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

TO: Hon. David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

DATE: December 9, 2016

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 3, 2016. Draft Minutes of this meeting are attached.

Proposals to amend Civil Rules 5, 23, 62, and 65.1 were published for comment in August. The Rule 5 proposals coordinate with similar proposals published for comment on recommendations by the Appellate, Bankruptcy, and Criminal Rules Committees. The Rules 62 and 65.1 proposals work in tandem with coordinating proposals published for comment on recommendation of the Appellate Rules Committee. Written comments are beginning to come in. The first scheduled hearing on the Civil Rules proposals was held on November 3 in conjunction with the Civil Rules meeting. The Rule 23 proposals have been the focus of most of the written comments and the witnesses at the hearing. The comments and testimony have been interesting, informative, and helpful. The second hearing will be held in Phoenix on January 4. The third hearing, set for February 16, will be held by teleconference rather than in person.

One action item is presented. Part I recommends that Rule 4(m) be submitted to the Judicial Conference as a technical amendment to restore a provision inadvertently omitted from the proposal that took effect on December 1, 2016.

Other rules proposals discussed at the meeting are in different stages of development. Part II presents three topics:

First, the Committee has concluded that there is no need to amend Civil Rule 5.2 to add a specific provision for correcting papers that are filed without redacting personal identifying information as required by the rule. But the Committee understands that the Bankruptcy Rules Committee will recommend adding a specific provision as Bankruptcy Rule 9037(h), and is prepared to consider the question further if the importance of uniformity among the rules is found to outweigh the lack of any independent need for a civil rule.

Second, consideration of the procedure for demanding jury trial has been expanded. The topic was opened up in response to a concern that the Style Project amendment of Civil Rule 81(c)(3) may have inadvertently created an ambiguity for cases removed before making a jury demand in state court. Discussion in the Standing Committee last June led to a post-meeting suggestion by two Standing Committee members that the demand procedure be reconsidered for all cases. Work has begun on this suggestion.

Third, Rule 45(b)(1) provides that a subpoena is served by "delivering a copy to the named person." The majority view is that personal service is required, although some courts have recognized other means of delivery, most often by mail. The question whether other means of delivery should be recognized in the rule has been added to the civil agenda.

Part III describes the efforts of the Rule 30(b)(6) Subcommittee to determine whether it is feasible and useful to address by rule text some of the problems that bar groups have regularly identified with depositions of entities. The question was studied carefully a decade ago; the conclusion then was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later; the conclusion that time was that the earlier work was persuasive. Now the questions have been renewed by 31 active participants in the American Bar Association Section of Litigation. The Subcommittee has not yet formed any recommendation as to whether the time has come to attempt development of new rules text with a recommendation for publication. But it has begun work, focused by tentative initial drafts that illustrate the challenges presented.

Finally, the Committee and the Pilot Projects Working Group are finishing work on the Expedited Procedures and Mandatory Initial Discovery pilot projects. Recruiting courts to participate in the projects is under way. Part IV is a report on these projects.

I. ACTION ITEM: RULE 4(m)

Rule 4(m) was amended on December 1, 2015, and again on December 1, 2016. The intended result of the two amendments is clear. But the proposed 2015 amendment was inadvertently overlooked in preparing the proposal that led to adoption of the 2016 amendment. This action item recommends approval of the intended rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court this spring.

The proposed rule text revises the final sentence of Rule 4(m). Rule 4(m) establishes a presumptive time for serving the summons and complaint, allowing for extension by the court. The final sentence of the rule should read:

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

The two-step process of amending Rule 4(m) went astray in this way: The 2015 amendment began as part of a large package designed in part to accelerate the initial steps in a civil action. The published proposal shortened the presumptive time for service from 120 days to 60 days; after hearings and comments, the time was set at 90 days. While this change was being considered, the Department of Justice recommended that the exemptions be expanded to add Rule 71.1(d)(3)(A) notices of a condemnation action. This recommendation was accepted without controversy. As of December 1, 2015, service of a notice under Rule 71.1(d)(3)(A) was excluded from Rule 4(m).

The 2016 amendment added Rule 4(h)(2) to the set of exemptions. The addition was made in response to many comments on the published proposal that eventually became the 2015 amendment. These comments reflected uncertainty, even confusion, as to Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. Rule 4(h)(2) allows such service "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking Rule 4(f) might bring service under (h)(2) within the Rule 4(m) exemption for service under Rule 4(f). That result makes sense—the problems with effecting prompt service outside the United States are much the same, and are augmented by shortening the presumptive time from 120 days to 90 days. But the rule text is ambiguous. So Rule 4(h)(2) was added to the exemptions.

The problem arose from preparing the Rule 4(h)(2) proposal by working from Rule 4(m) as it was in 2014, before the 2015 amendment. Adding the exemption for service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. That change was inadvertently not included in the proposal that, as subsequently published, recommended, and adopted, read:

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

The possibility of correcting the rule text as a scrivener's error was explored with Congress. The outcome is that the official print for the House of Representatives Committee on the Judiciary will include this footnote:

> Rule 4(m) is set out above as it appears in the Supreme Court order of Apr. 28, 2016. As amended by the Supreme Court order of Apr.29, 2015, the last sentence of Rule 4(m) reads as follows: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The language added to the last sentence in 2015, "or to service of a notice under Rule 71.1(d)(3)(A)", probably should be part of Rule 4(m), but does not appear in the 2016 amendment.

The omission of Rule 71.1(d)(3)(A) from the list of exemptions should be corrected through the Rules Enabling Act process. The provision has already been published, reviewed, and adopted. Because the omission resulted from sheer inadvertence, the correction can be recommended for adoption without further publication.

A redline text showing the proposed technical amendment to Rule 4(m) is included as Attachment 1.

II. ONGOING PROJECTS

(A) Rule 5.2(i)

Civil Rule 5.2 provides privacy protection by allowing court filings that "include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number."

Rule 5.2 was developed in a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

Inevitably, some filings (especially in bankruptcy proceedings) include information that should have been redacted. The Bankruptcy Rules Committee has taken the lead in drafting a new Rule 9037(h) that would establish a procedure for replacing an improper filing with a properly redacted filing.

A separate memorandum prepared by Administrative Office staff describes in detail the process that has led the Civil and Criminal Rules Committees to consider whether to recommend provisions that would parallel proposed Rule 9037(h). (Appellate Rule 25(a)(5) adopts, as relevant, the Bankruptcy, Civil, and Criminal Rules. The Appellate Rules Committee has not undertaken an independent study of this issue.)

The Civil Rules Committee has concluded that there is no independent need to add to Rule 5.2 a specific procedure for correcting an inappropriate filing. The district courts seem to be managing the problem well. Once a lawyer becomes aware that redaction is needed, the lawyer is eager to substitute a redacted filing. The Committee has further concluded that the interests of uniformity alone do not counsel adoption of a new provision to emulate proposed Bankruptcy Rule 9037(h). The need for a uniform national procedure appears to be greater in the bankruptcy courts, both because they experience high volumes of improper filings and because the same improper filings may be made in different courts. When the Court Administration and Case Management Committee recommended that the Bankruptcy Rules Committee take up this question, it did not make the same recommendation to the other advisory committees. In addition, the interest in "uniformity" divides into at least two dimensions. If different sets of rules adopt provisions addressing a common problem, it is important to address the common problem in common ways, always recognizing the need for departures that reflect different circumstances in the context of different rules sets. But adoption of a provision in one set of rules does not create as strong an interest in adopting a parallel provision in other sets of rules that do not confront the same problem in the same way.

What remains open is further consideration whether the interest in uniformity counsels adoption of Civil and Criminal Rules provisions that parallel Bankruptcy Rule 9037(h). Not much work will remain if parallel provisions are to be pursued. The draft Rule 5.2(i) that has been considered by the Civil Rules Committee has advanced to the point of reconciling most of the differences between earlier drafts of Rule 9037(h) and Rule 5.2(i). It should be possible this spring to work out any remaining differences in time to reach recommendations to publish.

(B) Rules 38, 39, 81(c)(3)

Rule 81(c)(3) governs demands for jury trial in actions removed from state court. Subparagraph (c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand "[i]f the state law did not require an express demand." Before the Style Project amendments of 2007, this provision excused the need to make a demand if state law does not require a demand. Most courts, recognizing the convention that Style Project changes do not affect meaning, continue to read the rule to excuse a demand after removal only if state law does not require a demand at any point. But it has been urged that "did not" creates a new ambiguity that may mislead a party who wants a

jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

The question whether to develop an amendment of Rule 81 to address this issue, and perhaps other questions about the effect of removal on demands for jury trial, was presented to the Standing Committee in June, 2016. Nothing was decided then. Shortly after the meeting, however, Judge Gorsuch and Judge Graber suggested that it is time to reconsider the demand requirement. Their suggestion, 16-CV-F (included as Attachment 2), is that, as in Criminal Rule 23(a), jury trial should be the standard. A case would be tried without a jury only if all parties waive jury trial. Like Rule 23(a), it would be possible to require that the court approve the waiver.

Several reasons are offered for the proposal. The revised rule might increase the number of jury trials, an outcome that is important to those who lament "the vanishing jury trial." It also would avoid a procedure that may be a trap for the unwary litigant who wants a jury trial but fails to make a timely demand and fails to persuade the court to allow an untimely demand under Rule 39(b).

The Rules Committee Support Office is undertaking research to support further consideration of the demand procedure. It will attempt to explore the reasons that led the original Advisory Committee to adopt a demand procedure, and to set the time for demand early in the action. Local federal-court rules will be examined, and experience with the wide range of different state procedures will be studied. An attempt will be made to find out how often parties who want a jury trial fail to get one for failing to make a timely demand.

A different kind of practical wisdom also will be sought. Any procedure that may lead to forfeiture of a desired practice may be considered a "trap." But many rules have that result because they serve important purposes. Requiring an early jury demand may be justified by the value to the court and the parties of knowing from the outset whether the case is to be tried to a jury. Advice will be sought where it can be found.

Many alternatives will be considered if the initial research suggests that the demand procedure should be reconsidered. The most modest approach would simply extend the time to make a demand, conceivably to very close to trial. The presumption that all cases will be tried to a jury could be implemented by a rule that requires a joint written waiver by all parties, or by variations that allow a single party to initiate waiver by inviting other parties to join. As with the criminal rule, the court's approval might be required. And some thought could be given to the complications that arise when it is not clear whether any part of the case falls within a statutory or constitutional right to jury trial. The complications that arise when only some parts of the case fall within a right to jury trial also might be addressed.

This project is in an early stage. Advice on whether to proceed, and on the approaches that might be taken, will be welcome.

(C) Rule 45: Serving a Subpoena

Rule 45(b)(1) says simply this: "Serving a subpoena requires delivering a copy to the named person * * *." Nothing further is said about what "delivering" means. A majority of courts interpret the word to require personal service. Others have accepted other means that actually deliver the subpoena to the named person. Mail is the means most frequently approved.

Personal service can be an expensive nuisance. Rule 45 was studied in depth only a few years ago. One of the questions considered was the method of serving a subpoena. An extensive memorandum prepared by Andrea Kuperman, the Rules Committee Law Clerk, explored the division of rulings on what constitutes delivery. The Discovery Subcommittee, having studied the question, recommended that no changes be made. The Committee accepted that recommendation. One of the reasons was that personal service is a dramatic event that emphasizes the importance of compliance.

The question has been renewed by a suggestion of the State Bar of Michigan Committee on United States Courts. They suggest that serving a subpoena is not as central to an action as serving the summons and complaint that commence the action and initiate the process that can lead to an adverse judgment. For this reason, they suggest that any of the means of serving a summons and complaint authorized by Rule 4(e), (f), (g), (h), (i), and (j) be allowed as well for serving a subpoena. Their proposal also would allow "alternate means expressly authorized by the court."

The first step will be to decide whether to take up again a topic that was recently considered and put aside. The simplest reason to go forward would be to establish a uniform and clear practice. Adopting the majority requirement that service be made in person would be the easiest way to do that.

Still, it is tempting to believe that substantial advantages could be found in accepting other means of service. If we can trust service of a summons and complaint by "leaving a copy * * * at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there," Rule 4(e)(2)(B), why not also trust such service for a subpoena? Or what of service by mail—is the risk not so much the possibility that properly addressed postal mail might go astray as the possibility that increasing numbers of people rely on e-mail and other means of communication and simply ignore real mail?

If this project goes forward, setting the level of ambition may prove the greatest challenge. An amendment might be limited to service on a natural person in the United States, whether or not a party to the action. It might venture beyond personal service only to "abode" service and perhaps

conventional or return-receipt-required mail. The questions whether those modes of service should be added seem straightforward questions of practical effect.

It also would be easy enough, and perhaps quite helpful, to add a provision authorizing service by any means approved by the court. Some additional guidance might be attempted in rule text, but might not be necessary.

Venturing beyond those simple starting points could lead to uncertain problems. It might be useful to distinguish between service on parties and nonparties. For a party, it would be worthwhile to consider service on a party's attorney, as Rule 5(b)(1) authorizes for many papers after the summons and complaint, although the limited use of Rule 45 subpoenas directed to parties could limit the value of that distinction.

Full-scale absorption of the many provisions of Rule 4 would present several issues. One simple illustration is provided by Rule 4(e)(1), which authorizes service on an individual "by (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." California, for example, authorizes service of a summons and complaint by first-class mail with a return receipt process. Rule 45(a)(2) directs that a subpoena must issue from the court where the action is pending. A single action may involve many subpoenas to be served on many persons in many states. Although incorporation of state practice has some advantages, the potential complications may outweigh the potential advantages.

This project will command further work, but remains in a tentative phase. The recent Committee decision to put it aside will be weighed carefully in deciding whether now to go ahead. Again, advice will be welcome.

III. RULE 30(b)(6) SUBCOMMITTEE

Rule 30(b)(6) authorizes a party to "name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity." The notice "must describe with reasonable particularity the matters for examination." The organization must designate real persons to testify, and "may set out the matters on which each person designated will testify." "The persons designated must testify about information known or reasonably available to the organization."

Rule 30(b)(6) has come back to the agenda for the third time in 12 years. In 2004 a Committee of the New York State Bar Association submitted a lengthy suggestion that problems with implementing Rule 30(b)(6) in practice should be studied with an eye to rule amendments. A Rule 30(b)(6) Subcommittee was formed. Its work included a survey of many bar groups—a

summary of the responses filled 27 pages. In the end both the Subcommittee and the Committee concluded that although Rule 30(b)(6) may be misused in a number of different ways, amendments of the rule text could do little to alleviate the problems.

In 2013 a committee of the New York City Bar expressed concerns that were in part similar to the 2004 suggestions, but that added some new concerns. The Committee again concluded, in part in light of the recent thorough examination, that it should not attempt to develop new rule provisions.

Now 31 members of the ABA Section of Litigation Federal Practice Task Force, acting "in our individual capacities only," have opened the familiar questions once again. Rather than advancing specific recommendations, they request that the Committee examine Rule 30(b)(6) once more, "with the goals of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules."

A new Rule 30(b)(6) Subcommittee has been appointed to examine these questions. Its work is well begun, but remains far from reaching any conclusion whether to recommend changes in rule text. The work is being undertaken because of the cumulative force of three thoughtful suggestions from three different groups, each of which have distinguished themselves by making helpful contributions to the Committee's work over many years. The eventual outcome may be to recommend several substantial amendments, a few minor amendments, or no amendments at all.

Draft rule sketches have been prepared to illustrate the range of questions that are being considered. They are only "pencil-scratch" drafts, useful to focus discussion without attempting to forecast what actual rule text might look like. They serve that function well, particularly when discussion shows that particular provisions should be dramatically revised or abandoned. The Subcommittee has begun discussion of many, but not all, of the drafts. Discussion at the November Committee meeting covered only a few of the topics, but was aided by thoughtful contributions from several observers.

Additional work by the Subcommittee will be assisted by further research, drawing on the facilities of the Rules Committee Support Office. Among other approaches, there will be a literature search that looks primarily at practitioner resources such as CLE materials that may reflect actual practice issues rather than more abstract academic commentary. Local district rules will be surveyed to determine whether they address possible problems in useful ways; individual standing orders may also prove useful (one example has already been examined by the Subcommittee). State practices will be studied as well. And among the many questions, one in particular will be explored—recognizing that the testimony of a person designated to testify for an organization is admissible in evidence, can the testimony be given any greater binding effect as a "judicial admission"?

The draft rules texts are set out in Attachment 3, which provides materials presented at the November 3, 2016 meeting, with a reminder that they are designed only to illustrate a number of issues, not to be a basis for actual recommendations. It is far too early to be doing anything more than attempting to determine what issues, if any, deserve to be pursued through the hard work that would be required to develop proposals that could be recommended for publication.

A first point can be made quickly. For whatever reason, Rule 30(b)(6) has become an important means, at least in some types of litigation, to identify the documents to be requested and the persons to depose in further discovery. It was strongly commended to the Committee as an effective, low-cost tool routinely used without difficulty in individual employment litigation.

A second and contrasting point can be made as quickly. There are regular complaints that notices of Rule 30(b)(6) depositions do not live up to the requirement of describing with reasonable particularity the matters for examination, and often describe far too many matters. There may be little point in attempting to find rule text that would be more effective than "describe with reasonable particularity." Attempting to set a limit on the number of matters described might easily lead to broader, less particular descriptions—as with other discovery discussions, it may often be better to confront a greater number of better-described matters for examination.

There is a third familiar issue. It is common to complain that the organization named as deponent does not actually satisfy the requirement that it educate the persons who testify "about information known or reasonably available to the organization." It does not seem likely that better preparation can be elicited by more demanding rule language, although the language of Rule 33(b)(1)(B) may be somewhat stronger—a party's agent responding to an interrogatory "must furnish the information available to the party."

Beyond those starting points, it may help to identify some of the more challenging questions illustrated by the initial draft, without attempting any indication of relative importance or reasonable prospects for effective rule amendments. Simple identification may suffice for most of these questions. Resort to the draft rule text, identified by the relevant subparagraph, likely will suffice for others.

(A) Time for Notice: The organization deponent is obliged to prepare one or more persons to testify to information known or reasonably available to it. Rule 30(b)(1) requires only "reasonable written notice" of a deposition. Should (b)(6) specify a particular time calculated to provide a reasonable opportunity to gather the information, determine which persons may be best able to convey it, and educate them to testify?

(B) Matters for Examination: This provision incorporates verbatim the present requirement that the notice describe with reasonable particularity the matters for examination.

(C) Objections to Notice: Should there be an express provision for objections, similar to the Rule 45(d)(2)(B) provision for a subpoena that commands production of documents by a nonparty? Rule 45 suspends production until a court orders it. So 30(b)(6) could suspend the deposition. Objections might go to such matters as the number of subjects designated, failure to designate the matters with reasonable particularity, or proportionality. One advantage of adopting an express objection procedure would be to require the parties to meet and confer before a motion to compel is made.

(D) Pre-deposition Disclosure of Exhibits: A party who has noticed a Rule 30(b)(6) deposition is free now to provide the deponent organization with documents that will be used to examine the persons who testify. This practice may clarify the matters for examination, and facilitate effective preparation of the witness. One approach would be to encourage this practice by a rule that says simply that a party "may" do this. A more forceful approach would require advance provision of all exhibits to be used. That approach could easily lead to providing a great mass of exhibits, for fear of omitting something that might be useful. The effect would be to stir objections, and (at least sometimes) massive over-preparation. It also could diminish the opportunity for useful "surprise" questions.

(E) Designation of Persons to Testify: The first new part of this subparagraph requires the organization to provide notice, _ days before the deposition, of the identity of the persons who will testify; if more than one person is named, the organization must state which matters each person will address. Further provisions would make the designation a certification that the persons named have been properly prepared to provide all information known or reasonably available to the organization, and provide for renewal of the deposition at the organization's expense if the named person is unable to provide information. A final provision would allow an organization to give notice that it is unable, after good faith efforts, to provide information on a designated matter.

(F) Questions Beyond Matters Designated: This provision would limit questioning to the matters for which the organization's witness was designated to testify. This is a preliminary effort to address the common circumstance that the witness has direct knowledge of facts that are relevant to the litigation but that are beyond the matters designated in the notice addressed to the organization.

(G) Contention Questions: This draft seeks to force contention discovery into Rule 33(a)(2) by providing a mirror negative: "The witness may not be asked to express an opinion or contention that relates to fact or the application of law to fact." There are indications that some lawyers attempt to force an organization's witness to describe the organization's legal positions. And at least at the outset, this practice seems undesirable.

(H) Judicial Admissions: The effects of a designated witness's testimony as "binding" the organization is frequently discussed. One effect is that the testimony is admissible in the same way as deposition testimony of an individual party. That means the organization can contradict the

testimony, a practice that ties to the question of supplementing the deposition testimony. Another possible effect is that the testimony can somehow become a "judicial admission" that the organization cannot contradict. There are strong arguments that the judicial-admission approach is sensible, if at all, only as a sanction for a serious failure to prepare the witness. The draft sketch approaches this effect indirectly: the court may not treat any answer as a judicial admission by the organization if it finds the witness was adequately prepared.

(I) Supplementation: It is not surprising that even a carefully prepared witness may not be able to answer all of the questions that may be covered by the matters described for examination. Rule 26(e) does not require supplementation of deposition testimony, except for the deposition of an expert required to give a report under Rule 26(a)(2)(B). It could be useful to add a duty to supplement Rule 30(b)(6) testimony. Supplementation can be useful not only when the designated person has not been adequately prepared to answer a specific question but also when continuing preparation by the organization uncovers information not known before the deposition, and when the organization had not understood the matters described for examination in the same way as the person who puts the question. There is an offsetting concern that a duty to supplement would be seized as an opportunity to answer "I do not know. We will get back to you later on that." The draft approaches the issue by creating a duty to supplement, apparently on paper, coupled with permission for resuming the deposition with regard to the supplemental information. Bracketed language would direct that the resumed deposition is at the organization's expense.

(J) Number and Duration of Depositions: This subparagraph would bring into rule text advice now provided in Committee Notes: A Rule 30(b)(6) deposition is counted as one toward the presumptive limit of 10 depositions per side, no matter how many persons are designated to testify for the organization. But the deposition of each person designated is treated as a single deposition for purposes of the presumptive limit to one day of seven hours.

IV. PILOT PROJECTS WORKING GROUP

Since its inception in the fall of 2015, the Pilot Projects Working Group has focused on the development of two pilots.[1] The first is the Mandatory Initial Discovery Pilot ("MIDP"), and the second is the Expedited Procedures Pilot ("EPP"). While the goal of both pilots is to measure whether improvements can be achieved in the pretrial management of civil cases to promote the just, speedy and inexpensive resolution of cases, they aim to do so in different ways. The Judicial Conference of the United States approved both pilot projects at its September 2016 meeting. The target for implementation of both pilots is Spring 2017.

The goal of the EPP is to expand practices already employed successfully by some judges and thereby promote a change in culture among federal judges generally by confirming the benefits of active management of civil cases through the use of the existing rules of civil procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90% of cases, and within 18 months of service or appearance in the remaining cases. The overarching design of the EPP is for the pilot courts to achieve this target objective of having 90% of civil cases set for trial within 14 months, with the remaining 10% set within 18 months.

The Working Group held numerous planning calls to refine the contours of the EPP. Analysis of civil filings across the federal courts reflects that most often discovery lasts between 120 and 180 days, but the Working Group realizes that some cases may require more time to complete discovery. The Working Group is of the view that EPP pilot judges should have flexibility in determining exactly how to informally resolve most discovery disputes, so long as they do so without the delay and expense associated with formal briefing. While the Working Group recognizes that a short deadline for ruling on dispositive motions may deter some districts (especially those with large civil dockets) from participating, it believes that a 60-day deadline from the filing of the reply is usually a sufficient amount of time for judges to rule, and that a longer deadline would jeopardize meeting the 14/18 month trial targets. Finally, the Working Group believes that EPP judges should have flexibility to determine the point at which to set a firm trial date in their civil cases (for

[1] The Working Group includes members from the Standing Committee, the Advisory Committee on Civil Rules, and the Committee on Court Administration and Case Management. It is currently chaired by Judge Paul Grimm, a former member of the Civil Rules Committee.

example: when the initial scheduling order is issued; when discovery is complete; when dispositive motions have been filed; or when dispositive motions have been decided), so long as the trial date is within the 14/18 month target.

The Working Group finalized its recommendations regarding the details of the EPP in October, and the Advisory Committee on Civil Rules has now given its approval to the pilot. A "user's manual" is being developed to give guidance to EPP judges, and model forms and orders as well as other educational materials will be developed before the EPP is ready for implementation. Mentor judges will be made available to support implementation in the pilot courts. The goal is to have the project in place in 2017, to run for a period of three years. The current description of the EPP is included as Attachment 4.

The goal of the MIDP is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery will reduce cost, burden, and delay in civil litigation. The MIDP will require a party to respond to a court order to produce specific items of information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case and including information that is both favorable and unfavorable to the responding party. In developing the MIDP, the Working Group drew on the positive experience of various state courts and the Canadian courts that have adopted mandatory disclosures of relevant information. If the MIDP results in a measurable reduction of cost, burden and delay in civil litigation, then this may provide empirical evidence supporting a recommendation that the Advisory Committee propose amendments to the civil rules to adopt mandatory initial discovery in all civil cases (except for a defined subset of cases where discovery generally does not take place).

The details of the MIDP have been set out in a proposed standing order that will be issued in the pilot courts, as well as a "user's manual" that supplements the standing order. The proposed MIDP standing order is included as Attachment 5. Some features of the MIDP are: the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1); the parties may not opt out; favorable as well as unfavorable information must be produced; responses must be filed with the court, so that it may monitor and enforce compliance; and the court will discuss the initial discovery with the parties at the Rule 16(b)(2) case management conference, and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised. Hence, answers, counterclaims, crossclaims and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to answer, etc. in order to consider a motion based on: lack of subject matter jurisdiction; lack of personal jurisdiction; sovereign immunity; absolute immunity; or qualified immunity.

As with the EPP, the Working Group is developing a "user's manual" and other educational materials to assist participating judges. For both pilots, the Federal Judicial Center is developing training. An early draft of a "Mini-Curriculum for an Intensive Case Management Pilot Program" is included as Attachment 6. The FJC will also be conducting data collection and analysis regarding each pilot. A memorandum from Emery Lee outlining that proposed effort is included as Attachment 7.

The Working Group is drawing to the close of its efforts to specify the details of the EPP and the MIDP, and has begun the task of recruiting district courts to participate. The hope is to have 5 to 10 districts of various sizes from diverse parts of the country that are willing to participate in each pilot, and then to begin implementation of the pilots in the Spring of 2017. Each pilot will last for a period of three years. Communication with the chief judges of districts interested in participating, or with other contact judges in those districts, is underway. Several districts are set to participate, but a few more are sought.

The Working Group hopes that the Standing Committee will provide further feedback that may be helpful as the details of the EPP and MIDP are finalized, and that members of the Committee will themselves reach out to other districts that might be willing to participate, or make the Working Group aware of possible districts. Such efforts should be coordinated through Judge Grimm (D. Md.). We are looking for five to ten districts for each pilot; no one district would be selected for both projects. Districts of different characteristics should be involved, both large, medium, and small, and from different parts of the country. Although it will be desirable to have participation by every judge on each pilot court, there is some flexibility about engaging a court that cannot persuade every judge to participate.

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ATTACHMENT 1

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Committee Note

This is a technical amendment that integrates the intended effect of the amendments adopted in 2015 and 2016.

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MEMORANDUM

TO: Judges Jeffrey Sutton, David Campbell, and John D. Bates

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for a jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea. Thank you.

ATTACHMENT 3

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Building a "stand-alone" Rule 30(b)(6)

A primary thrust of the Sept. 1 conference call was to include many specifics in Rule 30(b)(6) that either are found elsewhere in the rules or not included in the rules at all. This treatment might work better as a new Rule 30.1, or something of the sort. For present discussion purposes, however, it is presented as an extensive amendment to present 30(b)(6). The Subcommittee is not urging this approach, but instead offering the following sketches to show how such a rule might appear, and also to introduce various specifics that might be added to the current rule in a less comprehensive manner than this draft presents. For ease of discussion, this presentation will treat each sub-part of the sketch separately. They could be combined, but a mix-and-match treatment is also possible.

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

This revision is not designed to delete the specifics now in the rule, but rather to relocate them in the sub-parts presented below.

(A) *Minimum notice of examination.* The notice or subpoena must be served [at least __ days] {a reasonable time} before the date scheduled for the deposition.

Paragraph (A) could raise the more general question why we don't have a specific notice period for all depositions. Rule 30(b)(1) says only that there must be "reasonable written notice to every party." One answer to this question is that although there is no rule-imposed requirement to prepare for other depositions, there is an obligation under the rules to prepare the witness for this kind of deposition.

As noted below, several other sketches seem to assume a minimal notice period of some period of days to permit other actions to be taken within the defined time before the deposition. Those provisions might not be pursued, but if they are it would seem that some overall minimum notice period would follow.

An alternative to specifying a period in the rule, indicated in braces, is to say that a "reasonable time" is required. That might be explained in a Committee Note to be a sufficient time to permit the other things the new rule would require to be done to be completed, if those additional things are indeed included. But saying a "reasonable time" may be too oblique for that purpose. Putting that direction in 30(b)(6) might also seem odd because it is already in 30(b)(1).

Under the law of some states there is a specific notice period for a deposition. That period may differ in different places. Within the Civil Rules, one might note that Rule 33 provides a 30-day period for responding to interrogatories and Rule 34 sets 30 days for production of documents. Is that clearly enough time for this purpose? In any event, if other things must be done more than a certain number of days before the deposition (as provided in (D) and (E)(iii) below, for example), those requirements must be taken into account in setting the overall minimum notice period.

(B) *Matters for examination.* The notice must describe with reasonable particularity the matters for examination.

(B) attempts to carry forward the current language on specificity of the list of matters. One could also add a numerical limit on those matters. As noted below, one could alternatively make the effect on the ten-deposition limit depend on how many matters are listed. For example, if the notice listed more than ten matters, the deposition might be counted as two (or three, if more than twenty matters were listed). But as with Rule 34, it may be that there is a tension between a numerical limit and the desire for more pointed "rifle shot" designation of topics for examination. For the present, (B) does not confront these issues that are raised by subsequent sub-parts.

(C) *Objections to notice.* The organization may object in writing within __ days of service of the notice by stating with specificity the grounds for objecting, including the reasons.

(i) Upon service of an objection, the party that served the notice or subpoena may move under Rule 37(a) for an order compelling testimony.

(ii) Testimony may be required only as directed in the order[, and the court must protect the organization against disproportionate burden or expense resulting from compliance].

(C) is designed to work like the provision in Rule 45(d)(2)(B) excusing compliance with a document subpoena on objection by the nonparty. It might be noted that those subpoenas are already subject to the 30-day rule of Rule 34(b)(2)(A), but that the objection period is only 14 days after service of the subpoena. That may be something of a trap for the unwary, but it does perhaps suggest the need to take account of the relation between specified time periods under the current rules. Presumably it is desirable to have a shorter period for the objections, so those are known before the deposition is scheduled to occur.

One topic handled only by implication is the need to meet and confer to resolve objections; invocation of Rule 37(a) seems sufficient to do that. But perhaps an explicit reminder in the rule would be desirable.

Rule 26(g)(1) already provides that making an objection certifies that the objector has a valid basis for the objection. There seems no need to repeat that here.

Another topic is proportionality. There is a small effort in (C)(ii), in brackets, to introduce that topic. Rule 33 already is limited to "any matter that may be inquired under Rule 26(b)," and Rule 34 provides for "a request within the scope of Rule 26(b)." Both those rules therefore already invoke the principles of proportionality in Rule 26(b)(1) and (2). Is there a value to re-raising them here, and if so would an invocation of Rule 26's scope provisions be sufficient? If some reference to proportionality is in order, would a statement in the Committee Note suffice?

It may be that there is no need for the rule to provide a specific method for objecting, for lawyers already know how to object. It might be that the method presented in this sketch is important because it suspends the deposition until the objection is resolved. But that could easily be overkill; an objection to only one matter on a list would suspend inquiry altogether.

Alternative One

(D) *Disclosure of exhibits.* At least __ days before the date scheduled for the deposition, the party noticing the deposition must provide the organization with copies of all exhibits to be used as exhibits during the deposition.

Alternative Two

(D) *Disclosure of exhibits.* At least __ days before the date scheduled for the deposition, the party noticing the deposition may provide the organization with copies of exhibits to be used during the deposition. If such notice is given, the witness must be prepared to provide information about [the exhibits] {the topics raised by the exhibits}.

There are two alternative approaches to the idea of providing advance specifics regarding exhibits to be used during the deposition. Alternative One may be too demanding and restrictive. Alternative Two might serve much the same purpose in a more flexible manner.

One concept behind this provision is that, because there is a preparation obligation with this sort of deposition, additional notice of the topics to be addressed is important. Too often, perhaps, the list of matters served with the notice does not adequately notify the organization about what the party serving the notice actually plans to ask about during the deposition. As a consequence, the organization may be handicapped in identifying a suitable person to designate to testify, and also in preparing that person for the deposition.

Another concept behind it is derived from some experience in very complex litigation. For example, in In re San Juan DuPont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988), the district court imposed a deposition protocol in a litigation in which there had been massive document production and it was anticipated that around 2,000 depositions would be taken. To expedite the depositions, the district court ordered that the questioning party must provide a list of all exhibits to be used during the deposition five days before it was to occur.

The Plaintiffs' Steering Committee obtained appellate review of this order, arguing that it intruded on work product protection. Stressing the dimensions of this massive litigation and invoking Rule 16 and an earlier version of Rule 26(f), the First Circuit affirmed (id. at 1015):

> When case management, rather than conventional discovery, becomes the hammer which bangs against the work

> product anvil, logic demands that the district judge must be given greater latitude than provided by the routine striking of the need/hardship balance [under Rule 26(b)(3)((A)(ii)].

Below, a "case management" approach sketching possible changes to Rules 16 and 26(f) is offered as an alternative to either of the alternatives above. The Subcommittee's reaction to (D) is that would be a big change. Particularly if "all" were retained in Alternative One, it might result in a deluge of material from litigants who worried that they might be foreclosed from using an exhibit not provided. In addition, if the deposition included document production, such a rule provision would seem to forbid asking the witness about the documents produced at the deposition.

Alternative Two might avoid many problems that Alternative One could produce. It could provide the party noticing the deposition an opportunity to provide a manageable number of documents. One idea is that the organization has a better idea what will come up in the deposition once it sees the documents. It might also provide that supplying such advance notice has consequences for the duty to prepare. At the same time, if there is an advantage to surprise even in this sort of deposition, the interrogating party need not reveal its "surprise" exhibits. That might, of course, prompt objections to answering questions about such documents on the ground that they are "surprise" exhibits.

Whether a rule provision addressing such advance notice is a good idea remains very much open. In part, it may be that experience with such regimes could prove important in evaluating their utility. If they are only justified in extraordinary cases like the San Juan DuPont Plaza litigation, it seems dubious to include a provision in the rules for all cases. But if experience with this sort of requirement shows real benefits, it may be that those benefits could be general enough to warrant inclusion in the rules. Of course, the case management approach below could suggest, in a Committee Note, that one measure a court might include in a Rule 16 order when appropriate would be such an advance notice requirement.

It might also be noted that there is nothing now precluding a party that notices a 30(b)(6) deposition from doing what Alternative Two says, although no rule now says that providing advance notice in this manner directly affects the witness-preparation obligation. As an antidote to confronting "I don't know" answers at the deposition, it might be a very good idea.

(E) *Designation of persons to testify.*

(i) The organization must designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf about [information] {facts} known or reasonably available to the organization.

(ii) A subpoena must advise a nonparty organization of its duty to make this designation.

(iii) At least __ days before the deposition, the organization must notify the party that noticed the deposition of the identity of the person or persons it has designated. If it has designated more than one person, it must also state which matters each person will address.

(iv) By designating a person or persons to testify on its behalf, the organization certifies under Rule 26(g)(1) that each witness [is capable of providing] {has been properly prepared to provide} all [information] {facts} known or reasonably available to the organization about that matter. [If the witness is unable to provide [information] {facts} on a matter, the organization must prepare the witness [or another witness] after the deposition is adjourned, and the deposition may resume at the organization's expense to address that matter.]

(v) If the organization is unable, after good faith efforts, to locate [information] {facts} on a matter for examination, or a person with knowledge of that matter, it must so notify the party that served the notice or subpoena [at least __ days before the date scheduled for the deposition]. That party may then move the court under Rule 37(a) for an order compelling testimony on this matter, but such testimony may only be required as directed by the court.

Subparagraph (E) attempts to do a lot of things. In item (i), it tries to carry forward the current provision about designation of a witness or witnesses. Item (ii) similarly tries to carry forward the directive that a subpoena advise a nonparty of this obligation. (This provision would not be needed if 30(b)(6) depositions were limited to parties.) And item (iii)

then calls for notifying the party taking the deposition about who will actually be testifying, and (if more than one person is designated) about which topics. How much notice should be required? Is it correct that this notice should not be required until some time after the disclosure of exhibits called for by Subparagraph (D) (if that idea were to be pursued)? How much time is necessary after that designation pursuant to (D) to enable the responding organization to employ the insights derived from the exhibits to select the right person or persons to testify?

Items (iv) and (v) try to balance obligations, and to alert users of this rule of their Rule 26(g) obligations. Item (iv) offers two articulations of what is certified -- proper preparation or actual ability to answer -- that may serve to underscore the possible delicacy of the task the rule commands the organization to accomplish. Item (v) is designed to work like Subparagraph (C) when the organization claims ignorance. But won't there be many situations in which the organization has some information and the party seeking discovery wants more?[1]

One alternative introduced in the sketch above is whether to change from "information" to "facts." From time to time, it has been urged that inquiries in 30(b)(6) depositions should not go beyond locating facts or sources of evidence. In part, that concern may resemble the concern lying behind subparagraph (G) on contention questions. One might, in this connection, note that Rule 26(a)(2)(B)(ii) was recently changed to require disclosure of "the facts or data considered by the witness in forming [opinions]." Formerly, it had required disclosure of the "data or other information considered by the witness," and this change was designed to guard against undue intrusion into attorney/expert communications. Whether this situation is similar could be debated.

But making a change here might produce unfortunate discontinuities. Rule 26(b)(1), for example, refers to discovery of "information," not "facts." In regard to pleading requirements, there was a heated debate about what was an allegation of "fact" a century ago. Revisiting such debates would not likely be productive.

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[1] Note: One might somewhere try to require the organization to select the "most knowledgeable" witness, but this sketch does not do that. To do that may be a major challenge for the organization, and could also introduce the issue presented in Wultz v. Bank of China, 293 F.R.D. 677 (S.D.N.Y. 2013) -- what happens when that person is located overseas? If this sketch's route is adopted, it might be worth saying in a Committee Note that the organization cannot designate a person who is far away and then refuse to produce the person based on the distance limitations in Rule 45(c).

Regarding (E)(iii), it seems that something like this exchange of identities of designated witnesses happens with some frequency, which suggests that it can work. Perhaps it would work better via a party agreement or a Rule 16 court order (in the case management model introduced below). But if (F) below is also adopted (limiting questioning to listed matters), there might be complications with a person who is also a fact witness familiar with additional topics.

(E)(iv) may cause more problems than it solves. Often, it seems, parties who make a genuine effort to prepare their witnesses find that the questioning eventually reaches topics or sub-topics on which the witness has not been prepared. To suggest that the party is then in violation of Rule 26(g) seems overly strong medicine. Moreover, Rule 26(g) is basically a sanction provision. Treating all such shortfalls of preparation on something as an occasion for a sanctions motion seems like overkill and may invite gotcha litigation. Perhaps such a provision would put a premium on asking surprise questions that have a tenuous link to matters on the list. That would surely put pressure on the particularity of the list. It might be better to speak of remedies. One approach along that line might be a provision like the direction in brackets that the deposition be adjourned instead of completed, with a continuation at the organization's expense to explore the matter in question.

Regarding (E)(v), one question might be whether that is needed. It might be bolstered by a requirement that the party giving such notice also provide specifics on the efforts made to obtain responsive information or facts. If the argument is that another form of discovery -- interrogatories, for example -- would be a better way of inquiring about this topic, we already have a provision in Rule 26(b)(2)(C) that seems to speak to this situation and to specify what is to be done. Does adding a rule provision here with timing and other complications improve matters? Could a Committee Note reference to Rule 26(b)(2)(C)(i) suffice for the purpose?

Additionally, should something like (E)(v) be pursued, it is likely that the question could arise whether the entire subject is off limits during the deposition. Presumably some inquiry should be allowed about the efforts made to obtain responsive information (or facts). Moreover, the sketch seems to invite a motion to compel. Is it clear how that is to work? "You can't get blood from a stone" might be one reaction.

An alternative location for a provision about this problem, if there is reason to give serious consideration to such a provision, might be in (C), which deals with objections to the notice. But this sort of notice is not so much an objection as a report.

> **(F)** *Questioning beyond matters designated.* A witness may be questioned only about the matters for which the witness was designated to testify.

(F) takes one position on the "questioning beyond the notice" issue. Another could be to affirm that such questioning is allowed but try to specify how that impacts either the one day of seven hours or the second deposition problem (should it later be suggested that this person should sit for an "individual" deposition). One thing such a provision would do responds to something the ABA submission raised -- it would provide an explicit basis for objecting to such questioning. But a rule of this sort may be a very blunt instrument for that purpose.

One blunt aspect of this instrument would emerge when the person designated also has personal knowledge of other topics relevant to the action. Surely there are many cases in which that is true and it would not make sense to pretend otherwise. And insisting either that the 30(b)(6) deposition count as two depositions (one organizational and the other individual), or that the witness must return another time for an "individual" deposition, seems senseless.

Another blunt instrument aspect of such a rule provision is that it may invite an even longer list of topics. One concern that has been raised is that lawyers may be using overlong lists already. But if a party must "pay" for a short list by using up two of its ten depositions, that seems an unfortunate result of such a provision.

Yet another concern is whether the dividing line between listed matters and other topics will often be unclear. Of course, that could arise again in the "judicial admissions" topic addressed next below. Moreover, if something like (D) above (about advance provision of exhibits) were adopted, would that mean the witness nonetheless could not be asked questions about what was in those exhibits unless the topic of the questions directly related to a matter on the list?

(G) *Contention questions.* The witness may not be asked to express an opinion or contention that relates to fact or the application of law to fact.

(G) is modeled on Rule 33(a)(2). A Committee Note might say that this rule provision recognizes that there is a big difference between answering a contention interrogatory and responding spontaneously in a deposition setting. What's more, Rule 33 invites deferral even of the interrogatory answer, which shows that this sort of questioning is inappropriate in the hothouse deposition setting. A Committee Note might also affirm that it is not appropriate to ask such a witness to elect between the versions of events described by other witnesses, something we have heard is sometimes attempted under current Rule 30(b)(6).

It might be noted in connection with (G) that there is no attempt in the rule sketch to say that Rule 26(b)(3) applies. There is a tension between questioning to verify that the witness has been properly prepared for the deposition and the sort of intrusion into attorney preparation that we certainly do not want to enable. A Committee Note could probably make this point, but it seems odd to say in this rule that 26(b)(3) applies to this form of discovery because it applies to all forms of discovery already.

Note that the Subcommittee has not yet discussed (G).

(H) *Judicial admissions*. If it finds that the witness has been adequately prepared under Rule 30(b)(6)(E)(iv), the court must not treat any answer given in the deposition as a judicial admission by the organization.

(H) deals with the judicial admission question. Whether that term is well enough understood to be used in this way in a rule might be an issue. Tying that to adequate preparation seems consistent with cases dealing with failure to prepare, or at least seemed that way a decade ago when the Committee last dealt with this rule. Adding such a qualification may be unnecessary because Rule 37(c)(1) is always there to support a court order foreclosing presentation of material that should have been disclosed, provided in response to discovery, or provided by supplementation under Rule 26(e). It might also be argued that the condition in this sketch implies that the court will use that power whenever there is a failure to prepare. Frankly, it seems that courts do not lower the boom unless the failure to prepare is fairly flagrant.

One reaction to these issues has been mentioned above -- the need for research about the existing case law on judicial admission treatment of 30(b)(6) deposition responses. Except for noting that need for research, **the Subcommittee has not yet discussed (H).**

The Subcommittee has not yet discussed the topics presented below. Accordingly, this is only a Reporter's sketch designed to facilitate discussion.

(I) *Supplementation.* An organization that has designated a person to testify on its behalf must supplement or correct the testimony given [in a timely manner] {no later than the date pretrial disclosures are due under Rule 26(a)(3)} [no more than __ days after completion of review by the witness under Rule 30(e)] if it learns that the testimony was incomplete or incorrect in some material respect. The party that took the deposition may then retake [reopen] {resume} the deposition of the witness with regard to the supplemental information [at the expense of the organization].

(I) raises a number of issues. The first is familiar -- is this an invitation to say "We'll get back to you"? If so, it may actually weaken the duty to prepare. The stronger (E)(iv) and (H) are on the requirement to prepare the witness, the less that risk, perhaps.

But the timing feature causes difficulty. Tying the date for supplementation to the 26(a)(3) date has some appeal, in terms of preparation for trial, but it seems far too late for something that may require further discovery even if discovery is closed by then. Tying it to when the deposition transcript is completed may be too early for genuinely belated discoveries. Moreover, Rule 30(e) review occurs only in cases in which there is a request for review by the deponent or a party. Though that would likely occur most of the time for 30(b)(6) depositions, it might not occur all the time.

Another possible concern would be with matters covered by (E)(v) -- if the organization gave notice that it had no information on a given matter and later happened upon information by some fortuity, is there a duty to supplement? Were (E)(v) not pursued, this would not be an issue, but if it is pursued it could become an issue.

(J) *Number and duration of depositions.* For purposes of Rule 30(a)(2)(A)(i), each deposition under paragraph (6) is counted as one deposition, but for purposes of Rule 30(d)(1), the deposition of each person designated is treated as a separate deposition.

(J) sets out the deposition-counting and duration directions now in the 1993 and 2000 Committee Notes. Those could be changed. How one deals with questioning beyond the matters listed could present problems of this sort. If (F) is not adopted, questioning beyond the list could be regarded as meaning that one deposition of one individual would be counted as two depositions for the ten-deposition limit, even if it were relatively short. So being this specific in the rules could sometimes tie the parties in knots. Trying to connect the number of depositions allowed to the number of matters on the list might be included here, but might produce unfortunate strategic behaviors.

(K) *Additional depositions of same organization.* Notwithstanding Rule 30(a)(2)(A)(ii), any party may notice an additional deposition [or additional depositions] of the same organization on matters not listed in the notice for the first [a prior] deposition of the organization under paragraph (6). But any such deposition is counted as an additional deposition under Rule 30(a)(2)(A)(i).

(K) adopts the idea that a second deposition of the organization on different subjects is permitted, but that it counts against the ten-deposition limit. Those starting points could be changed. And there may be difficulties in deciding whether the second deposition is really on "matters not listed in the notice" for the first such deposition. That could become cloudier if questioning beyond the matters listed is allowed (as (F) says it is not).

Focusing on Case Management As a Method of Regulating Rule 30(b)(6) Depositions

As an alternative to the approach above, or to parts of it, one might instead focus mainly on case management solutions to the problems under discussion. That approach could involve considerably less detail in rules, and might be preferable. For one thing, the detail provided in the rule sketch above could be regarded as rather rigid. In a sense, it provides default positions that might be bargaining chips in the jockeying that may sometimes attend this discovery activity.

The Subcommittee has not yet discussed these topics. At least some members of the Subcommittee are initially inclined to prefer this approach to the issues raised rather than a detailed stand-alone rule. The Subcommittee solicits input from the full Committee on these ideas.

One approach would involve a modest addition to Rule 26(f)(3):

> **(3) Discovery Plan.** A discovery plan must state the parties' views and proposals on:
>
> **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
>
> **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
>
> **(C)** any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
>
> **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order;
>
> **(E)** any issues about [contemplated] Rule 30(b)(6) depositions, including _____;
>
> **(FE)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
>
> **(GF)** any other orders that the court should issue under

Rule 26(c) or under Rule 16(b) and (c).

A question under this approach would be whether to include in the rule reference to the sorts of topics included in the very specific "stand alone" rule sketched above. (C), for example, commands the parties to include discussion of the form or forms in which electronically stored information must be provided and invites a report on any other issues the parties might have identified. Various of the items set out in the stand-alone rule might instead be mandatory topics for reporting in Rule 26(f). Whether one could be specific about those topics at that early point in the litigation is not clear, however.

Even so brief a rule provision as the one sketched above could theoretically support a very substantial Committee Note addressing many of the items included in the comprehensive sketch of an amended Rule 30(b)(6) above. But absent the force of being in the rule, much of that Note might not carry the weight we might desire. And the dimensions of such a Note might well raise eyebrows. We are to be leery of "rulemaking by Note."

In addition, Rule 16(b)(3) could be amended to highlight the utility of judicial management of Rule 30(b)(6) depositions. Building on the experience with time limits for noticing such depositions, one could amend Rule 16(b)(3)(A):

> **(A)** *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, notice Rule 30(b)(6) depositions, complete discovery, and file motions.

But that may well overemphasize this form of discovery. Alternatively, Rule 16(b)(3)(B) could be amended along the following lines:

> **(B)** *Permitted Contents.* The scheduling order may:
>
> **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1);
>
> **(ii)** modify the extent of discovery;
>
> **(iii)** provide for disclosure, discovery, or preservation of electronically stored information;
>
> **(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
>
> **(v)** include specifics about any Rule 30(b)(6)

depositions, including minimum notice of examination, limitations on the number of matters for examination, specifics on objections, disclosure of proposed depositions exhibits, questioning of witnesses beyond the matters designated in the deposition notice, supplementation of deposition testimony, duration of such depositions, or additional depositions of organizations that have already been deposed;

(vi~~v~~) * * * * *

Such a detailed rule change might seem excessive. Though Rule 30(b)(6) depositions are important in many cases, it is probably difficult to say that they are so important that they warrant being featured in this way in general rules about litigation management. But it is worth noting that these changes to Rules 26(f) and 16(b) might be added measures even if the detailed stand-alone rule approach were taken. Indeed, a Committee Note could advert to the long list of particulars on the stand-alone rule as possible topics for a Rule 16 scheduling order to address. The real goal is probably to cajole the parties -- in the spirit of amended Rule 1 -- to discuss and resolve these problems without the need for "adult supervision" by the court.

ATTACHMENT 4

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Expedited Procedures Pilot Project

Acting on the recommendation of the Civil Rules Advisory Committee and the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States has authorized two pilot projects to test whether civil cases can be resolved more quickly, with less expense. One of the pilots is the Expedited Procedures Pilot Project (EPP). The EPP will begin in early 2017 and last for three years. It is designed to test whether more active use of certain case-management measures that employ the existing Rules of Civil Procedure can expedite the resolution of civil cases in a more just, speedy and inexpensive manner. There are five central features of the EPP, each of which will be described briefly below.

First, as required by Fed. R. Civ. P. 16(b)(2), EPP judges will hold a scheduling conference and issue a scheduling order as soon as possible, but in no case later than the earlier of 90 days after service of any defendant, or 60 days after entry of appearance of any defendant. In cases involving multiple parties, the scheduling conference and issuance of the scheduling order will be triggered by the service or entry of appearance of the first defendant.

Second, the scheduling orders issued by EPP judges will set a definite period for discovery, not to exceed 180 days, which will not be extended more than once and then only upon a showing of good cause, as required by Fed. R. Civ. P. 16(b). Good cause requires a showing that the parties have been diligent in their efforts to complete discovery within the deadline set in the scheduling order but that despite their diligence, the deadline could not be met. It is axiomatic that carelessness, inattention, or neglect are not good cause.

Third, EPP judges will resolve discovery disputes expeditiously and informally, as permitted by Fed. R. Civ. P. 16(b)(3)(B)(v). This can be accomplished in many ways, including conferences with the judge (by telephone, in chambers or in court), and the use of short submissions explaining the parties' positions in lieu of formal briefing.

Fourth, EPP judges will rule on all dispositive motions within 60 days of the filing of the reply brief. This deadline will be met even if the judge hears oral argument on the motion.

Fifth, EPP judges will set a firm trial date that will not be changed in the absence of exceptional circumstances. They will have flexibility to decide when to set the trial date (for example, when the scheduling order is issued, after discovery has ended, or when dispositive motions have been filed or resolved) but must set it so that in 90% of their cases trial is scheduled to take place within 14 months of the earlier of service on or appearance by any

defendant and, in the remaining 10% of cases, so that trial is scheduled to take place within 18 months.

A "users' manual" will be developed to provide additional guidance for EPP judges, and training will be provided by the Federal Judicial Center. Sample orders and other written materials also will be prepared for use by EPP judges. Finally, throughout the duration of the EPP, mentor judges will be available on request to assist EPP judges.

ATTACHMENT 5

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MANDATORY INITIAL DISCOVERY PILOT PROJECT

One of the pilots approved by the Judicial Conference of the United States is the Mandatory Initial Discovery Pilot ("MIDP"). It will be implemented by a standing order and apply to all civil cases not specifically exempted. Parties will be required to respond to the mandatory initial discovery, and will not be permitted to opt-out. The discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), and must be completed before the commencement of party-initiated discovery under Rules 30-36 and Rule 45. When making mandatory initial discovery responses, the parties will be required to disclose both favorable and unfavorable information that is relevant to their claims or defenses, regardless of whether they intend to use the information in their case, and the responses will be filed with the court to enable the presiding judge to monitor and enforce compliance with the standing order. The standing order appears below.

Standing Order

The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order supersede the disclosures required by Rule 26(a)(1) and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether

they intend to use the information in presenting their claims or defenses. The parties also must provide relevant legal theories in response to paragraph B.4 below. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the Court orders otherwise. If a party limits its response on the basis of any other objection, including an objection that providing the required information would involve disproportionate expense or burden, considering the needs of the case, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the Court may for good cause defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss based on: lack of subject-matter jurisdiction; lack of personal jurisdiction; sovereign immunity; or absolute immunity. In that event, the time to answer, counterclaim, crossclaim, or reply shall be set by the Court based upon entry of an order deciding the motion, and the time to serve responses to the mandatory initial discovery under paragraph 4 shall be measured from that date.

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle the case and have a good faith belief that it will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if

they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pretrial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims

or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described

items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. *Hard-Copy Documents.* Hard-copy documents must be produced as they are kept in the usual course of business.

2. *ESI.*

a. *Duty to Confer.* When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure, and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;

iii. the form in which the ESI will be produced.

b. *Resolution of Disputes.* If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. *Production of ESI.* Unless the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial response. Absent good cause, no party need produce ESI in more than one form.

d. *Presumptive Form of Production.* Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.

Instructions for Pilot Courts

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the

mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

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A "MINI-CURRICULUM" FOR AN INTENSIVE CASE MANAGEMENT PILOT PROGRAM

General Principles

Effective professional education is guided by two related concepts. First, the substance that is taught leads concretely and measurably to the development of specific competencies—knowledge, skills and attributes—relevant to a given professional task. Second, the method of instruction engages the learner in active participation—e.g., discussion, exercises and role plays—rather than passive reading or listening. A successful curriculum is competency-based, and successful instructors have both a deep understanding of the competencies they are teaching and the ability to draw out and involve learners in the learning process.

Competencies Related to Active Case Management

Knowledge:
- Applicable case law
- Applicable national and local rules
- Management theory
- Exemplary protocols, forms and procedures

Skills:
- Active listening
- Chambers management
- Communication (oral and written)
- Courtroom technology
- Courtroom management
- Procedural fairness
- Resolving conflicts (including mediation skills)

Attributes:
- Decisiveness
- Emotional intelligence
- Flexibility
- Temperament
- Mindfulness
- Seeing the big picture

Method of Instruction for an Intensive Program on Active Case Management

Small group sessions at a 1-2 day live workshop for judges in pilot districts

Assigned pre-reading and pre-work re knowledge competencies, followed by brief review at workshop

Practice of skill competencies using hypotheticals and role plays

Self-assessment and development of desirable attributes through video or other peer observation and discussion

Follow-up distance learning focused on recurring problems

Password-protected forum for participating judges to discuss case management issues and exchange ideas

If circumstances warrant, "advanced" live workshop at midpoint of pilot

Evaluation

Measurable learning objectives presented at the beginning of each session (e.g., "participants will learn to listen actively and identify the acknowledged and unacknowledged interests that underlie parties' litigation positions")

Post-session learner assessment of how well learning objectives were met (both immediately following the session and several months thereafter)

Appropriate coordination with study by FJC Research Division on long-term impact of training

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Federal Judicial Center

MEMORANDUM

TO: Judicial Conference Committee on Rules of Practice and Procedure
FROM: Emery G. Lee III
DATE: November 29, 2016
RE: Pilot Project Data Needs

Preliminary Points (Some Obvious, Some Less So)

The two projects are different, with little overlap in terms of data collection.

Success will require buy-in from the clerk's offices, but I do not anticipate that this will be an issue in the volunteer districts. I have never had difficulty working with clerk's offices. At the same time, it will be important to minimize the burden on the clerk's offices. Again, I don't anticipate this being a problem, but I wanted to raise it.

The major lingering issue, as I see is it, is that even if we can collect reliable data on the pilot districts, there is the question of comparison districts. In terms of the Expedited Procedures Pilot (EPP), it may be possible to measure within-judge change. E.g., do judges in the EPP move their cases faster as they implement the EPP? This raises the "judge-specific data" problem—but there is no need to report anything other than aggregate numbers. The Mandatory Initial Discovery Pilot (MIDP) is more complicated on this front. The comparison is to roughly similar districts using standard disclosure rules? Once we have a full slate of volunteer districts, defining the "roughly similar districts" will be necessary. Also, comparison districts are less likely to be "volunteer" districts (although N.D. Ohio may count as a volunteer comparison district, through Judge Oliver), so there is the sensitivity of accessing their CM/ECF data to consider.

Districts are never doing just one thing. (Nor, one might add, are judges just doing one thing.) This is not a laboratory experiment with only one variable changed between the treatment and control group. The example I would offer here is that one of the largest employment protocol districts has an aggressive mediation program as well. So, yes, they settle a lot of the pilot cases. But is that because they use the protocols, thus simplifying the discovery process, or because they send almost every pilot case to mediation? I've raised this before, but it will be necessary to consider local rules, procedures, and norms.

Multivariate analysis: The rule of thumb is that one generally needs 10-20 cases per variable in a multivariate analysis. I raise this just to reiterate my focus on the number of cases in the pilots as opposed to the numbers of districts or judges participating. Moreover, it is likely that some kind of multilevel modeling will be needed, which likely means we would need even larger numbers to meaningfully analyze district-level effects.

The "three year" pilot concept: As discussed on the calls, we will not stop collecting data on cases filed in the third year of the pilots but will instead track them (or, at least, most of them? 90%?) until they resolve in district court. If a case in the EPP is filed in the last month of the third year, and then a month or so later the trial date is set 18 months in the future, then that pushes into a fifth year. Realistically, assuming that the pilots are underway by June 2017 in the desired number of districts, data collection will not be completed and final reporting will not take place until 2022 or 2023. Interim reports can begin much sooner, of course.

Interim reports present interpretation problems, however, when one is studying terminated cases. The interim reports cannot capture data on the cases that take the longest—trial cases, protracted cases in which discovery disputes are likely to arise. The spoliation study from 2011[1] showed that many discovery disputes arise (or appear on the docket, at least) only at the motion *in limine* stage. Needless to say, an interim report in 2018 or even 2019 is going to miss most of those disputes in cases filed in 2018. Interim reports are likely to underestimate case disposition times. Subsequent interim reports will almost always show longer disposition times than previous ones, as the "long tail" of cases reach resolution.

Despite any concerns raised in this memorandum, the Research Division of the Federal Judicial Center is committed to studying the pilots and providing useful information to the committee.

Expedited Procedures Pilot (EPP)

The overarching goal is to have firm trial dates (and thus trials) set within 14 months from service on any defendant in 90% of cases and within 18 months in the remaining cases included in the pilot.

My initial observation is that service (or appearance of any defendant) is docketed, so this should be possible to track. I do not have much experience doing this, but this should be possible.

I have some hesitation about the "flexibility" built into the pilot on when the clock starts running on the 14-month/18-month timeframe. It should be possible in the pilot districts to have some kind of docket language or CM/ECF case event that triggers the clock. The problem will be in comparison districts, if any. If there is not a clear point at which the clock starts running, then comparison data will have to be based on a number of assumptions. (I.e., if the clock started at the service of the first defendant, or if the clock started at the first scheduling conference, what percentage had a trial date set within 14 months?)

The median civil case terminates in about a year (12 months) *after filing*. So in at least half of cases—and given exclusions in the EPP, and the fact that the clock starts at a later point, perhaps many more than half—the 14-month goal will be met even without the pilot. Most cases that go to trial (outside of the pilot) do so after 14- or 18-months *after filing*. The median disposition time of the employment protocol cases that went to trial was 24 months (admittedly, 24 months after *filing* and not service). That's a small sample size, but it is informative.

[1] Available at http://www.fjc.gov/public/pdf.nsf/lookup/leespoli.pdf/$file/leespoli.pdf.

"Firm" trial dates strike me as difficult to study, empirically. As discussed on the calls, a "firm" trial date is one that, once set, doesn't change. My guess is that in the run-of-the-mine case, trial dates are rarely reset, and they are probably only reset in cases that have reached a late stage in the case (decision of dispositive motions, scheduling of a final pretrial conference). So, for example, a case that settles in 11 months may (and should) have a final pretrial conference date set in the initial scheduling order, but was that is not the same as a "firm" trial date. In other words, to the extent trial dates (or final pretrial dates) are being set today, almost all of them are probably "firm" by this definition.

It will be necessary to take early resolution cases out of the denominator, so to speak. The firm trial date aspect of the study will have to focus on a limited subset of cases—i.e., cases in which the trial date *could have been* extended, whether it was or was not. How large that subset of cases will be is difficult, at this time, to gauge. It is not likely to be more than 25% of pilot cases (my estimate). This raises the numbers issue from the first section of the memorandum—it will be necessary to have enough cases *in this subgroup* to do meaningful analysis. The "top-line" number of cases is not the number that matters. In the final analysis, what matters is how many cases are in this category.

This category is perhaps not that difficult to define. It clearly includes cases that do not terminate early. It includes cases where discovery is completed—where the discovery cut-off date is reached. It includes cases in which one or more summary judgment motions are filed. This can be refined.

Most of the goals in the EPP should be easy to track through CM/ECF: the prompt case management conference, the discovery cut-off, resolution of discovery disputes by telephonic conferences (which are usually docketed now), decision on the summary judgment motion within 60 days of the filing of the reply brief. I think that some minor adjustments to docketing of these events will have to occur in CM/ECF, but none of these present significant hurdles.

I am hesitant about the one extension of the discovery cut-off with "good cause." I don't think I can gauge the "good cause" issue—judges granting the extension will find good cause, and it is not my place to second guess the judges. It will also be necessary to determine how each participating district dockets extensions. This is one area where district practice varies a great deal. But this should always trigger a resetting of deadlines in CM/ECF, so this should be workable.

Mandatory Initial Discovery Pilot (MIDP)

The model order for this pilot, requiring notice of and filing of discovery with the court, solves many of the data collection problems. In many ways, this is similar to the employment discovery protocols, where standard docketing language guides our research. This has been well thought out. Standard docketing language or CM/ECF case events will need to be developed, but that is probably a one-day task.

Supplementation of the mandatory discovery is an interesting issue. There should be some standard notice language for supplementation as well.

In terms of metrics, the idea here seems to be to streamline the discovery process. It should be possible to measure the discovery period, filing of dispositive motions, filing of discovery motions, and the like. Time to disposition is the simplest of all measures.
As mentioned above, the major issue here is comparison districts. Again, once we have a full slate of pilot districts, I can begin to consider what the relevant comparisons are.

Automated Attorney Surveys

One promising possibility, which I have learned about as part of the employment protocol study, is automating attorney surveys through CM/ECF. One district in the employment protocol study has a special CM/ECF case event that is triggered by the case-closing event. This event redirects the attorneys to an outside survey vendor to provide feedback on the closed case.

A colleague and I have had conversations with the court staff in this district and are interested in trying to implement this as part of the EPP and MIDP. The CM/ECF side of the process does not seem to be that hard, so this should not put much of a burden on clerk's offices. There are some issues still to be worked out, but we can discuss this at a later stage.

Attorney surveys in closed cases have been one of the Research Division's go-to research strategies for many years, but the compilation of the email list has always been one of the most time- and resource-intensive parts of the process. If that task can be automated through a very minor modification of a district's CM/ECF case event dictionary, there are efficiencies to be captured. There are many details to be worked out, but if one district is already doing this, we should be able to make it work on a larger scale.

Needless to say, attorney surveys in the closed cases will be necessary to measure certain aspects of the pilot projects that will not be docketed. For example, attorneys can report whether the frontloading of some discovery affected the procedural fairness of the case, or stimulated earlier resolution. Obviously, the development of these survey instruments will be an important step in the process. Thought must be given to the kinds of questions that should be asked.

TAB 3C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 3, 2016

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 3, 2016. (The meeting was scheduled to carry over to November 4, but all business was concluded by the end of the day on November 3.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Professor Robert H. Klonoff; Judge Sara Lioi; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, and Professor Daniel R. Coquillette, Reporter, 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., Lauren Gailey, Esq., and Julie Wilson, Esq., represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee, Esq., attended for the Federal Judicial Center. Observers included Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq.(Lawyers for Civil Justice); Professor Simona Grossi; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Frank Sylvestri (American College of Trial Lawyers); Derek Webb, Esq.; Ted Hirt, Esq.; Henry Kelsen, Esq.; Ariana Tadler, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelsen, Esq.; and Julie Yap, Esq.

HEARING

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

Eleven witnesses testified. The hearing ran through the morning to noon. A full transcript is available at uscourts.gov.

COMMITTEE MEETING

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

Clerk, is attending her first Civil Rules Committee meeting.

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

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

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

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

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

April 2016 Minutes

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

Report of the Administrative Office

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

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

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

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

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

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

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

Five Year Committee "Jurisdiction" Review

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

Rule 30(b)(6)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professor Marcus observed that the more detail we build into

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rules 38, 39, 81: Jury Trial Demand

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

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

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

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

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

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

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

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

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

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

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

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

Another Committee member said that "everyone demands jury

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

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

Draft Rule 5.2(i)

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

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

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

November 22, 2016 draft

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 45(b)(1)

The State Bar of Michigan Committee on United States Courts

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

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

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

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

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

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

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

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

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

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

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

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

A judge echoed the thought: "Why not say what ‘delivery’

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

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

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

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

Pilot Projects

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

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

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

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

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

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

Respectfully submitted,

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Reporter