJA) fees.

For example, the SSA draft model rules contain a section providing for an "Extension of Time" under Motions Practice. The provision states:

> *Extensions of time. On request, the court shall grant a 30-day extension of the deadline to file Defendant's response to Plaintiff's petition for review and of either party's first briefing deadline. Any other extension requests may be granted at the court's discretion. If the court grants an extension of time for any brief or motion under these Rules, the opposing party will automatically receive an extension of the same amount of time to file a responsive brief or motion party may request an extension at any time, including on the original due date.*

While the provision is seemingly balanced in the sense that if one party receives an extension, the opposing party is to receive the same extension, the proposed rule would almost routinely build-in an automatic first round extension of time for the Social Security Administration. Since one of ACUS's purported goals of a rules amendment is efficiency, AAJ members remain wary about any proposal that would formalize the routine acceptance of extensions into rules of procedure.

With respect to EAJA, the law on fees is clear, established, and uncontroversial. Yet, SSA's draft model rule on fees is quite substantial. The ACUS comment is silent on EAJA and there is

no reason given as to why the statute and court interpretation of the statute are insufficient. Indeed, there is no mention of the need for a rule or changes to fees at all in the Gelbach and Marcus study, which is the basis for the ACUS recommendations. In fact, the study justifies the current EAJA fee structure, recognizing that the current fee structure incentivizes lawyers only to appeal the most-worthy of cases to district court.[12]

Further, EAJA is a statutory creation of Congress. AAJ has concerns about any procedural rule impacting this important federal statute, and like any other suggestion that could potentially alter a substantive or statutory right, AAJ submits that such substantive changes are not within the proper jurisdiction of the Advisory Committee. For these reasons, AAJ would recommend that the Subcommittee not use the SSA draft model rules as a general starting point on any potential rulemaking.

V. Conclusion

AAJ appreciates the opportunity to provide some early feedback on this important discussion. Please note, AAJ's concerns and suggestions will continue to evolve as the potential rulemaking progresses and as AAJ considers both additional specifics on the proposed amendments and feedback from AAJ membership. If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel at the American Association for Justice at susan.steinman@justice.org.

Sincerely,

Kathleen L. Nastri
President
American Association for Justice

[12] Gelbach and Marcus at p. 56, "The opportunity cost of federal litigation adds to this risk of nonpayment and may further refine the metrics lawyers to select appeals."

AMERICAN ASSOCIATION for JUSTICE

February 16, 2018

Honorable Sara Lioi
United States District Judge
United States District Court for the Northern District of Ohio
526 United States Courthouse
2 South Main Street
Akron, Ohio 44308-1813

Dear Judge Lioi:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), hereby submits this letter in response to your request to have AAJ survey its membership regarding the Advisory Committee on Civil Rules' ("Advisory Committee") review of whether uniform national rules should be developed for review of decisions of the Commissioner of Social Security ("Commissioner") by district courts pursuant to 42 U.S.C. § 405(g). AAJ, with members in the United States, Canada and abroad, exists to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including those seeking disability benefits, receive their constitutional right to their day in court under fair, just and reasonable rules of procedure and evidence.

First, AAJ would like to thank the Advisory Committee for the opportunity to attend and participate in its November meeting. AAJ has surveyed its membership within AAJ's Social Security Disability Law Section regarding "best practices that might be suitable as a basis for general rules of procedure" and "whether the development of rules could achieve efficiencies in the administration of these cases that would benefit claimants, the government, and the courts." Due to the timeframe allotted for the requested response, AAJ was only able to conduct an informal survey of its members. In addition, Sue Steinman, Senior Director of Policy and Senior Counsel, discussed the survey questions with members at AAJ's winter convention.

AAJ has summarized the results of the survey below.

I. Whether National Uniform Rules Would Facilitate the Efficient Administration of Social Security Cases Filed in the District Courts pursuant to 42 U.S.C. § 405(g)

As an introduction, AAJ wishes to address this preliminary question first. There was not agreement among AAJ membership about whether "national uniform rules" would be beneficial to the administration of social security cases.

Generally, though not always, whether AAJ members viewed "national uniform rules" as beneficial depended upon whether they had a multi-district practice versus a single-district practice. Those attorneys with multi-district practices looked at uniformity of rules favorably. As one attorney explained, "[t]he significance for us in the proposed changes is the uniformity of practice." On the other hand, some members were concerned that a uniform rule may preempt the efficiencies established by their own district court. As an attorney noted, "I think it could take away some of the efficiencies that already exist in my district. Each district has to decide what works for them based on the volume." Other attorneys welcomed some smaller, uniform changes as "helpful," such as allowing or requiring electronic service.

There was some sentiment among responding attorneys that any national uniform procedural rules would fail to provide the efficiencies - for the court or the parties - that the Advisory Committee is seeking. Many attorneys felt that many of the inefficiencies and delays faced in social security cases are created at the ALJ stage, before litigants reach a district court. Further, some responding attorneys felt that the rules, particularly regarding a uniform Petition for Review, may actually increase the number of petitions to district courts by plaintiffs unrepresented by an attorney, ultimately increasing caseloads of the courts.

With regard to the proposed rules developed by the Social Security Administration (hereinafter "SSA's Proposed Rules"), there was real concern by many of the responding attorneys that some of these changes would in fact "operate to give the agency unjust litigation advantages." Many attorneys wanted to caution the Advisory Committee to only consider rule changes that were fair and efficient to both parties. For example, one member stated that the Advisory Committee should, "ensure that the final rules are fair to all parties and recognize the special problems of disabled people who rely on the federal courts to vindicate their rights under the law."

II. Specific Proposed Rule Topics

As requested, as part of its survey AAJ specifically asked AAJ member attorneys about the four procedural topics outlined in your letter.

In short, few of these rule suggestions received either unanimous opposition or support. Based on AAJ member responses, it was apparent that district court rules differ greatly on these matters, and what is standard in one court is unheard of in another. For instance, in some districts, reply briefs are not allowed but oral arguments are required. Attorneys in other districts are required to submit a reply brief and have not orally argued a case in decades. AAJ member opinions regarding the proposed changes generally, though not always, seemed dependent on the attorney's locality of practice.

1. Initiating the civil action in the district court. Specifically, the contents of the complaint/petition for review/notice of appeal.

Regarding the suggested amendment to initiate a civil action in district court merely by filing a petition for review that is the same or substantially similar to the model provided as Appendix A form "Petition for Review," most of the responding AAJ members favored this change. It appears that in most districts, though not all, a substantially similar one- or two-page form

complaint is also required to initiate an action. Many members believed that such a change would have little or no effect on their practice, and those attorneys who had practiced with such standard petitions generally viewed them favorably. Moreover, as a possible addition to the suggested language, at least one attorney suggested adding language to create a uniform method for applying for *in forma pauperis* ("IFP") status, as many plaintiffs have extinguished their financial resources by this point in litigation.

However, it is noteworthy that such a "petition for review" form was not used in all districts. At least one AAJ member unfamiliar with such forms felt that the form complaint would put some of their clients in an untenable situation. As this attorney explained, plaintiffs who are alleging that the ALJ violated the Administrative Procedure Act, or filing claims based on violations of the 5th Amendment (for instance the failure to provide notice of a decision, notice of a hearing or other mandatory procedural notice requirements), may be required to plead at a higher standard. There was concern that under the Federal Rules of Civil Procedure ("FRCP") and the controlling *Ashcroft v. Iqbal* decision, these actions (which are not uncommon) must be plead in a matter inconsistent with the form complaint. As this member questioned:

> *Those cases are cases under the Fifth Amendment and procedural due process but arise out of a denial of benefits which is appealed through 42 U.S.C. § 405(g). Under* Ashcroft v. Iqbal, et al., *556 US 662 (2009), that procedural due process must be plead under Federal Rule of Civil Procedure 8(a). Given the proposed Rule 1 and use of Exhibit A would there be a requirement to file a separate action to comply with Federal Rule of Civil Procedure 8(a)? Or would using the form submitted as Exhibit A be sufficient? Rule 8(a) of the proposed rules seems to indicate that the Federal Rules of Civil Procedure would control in this very common area of appeal.*

Perhaps, if this proposed rule is considered, a clarifying note on this matter would be helpful to assure litigators that their use of the "Petition for Review" form will not preclude related claims.

Furthermore, a technical clarification suggested by one attorney may help avoid later problems created by use of different language. 42 U.S.C. § 405(g) requires that the appeal of a decision be commenced by a "civil action," and FRCP 3 clearly states that a civil action is initiated by a "complaint." If the Model Petition for Review is to be used, then the model petition either may need to be changed to a "complaint" to be consistent with FRCP 3, or some language may need to be added to FRCP 3 to recognize that these proposed rules permit the filing of a "petition" as a proper method to initiate a civil action in lieu of a complaint.

2. Service of the complaint/petition for review/notice of appeal. Specifically, whether a procedure could be developed for service of the complaint/petition for review/notice of appeal on the Commissioner through CM/ECF, thereby obviating the need for any other form of service.

Nearly all responding AAJ members favorably reviewed the suggested change for a procedure for service of the complaint/petition for review/notice of appeal on the Commissioner through CM/ECF, thereby obviating the need for any other form of service. Some districts already either

allow or require service though ECF, while others did not. Nearly all of the attorneys felt that such a change would save plaintiff attorneys time and money.

However, clarification regarding this change was recommended by one attorney. There was concern that any petition filed under these proposed rules would not always be seen as complying with the service requirements of FRCP 4(i)(A) and (B). Therefore, it was suggested that either SSA's Proposed Rule 2(a) be changed to provide for such service automatically on the entities required to be served under FRCP 4(i)(A) and (B), or that FRCP 4(i)(A) and (B) be amended to reflect that the service permitted by SSA Proposed Rule 2(a) is sufficient as to all of the entities named in FRCP 4(i)(A) and (B).

3. Initial response by the Commissioner to the complaint/petition for review/notice of appeal.

a. Motion to Dismiss

Responding attorneys agreed that they rarely or never have seen a motion to dismiss by the Commissioner as an initial response. Almost all agreed that a motion to dismiss at this stage would most likely be inappropriate. However, there was a sentiment that if a motion to dismiss was an appropriate response, then the Commissioner should be permitted to put forth the argument and the plaintiff should be permitted to respond in accordance with the regular procedures under the Federal Civil Rules of Procedure.

b. Answer (consisting solely of the administrative record)

Most AAJ attorneys looked favorably on the proposed change to have the Commissioner's answer be solely the administrative record. Some attorneys noted that in their district no answer by the Commissioner was required at all, and others noted that the administrative record is far more important than an answer. Indeed, answers were described as "pointless" or "old-fashioned." Among the responding attorneys who had a favorable view of this change, all agreed that an electronic copy, rather than paper, is preferred.

However, some attorneys expressed concern over use of the word "transcript" in the SSA's Proposed Rule. Documents that were either excluded as exhibits or that were not labeled as exhibits are typically not included in the "Transcript." They are included in the electronic folder known as "Case Documents." A few attorneys recommended a small change to require the filing of the Transcript and "Case Documents" as the true administrative record, rather than just the "Transcript." As one attorney explained, ". . . administrative record would suffice, but I agree 100% that the copy should include the unexhibited files (Case Documents) . . . Having the record include Case Documents is essential to resolving disputes involving the administrative record so the DCJ can 1) see what's in dispute, and 2) whether admitting the evidence could have made a difference to the outcome."

c. Motion to remand (pursuant to 42 U.S.C. § 405(g) sentence six)

All of the attorneys conveyed that a motion for remand was rarely, if ever, seen at such an early state in the litigation. Many of the attorneys also agreed that remand motions are typically stipulated by the parties after dispositive motions are already decided. Due to the rarity of seeing motions for remand at this stage in litigation, responding AAJ members seemed ambivalent regarding the suggestion on motions to remand.

4. The order, length, and timing of briefing on the merits.

Regarding the length of the briefing on the merits, almost all of the responding attorneys were opposed to the strict page limits contained in the SSA Proposed Rules. Indeed, no other proposal received more complaints than the suggestion regarding page limits. Responding attorneys described this limit as "absurd," "too restrictive" and "far too short." Only a few districts had similar page limits, and most attorneys practice in districts with far more lenient page limits. Some attorneys noted that their initial brief is typically 30-50 pages. Others noted that they struggled to adequately brief the court on both law and fact with 25-30 district court page limits.

Indeed, some of the attorneys viewed the restrictive page limits as improper gamesmanship by the SSA to restrict the number and quality of plaintiffs' arguments or their ability (and many argued *duty*) to raise every material error in administrative record. As one attorney explained, "the page limitation is still far too short. Given the number of errors, both legal, procedural, ethical and factual, it simply would not be possible to adequately brief the issues being appealed."

AAJ attorneys also voiced concern that their clients' cases are often wrongfully seen as simple, whereas in reality their disability cases often have complicated facts and law, and they often face federal judges unfamiliar with certain medical conditions or issues relevant to social security law. As one attorney explained:

> *My biggest concern in this part is the 15-page limit on opening briefs. Unless these changes coincide with specialist judges, as I imagine Bankruptcy judges specialize, then we will be arguing often complex issues, specific to Social Security, to judges who may have never been exposed to a Social Security matter before. I am concerned by such a limit and what it suggests is the view of appellate argument in this field.*

Most attorneys feel that there should be no page limit, and see a 15-page limit as woefully inadequate.

On a related note, responding attorneys felt that the proposal regarding failure to comply with page limits, contained in Model Rule 4.d of SSA's Proposed Rules, was draconian, unfair and unnecessary.

No attorneys had any comments regarding the order and timing of briefs on the merits. A few attorneys had comments regarding timing. A few attorneys felt that they were close enough to their district rules that there would be no material change. On the other hand, a few attorneys

practiced under more lenient timelines in their district and felt that the suggested changes were too restrictive. For instance, at least one attorney conveyed that they typically had 90 days after the Commissioner's answer to submit a brief.

III. AAJ Member Experience for Specific Civil Actions Pursuant to 42 U.S.C. § 405(g)

1. Cases in which discovery in the district court action was appropriate, or was asked for or allowed even though it was not appropriate.

Regarding member experience with cases in which discovery in the district court action was appropriate, or was asked for or allowed even though it was not appropriate, most attorneys responded that they did not have experience in such cases. However, several attorneys had comments regarding the availability of discovery. There was sentiment among the several responding attorneys that the provisions in SSA's Proposed Rules regarding limiting district court discovery were an attempt by the SSA to foreclose useful and proper discovery. While unusual, responding attorneys felt that, when appropriate, discovery by the district court was far more efficient for a final resolution than a remand. As one member noted, "[p]recluding discovery that a court finds appropriate would assist SSA's litigation goals, but harm the ability of the plaintiff to prove her case."

Also, as one attorney explained, discovery may be becoming more important in SSA cases due to documents not being properly included in the "transcript." (See discussion above of "Transcript" vs. "Case Document" in II.3.b). One attorney noted that this has become a recent issue of contention in certain cases, as only the exhibits of record are a part of the transcript. As an example, one attorney explained the following potential case:

> *I once interviewed a potential client who at the ALJ hearing had hospital records excluded by the ALJ under the five-day rule in the regulations. The records would purportedly show atrial fibrillation in a person with diabetes type II. He was represented at the ALJ hearing by a non-attorney. But if it is appealed, those records would not be a part of the transcript on appeal.*

Therefore, some limited form of discovery may be important to the increasing number of cases where certain exhibited documents are excluded from the transcript.

5. Information on a case with more than one plaintiff (the claimant) or more than one defendant (the Commissioner); or a case in which class action allegations were asserted.

While AAJ specifically asked, AAJ received no responses from members regarding their experience with cases with more than one plaintiff (the claimant) or more than one defendant (the Commissioner), or cases in which class action allegations were asserted.

AAJ appreciates the opportunity to provide this feedback based on our informal survey of our membership. If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel at the American Association for Justice, at susan.steinman@justice.org.

Sincerely,

Kathleen L. Nastri
President
American Association for Justice

THIS PAGE INTENTIONALLY BLANK

SOCIAL SECURITY
Office of the General Counsel

February 16, 2018

The Honorable Sara Lioi
Chair
Social Security Review Subcommittee
Advisory Committee on Civil Rules
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
Washington, D.C. 20544

Dear Judge Lioi:

The Social Security Administration strongly supports a national uniform set of procedural rules for Social Security cases. Below are our answers to the Subcommittee's specific questions.

A. Whether national uniform rules would facilitate the efficient administration of Social Security cases filed in the district courts pursuant to 42 U.S.C. § 405(g)

A set of uniform procedural rules will increase efficiency for all parties, including the agency, plaintiffs' bar, the courts, and plaintiffs. Although judges have a legitimate interest in managing their dockets, uniformity will expedite decisions in Social Security cases.

More than half of all Federal district courts have recognized the unique nature of Social Security cases and the poor fit with the Federal Rules of Civil Procedure. As a result, many courts and judges have developed their own procedures. In so doing, though, courts have adopted rules that vary considerably from jurisdiction to jurisdiction and, often, from judge to judge—in effect, imposing inconsistent solutions. A comprehensive national set of rules to govern this workload, which is appellate in nature, would save time and costs by providing clear and uniform guidance to all involved. Litigants, whether represented or proceeding *pro se*, should need only one source for the relevant procedures. Comprehensive uniform rules would also allow more private practitioners to handle clients in different jurisdictions, giving claimants more choices for representation.

In addition to efficiency, uniform rules also would promote fairness. The Social Security Administration has an interest in ensuring that all claimants are treated alike, no matter where they are geographically. Yet different procedural rules can cause dissimilar treatment. Burdensome procedures adopted by some districts or individual judges, such as simultaneous briefing schedules, joint briefing, joint statements of facts, and requirements that the agency file its brief before the plaintiff, can increase delays and litigation costs for some claimants, while leaving other claimants free from those costs and delays.

A set of rules that covers only some, but not all, aspects of Social Security litigation invites gap-filling by courts and judges. The resulting variation causes inefficiencies and results in unnecessary delays and costs.

B. Possible rule topics

The agency agrees that efficiencies will be gained from uniformity on the four topics the Subcommittee has identified. We support rules on these topics that recognize the appellate nature of Social Security litigation under 42 U.S.C. § 405(g).

1. Initiating the civil action in the district court. Specifically, the contents of the complaint/petition for review/notice of appeal

2. Service of the complaint/petition for review/notice of appeal. Specifically, whether a procedure could be developed for service of the complaint/petition for review/notice of appeal on the Commissioner through CM/ECF, thereby obviating the need for any other form of service

Streamlined filing procedures would assist the government, the courts, plaintiffs' bar, and plaintiffs in several ways. Government attorneys and the courts could more quickly review initial filings, easing the review of jurisdictional requirements. Courts would face fewer issues related to service. Speedier service on the government and improved clarity in the plaintiff's initial filing would assist the agency in generating a record of the administrative proceedings. (The agency supports those districts that have already implemented procedures for electronic service, such as the Northern District of New York, the Northern and Central Districts of Illinois, and the Western District of Washington.) Plaintiffs' bar and plaintiffs themselves would benefit from procedures that make it easier, and less expensive, to draft, file, and serve the initial filing.

3. Initial response by the Commissioner to the complaint/petition for review/notice of appeal, including (a) motion to dismiss (untimely, failure to exhaust, improper venue); (b) answer (consisting solely of the administrative record); (c) motion to remand (pursuant to 42 U.S.C. § 405(g) sentence six)

The Social Security Administration supports a simplified response process that permits the agency to respond to the plaintiff's complaint by filing the certified administrative record, a procedure that has already been adopted in 14 Federal districts. The traditional complaint-and-answer process is unnecessary in Social Security cases where the legal issue—whether the agency's final decision is supported by substantial evidence—is defined by statute (42 U.S.C. § 405(g)). Simplifying this process reduces the number of filings to be prepared, filed, and reviewed in the vast majority of cases while still leaving the agency the option, where appropriate, of asserting an affirmative defense or conferring with the plaintiff on a motion to remand.

4. The order, length, and timing of briefing on the merits

Although the order, length, and timing of merits briefing are topics typically reserved to the discretion of individual district courts or judges, variances on these topics cause inefficiency. We urge the Subcommittee to consider the value of uniformity in these areas as well.

We support rules that create well-defined, uniform, and streamlined procedures for briefing the merits of the case. Recognizing the appellate nature of Social Security litigation, a number of courts have properly determined that summary judgment motions are inappropriate and, instead, require the exchange of merits briefs. Rules that impose structural limits on the form and length of the briefs force the parties to focus their arguments and direct the court's attention to the relevant portions of often lengthy administrative records. Requiring the plaintiff, as the party challenging the agency's decision, to identify and frame the contested issues is consistent with the appellate nature of these cases and allows the agency to respond directly to the plaintiff's arguments, which benefits both the parties and the courts.

Plaintiffs' attorneys and agency attorneys often practice in multiple—and sometimes many—different jurisdictions. Variances among these jurisdictions increase delay and costs for the agency and, ultimately, for taxpayers in the form of increased attorney's fees. Variation may also result in a plaintiff in one jurisdiction receiving a decision much more quickly than another plaintiff in a different jurisdiction.

5. Other topics

We urge the Subcommittee to consider rules on topics other than those identified by the Subcommittee as well. One example is attorney's fees under section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), which permits fees to be paid out of a plaintiff's past-due benefits after benefits are awarded. Individual courts have instituted varying procedures on this topic since the statutory provision lacks detail on a number of elements, including timing. Uniform deadlines and guidance on the necessary supporting documentation would help plaintiffs' attorneys, especially those practicing in multiple jurisdictions, file their fee claims. Such rules would also help the agency respond to these requests and courts to review them.

When the topic was discussed at the meetings of the Administrative Conference of the United States (ACUS) Committee on Judicial Review, members of the plaintiffs' bar with regional practices expressed support for a procedural rule on section 406(b) fees.

C. Information regarding civil actions pursuant to 42 U.S.C. § 405(g) that have involved any of the following: (1) a case in which discovery in the district court action was appropriate, or was asked for or allowed even though it was not appropriate; (2) a case with more than one plaintiff (the claimant) or more than one defendant (the Commissioner); and (3) a case in which class action allegations were asserted.

National uniform procedural rules should govern the typical Social Security case where an individual seeks judicial review under 42 U.S.C. § 405(g), challenging the agency's final decision about benefits or a related matter. In these cases, the court serves an appellate function and reviews a closed administrative record. When a case arises with different procedural and substantive needs, however, the court would not be bound by these rules. Examples include broad challenges to the constitutionality or validity of the agency's policies or actions, whether brought by one plaintiff or a class of plaintiffs. Such a challenge may not focus on a closed administrative record, and it may be necessary to conduct discovery, hold hearings, or brief preliminary matters.

During the ACUS meetings on this proposal, we understood there to be broad agreement on the scope of these rules among the stakeholders, including members of the plaintiffs' bar. Indeed, the agency proposed, and ACUS adopted, an amendment to an earlier version of the recommendation to emphasize the importance of flexibility when the needs of a case or class of

cases demand it. With the scope of the uniform procedural rules properly defined to include all but a few types of Social Security cases, courts would have no difficulty recognizing these exceptions and adjusting the procedures, as necessary, to accommodate the needs of the individual case. Such cases would be the exception, not the rule, allowing the efficiencies noted above to be achieved in the vast majority of Social Security cases.

D. Conclusion

Increasing efficiency is a critical issue for the Social Security Administration, the courts, plaintiffs' bar, and claimants. Efficiency is especially critical given that the already sizeable Social Security workload—18,000 cases each year—is expected to grow over time.

Any uniformity would help. The more comprehensive the rules, the more likely they are to foreclose unnecessary variance and create greater efficiency, thereby minimizing delays and costs for litigants. The rules should also recognize the appellate nature of Social Security cases, which would ease the friction caused by many current rules. The set of rules the agency presented to the informal subcommittee is based on lessons we have learned from litigating in 94 Federal jurisdictions and from the comments made during the ACUS meetings, including input from the National Organization of Social Security Claimants' Representatives, individual members of the plaintiffs' bar, and members of the public.

Sincerely,

Asheesh Agarwal
General Counsel

[redacted]

Dear Judge Lioi,

Thank you for the opportunity to have NOSSCR members provide feedback on the Judicial Conference's proposed uniform procedural rules for certain federal district court cases involving the Social Security Administration. NOSSCR received 71 responses to our survey. Some respondents omitted responses to certain questions. In the attached document, we have summarized the responses, with light editing for clarity. We have not, however, reviewed these comments for accuracy or interpretations of the current rules. These comments do not necessarily reflect NOSSCR's organizational positions on these draft rules.

We hope this information is helpful to you and would be glad to discuss it with you and other members of the Advisory Committee on Civil Rules' subcommittee on uniform procedural rules for Social Security cases. Once the subcommittee has reviewed the survey responses and has made any revisions to the proposed rules, NOSSCR would appreciate the opportunity to submit a statement on behalf of the organization. If you would prefer to have such a statement before the subcommittee formulates its next draft of the rules, please do not hesitate to contact me.

Sincerely,

Stacy Braverman Cloyd
National Organization of Social Security Claimants' Representatives (NOSSCR)
Deputy Director of Government Affairs
1025 Connecticut Ave, NW, Suite 709, Washington, DC 20036 | P 202.457.7775 | F 202.457.7773

THIS PAGE INTENTIONALLY BLANK

Local Rule X Social Security Cases Pursuant to 42 U.S.C. § 405(g)

(a) Applicability. This rule applies to actions for judicial review that are filed by a single plaintiff, solely against the Commissioner of Social Security, and that raise claims pursuant to 42 U.S.C. § 405(g) only.

(b) Initial Process. Upon docketing a complaint that falls within the scope of this local rule, the Clerk of Court shall email the complaint to the appropriate Regional Social Security Administration Office of General Counsel and United States Attorney's Office using the Case Management and Electronic Filing (CM/ECF) system. No summonses shall issue.[i]

(c) Inclusion of Social Security Number in Complaint. All complaints filed pursuant to this rule shall state the Plaintiff's full Social Security number. If the plaintiff's application for Social Security benefits was filed on another person's wage-record, that person's Social Security number shall also be included in the complaint.

(d) Answer. The certified administrative record filed by the Social Security Administration shall constitute the agency's answer to the complaint, and shall be due sixty (60) days after notice of the complaint is sent by CM/ECF pursuant to (b), unless a motion to dismiss is filed.

(e) No Discovery. There shall be no discovery in actions that fall within the scope of this rule.

(f) Merits Briefing. The parties shall adhere to the following briefing schedule with respect to the merits of the case:
(i) Plaintiff's merits brief is due within [X] days of the filing of the administrative record.
(ii) The Social Security Administration's opposition is due [Y] days after Plaintiff's brief is filed.
(iii) Plaintiff's reply brief, if any, is due [Z] days after defendant's brief is filed.
No other briefs or motions are required to be filed for the court to dispose of the case on its merits.

(g) Oral Argument. There will be no oral argument in cases that fall within the scope of this rule unless otherwise ordered by the Court.

Other Motions. This rule is not intended to prevent parties from making any other motions that are appropriate under the Federal Rules of Civil Procedure.

---

[1] When proposing this rule to their courts, USAOs should memorialize that the USAO and SSA agree not

to raise a defense of insufficient service of process if served in this manner. Otherwise, the courts could be concerned that we are impermissibly rewriting FRCP 4(i).

TAB 7

THIS PAGE INTENTIONALLY BLANK

TAB 7A

THIS PAGE INTENTIONALLY BLANK

7. Newspaper Notice in Condemnation Proceedings

17-CV-WWWWW proposed to amend Rule 71.1(d)(3)(B)(i) to allow publication of notice of a condemnation proceeding in any newspaper with general circulation where the property is located, deleting the present preference for publication "in a newspaper published in the county where the property is located."

This proposal was discussed at the November 2017 meeting. Minutes of the discussion are attached. The discussion concluded by leaving it to Judge Bates and the Reporters to consider the matter and reach a recommendation whether to proceed further.

The recommendation is to remove this proposal from the agenda.

17-CV-WWWWW is the only indication of interest in the requirement that, if there is one, notice be published in a newspaper published in the county where the property is located. The Department of Justice, the most frequent plaintiff in federal-court condemnation proceedings, does not support or oppose the proposal.

The empirical question that lies at the heart of the question asks where property owners are more likely to look for notice. It seems likely that in many rural areas a locally published newspaper has smaller circulation than other newspapers that have general circulation in the county. But accepting that possibility does not go far toward guessing whether the (likely rare) property owner who regularly looks for legal notices will think first of the locally published newspaper. The lack of much apparent interest in this question might suggest a general intuition that the local newspaper is a more likely choice, but this is at most a slender inference.

A central argument advanced for the proposal is that in New Mexico, and likely other states as well, state procedure allows publication in a newspaper of general circulation whether or not it is published where the property is located. This state practice might be absorbed into federal practice through Rule 71.1(d)(3)(A), which provides for personal service of the notice "in accordance with Rule 4." Rules 4(e)(1) and (h)(1)(A) allow service by following state law for serving a summons. That reading of Rule 4 is not compelling.[26] But accepting that reading complicates the

[26] The proposed reading of the rules is not inevitable. Rule 71.1(d)(3)(A) provides for personal service "in accordance with Rule 4" on a defendant who resides in the United States and whose address is known. It does not seem likely that notice by publication should be accepted. Several Supreme Court decisions conclude that publication alone does not satisfy due process if a defendant's address is known. See *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Walker v. City of Hutchinson, Kan.*, 352 U.S. 112 (1956). The due process problem may be avoided, however, by the provision in (3)(B)(i) that directs that publication be supplemented by mailing notice to every defendant who

argument. Owners looking for notice are likely to be influenced by state practice — it would not be surprising to learn that condemnation is more often effected in state courts under state law than in federal courts. If state practice requires publication in a newspaper published in the county where the property is located, a federal rule authorizing publication in any newspaper of general publication where the property is located might be overlooked. Only if all states converge on a newspaper of general circulation would the amended federal rule integrate fully with state practice.

More elaborate arguments also may be important. It seems likely that much property potentially exposed to condemnation is located in counties where more than one newspaper enjoys general circulation. If there also is one, but only one, locally published newspaper, a cautious owner need not look to more than one source.

A still more elaborate set of questions arises from the interplay between electronic media and the specific wording of Rule 71.1(d)(3)(B)(i). There is a comforting paper-and-ink aura around the words "published in the county." That comfort cannot be found so readily in "newspaper with general circulation." Reliance has to be on "newspaper" alone, and it is increasingly difficult to deny "newspaper" status to a publication that appears only on line where the property is located, particularly if it appears elsewhere in tangible form. A wide variety of newspapers are available on line in any place that has internet connections. It might be premature to act on the narrow proposal submitted to the Committee without considering the broader and elusive questions arising from continuing evolution in the world of mass media.

The central question remains empirical: what approach is best calculated to effect actual notice. Little more than intuition is available for guidance. Whatever elaborations may be considered, the lack of empirical guidance dooms the proposal.

---

cannot be personally served but whose place of residence is known. The same protection may be built into a state procedure borrowed under Rule 4(e)(1). Doubts about the sufficiency of publication, however, are supplemented by the integration of Rule 71.1(d)(3)(B)(i) with (A). Notice by publication is provided only upon filing a certificate stating that the defendant cannot be personally served "because, after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service." That may take the Rule 4 provisions for personal service out of the picture and provide an explicit federal standard for publication that may well exclude service by publication and mailed notice when the defendant can be served by other means.

TAB 7B

THIS PAGE INTENTIONALLY BLANK

Excerpt from the November 2017 Minutes: Publication Under Rule 71.1(d)(3)(B)(i)

This proposal is easily illustrated, but then should be fit into the full context of Rule 71.1(d). Rule 71.1(d)(3)(B)(i) directs that when notice is published in a condemnation action, the notice be published:

> in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located.

The proposal would eliminate the preference for a newspaper published in the county where the property is located, calling only for publication "in a newspaper with general circulation [in the county] where the property is located."

Under Rule 71.1 the complaint in a proceeding to condemn real or personal property is filed with the court. A "notice" is served on the owners. The notice provides basic information about the property and condemnation, and information about the procedure to answer or appear. Service of the notice must be made in accordance with Rule 4. But the notice is to be served by publication if a defendant cannot be served because the defendant's address remains unknown after diligent inquiry within the state where the complaint is filed, or because the defendant resides outside the places where personal service can be made. Notice must be mailed to a defendant who has a known address but who cannot be served in the United States.

The suggestion to delete the preference for publication in a newspaper published in the county where the property is located picks up from other rules for publishing notice that require only that the newspaper be one of general circulation in the county. Several provisions of the Uniform Probate Code are cited, along with New Mexico court rules. The New Mexico rules add a further twist. Federal Rule 4(e)(1) and (h)(1), incorporated in Rule 71.1(d)(3)(A), allow service by "following state law." The New Mexico rule allowing service by publication in a newspaper of general circulation in the county, when incorporated in Rule 4, is said to create a conflict with the Rule 71.1(d)(3)(B)(i) priority for a newspaper published in the county.

This suggestion raises empirical questions that cannot easily be answered. It is easy to point to counties that are the place of publication of intensely local newspapers that have limited circulation. And it is

easy to point to out-of-county newspapers that have much broader circulation within the county. In many counties there may be more than one out-of-county newspaper of "general" circulation — one question might be whether a rule should attempt to require publication in the newspaper of broadest circulation. But a different empirical question follows. Where will people interested in local legal notices look? Does it make sense to recognize publication in a newspaper of nationwide circulation, or is it highly unlikely that a resident of Sanillac County, Michigan, would look to USA Today for local legal notices? A participant looked at the current issue of a local Sanillac County newspaper and found eight legal notices. Perhaps readers indeed will look first at a locally published newspaper.

A second question is part theoretical, part empirical. In adapting the rules to the displacement of paper by electronic communication, the Committee has avoided many issues similar to the questions raised by this modest proposal. What counts as a "newspaper"? Should some form, or many forms, of electronic media be recognized? And where is a newspaper "published," particularly those that appear daily in electronic form but only one or two days a week in paper form? What should be done with a newspaper that is published daily on paper, and also — perhaps continually updated — on an electronic platform? Should a rule direct publication in both forms, direct one form or the other, or leave the choice to the government?

It would be possible to recommend the proposed amendment without addressing these broader questions. But they must at least be considered in the process of framing a recommendation.

The Department of Justice does not object to the proposal.

A Committee member asked whether the proposed change raises due process problems. The Supreme Court has recognized that as compared to other means of notice, publication is a mere feint. But publication is recognized in circumstances that make better notice impracticable. So it is for a defendant in a condemnation action who has no known address. Rule 71.1(d)(3)(B)(i) begins the compromise by demanding that an address be sought only by diligent inquiry within the state where the complaint is filed. Publication is required only for "at least 3 successive weeks." The test is nicely expressed by asking what would satisfy a prudent person of business, counting the pennies but anxious to accomplish notice. In this setting, this simply returns the inquiry to the empirical questions: are there

knowable advantages so general as to illuminate the choice between locally published newspapers and others that have general local circulation?

A judge expressed reluctance to change the rule. "You know to look to the local newspaper for legal notices," even when a newspaper published in a nearby county has broader circulation in the county.

These exchanges prompted a broader question: Should the Committee look at broader questions of publication by notice "in the world we live in"? The Committee agreed that the time has not come to address these questions.

Judge Bates summarized the discussion by suggesting that he and the Reporters will consider this proposal further. The present rule language is clear. The question is the wisdom of its choices. And it may be difficult to answer the empirical questions that underlie the choice, perhaps prompting a decision to do nothing.

THIS PAGE INTENTIONALLY BLANK

RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A.
ATTORNEYS AT LAW
SANTA FE OFFICE
119 EAST MARCY STREET, SUITE 200
SANTA FE, NEW MEXICO 87501-2046

P.O. BOX 1357
SANTA FE, NEW MEXICO 87504-1357
WWW.RODEY.COM

JOHN P. BURTON

DIRECT NUMBER: (505) 954-3906
JBURTON@RODEY.COM

TELEPHONE (505) 954-3900
FACSIMILE (505) 954-3942

August 10, 2017

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue NW
Washington, DC 20001

Re: Suggested Amendment to Rule 71.1(d)(3)(B)(i)

Dear Judge Bates:

I write to suggest a small but important amendment to Rule 71.1(d)(3)(B)(i).[1]

If certain conditions are met, the rule requires service of a notice directed to a defendant by publication "in a newspaper published in the county where the property is located." (Emphasis added).

Only if there is no such newspaper does the rule permit publication of the notice in a newspaper "with general circulation" in that county. (Emphasis added).

If there ever was a principled reason for a distinction between a newspaper published in the county and one with general circulation in the county, that reason vanished long ago. Many, if not most authorities have abandoned that distinction, deleting the requirement of publication in a newspaper published in the county and retaining only the standard of publication in a newspaper with general circulation in the county. The Uniform Probate Code provides several examples.

[1] I have no condemnation case, pending or contemplated, in any federal court so have nothing to gain personally or professionally. I seek only to simplify and modernize one of the Federal Rules of Civil Procedure, similar to my work with the Uniform Law Commission and the American Law Institute. However, these views are my own.

Several sections of the Probate Code require publication for different purposes in a newspaper with general circulation in the county.[2]

More pertinent, our state rules of civil procedure require publication for service of process in a newspaper with general circulation in the county.[3] This state rule may be used in federal court. Fed. R. Civ. P. 4(e)(1), (h)(1)(A). By making this state rule applicable in federal court proceedings, Rule 4 (e)(1) and 4(h)(1)(A) creates a conflict in this respect with Rule 71.1(d)(3)(B)(i). I do not believe that our state is alone, either in providing for service of process by publication or in providing for publication in a newspaper of general circulation in the county.

Perhaps the best reason for the elimination of the published-in-the-county requirement is that the requirement is an unnecessary complication at best and a trap for the ill-informed or unwary at worst.

It is unnecessary to inquire whether a condemnation judgment would bind one who claims lack of notice following a violation of this requirement or whether defenses might be available to defeat such a claim. It is necessary only to keep in mind that such a claim may be brought years or even decades after the condemnation case was closed.

Recent experience demonstrates that similar claims consume large amounts of judicial resources, even with the use of case-management tools. *See, e.g., T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*[4] That case arose from a quiet title decree entered in 1948 after several defendants were served with process by publication. After the property had increased in value, the successors of two of those defendants sued in 2010 to set aside the decree, alleging that service by publication was improper so that the court lacked jurisdiction over the defendants. After receiving the report of a special master, the district court entered summary judgment against the successors. The New Mexico Court of Appeals reversed the district court and remanded for consideration of defenses to the successors' claims. The New Mexico Supreme Court reversed the Court of Appeals and affirmed the district court in an opinion released for publication in 2017.

The upshot was that a case arising from an allegedly improper publication was finally resolved some 69 years later after occupying the time and attention of three courts for almost seven years.

---

[2] Unif. Probate Code § 1-401(a)(3) (notice of hearing on most petitions) 8 pt. I U.L.A. 82 (2013); *id.* §§ 3-310 (notice of intention to seek informal appointment as personal representative), 3-403(a) (notice of hearing on petition for formal testacy proceedings), 3-801(a) (notice to creditors) 8 pt. II U.L.A. 67, 86, 241 (2013).

[3] Rule 1-004(K)(1) NMRA (applicable to the district courts, which are the state's courts of general jurisdiction).

[4] 2015-NMCA-004, 340 P.3d 1277, *rev'd*, 2017-NMSC-004, 388 P.3d 240.

Better to avoid such problems to the extent possible by making this minor adjustment to the rule.

Respectfully submitted,

John P. Burton

THIS PAGE INTENTIONALLY BLANK

TAB 8

THIS PAGE INTENTIONALLY BLANK

TAB 8A

THIS PAGE INTENTIONALLY BLANK

8. RULE 4(K): EXPANDED NATIONAL-CONTACTS JURISDICTION

Introduction

The proposals described here would amend Rule 4 to expand the reach of personal jurisdiction in federal courts. They depart from the usual focus of Committee efforts on the procedures used in actions after personal jurisdiction is established or objections are forfeited. There are strong arguments that Enabling Act authority extends this far, a question explored below. In many ways the arguments whether to venture into this territory seem abstract, verging on realms only academics could love. But Rule 4(k)(2) established a national contacts foundation for personal jurisdiction 25 years ago. Reasons might be found for expanding on this beginning. Federal courts might be used to reach internationally foreign defendants in circumstances that do not support state court jurisdiction. It might seem useful to free federal courts from the limits of state court jurisdiction in federal-question cases that present Rule 4(k)(2) does not reach. It also could be useful to develop diversity jurisdiction by facilitating choice of a federal forum controlled only by venue statutes and Fifth Amendment due process, not the complex rules of Fourteenth Amendment due process and the occasionally variable state practices that fall short of the jurisdiction the Fourteenth Amendment would permit.

These questions are advanced for initial discussion. It does not seem likely that a rule should be proposed for publication this summer. The task is to determine whether practical benefits might be gained by developing these proposals further.

Rule 4(k)(2), added in 1993, establishes personal jurisdiction over a defendant sued on a claim that arises under federal law if the defendant has sufficient contact with the United States and no state court could assert jurisdiction:

> (2) *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
>
> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Two Proposals

Two proposals have been made to expand national-contacts jurisdiction.

One, 18-CV-E, is more limited. It would retain the condition

that the defendant not be subject to personal jurisdiction in any state court, but would expand Rule 4(k)(2) to include diversity and alienage cases:

> (2) ~~*Federal*~~ *Claims Outside State-Court Jurisdiction.* For a claim that arises under federal law or cases in which jurisdiction is based on Section 1332 of Title 28, serving a summons * * *

Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean up the Personal Jurisdiction Mess,* 67 American U.L. Rev. 413, 443 (2017). Pages 413-439 of this article express dissatisfaction with the doctrines developed by the Supreme Court to elaborate Fourteenth Amendment limits on state-court jurisdiction. The proposal to extend Rule 4(k)(2) is advanced from pages 439 to the end; those pages are attached as an appendix. The purpose is illustrated by the rejection of personal jurisdiction over a foreign defendant in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). The plaintiff was injured in New Jersey while working with a machine made by a firm in England and sold to an independent distributor in Ohio. Although the defendant hoped the distributor would sell its machines throughout the United States, and many states were in fact reached, no more than four — and possibly only the one that injured the plaintiff — reached New Jersey. The Court reversed New Jersey's assertion of specific personal jurisdiction. Justice Kennedy's plurality opinion suggests that perhaps Fifth Amendment due process would support jurisdiction in a federal court based on sufficient contacts with the United States as a whole. Professor Borchers proposes the extension of Rule 4(k)(2) to reach *Nicastro* and cases like it.

The other, more expansive proposal would delete all of present Rule 4(k)(1) and adopt a new Rule 4(k) that extends the personal jurisdiction of federal courts in all cases to the limits of Fifth Amendment due process. Professor Spencer has offered his own earlier article for help in considering Professor Borchers' article, A. Benjamin Spencer, *Nationwide Personal Jurisdiction for our Federal Courts*, 87 Denver U.L. Rev. 325 (2010). The article is attached, along with Professor Spencer's March 9 letter to Judge Bates comparing Spencer's proposal to Professor Borchers' proposal. This proposal would amend Rule 4(k)(1):

> (k) Territorial Limits of Effective Service. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant when exercising jurisdiction is consistent with the United States Constitution [and laws].

Protection against rampant forum shopping would be provided by the venue statutes, both general and subject-specific. As compared to Professor Borchers' proposal, Professor Spencer's proposal cuts federal courts free from the baseline in present Rule 4(k)(1), which adopts for all cases the personal jurisdiction "of a court of general jurisdiction in the state where the district court is located." (Rule 4(k)(1)(B) cuts free from state-court limits by

allowing service of a summons on a party joined under Rule 14 or 19 not more than 100 miles from where the summons was issued.) Four purposes would be served by this proposal: (1) Adopting variable state-court doctrines results in some lack of uniformity among federal courts; it is, moreover, inappropriate to turn federal-court jurisdiction on decisions made by state legislatures and courts, particularly as to federal-question cases. (2) Providing extended personal jurisdiction is a good use of diversity jurisdiction. (3) Most cases will obviously satisfy requirements of minimum contacts with the United States, freeing courts and litigants from the "notoriously confusing and imprecise" law of personal jurisdiction applied to state courts. And (4) Tying federal jurisdiction to state-court jurisdiction "duplicates, in many respects, the considerations comprising the federal venue analysis." Professor Spencer, however, notes in his March 9 letter that he has come to the view that the Enabling Act does not provide authority to adopt his proposal. Instead, it should be enacted by Congress.

The purposes served by Professor Borchers' modest proposal are sharply focused. It will be a rare case in which a defendant domestic to the United States is not subject to general personal jurisdiction in some state court, excluding application of the proposed Rule 4(k)(2).[27] Internationally foreign defendants will be the major targets. Providing a forum in the United States for cases like the *Nicastro* case has obvious advantages. The blanket adoption of § 1332 includes Class Action Fairness Act cases, a consequence that deserves some attention.

The purposes served by Professor Spencer's broad proposal begin with expanding personal jurisdiction in federal-question cases; the ability of at least one state court to assert personal jurisdiction would no longer oust national-contacts jurisdiction in a federal court. Federal courts would be freed from the confines of state-court jurisdiction that now apply to most federal-question cases and almost all diversity cases. Federal independence in federal-question cases is attractive. For diversity cases, the proposal is a bold assertion that one of the important uses of diversity jurisdiction is to ensure the availability of a convenient forum, as determined by federal venue statutes. For those inclined toward more abstract issues, this proposal also provides a direct answer as to why it is useful to have two sets of litigation-locating rules for federal courts. Focusing on the nationwide authority of a nationwide sovereign, it suggests that one set of rules, based on pragmatic considerations, is better. This rule frees Congress to craft optimal venue statutes, eventually catching up whatever inadequacies might be found in present statutes.

---

[27] A United States citizen domiciled abroad would not come within § 1332 jurisdiction.

Each proposal, within its scope, could provide important advantages for defendants subject to personal jurisdiction under present rules. Allowing a plaintiff to join additional defendants, or a defendant to implead third-party defendants, could make for a more coherent and efficient adjudication of related disputes. There even might be cases in which the ability to sue a defendant not now subject to personal jurisdiction would lead a plaintiff to omit other potential defendants. If Nicastro could sue the manufacturer, it might make sense not to sue the distributor (who in fact became insolvent).

Several questions remain to be resolved in considering these proposals. Among them are Enabling Act authority; choice-of-law consequences; and the stress that may be placed on the venue statutes — including the question whether revision of Rule 4(k) should be supported by amending the statutes.

Enabling Act Authority

Professor Borchers addresses the Enabling Act and concludes that it establishes authority to expand personal jurisdiction. Professor Spencer took the same position in 2010, but since has concluded that only Congress can adopt his broader proposal.

Professor Spencer provided a succinct history. From the First Judiciary Act in 1789 to 1938, service could be made only within the court's district. The original Rule 4, adopted in 1938, expanded to allow service anywhere in the district's state. The expansion was upheld in *Mississippi Pub. Corporation v. Murphree*, 326 U.S. 438 (1946), where the court observed that changing the place within the state where substantive rights are adjudicated may affect the rights, but does not abridge, enlarge, or modify those rights. The rule is one of procedure in the sense that it relates merely to the manner and means of enforcing rights. Rule 4 was amended again in 1963 to incorporate state long-arm statutes, as limited by the Fourteenth Amendment due process constraints that would apply to an action in a state court. The Rule 4(k)(2) provision establishing jurisdiction "consistent with the United States Constitution and laws" was added in 1993. The 1993 Committee Note begins with a "SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved," subdivision (k)(1) would become simply subdivision (k). The Committee Note observes that "[t]he Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had significant affiliating contacts with the United States." Beyond that, the Note suggests that especially scrupulous care should be taken to protect aliens who reside in a foreign country. In

addition, the Note observes that the rule does not affect venue statutes, including transfer provisions. Nonetheless, Professor Spencer has moved to the view that the Enabling Act does not provide authority to push personal jurisdiction to the outer limits he proposes.

In short, past Committees have concluded that the Enabling Act authorizes rules that expand personal jurisdiction by providing for service of process outside the court's district or state. The explicit "special note" provided with the adoption of Rule 4(k)(2) lends support to the view that the Supreme Court was fully aware of these questions and agreed that these rules satisfy both requirements of § 2072: They really are rules of procedure, and they do not abridge, enlarge, or modify the underlying substantive rights. Both the original Rule 4 and the expansion in 1963 to embrace state long-arm statutes support the view that § 2072 authority includes diversity as well as federal-question cases.[28] The question, however, deserves careful attention.

Some niggling questions remain. One is a supersession problem. Various federal statutes include expansive provisions for serving process. It is not at all clear that every one of them has been interpreted to reach as far as the outer limits of minimum contacts with the United States. Extending service beyond those limits, however, might be seen as no more than a more perfect implementation of the original purpose, particularly for statutes enacted before, or in the early days of, the evolution of contemporary due process concepts.

A second implication is more an observation than a question or problem. The 1993 Committee Note observed that although Rule 4(k)(2) "does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country," once jurisdiction is established with respect to a federal claim, 28 U.S.C. § 1367 establishes supplemental jurisdiction over related claims against that defendant. Professor Spencer's proposal seems to establish personal jurisdiction directly, superseding this potential complication. Professor Borchard's proposal might generate complications in a case that

---

[28] There is little reason to doubt that Article III diversity jurisdiction is a suitable basis for nationwide service. Statutory interpleader is the textbook example of nationwide service based on minimal diversity jurisdiction. See also 28 U.S.C. §§ 1369, 1697 (single accident multiparty, multiforum jurisdiction).

A comprehensive examination of nationwide personal jurisdiction is provided by Jonathan R. Nash, *National Personal Jurisdiction* (February 6, 2018 draft, available on SSRN). He concludes that a federal court sitting anywhere in the United States can assert personal jurisdiction over any defendant based on contacts with the United States as a whole. Congress can establish this jurisdiction for any case brought within the court's subject-matter jurisdiction. Twice, with little elaboration, he says that Congress can delegate this authority through the Rules Enabling Act.

combined a claim that cannot be heard in any state court with a claim that can be. That question can be confronted if that approach is taken up.

Choice of Law

Both proposals reach diversity and alienage jurisdiction. Professor Borchard's proposal is limited, at least at the first step, to cases that no state court could hear. That raises the choice-of-law question. Should a federal court be bound to follow local choice-of-law rules under the direction of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), when no state court, either in the local state or any other, could entertain the action? The question may be answered by *Griffin v. McCoach*, 313 U.S. 498 (1941), which applied the Klaxon decision to an interpleader action that asserted federal personal jurisdiction over claimants that could not (at least under 1941 views) be subjected to personal jurisdiction in the local state courts.

Whether *Klaxon* is viewed with satisfaction or despair, expanding a federal court's personal jurisdiction beyond the reach of local state courts raises troubling questions about forcing adoption of local choice-of-law rules. An amended Rule 4(k) might provide in general terms that the federal court may make an independent choice of law. The rule would escape some of the potential complications under Professor Spencer's proposal if it authorizes jurisdiction and an independent choice without the need to determine whether the local state court could in fact entertain the same action, or any part of the action. The Enabling Act challenge is apparent. If choice of law is substantive for Erie purposes, is it also so far substantive as to defeat an Enabling Act Rule for abridging, enlarging, or modifying substantive rights?

If choice of law must be left to state rules, an alternative might be to direct the federal court to adopt the choice rules of some state. Articulating the choice of the state whose choice rules govern, however, would come perilously close to adopting a federal choice rule. One easy example would be to look to the choice rules of the state with the most significant relationship to the dispute. But that would seem to adopt the Restatement Second as the first step, with overtones of renvoi. The Restatement Second, for that matter, may be replaced by the Restatement Third that is now in progress and moving toward adoption of presumptive rules that would be difficult to capture in the language of court rules. And it is not clear that this approach would mollify the Enabling Act concerns. It might be argued that authority to adopt rules for service of process (personal jurisdiction) includes authority to regulate the choice-of-law consequences of expanded service. But that argument might be turned back on itself to urge that the choice-of-law consequences show why the Enabling Act should not be used to expand personal jurisdiction outside of federal-question cases.

Expanding personal jurisdiction without ensuring an independent approach to choice of law should be approached with caution. It could be urged that the problem is not as serious as it appears: a federal court bent on achieving what it believes to be an appropriate choice of law may find a way to explain its choice in the formulas of whatever state supplies the choice rules. But it is hardly satisfying to shrug the problem off with this cavalier rationalization.

Venue

Both proposals rely on existing venue statutes to provide appropriate reassurances that litigation will occur only in a federal forum that meets traditional standards of fair play and substantial justice. The ability to transfer an action to another district reinforces this view. Some additional protection might be developed in elaborating Fifth Amendment due process standards. Although it would be difficult to assert the law is clearly established, there is substantial support for the proposition that the Fifth Amendment is not always satisfied by minimum contacts with the nation as a whole. There may be room to rule that the place of litigation within the United States cannot be unduly burdensome.

It would be difficult to assert that the general venue statutes were adopted in contemplation of nationwide personal jurisdiction. But they may work. The three paragraphs of § 1391(b) can be used as illustrations.

Section 1391(b)(1) authorizes venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." That seems reasonable. But the definition of an entity's residency in § 1391(c)(2) includes "any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." On the face of it, expanding Rule 4(k) to Fifth Amendment due process limits seems to obliterate any independent venue provision for entity defendants. Attempting to adjust this question through a more complicated Rule 4(k) may prove difficult. Adjusting it by amending § 1391 would require careful collaboration with Congress.

Section 1391(b)(2) authorizes venue in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." That would easily establish venue in New Jersey for Nicastro's case — that is where he was injured, an event giving rise to the claim. But how about Ohio, the state of the independent distributor who sold the machine? Nevada, where Nicastro's employer first learned about the machine at a trade show where the English manufacturer was an exhibitor? Different mixtures of contacts even among these three states might entice a plaintiff to shop for a forum thought to be more favorable than the place of injury. Sorting through the innumerable

combinations of facts that now complicate determinations of personal jurisdiction will place great weight on "substantial part," "events or omissions," "giving rise to the claim," and where the events or omissions occurred.

The potential difficulties might be illustrated by the facts of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017). Plaintiffs who were prescribed the drug in California, took it there, and claimed injury there, were joined by plaintiffs who were prescribed and took the drug and claimed injury in other states. Specific jurisdiction was rejected for the out-state plaintiffs, as was general jurisdiction. But what is the Fifth Amendment due process test for a domestic company doing business throughout the United States, and — for this case — having facilities, employees, and a large volume of sales in the state? Specific events and omissions giving rise to local plaintiffs' claims arose in California. Is it clear that the nonresidents' claims do not arise out of the same overall events of the business of designing, producing, and selling the same drug as part of a unified national course of business? If that is too tenuous, do claims of plaintiffs anywhere arise in substantial part in the place where the drug was developed? tested? manufactured? Where labels were composed? promotional campaigns formed?

Moving beyond something as concrete as personal injury, what to make of § 1391(b)(2) for antitrust claims? Securities law claims? Intellectual property injury? Transnational environmental claims? Antitrust and securities claims provide experience under their specific venue provisions, but it may be difficult to translate that experience to a general venue statute when the general statute is applied in a world of jurisdiction based on minimal nationwide contacts. If § 1391 was not drafted, and has not yet been interpreted, to do duty in a context of nationwide minimum contacts jurisdiction, is it fair to rely on it to supply appropriate locating factors?

Section 1391(b)(3) authorizes venue "if there is no district in which an action may otherwise be brought as provided in this section, [in] any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." As with the definition of residence for an entity defendant, this seems to surrender any independent venue provision for cases with nationwide personal jurisdiction. But there would not seem to be a problem if one defendant is subject to nationwide personal jurisdiction and another is not — venue might be established under the literal language of § 1391(b)(3), but the absence of personal jurisdiction would protect that defendant.

Turning to foreign defendants, § 1391(c)(2) and (3) seem to eliminate any venue protection. As noted above, (c)(2) provides that a defendant that is an entity resides in any judicial district in which it is subject to personal jurisdiction with respect to the civil action in question. (c)(3) provides that a defendant not resident in the United States may be sued in any judicial district,

although in context that does not defeat the requirement that there be personal jurisdiction. Present venue statutes do not seem to foreclose selection of any federal district if there are sufficient contacts with the United States as a whole to satisfy Fifth Amendment due process. Due process tests themselves might narrow the choice among all districts if due process concepts are developed to exclude the most obviously unsuitable courts. But it does not seem likely that constitutional principles will be refined to a point that leads to one, or a few, districts. And it remains to discover how far the Fifth Amendment test, based on all contacts with the United States as a whole, will provide specific jurisdiction that could not be asserted in any state, or in the state where the federal court sits. What, for example, of *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014)? Daimler makes cars in Germany. An indirect subsidiary, established as a Delaware LLC, buys Daimler-made cars and sells them throughout the United States. Daimler alone was sued by plaintiffs from Argentina on claims of human-rights violations in Argentina by Daimler's Argentinian subsidiary. The Court ruled that a federal court in California could not assert general jurisdiction over Daimler. Would Fifth Amendment due process tests allow jurisdiction because the claims arise from Daimler's auto-producing business, which is pursued on a large scale in the United States? So for the rather different fact pattern of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011). A Goodyear subsidiary in Turkey made a tire that, as claimed by plaintiffs in North Carolina, caused a fatal bus accident in Paris, France. Goodyear did not challenge jurisdiction. The Court rejected an assertion of general jurisdiction over the subsidiary. Killing North Carolinians in France has some connection to the United States, and other tires made by the subsidiary came to the United States, albeit in relatively small numbers. Again, would that satisfy the Fifth Amendment?

Apart from § 1391, thought also must be given to the various special venue statutes included in Title 28 and in many other federal statutes. It will not be surprising to encounter questions similar to those presented by § 1391.

Adopting the broad proposal for nationwide personal jurisdiction also might be ground to suggest amending the transfer provisions in §§ 1404 and 1406. Each allows transfer to a district in which the action "could have been brought." A defendant's consent to waive personal jurisdiction and venue does not of itself justify transfer to a district preferred by the defendant and found by the court to be in the interest of justice and — for § 1404 — for the convenience of parties and witnesses. With universal district court jurisdiction, however, it might be wise to allow transfer of Rule 4(k) cases to any district no matter what the other venue statutes might provide.

What to do? The present question is whether whatever practical gains might be made by expanding the personal jurisdiction reach of federal courts outweigh the considerable conceptual challenges that

must be confronted. Professor Borchers' proposal focuses on a specific gain by relying on any basis of subject-matter jurisdiction to support personal jurisdiction over defendants who otherwise would escape justice in the United States because no state court can assert personal jurisdiction. Professor Spencer's proposal seeks added gains in expanding personal jurisdiction to allow federal courts to provide an alternative forum — perhaps many alternative forums — even when one or more state courts could assert jurisdiction. This proposal frees federal courts from the limiting effects of state laws that fall short of Fourteenth Amendment due process limits and, more importantly, from the ways in which the Fourteenth Amendment limits that confine state courts fall short of the reach allowed to federal courts under the Fifth Amendment. An expanded federal reach could in turn advance the purely procedural objectives of facilitating optimal joinder of plaintiffs, defendants, and third-party defendants. An expanded reach also should reduce the frequency of preliminary litigation of jurisdiction questions — close cases would arise, but most cases would fit obviously and comfortably within a "national contacts" test.

It will be important to develop a good sense of the real-world importance of these potential gains. One dimension of the task will be to measure the offsetting real-world disadvantages. The broader the expansion of personal jurisdiction, the greater the burden that will be placed on interpreting — and perhaps amending — present venue statutes and working through whatever venue-like limits might be found in the Fifth Amendment. There is a risk of substantial unfairness to defendants, and a particular concern about fairness to internationally foreign defendants. Expansion is not always good, and venue may not always provide protection enough.

Conceptual complexities must be reckoned with if the net advantage of real-world benefits counsels further work. The premise that the Enabling Act authorizes service rules that exercise all possible Fifth Amendment power does not of itself justify rulemaking rather than legislation. The narrow proposal to reach only cases that cannot be reached by any state court is less ambitious and likely less controversial, although it does touch on international relations. The substantial expansion of federal-court authority under the broad proposal could easily provoke vigorous opposition couched in the language of politics. Even if the broad proposal were cut back to reach only federal-question cases, supplemental jurisdiction would present choice-of-law problems for issues governed by state law. Applying the full-bore approach to diversity jurisdiction would magnify the choice-of law problems. And the practical problems arising from reliance on current venue statutes and the unplumbed mysteries of potential intra-national Fifth Amendment due process limits are also conceptual problems.

TAB 8B

THIS PAGE INTENTIONALLY BLANK

From: "Borchers, Patrick" <PATRICKBORCHERS@creighton.edu>
To: "Rebecca_Womeldorf@ao.uscourts.gov" <Rebecca_Womeldorf@ao.uscourts.gov>
Cc: "Marcus, Richard" [redacted]
Date: 01/23/2018 04:10 PM
Subject: Rule 4(k)(2)

Dear Ms. Womeldorf:

Prof. Marcus suggested that I contact you with a proposed amendment to the Federal Rules of Civil Procedure. I attach a copy of an article recently published in the *American University Law Review* arguing for this change.

My proposal, noted on pages 443-44, is to add the words "or cases in which jurisdiction is based on Section 1332 of Title 28" immediately after "under federal law" in the first sentence of Rule 4(k)(2).

Under the U.S. Supreme Court's five personal jurisdiction decisions from 2011 to 2017, there exists a substantial set of U.S. plaintiffs injured in the United States by foreign defendants who have no U.S. court to which they can resort, even though the foreign defendants are benefiting substantially and intentionally from the U.S. market. This is because the Supreme Court's apparent view is that a foreign defendant needs to target a specific state; targeting the United States as a whole in a diffuse manner does not create personal jurisdiction in any one state.

This seems to me to be quite unfair to U.S. plaintiffs, who often have no realistic recourse abroad. It also puts U.S. defendants at a competitive disadvantage because in a similar situation to a foreign entity they would be subject to jurisdiction in, at least, their home states. Foreign entities can thus have the competitive advantage of benefitting from the U.S. market while evading any claim for liability in a U.S. court based on that conduct. Moreover, in the case of a U.S. defendant that might be jointly and severally liable with a foreign entity, the U.S. defendant might be left unable to implead the foreign entity, but instead take its chances on a foreign action for contribution or indemnity.

Rule 4(k)(2) was drafted in response to the Supreme Court's decision in *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) to help avoid the possibility that U.S. parties with federal question claims against foreign entities being left without a U.S. court available to them. The problem seems no less pressing now as to state law claims, which would almost inevitably be covered by diversity and alienage jurisdiction.

I hope the relevant committees find this proposed change worthy of consideration.

Patrick J. Borchers, J.D.
Lillis Family Distinguished Professor of Law
Creighton University
2500 California Plaza
Omaha, Nebraska 68178
Phone: 402.280.3009

case sold only a small percentage of its magazines in the forum state.[192] But many courts have resisted this result, demanding instead that the libelous communication target the state, a showing often dependent on whether the communication makes specific reference to the state and so on.[193] As a result, lower courts are badly split on whether internet libel plaintiffs can sue at home or not.[194]

II. THE PROPOSAL

In most cases, federal courts have the same territorial reach as their state court counterparts. Such has been the law for over half a century.[195] Currently this rule is contained in Federal Rule of Civil Procedure 4(k)(1)(A), which provides that federal courts have personal jurisdiction if the defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[196] So, as a general proposition, a federal court in Nebraska has the same territorial reach as a state court in Nebraska, and so on for all states.

All states have enacted what are commonly known as long-arm statutes.[197] With respect to common law bases of jurisdiction—such as

---

192. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772–73, 779–81 (1984) (permitting personal jurisdiction in a libel suit in New Hampshire even though "the bulk of the harm done to petitioner occurred outside New Hampshire" because the magazine had "continuously and deliberately exploited the New Hampshire market"); *see also* Borchers, *supra* note 191, at 480 (asserting that courts should treat personal jurisdiction in cases of libel on "passive" websites the same as cases of libel in physical publications because the resultant harm is equivalent).

193. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 258–59 (4th Cir. 2002) ("[A] court in Virginia cannot constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their websites or the posted articles at a Virginia audience."); Griffis v. Luban, 646 N.W.2d 527, 535 (Minn. 2002) ("While . . . Luban's statements were intentionally directed at Griffis, whom she knew to be an Alabama resident . . . nothing in the record indicates that the statements were targeted at the state of Alabama or at an Alabama audience beyond Griffis herself."); *see also* Borchers, *supra* note 191, at 473, 486–87 (discussing cases seemingly inconsistent with the Supreme Court's decision in *Keeton*).

194. *See* Borchers, *supra* note 191, at 482 (identifying thirty-two post-*Keeton* reported decisions on internet libel jurisdiction, with thirteen concluding jurisdiction existed and nineteen concluding jurisdiction did not exist).

195. *See, e.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219, 226, 231 (2d Cir. 1963) (en banc) (finding no reason for federal courts to override an applicable state law in a diversity jurisdiction case).

196. FED. R. CIV. P. 4(k)(1)(A).

197. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (elaborating that seven states have long-arm statutes "extend[ing] the state's jurisdiction to the limits of due process,"

in-forum service of an individual or voluntary appearance—the common law provides the state with affirmative authority to assert jurisdiction, and such assertions are constitutional.[198] Consequently, about a century ago, states began pushing the common law's jurisdictional bounds with statutes. Most prominent among these were non-resident motorist statutes. These statutes appointed a state official as the agent for service of process for non-residents based on the fiction that, by using a state's roads, an out-of-state motorist implicitly consented to jurisdiction over auto accident suits in that state.[199] The Supreme Court upheld the constitutionality of these statutes as long as they required reasonable notice to the non-resident, usually by having the state official mail the complaint and summons.[200] After *International Shoe*, states began to enact more expansive general statutes to assert jurisdiction over all types of civil cases, hence the colloquial name long-arm statutes.[201]

These statutes fall into two broad categories. Some, such as California's, give their courts all of the jurisdiction that the Constitution allows.[202] Others, such as New York's, are detailed and provide jurisdiction on specific bases, such as over any person who "transacts business within the state."[203] While in some cases the latter stop short of the constitutional line, they cannot go beyond constitutional limits.[204] As a result, the Fourteenth Amendment's

---

thirty states have long-arm statutes enumerating acts that subject a nonresident to the state's jurisdiction, and thirteen states have a hybrid of the two models).

198. *See, e.g.*, N.Y. C.P.L.R. 301 (McKinney 2010) (incorporating expressly common law bases of jurisdiction); *see also* Burnham v. Superior Court, 495 U.S. 604, 612, 615, 619 (1990) (plurality opinion) (reaffirming the common law basis of in-state service).

199. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927) (expanding the personal jurisdiction doctrine by condoning Massachusetts's novel theory of implied consent for out-of-state motorists).

200. *See id.* at 354, 356 (noting requirement of notice by mail in upholding the statute); Wuchter v. Pizzutti, 276 U.S. 13, 18–19 (1928) (striking down a statute with no express requirement of notice even though notice was given).

201. *See* McFarland, *supra* note 197, at 492–96 (discussing how *International Shoe* transformed the law of personal jurisdiction by authorizing service on non-residents outside the forum state).

202. CAL. CIV. PROC. CODE § 410.10 (West 2004) (providing that California courts have jurisdiction "on any basis not inconsistent with the Constitution").

203. N.Y. C.P.L.R. 302(1).

204. *See* McFarland, *supra* note 197, at 492–93 (explaining that states can exercise personal jurisdiction over non-residents only if the jurisdiction comports with the Fourteenth Amendment-derived "traditional notions of fair play and substantial justice" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

requirement of minimum contacts with the forum applies indirectly to federal courts, even though as organs of the federal government they normally would be subject to the Fifth Amendment. Thus, the Supreme Court has treated cases brought in federal court as if they had been brought in state court.[205]

Rule 4(k)(1) contains two exceptions purporting to give federal courts broader reach, however. One of long standing, which has launched thousands of Civil Procedure multiple-choice exam questions, is the "bulge rule."[206] The bulge rule provides that a supplemental party brought in by Federal Rules of Civil Procedure 14 or 19 is subject to service of process within 100 miles (as the crow flies[207]) of the federal courthouse, if the service takes place in the United States.[208] It is clear from the rule that the physical act of service must take place in the "bulge area," which can cover multiple states for many federal courthouses.

Courts have proposed three readings of the bulge rule. One is that the rule confers no extra-jurisdictional reach but merely authorizes delivery of the summons and complaint outside the forum state.[209] That reading, however, would render the rule meaningless, as the combination of Federal Rule of Civil Procedure 4 and state statutes that Rule 4 incorporates authorize delivery of the summons and complaint outside the forum state.[210] Courts are divided as to whether a party brought in by the bulge rule must have minimum contacts with the bulge area or with the "bulge state," or the state where service took place.[211] However, under either interpretation the federal courts have modestly broader jurisdictional reach than their state court counterparts.

---

205. *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463–64 (1985).

206. The bulge rule was adopted in 1963. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, THE LAW OF FEDERAL COURTS 451 (7th ed. 2011).

207. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412, 417 (5th Cir. 1979) (concluding that the proper way to measure the bulge area is to use straight-line air miles, "as the crow flies," instead of road miles).

208. HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 487.

209. *See, e.g.*, Coleman v. Am. Exp. Isbrandtsen Lines, Inc., 405 F.2d 250, 251 (2d Cir. 1968) (involving a Pennsylvania corporation served with a summons for the Southern District of New York pursuant to the bulge rule despite its conducting no business in New York).

210. *See id.* at 251–52 (explaining that most states had already provided for out-of-state process via long-arm statutes, which federal courts could also utilize).

211. HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 487 (noting that the view that "the defendant must have minimum contacts with the 'bulge' area itself" is more common). *Compare* Quinones v. Pa. Gen. Ins. Co., 804 F.2d 1167, 1174 (10th Cir. 1986)

The other Rule 4(k)(1) extension recognizes that Congress has enacted several statutes allowing nationwide service of process or using similar language.[212] As discussed more thoroughly below, lower federal courts have generally construed the constitutional requirement to be one of minimum contacts with the United States as a whole, not minimum contacts with the forum state.[213] Although dictum, the plurality opinion in *J. McIntyre* suggested that a national contacts test would apply to a federal statute giving the federal courts national reach in products liability cases.[214]

One of the best known examples of such a statute is the federal interpleader statute.[215] Interpleader allows the holder of a stake (commonly the proceeds of an insurance policy) to interplead rival claimants to the stake in order to avoid a multiplicity of suits and the possibility of multiple liability.[216] However, for this to be effective, the stakeholder needs to be able to bring all of the rival claimants to one forum, which would be impossible if the stakeholder could not get jurisdiction over all of them. Without any fuss, federal courts have assumed that the grant of nationwide jurisdiction here is constitutional.[217]

This brings us to the other major extension, which is Federal Rule of Civil Procedure 4(k)(2). Rule 4(k)(2) was drafted in response to the Supreme Court's decision *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*[218] The District Court determined that Louisiana's long-arm statute did not reach the defendants and dismissed the claims

---

(favoring the rule that a district court may exercise jurisdiction over an out-of-state party with minimum contacts within the 100-mile bulge area), *with Coleman*, 405 F.2d at 252–53 (holding that a district court may exercise jurisdiction over an out-of-state party who has minimum contacts "with the state of service").

212. *See* 15 U.S.C. §§ 22, 78aa (2012); 18 U.S.C. § 1915(d) (2012); 29 U.S.C. § 1132(e)(2) (2012); 42 U.S.C. § 9613(P) (2012); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480 n.6 (collecting statutes).

213. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480–84 (relating how equivocal Supreme Court decisions led lower federal courts to construe the constitutional requirement as one of minimum contacts with the United States as a whole).

214. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884–85 (2011) (plurality opinion) ("For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case . . . . It may be that . . . the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case . . . .").

215. 28 U.S.C. § 2361 (2012).

216. *See* WRIGHT & KANE, *supra* note 206, at 531–32.

217. *See, e.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219, 229 (2d Cir. 1963) (en banc).

218. 484 U.S. 97 (1987).

against them.[219] The case was brought on a federal question theory.[220] A sharply divided Fifth Circuit, sitting en banc, agreed with the District Court that the state statute applied, while the dissent opined that the result amounted to a "bizarre hiatus in the Rules."[221] The Supreme Court affirmed the Fifth Circuit's en banc ruling, holding that the predecessor of Rule 4(k)(1)(A) meant what it said: if the Louisiana state courts would not have jurisdiction, then neither would a federal court situated in Louisiana.[222] But along the way, the Court mentioned the possibility of amending the Federal Rules.[223]

The *Omni Capital* decision spawned Rule 4(k)(2).[224] Rule 4(k)(2) provides that, if the case is one "aris[ing] under federal law," federal courts have personal jurisdiction to the constitutional limit provided that no state could exercise jurisdiction.[225] Because Rule 4(k)(2) is directed at federal courts, the relevant provision of the Constitution is the Fifth Amendment.[226] Both the Advisory Committee on Rules of Civil Procedure (Rules Advisory Committee) report and most federal courts applying Rule 4(k)(2) have adopted some version of the national contacts test.[227]

My proposal is simple. Rule 4(k)(2) should be amended by adding "or cases in which jurisdiction is based on Section 1332 of Title 28,"

---

219. *Id.* at 101–02.

220. *Id.* at 100.

221. *See* Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415, 419 (5th Cir. 1986) (per curiam), *aff'd*, 484 U.S. 97; *id.* at 427–28 (Wisdom, J., concurring in part and dissenting in part).

222. *Omni Capital*, 484 U.S. at 108 (relying on then-Rule 4(e)).

223. *Id.* at 111 ("A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of . . . federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility . . . better rests with those who propose the Federal Rules of Civil Procedure and with Congress.").

224. *See* FED. R. CIV. P. 4(k), advisory committee's notes to 1993 amendment (recounting that the amended Rule 4(k) "corrects a gap in the enforcement of federal law . . . respond[ing] to the suggestion of the Supreme Court made in [*Omni Capital*]").

225. FED. R. CIV. P. 4(k)(2).

226. *See* FED. R. CIV. P. 4(k), advisory committee's notes to 1993 amendment (elaborating that "[t]he Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party").

227. *See id.* (indicating that one of two versions of the national contacts test apply under the Fifth Amendment); HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480–84 (explaining that lower courts have used the three different national contacts tests).

which is the diversity and alienage statute, immediately after the words "under federal law" in the first sentence of the rule.

III. PRACTICAL CONSIDERATIONS AND OBJECTIONS

Of course, no solutions to problems as intractable as those presented by personal jurisdiction law will either be perfect or immune from legal challenge. In this Part, I consider some of the limitations of, and possible challenges to, my proposal.

A. How Much Would the Extended Rule 4(k)(2) Accomplish?

An extended Rule 4(k)(2) would not affect cases like *World-Wide Volkswagen* and *Bristol-Myers* in which alternative state courts were available to the plaintiffs. In *World-Wide Volkswagen* and *Bristol-Myers*, the plaintiffs instead could have sued the dismissed defendants in New York state court.

An extended rule would, however, affect cases like *J. McIntyre*, assuming courts employ a national contacts test. The *J. McIntyre* plurality (and to a lesser degree, the concurrence in the judgment) made much of the fact that the defendant had not targeted New Jersey specifically.[228] There was, however, evidence in abundance that the defendant was targeting the U.S. market.[229] The plurality opinion,

---

228. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 873, 886 (2011) (plurality opinion) (declaring that a British scrap metal company did not have sufficient purposeful contacts with New Jersey because the company sold its products through a U.S. distributor; sent representatives to trade shows in several states other than New Jersey; had provided only four machines that ended up in New Jersey; and, in New Jersey, had no offices or employees, paid no taxes, owned no property, and did not advertise); *id.* at 888 (Breyer, J., concurring in the judgment) (agreeing that the British company did not have sufficient contacts with New Jersey because the company wanted its U.S. distributor to sell its products indiscriminately to any willing purchaser in America; because the company's representatives had attended trade shows in several U.S. cities, but not any in New Jersey; and because the U.S. distributor only once sold and shipped a machine to a New Jersey customer).

229. *Id.* at 896–97 (Ginsburg, J., dissenting) (pointing out that McIntyre UK's president attended annual scrap recycling industry conventions across the United States; McIntyre UK exhibited its product at trade shows with the intention of reaching people across the United States; a McIntyre UK engineer had installed the company's equipment in several states; until 2001, McIntyre UK distributed its products exclusively through an independent, Ohio-based company; in a letter to the independent distributor's president, "McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: 'All we wish to do is sell our products in the [United] States—and get paid!'"; when the independent distributor was worried about U.S. litigation over McIntyre UK products, McIntyre UK

which concluded there was no jurisdiction, did not quarrel with the assertion that the British company had been targeting the domestic U.S. market.[230] A letter from the defendant's corporate officers, quoted by Justice Ginsburg's dissent, made it obvious that the corporation was trying to profit maximally from the U.S. market.[231]

An extension of Rule 4(k)(2) to diversity and alienage cases would cure the worst of the worst cases, in which a foreign corporate defendant purposefully and substantially benefits from the U.S. market but is immunized from suit in any U.S. court arising from those U.S. activities. Whatever one thinks about the merits of not allowing the *World-Wide Volkswagen*, *Walden*, or *Bristol-Myers* plaintiffs to sue in the U.S. forum of their choice, they had other U.S. forums available. But Mr. Nicastro, the *J. McIntyre* plaintiff, had no U.S. forum. His only option would be a suit in England, which likely would have been an impracticable pursuit.[232]

"reassured its distributor that 'the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine'"; the independent distributor sought guidance from McIntyre UK when promoting McIntyre UK's products at conventions; and McIntyre UK had been named as a defendant in several states (citations omitted)).

230. *Id.* at 885 (plurality opinion) ("In this case, petitioner directed marketing and sales efforts at the United States.").

231. *Id.* at 897 (Ginsburg, J., dissenting). Justice Ginsburg was also appropriately offended by the plurality's implicit endorsement of a foreign manufacturer being able to "Pilate-like" wash its hands of liability for a product by passing it through a nominally independent distributor. *Id.* at 893–94 ("Inconceivable as it may have seemed yesterday, the splintered majority today 'turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.'" (alteration in original) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995))).

232. England now allows contingency fees but retains the "loser pays" rule, so if Mr. Nicastro were to lose he would be liable for the defense's attorney's fees. *See* Quinn Emanuel Urquhart & Sullivan LLP, *Contingency Fees in England After April 2013*, LEXOLOGY, (Oct. 24, 2012), https://www.lexology.com/library/detail.aspx?g=f053e1a5-6992-4ef0-a9d8-9bef404a85e6. By one estimate, tort recoveries in the United States are roughly ten times those in England. *See* P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1012. Thus, even if Mr. Nicastro's lawyers had been able to foresee the jurisdictional dismissal, it seems unlikely that they would have seen it as a viable proposition to find an English lawyer and sue there. Moreover, Mr. Nicastro was injured on October 11, 2001. *See* Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 96 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd sub nom. J. McIntyre*, 564 U.S. 873. The statute of limitations in England for personal injuries resulting from negligence is three years from discovery of the injury, or six years from the injury, whichever is later, subject to

The revised Rule 4(k)(2) also will not clear up, in domestic cases anyway, troublesome issues such as whether a contact is related or the weight of virtual contacts. Those issues will have to be resolved by the Supreme Court, I hope in a sensible fashion.[233] But, at the very least, it would end the absurdity of the Mr. Nicastros of the world having no U.S. remedy except what modest amount they might get in a workers' compensation forum.

I agree with Professor Sachs that a federal statute dealing in a sensible way with all or most of the messy jurisdictional issues would be better, in theory, than extending Rule 4(k)(2).[234] But the statutory solution will not come to pass. As Professor Sachs notes, in 2009, the Foreign Manufacturers Legal Accountability Act (FMLAA) was introduced in the House with multiple versions submitted in subsequent Congresses.[235] Every iteration of it has failed to advance.[236] The bill is reminiscent of the old implied consent statutes in that, via federal regulatory agencies, it would require foreign companies to appoint agents for service of process and then would deem that appointment consent to personal jurisdiction in the state where the agent is located.[237] As Professor Sachs notes, groups supportive of tort plaintiffs endorsed the bill, which had sponsors from both parties, but it still proved controversial.[238]

---

a maximum period of fifteen years from the negligent act. *Limitation Periods*, THOMAS REUTERS, Aug. 1, 2016, Practical Law, 1-518-8770. Thus, the statute of limitations in England barred Mr. Nicastro from recovering damages. It seems likely that most tort victims with close cases as to jurisdiction would attempt to bring the case in a U.S. forum and, if dismissed for lack of jurisdiction, would not pursue the matter in a foreign court for some combination of these reasons.

233. Based on the Court's recent performance, I am not holding my breath.

234. *See* Sachs, *supra* note 18, at 1325, 1330–31 (arguing that extending Rule 4(k)(2) "would preserve some troubling aspects of current law," e.g., plaintiffs would likely still end up in inconvenient forums, and proposing instead that Congress enact a bill to establish nationwide personal jurisdiction for federal courts).

235. *See id.* at 1325–26; *see also* H.R. 3304, 114th Cong. (2015); H.R. 1910, 113th Cong. (2013); H.R. 3646, 112th Cong. (2011); H.R. 4678, 111th Cong. (2010); S. 1606, 111th Cong. (2009). When the first version of the bill was introduced in 2009, Democrats controlled both houses of Congress and the White House. Currently Republicans control all three. Party alignment in the federal government has not affected the fate of the FMLAA.

236. The latest version is H.R. 3304, 114th Cong. (2015). The FMLAA has not yet been introduced in the 115th Congress.

237. *Id.* § 5.

238. *See* Sachs, *supra* note 18, at 1325–26.

An extended Rule 4(k)(2) would be preferable for several reasons. First, although the rulemaking process is hardly simple, it is not the dismal political swamp that Congress is. If the FMLAA cannot advance, a bill offering a comprehensive statute directly affecting domestic defendants would be dead on arrival. U.S. business interests would fight vigorously against giving back the jurisdictional bonuses that the five defense-friendly decisions of this decade have handed them, the most important of which was—perhaps ironically—penned by one of the Court's most liberal members, Justice Ginsburg, in limiting general jurisdiction over a corporation to its home.[239] Equally ironic, Justice Kennedy—perhaps the Court's most vigorous proponent of the power of state sovereignty against the federal government[240]—reasoned that sovereignty can give the federal courts personal jurisdiction that the Constitution does not permit state courts.[241]

Second, the bill is limited to certain kinds of products and claims on them.[242] An extended Rule 4(k)(2) would not be so limited because it would apply to the full range of legal theories brought in diversity and alienage cases.

Third, an extended Rule 4(k)(2) would work to the benefit of both U.S. plaintiffs and defendants and result in fairer outcomes. Most cases covered by the extended rule would look like *J. McIntyre* or *J. McIntyre* with a U.S. co-defendant. If one takes the *J. McIntyre* facts but instead assumes the defendant is incorporated in Delaware with its principal place of business in New York (rather than both in England), the defendant would be subject to jurisdiction in New York and Delaware. Pursuing a case against the defendant in New York or Delaware is a far more tenable proposition than trying to litigate in England.[243] Thus, the English defendant has a considerable competitive advantage over the hypothetical U.S. defendant because the former can avoid relatively generous U.S. juries, while the latter cannot.[244]

---

239. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 929 (2011).

240. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 711, 757 (1999) (establishing that state sovereign immunity prevents application of federal wage and hour laws to state employees).

241. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion).

242. H.R. 3304, 114th Cong. § 4(4) (listing the types of products to which the bill would apply).

243. *See supra* note 232.

244. *See* Atiyah, *supra* note 232, at 1012 (finding that tort recovery in the United States is typically ten times greater than in England).

If one assumes the facts of *J. McIntyre* but with a U.S. co-defendant,[245] an extended Rule 4(k)(2) would work to the advantage of the U.S. co-defendant. It would be a considerable benefit to the U.S. defendant to have the foreign defendant joined. If the U.S. defendant arguably is jointly and severally liable with the foreign defendant, the U.S. defendant could easily file an impleader claim against the foreign defendant in the same action if they were in the same court.[246] If the foreign defendant is not a party to the proceeding, then the U.S. defendant would be left in the position of the *Asahi* defendant, attempting to pursue a separate contribution and indemnity action in a foreign court.[247] Moreover, in the highly likely event that the case settles, the U.S. defendant would have the foreign defendant at the settlement table to contribute to any resolution, rather than attempting to calculate the odds and economics of passing off any portion of the settlement to an absent party.

While not comprehensive, an extended Rule 4(k)(2) is a realistic possibility and a broad federal statute is not. While an extended rule would not solve all the problems that jurisdictional law presents, it would solve the worst of them to the benefit of U.S. plaintiffs, defendants, and the fair administration of justice.

B. Would Extending Rule 4(k)(2) Violate the Rules Enabling Act?

Federal Rules, including the Federal Rules of Civil Procedure, are created by a relatively elaborate procedure controlled mainly by the Standing Committee of the Judicial Conference and the Rules Advisory Committee.[248] The latter drafts and proposes amendments to the Federal Rules, the Supreme Court chooses whether to promulgate them, and then Congress has several months to veto them.[249] For the

245. There was a U.S. co-defendant in *J. McIntyre*, the U.S. distributor of the machines. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom. J. McIntyre*, 564 U.S. 873. However, the U.S. distributor ceased to distribute McIntyre machines in 2001. *See J. McIntyre*, 564 U.S. at 896 (Ginsburg, J., dissenting). This is because the distributor went bankrupt. *See* Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575, *rev'd sub nom. J. McIntyre*, 564 U.S. 873. Thus, for practical purposes, the case was solely against the English J. McIntyre.

246. *See* FED. R. CIV. P. 14(a).

247. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114–15 (1987) (noting that the third-party claim should be dismissed and is possibly governed by different law than the underlying claim).

248. *See* Wasserman, *supra* note 18, at 333–34 (describing the rulemaking process).

249. *See id.*

most part, the proposed amendments are enacted in the form they leave the Rules Advisory Committee's hands, though several decades ago there was the noted congressional override and a poorly drafted rewrite of the service-of-process rules.[250]

The Rules Enabling Act[251] authorizes rules if they do not "abridge, enlarge or modify any substantive right."[252] Because federal rules are authorized by a federal statute, they are largely immune from the doctrine of *Erie Railroad Co. v. Tompkins*,[253] which has come to be understood to allow federal common law rules only if they will not promote forum shopping or result in inequitable administration of the laws.[254] Federal rules are within the scope of the Rules Enabling Act as long as they "really regulate procedure."[255] Or, as Justice John M. Harlan put it, a federal rule need only be "arguably procedural" to pass muster.[256]

Contending successfully that a Federal Rule of Civil Procedure violates the Rules Enabling Act is an uphill climb, to say the least. Because the rule must pass through the Supreme Court's hands, for a litigant to successfully challenge a rule the litigant would have to convince a lower court and then possibly the Supreme Court itself that the Court erred in adopting the rule.[257]

---

250. *See* WRIGHT & KANE, *supra* note 206, at 441 (highlighting the stark difference between the quality of proposed amendments based on the body that submits them, be it Congress or the Rules Advisory Committee).

251. 28 U.S.C. § 2072 (2012).

252. § 2072(b).

253. 304 U.S. 64 (1938).

254. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 468 (1965) (holding that the outcome-determination test cannot be read without referencing the twin aims of *Erie* regarding forum shopping and inequitable administration of the laws).

255. *Id.* at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

256. *Id.* at 476 (Harlan, J., concurring).

257. There have been a couple of close calls, however. At least twice, the Court has read rules in implausibly narrow fashions, apparently to avoid a serious argument that the rule was not really regulating procedure. In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the Supreme Court read Federal Rule of Civil Procedure 3—which states when an action "is commenced by filing a complaint"—as not affecting the Oklahoma rule that statutes of limitation stop when the complaint and summons is served, not when the plaintiff files the complaint. *Id.* at 750–51. As a result, Federal Rule 3 was left with almost no meaning. The Supreme Court was concerned that reading Federal Rule 3 as trumping the stop-on-service rule would interfere with an Oklahoma substantive policy decision. *Id.* at 751. In *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the Supreme Court read language of Federal Rule of Civil Procedure 41—which governs voluntary dismissals—regarding if a dismissal is "with prejudice" as only precluding refiling of the action in the same federal court that the first action was filed. *Id.* at 505. The Court was concerned that if Rule 41 were read to preclude an

The Federal Rules of Civil Procedure contain two provisions that extend personal jurisdiction of federal courts beyond that of their state court counterparts. One is the long-standing bulge rule that gives a 100-mile bonus to federal courts in haling supplemental parties under Rules 14 and 19.[258] The other is the current version of Federal Rule of Civil Procedure 4(k)(2), which is limited to federal question cases.[259]

One might argue that the federal courts have special powers that allow for Rule 4(k)(2) for federal question cases but not diversity cases. However, it is difficult to see why this should be so. Diversity jurisdiction has existed since the First Judiciary Act of 1789, while general federal question jurisdiction did not become a permanent fixture until after the Civil War.[260] So it cannot be argued seriously that federal question jurisdiction is more fundamental than diversity. The likely reason for current Rule 4(k)(2)'s limitation to federal question cases is that it was a response to *Omni Capital*, which was a federal question case.[261] When the Rules Advisory Committee proposed Rule 4(k)(2) in its current form, it referred only to the special powers of federal courts without any reference to the basis upon which they exercised subject matter jurisdiction.[262] Although lower court cases addressing whether these provisions in the federal rules violate the Rules Enabling Act are not plentiful, they come down on the side of upholding the relevant rule.[263] Extending Rule 4(k)(2) to diversity and

---

action in a state court in another state that Rule 41 would violate the basic federalism goals of *Erie*. *Id.*

258. *See supra* notes 206–11 and accompanying text.

259. *See supra* notes 218–27 and accompanying text.

260. *See* WRIGHT & KANE, *supra* note 206, at 102 (explaining that it was not until 1875 that Congress gave federal courts original jurisdiction over federal question cases); *id.* at 143 ("Ever since the First Judiciary Act, the federal courts have had original jurisdiction of so-called diversity cases, those involving a controversy between citizens of different states or between a citizen of a state and an alien.").

261. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 100 (1987) (noting that the original complaints were filed under the federal Securities laws).

262.

> There remain constitutional limitations on the exercise of territorial jurisdiction by *federal courts* over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision.

FED. R. CIV. P. 4(k)(2) advisory committee's note to 1993 amendment (emphasis added).

263. *See, e.g.*, Keith v. Freiberg, 621 F.2d 318, 319 & n.2 (8th Cir. 1980) (holding that Rule 4(d)(7), (e), and (f) of the Federal Rules of Civil Procedure and the Rules

alienage cases would be at least as arguably procedural as the bulge rule and the current version of Rule 4(k)(2).[264]

C. Is Basing Federal Court Personal Jurisdiction on National Contacts Constitutional?

Unless some form of a national contacts test applies to the proposed extension of Rule 4(k)(2), it would all be for naught. The Mr. Nicastros of the world would still be left without a U.S. forum against foreign defendants.

As noted above, it is difficult to see why the difference between extending personal jurisdiction in diversity and federal question cases should present any constitutionally significant distinction. As the Rules Advisory Committee noted, it is the fact that a federal court is hearing the case that brings into play the Fifth rather than the Fourteenth Amendment.[265] Moreover, the venerable bulge rule—which is not limited to federal question cases—would become ineffectual in diversity cases if minimum contacts with the forum state is a constitutional command both to state and federal courts in non-federal question cases.[266]

Of course, this assumes that the national contacts test, in one form or another, is the Fifth Amendment limitation. The Supreme Court has played coy on this issue. In *Stafford v. Briggs*,[267] the Court resolved the case on statutory grounds. In his dissent, however, Justice Stewart,

---

Enabling Act are constitutional); *cf.* Archangel Diamond Corp. Liquidating Tr. v. OAO Lukoil, 75 F. Supp. 3d 1343, 1365 (D. Colo. 2014), *aff'd*, 812 F.3d 799 (10th Cir. 2016) (applying Rule 4(k)(2) in determining whether jurisdiction is proper in the face of constitutional challenges to such jurisdiction); Dechand v. Ins. Co. of Pa., 732 F. Supp. 1120, 1122 (D. Kan. 1990) (upholding federal rules governing joinder in light of Kansas statute).

264. Other federal rules extend the reach of federal courts. Admiralty Supplemental Rules B and C have been interpreted to create nationwide personal jurisdiction in admiralty cases where the vessel is seized and Bankruptcy Rule 7004(f) gives bankruptcy courts nationwide personal jurisdiction. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 494–97. In admiralty proceedings, the "general common law" still applies, and in adversary proceedings in bankruptcy courts (suits by and against the debtor) state law applies. *See, e.g.*, *In re* Kewanee Boiler Corp., 270 B.R. 912, 925 (Bankr. E.D. Ill. 2002) ("[T]he mere presence of state law issues does not mean that jurisdiction over bankruptcy issues should be left to the state courts . . . ."). The applicable law has no bearing on whether the national contacts standard applies.

265. *See* FED. R. CIV. P. 4(k)(2) advisory committee's note to 1993 amendment ("These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment . . . .").

266. *See supra* notes 206–11 and accompanying text.

267. 444 U.S. 527 (1980).

joined by Justice Brennan, disagreed with the majority's statutory reading, and reached the constitutional issue of whether a federal court could exercise national personal jurisdiction.[268] They concluded that minimum contacts with the United States as a whole, not the forum state, was the constitutional requirement under the Fifth Amendment.[269] The majority opinion neither endorsed nor rejected the dissent's proposed constitutional test. In two cases in 1987 involving foreign defendants, the Court wrote brief footnotes stating that the Fifth Amendment standard was not relevant because Fourteenth Amendment standards were applicable under what is now Rule 4(k)(1)(A); thus, the Court had no need to decide the issue and said the same in throwaway dictum in *Bristol-Myers*.[270]

Lower courts take various views. One is the pure national contacts standard, which allows jurisdiction in any federal court anywhere in the United States, if the defendant has minimum contacts with the United States.[271] At the other pole is the view that the Fifth and Fourteenth Amendment standards are identical.[272] The middle view is that while the national contacts test is the basic one, the plaintiff

268. *Id.* at 553–54 (Stewart, J., dissenting).

269. *Id.*

270. Bristol-Myers Squibb Co. v. Superior Court, 173 S. Ct. 1773, 1784 (2017) (leaving open the question of whether the Fifth Amendment applies to federal court personal jurisdiction); Omni Capital Int'l. Ltd. v. Rudolph Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (stating the court has no occasion to address the Fifth Amendment's applicability to personal jurisdiction through national contacts); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (declining to address congressional authority of granting personal jurisdiction to federal courts "over alien defendants based on the aggregate of *national* contacts").

271. *See, e.g.*, *In re* Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207 (2d Cir. 2003) (per curiam) (holding that a federal court's minimum contacts analysis must look to a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction is consistent with due process); Med. Mut. of Ohio v. deSoto, 245 F.3d 561, 567 (6th Cir. 2001); *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 NRB, 2015 WL 6243526, at *23 (S.D.N.Y. Oct. 20, 2015) (agreeing that the national contacts test is consistent with Second Circuit precedent), *rev'd in part on rehearing*, 11 MD 2262 (NRB), 2016 WL 1301175 (Mar. 31, 2016); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 33 (D.D.C. 2010) (applying the national contacts test as the test for diversity jurisdiction); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 497 (discussing the application of pure national contacts test as the standard in bankruptcy cases).

272. *See, e.g.*, Republic of Panama v. BCCI Holdings (Luxembourg), S.A., 119 F.3d 935, 942 (11th Cir. 1997) (noting appellee's argument that under both Amendments, courts must look past the defendant's contacts with the forum state).

cannot pick out an unreasonably inconvenient forum.[273] The middle view has found favor among commentators.[274] A majority of the lower federal courts facing the issue appear to have adopted some form of the national contacts test.[275]

There are other strong suggestions that some form of the national contacts test applies under the Fifth Amendment.[276] The 1993 Rules Advisory Committee's notes to Rule 4(k)(2) assume that some form of the national contacts test applies.[277] If some form of the national contacts test does not apply, Rule 4(k)(2) would be of almost no effect. Rule 4(k)(2)(A) requires that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."[278] If the Fifth and Fourteenth Amendment standards are identical, Rule 4(k)(2) would be of effect only in the rare case that the defendant had minimum contacts with a forum state that has a long-arm statute that stops short of the constitutional line, the defendant's contacts fall between the constitutional and statutory lines, and no other state is available. Moreover, the venerable bulge rule[279] would be of no effect. Congress also clearly believes that it has the power to authorize federal court personal jurisdiction on a nationwide basis as it has several times so legislated.[280]

The Supreme Court plurality in *J. McIntyre* also appeared to endorse the possibility of broader personal jurisdiction for federal courts. Recognizing the implications of its sovereignty-based approach, the plurality wrote: "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States, but not of any particular State."[281] Then later, after noting that the defendant clearly targeted the U.S. market, the

273. *Id.* at 944–48.

274. HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 483 & n.22 (endorsing the test and noting other commentators who favor it).

275. *See id.* at 482–83; *see also BCCI Holdings*, 119 F.3d at 948 (suggesting a regional approach with personal jurisdiction being proper for a bank with few contacts in Florida but numerous contacts up and down the coast).

276. *See* Sachs, *supra* note 18, at 1319–20 (explaining that although the Supreme Court has never ruled as to whether national personal jurisdiction is constitutional under the Fifth Amendment, "the issue is about as settled by precedent as it could be" in favor of a national contacts test).

277. *See* FED. R. CIV. P. 4(k)(2) advisory committee's note to 1993 amendment.

278. *See* FED. R. CIV. P. 4(k)(2)(a).

279. *See supra* notes 206–11 and accompanying text.

280. *See* 15 U.S.C. §§ 22, 78aa (2012); 18 U.S.C. § 1915(d) (2012); 29 U.S.C. § 1132(e)(2) (2012); 42 U.S.C. § 9613(P) (2012); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480 n.6 (collecting statutes).

281. J. McIntyre Mach. Co. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion).

plurality stated: "It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts."[282] The plurality also did not attach any significance to the applicable law: "Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey."[283]

All of this appears to be an endorsement of the constitutionality of an extension of Rule 4(k)(2) to diversity and alienage cases and a rejection of the suggestion that the applicable law makes a difference. The plaintiff in *J. McIntyre* could only have brought the action in federal court on alienage grounds, as products liability law is state law. The only arguably significant difference is that extending Rule 4(k)(2) would not be direct action by Congress. But as discussed above, it would be a permissible exercise of the power granted by Congress under the Rules Enabling Act, and Congress would be able to veto the change. Thus, it is difficult to see why—under the plurality's view—it would make any constitutional difference had Mr. Nicastro been allowed to bring his action in New Jersey federal court under an extended Rule 4(k)(2) or a federal statute.

Of course, this only accounts for four votes on the Court and flows from a sovereignty rationale that the concurrence in the judgment did not remark on and the dissent rejected.[284] But it seems likely that the Justices who signed the *J. McIntyre* concurrence or the dissent would find an extended Rule 4(k)(2) constitutional, even if they rested their votes on a fairness rather than a sovereignty rationale. An extended Rule 4(k)(2) would apply directly only to foreign defendants because had the *J. McIntyre* defendant been domestic, the plaintiff could have sued the defendant corporation in its home state.[285] The dissent argued that it was unfair for a "foreign industrialist" to take advantage of the U.S. market, yet be immunized from suit in the most convenient U.S. forum.[286] The concurrence's reluctance to lay down absolutist

282. *Id.* at 885.

283. *Id.* at 885–86.

284. *See id.* at 899 (Ginsburg, J., dissenting).

285. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 929 (2011) (explaining that a court may assert general jurisdiction over a foreign subsidiary of a U.S.-based corporation only when the corporation's affiliations with the forum state are continuous and systematic).

286. *J. McIntyre*, 574 U.S. at 893 (Ginsburg, J., dissenting). A further hint that the dissenters would endorse an extended Rule 4(k)(2) is their approving citation of commentary urging that for foreign defendants the United States be viewed as a single

anti-jurisdictional rules would militate against any blanket finding that an extended Rule 4(k)(2) is unconstitutional.[287]

As a practical matter, an extended Rule 4(k)(2) would apply mainly in cases that look like *J. McIntyre*.[288] Under any version of a national contacts test, the defendant would have to purposefully direct its commercial activities toward the United States to its benefit.[289] Inevitably, there will be at least one state in which the bulk of the operative events took place, as was so with New Jersey in *J. McIntyre*. As the dissenting Justices already think it constitutional to sue in that state, they surely would find jurisdiction under an extended Rule 4(k)(2). For the plurality Justices, if there were federal law authorization, their sovereignty concerns would be addressed.

CONCLUSION

Extending Federal Rule of Civil Procedure 4(k)(2) to diversity and alienage cases would not resolve all the uncertainties and—in my view—unfair results produced by current jurisdictional law. But it would likely cure the worst of the injustices, which is leaving a U.S. plaintiff with no U.S. forum when a defendant exploiting the U.S. market injures the plaintiff in the United States and the suit is based on the defendant's U.S. activities. Extending Rule 4(k)(2) requires meeting and overcoming two substantial legal objections. The first is whether the extension would be allowed under the Rules Enabling Act. However, the Supreme Court has twice promulgated rules giving federal courts personal jurisdiction that their state court counterparts do not have. One is the bulge rule extending a federal court's reach to 100 miles from the courthouse over supplemental parties brought in under either Federal Rule 14 or 19.[290] The other is the current version of Rule 4(k)(2). Although the Supreme Court has never ruled on the question, the bulk of the authorities—including hints from the Supreme Court itself—suggest that the Fifth Amendment (which would be applicable instead of the Fourteenth) is satisfied by minimum contacts with the United States as a whole, rather than the more

---

market. *Id.* at 904 (citing Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Commentary on Recent Case Law*, 63 OR. L. REV. 431, 433 (1984)).

287. *See id.* at 890 (Breyer, J., concurring in the judgment).

288. *See supra* notes 242–47 and accompanying text.

289. *J. McIntyre*, 574 U.S. at 885 (plurality opinion).

290. Federal courts sitting in bankruptcy and admiralty also have, by rule, extended jurisdiction. *See supra* note 264.

familiar rule that there must be minimum contacts with the forum state. An extended Rule 4(k)(2) would be a practicable way to promote the fair administration of justice.

THIS PAGE INTENTIONALLY BLANK

UNIVERSITY of VIRGINIA SCHOOL OF LAW

A. Benjamin Spencer

PROFESSOR OF LAW

March 9, 2018

Hon. John D. Bates
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

SENT VIA EMAIL

Dear Judge Bates:

I hope all is well. In 2010, I penned a brief article proposing that Rule 4(k)(1)(A) be amended to permit federal courts to exercise personal jurisdiction to the constitutional limit—which would require a defendant to have minimum contacts with the United States rather than with any particular state—leaving to the federal venue statutes the task of ensuring that cases are litigated in districts that are connected with the litigants and/or the claims involved in the action. I write now to request that you put these views before the Committee.

I note that Prof. Patrick Borchers recently submitted a proposal to amend Rule 4(k)(2) to extend its provisions to diversity cases (Docket No. 18-CV-E). Although I commend the move to revise this rule in a manner that would extend its reach over defendants not subject to personal jurisdiction in any particular state, it does not entirely resolve the problems associated with retaining the basic connection between the jurisdictional reach of state and federal courts. For U.S.-based defendants, they will always be subject to personal jurisdiction in their states of incorporation and where their headquarters are located (*i.e.* general jurisdiction), realities that will preclude the operation of the proposed amended Rule 4(k)(2). Plaintiffs should not be limited—in federal court—to suing defendants only in those locales from a personal jurisdiction perspective. They should have access to the full array of districts that the federal venue statues will support; the federal courts are the courts of a distinct sovereign whose constitutional reach is not subject to the constraints of state boundaries. *See Toland v. Sprague*, 37 U.S. 300, 328 (1838) ("Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the [federal judicial] district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so.").

In my view, the better approach would be to eliminate entirely the artificial tether of a federal court's territorial jurisdiction to that of their respective host states. I would amend Rule 4(k) as follows:

> **(k) Territorial Limits of Effective Service**. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: when exercising jurisdiction is consistent with the United States Constitution and laws.[1]
>
> ~~(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where~~

[1] I've added the words "and laws" to the end of this proposal, which I omitted in my original suggestion contained in the attached article.

~~the district court is located;~~

~~(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or~~

~~(C) when authorized by a federal statute.~~

~~(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:~~

~~(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and~~

~~(B) exercising jurisdiction is consistent with the United States Constitution and laws.~~

In the absence of any linkage between personal jurisdiction in the federal district courts and the scope of such jurisdiction in their respective hosts' state courts, the determination of which among the several district courts would hear a case would be based on an application of the federal statutes governing venue. *See, e.g.*, 28 U.S.C. § 1391. In the ordinary case, that would limit a plaintiff's choice to (1) a defendant's district within the state in which all defendants reside, (2) a district in which a significant portion of the events or omissions giving rise to the action occurred, (3) the district in which property involved in the action is located, or (4) districts in which defendants could be subjected to personal jurisdiction if none of the other possibilities were available.[2] Ultimately, then, the district chosen would be one that had some connection to the situs of the events giving rise to the dispute, if not to the location of one or more of the defendants.

One final point: In a work currently in progress, I reach the conclusion that the Rules Enabling Act does not empower the Supreme Court to prescribe jurisdictional rules. *See Substance, Procedure, and the Rules Enabling Act* (on file with author). To the extent the Committee shares this view, the above proposed revision to Rule 4(k) should be legislatively enacted by Congress.

Thank you for your consideration of these views. I look forward to discussing them with you and other members of the Committee.

Best regards,

A. Benjamin Spencer
Professor of Law

Enclosure

[2] This latter possibility, a product of 28 U.S.C. § 1391(b)(3), would need to be tightened up since personal jurisdiction would in the federal courts would now be nationwide. Limiting § 1391(b)(3) to districts where any defendant could be subject to personal jurisdiction *in the state courts of that district* would do the trick. I do not acknowledge this needed adjustment in the attached article.

580 Massie Road • Charlottesville, VA 22903 • PHONE: 434.924.3572 • FAX: 434.982.2845 • bspencer@virginia.edu • www.law.virginia.edu

NATIONWIDE PERSONAL JURISDICTION FOR OUR FEDERAL COURTS

A. BENJAMIN SPENCER[†]

Rule 4 of the Federal Rules of Civil Procedure limits the territorial jurisdiction of federal district courts to that of the courts of their host states. This limitation is a voluntary rather than obligatory restriction, given district courts' status as courts of the national sovereign. Although there are sound policy reasons for limiting the jurisdictional reach of our federal courts in this manner, the limitation delivers little benefit from a judicial administration or even a fairness perspective, and ultimately costs more to implement than is gained in return. The rule should be amended to provide that district courts have personal jurisdiction over all defendants who have constitutionally sufficient contacts with the United States, leaving a refined venue doctrine to attend to matters relating to the convenience and propriety of litigating a matter in one particular district versus another.

———————

"We . . . see no reason why the extent of a Federal District Court's personal jurisdiction should depend upon the existence or nonexistence of a state 'long-arm' statute."[1]

INTRODUCTION

Traditionally, all first-year law students study personal jurisdiction as part of the basic civil procedure course. Many initial meetings of that class begin with discussions of *Pennoyer v. Neff*,[2] followed by an exploration of *International Shoe Co. v. Washington*[3] and its progeny. This rite of passage is occasioned by the fact that federal district courts are ordinarily subject to the same constraints on their ability to assert personal jurisdiction as the courts of the states in which they are located, a limitation that derives from Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.[4]

Although sloughing through these cases has great value as a means of introducing law students to case law analysis and inculcating them

† Associate Professor of Law (with tenure), Washington & Lee University School of Law. I would like to thank Washington & Lee for generous grant assistance that enabled this research. I would also like to thank those who were able to give helpful comments on the piece.

1. Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 869 (1963).
2. 95 U.S. 714 (1877).
3. 326 U.S. 310 (1945).
4. FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .").

with critical legal thinking skills, many wonder whether all of the time and attention devoted to the subject is warranted. Given its current relevance to personal jurisdiction in federal courts, it is indeed essential that law students gain an understanding of how to determine whether a party is subject to jurisdiction in any given state. But whether the jurisdictional reach of state courts should be the measuring rod for the jurisdictional reach of federal courts is another matter. Eliminating this linkage would certainly free up time in the first-year procedure course for other more pertinent topics. Of course, that consequence alone cannot justify what would seem to be a major innovation to the rules as they currently stand. Are there more serious grounds for dispensing with the requirement that federal district courts limit their jurisdictional reach to that of their host states? I believe so. My thinking on that prospect follows.

I. THE CURRENT RULE

Members of the founding generation were concerned that a national court system would subject citizens to suit in distant locales at great inconvenience and in violation of a perceived entitlement to localized justice.[5] Responding to this concern, the First Congress, via the Judiciary Act of 1789, limited effective service to that issued by the district in which the defendant resided or the district in which the defendant was actually present when served.[6] This was the federal practice until the enactment of the Federal Rules of Civil Procedure in 1938.[7] Rule 4(f) carried the torch from there, permitting service of process to be effective anywhere within the *state* in which the issuing district court was located, or beyond the state's borders if otherwise permitted by federal statute.[8] In 1963, the rules were amended to permit a district court's service of process to be effective beyond the host state's borders whenever permitted by the statutes or rules of court of the state in which the district court was

5. Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2903 (2009) ("Those members of the First Congress who set out to create the federal court system were keenly aware that their constituents were 'accustomed to receive justice at their own doors in a simple form,' and repeatedly were warned of the dangers that could attend a geographically expansive national judiciary." (quoting 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 28 (Maeva Marcus & James R. Perry eds., 1992))).

6. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 ("[N]o civil suit shall be brought before either of [circuit or district] courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . .").

7. Robertson v. R.R. Labor Bd., 268 U.S. 619, 623 (1925) ("Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district. And a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district. Such was the general rule established by Judiciary Act Sept. 24, 1789 . . . . And such has been the general rule ever since." (citations omitted)).

8. Rule 4(f) originally read, "Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." FED. R. CIV. P. 4(f) (1938 adoption), *reprinted in* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 4 app. 01 (3d ed. 1997 & Supp. 2009).

located.[9] The current incarnation of the rule linking the scope of effective service in a federal district court to the jurisdictional reach of their respective host states is found in Rule 4(k), which reads, "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . ."[10]

Linking federal and state court jurisdiction in this manner makes federal jurisdiction dependent upon both the scope of the host state's jurisdictional statutes and the constitutional scope of a state's jurisdictional reach under *International Shoe* and its progeny. Several problems attend this model.

First, incorporating state jurisdictional limits means that there will be some lack of uniformity among the federal courts respecting their own jurisdictional reach. Although most states assert personal jurisdiction to the constitutional limit,[11] federal courts located in states that do not reach so far will be correspondingly constrained.[12] As courts of a common sovereign, it makes little sense for the courts of our national government to have varying jurisdictional reach, and even less sense for the variation to be by virtue of the will of states' legislatures or courts. The linkage is particularly ill-fitting when federal question cases are concerned; in such cases there can be no claim that the federal court is merely acting as a court of the forum.[13]

The second shortcoming of the current approach is that by forsaking the full constitutional reach of federal courts' territorial authority, the district courts are deprived of an important aspect of their distinctiveness in the ordinary civil case. The federal courts are not only meant to provide a neutral forum in which outsiders can expect a hearing that is at least theoretically less tainted with localized biases.[14] They are more

---

9. Rule 4(e) was amended to read, "Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule." *Id.* 4(e) (1963 amendment), *reprinted in* 1 MOORE ET AL., *supra* note 8, at § 4 app. 03. Rule 4(f) was amended to indicate that extraterritorial service was effective "when authorized by a statute of the United States or by these rules." *Id.* 4(f) (1963 amendment), *reprinted in* 1 MOORE ET AL., *supra* note 8, at § 4 app. 03.

10. *Id.* 4(k)(1).

11. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (discussing the long-arm statutes across the states and indicating that 32 states have statutes that expressly or by judicial interpretation confer jurisdiction to the constitutional limit).

12. New York is a notable example of such a state. *See* N.Y. C.P.L.R. 302 (McKinney 2009).

13. *Cf.* Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945) ("[A] federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . . .").

14. Bank of U.S. v. Deveaux, 9 U.S. 61, 87 (1809) (Marshall, C.J.) ("However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citi-

generally seen as fora in which litigants can seek justice under circumstances in which state courts—for whatever reason—are unable or unwilling to provide it. The service of the federal courts in the South during the civil rights era comes to mind. Thus, if there are instances where the forum state cannot exercise personal jurisdiction over an individual, but a federal court within that state nonetheless would be a proper forum under applicable venue rules, the federal court's doors should be open to the dispute so long as exercising jurisdiction over the defendant would be constitutional with respect to the national sovereign. Rule 4(k) recognizes this principle, although to a much more limited extent, when it permits district courts to exercise jurisdiction to the constitutional limit in federal question cases when all states—not just the forum state—are unable to exercise personal jurisdiction over the defendant.[15]

Third, the reliance on the *International Shoe* doctrine vis-à-vis state boundaries that is a consequence of Rule 4(k)(1)(A) imports all of the shortcomings of that analysis into the federal court context. The constitutional law of personal jurisdiction doctrine is notoriously confusing and imprecise.[16] Thus, in close or difficult cases, raising and resolving personal jurisdiction challenges consumes an inordinate amount of parties' time and the courts' limited resources. Such satellite litigation contributes to the overall inefficiency of the judicial process and the inability of courts to reduce their burgeoning caseloads. Further, the imprecision of the *International Shoe* analysis and its incorporation of reasonableness considerations renders the outcome of the analysis unpredictable in difficult cases. As a result, litigants have less certainty regarding where a defendant may or may not be subject to jurisdiction, meaning parties end up litigating the jurisdictional question in the plaintiff's chosen forum. Doing so, of course, robs the defendant of some portion of the protection that the jurisdictional linkage rule was designed to deliver.

Finally, connecting federal jurisdictional reach to that of forum states duplicates, in many respects, the considerations comprising the federal venue analysis—making the double regime of personal jurisdic-

---

zen, or between citizens of different states."). Judge Friendly explores and questions this rationale in Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492–93 (1928).

15. Rule 4(k)(2) reads as follows: "For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." FED. R. CIV. P. 4(k)(2).

16. I have specified my views to that effect in a previous writing. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006) ("With each decision, the Court has convulsed away from the simple notion in *International Shoe* that state sovereignty and due process permit jurisdiction over nonresidents who are minimally connected with the forum, to a confused defendant-centric doctrine obsessed with defendants' intentions, expectations, and experiences of inconvenience."); *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171 & n.5 (2004) (describing personal jurisdiction doctrine under *International Shoe* and its progeny as "deeply confused" and collecting critical commentary).

tion and venue somewhat of a belt-and-suspenders approach. Federal venue law is focused on siting an action in states where the defendants reside, or within the districts in which property concerned in the action is located or actions or omissions giving rise to the action occurred.[17] As such, in most instances venue analysis is likely to identify federal districts to hear the action that will not present constitutionally undue burdens on defendants. Granted, venue analysis is not coterminous with personal jurisdiction analysis at the state level, as the latter requires the identification of purposeful forum state contacts on the part of each defendant.[18] But the minimum contacts concern is rooted in a need to give a defendant notice that they are within the sovereign authority of a particular state, not in a need to attend to the right of defendants to participate in the proceedings without undue burden.[19] The former concern is not one that properly pertains to the federal district courts as arms of the national sovereign. The latter concern is addressed by the reasonableness wing of the *International Shoe* analysis, which consists of factors that are addressed to some extent in a federal venue analysis.[20] Venue restrictions, then, can be said to do much (but not all) of the relevant service to the participation interests of defendants, with personal jurisdiction limitations failing to deliver any cognizable additional benefits without the additional attendant costs described above.

II. A PROPOSED REVISION

My proposal is to delink federal- and state-court personal jurisdiction by amending Rule 4(k) as follows:

> **(k) Territorial Limits of Effective Service**. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant~~: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located~~ when exercising jurisdiction is consistent with the United States Constitution. [delete the remainder of current Rule 4(k).]

This change would have the effect of authorizing nationwide service of process in all civil cases in the federal district courts, which the Supreme Court has recognized as constitutionally permissible.[21] To obtain

17. 28 U.S.C. § 1391 (2006).

18. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

19. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) ("By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" (alteration in original) (citation omitted) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))).

20. *Int'l Shoe*, 326 U.S. at 319.

21. Toland v. Sprague, 37 U.S. 300, 328 (1838) ("Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the [federal judicial] district. Congress might have authorized civil process from

personal jurisdiction under this revised rule, a plaintiff would simply need to show that the defendant had minimum contacts with the United States, the current approach taken when Rule 4(k)(2) is applied to establish jurisdiction.[22] Note that if the rule were amended in this way, there would be no need for the remaining components of Rule 4(k); because those provisions reflect circumstances falling within the constitutional scope of federal court territorial jurisdiction, they would become duplicative of the jurisdictional grant of revised Rule 4(k).[23]

In the absence of any linkage between personal jurisdiction in the federal district courts and the scope of such jurisdiction in their respective hosts' state courts, the determination of which among the several district courts would hear a case would be based on an application of the federal statutes governing venue.[24] In the ordinary case, that would limit a plaintiff's choice to (1) a defendant's district within the state in which all defendants reside, (2) a district in which a significant portion of the events or omissions giving rise to the action occurred, (3) the district in which property involved in the action is located, or (4) districts in which defendants could be subjected to personal jurisdiction if none of the other possibilities are available.[25] Ultimately, then, the district chosen would be one that had some connection to the situs of the actions giving rise to the dispute, if not to the location of one or more of the defendants.

---

any circuit court, to have run into any state of the Union. It has not done so."); *see also* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925).

22. *See* Fed. R. Civ. P. 4(k)(2) advisory committee notes to 1993 amendment (explaining that the Fifth Amendment, the basis of jurisdiction under Rule 4(k)(2), "requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party").

23. This includes the so-called 100-mile Bulge Rule of Rule 4(k)(1)(B), which currently permits personal jurisdiction over Rule 14 and Rule 19 parties served in a judicial district within 100 miles of the summoning courthouse. Under the proposed rule, parties so served would be constitutionally subject to jurisdiction in the United States based on having been served with process within the country's borders. *See* Burnham v. Superior Court of Cal., County of Marin, 495 U.S. 604, 628 (1990) (upholding the constitutionality of personal jurisdiction based on in-state service of process). That said, it is open to question whether jurisdiction over corporations would be constitutional solely based on service within the United States since *Burnham* left open the question of whether the in-state service rule applied to corporations. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1102 (3d ed. 2002 & Supp. 2009) ("Service made upon a corporation, partnership, or other unincorporated association simply by delivering process to a corporate or comparable officer who happens to reside or be physically present in the state at the time the documents are served will not be effective to establish in personam jurisdiction, unless that entity also is doing business so as to be amenable to service of process and the assertion of jurisdiction in the forum state."). But the same uncertainty could be said to exist under the current rule, which purports to authorize service over any Rule 14 or Rule 19 party served within 100 miles of the issuing courthouse, including corporations so served. *See, e.g.*, Turbana Corp. v. M/V "Summer Meadows", No. 03 Civ.2099(HB), 2003 WL 22852742, at *4 (S.D.N.Y. Dec. 2, 2003) (using the bulge rule to authorize jurisdiction over a corporation in New York whose agent was served in Bridgeport, Connecticut).

24. *See, e.g.*, 28 U.S.C. §§ 1391, 1404, 1406 (2006). In addition to the general venue statute, there are several other special venue statutes as well as venue provisions within the body of various substantive federal statutes. *See, e.g., id.* 42 U.S.C. § 2000e-5(f)(3) (employment discrimination claims); *id.* 29 U.S.C. § 1132(e)(2) (ERISA claims).

25. *Id.* 28 U.S.C. § 1391.

In the event that the plaintiff selects a venue not connected to the defendants' location, dissatisfied defendants may avail themselves of the change of venue statute: 28 U.S.C. § 1404. Section 1404 permits litigants to seek a transfer to a preferred district[26] provided the district is one that would satisfy the venue requirements had the action been filed there originally,[27] and assuming convenience considerations and the interests of justice warrant the transfer.[28] Indeed, once the statute is invoked, courts have occasion to consider a list of convenience and justice factors that closely mirror the list of factors the Supreme Court has identified for consideration for the reasonableness prong of a constitutional personal jurisdiction analysis.[29] In short, plaintiffs may only transfer to districts bearing some connection with the defendants or the dispute, and defendants are given an opportunity to move the case to a preferred alternate qualifying district by invoking many of the same considerations that would have undergirded a constitutional personal jurisdiction analysis.

What are the shortcomings of this proposed approach? Different jurisdictional standards mean that distinctions between federal and state courts within the same state will inevitably arise in terms of defendants' amenability to suit. As a result, plaintiffs with claims that entitle them to bring suit in the federal courts will have an advantage over plaintiffs whose claims must be brought in state court; defendants in the latter category of suits will evade jurisdiction in some state courts when diverse plaintiffs might be able to bring similar suits against those same defendants in federal courts in those states. This might strike some as an unfair distinction, indeed a distinction that the Supreme Court has, in

---

26. *Id.* § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."). Section 1406 similarly provides for a change of venue, though it presupposes an initial filing in an improper venue. *Id.* § 1406(a).

27. Hoffman v. Blaski, 363 U.S. 335, 344 (1960) ("If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district where [the action] might have been brought." (alteration in original) (internal quotation marks omitted) (quoting Blaski v. Hoffman, 260 F.2d 317, 321 (7th Cir. 1958))).

28. § 1404(a).

29. The factors that courts consider when evaluating a venue transfer request typically include the following:

> (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of the parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties.

Employers Ins. of Wausau v. Fox Entm't Group, Inc., 522 F.3d 271, 275 (2d Cir. 2008) (alteration in original) (internal quotation marks omitted) (quoting D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 106–07 (2d Cir. 2006)). Compare these factors with the factors the Court set forth in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

480 U.S. 102, 113 (1987) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

other contexts, suggested was to be avoided.[30] Of course, this concern is not pertinent to federal question cases, since all prospective plaintiffs would have equal access to the preferable jurisdictional reach of federal courts for such claims. But even in the diversity jurisdiction context, where the disparity would be unavoidable, I do not share the stated concern. I view federal courts as distinctive, and I do not view federal diversity jurisdiction as mere mimicry of state courts.

Another potential defect of the proposed reform is that governing choice-of-law rules would undoubtedly be altered in cases now able to be brought in federal courts in states that could not themselves exercise personal jurisdiction. That is, because federal courts sitting in diversity must apply the conflicts rules of the forum state,[31] diversity cases brought in states not having personal jurisdiction over the defendant will be governed by conflicts rules that would have been inaccessible under the current version of Rule 4(k). This result would allow plaintiffs to shop around for a forum state with the most favorable choice of law rules.[32] But the ability to forum shop would be constrained by the federal venue statute, which provides a narrower menu of options for bringing a suit, meaning that plaintiffs would not simply have the run of all federal districts (except perhaps in the case of claims against aliens).[33] An additional safeguard against this concern might be the fact that many states do not differ wildly in the substance of their choice of law rules,[34] meaning that less still would be at stake in a plaintiff's decision about where to bring a suit.

Finally, there is the Founders' concern about being subjected to suit in distant locales. The absence of a forum state personal jurisdiction requirement may sweep defendants into federal court in states with which they have little or no contacts. For example, suppose a vendor in Virginia sells a faulty product to a visiting Californian. If the product subsequently causes harm to the Californian in California, the Virginia vendor

30. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (indicating that "avoidance of inequitable administration of the laws" between federal and state court was one of the "twin aims" of the *Erie* doctrine); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that the conflict of laws rules to be applied by federal courts sitting in diversity are to be those of the forum state because "[o]therwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side").

31. *Klaxon*, 313 U.S. at 496.

32. Linda J. Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 587 (1991) ("[A] nationwide service rule would exacerbate forum shopping since a litigant would search for the forum with the most favorable choice-of-law rules.").

33. The general venue statute includes a provision that permits venue in actions against aliens to be brought in any federal district. 28 U.S.C. § 1391(d) (2006).

34. *See generally* Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-second Annual Survey*, 57 AM. J. COMP. L. 269 (2009) (describing the various approaches to choice of law questions taken in the states and indicating that a preponderance tend to follow the Restatement (Second) or some variant of an interest analysis approach, or a traditional *lex loci delicti* approach).

could be sued in California federal court consistent with the federal venue statute.[35] This possibility might lead the vendor to be unwilling to sell products to persons from distant states, an outcome that would be discriminatory and harmful to interstate commerce. This is a serious concern, although a court in such a situation would have the power to transfer the case to a Virginia federal court for the convenience of the parties and witnesses and in the interests of justice.[36] Under the current statutes concerning change of venue, such a transfer would not be guaranteed. However, this concern does not suggest that linkage with forum state territorial jurisdiction limitations is necessary. Rather, it indicates that in some instances federal venue law is inadequate to identify the most appropriate district within the federal judicial system for hearing a case. Thus, were de-linkage achieved, the federal venue statute might need to become more robust, tightening the connection between defendants and districts needed to lay venue.

The following amendment to the general venue statute, 28 U.S.C. § 1391, would appear to address this concern:

> **§ 1391. Venue generally**
>
> (a) A civil action . . . may . . . be brought only in
>
> . . . .
>
> (2) a judicial district in which a substantial part of the ~~events~~ actions or omissions of the defendant giving rise to the claim occurred . . . .[37]

If the venue statute read as proposed, our Virginia vendor could not be sued in California federal court for the Virginia sale of a defective product to a Californian. Proper venue in suits against defendants such as our vendor would exist only in those districts in which the defendant's wrongdoing could be located, not in districts in which only the effects of that wrongdoing were felt.

Although the proposed change to the general venue statute would bring venue law more in line with the constraints that are currently imposed via personal jurisdiction doctrine, I am not certain that changing the venue statute in this manner is advisable. There may be instances when it is perfectly reasonable for a case to be heard in the place of the harm, notwithstanding the defendant's lack of contacts with that district. The proposed venue statute change would preclude proper venue in such districts, which is likely too restrictive. I am more comfortable permitting venue to be determined under the statute as it is currently written and

35. This is so because a substantial part of the events giving rise to the action would have occurred in the relevant federal district in which the plaintiff was harmed.

36. *See* 28 U.S.C. § 1404(a) (2006).

37. A conforming change would have to be made to subsection (b) of the statute as well.

allowing disgruntled defendants to challenge that selection under the terms of the change of venue statutes that permit the court to consider the equities of the matter on a case-by-case basis.

CONCLUSION

Delinking the jurisdictional reach of federal courts from that of their host states seems to be an innovation that would simplify the identification of a proper court for civil actions without raising any constitutional or sovereignty-related concerns. The participation interests of defendants would not be forsaken but would still have a voice in venue doctrine and in the considerations embedded in the change of venue analysis. There are likely considerations and implications pertaining to this proposal that have not been considered in this Essay. But all in all, my view is that the benefits of revising Rule 4(k) in the manner proposed outweigh the costs that I am able to discern.

TAB 9

THIS PAGE INTENTIONALLY BLANK

TAB 9A

THIS PAGE INTENTIONALLY BLANK

9. 18-CV-H: Rule 73(b)(1), (2) Consent to Magistrate Judge

This item arises from the intersection between electronic court dockets and a procedure adopted in earlier days to preserve the anonymity of a party who fails to consent to trial before a magistrate judge. The question is whether the rule should be amended to conform to the contours of the present CM/ECF system, even if there is some cost in doing so.

Rule 73(b)(1):

(b) Consent Procedure.

(1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

Rule 73(b) implements 28 U.S.C. § 636(c)(2), which provides that when a magistrate judge is designated to exercise civil jurisdiction:

> the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in doing so, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. *Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.*

The requirement of Rule 73(b)(1) that a district judge or magistrate judge may be informed of a response to the clerk's notice only if all parties have consented to the referral is designed to "protect the voluntariness of the parties' consent." A party who fails to file a statement consenting to the referral can trust that the judge will know only that not all parties consented.

The problem identified by 18-CV-H arises from the routine operation of CM/ECF systems. When a party files a consent to refer the action to a magistrate judge the filing is automatically routed to the district judge's computer. So much for anonymity.

The best way to address this issue would be to find a means of preventing automatic notice to the district judge when a consent is filed. Programming the CM/ECF system to accomplish this result, however, seems to be impossible. Waiting for the design of the next next-gen system is not an attractive option.

Failing solution through the CM/ECF system directly, Rule 73(b)(1) could be amended to track the language of § 636(c)(2), displacing the present rule direction to "file" the statement of consent. Instead, the rule could direct that each party shall communicate to the clerk its statement consenting to the referral, and further direct that the clerk file the statements only if all parties consent. That approach would impose a heavy burden on clerks' offices, fraught with opportunities for error.

CV-18-H proposes a solution easily drafted: "the parties must jointly ~~or separately~~ file a statement consenting * * *." Leaving the rule in this form might at times defeat referral to a magistrate judge when all parties are willing but none is willing to take the lead in advancing the question. This approach would require discussion among the parties. Something might be lost by that. Each party might prefer trial before a magistrate judge, but hesitate to initiate the discussion. To ask consent is to invite bargaining about other matters. To ask might be read to imply concern that the assigned district judge is less favorable to the party who opens the consent discussion than to other parties, causing the others to react in a familiar pattern — "I thought I wanted it, but knowing that you want it makes me not want it." Some help from the court could be useful.

An example of help from the court is provided by the Southern District of Indiana Form "Notice, Consent, and Reference of a Civil Action to Magistrate Judge." The Form, a modification of AO 85, is attached. It is issued to the plaintiff's attorney when the case is opened. A prominent NOTICE in the form states that the form can be filed only if executed by all parties. In practice, a plaintiff's attorney who consents to referral transmits the form to all other attorneys in the case. If all sign on, the form is filed. This practice seems to work. And it has an added advantage that the form addresses an issue not covered by Rule 73: it allows any party to object within 30 days from reassignment of the case to a different magistrate judge.

It is not clear whether this practice can be fostered without somewhat greater revision of Rule 73(b)(1). The rule requires written notice to all parties. That can be accomplished by providing the form to each party when it first appears. There might be some advantage in sending notice from the court to all parties, even if all know the plaintiff has the form and can defeat a

reference by simply remaining quiet. Some other party, reminded by the form, might initiate discussion.

Remembering that the object is to forestall filing any party's consent with the court until all parties consent, it may work to revise the second sentence of Rule 73(b)(1) a bit more extensively:

> (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent [to a referral] under 28 U.S.C. § 636(c). ~~To signify their consent, the parties must jointly or separately file a statement consenting to the referral.~~ The parties may consent by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than all parties.] *A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.*[29]

Yet other approaches are possible. It may be that the direction to adopt procedures to protect the voluntariness of the parties' consent do not require anonymity. Anonymity protects against the risk that a judge who knows that a particular party preferred trial before a magistrate judge may, consciously or subconsciously, resent the preference. Many judges might instead be greatful — although then the party who did not consent might have an equal and offsetting concern. But anonymity has been built into the rule for many years. Absent problems greater than those caused by limitations of the CM/ECF system, it is better to continue to provide anonymity.

Finally, it seems appropriate to address this specific and narrow issue without undertaking to reopen other questions that might be raised about referrals for trial. One illustration arises when all parties consent and later, perhaps much later, another party is joined. Can that party undo the progress made before the magistrate judge by failing to consent? How far might Article III mandate a right to do so? Courts deal with this and other problems now. Seeking resolution by amending Rule 73 should be approached only when there is a strong prospect of providing good answers to questions that have generated problems that cannot be handled without further rule amendments.

---

[29] This sentence is italicized to raise the question whether it remains useful after withdrawing the opportunity to file individual consents. It might be replaced by a statement that the referral will be made, but that raises the question whether the referral must be made. It may be better to avoid that question.

THIS PAGE INTENTIONALLY BLANK

TAB 9B

THIS PAGE INTENTIONALLY BLANK

To: Hon. Jesse M. Furman, Chair, Pro Se Committee

From: Maggie Malloy

Re: Fed. R. Civ. P. 73's procedures for filing form for consenting to jurisdiction of a magistrate judge

Date: February 15, 2018

How can Federal Rule of Civil Procedure 73 be revised so that district and magistrate judges are not informed of the parties' positions on consent to jurisdiction of the magistrate judge unless *all* parties have consented?

The statute on the jurisdiction and powers of United States magistrate judges requires that "[r]ules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. § 636(c)(1). Presumably to protect the voluntariness of consent, Federal Rule of Civil Procedure 73(b) instructs that the district or magistrate judge must not be informed of the parties' positions on consent unless "all parties have consented to the referral." But the Rule also states that the parties may *separately* file consent forms. (The Rule is quoted below.)

Documents filed with the court are filed using the court's electronic case filing system, and are thus immediately available to the district and magistrate judge assigned to the case. So a party filing a consent form using the ECF system is providing notice to the district judge and magistrate judge of the party's individual consent even if not all parties have consented, contrary to the intent of the statute and rule. The same is true if the clerk's office scans and dockets a consent form submitted by a pro se litigant.

The clerk's office has long struggled with how to deal with this situation. Parties, especially pro se parties, frequently sign and submit the consent forms with only their own signatures on them.[1] In the past, clerk's office staff have sometimes sent these individually signed consent forms to the district judge, with a memo (a "5(d) memo") stating that only one party signed the form. In one of these cases, the district judge memo-endorsed the 5(d) memo: "Counsel for Defendants must also agree and sign." In other cases, a pro se party's

[1] The Eastern District has modified the AO-provided consent form to instruct litigants not to submit it unless all parties have signed it.

consent form has been scanned and docketed, consistent with the court's policy for pro se submissions. In one of those cases, the judge referenced in an opinion the fact that the pro se plaintiff had signed and filed a consent form, and that the judge's deputy had reached out several times to the defendant to see if the defendant was going to consent.

These cases show not only that judges are being informed about individual parties' positions on consent, contrary to the Rule, but also that the voluntariness of parties' consent may be compromised by this procedure.

This problem could be address by simply deleting the phrase "or separately" from the Rule:

> (b) Consent Procedure.
>
> > (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. §636(c). To signify their consent, the parties must jointly ~~or separately~~ file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.
> >
> > (2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

The clerk's office would then be authorized to reject consent forms that were filed without the consent of all parties.

The relevant ECF event, Consent to Jurisdiction by US Magistrate Judge, should include a warning to filers (if it doesn't already) that the document should only be docketed if all parties have consented.

UNITED STATES DISTRICT COURT

for the

Southern District of Indiana

_____	)	
Plaintiff	)	
v.	)	Civil Action No.
_____	)	
Defendant	)	

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO MAGISTRATE JUDGE

Notice of magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to the currently assigned magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to magistrate judge's authority. If all parties consent to have the currently assigned United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings, they should sign their names below (electronically or otherwise). Should this case be reassigned to another magistrate judge, any attorney or party of record may object within 30 days of such reassignment. If no objection is filed, the consent will remain in effect. NOTICE: This document is eligible for filing only if executed by all parties. The parties can also express their consent to jurisdiction by a magistrate judge in the Case Management Plan.

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

IT IS ORDERED: This case is referred to the currently assigned United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Should this case be reassigned to a magistrate judge other than the magistrate judge assigned the date of this order, any attorney or party of record may object within 30 days of such reassignment. If no objection is filed, the consent will remain in effect.

Date: _____

_____
District Judge's signature

_____
Printed name and title

THIS PAGE INTENTIONALLY BLANK

TAB 10

THIS PAGE INTENTIONALLY BLANK

TAB 10A

THIS PAGE INTENTIONALLY BLANK

10. Other Docket Matters

A. 17-CV-EEEEEE: Rule 5(b)(2)(C) — Return Receipt

Rule 5(a) requires service of many papers created after serving the summons and complaint. Rule 5(b) governs the modes of service. Rule 5(b)(2)(C) permits service by "mailing it to the person's last known address — in which event service is complete upon mailing."

17-CV-EEEEEE suggests that service by mail should be limited to mail that is "certified with a return receipt from the United States Postal Service." This suggestion is supported by saying it "would ensure timely delivery and a way to track it so that the sender can keep track of their mailings."

The suggestion could be implemented by adding a few words to Rule 5(b)(2)(C): "mailing it to the person's last known address by any form of mail requiring a return receipt[30] in which event service is complete upon mailing."

Service under Rule 5 has been studied at length in the last few years. The focus has been on service by electronic means. Postal mail seems to be falling behind, although it remains important and seems to be particularly important in actions that involve a pro se litigant. Electronic mail and postal mail have often been compared during these discussions, without any suggestion that ordinary mail should be replaced by return-receipt mail.

Any litigant that wants the reassurance of a return receipt is free to use that form of mail.

Convenience combines with many years of experience without significant problems to suggest that it is appropriate to continue to permit service by ordinary mail of papers after the complaint.

It is recommended that this agenda item be closed.

---

[30] This formula is borrowed from Supplemental Rule B(2)(b). Other words can readily be found.

THIS PAGE INTENTIONALLY BLANK

October 11, 2017

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
Hon.David G. Campbell, Chair
WASHINGTON, D.C. 20544

RE: Input into the federal rules of civil procedure

Dear Mr. Campbell,

I would like to submit a change in the rules. Under rule 5(b) (2)(c) it states mailing. There is a problem with that now. The population has increased.

What the change should be is that if it is mailed that IT HAS TO BE CERTIFIED WITH A RETURN RECEIPT FROM THE UNITED STATES POSTAL SERVICE. This would ensure timely delivery and a way to track it so that the sender can keep track of their mailings.

Sincerely,

Martin Monica
182 S. Morrison Ave.
San Jose, CA 95126

THIS PAGE INTENTIONALLY BLANK

TAB 10B

THIS PAGE INTENTIONALLY BLANK

B. 18-CV-A: Rule 55(a): Duty To Enter Default

This suggestion is easily described by showing the sentence it would add to Rule 55(a):

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter a party's default. <u>There is no room for judicial discretion on this point and the clerk must directly enter the party's default when properly asked by motion to do so.</u>

This amendment is supported by saying that "certain courts, such as the US District Court for Massachusetts, refuse to let the Clerk order the entry of default and insist that just the entry of default is subject to a judge's discretion and whenever the judge gets around to it."

Without yet exploring practices in the District of Massachusetts or elsewhere, the suggestion that "[t]here is no room for judicial discretion" seems misplaced. Rule 55(a) addresses the formal act of entering a default. It requires a judgment by the clerk that the party "has failed to plead or otherwise defend." A failure to plead may be apparent on the court's docket, although even then there may be reason to inquire further. A failure to "otherwise defend," before or after pleading, can be more complicated. At the least there should be room to refuse to enter a default when it seems likely that the court, exercising its discretion, would set it aside.

Preserving discretion is all the more supported by remembering that the court has discretion to set aside a default judgment. Rule 55(c) sets the standard at "good cause." Lesser reasons can readily justify refusal to take the first step of entering a default.

Courts regularly say that defaults are not favored. Rule 55(a)'s grant of default authority to the clerk properly assigns the burden of what often is a ministerial chore. But if there is a court that actually countermands Rule 55(a) by directing that all defaults be entered by the court, there is little reason to protect a litigant who would prefer to win by mandating routine entry by the court's clerk.

It is recommended that this agenda item be closed.

THIS PAGE INTENTIONALLY BLANK

Suggest a Change to the Rules
scleroplex to: Rules_Support 01/12/2018 01:13 PM

Dear Sir / Madam,

Federal Civil procedure Rule 55 (a) presently reads:

Rule 55. Default; Default Judgment
(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

Going forward Rule 55 (a) must read:

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the Clerk of the court must enter the party's default. There is no room for judicial discretion on this point and the Clerk must directly enter the party's default when properly asked by motion to do so.

This change is necessary as certain courts, such as the US District Court for Massachusetts, refuse to let the Clerk order the entry of default and insist that just the entry of default is subject to a judge's discretion and whenever the judge gets around to it.

Sincerely,
Bharani Padmanabhan MD PhD
Brookline MA

THIS PAGE INTENTIONALLY BLANK

TAB 10C

THIS PAGE INTENTIONALLY BLANK

C. 18-CV-G: Rule 8: Simplified Complaints

This suggestion complains that complaints have become too long. The suggestion itself presents a better picture of what is intended than can be accomplished by a summary or restatement. The proposal likely would be adopted by amending Rule 8(a)(2). The result would combine a terse identification of the event giving rise to the complaint with identification of specific statutes supporting the claim. The suggestion also provides that each defendant shall admit or deny each allegation.

The Committee studied Rule 8 pleading standards for several years after the Supreme Court's decisions in the *Twombly* and *Iqbal* cases. It has concluded that there is no reason to take up these questions now. This suggestion provides no reason to reconsider that conclusion.

It is recommended that this agenda item be closed.

THIS PAGE INTENTIONALLY BLANK

18-CV-G

SHORT Complaints
Thomas Jones
to:
Rules_Support@ao.uscourts.gov
02/03/2018 02:28 PM
Hide Details
From: Thomas Jones <demorep1@att.net>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Please respond to Thomas Jones <demorep1@att.net>

NEW AGE COMPLAINTS ARE TOTALLY OUT OF CONTROL -- NOW INCLUDING LOTS OF WORLD HISTORY FOR 6,000 PLUS YEARS. END THE CHAOS -

A Complaint shall ONLY include:

1. A short summary of the case (in not more than 100 words).
2. What language in the Constitution, laws or treaties of the United States gives jurisdiction to the court.
3. The parties in the case.
4. Separate numbered paragraphs having allegations of
(a) fact(s) regarding the act(s) and/or omission(s) of a party including times and places,
(b) parts of the Constitution, laws or treaties of the United States which have been or will be violated by a party,

(c) remedy in civil cases and punishment in criminal cases.

Example of 4:

Para. 7. (a) On date A and place B party C did such and such act D to the life, liberty or property of Party E.
(b) Act D violated Title F, Section G (1) of the U.S. Code.
(c) Party E should get the remedy in Title F, Section G (2) of the U.S. Code.

Each defendant shall admit or deny each allegation.

All legal points (case citations, etc.) regarding the allegations in a Complaint shall be in a separate legal brief.