

**COMMITTEE ON RULES OF  
PRACTICE AND PROCEDURE**

**Phoenix, AZ  
January 4, 2018**



**TABLE OF CONTENTS**

**AGENDA .....5**

**TAB 1      OPENING BUSINESS**

**A.      ACTION: Approval of Minutes**

**Draft Minutes of the June 12-13, 2017 Meeting of the  
        Committee on Rules of Practice and Procedure .....23**

**B.      September 2017 Report of the Committee on Rules of Practice  
        and Procedure to the Judicial Conference of the United States .....59**

**C.      Chart Tracking Proposed Rules Amendments .....105**

**TAB 2      TASK FORCE ON PROTECTING COOPERATORS .....113**

**TAB 3      ADVISORY COMMITTEE ON CRIMINAL RULES**

**A.      Report of the Advisory Committee on Criminal Rules  
        (December 8, 2017).....119**

        •      **Attachment: Side-By-Side Example Rule  
                Amendments – Variations on CACM  
                Procedures (November 2017) .....125**

**B.      Reporters’ Memorandum to the Cooperators Subcommittee  
        (August 24, 2017) (rev. September 2017) .....137**

        •      **Appendix A: Side-By-Side of Variations to “Full  
                CACM” .....175**

        •      **Appendix B: Side-By-Side of “Full CACM” and  
                “CACM Plus” .....185**

        •      **Appendix C: August 2017 Draft of New Rule 49.2  
                Before August 2017 Subcommittee  
                Call .....195**

**C.      Draft Minutes of the October 24, 2017 Meeting of the  
        Advisory Committee on Criminal Rules .....199**

**TAB 4      ADVISORY COMMITTEE ON CIVIL RULES**

**A.      Report of the Advisory Committee on Civil Rules  
        (December 6, 2017).....235**

	B.	Summary of Rule 30(b)(6) Comments .....	257
	C.	Draft Minutes of the November 7, 2017 Meeting of the Advisory Committee on Civil Rules .....	335
<b>TAB 5</b>		<b>ADVISORY COMMITTEE ON EVIDENCE RULES</b>	
	A.	Report of the Advisory Committee on Evidence Rules (November 15, 2017) .....	381
	B.	Draft Minutes of the October 26, 2017 Meeting of the Advisory Committee on Evidence Rules.....	389
<b>TAB 6</b>		<b>ADVISORY COMMITTEE ON BANKRUPTCY RULES</b>	
	A.	Report of the Advisory Committee on Bankruptcy Rules (December 6, 2017).....	411
	B.	Draft Minutes of the September 26, 2017 Meeting of the Advisory Committee on Bankruptcy Rules.....	419
<b>TAB 7</b>		<b>ADVISORY COMMITTEE ON APPELLATE RULES</b>	
	A.	Report of the Advisory Committee on Appellate Rules (December 6, 2017).....	433
	B.	Table of Agenda Items (December 2017).....	443
	C.	Draft Minutes of the November 8, 2017 Meeting of the Advisory Committee on Appellate Rules.....	449
<b>TAB 8</b>		<b>REPORT OF THE ADMINISTRATIVE OFFICE</b>	
	A.	Rules Coordination Report (December 11, 2017) .....	465
	B.	Pending Legislation That Would Directly Amend the Federal Rules (115th Congress).....	469
	C.	Judiciary Strategic Planning.....	477
		• Attachment: Strategic Plan Language on Equal Justice, Fairness, and Diversity .....	481

**JUDICIAL CONFERENCE OF THE UNITED STATES  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
JANUARY 4, 2018**

**AGENDA**

**I. Opening Business**

- A. Welcome and Opening Remarks – Judge David G. Campbell, Chair
- B. Status of Rules Amendments
  - Report on new rule amendments effective December 1, 2017
  - Report on rules approved by the Judicial Conference at its September 2017 session and transmitted to the Supreme Court on October 4, 2017 (potential effective date December 1, 2018)
  - Report on rules out for public comment (potential effective date December 1, 2019)
- C. **ACTION:** The Committee will be asked to approve the minutes of the June 12, 2017 Committee meeting

**II. Report on the Task Force on Protecting Cooperators – Judge Amy St. Eve**

**III. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair**

Information items

- Report on Criminal Rules Cooperator Subcommittee activity
- Report on possible Manual on Complex Criminal Litigation
- Rule 32 (Sentencing and Judgment) – consideration of suggestion to amend Rule 32(e)(2) regarding disclosure of PSRs to defendants
- Rule 43 (Defendant’s Presence) – consideration of suggestion regarding sentencing proceedings by video conference
- Rule 16 (Discovery and Inspection) – consideration of suggestion by Judge Rakoff concerning disclosure of experts

**IV. Report of the Advisory Committee on Civil Rules – Judge John D. Bates, Chair**

Information items

- Rule 30(b)(6) (Notice or Subpoena Directed to an Organization) – consideration of potential amendments

- Response to ACUS recommendation to adopt specific rules for Social Security section 405(g) procedures
- Consideration of suggestions to adopt rule provisions for MDL proceedings
- Rule 26(a)(1)(A) (Initial Disclosure) – consideration of suggestions to require disclosure of Third-Party Litigation Funding arrangements
- Rule 71.1 (Condemning Real or Personal Property) – consideration of suggestion to amend the rule’s notice directive
- Rule 16 (Pretrial Conferences; Scheduling; Management) – consideration of suggestion regarding the role of judges in settlement
- Pilot Projects – status update
- IAALS FLSA Discovery Protocols

**V. Report of the Advisory Committee on Evidence Rules – Judge Debra Ann Livingston, Chair**

Information items

- Report on Symposium on Forensic Expert Testimony, *Daubert* and Rule 702, hosted by Boston College Law School
- Proposed amendment to Rule 807 (Residual Exception) published for comment
- Consideration of a proposed amendment to Rule 801(d)(1)(A) (Prior Inconsistent Statements)
- Consideration of possible amendments to Rule 404(b) (Character Evidence; Crimes or Other Acts–Crimes, Wrongs, or Other Acts)
- Consideration of a proposal by Judge Grimm to amend Rule 106 (Rule of Completeness)
- Consideration of a suggestion to modify Rule 609(a)(1) to change the extent to which evidence of conviction for a crime not involving dishonesty is admissible to impeach the character of a witness for truthfulness.
- Consideration of a possible amendment to Rule 606(b) (Juror’s Competency as a Witness–During an Inquiry into the Validity of a Verdict or Indictment) (in response to a Supreme Court decision)

**VI. Report of the Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair**

Information items

- Withdrawal of recommendation to amend Rule 8023 (Voluntary Dismissal) published for comment in 2016
- Approval of National Instructions Permitting Alterations to Certain Official Bankruptcy Forms

- Consideration of Suggestion to Amend Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals)
- Formation of a subcommittee to consider restyling the bankruptcy rules

**VII. Report of the Advisory Committee on Appellate Rules** – Judge Michael A. Chagares, Chair

Information items

- Consideration of potential amendments to Rule 5(a)(1) (Petition for Permission to Appeal), 21(a)(1) (Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing) and (c) (Other Extraordinary Writs), 26(c) (Additional Time after Certain Kinds of Service), 32(f) (Items Excluded from Length), and 39(d)(1) (Bill of Costs: Objections; Insertion in Mandate) regarding proof of service (as needed to conform to pending amendment of Rule 25(d) (Proof of Service))
- Consideration of suggestion to amend Rule 29 (Brief of an Amicus Curiae) regarding amicus filings by Indian Tribes and cities
- Consideration of suggestion to clarify Rule 3(c)(1)(B) (Contents of the Notice of Appeal) regarding notices of appeal and the operation of the merger rule
- Consideration of suggestion to amend Rules 10 (The Record on Appeal), 11 (Forwarding the Record), and 12 (Docketing the Appeal; Filing a Representation Statement; Filing the Record) as concerns the content, the forwarding, and the filing of the record on appeals from a district court in non-bankruptcy cases to account for increase in filing electronic records
- Consideration of possible amendment to Rule 7 (Bond for Costs on Appeal in a Civil Case) to address whether attorney’s fees are “Costs on Appeal”

**VIII. Report of the Administrative Office**

- A. Coordination and Inter-Committee Work
- B. Legislative Update
- C. **ACTION: Judiciary Strategic Planning**

The Committee is asked to advise the Executive Committee on which strategies and goals from the *Strategic Plan for the Federal Judiciary* should receive priority attention for the next two years. The Committee is also asked to provide the Executive Committee with feedback on whether the strategic planning process is the appropriate mechanism for considering Judicial Conference committee efforts to study and address racial fairness, implicit bias, diversity, and related topics.

- D. Next Meeting

**THIS PAGE INTENTIONALLY BLANK**



**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
**(Standing Committee)**

<b>Chair, Standing Committee</b>	<b>Honorable David G. Campbell</b> United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
<b>Reporter, Standing Committee</b>	<b>Professor Daniel R. Coquillette</b> Boston College Law School 885 Centre Street Newton Centre, MA 02459
<b>Associate Reporter, Standing Committee</b>	<b>Professor Catherine T. Struve</b> University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
<b>Members, Standing Committee</b>	<p><b>Honorable Jesse Furman</b> United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501</p> <p><b>Daniel C. Girard, Esq.</b> Girard Gibbs LLP 601 California Street, 14<sup>th</sup> Floor San Francisco, CA 94108</p> <p><b>Robert J. Giuffra, Jr., Esq.</b> Sullivan &amp; Cromwell LLP 125 Broad Street New York, NY 10004-2498</p> <p><b>Honorable Susan P. Graber</b> United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204</p> <p><b>Honorable Frank Mays Hull</b> United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303</p>

<p><b>Members, Standing Committee (cont'd)</b></p>	<p><b>Peter D. Keisler, Esq.</b>  Sidley Austin, LLP  1501 K Street, N.W.  Washington DC 20005</p> <p><b>Professor William K. Kelley</b>  Notre Dame Law School  P. O. Box 780  Notre Dame, IN 46556</p> <p><b>Honorable Carolyn B. Kuhl</b>  Los Angeles Superior Court  600 South Commonwealth Avenue  Department 309  Los Angeles, CA 90005</p> <p><b>Honorable Rod J. Rosenstein</b>  Deputy Attorney General (ex officio)  United States Department of Justice  950 Pennsylvania Ave., N.W.  Washington, DC 20530</p> <p><b>Honorable Amy J. St. Eve</b>  United States District Court  Everett McKinley Dirksen  United States Courthouse  219 South Dearborn Street, Room 1260  Chicago, IL 60604</p> <p><b>Honorable Srikanth Srinivasan</b>  United States Court of Appeals  William B. Bryant United States Courthouse  Annex  333 Constitution Avenue, N.W., Room 3905  Washington, DC 20001</p> <p><b>Honorable Jack Zouhary</b>  United States District Court  James M. Ashley and Thomas W.L. Ashley  United States Courthouse  1716 Spielbusch Avenue, Room 203  Toledo, OH 43604</p>
<p><b>Advisors and Consultants, Standing Committee</b></p>	<p><b>Bryan A. Garner, Esq.</b>  LawProse, Inc.  14180 Dallas Parkway, Suite 280  Dallas, TX 75254</p>

<p><b>Advisors and Consultants, Standing Committee (cont'd)</b></p>	<p><b>Professor Geoffrey C. Hazard, Jr.</b>  Hastings College of the Law  200 McAllister Street  San Francisco, CA 94102</p> <p><b>Professor R. Joseph Kimble</b>  Thomas M. Cooley Law School  300 South Capitol Avenue  Lansing, MI 48933</p> <p><b>Joseph F. Spaniol, Jr., Esq.</b>  5602 Ontario Circle  Bethesda, MD 20816-2461</p>
<p><b>Secretary, Standing Committee and Rules Committee Chief Counsel</b></p>	<p><b>Rebecca A. Womeldorf</b>  Secretary, Committee on Rules of Practice &amp; Procedure and Rules Committee Chief Counsel  Thurgood Marshall Federal Judiciary Building  One Columbus Circle, N.E., Room 7-240  Washington, DC 20544  Phone 202-502-1820  Fax 202-502-1755  Rebecca_Womeldorf@ao.uscourts.gov</p>

**Committee on Rules of Practice and Procedure**

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

<b>Members</b>	<b>Position</b>	<b>District/Circuit</b>	<b>Start Date</b>	<b>End Date</b>
David G. Campbell Chair	D	Arizona	Member: ---- Chair: 2016	2019
Jesse Matthew Furman	D	New York (Southern)	2016	2019
Daniel C. Girard	ESQ	California	2015	2018
Robert J. Giuffra, Jr.	ESQ	New York	2017	2020
Susan P. Graber	C	Ninth Circuit	2013	2019
Frank Mays Hull	C	Eleventh Circuit	2016	2019
Peter D. Keisler	ESQ	Washington, DC	2016	2019
William K. Kelley	ACAD	Indiana	2015	2018
Rod J. Rosenstein*	DOJ	Washington, DC		Open
Sri Srinivasan	C	DC Circuit	2017	2020
Amy J. St. Eve	D	Illinois (Northern)	2013	2019
Jack Zouhary	D	Ohio (Northern)	2012	2018
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	2018
Catherine T. Struve Associate Reporter	ACAD	Pennsylvania	2017	2018

Secretary and Principal Staff: Rebecca Womeldorf 202-502-1820

\* Ex-officio - Deputy Attorney General

**COMMITTEES ON RULES OF PRACTICE AND PROCEDURE**  
**CHAIRS and REPORTERS**

<b>Chair, Committee on Rules of Practice and Procedure</b> <i>(Standing Committee)</i>	<b>Honorable David G. Campbell</b> United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
<b>Reporter, Committee on Rules of Practice and Procedure</b> <i>(Standing Committee)</i>	<b>Professor Daniel R. Coquillette</b> Boston College Law School 885 Centre Street Newton Centre, MA 02459
<b>Associate Reporter, Committee on Rules of Practice and Procedure</b>	<b>Professor Catherine T. Struve</b> University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
<b>Chair, Advisory Committee on Appellate Rules</b>	<b>Honorable Michael A. Chagares</b> United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
<b>Reporter, Advisory Committee on Appellate Rules</b>	<b>Professor Gregory E. Maggs</b> The George Washington University Law School 2000 H Street, N.W. Washington, DC 20052
<b>Chair, Advisory Committee on Bankruptcy Rules</b>	<b>Honorable Sandra Segal Ikuta</b> United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621
<b>Reporter, Advisory Committee on Bankruptcy Rules</b>	<b>Professor S. Elizabeth Gibson</b> Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
<b>Associate Reporter, Advisory Committee on Bankruptcy Rules</b>	<b>Professor Laura Bartell</b> Wayne State University Law School 471 W. Palmer Detroit, MI 48202

<b>Chair, Advisory Committee on Civil Rules</b>	<b>Honorable John D. Bates</b> United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
<b>Reporter, Advisory Committee on Civil Rules</b>	<b>Professor Edward H. Cooper</b> University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
<b>Associate Reporter, Advisory Committee on Civil Rules</b>	<b>Professor Richard L. Marcus</b> University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

<b>Chair, Advisory Committee on Criminal Rules</b>	<b>Honorable Donald W. Molloy</b> United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
<b>Reporter, Advisory Committee on Criminal Rules</b>	<b>Professor Sara Sun Beale</b> Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
<b>Associate Reporter, Advisory Committee on Criminal Rules</b>	<b>Professor Nancy J. King</b> Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

<b>Chair, Advisory Committee on Evidence Rules</b>	<b>Honorable Debra Ann Livingston</b> United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
<b>Reporter, Advisory Committee on Evidence Rules</b>	<b>Professor Daniel J. Capra</b> Fordham University School of Law 150 West 62nd Street New York, NY 10023

---

Effective: October 1, 2017

Committee Chairs and Reporters

Revised: October 1, 2017

Committee on Rules of Practice and Procedure | January 4, 2018

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

**RULES COMMITTEE LIAISON MEMBERS**

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



**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS**

<p><b>Rebecca A. Womeldorf</b> Secretary, Committee on Rules of Practice &amp; Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>
<p><b>Julie Wilson</b> Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-3678 Fax 202-502-1755 Julie_Wilson@ao.uscourts.gov</p>
<p><b>Scott Myers</b> Attorney Advisor (Bankruptcy) Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1913 Fax 202-502-1755 Scott_Myers@ao.uscourts.gov</p>
<p><b>Bridget M. Healy</b> Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-240 Washington, DC 20544 Phone 202-502-1313 Fax 202-502-1755 Bridget_Healy@ao.uscourts.gov</p>
<p><b>Shelly Cox</b> Administrative Specialist Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-4487 Fax 202-502-1755 Shelly_Cox@ao.uscourts.gov</p>
<p><b>Frances F. Skillman</b> Paralegal Specialist Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-3945 Fax 202-502-1755 Frances_Skillman@ao.uscourts.gov</p>

**FEDERAL JUDICIAL CENTER LIAISONS**

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

# TAB 1

**THIS PAGE INTENTIONALLY BLANK**

# TAB 1A

**THIS PAGE INTENTIONALLY BLANK**

**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
Meeting of June 12-13, 2017 | Washington, D.C.

**TABLE OF CONTENTS**

Attendance .....	1
Opening Business.....	2
Approval of the Minutes of the Previous Meeting.....	3
Inter-Committee Coordination.....	3
Report of the Advisory Committee on Criminal Rules .....	12
Report of the Advisory Committee on Appellate Rules .....	16
Report of the Advisory Committee on Bankruptcy Rules .....	19
Report of the Advisory Committee on Civil Rules.....	26
Report of the Advisory Committee on Evidence Rules.....	30
Legislative Report.....	34
Concluding Remarks.....	34

**ATTENDANCE**

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee”) held its fall meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12-13, 2017. The following members participated:

Judge David G. Campbell, Chair  
Judge Jesse M. Furman  
Gregory G. Garre, Esq.  
Daniel C. Girard, Esq.  
Judge Susan P. Graber  
Judge Frank Mays Hull

Peter D. Keisler, Esq.  
Professor William K. Kelley  
Judge Amy St. Eve  
Professor Larry D. Thompson  
Judge Richard C. Wesley  
Judge Jack Zouhary

The advisory committees were represented by their chairs and reporters:

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

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

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

Advisory Committee on Evidence Rules –  
Judge William K. Sessions III, Chair  
Professor Daniel J. Capra, Reporter

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

Deputy Attorney General Rod J. Rosenstein represented the Department of Justice along with Elizabeth J. Shapiro, Deputy Director of the DOJ’s Civil Division.

Present to provide support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Bridget Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

### OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed the participants. He announced this as the final meeting for Judge Wesley, Professor Thompson, and Greg Garre, who have been “invaluable contributors” to the rules committees. Judge Wesley called his appointment to the Committee an “incredible assignment” and thanked Judge Campbell and his predecessor, Judge Jeffrey S. Sutton, for their leadership. Mr. Garre expressed thanks for the “great privilege” of serving on the Committee. Professor Thompson thanked his fellow Standing Committee members, especially the judges, for their service, and was “happy to be just a small part” of the Committee’s work.

Judge Campbell acknowledged a number of other recent and impending departures. He thanked Judge Sessions, whose term as Chair of the Evidence Rules Advisory Committee is coming to an end, for his “quiet but very effective leadership.” Judge Campbell explained that former Standing Committee member Justice Robert P. Young recently stepped down from the bench to accept a position in private practice, and Bankruptcy Judge Michelle Harner left her position as Associate Reporter to the Bankruptcy Rules Advisory Committee upon her appointment to the bench. Another notable departure is that of Associate Justice Neil M. Gorsuch of the United States Supreme Court, who left his position as Chair of the Appellate Rules Advisory Committee upon his confirmation in April 2017.

Judge Campbell introduced Deputy Attorney General Rod Rosenstein, who was also confirmed in April 2017. DAG Rosenstein expressed his “deep appreciation” for the judiciary and thanked his colleague Betsy Shapiro, a career DOJ attorney whose duties for a number of years have included attending and participating in rules committee meetings, for her contributions.

Rebecca Womeldorf reported on the Judicial Conference session held on March 14, 2017, in Washington, D.C. Typically, the Standing Committee submits proposed rules amendments to the Judicial Conference for final approval at its September session. Approved rules are then submitted to the Supreme Court for consideration. Rules that the Court adopts are transmitted to



Congress by May 1 of the following year. Absent any action by Congress, the amendments go into effect on December 1 of that year.

This year, a “special circumstance”—the Bankruptcy Rules Advisory Committee’s rules package implementing the new national Chapter 13 plan form—necessitated a different timetable. The Standing Committee decided to expedite the approval of the Chapter 13 rules package so it could go into effect at the same time as the proposed changes approved at the Judicial Conference’s September 2016 session, which affect Bankruptcy Rules 1001, 1006(b), and 1015(b) and Evidence Rules 803(16) (the “ancient document” rule) and 902 (concerning self-authenticating evidence) (see Agenda Book Tab 1B).

At its January 2017 meeting, the Standing Committee approved the Chapter 13 package, consisting of proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113. The Judicial Conference approved those amendments at its March 2017 session, along with technical amendments to Appellate Rule 4(a)(4)(B) and Civil Rule 4(m). The proposed amendments were submitted to the Supreme Court, which approved them on an expedited basis and transmitted them to Congress on April 27, 2017. If Congress does not take action, these amendments will take effect on December 1, 2017.

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

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 3, 2017 meeting (see Agenda Book Tab 1A).**

#### **INTER-COMMITTEE COORDINATION**

Many provisions of the four procedural rule sets use near-identical language to address similar issues. For that reason when an advisory committee proposes an amendment to a rule with analogous provisions in other rule sets, and the other advisory committees determine that it is practical and worthwhile to make a parallel amendment, the advisory committees attempt to use identical or similar language unless issues specific to a rule set would justify diverging. The Standing Committee considered a number of these coordination items at the June 2017 meeting (see Agenda Book Tab 7B), including: electronic service and filing, stays of execution, disclosure rules, and redaction of personal identifiers.

##### *Electronic Service and Filing:*

*Civil Rule 5, Appellate Rule 25, Bankruptcy Rules 5005 & 8011, and Criminal Rules 45 & 49*

The Appellate, Bankruptcy, Civil, and Criminal Rules contain a number of similar provisions addressing service and filing, many of which needed to be updated to account for the use of electronic technology. Professor Cooper added that the number of interrelated provisions involved made for “a lot of moving parts,” but the advisory committees worked together to achieve “maximum desirable uniformity” in their amendments. Any remaining differences in “structure and expression” can be attributed to “the context of the individual rule set.”

*Civil Rule 5.* Professor Cooper presented the proposed changes to Civil Rule 5, which governs service and filing in civil cases (see Agenda Book Tab 4A, pp. 416-30).

Current Civil Rule 5(b)(2)(E) requires the written consent of the person to be served if a paper is to be served electronically. The proposed amended version would permit a paper to be served by filing it with the court's electronic filing system ("CM/ECF"), which automatically sends an electronic copy to the registered users associated with that particular case, without consent. Consent in writing would still be required for methods of electronic service other than CM/ECF. This amended rule would abrogate Civil Rule 5(b)(3), which permits use of the court's facilities to file and serve via CM/ECF if applicable local rules allow. These proposed amendments generated "very little comment." In response to a concern raised by a clerk of court, a sentence was added to the committee note to clarify that the court is not required to notify the filer in the event that an attempted CM/ECF transmission fails.

Although the current version of Civil Rule 5(d)(1) requires a certificate of service, the proposed amendments would lift this requirement in part. The published version provided that, for documents filed through CM/ECF, the automatically-generated notice of electronic filing would constitute a certificate of service. Professor Cooper explained that after publication, the Civil Rules Advisory Committee followed the Appellate Rules Advisory Committee's lead in revising Rule 5(d)(1)(B) to provide "simply that no certificate of service is required" for papers served through CM/ECF. For other papers, amended Rule 5(d)(1)(B) also addresses whether a certificate of service must be filed. "[T]he committees . . . are in accord" that if a paper is filed nonelectronically, "a certificate of service must be filed with it or within a reasonable time after service." In civil practice, however, many papers, including "a very large share of discovery papers," are exchanged among the parties but not filed. "Unique to Civil Rule 5," therefore, is the "separate provision" stating that if a paper is not filed, a certificate of service generally need not be filed.

The proposed amendment to Civil Rule 5(d)(3) would make electronic filing mandatory for parties represented by counsel, except when nonelectronic filing is allowed or required by local rule or permitted by order for good cause. The proposed amendment would continue to give courts discretion to permit electronic filing by pro se parties, as long as the order or local rule allows for reasonable exceptions. The Civil Rules Advisory Committee elected not to require pro se parties to file electronically; while many pro se parties are willing and able to use CM/ECF, the Advisory Committee had "some anxiety" about the possibility of effectively denying access to those who are not. The Advisory Committee declined, in response to a public comment, to grant pro se litigants a right to file electronically.

A proposed new subparagraph, Civil Rule 5(d)(3)(C), establishes a uniform national signature provision. As published, the rule provided that "[t]he user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." During the public comment period, concerns were raised that the first clause, read literally, required attorneys to place their usernames and passwords in the signature block. The advisory committees worked together to clarify the language, replacing that clause with, "An authorized filing made through a person's electronic filing account."

Initially, the Bankruptcy Rules Advisory Committee omitted the word “authorized” from its version, citing an ambiguity as to whether the court was to authorize the filing, or “the attorney was authorizing someone else to do the filing” (the intended reading). The Appellate Rules Advisory Committee was inclined to omit the term as well. Because their concerns were not unique to a particular rule set, and “merely a question of wording,” Judge Campbell encouraged the advisory committees to adopt a uniform, mutually-agreeable solution at the Standing Committee meeting. The Standing Committee, advisory committee chairs and reporters, and style consultants worked together to refine the language, settling on, “A filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.” The Standing Committee agreed to use this language in the parallel provisions of all four rule sets.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Civil Rule 5, with the revisions made during the meeting.**

*Appellate Rules 25 and 26.* Judge Chagares and Professor Maggs presented the proposed changes to appellate e-filing and service under Appellate Rule 25 (see Agenda Book Tab 2A, pp. 89-95; Agenda Book Supplemental Materials, pp. 2-3, 5-17).

Proposed amended Appellate Rule 25(a)(2)(B)(i) requires represented persons to file papers electronically but allows exceptions for good cause and by local rule. Appellate Rule 25(a)(2)(B)(iii), addressing electronic signatures, incorporates the uniform national signature provision developed in consultation with the other advisory committees (see discussion of Civil Rule 5(d)(3)(C), *supra*). Like the analogous Civil Rules provisions concerning electronic service, Appellate Rule 25(c)(2) has been amended to permit electronic service through the court’s CM/ECF system, or by other electronic means that the person to be served consented to in writing. The proposed amendment to Appellate Rule 25(d)(1) also omits the requirement of a certificate of service for papers filed via CM/ECF (see discussion of Civil Rule 5(d)(1)(B), *supra*).

The Advisory Committee made a number of revisions in response to public comments. Some criticized the proposed electronic signature provision, which subsequently incorporated the language drafted during the Standing Committee meeting (see discussion of Civil Rule 5(d)(3)(C), *supra*). To clarify that there are two available methods of electronic service under proposed Appellate Rule 25(c)(2), the Advisory Committee placed them in separate clauses: a paper can be served electronically by “(A) by sending it to a registered user by filing it with the court’s electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.” Like the other advisory committees, the Appellate Rules Advisory Committee discussed but declined to make changes in response to a comment suggesting that pro se parties should have a right to file electronically.

The proposed amendment to Appellate Rule 25(a)(2)(C), which addresses inmate filings, was revised to incorporate amendments that took effect in December 2016. Professor Maggs added that that the amended rules’ subheadings have also been altered to match the Civil Rules’ subheadings.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rule 25, with the revisions made during the meeting.**

After the Standing Committee meeting, the Advisory Committee recognized the need for technical and conforming changes to Appellate Rule 26(a)(4)(C), which contains references to Rules 25(a)(2)(B) and 25(a)(2)(C), and Appellate Form 7, which contains a note referring to Rule 25(a)(2)(C). The proposed amendments discussed above renumbered subparagraphs (B) and (C) as Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii), respectively, and the Advisory Committee recommended updating the references in Rule 26 and Form 7 accordingly. The Standing Committee approved the proposed amendments.

*Bankruptcy Rules 5005 and 8011.* Judge Ikuta presented the proposed amendments to Bankruptcy Rules 5005(a)(2) and 8011, governing electronic filing and signing in bankruptcy cases (see Agenda Book Tab 3A, pp. 192-94, 204).

The proposed amendments to Bankruptcy Rule 5005 generally track the proposed amendments to Civil Rule 5 (see discussion *supra*). When proposed amended Rule 5005 was published, most of the comments concerned the wording of new subparagraph (a)(2)(C), the electronic signature provision. Despite the Bankruptcy Rules Advisory Committee's initial concern about the term "authorized filing," it adopted the revised text drafted by the Standing Committee, which clarified that the attorney, not the court, is to authorize the filing (see discussion of Civil Rule 5(d)(3)(C), *supra*). Another comment opposed the presumption against electronic filing by pro se litigants, but, like the other advisory committees, the Bankruptcy Rules Advisory Committee declined to give pro se parties the right to e-file.

When the Advisory Committee recommended publication of proposed amendments to Bankruptcy Rule 5005, it overlooked the need for similar amendments to Rule 8011, its bankruptcy appellate counterpart. Accordingly, the Advisory Committee subsequently recommended amendments conforming Bankruptcy Rule 8011 to Civil Rule 5 and Appellate Rule 25 without publication, so all of the e-filing amendments can take effect at the same time. For consistency with the other rules, minor changes will be made to Rule 8011's captions as originally drafted. Revisions will also be made to the committee notes.

The proposed amendments to the Bankruptcy Rules regarding electronic filing and service are not identical to the other rule sets' parallel provisions. Beyond bankruptcy-specific language derived from the Bankruptcy Code—e.g., use of the term "individual" rather than "person," and "entity" to describe a litigant represented by counsel—the amendments phrase their incomplete-service provisions differently. Instead of deeming electronic service complete unless the sender or filer "learns" or "is notified" that the paper was not received, the Bankruptcy Rules use the phrase "receives notice" to prevent litigants from "purposely ignor[ing] notice" to avoid "learning . . . that the document was not received." Because these linguistic disparities have existed since the various rule sets were adopted, the reporters agreed the provisions did not need to be reconciled.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 5005 and 8011, with the revisions made during the meeting.**

*Criminal Rules 45 and 49.* Professor Beale explained that the inter-committee effort to develop rules for electronic filing, service, and notice necessitated more substantial changes to Criminal Rule 49 (see Agenda Book Tab 5A, pp. 652-53, Tab 5B, pp. 665-80). The proposed amendments to Civil Rule 5 mandating electronic filing directly affect Criminal Rule 49(b) and (d) (service and filing must be done in the manner “provided for a civil action”) and Criminal Rule 49(e) (locals rule may require electronic filing only if reasonable exceptions are allowed). Although, as Professor King said, the Advisory Committee “worked diligently” to track the changes to the Civil Rules where possible, it concluded that the proposed default rule requiring represented parties to file and serve electronically could be problematic in criminal cases, where prisoners and unrepresented defendants often lack access to CM/ECF. In light of these differences, the Advisory Committee decided to draft and publish a stand-alone Criminal Rule to address electronic filing and service. Professor Beale explained that because the Advisory Committee would essentially be starting from scratch, it decided to take the opportunity “to more fully specify how [electronic filing and service were] going to work.”

There are a number of substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5. Instead of allowing courts to require by order or local rule (with reasonable exceptions) unrepresented parties to e-file, proposed Criminal Rule 49(b)(3)(B) requires them to file *nonelectronically*, unless permitted to e-file. Proposed subsection (c) also makes nonelectronic filing the default rule for all nonparties, whether they are represented or not. Proposed Criminal Rule 49(b)(4) borrows language from the signature provision of Civil Rule 11(a), and the text of Civil Rule 77(d)(1) regarding the clerk’s duty to serve notice of orders replaces current Criminal Rule 49(c)’s direction that the clerk serve notice “in a manner provided for in a civil action.” A conforming amendment to Criminal Rule 45 would update its cross-references accordingly (see Agenda Book Tab 5B, pp. 681-82).

The changes were not controversial. The Criminal Rules Advisory Committee considered a comment regarding extending electronic filing privileges to pro se parties (other than inmates, as well as inmates and nonparties) but, like the other advisory committees, declined to do so.

Following the public comment period, the Advisory Committee replaced the phrase “within a reasonable time after service” in Criminal Rule 49(b)(1) with “*no later than a reasonable time after service,*” to make clear that certain papers may be filed before they are served. Similarly, text addressing papers served by means other than CM/ECF now requires a certificate of service to “be filed with [the paper] or within a reasonable time after service or filing.” Paragraph (b)(1) was also revised to state explicitly that no certificate of service is required for papers served via CM/ECF. Like the Civil Rules Advisory Committee, the Criminal Rules Advisory Committee added a sentence to the committee note to Rule 49(a)(3) and (4) to make clear that the court is not responsible for notifying the filer that an attempted CM/ECF transmission failed (see discussion of Civil Rule 5(b), *supra*). The Advisory Committee adopted

the revisions made at the Standing Committee meeting to its electronic signature provision in proposed Criminal Rule 49(b)(2), with conforming changes to the committee note (see discussion of Civil Rule 5(d)(3)(C), *supra*).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Criminal Rule 49 and conforming amendment to Criminal Rule 45, with the revisions made during the meeting.**

*Stays of Execution:*

*Civil Rules 62 & 65.1; Appellate Rules 8, 11, & 39; and  
Bankruptcy Rules 7062, 8007, 8010, 8021, & 9025*

*Civil Rules 62 and 65.1.* The proposed amendments to Civil Rule 62, which governs stays of proceedings to enforce judgments, are the product of a joint subcommittee of the Civil Rules and Appellate Rules Advisory Committees known as the “Civil/Appellate Subcommittee.”

The proposed amendments make three changes (see Agenda Book Tab 4A, pp. 524-27). First, the automatic stay period is extended to eliminate a gap in the current rule between the length of the current automatic-stay period under Rule 62(a) and the length of a stay pending disposition of a post-judgment motion under Rule 62(b). This discrepancy arose when the Time Computation Project set the expiration of an automatic stay under Civil Rule 62(a) at 14 days after entry of judgment, and the time for filing a post-judgment motion under Rules 50, 52, or 59 at 28 days after entry of judgment. The unintended result was a “gap”: the automatic stay expires halfway through the time allowed to make a post-judgment motion. The proposed amendment to Civil Rule 62(a) addresses this gap by extending the automatic stay period to 30 days and providing that the automatic stay takes effect “unless the court orders otherwise.” In response to a judge member’s question, Judge Bates confirmed that the court has discretion to extend the stay beyond 30 days.

Second, the proposed amendments make clear that a judgment debtor can secure a stay that lasts from termination of the automatic stay through final disposition on appeal by posting a continuing security, whether as a bond or another form (see discussion of Appellate Rules 8(a), 11(g), and 39(e), *infra*). The amendments allow the security to be provided before the appeal is taken, and permit any party, not just the appellant, to obtain the stay. Third, subdivisions (a) through (d) have been rearranged, carrying forward with only a minor change the current provisions for staying a judgment in an action for an injunction or a receivership, or directing an accounting in a patent infringement action.

The proposed amendment to Civil Rule 65.1 reflects the expansion of Civil Rule 62 to include forms of security other than a bond (see Agenda Book Tab 4A, pp. 524, 528-29). Following the comment period, the Advisory Committee made additional changes to Civil Rule 65.1 for consistency with the proposed amendments to parallel Appellate Rule 8(b), substituting the terms “security” and “security provider” for “bond,” “undertaking,” and “surety” (see discussion *infra*). The Advisory Committee decided shortly before the Standing Committee

meeting to change the word “mail” in the last sentence to “send,” and will adopt the parallel Appellate Rule’s committee note language.

Judge Campbell noted that the proposed amendments to Civil Rules 62 and 65.1 represent “a real improvement” by eliminating the gap, replacing “arcane language,” and clarifying the structure. He thanked the Civil/Appellate Subcommittee, chaired by Judge Scott M. Matheson, Jr. of the Civil Rules Advisory Committee, for its efforts.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Civil Rules 62 and 65.1.**

*Appellate Rules 8, 11, and 39.* Judge Chagares and Professor Maggs presented the Appellate Rules Advisory Committee’s proposed amendments to Appellate Rules 8 (stays or injunctions pending appeal), 11 (forwarding the record), and 39 (costs) (see Agenda Book Tab 2A, pp. 83-86). Also developed by the Civil/Appellate Subcommittee, they would conform Appellate Rules 8(a), 11(g), and 39(e) to proposed amended Civil Rule 62 by eliminating the “antiquated” term “supersedeas bond,” instead allowing an appellant to provide “a bond or other security.” The Advisory Committee also replaced “surety” with “security provider” and “a bond, a stipulation, or other undertaking” with the generic term “security”—the same changes made to proposed amended Civil Rule 65.1 (see discussion *supra*). The Advisory Committee also changed the word “mail” to “send” to conform Rule 8(b) to the proposed amendments to Appellate Rule 25. The committee note has been modified accordingly.

A judge member noted that the amended rule is consistent with current practice, as “other forms of security,” such as letters of credit, have long been used to secure stays or injunctions pending appeal. Another judge member pointed out that the proposed amendments use the phrase “gives security,” while “*provides* security” is used in practice and elsewhere in the rules. Professor Maggs explained that the Advisory Committee deliberately decided not to use “provides security” to avoid implying that a security provider—as opposed to a party—must provide the security.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rules 8, 11, and 39.**

*Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025.* Judge Ikuta presented the Bankruptcy Rules Advisory Committee’s proposed conforming amendments to Rules 7062 (stays of proceedings to enforce judgments), 8007 (stays pending appeal), 8010 (transmitting the record), 8021 (costs), and 9025 (proceedings against sureties). Consistent with proposed amendments to Civil Rules 62 and 65.1 and Appellate Rules 8, 11, and 39, the proposed conforming amendments to the Bankruptcy Rules would broaden and modernize the terms “supersedeas bond” and “surety” by replacing them with “bond or other security” (see Agenda Book Tab 3A, pp. 204-06).

Because Bankruptcy Rule 7062 currently incorporates all of Civil Rule 62 by reference, this new terminology will automatically apply in bankruptcy adversary proceedings when Rule 62 goes into effect. However, the Bankruptcy Rules Advisory Committee did not adopt the amendment to Civil Rule 62(a) that lengthens the automatic stay period from 14 to 30 days (see discussion of Civil Rule 62, *supra*). As a judge member pointed out, the deadline for filing post-judgment motions in bankruptcy is 14 days, not 28—there is “no gap.” Accordingly, amended Rule 7062 would continue to incorporate Civil Rule 62, “except that proceedings to enforce a judgment are stayed for 14 days after its entry.”

Publication was deemed unnecessary because, as Professor Gibson explained, the proposed amendments simply adopt other rule sets’ terminology changes and “maintain[] the status quo” with respect to automatic stays in the bankruptcy courts.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for final approval without publication the proposed conforming amendments to Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025.**

*Disclosure Rules:*

*Criminal Rule 12.4 and Appellate Rules 26.1, 28, & 32*

*Criminal Rule 12.4.* Criminal Rule 12.4 governs disclosure statements. Judge Molloy explained that when the rule was adopted in 2002, the committee note stated that it was intended “to assist judges in determining whether they must recuse themselves because of a ‘financial interest in the subject matter in controversy.’” The note quoted a provision of the 1972 judicial ethics code that treated all victims entitled to restitution as “parties” for the purpose of recusal. This is no longer the case. As amended in 2009, the Code of Conduct for United States Judges now requires disclosure only when a judge has an “interest that could be affected substantially by the outcome of the proceeding.”

In response to a suggestion from the DOJ, the proposed amendment to Criminal Rule 12.4(a) would align the scope of the required disclosures with the 2009 amendments to the Code by relieving the government of its obligation to make the required disclosures upon a showing of “good cause” (see Agenda Book Tab 5A, pp. 653-54, Tab 5B, pp. 683-86). In essence, the revised rule allows the court to use “common sense” to decline to require burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small. Criminal Rule 12.4(b) would also be amended, to specify in paragraph (b)(1) that the disclosures must be made within 28 days after the defendant’s initial appearance, and to replace paragraph (b)(2)’s references to “supplemental” filings with “later” filings. The final version of Rule 12.4(b)(2), which is modeled after language used in Civil Rule 7.1(b)(2), requires certain parties to “promptly file a later statement if any required information changes.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Criminal Rule 12.4.**



*Appellate Rules 26.1, 28, and 32.* Under Appellate Rule 26.1, corporate parties and amici curiae must file disclosure statements to assist judges in determining whether they have an interest in a related corporate entity that would disqualify them from hearing an appeal. Because some local rules require more information to be disclosed than Appellate Rule 26.1 does, the Advisory Committee considered whether the federal rule should be similarly amended and sought approval to publish proposed amendments for public comment.

The Advisory Committee proposed adding a new subdivision (b) to require disclosure of organizational victims in criminal cases (see Agenda Book Tab 2A, pp. 102-06), generally conforming Appellate Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2). New subdivision (c) would require disclosure of the name(s) of the debtor(s) in a bankruptcy appeal if not included in the caption (as in some appeals from adversary proceedings, such as disputes among the debtor’s creditors). New subdivision (d) would require a “person who wants to intervene” to make the same disclosures as parties. At the Standing Committee meeting, the committee note was also revised to require “persons who want to intervene,” rather than “intervenor,” to “make the same disclosures as parties.”

The Advisory Committee moved current subdivisions (b) and (c), which address supplemental filings and the number of copies, to the end and re-designated them (e) and (f) to clarify that they apply to all of the preceding disclosure requirements. Because proposed new subdivision (d) makes the rule applicable to those seeking to intervene as well as parties, the Standing Committee rephrased subdivisions (e) and (f) in the passive voice to account for the possibility that non-parties may also be required to file disclosure statements. In addition to these revisions to subdivisions (d), (e), and (f), the Standing Committee made minor wording changes to proposed subdivision (c).

Current Appellate Rule 26.1(b) (redesignated (e)), like Criminal Rule 12.4(b), uses the term “supplemental filings.” The Appellate Rules Advisory Committee, aware that the Criminal Rules Advisory Committee was revising Rule 12.4(b) (see *supra*), considered amending Rule 26.1 to conform to a preliminary draft. The Criminal Rules Advisory Committee, however, informed the Appellate Rules Advisory Committee of its intention to scale back its draft amendments to Rule 12.4(b) and recommended no conforming changes to Appellate Rule 26.1(b).

The proposed change of Appellate Rule 26.1’s heading from “Corporate Disclosure Statement” to “Disclosure Statement” will require additional minor conforming amendments to Appellate Rules 28(a)(1) (cross-appeals) and 32(f) (formal requirements for briefs and other papers) and accompanying notes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Appellate Rules 26.1, 28(a)(1), and 32(f), subject to the revisions made during the meeting.**

*Bankruptcy Rule 8012.* Scott Myers (RCS) reported that the Bankruptcy Rules Advisory Committee will examine Bankruptcy Appellate Rule 8012, which governs disclosures in bankruptcy appeals, to

determine whether conforming changes are necessary in light of the proposed amendments to Appellate Rule 26.1.

*Redacting Personal Identifiers:  
Bankruptcy Rule 9037*

The Bankruptcy Rules Advisory Committee sought approval to publish for comment proposed new Bankruptcy Rule 9037(h), which would provide a procedure for redacting personal identifiers in documents that were not properly redacted prior to filing (see Agenda Book Tab 3A, pp. 213-15). In response to a suggestion from the CACM Committee, new subdivision (h) lays out the steps a moving party must take to identify a document that needs to be redacted under Rule 9037(a) and for providing a redacted version (see Agenda Book Tab 3B, App'x B, pp. 385-88). When such a motion is filed, the court would immediately restrict access to the original document pending determination of the motion. If the motion is granted, the court would permanently restrict public access to the original filed document and provide access to the redacted version in its place.

The other advisory committees considered but declined to adopt similar privacy rules. A reporter explained that CACM's suggestion was specifically directed toward bankruptcy filings, which pose "a problem of a different order of magnitude." For example, when improperly-redacted documents are filed in a civil case, the filer and the clerk's office typically work together to address the problem "quickly" and "effectively." In bankruptcy cases, however, creditors often "make multiple filings, sometimes in different courts." Professor Gibson added that, although the other advisory committees were willing to add privacy rules for the sake of uniformity, they ultimately decided that bankruptcy's special circumstances warranted different treatment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendment to Bankruptcy Rule 9037.**

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

Judge Molloy and Professors Beale and King provided the report of the Advisory Committee on Criminal Rules, which met on April 28, 2017, in Washington, D.C. In addition to final approval of inter-committee amendments to three rules, the Advisory Committee sought permission to publish a new rule and proposed amendments to two others. It also presented two information items.

### *Action Items*

*Inter-Committee Amendments.* The Standing Committee approved for submission to the Judicial Conference amendments to three Criminal Rules with inter-committee implications: Criminal Rules 12.4, 45, and 49 (see "Inter-Committee Coordination," *supra*).

*New Criminal Rule 16.1 – Disclosures and Discovery.* Proposed new Criminal Rule 16.1 would set forth a procedure for disclosures and discovery in criminal cases. It originated from a suggestion submitted by two criminal defense bar organizations to amend Criminal Rule 16, which currently governs the parties' respective duties to disclose, to address cases involving voluminous information and electronically stored information ("ESI"). The Rule 16.1 Subcommittee was formed to consider this suggestion, but determined that the "lengthy" and "complicated" original proposal, which focused on district judges' procedures, was unworkable.

The Subcommittee concluded, however, that a need might exist for a narrower, more targeted amendment. "[A]fter a great deal of discussion" at the fall 2016 meeting, the Advisory Committee decided at Judge Campbell's suggestion to hold a mini-conference to obtain the views of various stakeholders on the problems and "complexities" posed by large volumes of digital information. The mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

All participants agreed that (1) ESI discovery problems can arise in both small and large cases, (2) these issues are handled very differently between districts, and (3) most criminal cases now include ESI. In 2012, the DOJ, AO, and the Joint Working Group on Electronic Technology in the Criminal Justice System developed a set of "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases," known as the "ESI Protocol." The defense attorneys and prosecutors at the mini-conference reached a consensus that there is a general lack of awareness of the ESI Protocol, and more training on it would be useful.

The major initial point of disagreement at the mini-conference was whether a rule amendment was necessary and desirable. The prosecutors were not convinced of the need for a rule change. The defense attorneys strongly favored one, but acknowledged problematic threshold questions: Would the rule only apply in "complex" cases? And if so, what *is* a complex case? For example, even "the simplest" criminal case can become "complicated" when it involves electronic evidence such as cell-phone tower location information. None of the attendees supported a rule that would require defining or specifying a "type" of case. A consensus emerged that any rule the Subcommittee might draft should (1) be simple and place the principal responsibility for implementation on the lawyers rather than the court, and (2) encourage use of the ESI Protocol. The prosecutors and DOJ felt strongly that the rule must be flexible in order to address variation between cases.

Guided by the "really helpful information and perspective" shared at the mini-conference, as well as existing local rules and orders addressing ESI discovery, the Subcommittee drafted and the Advisory Committee unanimously approved proposed new Criminal Rule 16.1 (Pretrial Discovery Conference and Modification) (see Agenda Book Tab 5A, pp. 654-56, Tab 5C, pp. 689-90). Subdivision (a) requires that, in every case, counsel must confer no more than 14 days after the arraignment and "try to agree" on the timing and procedures for disclosure. Subdivision (b) emphasizes that the parties may seek a modification from the court to facilitate preparation. Because technology changes rapidly, proposed Rule 16.1 does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that

encourages the parties to confer early in the case to determine whether the standard discovery procedures should be modified and neither “alter[s] local rules nor take[s] discretion away from the court.” So far, the proposal has been “satisfactory” to all, including the groups who made the initial suggestion.

Judge members asked why the new language has been added as a proposed stand-alone rule rather than an addition to Rule 16. Professors Beale and King responded that, while Rule 16 specifies *what* must be disclosed, Rule 16.1 concerns the timing of and procedures for disclosure. Whereas Rule 16 is a discovery rule, the new rule addresses activity that occurs prior to discovery. Judge Molloy added that, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

Several members wondered whether the rule’s directive that the parties confer “in person or by telephone” excluded other “equally effective” modes of communication, such as live videoconferencing, that are either currently in use or will come into use as technology progresses. Judge Molloy responded that the rules define “telephone” broadly enough to encompass other means of live electronic communication, and Professors Beale and King explained that the Subcommittee consciously chose that language in order to promote live interaction. A reporter noted that removing the language would more closely track parallel Civil Rule 26(f), and Judge Campbell added that the term “confer” already implies real-time communication. A judge member moved to delete the phrase “in person or by telephone” from the proposed rule, the motion was seconded, and the Standing Committee unanimously voted in favor of the motion. The Advisory Committee and Standing Committee will pay attention to this issue during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 proposed new Criminal Rule 16.1, as modified by the Standing Committee.**

*Rules 5 of the Section 2254 and Section 2255 Rules – Right To File a Reply.* In response to a conflict in the case law identified by Judge Wesley, the Advisory Committee proposed an amendment to Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts to make clear that a petitioner has the right to file a reply. The Advisory Committee also proposed amending the parallel provision in Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts (see Agenda Book Tab 5A, pp. 657-58, Tab 5C, pp. 691, 693).

The current text of those rules provides that the petitioner or moving party “may submit a reply . . . within a time period fixed by the judge.” Although this language was intended to create a right to file a reply, a significant number of district courts have read “fixed by the judge” to allow a reply only if the judge determines that a reply is warranted and sets a time for filing. Reasoning that this particular reading was unlikely to be corrected by appellate review, the Subcommittee formed to study the issue proposed an amendment that would confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence: “The moving party may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.” The

proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

The word “may” was retained because it used in many other rules, and the Advisory Committee did not want to cast doubt on its meaning. However, to prevent the word “may” from being misread, the following sentence was added to the committee note: “We retain the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts.**

### *Information Items*

*Manual on Complex Criminal Litigation.* The FJC has confirmed that it has received approval to publish a manual for trial judges on complex criminal litigation (see Agenda Book Tab 5A, p. 662). The Advisory Committee has formed a subcommittee to determine which subjects to include.

*Cooperators.* In response to an FJC study concluding that hundreds of criminal defendants had been harmed after court documents revealed that they had cooperated with the government, the Judicial Conference Committee on Court Administration and Case Management (“CACM”) in 2016 released “interim guidance” to the district courts on managing cooperation information. The CACM guidance requires, for example, every plea agreement to include a sealed addendum for cooperation information and a bench conference to be held to discuss cooperation during every plea hearing, whether or not the defendant is actually cooperating.

Judge Jeffrey S. Sutton, then Chair of the Standing Committee, directed the Criminal Rules Advisory Committee to consider rules changes that would implement the recommendations in the CACM guidance, before making a normative recommendation as to whether some, all, or none, of those changes should be adopted. Recognizing the breadth of the cooperator-harm issue, Judge Sutton encouraged that other stakeholders, such as the DOJ and Bureau of Prisons, be included in the discussion. In response, Director James C. Duff of the Administrative Office of the U.S. Courts (“AO”) created a Task Force on Protecting Cooperators, consisting of CACM and Criminal Rules Advisory Committee members, as well as a variety of experts and advisors.

The Advisory Committee has since formed a Cooperator Subcommittee, which continues to explore possible rules amendments to mitigate the risks that access to information in case files poses to cooperating witnesses. In addition to rules that would implement the CACM guidance, the Subcommittee is also considering alternative approaches. The Subcommittee intends to present its work to the full Advisory Committee at the fall 2017 meeting. The Advisory Committee will then make its recommendation to the Task Force, which plans to issue its report and recommendations—including any amendments to the Criminal Rules—in 2018 (see Agenda

Book Tab 5A, pp. 658-62).

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Maggs provided the report of the Advisory Committee on Appellate Rules, which met on May 2, 2017, in Washington, D.C. Judge Chagares succeeded Justice Gorsuch as chair in April 2017. The Advisory Committee sought approval of several action items and presented a list of information items.

### *Action Items*

*Inter-Committee Amendments.* The Standing Committee approved for submission to the Judicial Conference proposed amendments to Appellate Rules 25 (electronic filing and signing), 8, 11, and 39 (stays and injunctions pending appeal), and approved proposed amendments to Appellate Rules 26.1, 28, and 32 (disclosures) for publication in August 2017 (see “Inter-Committee Coordination,” *supra*).

*Appellate Rules 28.1 and 31 – Time To File a Reply Brief.* Rules 28.1(f)(4) and 31(a)(1) currently set the time to file a reply brief at 14 days after service of the response brief. Until the 2016 amendments eliminated the “three day rule” for papers served electronically, however, parties effectively had 17 days because Appellate Rule 26(c) allowed three additional days when a deadline ran from service that was not accomplished same-day as well as service completed electronically. The Advisory Committee concluded that “shortening” this period from 17 days to 14 could hinder the preparation of useful reply briefs. Accordingly, the Advisory Committee proposed extending the time to file a reply to 21 days, the next seven-day increment (see Agenda Book Tab 2A, pp. 81-82). The Advisory Committee received two comments in support of the published amendments and recommended approval without further changes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rules 28.1 and 31.**

*Appellate Form 4.* Question 12 of Appellate Form 4 currently asks litigants seeking permission to proceed in forma pauperis to provide the last four digits of their social security numbers. Due to privacy and security concerns, the Advisory Committee asked its clerk representative to investigate whether this information was necessary for administrative purposes. When the clerks who were surveyed reported that it was not, the Advisory Committee recommended deleting the question (see Agenda Book Tab 2A, pp. 82-83). The proposed amendment received two positive comments when it was published, and the Advisory Committee recommended no further changes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Form 4.**

*Appellate Rule 29 – Limitations on Amicus Briefs Filed by Party Consent.* Appellate Rule 29(a) currently permits an amicus curiae to file a brief either with leave of the court or with the parties' consent. Several courts of appeals, however, have adopted local rules forbidding the filing of an amicus brief that could result in the recusal of a judge. Of particular concern is the use of "gamesmanship" to try to affect the court's decision by forcing particular judges to recuse themselves. Given the arguable merit of these local rules, the Advisory Committee proposed adding an exception to Appellate Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification" (see Agenda Book Tab 2A, pp. 87-89).

The Advisory Committee received six comments opposing the proposed amendment. The commenters argued that the proposed amendment is unnecessary because amicus briefs that force the recusal of a judge are rare. In any event, the amicus curiae could not be expected to predict who the panel judges would be at the time the brief is filed and would have no recourse if the court strikes the brief—wasting time and money through no fault of the amicus curiae or its counsel. The Advisory Committee considered these comments, but determined that the interests in preventing gamesmanship and resolving the conflict among local rules outweighed the concerns.

The Advisory Committee made two revisions at its May 2017 meeting. First, to match the 2016 amendments renumbering Rule 29's subparts and adding new rules governing amicus briefs at the rehearing stage, the Advisory Committee moved the exception from the former subdivision (a) to new paragraph (a)(2) and added the exception to the new paragraph (b)(2) regarding rehearing. Second, the Advisory Committee rephrased the exception from "strike or prohibit the filing of" to "prohibit the filing of or . . . strike" to make it more chronological without changing its meaning or function.

Discussion during the Standing Committee meeting was robust. An attorney member recommended deleting from paragraph (b)(2) the proposed language regarding prohibiting or striking briefs at the rehearing stage, reasoning that the court already had discretion to do so, existing local rules would continue to stand under either version of the proposal, and republication would not be required. A judge member disagreed, arguing that the language in (b)(2) would at least give an amicus curiae an indication as to why its brief had been barred. The Standing Committee reached a compromise: the language would be deleted from (b)(2), but the committee note would explain that the court already has discretion to strike an amicus brief at the rehearing stage if it could cause recusal, and confirm that local rules and orders allowing such briefs to be barred are permissible. The language "such as those previously adopted in some circuits" would be deleted from the note.

The Standing Committee accepted a style consultant's recommendation to replace "except that" with "but" in paragraph (a)(2). A member repeated a commenter's suggestion to change the phrase "amicus brief" to "amicus-curiae brief" for accuracy, but the Advisory Committee and style consultants preferred to continue to use "amicus" as an adjective and "amicus curiae" as a noun for consistency with the other rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rule 29, subject to the revisions made during the meeting.**

*Appellate Rule 41 – Stays of the Mandate.* The Advisory Committee proposed amendments to Appellate Rule 41, which governs the contents, issuance, effective date, and stays of the mandate. Among other changes, the Advisory Committee initially added a sentence to Rule 41(b) permitting the court to extend the time to issue the mandate “only in extraordinary circumstances” (see Agenda Book Tab 2A, pp. 95-99).

The proposed amendments were published in August 2016, and the Advisory Committee made several revisions to account for the five comments received. In response to observations that a court might wish to extend the time for good cause in circumstances that are not “extraordinary,” the Advisory Committee deleted the proposed sentence from Rule 41(b). The Advisory Committee also added subheadings, renumbered subparagraph (d)(2)(B) as (d)(2), and, in response to a comment warning of a potential gap in the rule, added a clause that would extend a stay automatically if a Supreme Court Justice extends the time for filing a petition for certiorari. The Advisory Committee made further revisions after its May 2017 meeting (see Agenda Book Supplemental Materials, pp. 3-4, 18-24).

As shown here, at the Standing Committee meeting the style consultants and an attorney member suggested additional changes to Appellate Rule 41(d)(2)(B) ((d)(2) as amended), which prohibits a stay from exceeding 90 days unless “the party who obtained the stay ~~files a petition for the writ and so~~ notifies the circuit clerk in writing within the period of the stay: (i) that the time for filing a petition for a writ of certiorari in the Supreme Court has been extended, in which case the stay continues for the extended period; or (ii) that the petition has been filed, in which case the stay continues until the Supreme Court’s final disposition.”

Three appellate judge members pointed out that unlike most courts of appeals, which circulate opinions to the full court prior to publication, their courts instead have the option to place a “hold” on the mandate while the full court reviews a panel’s decision and considers whether to rehear the case en banc. They disagreed among themselves as to whether Rule 41(b)’s new provision allowing the court to extend the time to file the mandate “by order” was an appropriate solution, as it was unclear whether a standing order or clerk’s order (as opposed to an order issued by an individual judge) would suffice. Satisfied that it would, and that the rule did not impose a time limit for issuing the order, the Standing Committee approved the rule as modified. Accordingly, the first sentence of the committee note would be revised as follows: “Subdivision (b) is revised to clarify that an order is required for a stay of the mandate ~~and to specify the standard for such stays.~~”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rule 41, subject to the revisions made during the meeting.**

*Technical Amendments to Rules 3(d) and 13 – References to “Mail.”* In light of the proposed changes to Appellate Rule 25 to account for electronic filing and service (see “Inter-



Committee Coordination,” *supra*), the Advisory Committee recommended eliminating the term “mail” from other provisions (see Agenda Book Tab 2A, pp. 100-02).

Appellate Rule 3(d) concerns the clerk’s service of the notice of appeal. The Advisory Committee changed “mailing” and “mails” to “sending” and “sends” in paragraphs (d)(1) and (3), and eliminated the mailing requirement from the portion of paragraph (d)(1) that directs the clerk to serve a criminal defendant “either by personal service or by mail addressed to the defendant.” Instead, the clerk will determine whether to serve a notice of appeal electronically or nonelectronically based on the principles of revised Rule 25. The Standing Committee modified the committee note as follows: “Amendments to Subdivision (d) change the words ‘mailing’ and ‘mails’ to ‘sending’ and ‘sends,’ and delete language requiring certain forms of service, to make allow electronic service possible.”

Amended Rule 13, which governs appeals from the Tax Court, currently uses the word “mail” in its first and second sentences. The Advisory Committee recommended changing the reference in the first sentence to allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail, but not the second sentence, which expresses a rule that applies to notices sent by mail.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Appellate Rules 3(d) and 13, subject to the revisions to the committee note made during the meeting.**

#### *Information Items*

At its spring 2017 meeting, the Advisory Committee declined to move forward with several unrelated suggestions: (1) amending Appellate Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as “published” decisions, (2) adding a provision similar to Appellate Rule 28(j) to the Civil Rules, (3) addressing certain types of subpoenas in Appellate Rules 4 and 27, and (4) prescribing in Appellate Rule 28 the manner of stating questions presented in appellate briefs.

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

Judge Ikuta and Professor Gibson presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 6-7, 2017, in Nashville, Tennessee. The Advisory Committee sought approval of thirteen action items and shared two information items.

#### *Action Items*

*Inter-Committee Amendments.* The Standing Committee approved for submission to the Judicial Conference proposed amendments to Bankruptcy Rules 5005 and 8011 (electronic filing and signing) and 7062, 8007, 8010, 8021, and 9025 (stays and injunctions pending appeal), and approved for publication in August 2017 a proposed new subdivision to Rule 9037 (redaction of

personal identifiers) (see “Inter-Committee Coordination,” *supra*).

*Bankruptcy Rule 3002.1 – Home Mortgage Claims in Chapter 13 Cases.* In chapter 13 cases in which a creditor has a security interest in a debtor’s home, Bankruptcy Rule 3002.1(b) and (e) imposes noticing requirements on the creditor that enable the debtor or trustee to make mortgage payments in the correct amount while the bankruptcy case is pending (see Agenda Book Tab 3A, pp. 191-92). The proposed amendments to subdivisions (b) and (e) create flexibility regarding a notice of payment change for home equity lines of credit; create a procedure for objecting to a notice of payment change; and expand the category of parties who can seek a determination of fees, expenses, and charges owed at the end of the case.

The proposed amendments were published in August 2016. A comment noted that, although the amendments purported to prevent a proposed payment change from taking effect in the event of a timely objection, under the time-counting rules the deadline for filing the objection would actually be later than the payment change’s scheduled effective date. The Advisory Committee revised the proposed amendment to eliminate this possibility and clarify that “if a party wants to stop a payment change from going into effect, it must file an objection *before* the change goes into effect” (see Agenda Book Tab 3B, App’x A, pp. 223-24).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rule 3002.1.**

*Conforming Amendments to the Bankruptcy Part VIII Appellate Rules and Related Forms.* The proposed amendments to Bankruptcy Part VIII Appellate Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022; Official Forms 417A and 417C; and the new Part VIII Appendix conform the Bankruptcy Rules to the December 1, 2016 Appellate Rules amendments (see Agenda Book Tab 3A, pp. 194-97). Because the Bankruptcy Appellate Rules generally follow the Appellate Rules, the Advisory Committee tracked the Appellate Rules absent a bankruptcy-specific reason not to.

Bankruptcy Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), list the post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4) added an express requirement that, in order to toll this deadline, the motion must be filed within the time period the rule the motion is made under specifies. The Bankruptcy Rules Advisory Committee published a similar amendment to Rule 8002(b) in August 2016 and received no comments.

Bankruptcy Rules 8002(c) (time to file a notice of appeal) and 8011(a)(2)(C) (filing, signing, and service) contain inmate-filing provisions virtually identical to the parallel provisions of Appellate Rule 4(c) and rule currently numbered Appellate Rule 25(a)(2)(C). The proposed amendments would conform to those rules by treating inmates’ notices of appeal and other papers as timely filed if they are deposited in the institution’s internal mail system on or before the last day for filing. The new inmate-declaration form designed to effectuate this rule is replicated by a director’s form for bankruptcy appeals, and an amendment to Official Form 417A would direct inmate filers to the director’s form.

The 2016 Appellate Rules amendments also affected the length limits in Bankruptcy Rules 8013, 8015, 8016, and 8022 and Official Form 417C, and necessitated the new Part VIII Appendix. Amended Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word-count limits for documents prepared using a computer and reduced the existing word limits for briefs under Appellate Rules 28.1 (cross-appeals) and 32 (principal, response, and reply briefs). Appellate Form 6, the model certificate of compliance, was amended accordingly. Amended Appellate Rule 32(e) authorizes the court to vary the federal rules' length limits by order or local rule, Rule 32(f) lists the items that may be excluded from the length computation, and a new appendix collecting all of the length limits in one chart was added. The Bankruptcy Rules Advisory Committee proposed parallel amendments to Rules 8013(f) (motions), 8015(a)(7) and (f) (briefs), 8016(d) (cross-appeals), and 8022(b) (rehearing), along with Official Form 417C (model certificate of compliance). It also proposed an appendix to Part VIII similar to the Appellate Rules appendix.

Bankruptcy Rule 8017, addressing amicus filings, is the bankruptcy counterpart to Appellate Rule 29, which was amended in 2016 to address for the first time amicus briefs filed in connection with petitions for rehearing. The 2016 amendment does not require courts to accept amicus briefs at the rehearing stage, but provides guidelines for briefs that *are* permitted. In August 2016, the Appellate Rules Advisory Committee published an additional amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit the filing of or strike an amicus brief that could cause the recusal of a judge (see discussion *supra*). To maintain consistency, the Bankruptcy Rules Advisory Committee proposed and published a parallel amendment to Rule 8017.

A commenter pointed out that, because amicus briefs are usually filed before a panel is assigned, an amicus curiae could not possibly predict whether its brief could lead to a recusal. The Advisory Committee rejected this comment because the proposed amendment does not *require*, but merely permits, the brief to be struck. Another comment suggested a more extensive and detailed rewrite that was beyond the scope of the proposed amendment. The Bankruptcy Rules amendments and committee note will be conformed to the revisions made to Appellate Rule 29 at the Standing Committee meeting (see discussion *supra*).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022; Official Forms 417A and 417C; and the new Part VIII Appendix; subject to the conforming revisions to Bankruptcy Rule 8017 made during the meeting.**

*Additional Bankruptcy Appellate Rules Amendments: Rules 8002, 8006, and proposed new Rule 8018.1.* In addition to the conforming amendments to the Part VIII rules, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published in August 2016 and received no comments. Following discussion of these amendments at the spring 2017 meeting, the Advisory Committee recommended final approval of Rules 8002, 8006, and 8018.1 as published (see Agenda Book Tab 3A, pp. 197-200), but sent Rule 8023 back to a subcommittee for further consideration (see Information Items,

*infra*).

Bankruptcy Rule 8002(a) generally requires a notice of appeal to be filed within 14 days of the entry of judgment. The proposed amendment would add a new paragraph (a)(5), which defines “entry of judgment” for this purpose. It would also clarify that, in contested matters and adversary proceedings where Civil Rule 58 does not require the entry of judgment to be filed as a separate document, the time for filing the notice of appeal begins to run when the judgment, order, or decree is entered on the docket (see Agenda Book Tab 3B, App’x A, pp. 237-43). In adversary proceedings where Civil Rule 58(a) *does* require a separate document, the time for filing a notice of appeal generally runs from when the judgment, order, or decree is docketed as a separate document or, if no separate document is prepared, 150 days from docket entry.

Bankruptcy Rule 8006 implements 28 U.S.C. § 158(d)(2)(A), which permits all parties to jointly certify a proceeding for direct appeal to the court of appeals. Because, as Professor Gibson explained, this “somewhat odd procedure” gives the parties the option to certify an appeal, new paragraph 8006(c)(2) authorizes the bankruptcy court, district court, or Bankruptcy Appellate Panel to, Judge Ikuta reported, “provide its views about the merits of such a certification to the court of appeals” (see Agenda Book Tab 3B, App’x A, pp. 245-46). Professor Gibson added that the proposed amendment was intended as “the counterpart” to existing rules that allow the parties to file a statement when the judge certifies an appeal: “If the parties get to comment on the judge’s certification, the judge ought to be able to comment on the parties’ [certification].” The judge would not be required to do so, and the court of appeals still has discretion to decide whether to accept the appeal.

Proposed new Rule 8018.1 addresses district court review of a judgment that the bankruptcy court lacked constitutional authority to enter under *Stern v. Marshall*, 564 U.S. 462 (2011), which held that certain claims, now dubbed “*Stern* claims,” must be decided by an Article III court rather than a bankruptcy court. In *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the U.S. Supreme Court held that bankruptcy judges may hear *Stern* claims and submit proposed findings of fact and conclusions of law, but they lack the authority to enter judgment on them; the district court is empowered to enter judgment after a de novo review. Under the existing rules, when a district court that determines that the bankruptcy court has entered final judgment in a *Stern* claim despite its lack of constitutional authority to do so, the case must be remanded to the bankruptcy court so the judgment can be recharacterized as proposed findings of fact and conclusions of law. New Bankruptcy Rule 8018.1 would bypass this process by authorizing the district court to simply treat the bankruptcy court’s judgment as proposed findings and conclusions that it can review de novo (see Agenda Book Tab 3B, App’x A, pp. 289-90).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 8002 and 8006 and new Bankruptcy Rule 8018.1.**

*Official Form 309F – Notice of Chapter 11 Bankruptcy Case (Corporations and Partnerships)*. The instructions at line 8 of Form 309F currently require a creditor seeking to

have its claim excepted from the discharge under § 1141(d)(6)(A) of the Bankruptcy Code to file a complaint by the stated deadline. But because the applicability of the deadline is unclear in some circumstances, the proposed revision to the instructions would allow the creditor to decide whether the deadline applies to its claims. When the proposed amendment was published in August 2016, a commenter pointed out that it necessitated a similar change to line 11 of the form (see Agenda Book Tab 3A, pp. 200-02). Accordingly, the Advisory Committee amended the last sentence of line 11 in a manner similar to the amendment to line 8 and recommended both changes for final approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Official Form 309F.**

*Official Forms 25A, 25B, 25C, and 26 – Chapter 11 Small Business Debtor Forms and Periodic Report.* Most bankruptcy forms have been modernized over the past several years through the Forms Modernization Project, but the Advisory Committee deferred consideration of Official Forms 25A, 25B, 25C, and 26, which relate to chapter 11 cases. The Advisory Committee has now reviewed these forms extensively, revised and renumbered them, and published them for comment in August 2016 (see Agenda Book Tab 3A, pp. 202-04).

The small business debtor forms, Forms 25A, 25B, and 25C, are renumbered as Official Forms 425A, 425B, and 425C (see Agenda Book Tab 3B, App'x A, pp. 315-59). Official Forms 425A and 425B contain an illustrative form plan of reorganization and a disclosure statement, respectively, for chapter 11 small business debtors. Official Form 425C is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. Official Form 26, renumbered as Official Form 426 and rewritten and formatted in the modernized form style, requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest (see Agenda Book Tab 3B, App'x A, pp. 361-73).

The Advisory Committee made “minor, non-substantive” changes in response to the three comments received, the “most substantial” of which was to add a section to Form 425A where the parties can address whether the bankruptcy will retain jurisdiction of certain matters after the plan goes into effect (see Agenda Book Tab 3B, App'x A, p. 318).

Upon motion, seconded by a member, and by voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Official Forms 25A, 25B, 25C, and 26 (renumbered respectively as 425A, 425B, 425C and 426).**

*Conforming Amendments to Official Forms 309G, 309H, and 309I – Notices to Creditors in Chapter 12 and 13 Cases.* Bankruptcy Rule 3015 governs the filing, confirmation, and modification of chapter 12 and chapter 13 plans. Absent contrary congressional action, as of December 1, 2017, an amendment to Rule 3015 adopted as part of the chapter 13 plan form package will no longer authorize a debtor to serve a plan summary, rather than a copy of the plan itself, on the trustee and creditors. This change will affect Official Forms 309G, 309H, and 309I,

the form notices sent to creditors to inform them of the hearing date for confirmation of the chapter 12 or 13 plan and the associated objection deadlines. The current versions of the forms also indicate whether a plan summary or the full plan is included with the notice. In accordance with the pending changes to Bankruptcy Rule 3015, the proposed amendments to Official Forms 309G, 309H, and 309I remove references to a “plan summary,” which will no longer be an available option (see Agenda Book Tab 3A, p. 206, Tab 3B, App’x A, pp. 301-08). The Advisory Committee recommended approval of these conforming changes without publication so that they can take effect at the same time as the pending change to Rule 3015.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval without publication the proposed conforming amendments to Official Forms 309G, 309H, and 309I.**

*Bankruptcy Rule 4001 – Obtaining Credit.* Bankruptcy Rule 4001(c) governs the process by which a debtor in possession or a trustee can obtain credit outside the ordinary course of business while a bankruptcy case is pending. Among other things, the rule outlines eleven different elements of post-petition financing that a motion for approval of a post-petition credit agreement must address. These detailed disclosure requirements, which are intended supply the kind of specific information necessary for credit approval in chapter 11 business cases, are unhelpful and unduly burdensome in chapter 13 consumer bankruptcy cases, where typical post-petition credit agreements involve loans for items such as personal automobiles or household appliances. Accordingly, the Advisory Committee sought approval to publish for public comment a new paragraph to Rule 4001(c) that would make the disclosure provision inapplicable in chapter 13 cases (see Agenda Book Tab 3A, pp. 207-08, Tab 3B, App’x B, p. 379). Judge Ikuta reported that “many bankruptcy courts have already adopted [similar] local rules that impose less of a burden on chapter 13 debtors.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rule 4001.**

*Bankruptcy Rules 2002 & 9036 and Official Form 410 – Electronic Noticing.* The proposed amendments to Bankruptcy Rules 2002(g) (Addressing Notices) and 9036 (Notice by Electronic Transmission) and Official Form 410 (Proof of Claim) are part of the Advisory Committee’s effort to reduce the cost and burden of notice. Section 342 of the Bankruptcy Code gives creditors in chapter 7 and chapter 13 cases the right to designate an address to receive service. As part of the rules committees’ efforts to ensure that the rules are consistent with modern technology, the Advisory Committee originally considered an opt-out provision under which electronic notice would be the default, but rejected it due to concerns that it might run afoul of § 342 or be incompatible with creditors’ existing systems for processing notice by mail.

Instead, the proposed amendments make three changes that would allow creditors to opt in to electronic notice. First, a box has been added to Official Form 410, the proof-of-claim form, that creditors who are not CM/ECF users can check to receive notices electronically (see Agenda Book Tab 3B, App’x B, p. 389). Second, the proposed change to Rule 2002(g) would expand the rule’s references to “mail” to include other means of delivery and delete “mailing”

before “address” so creditors can receive notices by email (see Agenda Book Tab 3B, App’x B, pp. 377-78). Third, amended Rule 9036 would allow registered users to be served via the court’s CM/ECF system, and non-CM/ECF users by email if they consent in writing (see Agenda Book Tab 3B, App’x B, pp. 383-84).

A judge member wondered whether it was appropriate for the rules to refer to documents sent electronically as “papers.” The Standing Committee determined to continue to use the term “papers,” which is generic and is already used throughout the rules with respect to both electronic and hard-copy documents.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rules 2002 and 9036 and Official Form 410.**

*Bankruptcy Rule 6007 – Motions To Abandon Property.* Under § 554(a) and (b) of the Bankruptcy Code, only the trustee or debtor in possession has authority to abandon property of the estate. A hearing is not mandatory if the abandonment notice or motion provides sufficient information concerning the proposed abandonment; is properly served; and neither the trustee, debtor, nor any other party in interest objects. Bankruptcy Rule 6007, which concerns the service of abandonment papers under § 554, treats notices to abandon property filed by the trustee under subdivision (a) and motions filed by the parties in interest to compel the trustee to abandon property under subdivision (b) inconsistently (see Agenda Book Tab 3A, pp. 211-13). Specifically, Rule 6007(a) identifies the parties the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a motion to compel abandonment.

“So that the procedures are essentially the same in both cases,” the proposed amendment to Rule 6007(b) would specify the parties to be served with the motion to abandon and any notice of the motion, and establish an objection deadline. The proposed amendment would also make clear that, if the motion to abandon is granted, the abandonment is effected without further notice, unless the court directs otherwise (see Agenda Book Tab 3B, App’x B, pp. 381-82).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rule 6007.**

#### *Information Items*

*Bankruptcy Rule 2002 – Noticing in Chapter 13 Cases.* The current version of Bankruptcy Rule 2002(f)(7) requires the clerk to give notice to the debtor and all creditors of the “entry of an order confirming a chapter 9, 11, or 12 plan,” but not a chapter 13 plan. The committee note identifies no reason for treating chapter 13 plans differently, and the Advisory Committee’s meeting minutes are silent as to why it rejected a 1988 effort to make Rule 2002(f) applicable to a plan under any chapter. Seeing no reason to continue to exclude chapter 13 plans, the Advisory Committee intends to propose an amendment to Bankruptcy Rule 2002(f) (see Agenda Book Tab 3A, pp. 215-16).

Similarly, the Advisory Committee will propose an amendment expanding to chapter 13 cases the exception to Rule 2002(a)'s general noticing requirements. Current Rule 2002(h) allows a court to limit notice in a chapter 7 case to, among others, creditors holding claims for which proofs of claim have been filed. The Advisory Committee has concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in chapter 13 cases support an amendment (see Agenda Book Tab 3A, p. 216).

Because the time provisions of Rule 2002(f)(7) will also need to be amended when a pending 2017 amendment to Rule 3002 changes the deadline for filing a proof of claim, the Advisory Committee decided to wait to publish the amendments to the noticing provisions in subdivisions (f) and (h) so that they can be proposed as a package along with the timing changes in 2018.

*Bankruptcy Rule 8023 – Voluntary Dismissal.* In response to a comment submitted after the publication of the Part VIII amendments (see *supra*), the Advisory Committee proposed an amendment to Bankruptcy Appellate Rule 8023 that would add a cross-reference to Bankruptcy Rule 9019, which provides a procedure for obtaining court approval of settlements. The amendment was intended as a reminder that, when dismissal of an appeal is sought as the result of a settlement, Rule 9019 might require the settlement to be approved by the bankruptcy court (see Agenda Book Tab 3A, pp. 216-17).

No comments were submitted when the proposed amendment to Rule 8023 was published in August 2016. At the spring 2017 meeting, the Advisory Committee's new DOJ representative raised a concern that, although Rule 9019 is generally interpreted to require court approval of a settlement only when a trustee or debtor in possession is a party to it, amended Rule 8023 can be read to suggest that no voluntary dismissal of a bankruptcy appeal in the district court or BAP may be taken without the bankruptcy court's approval. Other Advisory Committee members wondered whether amended Rule 8023's reference to Rule 9019 could be read to require district and BAP clerks to make a legal determination as to whether Rule 9019 applies to a particular voluntary dismissal and, if so, whether the bankruptcy court has jurisdiction to consider the settlement while the appeal is pending. A question was also raised about whether the current version of Rule 8023, which does not state that it is subject to Rule 9019, has caused any problems. After discussing these issues, the Advisory Committee decided to send the Rule 8023 amendment "back to the drawing board" for further consideration by a subcommittee. The Advisory Committee expects to "suggest[] a different change" and will discuss the matter further at its fall 2017 meeting.

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

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on Tuesday, August 25, in Austin, Texas. In addition to two sets of inter-committee amendments, the Advisory Committee sought approval of one action item—proposed amendments to Civil Rule 23—and presented two information items.



*Action Items*

*Inter-Committee Amendments.* The Advisory Committee submitted proposed amendments to Civil Rules 5 (electronic filing and signing) and 62 and 65.1 (stays and injunctions pending appeal) for final approval. The Standing Committee approved the amendments for transmission to the Judicial Conference, subject to the revisions made during the meeting (see “Inter-Committee Coordination,” *supra*).

*Civil Rule 23 – Class Actions.* The proposed amendments to Civil Rule 23 (see Agenda Book Tab 4A, pp. 431-51) are the product of more than five years of study and consideration by the Civil Rules Advisory Committee and its Rule 23 Subcommittee. The effort was motivated by a number of factors: (1) the passage of time since Rule 23 was last amended in 2009; (2) the development of a body of case law on class action practice; and (3) recurring interest in Congress, including the 2005 adoption of the Class Action Fairness Act. In developing the proposed amendments, members of the Subcommittee attended nearly two dozen meetings and bar conferences and held a mini-conference in September 2015 to gather additional feedback from a variety of stakeholders.

After extensive consideration and study, the Subcommittee narrowed the list of issues to be addressed and published these proposed amendments (see Agenda Book Tab 4A, pp. 431-41):

- Rule 23(c)(2) has been updated to recognize contemporary means of providing notice to individual class members in Rule 23(b)(3) class actions.
- The amendments to Rule 23(e)(1) clarify that the parties must supply information to the court to enable it to decide whether to notify the class of a proposed settlement, that the court must direct notice if it is likely to be able to approve the proposal and certify the class, and that class notice triggers the opt-out period in Rule 23(b)(3) class actions.
- Amended Rule 23(e)(2) identifies substantive and procedural “core concerns”—as opposed to a “long list of factors” like those some courts use—for the parties to address and the court to consider in deciding whether to approve a settlement proposal.
- Rule 23(e)(5) has been amended to address “bad faith” class-action objectors. Specifically, the proposed amendments require that specific grounds for the objection be provided to the court, the person on whose behalf the objection is being made be identified, and the court approve payment or other consideration received in exchange for withdrawing an objection.
- Amended Rule 23(f) makes clear that there is no interlocutory appeal of a decision to send class notice under Rule 23(e)(1).
- At the suggestion of the DOJ, the amendments to Rule 23(f) extend to 45 days the time to seek permission for an interlocutory appeal when the United States is a party.

The Advisory Committee considered but declined to address other topics, such as issue classes and ascertainability.

Almost all of the comments received during the August 2016 public comment period concerned the Rule 23 proposals. Most addressed the modernization of notice methods under Rule 23(c)(2) and the handling of objections to proposed settlements. Some comments proposed additional topics, while others urged reconsideration of topics the Subcommittee had decided not to pursue. After carefully considering the comments, the Advisory Committee and Subcommittee made minor changes to the proposed rule text and clarified and shortened the committee note. The Advisory Committee has concluded that “the community is very satisfied” with the proposed amendments, which are “important improvements” but “not dramatic changes.”

A judge member asked whether a litigant could argue that the court had not adequately reviewed the settlement proposal if it did not consider one of the “core concerns” under Rule 23(e)(2). Professor Marcus explained that the Subcommittee initially considered requiring the court to find that each factor was satisfied, but ultimately decided “to introduce the considerations” but not *require* the court to find each one in order to approve the settlement. The rule does not require the trial judge to “make findings” or address each factor on the record—the judge need only “consider” the information the parties supply under Rule 23(e)(1)(A) and any objections under Rule 23(e)(5). A judge member added that district courts should be given broad discretion to review these factors.

Another judge member raised the possibility of adding a “catchall” category to those listed in Rule 23(e)(2) and (e)(2)(C). Professor Marcus clarified that the list is not intended to require a judge to ignore important factors that should obviously be considered in a given situation, and the judge member agreed that the current language allows sufficient flexibility. A different judge member added that the four general categories set out in the amended rule are a “good compromise” between the need to add structure and guidance to the settlement-approval process on one hand, and the “long lists of factors” identified by the courts of appeals on the other.

Judge Campbell commended the Rule 23 Subcommittee, chaired by Judge Robert M. Dow, Jr., for its work.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously voted to recommend the proposed amendments to Civil Rule 23 to the Judicial Conference for approval.**

#### *Information Items*

*Social Security Disability Review Cases.* The Administrative Conference of the United States (“ACUS”) recently submitted a suggestion to the Judicial Conference that a uniform set of procedural rules be developed for district court review of final administrative decisions in Social Security cases under 42 U.S.C. § 405(g), which provides that an individual may obtain review of a final decision of the Commissioner of Social Security “by a civil action.” The suggestion was referred to the Civil Rules Advisory Committee, which is responsible for studying and recommending rules governing civil actions in the district courts (see Agenda Book Tab 4A, pp. 532-50).

More than 17,000 Social Security review cases are brought in the district courts every year, accounting for “a fairly large numerical proportion”—about seven percent—of civil filings. The national average remand rate is approximately forty-five percent, ranging from twenty percent in some districts to seventy percent in others—sometimes even within a single circuit. Different districts use a variety of procedures and standards in reviewing these actions.

The Advisory Committee first discussed the ACUS suggestion at the spring 2017 meeting. Although judges might be apprehensive about the possibility of a “special set of rules” for Social Security cases, the Advisory Committee will explore “whether, and if so, how” rule changes could address the problems that have been identified: the high remand rate, delays in the process, and a lack of uniformity among the district courts. The Advisory Committee plans to gather more information and form a subcommittee to fully consider various options, including a new Civil Rule addressing these types of cases or even a separate set of rules.

Professor Cooper welcomed input from the members of the Standing Committee. Judge members suggested examining circuit law and local rules addressing Social Security issues. Another judge proposed asking the DOJ to formulate a position as to whether district court review procedures should be modified. Although some members felt that more uniformity in the rules might help to reduce variance among the remand rates, a professor member cautioned that the variance might be attributable to the substantive law (such as the treating physician rule, a judge noted), rather than differences in the rules. A reporter added that a change in district court review procedures would be unlikely to affect how administrative law judges review Social Security cases. There was a general consensus that the rules committees should not attempt to “fix the [Social Security] system generally.” The Civil Rules Advisory Committee will continue to study and discuss these issues.

*Civil Rule 30(b)(6) – Organizational Depositions.* In April 2016, the Advisory Committee formed a Rule 30(b)(6) Subcommittee chaired by Judge Joan N. Ericksen to consider whether reported problems with Rule 30(b)(6) depositions can be addressed by rule amendment (see Agenda Book Tab 4A, pp. 555-86). The Subcommittee initially focused on drafting provisions that might address the problems attorneys claim to encounter. Guided by feedback from the Advisory Committee and Standing Committee, and equipped with additional legal research, the Subcommittee continues to narrow the issues that could feasibly be remedied by rule amendment.

Specifically, the Subcommittee has solicited comment about six potential amendment ideas through a posting on the federal judiciary’s rulemaking website (see Agenda Book Tab 4A, pp. 557-59): (1) including Rule 30(b)(6) depositions among the topics for discussion at the Rule 26(f) conference and in the Rule 16 report, (2) confirming that a 30(b)(6) deponent’s statements do not function as “judicial admissions” (an issue which, a judge member added, is a source of much of the “angst” surrounding these depositions), (3) requiring and permitting supplementation of Rule 30(b)(6) testimony, (4) forbidding contention questions, (5) adding a provision for objections, and (6) addressing the applicability to Rule 30(b)(6) of limits on the duration and number of depositions. Members of the Subcommittee continue to gather feedback by participating in bar conferences around the country.

When a district judge observed that litigants do not frequently approach him with Rule 30(b)(6) disputes, another judge added that active case management cures many of the problems that do arise. An attorney member who finds the current version of the rule useful cautioned the Advisory Committee not to change Rule 30(b)(6) so much that the problem it was designed to resolve—“hiding the ball”—has room to recur. Professor Marcus, reporter to the Rule 30(b)(6) Subcommittee, explained that the old problem of “bandying” has been replaced by a new one: 30(b)(6) notices listing numerous deposition topics are sent at the last minute, just before the close of discovery, to “imped[e] preparation for trial.” The potential for abuse of the Rule 30(b)(6) process can therefore cut in both directions, and although case management may be the only workable solution, the subcommittee will continue to explore possible rule changes.

*Pilot Projects Update.* Judge Bates updated the Standing Committee on the Civil Rules Advisory Committee’s two ongoing pilot projects, Mandatory Initial Discovery Pilot (“MIDP”) and Expedited Procedures Pilot (“EPP”) (see Agenda Book Tab 4A, pp. 587-89). The MIDP, which is designed to explore whether mandating the production of robust discovery prior to traditional discovery will reduce costs, burdens, and delays in civil litigation, is “well underway” in two districts and expects to add another one to two courts. Judge Campbell reported that the MIDP began in the District of Arizona on May 1, 2017, and Dr. Emery Lee and the FJC were already monitoring 170 cases filed on or after that date. The district’s judges have all agreed to participate and will become personally involved at the case management conference stage. The MIDP began in the Northern District of Illinois one month later, on June 1.

The EPP, which is intended to confirm the benefits of active judicial management of civil cases, “has hit a few roadblocks.” At this time, only the U.S. District Court for the Eastern District of Kentucky has agreed to participate; vacancies, workloads, and other factors have hindered efforts to recruit participating courts. If more courts do not join despite renewed recruitment efforts, the Eastern District of Kentucky will be moved to the MIDP, and the EPP will be delayed.

Judge Campbell thanked Judge Paul W. Grimm, Chair of the Pilot Projects Working Group and a former member of the Civil Rules Advisory Committee, for his “tremendous effort,” and the FJC and Rules Committee Support Office for their contributions.

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

Judge Sessions and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 21, 2017, in Washington, D.C. The Advisory Committee presented one action item and two information items.

### *Action Item*

*Evidence Rule 807 – Residual Exception.* The Advisory Committee has considered possible changes to Evidence Rule 807, the residual exception to the hearsay rule, for two years. One approach would involve broadening the residual exception, which is invoked “narrowly and

infrequently.” After extensive deliberation the Advisory Committee decided to pursue a more “conservative,” less “dramatic” approach that does not expand the hearsay exception.

Instead, the proposed amendment is intended to “improve[]” current Rule 807 in a number of ways (see Agenda Book Tab 6A, pp. 736-41, Tab 6B, pp. 749-54). First, it no longer defines “trustworthiness” in terms of the “equivalent circumstantial guarantees” of the Rule 803 and 804 exceptions; because those rules contain no such “circumstantial guarantees,” there is “no unitary standard” of trustworthiness. Under amended Rule 807, the court would simply determine whether the residual hearsay is supported by sufficient guarantees of trustworthiness. Second, the proposed amendment resolves a conflict among the courts by making clear that corroborating evidence may be considered in determining trustworthiness. Third, current Rule 807(a)’s requirements that the residual hearsay relate to a “material fact” and “serve the purposes of the[] rules and the interests of justice” have proved “meaningless” and will be deleted. “[I]nterests of justice” has been particularly troublesome, as some courts have relied on it to expand their discretion to admit hearsay evidence under Rule 807. Removing the phrase reinforces that the Advisory Committee does not “advocat[e for] the use of 807 more broadly.”

“Most important” was the Advisory Committee’s decision to continue to require under Rule 807(a)(3) that the residual hearsay be “more probative . . . than any other evidence” the proponent can reasonably obtain. The “more probative” requirement ensures that the rule will be used only when necessary, reinforcing the Advisory Committee’s intent to refine but not broaden the residual exception. The Advisory Committee has made clear in amended subdivision (a)(1) that the proponent cannot invoke the residual exception unless the proffered hearsay is not otherwise admissible under any of the Rule 803 or 804 exceptions.

The Advisory Committee has also proposed “significant” amendments to Rule 807’s notice requirement. Currently, Rule 807(b) does not include a good-cause exception for untimely notice, creating a conflict as to whether courts may excuse notice when a proponent has acted in good faith. Adding a good-cause provision would authorize district judges to admit evidence under these circumstances during trial, as well as conform Rule 807 to the Evidence Rules’ other notice provisions. Other changes include replacing the confusing word “particulars” with “substance,” requiring notice to be given in writing, and deleting the requirement that the proponent provide the declarant’s address.

A judge member warned that the language of proposed amended Rule 807(a)(1) describing the hearsay statement as “not specifically covered by a hearsay exception in Rule 803 or 804” could be interpreted as requiring the judge to make a finding of inadmissibility under Rules 803 and 804. Professor Capra argued that the language is not new, but has merely “dropp[ed] down” from its existing position in the current version of the rule. In any event, some courts have interpreted the *current* text to require such a finding. Professor Capra explained that the amended language was simply intended “to get the parties to explain to the court why they’re not using 803 and 804.” Another judge member wondered whether removing the provision now would inadvertently “signal” to district judges that the analysis under Rules 803 and 804 is unimportant when, in fact, “the whole point of this provision is to get them to look [to Rules 803 and 804] first.” The Advisory Committee will pay attention to this issue during the public comment period and will consider addressing it in the committee note.

A judge member asked whether the language, “after considering . . . any evidence corroborating the statement,” in revised paragraph (a)(2) was intended to require courts to “heavily weigh” corroborating evidence, thus “effectively narrow[ing]” the rule. She proposed instead, “evidence, if any, corroborating the statement”—language the DOJ and U.S. Attorneys had supported during the drafting process. Professor Capra reported that the Advisory Committee had considered “the existence or absence of any” corroborating evidence, but were satisfied with that the word “any” in the current draft, coupled with the committee note, made sufficiently clear that “you don’t have to have [corroborating evidence], but it’s good to have.” Judge Sessions and Professor Capra agreed to add “if any” to the published version of the proposed amendments. Another judge member asked whether the amended rule implied that the corroborating evidence must be admitted at trial; Professor Capra clarified that it did not, and will consider making that clear in the note. The Advisory Committee will continue to discuss the topic of corroborating evidence in the future.

A reporter wondered what “negative implications” removing the term “material,” or equating materiality with relevance, could have for other rules. Professor Capra explained that Rule 807’s use of “material,” which does not appear anywhere else in the Evidence Rules, is a historical anomaly: Congress added paragraph (a)(2) when the Evidence Rules were first enacted, despite the Advisory Committee’s deliberate decision not to use the word “material.” Courts struggled to define the term, finally equating materiality with relevance for the purposes of Rule 807. In Professor Capra’s opinion, these complications were “all the better reason to take it out.”

On the subject of the notice provision, a judge member emphasized that lawyers and judges would “vastly prefer” the residual hearsay to be proffered before—rather than during—trial to give the court adequate time to rule on its admissibility. She suggested that the Advisory Committee make clear in the committee note that use of “the good-cause exception will be unusual or rare.” Although, as Judge Sessions added, the timing of the proffer is a factor “inherent within good cause,” the Advisory Committee will consider emphasizing the importance of timely notice in reducing surprise and promoting early resolution of the issue.

Two members raised issues related to deleting the requirement of the declarant’s address from the notice provision. Citing privacy concerns, an academic member proposed removing the requirement of the declarant’s name as well. Judge Sessions and Professor Capra felt that this would not give sufficient notice; whereas a known declarant’s address is easily obtainable from other sources, the declarant would be virtually impossible to identify without a name. And in any event, a protective order can be sought in the event of security concerns. An attorney member wondered whether removing the address requirement, which forces the proponent to exercise care in confirming the declarant’s identity, might create practical problems. He suggested soliciting input from attorneys as to potential unintended consequences. Professor Capra said that the Advisory Committee had already done so in the New York area and had not received any negative feedback, but will monitor the issue during the comment period. He added that the committee note makes clear that an attorney in need of an address can seek it through the court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Evidence Rule 807, subject to the modification made during the meeting.**

*Information Items*

*Evidence Rule 801(d)(1)(A) – Audio-Visual Recordings of Prior Inconsistent Statements.* Evidence Rule 801(d)(1) exempts certain out-of-court statements from the rule against hearsay—making them admissible as substantive evidence rather than for impeachment only—when the witness is present and subject to cross-examination. Prior inconsistent statements, which raise reliability concerns, are deemed “not hearsay” under Rule 801(d)(1)(A) if they were made “under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.”

The Advisory Committee is considering whether to expand Rule 801(d)(1)(A)’s exemption for prior inconsistent statements beyond those made under oath during a legal proceeding (see Agenda Book Tab 6A, pp. 741-42). The Advisory Committee has already rejected one approach used in some states—admitting *all* prior inconsistent statements—due to concerns that, absent more, there is no way to ensure their reliability. Instead, it is considering a more “modest,” “conservative” approach: broadening Rule 801(d)(1)(A) to include prior inconsistent statements recorded audio-visually. The advantages of this approach are that the audio-visual record confirms that the statement was, in fact, made, and the possibility of using statements as substantive evidence should encourage law enforcement to record interactions with suspects. The DOJ has also proposed making prior inconsistent statements admissible substantively when the witness acknowledges having made the statement. The Advisory Committee is in the process of seeking comments from stakeholders on the practical effect of more liberal admission of prior inconsistent statements and will continue to discuss the issue.

*Evidence Rule 606(b) – Juror Testimony after Peña-Rodriguez.* Evidence Rule 606(b) generally prohibits jurors from testifying about “any statement made or incident that occurred during the jury’s deliberations,” subject to limited exceptions. On March 6, 2017, the U.S. Supreme Court held in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), that an analogous state rule had to yield so the trial court could consider the Sixth Amendment implications of a juror’s “clear statement” that he “relied on racial stereotypes or animus to convict [the] criminal defendant.” The Advisory Committee is considering whether and how to amend Evidence Rule 606(b) in light of *Peña-Rodriguez* (see Agenda Book Tab 6A, pp. 742-43).

*Evidence Rule 404(b) – “Bad Acts” Evidence.* The current version of Rule 404(b)(2) requires the prosecution to give reasonable notice of evidence of crimes, wrongs, or other “bad acts” that will be introduced at trial—but only if the defendant so requests. Because this requirement disproportionately affects inmates with less competent counsel, “all sides agree” that it should be revisited (see Agenda Book Tab 6A, pp. 743-44). “More controversial,” especially for the DOJ, is a proposal that would require the proponent of propensity evidence to set forth in a notice the chain of inferences showing that the evidence is admissible for a permissible purpose under Rule 404(b)(2). This issue will be considered at future meetings.

*Upcoming Symposium – Rule 702 and Expert Evidence.* In conjunction with its fall 2017 meeting, the Advisory Committee will host a symposium on scientific and technological developments regarding expert testimony, including challenges raised in the last few years to forensic expert evidence, which might justify amending Evidence Rule 702 (see Agenda Book Tab 6A, pp. 744-45). The symposium will take place on Friday, October 27, 2017, at Boston College Law School.

Judge Sessions reminded the Standing Committee that this meeting would be his last as chair and that he would be succeeded by Judge Debra A. Livingston, a current member of the Advisory Committee. Professor Capra and the members of the Standing Committee commended Judge Sessions for his work.

### **LEGISLATIVE REPORT**

Julie Wilson delivered the Legislative Report, which summarized RCS’s efforts to track legislation implicating the federal rules. The 115th Congress has introduced a number of bills that would either directly or effectively amend the Civil Rules, Criminal Rules, and Section 2254 Rules (see Agenda Book Supplemental Materials, pp. 30-35). The Standing Committee discussed two bills that have already passed the House of Representatives, the *Lawsuit Abuse Reduction Act of 2017* (“LARA”) and the *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*.

### **CONCLUDING REMARKS**

Judge Campbell thanked the Standing Committee members and other attendees for their preparation and their contributions to the discussion before adjourning the meeting. The Standing Committee will next meet on January 4-5, 2018, in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf  
Secretary, Standing Committee



# TAB 1B

**THIS PAGE INTENTIONALLY BLANK**

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

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

1. Approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2-7
  
2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and  
  
b. Approve proposed revisions effective December 1, 2017 to Bankruptcy Official Forms 25A, 25B, 25C, 26 (renumbered respectively as 425A, 425B, 425C, and 426), 101, 309F, 309G, 309H, and 309I, and approve proposed revisions effective December 1, 2018 to Official Forms 417A and 417C, to govern all proceedings in bankruptcy cases commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 10-21
  
3. Approve the proposed amendments to Civil Rules 5, 23, 62, and 65.1, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 24-29
  
4. Approve the proposed amendments to Criminal Rules 12.4, 45, and 49, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 31-35

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

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

§	Federal Rules of Appellate Procedure .....	pp. 8-10
§	Federal Rules of Bankruptcy Procedure .....	pp. 21-23
§	Federal Rules of Civil Procedure .....	pp. 29-31
§	Federal Rules of Criminal Procedure.....	pp. 35-39
§	Federal Rules of Evidence .....	pp. 39-41
§	Judiciary Strategic Planning .....	pp. 41-42

**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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

The Committee on Rules of Practice and Procedure (Standing Committee) met in Washington, D.C. on June 12–13, 2017. All members were present.

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

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee’s Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee’s Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; and Dr. Tim Reagan and Dr. Emery G. Lee III, of the Federal Judicial Center. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

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

## **FEDERAL RULES OF APPELLATE PROCEDURE**

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

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, with a recommendation that they be approved and transmitted to the Judicial Conference. Proposed amendments to these rules were circulated to the bench, bar, and public for comment in August 2016.

#### Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs)

The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.” One comment was filed in support of the proposed amendment.

The advisory committee recommended no changes to the published proposals to amend Rules 8(a), 11(g), and 39(e), but recommended minor revisions to Rule 8(b). First, to conform proposed amendments with Civil Rule 65.1, the advisory committee recommended rephrasing the heading and the first sentence of Rule 8(b) to refer only to “security” and “security provider” (and not to mention specific types of security, such as a bond, stipulation, or other undertaking). Second, the advisory committee changed the word “mail” to “send” in Rule 8(b) to conform Rule 8(b) to the proposed amendments to Rule 25. The advisory committee modified the Committee Note to explain these revisions. The Standing Committee approved the proposed amendments to Rules 8(a) and (b), 11(g), and 39(e).

#### Rule 25 (Filing and Service)

The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. The proposed amendment to

Rule 25(a)(2)(B)(i) requires a person represented by counsel to file papers electronically, but allows exceptions for good cause and by local rule.

The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures and, in consultation with other advisory committees, establishes a uniform national signature provision. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other advisory committees, the advisory committee recommended several minor revisions to the proposed amendments as published. First, minor changes were needed to take into consideration amendments to subdivision (a)(2)(C) that became effective in December 2016 and altered the text of that section. Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). The advisory committee recommended replacing the language published for public comment with a new provision drafted jointly with the other advisory committees. Third, another comment revealed an ambiguity in the clause structure of the proposed Rule 25(c)(2), which was addressed by separating the two methods of service using "(A)" and "(B)."

The advisory committee received several comments arguing that unrepresented parties should have the same right to file electronically as represented parties. These comments noted that electronic filing is easier and less expensive than filing non-electronically. The advisory committee considered these arguments at its October 2016 and May 2017 meetings, but decided against allowing unrepresented parties the same access as represented parties given potential difficulties caused by inexperienced filers and possible abuses of the filing system. Under the

proposed amendment, unrepresented parties have access to electronic filing by local rule or court order.

The Standing Committee approved the proposed amendments to Rule 25, as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

#### Rule 26 (Computing and Extending Time)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for technical, conforming changes to Rule 26. Rule 26(a)(4)(C) refers to Rules 25(a)(2)(B) and 25(a)(2)(C). The recent amendments to Rule 25 have renumbered these subdivisions to be Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii). Therefore, the references in Rule 26 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Rule 26.

#### Rules 28.1 (Cross-Appeals) and 31 (Serving and Filing Briefs)

The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule” (JCUS-SEP 15, pp. 28-30). These rules currently provide only 14 days after service of the response brief to file a reply brief. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 28.1(f)(4) and 31(a)(1). The advisory committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. To maintain consistency in measuring time periods in increments of seven days when possible, the advisory committee proposed that the time period to file a reply should be extended to 21 days.

The advisory committee received two comments in support of the published proposal. The advisory committee recommended approval of the proposed amendments without further



changes. The Standing Committee approved the proposed amendments to Rules 28.1(f)(4) and 31(a)(1).

#### Rule 29 (Brief of an Amicus Curiae)

Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. Given the arguable merit of these local rules, the advisory committee proposed to add an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the advisory committee revised its proposed amendment to Rule 29 in two ways. First, amendments that went into effect in December 2016 renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. To match the renumbering, the advisory committee moved the exception from the former subdivision (a) to the new subdivision (a)(2) and copied the exception into the new subdivision (b)(2). Second, the advisory committee rephrased the exception authorizing a court of appeals to “prohibit the filing of or strike” an amicus brief (rather than “strike or prohibit the filing of” the brief), making the exception more chronological without changing the meaning or function of the proposed amendment.

The advisory committee received six comments in opposition to the proposed amendment. These commenters asserted that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further asserted that the amendment could prove wasteful if an amicus curiae pays an attorney to write a brief which the court then strikes. The amicus curiae likely would not know the identity of the judges on the

appellate panel when filing the brief and would have no options once the court strikes the brief. The advisory committee considered these comments, but concluded that the necessity of the amendment was demonstrated by local rules carving out the exception and that the merits of the amendment outweigh the concerns.

One commenter observed that the proposed amendment should not change “amicus-curiae brief” to “amicus brief.” The advisory committee understands the criticism but recommended the change for consistency with the rest of Rule 29.

The Standing Committee approved the proposed amendment to Rule 29, after making minor revisions to the proposed rule and committee note.

#### Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)

In August 2016, the Standing Committee published proposed amendments to Rule 41. Five public comments were received, which prompted the advisory committee to recommend several revisions.

First, in response to commenters’ observations that a court might wish to extend the time for good cause even if exceptional circumstances do not exist, the advisory committee deleted the following sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Second, the advisory committee recommended renumbering subdivision (d)(2)(B) to subdivision (d)(2). In response to a comment regarding a potential gap in the rule, the advisory committee added a proposed new clause that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

The Standing Committee approved the proposed amendments to Rule 41, after making minor revisions to the proposed rule and committee note.

#### Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed *in forma pauperis* must complete Form 4, question 12 of which currently asks litigants to provide the last four digits of their social security numbers. The advisory committee undertook an investigation and determined that no current need exists for this information. Accordingly, the advisory committee recommended deleting this question.

The advisory committee received two comments in support of the proposal and recommended no changes to the proposed amendment. The Standing Committee approved the proposed amendments to Form 4.

#### Form 7 (Declaration of Inmate Filing)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for a technical, conforming change to Form 7. Form 7 contains a note that refers to Rule 25(a)(2)(C). The recent amendments to Rule 25 have renumbered this subdivision as Rule 25(a)(2)(A)(iii). The reference in the note on Form 7 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Form 7.

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

**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Appellate Procedure are set forth in Appendix A, with an excerpt from the advisory committee's report.

### ***Rules Approved for Publication and Comment***

The advisory committee submitted proposed amendments to Rules 3(d), 13, 26.1, 28(a)(1), and 32(f) with a request that they be published for comment in August 2017.

#### **Rules 3 (Appeal as of Right—How Taken) and 13 (Appeals from the Tax Court)**

In light of the proposed changes to Rule 25, the advisory committee recommended changes to Rules 3(d) and 13(a) regarding the use of the term “mail.”

Rule 3(d) concerns the clerk’s service of the notice of appeal. The advisory committee concluded that subdivisions (d)(1) and (3) require two changes, changing the words “mailing” and “mails” to “sending” and “sends” to make electronic filing and service possible. In addition, the portion of subdivision (d)(1) providing that the clerk must serve the defendant in a criminal case “either by personal service or by mail addressed to the defendant” is deleted to eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 13 concerns appeals from the Tax Court, and currently uses the word “mail” in both its first and second sentences. Changing the reference in the first sentence of the rule would allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. The second sentence expresses a rule that applies when a notice is sent by mail, which is still a possibility. Accordingly, the advisory committee does not recommend a change to the second sentence.

#### **Rules 26.1 (Corporate Disclosure Statement), 28 (Briefs), and 32 (Form of Briefs, Appendices, and Other Papers)**

Rule 26.1 currently requires corporate parties and amici curiae to file corporate disclosure statements. These disclosure requirements assist judges in making a determination whether they have any interest in a party’s related corporate entities that would disqualify them from hearing an appeal.

Various local rules require disclosures that go beyond the current requirements of Rule 26.1, and the advisory committee considered whether the national rules should be similarly amended.

The advisory committee proposes adding a new subdivision (b) requiring disclosure of organizational victims in criminal cases. This new subdivision (b) conforms Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2) that was published for public comment in August 2016. The only differences are the introductory words “[i]n a criminal case” and the reference to “Rule 26.1(a)” instead of Criminal Rule 12.4(a)(1).

The advisory committee proposes adding a new subdivision (c) requiring disclosure of the name of the debtor or debtors in bankruptcy cases when they are not included in the caption. The caption might not include the name of the debtor in appeals from adversary proceedings, such as a dispute between two of the debtor’s creditors.

The advisory committee recommended moving current subdivisions (b) and (c) to the end of Rule 26.1 by designating them as subdivisions (e) and (f). These provisions address supplemental filings and the number of copies that must be filed. Moving the subdivisions will make it clear that they apply to all of the disclosure requirements. The advisory committee also considered amending current subdivision (b) to make it conform to the proposed amendments to Criminal Rule 12.4(b). The Criminal Rules Advisory Committee, however, informed the advisory committee of its intention to scale back its proposed revision of Criminal Rule 12.4(b), obviating the need for corresponding changes to Appellate Rule 26.1(b).

Changing Rule 26.1’s heading from “Corporate Disclosure Statement” to “Disclosure Statement” will require minor conforming amendments to Rules 28(a)(1) and 32(f). References to “corporate disclosure statement” must be changed to “disclosure statement” in each rule.

The Standing Committee unanimously approved all of the above amendments for publication in August 2017.

### ***Information Items***

At its May 2017 meeting, the advisory committee declined to move forward with several suggestions under consideration. First, the advisory committee considered a proposal to amend Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as “published” decisions. Second, the advisory committee considered a new proposal regarding an amendment to the Civil Rules to include a provision similar to Appellate Rule 28(j). Third, the advisory committee declined to move forward with a proposal to amend Rules 4 and 27 to address certain types of subpoenas. Finally, the advisory committee determined not to accept an invitation to amend Rule 28 to specify the manner of stating the question presented in appellate briefs.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

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

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, new Part VIII Appendix, and Official Forms 25A, 25B, 25C, 26, 101, 309F, 309G, 309H, 309I, 417A, and 417C, with a recommendation that they be approved and transmitted to the Judicial Conference.

Most of these proposed changes were published for comment in 2016, and the others were recommended for final approval without publication. The Standing Committee recommended Rule 7004 and Official Form 101 for final approval at its January 2017 meeting, and recommended the remaining rules and forms for final approval at its June 2017 meeting.

## Rules and Official Forms Published for Comment in 2016

*Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).* Rule 3002.1(b) and (e) apply with respect to home mortgage claims in chapter 13 cases. These provisions impose notice requirements on the creditor to enable the debtor or trustee to make mortgage payments in the correct amount during a pending bankruptcy case.

There were three comments submitted in response to the publication. The commenters each expressed support for the amendments, with some suggested wording changes. One commenter noted that although the published rule purported to prevent a proposed payment change from going into effect if a timely objection was filed, under time counting rules the deadline for filing the objection was actually later than the scheduled effective date of the payment change. The advisory committee revised the proposed amendment to eliminate this possibility.

*Rule 5005 (Filing and Transmittal of Papers).* Rule 5005(a)(2) addresses filing documents electronically in federal bankruptcy cases. The amendments published for public comment in August 2016 sought consistency with the proposed amendments to Civil Rule 5(d)(3), which addresses electronic filing in civil cases. The publication of changes to Bankruptcy Rule 5005 and Civil Rule 5 were coordinated with similar proposed changes to the criminal and appellate electronic filing rules: Criminal Rule 49 and Appellate Rule 25.

The advisory committee received six comments on the proposed amendments to Rule 5005(a)(2). Most comments addressed the wording of subdivision (a)(2)(C), the intent of which was to identify who can file a document and what information is required in the signature block. Other advisory committees received similar comments with respect to the parallel

provision in their rules, and the advisory committees each worked to coordinate language to clarify the provisions.

In addition, the advisory committee received one comment (also submitted to the other advisory committees) opposing the default wording in the rule that pro se parties cannot file electronically. Along with the other advisory committees, the Bankruptcy Rules Committee chose to retain a default against permitting electronic filing by pro se litigants. It reasoned that under the published version of the rule pro se parties would be able to request permission to file electronically, and courts would be able to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

The Standing Committee approved the proposed amendments to Rule 5005(a)(2), as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

*Proposed amendments to conform Bankruptcy Appellate Rules to recent or proposed amendments to the Federal Rules of Appellate Procedure (“FRAP”).* A large set of FRAP amendments went into effect on December 1, 2016. The amendments to Bankruptcy Rules, Part VIII, Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022, Official Forms 417A and 417C, and the Part VIII Appendix discussed below bring the Bankruptcy Rules into conformity with the relevant amended FRAP provisions. One additional amendment to Rule 8011 was proposed to conform to a parallel FRAP provision that was also published for comment last summer.

- Rules 8002 (Time for Filing Notice of Appeal) and 8011 (Filing and Service; Signature), and Official Form 417A (Notice of Appeal and Statement of Election).

Bankruptcy Rules 8002(c) and 8011(a)(2)(C) include inmate-filing provisions that are virtually identical to, and are intended to conform to, the inmate-filing provisions of Appellate Rules 4(c) and 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed



by inmates if certain specified requirements are met, including that the documents are deposited in the institution's internal mail system on or before the last day for filing. To implement the FRAP amendments, a new appellate form was adopted to provide a suggested form for an inmate declaration under Rules 4 and 25. A similar director's form was developed for bankruptcy appeals, and the advisory committee published an amendment to Official Form 417A (Notice of Appeal and Statement of Election) that will alert inmate filers to the existence of the director's form.

Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4) added an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. A similar amendment to Rule 8002(b) was published in August 2016.

No comments were submitted specifically addressing the proposed amendments to Rule 8002, Rule 8011, or Official Form 417A.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), 8016 (Cross-Appeals), and 8022 (Motion for Rehearing), Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements), and Part VIII Appendix (length limits). The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word limits for documents prepared using a computer. For documents prepared without using a computer, the existing page limits were retained. The FRAP amendments also reduced the existing word limits of Rules 28.1 (Cross-Appeals) and 32 (Briefs).

Appellate Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) was amended to reflect the changed length limits. Finally, a new appendix was adopted that collects all the FRAP length limits in one chart.

The advisory committee proposed parallel amendments to Rules 8013(f), 8015(a)(7) and (f), 8016(d), and 8022(b), along with Official Form 417C. In addition, it proposed an appendix to Part VIII that is similar to the FRAP appendix.

In response to publication, no comments were submitted that specifically addressed the amendments to these provisions or to the appendix.

· Rule 8017 (Brief of an Amicus Curiae). Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The recent amendment to Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule previously did not address the topic; it was limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment does not require courts to accept amicus briefs regarding rehearing, but it provides guidelines for such briefs as are permitted. The advisory committee proposed a parallel amendment to Rule 8017.

In August 2016 the Appellate Rules Advisory Committee published another amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit or strike the filing of an amicus brief if the filing would result in the disqualification of a judge. The Bankruptcy Rules Advisory Committee proposed and published a similar amendment to Rule 8017 to maintain consistency between the two sets of rules.

Two comments were submitted in response to publication of Rule 8017. One commenter opposed the amendment because amicus briefs are usually filed before an appeal is assigned to a

panel of judges, and thus the amicus and its counsel would not know whether recusal would later be required. The advisory committee rejected this comment because the proposed amendment merely permits, but does not *require*, striking amicus briefs in order to address recusal issues. The other commenter opposed the wording of the amendment, suggesting instead a more extensive and detailed rewrite of the rule. The advisory committee rejected this comment as beyond the scope of the proposed amendment.

*Additional Amendments to the Bankruptcy Appellate Rules.* In addition to the conforming amendments to Part VIII rules discussed above, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published last summer. None of the comments submitted in response to publication specifically addressed these amendments. Following discussion of the amendments at its spring 2017 meeting, the advisory committee recommended final approval of each rule as published, except for Rule 8023, which the advisory committee sent back to a subcommittee for further consideration.

- Rule 8002 (Time for Filing Notice of Appeal). The proposed amendment to Rule 8002(a) adds a new subdivision (a)(5) defining entry of judgment. The proposed amendment clarifies that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and either (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

- Rule 8006 (Certifying a Direct Appeal to the Court of Appeals). The proposed amendment to Rule 8006 adds a new subdivision (c)(2) that authorizes the bankruptcy judge to

file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.

- Rule 8018.1 (District Court Review of a Judgment that the Bankruptcy Court Lacked Constitutional Authority to Enter). New Rule 8018.1 authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy court lacked constitutional authority to enter a final judgment. The procedure would eliminate the need to remand an appeal to the bankruptcy court merely to recharacterize the judgment as proposed findings and conclusions.

*Additional Amendments to Official Forms.*

- Official Form 309F (Notice of Chapter 11 Bankruptcy Case—For Corporations or Partnerships). As published, the proposed amendment to Official Form 309F would change the instructions at line 8 of the form. The instructions currently require a creditor who seeks to have its claim excepted from the discharge under § 1141(d)(6)(A) of the Bankruptcy Code to file a complaint by the stated deadline. The applicability of the deadline is in some circumstances unclear, however, so the proposed revision leaves it to the creditor to decide whether the deadline applies to its claim.

Two comments were submitted in response to publication of the amendment. One supported adoption of the amendment, while the other pointed out that the proposed change necessitated a similar change at line 11 of the form. The advisory committee voted unanimously to amend the last sentence of line 11 in a manner similar to the amendment to line 8, and recommended both changes for final approval.

- Official Forms 25A, 25B, 25C, and 26 (Small Business Debtor Forms and Periodic Report Regarding Value, Operations and Profitability). Most bankruptcy forms have been modernized over the past several years through the Forms Modernization Project, but the

advisory committee deferred consideration of four forms relating to chapter 11 cases—specifically, Official Forms 25A, 25B, 25C, and 26. After reviewing each of these forms extensively and revising and renumbering them, the advisory committee obtained approval to publish the revised versions in August 2016. The small business debtor forms—Forms 25A, 25B, and 25C—are renumbered as Official Forms 425A, 425B, and 425C. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for chapter 11 small business debtors. Official Form 425C is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee.

Official Form 26 (renumbered as Official Form 426 and rewritten and formatted in the modernized form style) requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest.

The advisory committee received three comments proposing some suggested changes in response to the forms' publication. The advisory committee made minor changes in response to the comments and recommended final approval of the four forms.

#### Conforming Changes Proposed without Publication

*Rules and Forms Considered at the January 2017 Committee Meeting.* At the Standing Committee's January 2017 meeting, the advisory committee recommended final approval without publication of technical conforming amendments to Rule 7004(a)(1) and Official Form 101.

- Rule 7004 (Process; Service of Summons, Complaint). Rule 7004 incorporates by reference certain components of Civil Rule 4. In 1996, Rule 7004(a) was amended to incorporate by reference the provision of Civil Rule 4(d)(1) addressing a defendant's waiver of service of a summons.

In 2007, Civil Rule 4(d) was amended to change, among other things, the language and placement of the provision addressing waiver of service of summons. The cross-reference to Civil Rule 4(d)(1) in Rule 7004(a), however, was not changed at that time.

Accordingly, the advisory committee recommended an amendment to Rule 7004(a) to refer to Civil Rule 4(d)(5). Based on its technical and conforming nature, the advisory committee also recommended that the proposed amendment be submitted to the Judicial Conference for approval without prior publication.

· Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). The advisory committee identified a need to amend question 11 on Official Form 101, the voluntary petition for individual debtors, to make the wording consistent with § 362(l)(5)(A) of the Bankruptcy Code and thereby fix an inadvertent error introduced into the form when it was revised as part of the forms modernization project in 2015. Question 11 currently only requires debtors who wish to remain in their residences to provide information concerning an eviction judgment against them. The Bankruptcy Code, however, requires that such information be reported regardless of whether the debtor wishes to stay in the residence.

The advisory committee recommended amending question 11 on Form 101 to correct this error. Based on the technical and conforming nature of the proposed change, the advisory committee recommended that the proposed amendments be submitted to the Judicial Conference for approval without prior publication.

*Rules and Forms Considered at the June 2017 Standing Committee Meeting.* At the Standing Committee's June 2017 meeting, the advisory committee recommended that the changes described below to Rules 7062, 8007, 8010, 8011, 8021, and 9025, and Official Forms 309G, 309H, and 309I, be approved and transmitted to the Judicial Conference.

· Rule 8011 (Filing and Service; Signature). Rule 8011 addresses filing, service, and signatures in bankruptcy appeals. At the time the advisory committee recommended publication of the proposed amendments to Rule 5005 regarding electronic filing, service, and signatures in coordination with the other advisory committees' e-filing rules, it overlooked the need for similar amendments to Rule 8011. It accordingly recommended that conforming amendments to Rule 8011 consistent with the e-filing changes to Rule 5005 and its counterpart, Appellate Rule 25, be approved without publication so that all of the e-filing amendments could go into effect at the same time. The Standing Committee accepted the advisory committee's recommendation, approving amendments to Rule 8011 after incorporating stylistic changes it made to the other e-filing amendments at the meeting.

· Rules 7062 (Stay of Proceedings to Enforce a Judgment), 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings), 8010 (Completing and Transmitting the Record, 8021 (Costs), and 9025 (Security: Proceedings Against Sureties). The advisory committee recommended conforming amendments to Rules 7062, 8007, 8010, 8021, and 9025, consistent with proposed and published amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using instead the broader term "bond or other security." The Advisory Committee on Appellate Rules also published amendments to Appellate Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology.

Because Bankruptcy Rule 7062 incorporates the whole of Civil Rule 62, the new security terminology will automatically apply in bankruptcy adversary proceedings when the civil rule goes into effect. Rule 62, however, also includes a change that would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The civil rule change

addresses a gap between the end of the judgment-stay period and the 28-day time period for making certain post-judgment motions in civil practice. Because the deadline for post-judgment motions in bankruptcy is 14 days, however, the advisory committee recommended an amendment to Rule 7062 that would maintain the current 14-day duration of the automatic stay of judgment. As revised, Rule 7062 would continue incorporation of Rule 62, “except that proceedings to enforce a judgment are stayed for 14 days after its entry.”

Because the amendments to Rules 7062, 8007, 8010, 8021, and 9025 simply adopt conforming terminology changes from the other rule sets that have been recommended for final approval, and maintain the status quo with respect to automatic stays of judgments in the bankruptcy courts, the advisory committee recommended approval of these rules without publication.

- Official Forms 309G, 309H, and 309I. The advisory committee recommended minor amendments to each of the notice forms that are sent to creditors upon the filing of a chapter 12 or chapter 13 case. The proposed form changes conform to a pending amendment to Rule 3015 scheduled to take effect on December 1, 2017, absent contrary congressional action.

Rule 3015 governs the filing, confirmation, and modification of chapter 12 and chapter 13 plans. The pending amendment to the rule eliminates the authorization for a debtor to serve a plan summary, rather than a copy of the plan itself, on the trustee and creditors. This change was made as part of the adoption of a national chapter 13 plan form or equivalent local plan form. Official Forms 309G, 309H, and 309I are the form notices that are sent to creditors to inform them of the hearing date for confirmation of the chapter 12 or 13 plan, as well as objection deadlines. The forms also indicate whether a plan summary or the full plan is included with the notice. The proposed changes to Official Forms 309G, 309H, and 309I remove references to the inclusion of a “plan summary,” as that option will no longer be available. The



advisory committee recommended approval of these conforming changes without publication so that they could take effect at the same time as the pending change to Rule 3015.

The Standing Committee voted unanimously to support the recommendations of the advisory committee.

**Recommendation:** That the Judicial Conference:

- a. Approve proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and the new Part VIII Appendix, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
- b. Approve proposed revisions effective December 1, 2017 to Bankruptcy Official Forms 25A, 25B, 25C, 26 (renumbered respectively as 425A, 425B, 425C, and 426), 101, 309F, 309G, 309H, and 309I, and approve proposed revisions effective December 1, 2018 to Official Forms 417A and 417C, to govern all proceedings in bankruptcy cases commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

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

#### ***Rules and Official Form Approved for Publication and Comment***

The advisory committee submitted proposed amendments to Bankruptcy Rules 2002, 4001, 6007, 9036, and 9037 and Official Form 410 for public comment in 2017. The Standing Committee agreed with all recommendations.

**Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements).**

The proposed amendment to Rule 4001(c) governs the process for a debtor in possession or a trustee to obtain credit outside the ordinary course of business in a bankruptcy case. Among other things, the rule outlines eleven different elements of post-petition financing that must be

explained in a motion for approval of a post-petition credit agreement. The suggestion was made that because Rule 4001(c) is designed to provide needed information for approval of credit in chapter 11 business cases, its application in chapter 13 consumer bankruptcy cases was unhelpful, where typical post-petition credit agreements concern loans for items such as personal automobiles or household appliances. The advisory committee agreed and proposed an amendment to Rule 4001(c) that removes chapter 13 from the bankruptcy cases subject to the rules' requirements.

Rules 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee) and 9036 (Notice by Electronic Transmission), and Official Form 410 (Proof of Claim)

The proposed amendments to Rules 2002(g) and 9036 and Official Form 410 are part of the advisory committee's ongoing review of noticing matters in bankruptcy. The proposed amendments would enhance the use of electronic noticing in bankruptcy cases in a number of ways. The amendment to Official Form 410 would allow even creditors who are not registered with the court's case management/electronic case files (CM/ECF) system the option to receive notices electronically, instead of by mail, by checking a box on the form. The proposed change to Rule 2002(g) would expand the references to "mail" to include other means of delivery and delete "mailing" before "address," thereby allowing a creditor to receive notices by email. And the amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to other persons by electronic means that the person consents to in writing.

Rule 6007 (Abandonment or Disposition of Property)

The proposed amendment to Rule 6007(b) addresses a suggestion that the advisory committee received concerning the process for abandoning estate property under § 554 of the Bankruptcy Code and Bankruptcy Rule 6007. The suggestion highlights the inconsistent

treatment afforded notices to abandon property filed by the bankruptcy trustee under subdivision (a) and motions to compel the trustee to abandon property filed by parties in interest under subdivision (b). Specifically, Rule 6007(a) identifies the parties that the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a party in interest's motion to compel abandonment. In order to more closely align the two subdivisions of the rule, the proposed amendment to Rule 6007(b) would specify the parties to be served with the motion to abandon and any notice of the motion, and establish an objection deadline. In addition, the proposed amendment would clarify that, if a motion to abandon under subdivision (b) is granted, the order effects the abandonment without further notice, unless otherwise directed by the court.

#### Rule 9037 (Privacy Protection For Filings Made with the Court)

New subsection (h) to Rule 9037 would provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. The proposed amendment responds to a suggestion from the Committee on Court Administration and Case Management that a uniform national procedure is needed for belated redaction of personal identifiers. The proposed new subdivision (h) sets forth a procedure for a moving party to identify a document that needs to be redacted and for providing a redacted version of the document. Upon the filing of such a motion, the court would immediately restrict access to the original document pending determination of the motion. If the motion is ultimately granted, the court would permanently restrict public access to the originally filed document and provide access to the redacted version in its place.

The Standing Committee unanimously approved all of the above amendments for publication in August 2017.

## FEDERAL RULES OF CIVIL PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 5, 23, 62, and 65.1, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2016.

#### Rule 5 (Serving and Filing Pleadings and Other Papers)

The proposed amendments to Civil Rule 5 are part of the inter-advisory committee project to develop rules for electronic filing and service.

Proposed amendments to Rule 5(b)(2)(E) address electronic service. The present rule allows electronic service only if the person to be served has consented in writing. The proposal deletes the requirement of consent when service is made on a registered user through the court's electronic filing system. Written consent is still required when service is made by electronic means outside the court's system (*e.g.*, discovery materials).

Proposed amendments to Rule 5(d) address electronic filing. Present Rule 5(d)(3) permits papers to be filed, signed, or verified by electronic means if permitted by local rule; a local rule may require electronic filing only if reasonable exceptions are allowed. In practice, most courts require registered users to file electronically. Proposed Rule 5(d)(3)(A) recognizes this reality by establishing a uniform national rule that makes electronic filing mandatory for parties represented by counsel, except when non-electronic filing is allowed or required by local rule, or for good cause.

Proposed Rule 5(d)(3)(B) addresses filings by pro se parties. Under the proposal, courts would retain the discretion to permit electronic filing by pro se parties through court order or local rule. Any court order or local rule requiring electronic filing for pro se parties must allow

reasonable exceptions. While the advisory committee recognizes that some pro se parties are fully capable of electronic filing, the idea of *requiring* a pro se party to electronically file raised concerns that such a requirement could effectively deny access to persons not equipped to do so.

Proposed Rule 5(d)(3)(C) establishes a uniform national signature provision.

Commentators found ambiguity in the published language regarding whether the rule would require that the attorney's username and password appear on the filing. In response, the advisory committee, in consultation with the other advisory committees, made revisions to increase the clarity of this amendment.

Finally, the proposal includes a provision addressing proof of service. The current rule requires a certificate of service but does not specify a particular form. The published version of the rule provided that a notice of electronic filing generated by the court's CM/ECF system constitutes a certificate of service. Following the public comment period, the advisory committee revised the proposal to provide that no certificate of service is required when a paper is served by filing it with the court's system. The proposal also addresses whether a certificate of service is required for a paper served by means other than the court's electronic filing system: if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service, and if the paper is not filed, a certificate of service is not required to be filed unless required by local rule or court order.

### Rule 23 (Class Actions)

The proposed amendments to Rule 23 are the result of more than five years of study and consideration by the advisory committee, through its Rule 23 subcommittee. As previously reported, the decision to take up this effort was prompted by several developments that seemed to warrant reexamination of Rule 23, namely: (1) the passage of time since the 2003 amendments to Rule 23 went into effect; (2) the development of a body of case law on class

action practice; and (3) recurrent interest in Congress, including the 2005 adoption of the Class Action Fairness Act. In developing the proposed amendments to Rule 23, the subcommittee attended nearly two dozen meetings and bar conferences with diverse memberships and attendees. In addition, in September 2015, the subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments.

After extensive consideration and study, the subcommittee narrowed the list of issues to be addressed in proposed rule amendments. The proposed amendments published in August 2016 addressed the following seven issues:

1. Requiring earlier provision of information to the court as to whether the court should send notice to the class of a proposed settlement (known as “frontloading”);
2. Making clear that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by “bad faith” class action objectors;
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2); and
7. A proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.

The majority of the comments received during the public comment period for all the proposed Civil Rules amendments—both written and in the form of testimony at three public hearings—addressed the Rule 23 proposals. The advisory committee received some comments

urging it to reconsider topics it had determined not to pursue, as well as comments urging it to consider additional topics not previously considered. As to those topics that were included in the proposals published for public comment, most comments addressed the modernization of notice methods and the handling of class member objections to proposed class action settlements.

The subcommittee and advisory committee carefully considered all of the comments received. Minor changes were made to the proposed rule language, and revisions to the committee note were aimed at increasing clarity and succinctness.

Rules 62 (Stay and Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety)

The proposed amendments to Rule 62 and Rule 65.1 are the product of a joint subcommittee with the Advisory Committee on Appellate Rules. The advisory committee received three comments on the proposed amendments, each of which was supportive.

The proposed amendments to Rule 62 make three changes. First, the period of the automatic stay is extended to 30 days. This change would eliminate a gap in the current rule between automatic stays under subsection (a) and the authority to order a stay pending disposition of a post-judgment motion under subsection (b). Before the Time Computation Project, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, or 59, or 60. The Time Computation Project reset at 28 days the time for motions under Rules 50, 52, or 59. It also reset the expiration of the automatic stay in Rule 62(a) at 14 days after entry of judgment. An unintentional result was that the automatic stay expired halfway through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay “pending disposition of any of” these motions. The proposed amendment to Rule 62(a) addresses this gap by extending the time of an automatic stay to 30 days. The proposal further provides that the automatic stay takes effect “unless the court orders otherwise.”

Second, the proposed amendments make clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through final disposition on appeal. The former provision for securing a stay on posting a supersedeas bond is retained, without the word “supersedeas.” The right to obtain a stay on providing a bond or other security is maintained with changes that allow the security to be provided before an appeal is taken and that allow any party, not just an appellant, to obtain the stay.

Third, subdivisions (a) through (d) are rearranged, carrying forward with only a minor change the provisions for staying judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement.

The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond. Additional changes were made following the public comment period in order to conform Rule 65.1 to the proposed amendments to Appellate Rule 8(b). As discussed above, the Advisory Committee on Appellate Rules has proposed amendments to the Appellate Rules to conform those rules with the amendments to Civil Rule 62, including amendments to Appellate Rule 8(b). Appellate Rule 8(b) and Civil Rule 65.1 parallel one another. The proposed amendments to Rule 65.1 imitate those to Appellate Rule 8(b), namely, removing all references to “bond,” “undertaking,” and “surety,” and substituting the words “security” and “security provider.”

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

**Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 5, 23, 62, and 65.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.



The proposed amendments to the Federal Rules of Civil Procedure are set forth in Appendix C, with an excerpt from the advisory committee’s report.

### *Information Items*

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

The advisory committee continues its consideration of Rule 30(b)(6), the rule addressing deposition notices or subpoenas directed to an organization. As previously reported, a subcommittee was formed in April 2016 and tasked with considering whether reported problems with the rule should be addressed by rule amendment.

In its initial consideration, the subcommittee worked on initial drafts of possible amendments that might address the problems reported by practitioners. The subcommittee—guided by feedback it received on the initial draft rule amendments from both the Standing Committee and the advisory committee, as well as ongoing research—continues to evaluate which issues could feasibly be remedied by rule amendment. As part of that evaluation, the subcommittee solicited comment about practitioners’ general experience under the rule as well as the following six potential amendment ideas:

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

The advisory committee posted the invitation for comment on the federal judiciary's rulemaking website and asked for submission of any comments by August 1, 2017. Members of the subcommittee continue to participate in various conferences around the country to receive input from the bar.

### Social Security Disability Review Cases

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

By way of background, 42 U.S.C. § 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." Every year, 17,000 to 18,000 of these review cases are brought in the district courts and account for approximately 7 percent of all civil filings. The national average remand rate is about 45 percent, a figure that includes rates as low as 20 percent in some districts and as high as 70 percent in others. Different districts employ widely differing procedures in deciding these actions.

The advisory committee's consideration of the suggestion is in the beginning stages. For now, the advisory committee has determined that more information and data need to be collected, and there are plans to form a subcommittee to fully consider various options, including either developing a separate set of rules or addressing social security cases in more detail within the Civil Rules. Discussion of the suggestion and its possible implications occurred at both the

spring 2017 meeting of the advisory committee and the June 2017 meeting of the Standing Committee.

## **FEDERAL RULES OF CRIMINAL PROCEDURE**

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

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 12.4, 45, and 49, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2016.

#### Rule 12.4 (Disclosure Statement)

Criminal Rule 12.4 governs the parties' disclosure statements. When Rule 12.4 was added in 2002, the committee note stated that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

When Rule 12.4 was promulgated, the Code of Conduct for United States Judges treated all victims entitled to restitution as parties. As amended in 2009, the Code no longer treats any victim who may be entitled to restitution as a party, and requires disclosure only when the judge has an "interest that could be affected substantially by the outcome of the proceeding." The proposed amendment to Rule 12.4(a) aims to make the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments. The proposed amendment allows the court to relieve the government's burden of making the required disclosures upon a showing of "good cause." The amendment will avoid the need for burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small.

Rule 12.4(b) would also be amended. First, the proposed amendments specify that the time for making the disclosures is within 28 days after the defendant's initial appearance.

Second, it revises the rule to refer to “later” (rather than “supplemental”) filings. As published, the proposal included a third amendment adding language to make clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were submitted. One stated that the proposed changes were unobjectionable. The other suggested that the phrase “good cause” should be limited to “good cause related to judicial disqualification.” The advisory committee fully considered this suggestion, but concluded that in context the amendment was clear as published.

Following the public comment period, the advisory committee learned that the proposed clarifying language in subsection (b) would be inconsistent with language used in Civil Rule 7.1(b)(2). To make the language in the parallel rules consistent, the advisory committee revised its proposed amendment to Rule 12.4(b)(2) to require a party to “promptly file a later statement if any required information changes.”

#### Rules 49 (Serving and Filing Papers) and 45 (Computing and Extending Time)

The proposed amendments to Criminal Rule 49 and a conforming amendment to Rule 45(c) are part of the inter-advisory committee project to develop rules for electronic filing, service, and notice. The decision by the Advisory Committee on Civil Rules to pursue a national rule mandating electronic filing in civil cases required reconsideration of Criminal Rule 49(b) and (d), which provide that service and filing “must be made in the manner provided for a civil action,” and Rule 49(e), which provides that a local rule may require electronic filing only if reasonable exceptions are allowed.

In its consideration of the issue, the advisory committee concluded that the default rule of electronic filing and service proposed by the Advisory Committee on Civil Rules could be problematic in criminal cases. Therefore, with the approval of the Standing Committee, the

advisory committee drafted and published a stand-alone criminal rule for filing and service that included provisions for electronic filing and service.

Substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5 include the provisions regarding unrepresented parties—under proposed Rule 49, an unrepresented party must file non-electronically, unless permitted to file electronically by court order or local rule. In contrast, under proposed Civil Rule 5, an unrepresented party may be required to file electronically by a court order or local rule that allows reasonable exceptions. Proposed Rule 49 also contains two provisions that do not appear in Civil Rule 5, but were imported from other civil rules: it incorporates the signature provision of Civil Rule 11(a); and substitutes the language from Civil Rule 77(d)(1), governing the clerk’s duty to serve notice of orders, for the direction in current Rule 49 that the clerk serve notice “in a manner provided for in a civil action.”

Proposed Rule 49 also requires all nonparties, represented or not, to file and serve non-electronically in the absence of a court order or local rule to the contrary. If a district decides that it would prefer to adopt procedures that would allow all represented media, victims, or other filers to use its electronic filing system, that remains an option by local rule.

A conforming amendment to Rule 45 eliminates cross-references to Civil Rule 5 that would be made obsolete by the proposed amendments to Rule 49. The proposed conforming amendment replaces those references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

Following the public comment period, the advisory committee reviewed both the public comments on Rule 49 specifically, as well as the comments that implicated the common provisions of the electronic service and filing across the federal rule sets. In response to those

comments, the advisory committee revised two subsections in the published rule and added a clarifying section to another portion of the committee note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required, as well as certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised during inter-committee discussions. The published criminal rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed “within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court’s electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court’s electronic filing system, the certificate must be filed “within a reasonable time after service or filing, whichever is later.” Because that might be read as barring filing of the certificate with the paper, subsection (b)(1) was revised to state that the certificate must be filed “with it or within a reasonable time after service or filing.”

The second change revised the language of the signature provision in proposed Rule 49(b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. In consultation with the other advisory committees, minor revisions were made to clarify this provision.

In response to concerns expressed by clerks of court, a clarifying sentence was added to the committee note to Rule 49(a)(3) and (4) stating that “[t]he rule does not make the court

responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

The advisory committee also considered, but declined to adopt, recommendations by some commentators that it extend the default of electronic filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to electronic filing was considered extensively during the drafting process and after publication. The advisory committee adhered to its policy decision and made no further changes following publication.

The Standing Committee voted unanimously to support the recommendations of the advisory committee.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 12.4, 45, and 49 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are set forth in Appendix D, with an excerpt from the advisory committee’s report.

### ***Rules Approved for Publication and Comment***

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a request that they be published for comment in August 2017. The Standing Committee unanimously approved the advisory committee’s recommendations.

#### **New Rule 16.1 (Pretrial Discovery Conference and Modification)**

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and electronically stored information (ESI). While the

subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment.

Following robust discussion at the fall 2016 meeting, the advisory committee determined to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. The mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges.

There was not unanimity among the mini-conference participants on the threshold question of whether a rule amendment is warranted—the private practitioners and public defenders expressed strong support for a rule change, and the prosecutors were not initially convinced there was a need for a rule change. All participants agreed, however, on the following points: ESI discovery problems can arise in both small and large cases; ESI issues are handled very differently among districts; and most criminal cases now include ESI.

Discussion quickly focused on the ESI Protocol and whether it was sufficient to solve most problems encountered by practitioners.<sup>1</sup> Defense attorneys reported that some prosecutors and judges are neither aware of the ESI Protocol nor the problems some disclosures pose for the defense. While the prosecutors and Department of Justice attorneys who attended the mini-conference were not initially convinced a rule was needed, they did agree with the defense attorneys that there is a lack of awareness of the ESI Protocol and that more training would be useful.

---

<sup>1</sup>The “ESI Protocol” is shorthand for the “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.



Consensus eventually developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol. Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible in order to address variation among cases.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. The proposed rule has two sections. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.

Because technology changes rapidly, proposed Rule 16.1 does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified.

Two factors support the decision to place the new language in a new Rule 16.1 rather than in Rule 16. First, the new rule addresses activity that is to occur shortly after arraignment and well in advance of discovery. Second, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for

the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases—provides that the petitioner/moving party “may submit a reply . . . within a time period fixed by the judge.” The committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, but the subcommittee determined that the text of the rule itself is contributing to a misreading of the rule by a significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing “within a time fixed by the judge” as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendment confirms that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence: “The moving party may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.”

The word “may” was retained because it is a word used in other rules, and the advisory committee did not want to cast doubt on its meaning. However, to address any possible misreading of the rule due to the use of “may,” the following sentence was added to the committee notes: “We retain the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’” The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

### ***Information Item***

The advisory committee, through its cooperator subcommittee, continues its mandate to develop possible rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is considering what rules amendments would be required to implement the specific recommendations of the Judicial Conference Committee on Court Administration and Case Management (CACM) in its guidance issued in June 2016. The subcommittee is also considering alternative approaches and rules amendments other than those contemplated in the CACM guidance.

The subcommittee will present its work to the full advisory committee in the fall. The advisory committee will share its initial conclusions with the AO's Task Force on Protecting Cooperators. The Task Force on Protecting Cooperators plans to issue its report and recommendations to the AO Director in 2018. If the recommendations include proposals to amend the Criminal Rules, such proposals will be considered through the Rules Enabling Act process, including opportunity for public comment.

## **FEDERAL RULES OF EVIDENCE**

### ***Rule Approved for Publication and Comment***

The Advisory Committee on Rules of Evidence submitted a proposed amendment to Rule 807 (Residual Exception), with a request that it be published for comment in August 2017.

This proposed amendment caps more than two years of study concerning possible changes to Rule 807—the residual exception to the hearsay rule. After extensive deliberation, including a symposium held at the Pepperdine University School of Law, the advisory committee decided against expansion of the residual exception, but concluded several problems with current Rule 807 could be addressed by rule amendment. First, the requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions

is exceedingly difficult to apply, because no unitary standard of trustworthiness exists in the Rule 803 and 804 exceptions. Given the disutility of the “equivalence” standard, the advisory committee determined that a better, more user-friendly approach is simply to require the judge to find that the hearsay offered under Rule 807 is supported by sufficient guarantees of trustworthiness.

Second, uncertainty exists regarding whether courts should consider corroborating evidence in determining whether a statement is trustworthy. The advisory committee determined that a clarifying amendment would promote uniformity in the evaluation of trustworthiness under the residual exception. The proposed amendment specifically allows a court to consider corroborating evidence in evaluating trustworthiness.

Third, the requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The advisory committee determined that the rule would be improved by deleting the references to “material fact,” “interest of justice,” and “purpose of the rules.”

In addition, the proposed amendment addresses several issues with the current notice requirements. The current rule makes no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court has the power to excuse untimely notice, no matter how good the cause. Other notice provisions in the evidence rules contain good cause provisions, so adding such a provision to Rule 807 promotes uniformity. The requirement in the current rule that the proponent disclose “particulars” has led to confusion and is eliminated. A requirement that notice be in writing has been added to eliminate disputes about whether notice was ever provided. Finally, the proposed amendment eliminates as nonsensical the current requirement that the proponent disclose the declarant’s

address when the witness is unavailable—which is usually the situation in which residual hearsay is offered.

The advisory committee retained the requirement from the original Rule 807 that the proponent must establish that the proffered hearsay is more probative than any other evidence the proponent can reasonably obtain to prove the point. Retaining the “more probative” requirement indicates an intent to improve the residual exception, not to expand it. The “more probative” requirement ensures that the rule will be invoked only when it is necessary to do so. Furthermore, under the amendment the proponent cannot invoke the residual exception unless the court finds that the proffered hearsay is not admissible under any of the Rule 803 or 804 exceptions.

The Standing Committee voted unanimously to approve the proposed amendment to Rule 807 for publication in August 2017.

### ***Information Items***

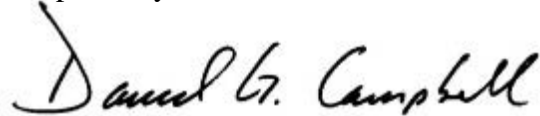
As part of its fall 2017 meeting, the advisory committee will host a symposium on Rule 702 and developments regarding expert testimony, including the challenges raised in the last few years to forensic expert evidence. The advisory committee is also seeking comments from stakeholders on the practical effect of more liberal admission of audio-visual records of prior inconsistent statements under Rule 801(d)(1)(A).

## **JUDICIARY STRATEGIC PLANNING**

Judge William Jay Riley, the judiciary’s planning coordinator, asked each committee of the Judicial Conference for an update on strategic initiatives being implemented in support of the *Strategic Plan for the Federal Judiciary*. On July 5, 2017, the Standing Committee provided

Judge Riley a written update on two initiatives—Implementing the 2010 Civil Litigation Conference and Evaluating the Impact of Technological Advances.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Gregory G. Garre	Rod J. Rosenstein
Daniel C. Girard	Amy J. St. Eve
Susan P. Graber	Larry D. Thompson
Frank M. Hull	Richard C. Wesley
Peter D. Keisler	Jack Zouhary

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Revisions to the Official Bankruptcy Forms (proposed amendments and supporting report excerpts)

Appendix C – Federal Rules of Civil Procedure (proposed amendments and supporting report excerpt)

Appendix D – Federal Rules of Criminal Procedure (proposed amendments and supporting report excerpt)

# TAB 1C

**THIS PAGE INTENTIONALLY BLANK**



**Effective December 1, 2017**

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress in April 2017;  
approved by the JCUS and transmitted to the Supreme Court in September 2016

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

**Effective December 1, 2018**

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

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

**Effective December 1, 2018**

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

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

**Effective December 1, 2018**

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

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

**Effective (no earlier than) December 1, 2019**

Current Step in REA Process: published for public comment in August 2017; comment period closes February 2018  
 REA History: approved for publication by the Standing Committee in June 2017

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

**THIS PAGE INTENTIONALLY BLANK**

# TAB 2

**THIS PAGE INTENTIONALLY BLANK**



Report on the Task Force on Protecting Cooperators

Item 2 will be an oral report.

**THIS PAGE INTENTIONALLY BLANK**

# TAB 3

**THIS PAGE INTENTIONALLY BLANK**

# TAB 3A

**THIS PAGE INTENTIONALLY BLANK**

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

DAVID G. CAMPBELL  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

**MEMORANDUM**

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

**FROM:** Hon. Donald W. Molloy, Chair  
Advisory Committee on Criminal Rules

**RE:** Report of the Advisory Committee on Criminal Rules

**DATE:** December 8, 2017

---

**I. Introduction**

The Advisory Committee on Criminal Rules met on October 24, 2017, in Chicago, Illinois. There are no action items. This report discusses the following information items:

- The Committee's continued consideration of draft rules implementing the CACM Guidance and other options to protect cooperators;
- The Federal Judicial Center's preparation of materials concerning complex criminal litigation;
- A suggestion to amend Rule 32 concerning the provision of presentence reports (PSRs);
- A suggestion to amend Rule 43 to permit the court to sentence by videoconference; and

- A suggestion to revise Rule 16 to provide additional pretrial discovery concerning the testimony of expert witnesses.

Finally, in lieu of a formal hearing, the Rule 16.1 Subcommittee invited Professor Daniel McConkie to make a statement and answer questions on proposed Rule 16.1, which has been published for public comment.

## **II. Draft Rules to Implement CACM’s Guidance Concerning Cooperators**

The main topic for discussion at the meeting was the report of the Cooperator Subcommittee. The Subcommittee had drafted multiple alternative sets of rules amendments to implement CACM’s Guidance concerning cooperators. The Subcommittee’s Chair, Judge Kaplan, summarized the Subcommittee’s report, including:

- Amendments designed to implement CACM’s Guidance exactly as the Guidance was written, without change;
- Amendments omitting CACM’s requirement for bench conferences in every case during the plea and sentencing hearings;
- Amendments omitting the bench conferences and sealing the entirety of various documents that may refer to cooperation, rather than requiring bifurcation and the filing of sealed supplements to each document;
- Amendments omitting the bench conferences and directing these documents to be submitted directly to the court and not filed, rather than filed under seal; and
- Amendments designed to implement CACM’s Guidance and to supplement it with additional amendments that might be deemed necessary or desirable to carry out CACM’s approach and objectives (“CACM plus”).

These five options were discussed in detail in a memorandum from the reporters, which included as appendices side-by-side charts allowing comparison of the changes required for each approach. That memorandum and the appendices are included as Tab B. Judge Kaplan noted that the Subcommittee had earlier drafted yet another set of amendments directing that documents that may refer to cooperation be added to the PSR rather than filed with the court, but the Task Force on Protecting Cooperators (which Judge Kaplan also chairs) had rejected that approach.<sup>1</sup> A side-by-side comparison of all five options noted above appears in a chart included as an attachment to this report.

---

<sup>1</sup> A variety of concerns were expressed about the PSR approach. It would reduce transparency, alter the character of the PSR, and impose new responsibilities and burdens on Probation Officers.



Additionally, Judge Kaplan stated that the Subcommittee had worked on, but had not completed, a new draft Rule 49.2 taking a different approach: limiting remote access to categories of documents that frequently refer to cooperation, but retaining full access to those documents at the courthouse.

Judge Kaplan informed the Committee that after multiple telephone conferences to discuss and refine the various sets of amendments based on the CACM Guidance, the Subcommittee had voted unanimously to advise the Committee that:

- (1) the Subcommittee believes that the CACM rules package included in its report would accurately implement CACM's Guidance; and
- (2) the Subcommittee does not recommend the adoption of that CACM rules package or any of the other alternative sets of rules amendments designed as variations on CACM's Guidance.

Although there was no dissent from these conclusions in the Subcommittee, there were two abstentions. Judge Kaplan abstained because of his role as chair of the Task Force. Mr. Wroblewski abstained, stating that the Department of Justice had not reached a final position on these issues.

After Judge Kaplan's presentation and a detailed discussion of the various amendments, each member of the Committee had the opportunity to state his or her views on the two questions before the Committee:

- (1) whether the CACM rules package would fully implement CACM's Guidance, and
- (2) whether the Committee should recommend to the Standing Committee the adoption of the CACM rules package drafted by the Subcommittee or the adoption of any of the alternative variations on those rules amendments.

On the first question, all members of the Committee endorsed the view that the CACM rules package drafted by the Subcommittee would faithfully implement CACM's Guidance.

On the second question, no member of the Committee spoke in favor of adopting that package of amendments. The statements of each member are summarized on pages 8-19 of the draft minutes, which are included as Tab C. Several main themes emerged. First, all Committee members agreed that the threat to cooperators is a serious problem that must be addressed. Second, members were strongly opposed to CACM's recommendations requiring bench

---

Additionally, some of the materials including information about cooperation (such as plea documents, transcripts and Rule 35 materials) are normally produced and filed after the preparation of the PSR.

conferences in every case at the plea and sentencing hearings. Third, many members expressed the view that the CACM Guidance goes too far. Some members characterized the amendments necessary to implement that guidance as a dramatic sea change in the rules. Others opposed a solution based on secrecy in judicial proceedings, and described the CACM amendments as shifting from the current culture of transparency to a culture of secrecy. Some members were concerned that the Federal Judicial Center's survey did not provide a sufficient empirical basis for CACM's recommendations. Several members expressed the view that it was not appropriate to make dramatic across-the-board legislative changes. Rather, the situation called for more modest changes, as well as continuing to monitor and to learn from the experience in various districts before imposing national solutions.

Many members also expressed the view that administrative changes might substantially reduce the need for amendments to the Rules of Criminal Procedure, and that those non-rules options should be explored first. The Task Force working group has developed recommendations for changes by the Bureau of Prisons (BOP) that should help to reduce inmates' use of court records to identify and target cooperators. Additionally, another Task Force working group was considering changes in the CM/ECF system that would make it more difficult for anyone to identify cooperators from the court's records. Mr. Wroblewski, for example, stated that the Department was not sure rule amendments are the best approach and was very hopeful that the BOP and CM/ECF working groups will offer solutions that would significantly reduce the problem.

Although no member expressed the view that the Committee should endorse the CACM rules, a motion was made and seconded to defer action on the Subcommittee's recommendations until the Committee had more information on possible changes at BOP facilities and in the CM/ECF systems. This motion failed on a voice vote.

The motion to adopt the Subcommittee's recommendation to oppose the CACM rules (and all of the variations on those rules) passed with two no votes. Judge Kaplan and Mr. Wroblewski abstained.

The Committee also voted unanimously to hold in abeyance any final recommendation on the Subcommittee's alternative approach of limiting remote public access, reflected in its working draft of new Rule 49.2. Judge Kaplan explained that the new Rule's approach of limiting remote access overlapped to a degree with proposals under consideration by the Task Force's CM/ECF working group. Although the Committee deferred action on any new remote access rule, members provided feedback to the Subcommittee on its working draft of Rule 49.2.

### **III. Federal Judicial Center Initiatives Concerning Complex Criminal Litigation**

The Committee heard a report from the Rule 16.1 Subcommittee, chaired by Judge Kethledge, which had been charged with exploring with the Federal Judicial Center (FJC) the possibility of developing a manual on complex criminal litigation that would parallel the

Manual on Complex Civil Litigation. At the FJC's request, the Subcommittee prepared a short list of topics it considered important to include in such a manual. Ms. Laural Hooper, senior research associate at the FJC, explained that the FJC will develop a special topics webpage focusing exclusively on complex criminal litigation, which will initially include materials that it has already prepared in a more user-friendly fashion. No decision has been made yet whether all of the materials originally prepared for judicial audiences will be available to the public. Many new FJC publications are made available online, rather than in hard copy, and are prepared by outside academics and lawyers, rather than in house. The FJC is willing to take the next steps on developing the manual, including getting input on new topics, from a broader group.

#### **IV. New Rules Suggestions**

The Committee discussed three new rules suggestions.

First, Judge Molloy brought to the Committee's attention a suggestion concerning the provision of PSRs to defendants that the Committee deemed related to its ongoing consideration of protection of cooperators. Rule 32(e)(2) now provides:

The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

Judge Molloy reported that in his district Probation Officers were receiving requests from defendants for copies of their PSRs. There was concern that those making such requests might have been facing pressure to provide materials that could reveal whether they had cooperated. The Committee discussed the history of Rule 32(e)(2), which deliberately granted the right to receive the PSR to the defendant (as well as counsel), in order to increase the chances that incorrect information would be identified and corrected. Members noted, however, that in practice PSRs are served only on counsel, not on the defendant. In light of the concerns that the provision of PSRs directly to defendants might contribute to the problem of threats and harm to cooperators, the question whether Rule 32(e)(2) should be revised was referred to the Cooperator Subcommittee.

Second, the Committee considered a suggestion from Judge Donald Walters that it consider amending Rule 43 to allow sentencing by videoconference. He proposed that unless the defendant objects and shows good cause, a judge should be allowed to conduct a sentencing hearing from a remote location, appearing in the courtroom via videoconference. Committee members agreed that there is a significant difference between sentencing by videoconference and sentencing in person. When both the defendant and the judge are in the courtroom, the judge can better determine whether the defendant understands the proceedings and has not been forced or threatened. Moreover, sentencing is the most human thing judges do, and it has very grave consequences for the defendant. Members also noted unusual situations where, under the existing rule, a court has conducted sentencing with a remotely located defendant, when the

*defendant* preferred to appear by videoconference rather than in person. Accordingly, the Committee decided not to pursue the proposed amendment.

The Committee decided to table a third proposal, by Judge Jed Rakoff, to amend Rule 16 to bring pretrial disclosure of the testimony of expert witnesses in criminal cases closer to the pretrial discovery now provided in civil cases. The Committee was informed that the Evidence Committee would be taking up questions regarding the admissibility of expert testimony, and it decided to defer further consideration of Judge Rakoff's proposal for the time being.

#### **V. Comments on Proposed Rule 16.1**

Finally, in lieu of a holding formal hearing (which been cancelled) the Committee heard from Professor Daniel McConkie, regarding proposed Rule 16.1. Professor McConkie expressed his support of the general direction taken in the published rule, suggested that the rule be revised to require that the parties confer "in good faith" and report back to the court, and answered several questions from Committee members.

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

<b>Full CACM Procedures: Sealed Supplements &amp; Courtroom Restrictions</b>	<b>CACM Sealing; No Courtroom Restrictions</b>	<b>Whole Document Sealing; No Courtroom Restrictions</b>	<b>No Document Filing; No Courtroom Restrictions</b>	<b>CACM Plus/Complete</b>
<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>
<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>
<p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p><b><u>(B) Bench Conference Required.</u></b> [In every case.] The disclosure must include a bench conference at which the government must disclose any agreement by the defendant to cooperate with the government or must state that there is no such agreement.</p>	<p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p>	<p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p>	<p><i>(2) Disclosing <u>and Submitting</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p>	<p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p><b><u>(B) Bench Conference Required.</u></b> [In every case.] The disclosure must include a bench conference. <b>Any discussion of or reference to the defendant’s cooperation or lack of cooperation with the government must take place at this conference and not in open court.</b></p> <p><i>[NOTE: CACM guidance mandates bench conferences for prosecutor to state whether or not the defendant cooperated, but does not regulate the discussion of cooperation in open court during plea proceeding by anyone. CACM guidance literally would allow the parties to discuss or refer to the defendant’s cooperation or lack of cooperation in open court, so long as they disclosed the agreement or made the required statement at the bench.]</i></p>

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

<b>Full CACM Procedures: Sealed Supplements &amp; Courtroom Restrictions</b>	<b>CACM Sealing; No Courtroom Restrictions</b>	<b>Whole Document Sealing; No Courtroom Restrictions</b>	<b>No Document Filing; No Courtroom Restrictions</b>	<b>CACM Plus/Complete</b>
<p><b>[Rule 11(c)(2) cont]</b></p> <p><b>(C) Filing the Agreement.</b> The parties must file the plea agreement.<sup>1</sup> The agreement must include a public part and a sealed supplement that contains any discussion of or references to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p style="text-align: center;">* * *</p>	<p><b>(B) Filing the Agreement.</b> The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or references to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p style="text-align: center;">* * *</p>	<p><b>(B) Filing the Agreement.</b> The plea agreement must be filed under seal. The agreement must remain under seal indefinitely until the court orders otherwise.</p> <p style="text-align: center;">* * *</p>	<p><b>(B) Submitting the Agreement.<sup>2</sup></b> The plea agreement must be submitted directly to the Sentencing Judge, the United States Probation Department, and all counsel of record for the government and the defendant who signed the agreement, and not filed [with the court/in the record].</p> <p style="text-align: center;">* * *</p>	<p><b>(C) Filing the Agreement.</b> The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or reference to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until otherwise ordered by the court.</p> <p><b>(D) Filing Submissions Concerning the Agreement.</b> If a written submission concerning the plea agreement is filed, the submission must include a public part and a sealed supplement. The supplement must contain any discussion of or references to the defendant’s cooperation or lack of cooperation with the government. The supplement must remain under seal indefinitely until otherwise ordered by the court.</p> <p style="text-align: center;">* * *</p> <p><i>[NOTE: Subcommittee discussion confirmed that parties do file memoranda in connection with plea proceedings that may discuss cooperation or lack of cooperation. Such memoranda are not addressed by CACM guidance.]</i></p>

<sup>1</sup> The CACM Guidance appears to assume that plea agreements will be filed, though that procedure is not universal. Our drafts in Columns 1 to 3 reflect that interpretation of the Guidance. Requiring all plea agreements to be filed will create the national uniformity in docket sheets that CACM has concluded is necessary to fully protect cooperators. However, the CACM guidance is not explicit on this point, and it would be possible to revise these columns to refer to plea agreements “if filed.” We note also that the CACM Guidance did not specifically address written submissions by the parties concerning pleas, and our amendments do not address such submissions. But in early discussions Subcommittee members indicated such pleadings are fairly common, and we have included written submissions concerning pleas in Appendix B, which shows amendments that might supplement the Full CACM approach to implement its goals.

<sup>2</sup> Alternatively, no amendment would be required if CACM promulgated a national no filing rule. Action by CACM might be appropriate because (1) the current rules do not speak to what should and should not be filed, and (2) CACM guidance can be provided much more rapidly than a rules amendment.

## Side by Side Example Rule Amendments–Variations on CACM Procedures November 2017

Full CACM Procedures: Sealed Supplements & Courtroom Restrictions	CACM Sealing; No Courtroom Restrictions	Whole Document Sealing; No Courtroom Restrictions	No Document Filing; No Courtroom Restrictions	CACM Plus/Complete
<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>
<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>
<p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b>(3) Bench Conference.</b> If the bench conference required by Rule 11(c)(2) is transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</p>	<p><u><i>(no change)</i></u><sup>3</sup></p>	<p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b>(3) Filing Under Seal.</b> If the <del>proceedings required by Rule 11(c)(2)</del> are transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</p>	<p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b>(3) No filing.</b> [Unless the court orders otherwise,] the recording or transcript of the plea proceeding must not be filed with the court.<sup>4</sup></p>	<p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b>(3) Bench Conference.</b> If filed, any recording or transcript of a bench conference required by Rule 11(c)(2) must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</p> <p><i>[NOTE: The rule contemplates a recording. CACM’s guidance referenced transcripts only. If it is possible that a recording could be filed in addition to or instead of a transcript, the words “recording or” may need to be included.]</i></p>

<sup>3</sup> Alternatively, a rule could require the government to identify portions of the plea transcript that might prove or disprove cooperation and either redact or file those portions under seal. This proposal does not include such a rule.

<sup>4</sup> As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference’s policy, and perhaps also legislation.

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

<b>Rule 32</b> <b>(g) Submitting the Report; Written Memoranda.</b>	<b>Rule 32</b> <b>(g) Submitting the Report; Written Memoranda.</b>	<b>Rule 32</b> <b>(g) Submitting the Report; Written Memoranda.</b>	<b>Rule 32</b> <b>(g) Submitting the Report; Written Memoranda.</b>	<b>Rule 32</b> <b>(g) Submitting the Report; Written Memoranda.</b>
<p><b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.</p> <p><b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The supplement must contain:</p> <p><b><u>(A) any discussion of or reference to the defendant’s cooperation, including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or</u></b></p> <p><b><u>(B) a statement that there has been no cooperation.</u></b></p> <p style="text-align: center;">* * *</p>	<p><b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.</p> <p><b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed is with the court, it must have a public portion and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The sealed supplement must contain:</p> <p><b><u>(A) any discussion of or reference to the defendant’s cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1 or</u></b></p> <p><b><u>(B) a statement that there has been no cooperation.</u></b></p> <p style="text-align: center;">* * *</p>	<p><b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.</p> <p><b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must be sealed. The memorandum must remain under seal indefinitely until the court orders otherwise.</p> <p style="text-align: center;">* * *</p>	<p><b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.</p> <p><b><u>(2) Memoranda.</u></b> Any written sentencing memorandum must be submitted directly to</p> <ul style="list-style-type: none"> <li>• <u>the sentencing judge,</u></li> <li>• <u>counsel of record for the government, and</u></li> <li>• <u>counsel of record for the [individual] defendant in the underlying prosecution.</u></li> </ul> <p>The memorandum must not be filed with the court.</p> <p style="text-align: center;">* * *</p>	<p><b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any un-resolved objections, the grounds for those objections, and the probation officer’s comments on them.</p> <p><b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The sealed supplement must contain:</p> <p><b><u>(A) any discussion of or reference to the defendant’s cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or</u></b></p> <p><b><u>(B) a statement that there has been no cooperation.</u></b></p> <p><b><u>(3) Filing Presentence Report.</u></b> If filed, the presentence report and appended documents must be filed under seal. The presentence report must remain under seal indefinitely until the court orders otherwise.</p> <p style="text-align: center;">OR, as alternative</p> <p><b><u>(3) No Filing of Presentence Report.</u></b> The presentence report [and appended documents] must be submitted directly to the sentencing judge, counsel of record for the government, and counsel of record for the [individual] defendant in the underlying prosecution, and must not be filed with the court.</p> <p><i><u>[NOTE: CACM’s Guidance does not mandate filing or sealing of the presentence report].</u></i></p>



## Side by Side Example Rule Amendments–Variations on CACM Procedures November 2017

Full CACM Procedures: Sealed Supplements & Courtroom Restrictions	CACM Sealing; No Courtroom Restrictions	Whole Document Sealing; No Courtroom Restrictions	No Document Filing; No Courtroom Restrictions	CACM Plus/Complete
Rule 32	Rule 32	Rule 32	Rule 32	Rule 32
(i) Sentencing <sup>5</sup>	(i) Sentencing	(i) Sentencing	(i) Sentencing	(i) Sentencing
<p style="text-align: center;">* * *</p> <p><i>(4) Opportunity to Speak</i></p> <p style="text-align: center;">* * *</p> <p><b>(C) <del>In Camera</del> Proceedings <u>In Camera or at the Bench.</u></b></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> [In every case,] <u>Sentencing must include a conference at the bench for discussion of the defendant’s cooperation or lack of cooperation with the government. The transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.</u></p>	(no change)	(no change)	(no change) <sup>6</sup>	<p style="text-align: center;">* * *</p> <p><i>(4) Opportunity to Speak</i></p> <p style="text-align: center;">* * *</p> <p><b>(C) <del>In Camera</del> Proceedings <u>In Camera or at the Bench.</u></b></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> In every case, sentencing must include a conference [in camera or] at the bench. <u>Any discussion of or reference to the defendant’s cooperation or lack of cooperation with the government must take place at this conference and not in open court. The [recording or] transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.</u></p> <p style="text-align: center;">* * *</p> <p><i>[NOTE: CACM’s Guidance requires that every sentencing include a bench conference at which the parties may discuss cooperation or lack of cooperation, but does not regulate any mention of cooperation or lack of cooperation in open court during sentencing by anyone. Although the intent to bar any public mention of this subject is implicit in CACM’s Guidance, the Guidance text taken literally would allow the parties to discuss or refer to the defendant’s cooperation or lack of cooperation in open court, so long as they also discuss it at the bench. Because one or more participants in a sentencing hearing may want references to cooperation (or lack of it) to be on the record, it may be necessary to be more explicit. Subsection (ii) illustrates one option for more clarity.]</i></p>

<sup>5</sup> The CACM Guidance did not reference PSRs—though they frequently include information about cooperation—perhaps because PSRs are not universally filed and when filed are already universally sealed. Thus we do not include them in Columns 1 to 4. A revision to Rule 32(i) that would require a PSR, if filed, to be filed under seal is included in Appendix B, which CACM Plus amendments.

<sup>6</sup> As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference’s policy, and perhaps legislation.

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

Full CACM Procedures: Sealed Supplements & Courtroom Restrictions	CACM Sealing; No Courtroom Restrictions	Whole Document Sealing; No Courtroom Restrictions	No Document Filing; No Courtroom Restrictions	CACM Plus/Complete
				<p><b>[Rule 32, cont.]</b></p> <p><b><u>(l) Written References to Cooperation.</u></b></p> <p><b><u>(1) By a Party or Victim.</u></b> If a party or victim files a written submission regarding sentencing [with the court/ in the record], it must include a public portion and a sealed supplement. The sealed supplement must contain any discussion of or references to the defendant’s cooperation or lack of cooperation with the government [including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1]. “Submission” includes sentencing memoranda, objections under Rule 32(f), and evidence submitted under Rule 32(i)(2). The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p><b><u>(2) By the Judge.</u></b> If a written notice under Rule 32(h) or summary under Rule 32(i)(B) is filed [with the court/ in the record] it must include a public portion and a sealed supplement. The sealed supplement must contain any discussion of or references to the defendant’s cooperation or lack of cooperation with the government. The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p><i><u>[NOTE: CACM’s Guidance provides for sealed supplements to sentencing memos. But a number of other items sometimes filed in connection with sentencing may mention cooperation or lack of it. These include:</u></i></p> <ul style="list-style-type: none"> <li>• <i><u>objections to the PSR</u></i></li> <li>• <i><u>evidence submitted by victims and parties for sentencing</u></i></li> <li>• <i><u>notice by the court under Rule 32(h), and</u></i></li> <li>• <i><u>summaries under Rule 32(i)(B).</u></i></li> </ul> <p><i><u>CACM’s Guidance does not address any of these items. This shows what a rule might look like if the same “sealed supplement” approach were followed for all of these items. Also, this places these changes in a new subsection for Rule 32, rather than an amendment subdividing existing Rule 32(g) or (i).]</u></i></p>

## Side by Side Example Rule Amendments—Variations on CACM Procedures November 2017

Rule 35. Correcting or Reducing a Sentence.	Rule 35. Correcting or Reducing a Sentence.	Rule 35. Correcting or Reducing a Sentence.	Rule 35. Correcting or Reducing a Sentence.	Rule 35. Correcting or Reducing a Sentence.
(b) Reducing a Sentence for Substantial Assistance.	(b) Reducing a Sentence for Substantial Assistance.	(b) Reducing a Sentence for Substantial Assistance.	(b) Reducing a Sentence for Substantial Assistance.	(b) Reducing a Sentence for Substantial Assistance.
<p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p style="text-align: center;">* * *</p> <p><u>no change; see Rule 49 below)</u></p>	<p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion, <u>an order, and related documents under Rule 35(b)</u> must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> <p><i>[NOTE: CACM’s Guidance does not require that Rule 35 orders or memoranda be filed under seal, nor does it address the obvious import of a sealed entry after sentencing followed by an order reducing sentence. This version provides for sealing of orders and related documents.]</i></p>

## Side by Side Example Rule Amendments–Variations on CACM Procedures November 2017

Full CACM Procedures: Sealed Supplements & Courtroom Restrictions	CACM Sealing; No Courtroom Restrictions	Whole Document Sealing; No Courtroom Restrictions	No Document Filing; No Courtroom Restrictions	CACM Plus/Complete
<b>Rule 47</b>	<b>Rule 47</b>	<b>Rule 47</b>	<b>Rule 47</b>	<b>Rule 47</b>
<b>(b) Form and Content of a Motion.</b>	<b>(b) Form and Content of a Motion.</b>	<b>(b) Form and Content of a Motion.</b>	<b>(b) Form and Content of a Motion.</b>	<b>(b) Form and Content of a Motion.</b>
<p>A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.</p> <p><u>(no change)</u><sup>7</sup></p>	<p><u>(no change)</u></p>	<p><u>(no change)</u></p>	<p><u>(no change; see Rule 49 below)</u></p>	<p><b>(1) In Writing.</b> A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means.</p> <p><b>(2) Contents and Support.</b> A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.</p> <p><b>(3) Motions for Sentence Reduction.</b> Any motion for a sentence reduction under [Rule 35,] 18 U.S.C. §3553(e), [or U.S.S.G. §5K1.1],<sup>8</sup> together with supporting documents, must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><i>[NOTE: CACM’s Guidance makes no pro-vision for sealing § 3553(e) and §5K motions. This version amends rule 47 to require the government to file such motions under seal. Rule 35 is added in brackets here as an option for replacing or supplementing the amendment to that Rule requiring the motion to be filed under seal.]</i></p>

<sup>7</sup> The reporters’ initial subcommittee discussion draft included an amendment to Rule 47(b)(1) that provided: “Any motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must filed under seal.” Although we believe that the failure to seal these documents would undermine CACM’s goals, we omitted this provision from Columns 1 to 4 because of the Subcommittee’s tentative decision this spring to come forward with one proposal that implemented all of CACM’s recommendations but no additional provisions. Similar language, does, however, now appear in Column 2 of Appendix B (CACM plus/complete).

<sup>8</sup> There is no statutory requirement for a “motion” expressing the government’s support for a substantial assistance departure under § 5K1.1. Thus the Sentencing Commission may have the authority to provide that (1) no “motion” is required, and (2) the government must request consideration of a substantial assistance departure by other means, such as a letter to the court, that would not be filed. Action by the Commission would not, however, affect requests for substantial assistance for departures under 18 U.S.C. §3553(e), which requires a government “motion.”

**Side by Side Example Rule Amendments–Variations on CACM Procedures  
November 2017**

Full CACM Procedures: Sealed Supplements & Courtroom Restrictions	CACM Sealing; No Courtroom Restrictions	Whole Document Sealing; No Courtroom Restrictions	No Document Filing; No Courtroom Restrictions	No Remote Access
Rule 49	Rule 49	Rule 49	Rule 49 <sup>9</sup>	Rule 49
<u>(no change)</u>	<u>(no change)</u>	<u>(no change)</u>	<p><b><u>(b) Filing.</u></b></p> <p><b><u>(1) When Required; Certificate of Service.</u></b>  <del>Ordinarily, a</del>Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing. <b><u>But a motion for a sentencing reduction under Rule 35(b), 18 U.S.C. §3553(e), or U.S.S.G. §5K1.1 [and supporting documents] must be submitted directly to</u></b></p> <ul style="list-style-type: none"> <li>• <u>the sentencing judge.</u></li> <li>• <u>counsel of record for the government, and</u></li> <li>• <u>counsel of record for the [individual] defendant in the underlying prosecution.</u></li> </ul> <p><b><u>The motion must not be filed with the court.</u></b></p>	<u>(no change; see proposed amendment Rule 49.2)</u>

<sup>9</sup> Changes shown to proposed amendment sent to the Judicial Conference in August. New material dealing with cooperators is shown in red.

**THIS PAGE INTENTIONALLY BLANK**

# TAB 3B

**THIS PAGE INTENTIONALLY BLANK**



**MEMO TO: Cooperators Subcommittee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**DATE: August 24, 2017 (revised September 2017)**

The Subcommittee has been charged with providing the full Committee with (1) a set of amendments that would implement CACM’s recommendations, (2) its view on whether those amendments—or alternative Rules amendment(s)—should be recommended to the Standing Committee for adoption, and (3) any other new rules for cooperators it recommends. This memorandum provides several draft rules for discussion at the Subcommittee’s next conference call on August 31 at 10:15 EST.

As a preliminary matter we note, but do not discuss, two factors that may affect the Subcommittee’s decisions.

First, CACM’s recommendations, even if fully implemented, cannot fully eliminate the danger to cooperators, and there is no way to be certain how successful these recommendations would be in reducing threats and harm. The recommendations address only some, but not all of the myriad of ways that those interested in identifying cooperators learn who has and who has not assisted the government. These include, for example, plea and sentencing documents obtained by the defendant from his attorney then shared with others,<sup>1</sup> information about cooperation in documents that are not covered by CACM’s Guidance, information from family or associates outside the court and corrections systems, testimony by the defendant or others in open court, *Brady* and *Giglio* disclosures, the defendant’s removal from prison or jail to meet with prosecutors or appear in court, changes in the defendant’s litigation strategy (such as withdrawal from joint defense agreement or refusal to cooperate informally with co-defendants), a revised charging document that omits or reduces charges, delayed sentencing, the imposition of a sentence below the applicable mandatory minimum or below the Guideline range, or a post-sentencing reduction of punishment.

Second, the Task Force is exploring means other than rules changes that may reduce the threat to cooperators, though it is also uncertain how effective those efforts will be. Some of the

---

<sup>1</sup> For example, Rule 32(e)(2) provides that “the probation officer must give the presentence report to *the defendant*, the defendant’s attorney, and an attorney for the government . . . .” (emphasis added). Also, defense attorneys have told us they believe it is their ethical obligation to provide plea and sentencing documents to their clients. The Agenda for the Committee’s October meeting will include consideration of problems that have arisen under Rule 32(e)(2). Revisions might include an amendment requiring the probation officer to provide the presentence report only to the defense attorney to share with the defendant. This might allow a defense attorney to meet ethical obligations without allowing the client to retain a copy.

Task Force initiatives (particularly those for changes by the Bureau of Prisons) are fairly advanced and show significant promise. Perhaps the largest unknown—which has tremendous implications for proposals to amend the Criminal Rules—is what, if anything, can be done with the CM/ECF dockets to reduce the extent to which they communicate information about cooperation.

**Appendix A** presents the first four options side by side in a chart. All begin with the CACM Guidance, which is then modified in Columns 2 to 4.

- **Column 1 (Full CACM procedures)** provides amendments intended to fully implement CACM's Guidance, with no additional provisions that might carry further CACM's approach. The core recommendations are:
  - appending a sealed supplement to every plea agreement and sentencing memorandum;
  - requiring a bench conference in every case at the plea and sentencing stages where cooperation, or lack of cooperation, is discussed;
  - sealing the transcripts of the bench conferences; and
  - sealing all Rule 35 motions.
- **Columns 2 and 3** provide alternatives based on the CACM sealing approach; both omit CACM's requirement of bench conferences at the plea and sentencing stage in every case (and sealed transcripts of those portions of the hearing). They differ, however, in their treatment of the plea, sentencing, and Rule 35 documents that might mention cooperation.
  - **Column 2 (CACM/sealing with no courtroom restrictions)** incorporates CACM's requirements for sealed supplements to plea agreements and sentencing materials in all cases. The omission of mandated bench conferences is the only departure from CACM's recommendations.
  - **Column 3 (Whole document sealing/no courtroom restrictions)** includes neither CACM's requirement for bench conferences nor its requirement of sealed supplements for plea and sentencing documents in all cases. Instead, it seals the entirety of the critical documents.
- **Column 4 (no document filing; no courtroom restrictions)** likewise omits the requirement of bench conferences in each case, and prevents public access not by sealing documents that may discuss cooperation but by providing that those document not be filed with the court.

**Appendix B** also begins with the CACM Guidance. Column 1 shows the Full CACM approach from Appendix A. The second column shows additional amendments with protections that might be necessary to implement fully CACM's goals (CACM Plus), addressing items that may contain information about cooperation but that are not included in CACM's Guidance. The third column contains a brief explanation of the additions.

**Appendix C** provides new Rule 49.2, to implement the no-remote-access approach. This is an entirely different option that permits remote access to the record for parties only, retaining public and press access in person at the courthouse after showing identification. Like Civil Rule 5.2(c), on which it is modeled, the new Rule 49.2 recognizes that sealed documents would not be available at the courthouse absent a court order.

We begin with a discussion of the arguments for and against the elements of the CACM Guidance, and any problems posed by those proposals. For each element of the Guidance identified below, we add a discussion of any alternative approaches we have identified, including alternatives in Columns 2-4 of Appendix A.

We then turn to the alternative in Appendix C: limiting remote access. We present new Rule 49.2, and discuss the advantages and disadvantages of this approach.

## **I. Rules Based on the CACM Guidance**

Our discussion of the elements of the CACM Guidance will proceed as follows:

- A. Bench conferences at all plea and sentencing hearings;
- B. Sealed supplements to all plea and sentencing transcripts containing the bench conferences;
- C. Sealed supplements to all plea agreements;
- D. Sealed supplements to all sentencing memoranda;
- E. Sealing all Rule 35(b) motions; and
- F. Continuing this sealing indefinitely unless otherwise ordered by the court.

### **A. Bench Conferences at Plea and Sentencing Proceedings**

Restricting discussion of cooperation at both the plea and sentencing phase to a bench conference and requiring these bench conferences in every criminal case is a foundational element of the CACM Guidance. This aspect of the CAMC Guidance is reflected in the amendments to Rule 11(c)(2)(B) and Rule 32(i)(4)(C)(ii) shown in Column 1 of Appendix A. In this section of the memo, we focus exclusively on the recommended courtroom procedure, turning to the closely related requirement of sealing the transcripts of these sessions in the next section.

#### Arguments in favor.

Moving the discussion from open court to a bench conference would prevent disclosure of an individual's cooperation to those present in the courtroom in an individual case, and sealing the transcript (discussed below) would prevent others from gleaning that information later from the court's records.

If bench conferences were used only for cooperators, the procedure itself would be a red flag to courtroom observers. By requiring a bench conference in every case, CACM's Guidance would produce uniform courtroom procedures nationwide regardless of whether a defendant had cooperated. This uniform nationwide procedure would prevent observers of hearings at the plea and sentencing stage from overhearing discussions that could identify cooperators.

The rules already authorize confidential consultations with the parties during these proceedings, for good cause. Rule 11 allows the parties to disclose the plea agreement in camera for good cause, and Rule 32 allows the court to hear in camera any allocution by victim, defendant, or government "upon a party's motion and for good cause." If reducing the risk of threats and harm to suspected cooperators is good cause in a single case, it might be argued that the need for uniformity in order to disguise the cases involving cooperation is good cause for conducting bench conferences in every case.

#### Arguments against.

The Subcommittee previously discussed this element of the CACM Guidance, noting several serious problems that were sufficient to warrant a tentative conclusion that the Subcommittee would not support the proposed restriction on courtroom procedures.

First, requiring this time-consuming procedure in every case (the vast majority of which do not involve cooperation<sup>2</sup>) would put a substantial burden on the courts' resources, especially in districts with very large criminal dockets. For example, the District of Arizona has 7,000 cases per year, and the magistrate judges in that district think the CACM in-court sidebars would make it difficult to process their caseload. Also, the separate bench conferences are required for sentencing in every case, even guilty pleas without agreements or trials.

Second, the procedure might not prevent courtroom observers from learning who is cooperating. If the parties approached the bench only briefly to say "no cooperation" in most cases, observers would have no difficulty identifying the cases in which a longer bench colloquy indicated that cooperation had occurred and was being discussed. In theory courts could respond by making it their practice to keep the parties at the bench for several minutes in every case, even when there had been no cooperation, but that charade (if it could be carried out effectively) would impose an even greater burden on judicial resources.

Some judges also raised security concerns, because defendants have a presumptive right to be present for the discussion of the facts concerning their cooperation and would need to approach the bench. Judge Campbell stated that in his district a deputy marshal would need to accompany defendants to the bench. He expressed concern that the bench conferences would require three marshals in order to bring multiple defendants into the courtroom for sentencings, so that two marshals could remain with the other defendants.

---

<sup>2</sup> In Fiscal Year 2016, 11.1% of defendants (7,443 individuals) received downwards departures for substantial assistance under U.S.S.G. § 5K1.1. U.S. Sentencing Comm'n, 2016 Sourcebook of Federal Sentencing Statistics, *Table N* (2016). That number does not, however, include all individuals who provided some sort of cooperation.

Moreover, the proposed regulation of courtroom advocacy would have a significant negative effect on the defense function. The most effective advocacy for a defendant in plea and sentencing proceedings will frequently weave references to cooperation (or the reasons for not cooperating) throughout the arguments, rather than restricting them to a brief discussion at the bench. This procedure would also restrict the representation of other defendants in several ways. For example, counsel might wish to attend (or read the transcripts of) the plea or sentencing proceedings in other cases to determine whether the court was receptive to arguments or approaches counsel was considering in the representation of another defendant. Counsel might also wish to rely on a comparison to the court's resolution of other cases in making arguments in favor of a current client. Indeed, because 18 U.S.C. § 3553(a)(6) requires the court to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," research of this nature may be a required element of effective assistance of counsel.

Finally, there could be a serious constitutional challenge to shifting part of the plea and sentencing phase to a bench conference in every case. As described in more detail in our First Amendment memorandum, the public and press enjoy a presumptive right of access to any proceeding, hearing, filing, or document within that right's scope.<sup>3</sup> It is now well established that the First Amendment right of public access applies<sup>4</sup> to both the plea<sup>4</sup> and sentencing phases<sup>5</sup> of a

---

<sup>3</sup> See Memorandum from Sara Sun Beale & Nancy King to Cooperator Subcommittee, First Amendment Right of Access & CACM Guidance on Cooperator Safety, 3 (Jul. 21, 2016) (revised) (on file with authors) (explaining "[i]n addition to the trial itself, the right of access also applies to other stages of criminal adjudication. Whether a particular proceeding falls within the right's scope depends on a two-part inquiry that analyzes 'considerations of experience and logic.'" *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 9 (1986). The 'experience and logic' test asks: (1) 'whether the place and process has historically been open to the press and general public' (experience) and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question' (logic). *Id.* at 8.")

<sup>4</sup> *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989) ("[M]embers of the public . . . may attend proceedings at which pleas are taken and inspect the transcripts, unless there is strong justification for closing them."; "Public access to them reveals the basis on which society imposes punishment, especially valuable when the defendant pleads guilty while protesting innocence"); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) ("[W]e conclude there is a right of access to plea hearings and to plea agreements."); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("[W]e hold that the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves.").

<sup>5</sup> *In re Hearst Newspapers, LLC*, 641 F.3d 168, 176 (5th Cir. 2011) ("[T]he public and press have a First Amendment right of access to sentencing proceedings."); *United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (applying First Amendment closure analysis to sentencing hearing); *United States v. Alcantara*, 396 F.3d 189, 199 (2d Cir. 2005) ("[A]s with plea proceedings, a qualified First Amendment right of public access attaches to sentencing proceedings."); *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995) (quoting *United States v. Carpentier*, 526 F. Supp. 292, 294–95 (E.D.N.Y. 1981) ("The public has a strong First Amendment claim to access evidence admitted in a public sentencing hearing."); *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986) (remanding for tailoring findings where district judge closed sentencing proceedings); *United States v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984) ("[T]he public has a First Amendment right to see and hear that which is admitted in evidence in a public sentencing hearing."). One D.C. Circuit opinion assumed without deciding that the right applies at sentencing. *United States v. Brice*, 649 F.3d 793, 794 (D.C. Cir. 2011). See also *United States v. Thompson*, 713 F.3d 388, 393–96 (8th Cir. 2013) (holding the Sixth Amendment right to public access attaches at sentencing, upholding closure that was narrowly tailored and justified by case-specific findings of need).

criminal case. If a court denies public access, it must do so in a manner narrowly tailored to serve a compelling governmental interest, and the court must make specific findings on both the interest advanced and the alternatives considered and rejected as inadequate. Our memo summarized the four-part constitutional enquiry as follows:

First, closure must serve an interest that is “compelling,” *Globe Newspaper*, 457 U.S. at 607, or “overriding,” *Richmond Newspapers*, 448 U.S. at 581, that “outweighs the value of openness,” *Press-Enterprise I*, 464 U.S. at 509. Second, there must be a “substantial probability” that openness would undermine that interest and that closure would preserve it. *Press-Enterprise II*, 478 U.S. at 14. Third, closure is only appropriate if “reasonable alternatives” cannot protect the interest. *Id.* Finally, a court that ultimately decides a proceeding or document should remain secret must articulate the interest invoked and make “findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.*<sup>6</sup>

The presumptive First Amendment right of access at the plea and sentencing stage does not, however, preclude the district courts from exercising their traditional discretion to conduct bench or in camera conferences in individual cases.<sup>7</sup> For example, Rules 11(c)(2) and 32(i)(4)(C) authorize such conferences for good cause. Similarly, the Supreme Court recognized the trial court has discretion during jury selection in a rape trial to allow an individual juror to request an opportunity to speak to the judge *in camera* but with counsel present and on the record to discuss private and extremely sensitive issues such as a prior sexual assault on the prospective juror or member of her family.<sup>8</sup>

But the cases and Rules that recognize the authority to conduct *in camera* or bench conferences generally involve case-by-case determinations that excluding the public is necessary, rather than a procedural rule mandating bench conferences at two critical points in all

---

<sup>6</sup> *Press-Enterprise II*, 478 U.S. at 16 (footnotes omitted and emphasis added).

<sup>7</sup> See e.g., *United States v. Valenti*, 987 F.2d 708, 713–15 (11th Cir. 1993) (approving closed bench conferences before trial). In *Valenti*, the court recognized (albeit in passing) that the trial courts retain this traditional authority to conduct such conferences, and some lower court decisions have discussed the need to “accommodate the public’s right of access and the long recognized authority of the trial court to conduct bench conferences outside of public hearing.” *Id.* at 713 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (recognizing discretion to protect victim is “discretion is consistent with the traditional authority of trial judges to conduct *in camera* conference”). *Valenti* also cited *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (Brennan, J. concurring in judgment (citation omitted)):

“The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.”)

See also WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 23.1(d) text accompanying nn.167–79 (4th ed. 2015).

<sup>8</sup> *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 512 (1984).

criminal cases. As explained in our First Amendment memo,<sup>9</sup> that distinction is critical for constitutional purposes. In ruling on requests to seal, the trial courts have consistently recognized the need to make case-specific findings, even in cases involving cooperation. They recount facts that show a specific threat to the individual cooperator. For example, courts have upheld sealing where a defendant cooperated in a case involving a complex criminal organization where many international participants had not yet been apprehended,<sup>10</sup> and where a defendant who had infiltrated an international criminal syndicate as a confidential informant reasonably feared retaliation (though he had not received a direct threat).<sup>11</sup> Similarly, where the government requested that the trial court seal the courtroom, seal the transcript, and use the name John Doe in the caption of a terrorism case, the government did not rely on a bald assertion, but the government explained the national security concerns to the district court under seal.<sup>12</sup> This provided a sufficient basis to deny a journalist's motion to unseal.<sup>13</sup> And even if courts find a sufficient basis to seal some documents, they may unseal other documents or portions of documents in order to meet the narrowly tailoring requirement.<sup>14</sup>

In contrast, under CACM's Guidance the courts will not make an *individualized* determination, but instead conduct bench conferences at the plea stage whenever there is a plea agreement, and at the sentencing stage in every case, even in cases that go to trial and cases involving "open" pleas, none of which include plea agreements.

In our view, it is doubtful whether a rule of blanket closure of a portion of the plea and sentencing proceeding without a case-specific showing of need could survive a First Amendment challenge. For example, the Second Circuit held that a district court had erred in conducting plea and sentencing proceedings in its robing room because it had failed to make "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest."<sup>15</sup> An across-the-board policy on bench conferences also denies the press and public of their right of advance notice, so that they may have the opportunity to object to closure.<sup>16</sup> It would also undermine important functions served by public access in these proceedings.<sup>17</sup>

---

<sup>9</sup> See Beale and King, *supra* note 3, at 15–20 (quoting *Press-Enterprise I*, 464 U.S. at 510) (explaining that "the qualified right of access amounts to a 'presumption of openness' that may be overcome if access restrictions are essential to preserving a 'compelling governmental interest, and [the restrictions are] narrowly tailored to serve that interest.'" (citations omitted)).

<sup>10</sup> *United States v. Sonin*, 167 F. Supp. 3d 971, 978–83 (E.D. Wis. 2016).

<sup>11</sup> *United States v. Doe*, 63 F.3d 121, 129–30 (2d Cir. 1995).

<sup>12</sup> *United States v. Doe*, 629 F. App'x 69, 72–73 (2d Cir. 2015).

<sup>13</sup> *Id.* When necessary, the order discussing the specific reasons for sealing may be sealed. See *In re Motion for Civil Contempt by John Doe*, No. 12-mc-0557 (BMC), 2016 WL 3460368, at \*1, \*5–6 (E.D.N.Y., June 22, 2016).

<sup>14</sup> See, e.g., *id.* at \*1, 6 (noting that various items had been sealed and some later unsealed).

<sup>15</sup> *Alcantara*, 396 F.3d at 199 (quoting *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988)).

<sup>16</sup> E.g., *In re Hearst Newspapers, LLC*, 641 F.3d 168, 182, 184–85 (5th Cir. 2011) (holding that court improperly closed portion of sentencing proceeding without giving newspaper notice and an opportunity to be heard before closing, stating, "courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given before closure of a proceeding or sealing of documents to which there is a First Amendment right of

### Alternatives.

*Case-by-case determination whether to have a bench conference or close the courtroom.* The main alternative for protecting proceedings from public access is the traditional procedure of conducting proceedings at the bench or sealing the courtroom only on a case-by-case basis when the parties demonstrate good cause, including a danger to the individual defendant. Although this procedure prevents courtroom observers from learning the details of a defendant's cooperation in individual cases, it also creates a potential red flag for those observers.

*Informal measures, such as scheduling.* Some courts have tried informally to reduce the likelihood that cooperation will be revealed in the courtroom during plea or sentencing proceedings by scheduling proceedings at which cooperation will be discussed when it is unlikely that observers will be present.<sup>18</sup> Although this may be effective in certain cases, we see no way it could be implemented as a general practice by a rules amendment.

*Minimizing courtroom discussion of cooperation.* Courts may also avoid or minimize discussion of cooperation in open court. For example, if a plea agreement includes cooperation,

---

access, have uniformly required adherence to such procedural safeguards”) (collecting authority); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) (holding “in determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific ‘findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest’” (citations omitted)). Although the Rules Enabling Act procedure would provide advanced notice and an opportunity to be heard on the general policy of sealing in all future cases, it does not provide the opportunity for case specific notice and an opportunity to be heard before closure in an individual case as contemplated by these cases.

It is unclear whether a protocol recently adopted by the judges in the District of New Jersey would provide adequate notice. The protocol, which will go into effect Sept. 1, 2017, provides that parties submitting sentencing materials will not file them on the CM/ECF system, but must file a notice of submission. Then anyone who wishes to obtain a copy of any sentencing materials has only two days to make a request for disclosure; such a request triggers a redaction process. A requestor who wishes to challenge the redactions may do so. *See* United States District Court for the District of New Jersey, Notice of Resolution Regarding Protocol for Sentencing Materials, June 22, 2017, available:

[http://www.njd.uscourts.gov/sites/njd/files/Protocol%20for%20Disclosure%20of%20Sentencing%20Materials\\_0.pdf](http://www.njd.uscourts.gov/sites/njd/files/Protocol%20for%20Disclosure%20of%20Sentencing%20Materials_0.pdf).

<sup>17</sup> *See also In re Washington Post Co.*, 807 F.2d at 389 (“[P]ublic access [at plea and sentencing hearings] serves the important function of discouraging either the prosecutor or the court from engaging in arbitrary or wrongful conduct. The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.”).

<sup>18</sup> In a survey of district court clerks conducted for the Task Force, clerks in numerous districts reported using scheduling to protect cooperators. Memorandum from Larry Baerman to the Task Force on the Protection of Cooperators Subcommittee on Docket Issues at 2 (Mar. 15, 2017) (on file with authors) (responses to Question 1). For example, the District of Puerto Rico reported that “no other criminal proceedings are scheduled for the same time to avoid having cooperators and noncooperators in a courtroom at the same time. *Id.* If, for any reason, this separation is not possible, plea proceedings of cooperators are held without making any explicit mention of the terms and conditions of the cooperation.” *Id.* The Southern District of New York reported that “[a]t times defense counsel will make an application to hold a plea proceeding in a Courtroom with less public traffic.” *Id.* In addition, the Middle District of Pennsylvania reported, “If there is no member of the public in the courtroom, the cooperator proceeding is held before the regular plea proceeding; otherwise the sealed cooperator proceeding is done in chambers, with the Court going through a complete colloquy in both locations/portions of the proceedings.” *Id.*



the court may not mention cooperation at the plea colloquy, but ask the defendant only in general terms whether his counsel discussed the plea agreement with him and whether he understands its terms.<sup>19</sup> The practice of not mentioning cooperation in open court seems to be common in a number of districts.<sup>20</sup>

This strategy runs counter to the general practice in some—but not all—courts of discussing each term in the plea agreement on the record at the plea hearing to ensure that the plea is knowing and voluntary.<sup>21</sup> The Second Circuit has expressed doubts about this procedure, despite concerns about the safety of cooperators:

[T]here is an understandable reluctance during plea hearings to refer openly to a cooperation agreement. Advances in technology and the advent of the Federal PACER system make us ever mindful of the significant public safety risks to cooperating defendants or the hazards to ongoing government investigations that exposing even the fact of cooperation may pose. But we find it difficult to reconcile the tactic of remaining completely silent about such an agreement with the judicial obligation to ensure that the defendant understands the range of possible consequences of his plea and to “determine that the plea is voluntary and did not result from . . . promises [ ] other than promises in a plea agreement[ ].” Fed. R. Crim. P. 11(b)(2). For example, where a cooperation agreement that states that the Government may make a motion to reduce the defendant’s sentence is never referenced during the plea colloquy, the defendant will be unable to answer accurately the critical question of whether additional promises have been

---

<sup>19</sup> See *United States v. Rodriguez*, 725 F.3d 271, 278, 278 n. 4 (2d Cir. 2013) (suggesting this as a possible means of preventing disclosure of a defendant’s cooperation). *But see United States v. Tarbell*, 728 F.3d 122, 127 (2d Cir. 2013) (“[T]he better practice in these circumstances would have been for the District Court to use one of the ‘various tools at [its] disposal to reduce if not eliminate the risks that may arise from fulfilling [its] obligation to ensure that the defendant understands the range of potential penalties,’ rather than simply ‘remaining completely silent about such [a] [cooperation] agreement.’ These tools include closing the courtroom during plea proceedings, sealing the transcript of such proceedings, and issuing rulings under seal.” (citations omitted)).

<sup>20</sup> For example, the clerk in the Southern District of New York reported that “The Assistant U.S. Attorney or defense counsel may request that the Judge not make any reference to the defendant’s cooperation during the plea proceeding.” Baerman, *supra* note 18 (responses to Question 1). The Districts of Oregon and New Jersey, the Northern District of Texas, and the Eastern and Western Districts of Wisconsin all reported that there is no discussion of cooperation (or substantial assistance) in the plea proceedings. *Id.*

<sup>21</sup> The amendment takes no position on the question whether the present rule generally requires the terms of plea agreements to be discussed in open court, as is the case in some districts, or instead may be satisfied by providing the judge with a written copy of the agreement, either in chambers or on the bench. Neither the text nor the Committee Notes squarely address this issue. Although some courts and commentators have expressed the view that all terms must be stated on the record, we have found no precedent squarely on point either way. The checklist in the Benchbook for U.S. District Court Judges provides:

B. If it has not previously been established, [the court should] determine whether the plea is being made pursuant to a plea agreement of any kind. If so, [the court should] require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(c)(2).

§ 2.01 (6th ed. 2013), <https://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf>.

made to him concerning his sentence, and the district judge will have failed to ensure that the defendant truly understands the range of applicable penalties. Indeed, here, Rodriguez was put in just such a quandary and answered “no” to that question, notwithstanding the existence of a separate agreement.<sup>22</sup>

*Exempting cases without plea agreements.* To avoid restrictions on access to sentencing information and proceedings in cases that go to trial or involve “open” pleas with no plea agreements, the amendments to Rule 32(i)(4)(C)(ii) in Column 1 of Appendix A could be more narrowly tailored. One option would be to add to the first sentence the following text shown in brackets: “In every case [resolved by a plea of guilty or nolo contendere/plea agreement], sentencing must include a conference at the bench for discussion of the defendant’s cooperation or lack of cooperation . . . .”

## **B. Sealing Transcripts of Bench Conferences**

CACM’s Guidance requires courts to seal the transcript of the bench conference that would be required in each plea proceeding involving a plea agreement and every sentencing hearing. This aspect of the CAMC Guidance is reflected in the amendments to Rule 11(c)(g)(iii) and Rule 32(i)(4)(C)(ii) shown in Column 1 of Appendix A. The requirement for the bench conferences and for sealing complement one another. Because the sealing requirement is applicable only to the bench conference, it cannot be implemented unless such conferences are conducted.

### Advantages.

Coupled with the requirement of a bench conference in every case, sealing this portion of the transcript in every case would completely block one critical source of information that could be used to identify cooperators for purposes of retaliation. It would fulfill two important goals: (1) preventing the release of specific information about cooperation that is discussed in the courtroom, and (2) making the docket of all cases identical, so that there are no actual (or apparent) red flags in individual cases.

### Disadvantages.

Since the requirement for sealing depends on the requirement of bench conferences in each case, all of the problems with that requirement would also be barriers to the adoption of this aspect of the CACM Guidance. If the bench conference requirement were adopted, the related sealing proposal would raise three additional concerns.

First, segmenting the transcript of every plea and sentencing hearing and sealing a portion of each transcript would impose an administrative burden. It is unclear whether this burden would be borne by the parties or court staff.<sup>23</sup>

---

<sup>22</sup> *United States v. Rodriguez*, 725 F.3d 271, 278 (2d Cir. 2013).

<sup>23</sup> Our clerk of court liaison, Mr. Hatten, noted that in his district court reporters are normally responsible for filing their transcripts, but if the transcripts are sealed the reporters must bring them to one of the sealed pleadings clerks for filing. If a uniform system could be developed that exactly identifies for every trial that portion of the transcript

Second, a blanket restriction on public access to key portions of the transcript in every criminal case would face challenges under both the First Amendment and the common law right of access to judicial documents. As noted above, mandating a bench conference at which cooperation or lack of cooperation is discussed in every case, including sentencings after trial, is itself subject to challenge under the First Amendment. But assuming *arguendo* that the conferences themselves are valid, there is a division of authority on the question whether the public has a presumptive right of access to the transcripts of such conferences.

Media representatives have argued that “the First Amendment operates to require disclosure of the transcripts of sidebar or in-chambers conferences ‘contemporaneously or at the earliest practicable times,’ absent a judicial finding of a need to seal such transcripts under the rigorous First Amendment standards of *Press-Enterprise II*.”<sup>24</sup> The lower courts are divided on the proper analysis of such claims, and several positions have emerged. Some courts have concluded that when a bench or in-chambers conference falls within the traditional use of such conferences, that tradition negates not only a First Amendment right to presence at the conference, but also a First Amendment right of access to the transcript of the proceeding. Other courts, however, have suggested that the First Amendment claim has merit when the court has made an evidentiary or other substantive ruling at the bench conference,<sup>25</sup> or after the trial or when the danger that prompted the confidential conference has passed.<sup>26</sup> Other approaches have also been noted.<sup>27</sup>

The absence of both a prior opportunity for interested parties to object and case-specific findings in favor of sealing would be problematic. The Second and Ninth Circuits have held that

---

to be sealed (a system in which no discretion on the part of the court reporter is required), he thought his court reporters could handle the redaction and proper filing. But he would oppose placing responsibility on court reporters if they were responsible for identifying what needed to be sealed. If a discretionary judgment must be made, he suggested that the redaction required by Fed. R. Crim. P. 49.1 and Civil Rule 5.2 might provide one model. In his district, an unredacted version of the transcript is provided by the court reporter to the parties, who are responsible for filing a redacted version within twenty-one days.

He also noted it would be beneficial to have separate transcripts for the bench conference and the remainder of proceeding. Otherwise, transcripts for cooperators might have 125 numbered lines missing while transcripts for non-cooperators have only twenty-five numbered lines excerpted, or transcripts for cooperators might be ten pages longer than transcripts for non-cooperators. One transcript document containing everything except the bench conference would be filed electronically by the court reporters on the public docket and would contain language along the following lines: “Bench conference took place at this time.” The second transcript document would be filed under seal with a title page identifying it as the bench conference transcript. Given that every trial would have these two documents, he thought the court reporters would almost certainly need the authority to file documents under seal electronically.

<sup>24</sup> LAFAVE ET AL., *supra* note 7, § 23.1(d) at text accompanying note 174.

<sup>25</sup> *United States v. Smith*, 787 F.2d 111, 113 (3d Cir. 1986) (applying common law right of access, but also citing the First Amendment).

<sup>26</sup> *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (“transcripts of properly closed proceedings must be released when the danger of prejudice has passed”); *In re Associated Press*, 172 F. App’x 1, 6 (4th Cir. 2006) (assuming constitutional or common law interest in eventual release of transcripts of bench conferences, “this right is amply satisfied by prompt post-trial release of transcripts”).

<sup>27</sup> LAFAVE ET AL., *supra* note 7, § 23.1(d) at text accompanying notes 177–97.

sentencing hearing transcripts must not be sealed without prior notice and opportunity to object (generally by the public docketing of a motion to seal),<sup>28</sup> and the Second Circuit has also suggested that even a sealing decision based on compelling interest in an individual case should not necessarily be permanent.<sup>29</sup>

### Alternatives.

*Case-by-case sealing.* As with other aspects of the CACM Guidance, one option is to approach the potential for threats to cooperators by sealing on a case-by-case basis, applying the traditional constitutional standards discussed in our First Amendment memo.<sup>30</sup> This approach involves tradeoffs: it protects the specifics of the cooperation in these cases and is clearly consistent with the First Amendment and the general policy of transparency of judicial proceedings. But it provides substantially less protection to cooperators than CACM's approach, where sealed entries on the docket create a red flag for those who search the PACER database. Indeed, there is a Catch-22 element of the tradeoffs between the constitutional rights of the press and public, on the one hand, and the protection of cooperators. Sealing or redacting transcripts or documents only in cases that involve cooperation would likely survive any challenge under the First Amendment or the common law right to public access to judicial records, but it creates a red flag for those seeking to identify cooperators by viewing the docket sheet. An across-the-board approach to sealing in every case eliminates this red flag, but raises the most significant First Amendment concerns. The Task Force is trying to develop other solutions to the docket/red flag problem, but to date we have received no information about what, if any, options it may find to be technically feasible for the existing electronic-filing system. Moreover, removing or disguising items on the docket sheet, or creating separate public and a private docket sheets would raise First Amendment issues.<sup>31</sup>

---

<sup>28</sup> *Alcantara*, 396 F.3d at 202–03 (holding plea and sentencing proceedings in robing room infringed on First Amendment right of access “and could be justified only if the District Court complied with the notice requirements set forth in *Herald* and also made “specific, on the record findings . . . demonstrating that closure [was] essential to preserve higher values and [was] narrowly tailored to serve that interest.”); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998) (“[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible.”).

<sup>29</sup> *United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (“[E]ven if total and permanent sealing is unjustified, it may be possible to protect the ‘compelling interest’ at issue here by sealing the sentencing transcript in a way that is *less than total and permanent*.”)

<sup>30</sup> See Beale and King, *supra* note 3.

<sup>31</sup> For example, routinely disguising the existence and location of motions, transcripts, and other documents by placing them in a sealed entry or separate sealed docket may run afoul of the First Amendment or common law rights of access. See, e.g., *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (“[D]ocket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment . . . [T]he docketing of a hearing on sealing provides effective notice to the public that it may occur.”); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (sealed docket that hid closed pretrial bench conferences and the filing of in camera pretrial motions from public view could “effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences,” and “is an unconstitutional infringement on the public and press’s

*Master sealed event.* One method of disguising sealed docket items is already in use in the District of Arizona. There, a master sealed event is placed on the docket sheet in every criminal case after the initial entry, and all cooperation-related documents go into that sealed event. The public cannot access cooperation-related documents in the master sealed event, and all criminal cases look the same on PACER. Thus, there are no red flags on the docket sheet that might identify cooperators.

This procedure could be challenged on the ground that the press and public First Amendment right of access extends to docket sheets.<sup>32</sup> The Eleventh Circuit has held that the maintenance of a public and a sealed docket is inconsistent with the public's right of access.<sup>33</sup> Citing the decision of the Eleventh Circuit, the Second Circuit agreed that there is a qualified First Amendment right of access to docket sheets.<sup>34</sup> These decisions emphasized several points. First, as a practical matter, sealing all or part of the docket in a criminal case frustrates the ability of the press and public to inspect documents (such as transcripts) that are presumptively open, and it may thwart appellate review of sealing decisions concerning particular documents.<sup>35</sup> Sealing the docket is also contrary to the historical practice of maintaining public docket sheets, which experience demonstrates enhances both basic fairness and the appearance of fairness.<sup>36</sup> Finally, a sealed docket (or in this case, a sealed master event) prevents the public from presenting objections to the sealing of individual documents.<sup>37</sup>

*No bench conferences: sealing or redacting portions of the transcript dealing with cooperation.* Even without a bench conference at which all references to cooperation must occur, it would still be possible to redact or seal only those portions of the hearing transcript that contain references to cooperation. One court favoring redaction over sealing commented: "wholesale suppression of those documents cannot overcome the press's and public's strong interest in monitoring sentencing decisions. A sledgehammer is unnecessary where a pick will do. Careful redactions can appropriately balance the interests of confidentiality, a free press, and an informed citizenry."<sup>38</sup> However, redaction would require significant resources for a close reading of the transcript, making the question who would have this responsibility even more critical. In addition, as with all redaction, it is possible that mistakes would occur, allowing references suggesting cooperation to remain in the unsealed transcript. Although this process could be facilitated by focusing all discussion of cooperation at some point in the hearing, references to it might still occur, even in passing, at other points. Redaction in individual cases would still raise a red flag, though it would not be obvious from the docket sheet like sealing all

---

qualified right of access to criminal proceedings"); see also *United States v. Mendoza*, 698 F.3d 1303, 1306–07 (10th Cir. 2012) (discussing history of open and public dockets).

<sup>32</sup> See sources collected *supra* note 31. See generally Meliah Thomas, Comment, The First Amendment Right of Access to Docket Sheets, 94 Cal. L. Rev. 1537 (2006).

<sup>33</sup> *United States v. Valenti*, 987 F.3d 708, 715 (11th Cir. 1993).

<sup>34</sup> *Hartford Courant Co.*, 380 F.3d at 96.

<sup>35</sup> *Id.* at 93–94.

<sup>36</sup> *Id.* at 95–96.

<sup>37</sup> *Id.* at 96 (citing *Valenti*, 987 F.3d at 96).

<sup>38</sup> *United States v. Munir*, 953 F. Supp. 2d 470, 478 (E.D.N.Y. 2013).

or part of the transcript. A PACER user would see no distinction among cases from the docket sheet, and would have to review the transcript to determine whether there had been any redactions.

*No bench conferences: sealing the entire transcript.* Another option if bench conferences are not required in every plea and sentencing proceeding would be to seal the entire transcript of all plea and sentencing proceedings. In Column 3 of Appendix A we show an amendment to Rules 11(c)(g)(iii) accomplishing whole document sealing for plea hearings. Sealing the whole transcript would reduce the administrative burden, but make it much more difficult to defend the procedure if it were challenged under First Amendment or the common law right to access judicial documents, especially since transcripts of plea and sentence would be unavailable *in every case*, including the majority of cases that do not involve a cooperator,<sup>39</sup> without a prior showing of need or notice and opportunity for media and the public to object.

*Not filing the transcripts.* Not filing the transcripts of plea and sentencing hearings would accomplish the same secrecy as sealing, and this approach does not require the adoption of amendments requiring bench conferences in all cases. In Column 4 of Appendix A we show amendments to Rule 11(c)(g)(iii) taking this approach.

At present, filing is required by the directive in Volume VI of the *Guide to Judiciary Policy* at 290.20.20.4 requiring court reporters to “file with the clerk of court for the records of the court a certified transcript” of all proceedings “requested and prepared.”<sup>40</sup> A change in this policy would require action by the Judicial Conference of the United States, and CACM would likely play a significant role in the consideration of any change.

Moreover, legislative action might also be required. Title 28 U.S.C. § 753(b) provides:

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court . . . .

. . . . .

---

<sup>39</sup> See *supra* text accompanying note 2 (citing figures on percentage of defendants receiving 5K1.1 departures).

<sup>40</sup> Section 290.20.20 of the *Guide to Judiciary Policy* (vol. 6) provides:

(a) Transcripts Requested by Parties

Court reporters must promptly transcribe the proceedings requested by a judicial officer or a party who has agreed to pay the fees established by the Judicial Conference, and any proceedings that a judge or the court may direct. 28 U.S.C. § 753(b).

(b) Transcripts Filed with the Court

The reporter must also file with the clerk of court for the records of the court a certified transcript of all proceedings requested and prepared. The certified transcript, which may be in electronic format or hard copy as determined by the court, must be filed with the clerk of court concurrently with, but no later than three working days after delivery to the requesting party pursuant to 28 U.S.C. § 753(b).

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

.....

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

Although this statute might be interpreted to require only that the reporter “deliver” but not file the transcript, that narrow interpretation would be in tension with the concluding statutory directive that the transcript in the clerk’s office “be open to inspection by any person without charge.” Thus, although we show a “no filing” amendment to Rule 11(g) in Column 4 of Appendix A, adoption of that approach would require a change in JCUS policy, and perhaps also amendment of § 753(b).

Assuming that the necessary groundwork could be laid by changes in the *Guide to Judiciary Policy* and perhaps to § 753(b), there would be several disadvantages to this approach.

First, removing these critical documents would impair the functionality of the court’s records for purposes of the appeals process and preserving the integrity of the records of the case. (Presumably these transcripts, like plea agreements in some districts, would be maintained by the United States Attorney’s Offices.) Second, the public and the press would lose an important source of information for monitoring the courts and criminal justice practices. Also, defense counsel in other cases would lose access to resources they may need to defend their clients. Keeping the transcripts out of the court system would make it even more difficult for the press, public, and defense counsel to access them than if they were sealed, for there is always the possibility that a court might agree to unseal them. (Indeed, those seeking access might have no idea where the documents were being maintained and how they might seek access.) Finally, a no filing procedure for transcripts might also face challenges under the First Amendment or common law right of access, which courts have found to be applicable to some documents that have not been filed with the courts.<sup>41</sup> It is unclear whether that analysis would extend to transcripts, which are generally prepared for the use of the parties, rather than the court.<sup>42</sup> On the other hand, those cases generally involved a challenge to not filing certain documents on a case-by-case basis, rather than the decision to withdraw from public access a category of documents that contain a detailed record of the courts’ functioning.

### C. Requiring All Plea Agreements to Have a Sealed Supplement

CACM’s Guidance requires that every plea agreement “shall have both public portion and a sealed supplement, and the sealed supplement shall either be a document containing any

---

<sup>41</sup> See *infra* text and notes 52–54.

<sup>42</sup> See *infra* text and note 53 regarding the functional test for determining whether documents are subject to the presumptive right to public access.

discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement." This aspect of the CAMC Guidance is reflected in the amendment to Rule 11(c)(3)(C) shown in Column 1 of Appendix A.

#### Advantages.

This requirement serves several purposes. It prevents those who access the court's records from using plea agreements to determine whether an individual defendant cooperated or to discover specific details of his cooperation. It also ensures that all dockets in criminal cases nationwide look the same, eliminating the red flag problem. Coupled with CACM's other recommendations, it would shut off many of the common methods of determining cooperation from the courts' records. Moreover, since the government is necessarily involved in the preparation of all plea agreements, the Department of Justice is well positioned to ensure that all plea agreements are properly constructed to meet this requirement. It should be possible to achieve virtually universal compliance with this mandate without imposing any burden on the courts. And, once institutionalized, this procedure should not impose a major burden on the parties. Finally, using a sealed supplement maintains public and press access to all aspects of plea agreements other than cooperation terms.

Further, it concerns a document—an agreement between the prosecution and defense concerning cooperation—that might be said to lack the long historical pedigree of other documents that have traditionally been regarded as part of the court's records and therefore subject to a right of public access.

This aspect of the CACM Guidance could be adopted with the CACM's other recommendations, but it does not depend upon them and could stand alone.

#### Disadvantages.

Approximately 97% of defendants in the federal system plead guilty, most of them with plea agreements. The sealed supplement would deprive the press, the public, victims, and defense counsel in other cases of information about who is and is not cooperating, what form cooperation takes, racial or gender biases in cooperation practices, geographic variation in cooperation practices, etc. Indeed, the very purpose of this procedure is to disguise who has and has not cooperated, making it impossible for the public to assess whether the government has negotiated an agreement in an individual case that is too harsh or too favorable, or to assess whether the agreement in an individual case is consistent with agreements in other similar cases.

An across-the-board procedure sealing all cooperation agreements would be subject to challenge under the First Amendment and the common law right of access to court documents. Many courts have held that the public has a presumptive right of access to plea agreements,<sup>43</sup>

---

<sup>43</sup> *United States v. DeJournett*, 817 F.3d 479, 485 (6th Cir. 2016) (“[T]he public has a constitutional right to access plea agreements . . . .”); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (“[T]here is a first amendment right of access to plea agreements . . . .”); *Oregonian Publ’g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990) (“[T]he press and public have a qualified right of access to plea agreements and related documents . . . .”)



and the Ninth Circuit has held the right covers a plea agreement's cooperation addendum.<sup>44</sup> Of course this qualified right may be overcome, but the decisions of the Supreme Court and many more recent lower court decisions require both case-specific findings regarding the need to restrict access and narrow tailoring when courts are considering sealing material that is presumptively subject to public access.<sup>45</sup> We are aware of only one case—Chief Judge Ron Clark's decision in 2015<sup>46</sup>—holding across-the-board sealing is necessary to protect the admittedly critical interest in protecting cooperators.

Use of a sealed supplement in all cases will also adversely affect the defense function. It will handicap defense counsel in negotiating pleas because they cannot determine which cases are comparable. Similarly, counsel may also wish to rely on a comparison to the court's resolution of other cases in making arguments in favor of a current client. Indeed, because 18 U.S.C. 3553(a)(6) requires the court to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," research of this nature may be a required element of effective assistance of counsel. Having a separate sealed

---

. . ."); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) ("[W]e conclude there is a right of access to plea hearings and to plea agreements."); *In re Washington Post Co.*, 807 F.2d at 390 ("[W]e hold that the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves.").

We found no contrary authority. We note, however, that an early decision by the Tenth Circuit, *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985), rejected a claim that the First Amendment right applies to sealed plea bargain documents. The First Amendment was not the principal focus of the case. The court stated that the question presented was "whether the common law right of access to court records extends to the sealed plea bargain of a criminal defendant now enrolled in the witness protection program of the United States Marshal's Service." *Id.* at 706. Acknowledging the common law right to inspect and copy judicial records, the majority concluded that the district judge had not abused his discretion in balancing the competing interests and striking the balance in favor of the defendant's safety. *Id.* at 708–09. Judge McKay dissented from this portion of the court's opinion, concluding that there had been no showing that the plea bargain would provide information about the defendant's current location, and thus the public's right of access had not been overcome. *Id.* at 711. But in a brief paragraph the court also rejected the defendant's constitutional arguments under the First and Sixth Amendments, noting that *Press Enterprise I* and *Waller* did not overrule or question *Nixon*, which it found to be the governing authority for court documents. *Id.* at 709. The *Hickey* decision, however, pre-dated *Press-Enterprise II* and the court reached its conclusion without applying the "experience and logic" test.

<sup>44</sup> *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008).

<sup>45</sup> See, e.g., *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984) (constitutional "presumption of openness" may be overcome only if restrictions are essential to preserving a "compelling governmental interest, and [are] narrowly tailored to serve that interest."); *Alcantara*, 396 F.3d at 199 ("Before closing a proceeding to which the First Amendment right of access attaches, '[a] district court must make 'specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" (citations omitted)); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) ("in determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific 'findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest'" (citations omitted)).

<sup>46</sup> *United States v. McCraney*, 99 F.Supp.3d 651 (E.D. Tex. 2015).

supplement also increases the risk of *Brady* violations when there are two documents to disclose not one.<sup>47</sup>

We noted one other issue when we compared CACM's recommendations for plea agreements with its recommendations concerning sentencing. CACM's Guidance requires every sentencing memorandum to have a sealed supplement that includes references to or discussion of cooperation or a statement that there was none. In earlier discussions, Subcommittee members agreed that parties also file memoranda in connection with the plea, and they may include references to cooperation. Plea memoranda are not covered in CACM's Guidance, and this could provide a means of identifying cooperators even if all plea agreements have sealed supplements. Accordingly, an amendment to Rule 11(c)(3) requiring plea memoranda to include a plea supplement is shown in Column 2 of Appendix C (CACM Plus).

#### Alternatives.

*Case-by-case determination whether to seal all or part of a plea agreement.* Sealing is currently permitted when the court makes case specific findings of need and narrow tailoring. But if there is public access to the docket and it shows a sealed plea agreement, case-by-case sealing does not solve the red flag problem. As noted above,<sup>48</sup> the Task Force is trying to determine whether any changes can be made in the docket that would mitigate the red flag problem.

*Master sealed event.* The option of creating a master sealed event on the docket sheet of every criminal case for all cooperation-related documents may eliminate the red flag problem created by sealing only information in cases of cooperators, but raises concerns under the First Amendment, as noted earlier.<sup>49</sup>

*Redaction.* Like case-by-case sealing, case-by-case redaction of plea agreements supported by specific findings would avoid access and First Amendment challenges and would not be apparent from looking at the docket alone. However, as discussed above,<sup>50</sup> redaction would be more time consuming than sealing and would allow identification of cooperators by anyone able to see the redactions.

*Sealing all plea agreements in their entirety.* This option would avoid the need to bifurcate each agreement and create a sealed supplement even in cases in which there has been no cooperation. We show an amendment to Rule 11(c)(3)(C) sealing the entirety of all plea agreements in Column 3 of Appendix A. However, we noted above our assumption that once the practice of creating sealed supplements becomes institutionalized it should not be difficult or burdensome for the parties to comply. If that assumption is correct, we see little to recommend

---

<sup>47</sup> For one example of the fallout from inadvertent failure to disclose such a supplement, see *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016).

<sup>48</sup> See *supra* text accompanying note 31.

<sup>49</sup> See *supra* text accompanying notes 32–37.

<sup>50</sup> See *supra* text accompanying note 38.

this option. It provides no greater protection to cooperators, but blocks access public and defense access to substantially more material in the majority of federal criminal cases.

*Not filing plea agreements.* This is the practice of a few districts, most notably the Southern District of New York, where plea agreements are shown to the district judge, not filed, and retained by the U.S. Attorney's Office. We show an amendment to Rule 11(c)(3)(C) implementing this practice in Column 4 of Appendix A. This procedure might be seen as sidestepping the First Amendment and common law rights of access to judicial documents, since by design these documents are not made part of the judicial record. But strong concerns have been expressed by Committee members about deliberately excluding a critical document from the official record of the court in a majority of federal cases. The clerk of each district court carefully maintains the integrity of the court's record; no similar protection exists for documents that are never filed.

Moreover, not filing the plea agreement may lead to incomplete compliance with 28 U.S.C. § 994(w), which requires the chief judge of each district to submit to the Sentencing Commission in every case "any plea agreement" (as well as the written statement of reasons for sentence, the judgment and commitment order, and the presentence report). It appears, however, that this does not always occur at present.<sup>51</sup>

Importantly, not filing plea agreements and other documents used by judges in adjudicating the case and making judicial decisions, and then denying access to those unfiled documents, may violate the common law right of access to court records. As the Third Circuit explained recently, a document's coverage by the qualified common law right of access does not turn only upon whether the document is or is not formally filed in the case record.

---

<sup>51</sup> When we contacted the Commission to ask how plea agreements from the Southern District of New York reach the Commission, we received the following e-mail response:

We have not been aware of the [non-filing] practice that you describe in SDNY. Based on your inquiry, we examined the SDNY data from FY16, and focused on cases in which the court indicated (on the SOR) that the case involved a departure under USSG 5K1.1 for substantial assistance. We find that in over 80% of those cases no plea agreement was submitted to the Commission. In fact, the court reported those cases to us as ones involving a "straight" plea. This is certainly incorrect.

My reading of 28 USC 994(w)(1) is that the court is required to submit "any plea agreement" to the Commission. That statute is not limited to only those documents that were entered into the docket. So there may be an issue here. We'll have to discuss this further internally before the Commission takes a position, but it does appear that the supposition that you and Brent had as to how SDNY would address the statute is not what is happening.

Email from Glenn Schmitt to Sara Beale, August 18, 2017 (on file with author).

Plea agreements are not public while in the hands of the Commission, but researchers are able to access them by special letter agreement negotiated with the Commission pursuant to statute. *See, e.g.,* Susan R. Klein, Aleza S. Remis, & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 83, 83 n.61 (2015) ("Professor Klein entered into a Cooperation Agreement with the United States Sentencing Commission (USSC) that gave her access to all written plea agreements entered in the federal courts" pursuant to 28 U.S.C. § 995(a)(6)-(7) (2012)).

The fact of filing is one point to consider but it cannot be the sole basis for applying the right of access. The test is more functional than that. “[T]he issue of whether a document is a judicial record should turn on the use the court has made of it rather than on whether it has found its way into the clerk’s file.” . . . To be considered a judicial record, to which the common law right of access properly attaches, “the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.”<sup>52</sup>

Similarly, the First Circuit held that the presumptive common law right of access applied to letters sent directly to the court by third parties, because they were meant to affect the judge’s sentencing determination and thus “take on the trappings of a judicial document under the common law.”<sup>53</sup> And in a child pornography prosecution, a district court held that there was a presumptive right of public access to victim impact letters provided to the court by probation and not docketed, though that right could be limited by the victims’ privacy interests.<sup>54</sup>

#### **D. Requiring Any Sentencing Memorandum to Have a Public Portion and a Sealed Supplement**

CACM’s Guidance treats sentencing memoranda like plea agreements, requiring that they be subdivided into sealed and non-sealed documents. It provides:

In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant’s cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.

In Column 1 of Appendix A, we show an amendment to Rule 32(g) that would implement this requirement.

#### Advantages.

This aspect of CACM’s Guidance blocks access to another source of frequent references to cooperation, and it does so in a manner that makes all cases look identical, with no red flags

---

<sup>52</sup> *North Jersey Media Group Inc. v. United States*, 836 F.3d 421, 435 (3d Cir. 2016) (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)) (finding no right of public access to conspirator letter submitted at sentencing where it played “no part in the judicial function or process,” and “was intended as an aid to the defense, not as an aid to the judge in rendering a decision or for some other judicial purpose.”).

<sup>53</sup> *United States v. Kravetz*, 706 F.3d 47, 58 (1st Cir. 2013) (quoting *United States v. Gotti*, 322 F. Supp. 2d 230, 249 (E.D.N.Y. 2004). Compare *United States v. Kushner*, 349 F. Supp. 2d 892, 904 (D.N.J. 2005) (holding that the presumption of access under common law applies most strongly to “documents that directly impacted and were crucial to the district court’s exercise of its Article III duties” but with less strength to discovery materials or sentencing letters, which “potentially have far less relevance to the court’s functioning. The strength of the presumption as to these documents should fall toward the weaker end of the continuum, until not at all.”)

<sup>54</sup> *United States v. Morrill*, 2014 WL 1381449, at \*1 (D. Mass. April 4, 2014).

signaling cooperation. The Guidance appears to cover not only “memoranda,” but also any substantial assistance motions made under either the Guidelines or § 3553(e). Most cooperation cases will involve such a motion. (Rule 35(b) motions are discussed below.)

This aspect of the Guidance limits access only to materials relating to cooperation, preserving remote access by the public to other sentencing memoranda and motions.

Moreover, a uniform policy of sealing cooperation motions and memoranda may be reassuring to individuals considering cooperation, and the government has a strong and legitimate interest in obtaining cooperation in future cases.<sup>55</sup>

#### Disadvantages.

The proposed procedure is overbroad. It would seal pleadings concerning information about cooperation or lack of cooperation even in cases in which the defendant’s cooperation or lack of cooperation is well known or has already been revealed in open court.<sup>56</sup>

By prescribing sealing across the board, the policy requires no case specific findings, and it provides no advance notice and opportunity to object in individual cases. As we have noted above and described in greater detail in our First Amendment memo, the Supreme Court has required case specific findings and recognized the importance of providing notice and considering objections to proposals to seal proceedings that are presumptively subject to the First Amendment right of access.<sup>57</sup>

The common law right of access is also applicable to sentencing memoranda. In *United States v. Kravetz*,<sup>58</sup> the First Circuit held that the common law right of access applied to sentencing memoranda and third-party letters filed with the court for sentencing. The court reasoned that sentencing memoranda “bear directly on criminal sentencing in that they seek to influence the judge’s determination of the appropriate sentence,” and that there was “no principled basis for affording greater confidentiality as a matter of course to sentencing memoranda than is given to memoranda pertaining to the merits of the underlying criminal

---

<sup>55</sup> See *United States v. Armstrong*, 185 F. Supp. 3d 332, 336–37 (E.D.N.Y. 2016) (“[W]here release of information ‘is likely to cause persons in the particular *or future* cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.’”) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

<sup>56</sup> The Ninth Circuit disagreed with a somewhat similar argument made by a district court in a recent case. The district court had refused to seal documents involving a 5K motion, reasoning that “striking references in the docket to a motion and section of the Guidelines that will undoubtedly be mentioned in open court during the defendant’s sentencing makes little sense.” *United States v. Doe*, 2017 WL 3996799, at \*2 (9th Cir. Sept. 12, 2017). But the Court of Appeals stated: “The CCACM Report verifies that orally pronouncing a sentence, including references to § 5K1.1, does not jeopardize defendants in the same way as memorializing someone’s cooperation in publicly accessible documents that easily may be viewed online,” and that the “district court’s order did not recognize this distinction.” *Id.* at \*6.

<sup>57</sup> See generally Beale and King, *supra* note 3.

<sup>58</sup> 706 F.3d 47, 57–58 (1st Cir. 2013).

conviction, to which we have found the common law right of access applicable.”<sup>59</sup> Public access to such memoranda “allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system” and “may serve to check any temptation that might be felt by either the prosecutor or the court to seek or impose an arbitrary or disproportionate sentence; promote accurate fact-finding; and in general stimulate public confidence in the criminal justice system by permitting members of the public to observe that the defendant is justly sentenced.”<sup>60</sup> The court remanded for a document-by-document balancing analysis and redaction if necessary. This analysis seems to leave little room for an across-the-board rule requiring sealing of a section of each sentencing memorandum.

### Alternatives.

*Case-by-Case Sealing.* As discussed above in connection with the sealed transcripts and sealed plea agreements,<sup>61</sup> sealing is clearly permitted by existing precedent when supported by case specific findings but does not solve the red flag problem created when a sealed document appears on some docket sheets but not others.

*Master sealed event.* The option of creating a master sealed event on the docket sheet of every criminal case into which all cooperation-related documents would go may eliminate the red flag problem created by sealing only information in cases of cooperators, but raises concerns under the First Amendment, as noted earlier.<sup>62</sup>

*Redaction.* Case-by-case redaction of sentencing memoranda would withstand First Amendment challenges and would not be apparent from looking at the docket alone. But, as discussed above,<sup>63</sup> redaction would be more time consuming than sealing and would allow identification of cooperators by anyone able to see the redactions..

*Not filing sentencing motions and memoranda concerning cooperation.* Some courts have attempted to protect cooperator information by showing to the court but not filing sentencing memoranda (and motions) concerning cooperation, or by filing them with restricted status on the CM/ECF system. For example, in the Task Force survey one district reported that “Sentencing Memoranda are submitted directly to the Judge and are NOT docketed,” and another reported that “information concerning any cooperation or assistance provided by the Defendant will not be included in sentencing memoranda or other filed documents, but furnished to the

---

<sup>59</sup> *Id.* at 56. It explained:

Sentencing memoranda, which contain the substance of the parties’ arguments for or against an outcome, are clearly relevant to a studied determination of what constitutes reasonable punishment. Thus, like substantive legal memoranda submitted to the court by parties to aid in adjudication of the matter of a defendant’s innocence or guilt, sentencing memoranda are meant to impact the court’s disposition of substantive rights.

<sup>60</sup> *Id.* at 56–57 (citations, internal quotation marks, and alterations omitted).

<sup>61</sup> See *supra* text accompanying note 31.

<sup>62</sup> See *supra* text accompanying notes 32–37.

<sup>63</sup> See *supra* text accompanying note 38.

Court via a confidential letter submitted to the courtroom Deputy Clerk.”<sup>64</sup> Several other districts reported that they file sentencing memoranda (or memoranda mentioning cooperation) under restricted access, which permit access only by the court, probation, and all parties, or may be even more limited.<sup>65</sup>

As noted above in connection with the alternative of not filing plea agreements,<sup>66</sup> providing a document directly to the judge instead of filing it does not insulate from scrutiny under the First Amendment and common law right of access. That doctrine has been applied to material submitted directly to the judge in connection with sentencing, which is subject to the public right of access if it was meant to affect the judge’s sentencing determination.<sup>67</sup>

*Exempting cases without plea agreements.* To avoid restrictions on access in cases that go to trial or involve “open” pleas with no plea agreements, the amendments to Rule 32(g) in Column 1 of Appendix A could be more narrowly tailored. One option would be to add the following text shown in brackets: “If a written sentencing memorandum is filed with the court [in a case resolved by a plea of guilty or nolo contendere/plea agreement], it must have a public portion and a sealed supplement. . . .”

#### **E. Sealing Rule 35(b) Motions**

CACM’s Guidance also requires that “[a]ll motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court.” We implement that recommendation by an amendment to Rule 35(b) as shown in Column 1 of Appendix A.

#### Advantages.

Because Rule 35(b) deals exclusively with motions for sentencing reductions based on cooperation, persons seeking information about cooperators will necessarily be interested in any motion filed under this rule. Sealing these motions is much more targeted than other aspects of CACM’s recommendations. It affects only cases in which there has been cooperation, and blocks general access only to the details of that cooperation and the government’s resulting sentencing recommendation. Although post-trial Rule 35(b) motions are far less common than pre-sentencing substantial assistance motions under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), they are used frequently in a few districts.<sup>68</sup> In those districts, sealing could be of particular importance.

---

<sup>64</sup> Baerman, *supra* note 18 (responses from New Jersey and the Northern District of New York to Question 4).

<sup>65</sup> *See, e.g., id.* (citing responses of the Western District of North Carolina, the District of Maryland, the Northern District of Texas, and the Western District of Michigan).

<sup>66</sup> *See supra* text accompanying notes 51–54.

<sup>67</sup> *See supra* text accompanying notes 52–54.

<sup>68</sup> U.S. Sentencing Comm’n, *The Use of Federal Rule of Criminal Procedure 35(b) 9* (2016) (noting that district courts within the Fourth and Eleventh Circuits account for 49.3 percent of Rule 35(b) reductions).

Disadvantages.

Unfortunately, sealing a Rule 35(b) motion blocks access to the details of a defendant's cooperation, but not to the fact that he did cooperate. Indeed, the presence of such a motion on the docket is a red flag signaling that the defendant has cooperated. The motion and resentencing process itself may also provide disclosure when the defendant is removed from prison and brought to court. And if the defendant is successful in obtaining a sentence reduction under Rule 35(b), the court will impose a new and lower sentence, which itself will be recorded on the docket and serve as a very strong signal that the defendant cooperated. Thus sealing Rule 35(b) motions is unlikely to prevent third parties who can access the docket from learning of an individual's cooperation. And inmates who are imprisoned with the defendant may also be able to learn of his cooperation by observing his absence from the prison in order to cooperate and later to be resentenced.

CACM's recommendation may also be under inclusive, leaving other sources of information in the court's records. Unlike CACM's Guidance concerning plea agreements and sentencing, the Guidance concerning Rule 35(b) motions does not appear to reach briefs/memorandum filed in support of/opposition to a Rule 35(b) motion, nor does it require that the transcript of any hearing on the motion be sealed. Thus the court's records in Rule 35(b) cases will contain other documents describing or referring to the defendant's cooperation. To remedy this gap, we provide an amendment to Rule 35(b) in Column 2 of Appendix C (CACM Plus) that requires "A motion, an order, and related documents under Rule 35(b)" to be filed under seal.

Although a number of districts now provide that the government may seal all Rule 35(b) motions without the need to file a motion,<sup>69</sup> there may also be a First Amendment or common law right of access to Rule 35(b) motions absent a case-specific showing of the need for sealing. As noted above, it is well established that the sentencing process is subject to the First Amendment, and courts have held that the public has a presumptive right of access under the First Amendment or the common law.<sup>70</sup> Although few cases have focused specifically on Rule 35(b) motions, the Ninth Circuit found a right of public access to Rule 35(b) submissions, and a California district court found a right of access to Rule 5K1.1 motions, which present similar issues.<sup>71</sup> Assuming that the courts will hold that Rule 35(b) motions are subject to a presumptive right of access, that right could be overcome by case specific information about threats of harm to a cooperator. But the courts would have to break new ground to uphold an across-the-board rule authorizing sealing. One difficulty in responding to such a challenge is the fact (as noted) that sealing the motions leaves open many other sources of information in the court's records concerning a defendant's cooperation. Some courts have found that the public's right to access

---

<sup>69</sup> See Baerman, *supra* note 18 (describing responses to Question 3).

<sup>70</sup> See *supra* text accompanying notes 51–54.

<sup>71</sup> *CBS, Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 765 F.2d 823, 825–26 (9th Cir. 1985) (finding right of access in rule 35(b) submissions); *United States v. Morales*, 2015 WL 2406099, at \*2 (S.D. Cal. May 19, 2015) (finding right of access to 5K1.1 motions).



cannot be overcome, even where there is a legitimate interest such as privacy or security, if sealing cannot be effective because there are other available sources of the same information.<sup>72</sup>

CACM's Guidance could be expanded to include memoranda concerning Rule 35(b) motions and transcripts of hearing on those motions to block some other sources of information, but substantially broadening the scope of sealing in that fashion would also make it even more difficult for such procedures to withstand a constitutional or common law challenge.

#### Alternatives.

*Requiring a shell document in every criminal case.* We previously drafted but did not present to the Subcommittee an amendment requiring the government to file a sealed shell document containing any Rule 35 motion or stating there was no Rule 35 motion in every case within one year of the date of sentencing. Such a shell document—which would parallel the approach CACM has recommended for the plea agreement—would make it impossible to identify cooperators from the docket sheet, since every case would show a sealed entry. Two concerns led us not to include this proposal. First, the concentration of Rule 35 motions in just a handful of districts<sup>73</sup> may not justify imposing a burden on U.S. Attorneys' Offices and clerks in the majority of districts where Rule 35 motions are rare. Second, it would be difficult and burdensome to enforce such a provision. Particularly in light of the fact that the defendant's resentencing would signal that he had cooperated, this proposal did not seem to be warranted.

*Not filing.* The Task Force survey of district court clerks found that “[s]everal courts reported that the motions are not filed, but provided to the Judge and noted on the Statement of Reasons form.”<sup>74</sup> Not filing Rule 35(b) motions is contrary to Rule 49(b)(1), which requires that any paper that must be served must be filed. Accordingly, we show an amendment to Rule 49.1(b)(1) in Column 4 of Appendix A.

We have noted above the constitutional and common law right of access issues raised by not filing other document that may mention cooperation, such as plea agreements and sentencing memoranda.<sup>75</sup> Not filing Rule 35(b) motions would raise the same First Amendment and common law right to public access issues.

---

<sup>72</sup> See, e.g., *United States v. Key*, 2010 WL 3724358, at \*3 (E.D.N.Y. Sept. 15, 2010) (despite death threats because of defendant's cooperation, sealing of all materials related to cooperation not warranted because person making threats already had access to these materials); *United States v. Strevell*, 2009 WL 577910, at \*5 (N.D.N.Y. Mar. 4, 2009) (unsealing various sentencing memoranda because fact of defendant's cooperation, “like the genie, has long been out of the bottle”).

<sup>73</sup> See U.S. Sentencing Comm'n, *supra* note 68 (stating districts in two circuits account for approximately half of all Rule 35(b) motions).

<sup>74</sup> Baerman, *supra* note 18 (describing responses to Question 3).

<sup>75</sup> See *supra* text accompanying notes 41–42, 52–54, 67.

## F. Permanent Sealing

CACM's Guidance states that "[a]ll documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis." In Column 1 of Appendix A, we have added language to Rules 11(c)(3)(C), 11(g)(3), 32(g)(2), and 32(i)(4)(ii), and 35(b)(3) to implement this recommendation.

### Advantages.

The danger to cooperators continues (or intensifies) throughout their imprisonment, especially for those assigned to maximum-security prisons. To address the problem of threats and harm to federal prisoners who have cooperated, it is essential for sealing (or other restrictions on access to cooperation information) to continue throughout the time an individual is serving his sentence. For example, the Task Force found that problems often arise when inmates are transferred to a new institution.

Accordingly, CACM's Guidance provides for continued sealing unless the court orders otherwise on a case-by-case basis. Assuming the press or others were aware that a document was sealed, this would allow them to seek a fact-specific determination on the need for continued sealing. Assuming a case and fact-specific determination of need is required by the First Amendment and common law right of access cases, at least this approach provides the opportunity for such a determination after the fact, though not at the time of sealing.

CACM's Guidance also responds to local rules on sealing that may endanger inmates. Local rules in several districts set a standard time for unsealing, sometimes a short period likely to run before many defendants complete their sentences.<sup>76</sup> Although the parties in those districts may be successful in seeking to extend sealing for cooperators in individual cases, amending the rules to incorporate CACM's Guidance on this point would better protect inmates sentenced in those districts.

CACM's Guidance will also encourage others to cooperate. In weighing the need for continued sealing, some courts have given substantial weight to the government's need to secure cooperation in other cases.<sup>77</sup> In rejecting a newspaper's request to unseal the government's

---

<sup>76</sup> Examples of districts that place a sunset period on sealing, unless the court orders sealing continued, include: *Standing Order 09-SO-2. In Re: Sealing of Plea Agreements and Substantial Assistance Motions* (E.D.N.C. 2009) ("Upon the expiration of two years from the date of the filing of the order or other resolution of the substantial assistance motion sealed by operation of this standing order, such motion and order shall be unsealed, unless the presiding judge in the case extends the sealing order."); U.S. Dist. Ct. Rules N.D. Tex., LCrR 55.4 (2008) ("Unless the presiding judge otherwise directs, all sealed documents maintained on paper will be deemed unsealed 60 days after final disposition of a case. A party that desires that such a document remain sealed must move for this relief before the expiration of the 60-day period."); U.S. Dist. Ct. Rules W.D. Va., Gen. R. 9(d)(5) ("As for any other sealed documents, the documents will be unsealed 120 days from the date of entry of the sealing order, unless the sealing order provides otherwise.")

<sup>77</sup> *In re Motion for Civil Contempt by John Doe*, 2016 WL 3460368, at \*5-6 (finding that the government has a "unique interest in keeping documents relating to cooperation sealed, even after an investigation is complete," because release might cause others in the future to resist cooperation).

sentencing letters concerning cooperation, one court explained the need to consider not only the risk of harm to the individual defendant but also the potential damage to the government's ability to secure cooperation in the future:

[T]he government retains a unique interest in keeping documents relating to cooperation under seal even after a given investigation is completed. If we limit the government interest in protecting documents to a narrow interest in the secrecy of ongoing investigations, we fail to acknowledge how profoundly the federal criminal justice system relies on cooperators. As the Second Circuit has recognized, where release of information “is likely to cause persons in the particular *or future* cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.

The central role of cooperation in the federal criminal justice system is evident from the federal statute and Sentencing Guidelines, which permit the court to impose sentences below the mandatory minimums for cooperators. No other mitigating factor receives that level of deference. This sentencing policy achieves two goals—it gives the government leverage to investigate and prosecute the conspiracies that the federal criminal justice system targets, and it gives the court a means of acknowledging the cooperating defendant's contribution to the administration of justice, often at substantial risk to himself.

. . . Harm to cooperating defendants is distressingly, if not surprisingly, common. A potential cooperator must weigh the possibility of a reduced sentence against a very real risk of harm to himself and his loved ones. Many defendants refuse to cooperate because of these risks; others withdraw their cooperation.

For this reason, the government's ability to secure current and future cooperation from defendants depends on the government's ability to convince them to accept some risk, and on its ability to minimize this risk where it can. To this end, the government must be able to represent to cooperators that it can and will make efforts to keep the nature and scope of cooperation confidential. Of course, a cooperator's identity may emerge at trial, if one occurs, or at sentencing, as it did here. It may be gleaned from the appearance of sealed entries on the docket sheet. Nonetheless, the government should be able to make a good-faith representation to a cooperator, at the time cooperation is initiated, that it will take reasonable efforts to protect him from retaliation. It cannot make this representation if it believes the court will routinely unseal government submissions detailing cooperation upon a third-party request once the proceedings have concluded.<sup>78</sup>

There is precedent for continued sealing after the conclusion of an investigation or prosecution. Applying the First Amendment analysis, courts have declined post-conviction

---

<sup>78</sup> *United States v. Armstrong*, 185 F. Supp. 3d 332, 336–37 (E.D.N.Y. 2016) (footnote and citations omitted).

requests to unseal material related to cooperation that had been sealed or redacted after a case-specific showing of need.<sup>79</sup>

### Disadvantages.

Coupled with CACM's across-the-board approach—which seals a variety of materials (plea agreements and hearings, sentencing memoranda and hearings, and Rule 35 motions)—making permanent sealing the default would remove a very significant amount of information from the press and public in perpetuity, even in cases in which there has been—and could not be—any showing of a case-specific need for sealing. As the Second Circuit has explained in an unpublished opinion, a party seeking to overcome the public right of access to sentencing proceedings “bears a heavy burden” which “increases the more extensive the closure sought,” and when the party “seeks to seal *totally and permanently*, the burden is heavy indeed.”<sup>80</sup> It is unclear whether this burden can be met when the only reason to seal in the majority of cases is to disguise cooperation in a small fraction of the cases.

Additionally, although the Guidance is not clear on this point, it can be read as requiring a person seeking to unseal materials to carry the burden of demonstrating that sealing is no longer required. If that is what is intended, it would reverse the burden the Supreme Court has established for restricting access to materials that are presumptively available to the public. Not only would it dispense with a showing of case-specific need to protect information before sealing, by requiring a showing of case-specific need to unseal it would reverse the constitutional presumption of openness, substituting instead a presumption of secrecy.

Finally, the First Amendment requires sealing to be narrowly tailored, and we are not sure whether CACM explored other less restrictive options in between blanket permanent sealing and sealing only upon a specific showing of need. These might include, for example, requiring a reexamination of the sealing policy under the new rules after a period of 3 or 5 years, or requiring Bureau of Prisons to provide the sentencing court with notice when a defendant completes his term of supervised release, which could trigger either unsealing (absent a contrary order of the court) or a reexamination of the need for continued sealing.

## **II. Limiting Remote Access: New Rule 49.2**

At its last phone conference, the Subcommittee considered the text of a possible rule to limit remote access to certain records in criminal cases, while preserving full access at the courthouse. Although not all members of the Subcommittee expressed support for this approach (indeed both defense members expressed a preference for no limitations on access), the

---

<sup>79</sup> See, e.g., *In re Motion for Civil Contempt by John Doe*, 2016 WL 3460368, at \*5–6 (finding that the government has a “unique interest in keeping documents relating to cooperation sealed, even after an investigation is complete,” because release might cause others in the future to resist cooperation); *United States v. Park*, 619 F. Supp. 2d 89, 94 (S.D.N.Y. 2009) (denying newspaper’s argument that because “redactions lack specificity and more than a year has passed since Park was re-sentenced” document should be unsealed).

<sup>80</sup> *United States v. Doe*, 356 Fed. Appx. 488, 490 (2d Cir. 2009) (citation omitted).

Subcommittee made some decisions on the features that should be included if a rule prohibiting remote access is proposed.<sup>81</sup> The language in the attached draft (Appendix C) reflects the decisions made during that call, as well as several changes requested by the style consultants to eliminate inconsistent phrasing and duplicate language, and to improve the structure and flow of the provisions. The reporters declined to adopt several other changes suggested by the style consultants because they would affect the substance of the proposed rule.<sup>82</sup>

Unlike the version previously considered by the Subcommittee, which was placed within Rule 49.1(c),<sup>83</sup> the present version is a new free-standing Rule 49.2. Rule 49.1(c) currently provides that actions under § 2241 that relate to a petitioner's immigration rights are governed by Civil Rule 5.2. The style consultants correctly noted that the reference to Rule 5.2 brings into play all of the provisions in Rule 5.2, not merely those dealing with remote access. Accordingly,

---

<sup>81</sup> The draft includes the following decisions made by the Subcommittee at its last call:

- (1) All defendants, represented or not, should have remote access to the documents in their case files.
- (2) When a case includes multiple defendants, the rule should ensure that ex parte documents and documents restricted when filed are not available to parties whose access is barred.
- (3) Misdemeanors should not be exempted from the rule, but districts should be encouraged to consider exempting case categories (such as petty offenses on a national seashore) for which the district concludes unlimited remote access would not generally pose a risk of harm to suspected cooperators and family members. The Committee Note should make clear that such local rules are permitted by the introductory "Unless" clause in line 1. Tailoring in this fashion could be helpful if the rule were challenged under the First Amendment or the E-Government Act.
- (4) The public should have remote access to all indictments and informations, but more information is needed from DOJ concerning whether the few districts (including SDNY) would be willing to give up their unique charging policies that make a superseding indictment a red flag for cooperators.
- (5) The rule should provide the same remote access to the public and the press; the rule anticipates that courts retain the discretion to expand press access in high-interest cases, just as they currently entertain motions by the press seeking to unseal documents.
- (6) The rule should permit defense attorneys in other criminal cases to have remote access to plea and sentencing documents if they certify that they need the documents to represent another defendant. The rule should not attempt to prescribe how defense counsel could use the document.

<sup>82</sup> The following changes were not included:

- (1) In line 8, style suggested "party's access." We restored it to access by the "person."
- (2) In lines 3–5, style asked why the rule departed from Civil Rule 5.2. The Subcommittee decided the rule must be party specific so that one defendant's information is not accessible to another defendant, and so that information available to only one side or the other remain so. In contrast, because Rule 5.2 was designed to protect confidential information from non-parties, there was no reason to limit access by parties themselves.
- (3) In line 27, style suggested the certification must state the case-related need; this would be a major change from requiring only that an attorney certify that she has a need, and would potentially reveal the defense strategy.

<sup>83</sup> Rule 49.1(c) provides that actions under § 2241 that relate to a petitioner's immigration rights are governed by Civil Rule 5.2, which includes limitations on remote access in both immigration and social security cases. We initially placed the new provision within Rule 49.1(c) to put all limitations on remote access together and to avoid the relettering that would have been necessary if the new provision was added as a separate section where it would logically be placed in Rule 49.1.

they suggested that it was not appropriate to place the new provisions within 49.1(c). We agreed. We first considered adding a new subsection at the end of Rule 49.1, but concluded that the complexity and importance of the proposed amendment warranted a new rule. Because Rule 49.1(c) will continue to govern in § 2241 cases involving a petitioner's immigration rights, new Rule 49.2 begins "Unless the court orders [or these rules provide] otherwise," and the Committee Note will draw attention to Rule 49.1(c).

Like Civil Rule 5.2(c), new Rule 49.2 is a compromise between unlimited access (which allows viewing and downloading documents remotely through PACER or at a courthouse terminal) and sealing or not filing at all (which denies access completely, both online and in person). This compromise approach creates two levels of *remote* access to documents not filed under seal or otherwise restricted: (1) full access on line for parties and their counsel and (2) limited access for everyone else only to the docket, the charge, and the court's opinions and orders. The Rule retains public access to other documents in person at the courthouse terminal.

The general idea of this approach is one of "practical obscurity," a term used by the Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770 (1989), to describe protection for information that was previously disclosed to the public, but would require a burdensome amount of time and effort to obtain.<sup>84</sup> The burdensome effort here would include not only travel to the courthouse but having one's identity recorded when accessing the court record.<sup>85</sup> Files accessed at courthouse terminals can be tracked electronically,<sup>86</sup> and users could be put on notice of this fact as well.

The draft rule does depart from Civil Rule 5.2(c), which places similar limitations on remote access in social security and immigration cases, in several respects:

- (1) The deterrent effect of requiring a trip to the courthouse is enhanced with a requirement of showing identification, signing in, or other steps that might be required by the Judicial Conference.
- (2) Limitations on access are expressly party and person-specific; in multi-defendant cases, each defendant has full access only to his own file, and not to that of all

---

<sup>84</sup> The Court held that the privacy interest in maintaining the "practical obscurity" of documents that have at one time been disclosed outweighs the FOIA-based public value of additional disclosure. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

<sup>85</sup> See Caren Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 971 (2009) (arguing that "raising the costs of access can slow this process and lessen the risks of cooperators' identities being discovered online. To the extent that placing limits on electronic access could protect even a small number of cooperating defendants from unnecessary exposure, and more importantly, reassure prosecutors and courts that cooperation bargains can be conducted more openly, it is still worth attempting.").

<sup>86</sup> As one respondent explained in response to the Task Force survey of clerks, the records of use by persons at the courthouse terminal "could be maintained by the log files at PACER." The respondent noted that his office has previously had to use these log files from PACER and found that they "keep accurate and complete records of who accesses what document and at what time," and "[t]his technology could be used to help track back in case of cooperation harm." Baerman, *supra* note 18 (response to Question 14 from Northern District of Illinois).

codefendants; ex parte documents and documents filed with restricted access remain unavailable to any party or parties whose access is barred.

(3) Language expressly denying access to files that are sealed “or otherwise restricted” has been added to recognize that access restrictions separate from sealing are often placed upon documents when they are filed in CM/ECF.<sup>87</sup> While some local rules bar parties from filing something under seal without permission from the court, others allow parties to file a document under seal on their own.

(4) Other criminal defense attorneys are provided remote access to specified restricted documents upon filing a certification.

(5) In addition to the docket and the court’s orders, those seeking information at the courthouse may access any indictment or information filed on the docket.

#### Advantages.

If used as an *alternative* to routine sealing, bench conferences, or not filing, the primary advantage of restricting only remote access is that it preserves the press and public access to court records and proceedings in criminal cases that has traditionally been available. It also avoids many of the administrative burdens and costs of bench conferences, separate sealed supplements for plea agreements, sentencing and plea submissions, and plea and sentencing transcripts.

Civil Rule 5.2 provides a strong foundation and precedent for proposed Rule 49.2. Rule 5.2(c) restricts remote access in social security and immigration cases, and Rule 49.1(c) already makes those limitations applicable to § 2241 actions that relate to immigration rights.<sup>88</sup> Using Rule 5.2(c) as a model for Rule 49.2 has at least four benefits. First, although the limits on access in Rule 5.2(c) have not been challenged under the First Amendment, commentators have

---

<sup>87</sup> The CM/ECF system allows the filer or clerk to assign one of several different access levels to a given document. Jim Hatten, our clerk of court liaison, informs us these levels are:

- Non-public users and public terminals,
- Non-public,
- Ex-parte,
- Private (court user only),
- Sealed, and
- Applicable Party.

Local rules and custom may modify or regulate the use of these various levels. This means documents that are part of the case file but not “sealed”—including those filed as “Non- public,” “Ex-parte,” or “Private,”—are also be barred from public access. Some local rules added the phrase “or otherwise restricted” when referring to documents under seal and we adapted that idea for this draft.

<sup>88</sup> See, e.g., *Crossman v. Astrue*, 714 F. Supp. 2d 284, 290 (D. Conn. 2009) (Kravitz, D.J.) (discussing and defending Civil Rule 5.2—“In order to review any other part of the unsealed case file, non-parties have to physically go to the courthouse where it is stored. Thus, even if Mr. Pirro’s clients choose not to redact their filings at all, they are still provided some degree of privacy through the relative inaccessibility of the case file.”).

generally agreed that Rule 5.2(c) meets First Amendment and common law access standards.<sup>89</sup> Rule 49.2 should as well, since it allows access to all unsealed criminal case materials at the courthouse, providing the press and the public the same access they had from the founding through the Internet age.<sup>90</sup> Second, although the online access restrictions under Rule 5.2 have not been challenged under the E-Government Act, if Rule 5.2 is valid under the Act, similar restrictions in the Criminal Rules should be as well. Third, in approving Civil Rule 5.2, the federal courts and Congress have already endorsed the approach of limiting remote access to sensitive information in court files rather than sealing them. Finally, clerks' offices are familiar with how Civil Rule 5.2(c) works. Expanding this well-understood process to additional documents may generate fewer mistakes and less confusion than adopting an entirely new process.<sup>91</sup>

Requiring identification to access court documents is feasible.<sup>92</sup> The proposed text provides that a local rule will specify the identification required, or in the alternative, that the Judicial Conference will do so. This allows for adaptation as technology and identification methods change over time.

The present draft accommodates the needs of criminal defense attorneys, allowing them to have remote access to all unsealed/unrestricted materials in other cases in order to defend other clients if they provide a signed certification of need.<sup>93</sup>

---

<sup>89</sup> Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21–24 (2013) (noting “many cases support the concept of “practical obscurity,” which usually involves off-line limitations to accessing information”). See also Morrison, *supra* note 85, at 956; Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 160 (2009).

<sup>90</sup> See also Winn, *supra* note 89, at 160 (stating that this “intermediate system of access, reflected in the new privacy rules, appears to comply with the constitutional and common-law right to public access,” in that “it merely recreates certain aspects of the system of practical obscurity of the former paper based system—which, perforce, met constitutional muster”).

<sup>91</sup> See Baerman, *supra* note 18, (responses to Question 12) (District of Vermont: “it probably is most efficient to follow the Social Security Case protocol when handling certain documents. This method will save court time (i.e. the extra steps/processes required to protect certain information for certain documents could be reduced by making them not readily available) and would help protect against any possible mistakes which inadvertently disclose cooperating information.”); *id.* (Southern District West Virginia: “this process would make it easier for the Court to comply without unnecessary sealing”).

<sup>92</sup> Of districts responding to a CACM survey, one district, the district of Maryland, stated that it requests identification to access records at the clerk's office. Baerman, *supra* note 18 (responses to Question 13). Identification is also requested in the Western District of Texas. There, the process was described as follows: Those seeking access to documents at the terminal must note in a log the date, name, time requested, time viewing complete, and affiliation (e.g., CJA, bonding company, media, family members, members of public). If it is an individual known to the clerk's office employee, generally there is no further identification information required. If it is a member of the public, clerk's office staff requests picture identification. Once satisfied that the person is the person she claims to be in the log, no copy is made of the id. The staff member then steps out to the public terminal and unlocks it with a password. Telephone Conversation with Mike Maiella, Operation Supervisor for the District Court for the Western District of Texas, July 10, 2017.

<sup>93</sup> This provision is based on a 2009 standing order in the Eastern District of North Carolina. *Standing Order 09-SO-2*, *supra* note 76.



Finally, several states have adopted this “practical obscurity” approach with their court filings to protect sensitive information,<sup>94</sup> and at least two federal courts have done so for plea and sentencing related materials.<sup>95</sup>

### Disadvantages.

The risk that documents containing cooperation information will get into the wrong hands is higher with this option than with the sealing or no-file options, because documents concerning cooperation will remain available at the courthouse for those who show identification. The assumption that showing identification in person at the clerk’s office would deter some would-be PACER users from seeking that information is untested.<sup>96</sup> Even with an identification requirement, anyone could show identification, access the information, then relay it to those inside the prison or post it on the internet. Conceivably, someone could start a business that looks up records at courthouses for a fee.<sup>97</sup> If a defendant persuades a family member that he needs a copy of his plea agreement to avoid attack, then showing identification may be unlikely to deter that family member from attempting to help.<sup>98</sup>

Like the other options, the restrictions on remote access may generate costly litigation initiated by those objecting to the restrictions. As noted above, we believe that limiting remote access while preserving in person access stands on much firmer constitutional ground than blanket sealing, and likely would be upheld under existing First Amendment and common law access precedent. Unique to the remote access limitations, however, would be challenges under the E-Government Act. Section 205 of that Act imposes a general requirement that courts “make any document that is filed electronically publicly available online.”<sup>99</sup> Section 205(c) provides,

---

<sup>94</sup> Telephone conversation with Thomas Clarke, National Center for State Courts, August 2, 2017. *See also Okla. Supreme Court Bars Internet Access to Filed Documents*, 5 No. 8 ANDREWS PRIVACY LITIG. REP. 13 (April 2008); Lynn Sudebek, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 119–20 (2006) (recommending this approach).

<sup>95</sup> The Western District of Texas, El Paso Division has implemented this system recently, and initial reports are that it has been working well. However, court personnel noted that there had been few requests to view information. *See* Telephone Conversation, *supra* note 91. The Northern District of Texas has also adopted this approach. Baerman, *supra* note 18, summary count of responses to Question 11 (noting “Texas Northern has issued a Special Order that places limits on public PACER access to documents that reveal cooperation.”). At one time, the approach was advanced by the Department of Justice. *See* Morrison, *supra* note 85, at 960 (describing earlier DOJ proposal for “tiered electronic access, restricting certain documents to that defendant’s counsel and the government, making others available to a broader group of counsel, and releasing a third category to the general public.”).

<sup>96</sup> In the Northern District of Texas where some documents are available only at the courthouse, but there is no identification requirement, the clerk’s office staff reported to CACM that “We have had individuals specifically looking for cooperator information in the lobby in this district.” Baerman, *supra* note 18,

<sup>97</sup> *See* Morrison, *supra* note 85, at 970 (discussing proposal to limit PACER access without any identification requirements: “nothing prevents a motivated individual from physically visiting the clerk’s office and reviewing the court files of a suspected cooperator. Equally, a more enterprising version of Whosarat.com might send runners to the courts to scan criminal case information into mobile devices for subsequent dissemination online.”)

<sup>98</sup> CACM survey, at 87 (“Incarcerated Defendants, or friends/family members on their behalf, regularly request copies of their plea agreement and sentencing documents.”).

<sup>99</sup> E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (2002) (44 U.S.C. § 3501 et seq.).

however, that “[d]ocuments that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online,” *id.* § 205(c)(3), and that rules may be enacted under the Rules Enabling Act procedures “to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically,” *id.* § 205(c)(3)(A)(i). Any rules promulgated under this authority must “take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.” *Id.* § 205(c)(3)(A)(iii). Although there is no precedent to indicate how that statute will be construed, we believe that the limitations in the rule would probably withstand an E-Government Act challenge. If Rule 5.2(c), which adopts a similar approach, is valid under the E-Government Act, then Rule 49.2 should be also.

Requiring identification to access court documents is a novel procedure that may attract challenge as well, but is probably constitutional. We could find no case law on the question whether requiring identification for access to court documents would be constitutionally problematic. The REAL ID Act already requires showing compliant identification to gain access to federal buildings, including courthouses,<sup>100</sup> and many cases have upheld the requirement of identification for entry into federal courthouses without a specific showing of need.<sup>101</sup> On the other hand, the constitutionality of the added identification requirements for document access are not certain. The security concerns animating restrictions on those who enter courthouses are different than those underlying an identification requirement for document access. Also, as pointed out in an earlier memo, although courts have upheld under the Sixth Amendment an identification requirement before entry into criminal proceedings within a courthouse, these decisions applied a “relaxed” test instead of the more exacting test usually applied to courtroom closures under *Waller v. Georgia*, 467 U.S. 39 (1984), and most also noted a case-related reason.

Even apart from litigation, the limited remote access approach is sure to generate opposition from those who believe in preserving free and open public access to the judicial system and court records. As compared to filing under seal or never filing, it does allow some access to documents that would otherwise be secret and completely unavailable to the press, public, victims, and researchers. But as compared to the traditional approach of requiring case-by-case justification before sealing documents in criminal cases—still followed in many

---

<sup>100</sup> REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (2005); Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272 (Jan. 29, 2008) (“DHS does not believe that the REAL ID Act or the implementing regulations will impede the public’s Constitutional rights. Once REAL ID is in effect, an individual presenting a driver’s license to access a Federal courthouse must use a REAL ID driver’s license to do so. However, that individual may present other documents, or may not be required to present identification at all, depending on the courthouse’s pre-existing identification policies.”).

<sup>101</sup> *E.g.*, *United States v. Smith*, 426 F.3d 567, 574 (2d Cir. 2005); *United States v. Cruz*, 407 F. Supp. 2d 451, 452 (W.D.N.Y. 2006) (finding that United States Marshals Service’s practice of requiring photographic identification of all visitors to courthouse did not violate defendant’s constitutional right to a public trial).

districts—limiting remote access significantly impacts transparency and the practical ability of the public, press, and researchers to monitor federal criminal cases.

Like the other options, the remote access approach also entails additional time and resources by Clerk's Offices. We cannot predict how much demand there will be for these documents at the courthouse by people willing to submit to the identification process. If the demand is significant, additional terminals and staff to check and record the identification of those who come to request documents at the courthouse may be needed.<sup>102</sup> Limiting remote access may also require reconfiguring remote access rules, and other changes to PACER to inform users of the new restrictions. And, like the other options, it would require districts and individual judges to adapt any local rules and orders that conflict with the new restrictions.

### III. Concluding Remarks

We have attempted to list the advantages and disadvantages of the various options discussed so far by the Subcommittee, using information available at this point from the ongoing work of the Task Force. If additional information becomes available before the conference call (concerning, for example, the configuration of docket sheets), we will bring that to the Subcommittee's attention.

To assist the Subcommittee in evaluating whether to recommend adoption of amendments implementing the CACM Guidance, and whether to recommend any of the alternatives including limiting remote access with a new Rule 49.2, we include here a brief summary list of the issues.

- the need to restrict access to information to protect against threats and harm to cooperators, and
  - the effectiveness of each Guidance procedure to protect against threats and harm,<sup>103</sup>
  - the effectiveness of alternative non-rules procedures to protect against threats and harm,<sup>104</sup> and
  - the interaction between those other procedures and any changes in the rules;
- the policy favoring transparency in judicial proceedings;

---

<sup>102</sup> The U.S. Marshal's service already checks identification at the courthouse entrance, so there may be a more efficient solution that would incorporate this process.

<sup>103</sup> As noted on page 1, many other sources of information about cooperation will remain, and indeed none of the options completely prevents the use of court records to confirm or deny cooperator status. For example, none restricts a defendant's right to request copies of documents in his own case file or retain documents initially furnished to him by his attorneys, and then to share those documents as he pleases.

<sup>104</sup> Even perfect enforcement of any BOP regulation barring possession of such papers by inmates would not prevent defendants who obtain documents from their attorney prior to entering BOP custody from sharing those documents with another who can later relate the information by telephone or other means with those interested in it. In addition, mistakes by court staff administering restrictions have been reported to us in several districts.

- potential constitutional challenges under the First Amendment;<sup>105</sup>
- potential challenges under the common law right of access to court records;
- potential challenges to Rule 49.2 under the E-Government Act;
- the impact on the representation of criminal defendants;
- increased administrative and security burdens and additional costs for courts, clerks, marshals, Bureau of Prisons, Sentencing Commission;
- the impact on the integrity and completeness of case records; and
- the impact on the ability of the press, scholars, and the public to track and monitor activity in federal criminal cases.<sup>106</sup>

---

<sup>105</sup> Although we do not focus on this issue in this memo, the proposed procedures also implicate the Sixth Amendment right to a public trial. *See* Beale and King, *supra* note 3, at 5–8.

<sup>106</sup> If access to individual case documents is barred, it may still be possible for the Sentencing Commission to collect and report detailed anonymized data on the use of cooperation, but that would entail additional costs and delay compared to the real-time access currently available through court records.

# APPENDIX A

**THIS PAGE INTENTIONALLY BLANK**

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>	<b>Rule 11</b>
<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>
<p><i>(2) Disclosing <u>and Filing a Plea Agreement.</u></i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p><b><u>(B) Bench Conference Required.</u></b> [In every case,] <u>The disclosure must include a bench conference at which the government must disclose any agreement by the defendant to cooperate with the government or must state that there is no such agreement.</u></p>	<p><i>(2) Disclosing <u>and Filing a Plea Agreement.</u></i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p><b><u>(B) Filing the Agreement.</u></b> <u>The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or references to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise.</u></p> <p style="text-align: center;">* * *</p>	<p><i>(2) Disclosing <u>and Filing a Plea Agreement.</u></i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p><b><u>(B) Filing the Agreement.</u></b> <u>The plea agreement must be filed under seal. The agreement must remain under seal indefinitely until the court orders otherwise.</u></p> <p style="text-align: center;">* * *</p>	<p><i>(2) Disclosing <u>and Submitting a Plea Agreement.</u></i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p><b><u>(B) Submitting the Agreement.</u></b><sup>1</sup> <u>The plea agreement must be submitted directly to the Sentencing Judge, the United States Probation Department, and all counsel of record for the government and the defendant who signed the agreement, and not filed [with the court/in the record].</u></p> <p style="text-align: center;">* * *</p>

<sup>1</sup> Alternatively, no amendment would be required if CACM promulgated a national no filing rule. Action by CACM might be appropriate because (1) the current rules do not speak to what should and should not be filed, and (2) CACM guidance can be provided much more rapidly than a rules amendment.

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<b>Rule 11(c)(2) continued</b>			
<p><b><u>(C) Filing the Agreement.</u></b> The parties must file the plea agreement.<sup>2</sup> The agreement must include a public part and a sealed supplement that contains any discussion of or references to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p>* * *</p>			

<sup>2</sup> The CACM Guidance appears to assume that plea agreements will be filed, though that procedure is not universal. Our drafts in Columns 1 to 3 reflect that interpretation of the Guidance. Requiring all plea agreements to be filed will create the national uniformity in docket sheets that CACM has concluded is necessary to fully protect cooperators. However, the CACM guidance is not explicit on this point, and it would be possible to revise these columns to refer to plea agreements “if filed.” We note also that the CACM Guidance did not specifically address written submissions by the parties concerning pleas, and our amendments do not address such submissions. But in early discussions Subcommittee members indicated such pleadings are fairly common, and we have included written submissions concerning pleas in Appendix B, which shows amendments that might supplement the Full CACM approach to implement its goals.



## Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<b>Rule 11</b>	<b>Rule 11</b>		<b>Rule 11</b>
<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>
<p><b><u>(1) In General.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b><u>(2) Inquiries and Advice.</u></b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b><u>(3) Bench Conference.</u></b> If the bench conference required by Rule 11(c)(2) is transcribed, <b>the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</b></p>	<p><b><u>(no change)</u></b><sup>3</sup></p>	<p><b><u>(1) In general.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b><u>(2) Inquiries and advice.</u></b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b><u>(3) Filing under seal.</u></b> If the bench conference required by Rule 11(c)(2) is transcribed, <b>the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</b></p>	<p><b><u>(1) In general.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b><u>(2) Inquiries and advice.</u></b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b><u>(3) No filing.</u></b> [Unless the court orders otherwise,] the recording or transcript of the plea proceeding must not be filed with the court.<sup>4</sup></p>

<sup>3</sup> Alternatively, a rule could require the government to identify portions of the plea transcript that might prove or disprove cooperation and either redact or file those portions under seal. This proposal does not include such a rule.

<sup>4</sup> As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference’s policy, and perhaps also legislation.

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<b>Rule 32</b>	<b>Rule 32</b>	<b>Rule 32</b>	<b>Rule 32</b>
<p><b><u>(g) Submitting the Report; Written Memoranda.</u></b>  <b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.  <b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The supplement must contain:            <u>(A) any discussion of or reference to the defendant’s cooperation, including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or</u>            <u>(B) a statement that there has been no cooperation.</u>  ***</p>	<p><b><u>(g) Submitting the Report; Written Memoranda.</u></b>  <b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.  <b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed is with the court, it must have a public portion and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise.. The sealed supplement must contain:            <u>(A) any discussion of or reference to the defendant’s cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1 or</u>            <u>(B) a statement that there has been no cooperation.</u>  ***</p>	<p><b><u>(g) Submitting the Report; Written Memoranda.</u></b>  <b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.  <b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must be sealed. The memorandum must remain under seal indefinitely until the court orders otherwise.  ***</p>	<p><b><u>(g) Submitting the Report; Written Memoranda.</u></b>  <b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.  <b><u>(2) Memoranda.</u></b> Any written sentencing memorandum must be submitted directly to  <ul style="list-style-type: none"> <li>· <u>the sentencing judge,</u></li> <li>· <u>counsel of record for the government, and</u></li> <li>· <u>counsel of record for the [individual] defendant in the underlying prosecution.</u></li> </ul> <u>The memorandum must not be filed with the court.</u>  ***</p>

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<b>Rule 32</b>	<b>Rule 32</b>	<b>Rule 32</b>	<b>Rule 32</b>
<p>(i) Sentencing<sup>5</sup></p> <p>...</p> <p>(4) Opportunity to Speak</p> <p>...</p> <p>(C) <del>In Camera</del> Proceedings <u>In Camera or at the Bench.</u></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> <u>[In every case,] Sentencing must include a conference at the bench for discussion of the defendant’s cooperation or lack of cooperation with the government. The transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.</u></p>	(no change)	(no change)	(no change) <sup>6</sup>

<sup>5</sup> The CACM Guidance did not reference PSRs—though they frequently include information about cooperation—perhaps because PSRs are not universally filed and when filed are already universally sealed. Thus we do not include them in Columns 1 to 4. A revision to Rule 32(i) that would require a PSR, if filed, to be filed under seal is included in Appendix B, which CACM Plus amendments.

<sup>6</sup> As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference’s policy, and perhaps legislation.

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<b>Rule 35. Correcting or Reducing a Sentence.</b>	<b>Rule 35. Correcting or Reducing a Sentence.</b>	<b>Rule 35. Correcting or Reducing a Sentence.</b>	<b>Rule 35. Correcting or Reducing a Sentence.</b>
<p><b>(b) Reducing a Sentence for Substantial Assistance.</b> *****</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p><b>(b) Reducing a Sentence for Substantial Assistance.</b> *****</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p><b>(b) Reducing a Sentence for Substantial Assistance.</b> *****</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise..</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p><u>(no change; see Rule 49 below)</u></p>

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

<b>Rule 47</b>	<b>Rule 47</b>	<b>Rule 47</b>	<b>Rule 47</b>
<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>
<p><b>(b) Form and Content of a Motion.</b> A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.</p> <p><i>(no change)</i><sup>7</sup></p>	<i>(no change)</i>	<i>(no change)</i>	<i>(no change; see Rule 49 below)</i>

<sup>7</sup> The reporters’ initial subcommittee discussion draft included an amendment to Rule 47(b)(1) that provided: “Any motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must filed under seal.” Although we believe that the failure to seal these documents would undermine CACM’s goals, we omitted this provision from Columns 1 to 4 because of the Subcommittee’s tentative decision this spring to come forward with one proposal that implemented all of CACM’s recommendations but no additional provisions. Similar language, does, however, now appear in Column 2 of Appendix B (CACM plus/complete).

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

Rule 49	Rule 49	Rule 49	Rule 49 <sup>8</sup>	Rule 49
<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM Sealing; no courtroom restrictions</b>	<b>Whole Document Sealing; no courtroom restrictions</b>	<b>No Document Filing; no courtroom restrictions</b>	<b>No Remote Access</b>
<u>(no change)</u>	<u>(no change)</u>	<u>(no change)</u>	<p><b><u>(b) Filing.</u></b></p> <p><b><u>(1) When Required; Certificate of Service. Ordinarily, aAny paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court’s electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing. But a motion for a sentencing reduction under Rule 35(b), 18 U.S.C. §3553(e), or U.S.S.G. §5K1.1 [and supporting documents] must be submitted directly to</u></b></p> <ul style="list-style-type: none"> <li><b><u>· the sentencing judge,</u></b></li> <li><b><u>· counsel of record for the government, and</u></b></li> <li><b><u>· counsel of record for the [individual] defendant in the underlying prosecution.</u></b></li> </ul> <p><b><u>The motion must not be filed with the court.</u></b></p>	<u>(no change; see proposed amendment Rule 49.2)</u>

<sup>8</sup> Changes shown to proposed amendment sent to the Judicial Conference in August. New material dealing with cooperators is shown in red.  
Committee on Rules of Practice and Procedure | January 4, 2018

# APPENDIX B

**THIS PAGE INTENTIONALLY BLANK**



## Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

This chart shows the first column of Appendix A (intended to implement the CACM guidance strictly) side by side with a set of amendments that would add additional changes that might be required to effectuate the goals of the CACM guidance. The “CACM plus/complete” column illustrates such changes. The Subcommittee was opposed generally to amendments that went beyond what was expressly required by CACM guidance. This side by side shows specifically what those additional changes might be. New material is highlighted.

Full CACM procedures including courtroom restrictions	CACM plus/complete	Notes
<b>Rule 11</b>	<b>Rule 11</b>	
<b>(c) Plea Agreement Procedure.</b>	<b>(c) Plea Agreement Procedure.</b>	
<p data-bbox="197 626 621 691"><b>(2) <u>Disclosing and Filing a Plea Agreement.</u></b></p> <p data-bbox="226 734 642 766"><b><u>(A) Disclosure In Open Court.</u></b></p> <p data-bbox="197 773 642 984">The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p data-bbox="218 1026 525 1058"><b><u>(B) Bench Conference</u></b></p> <p data-bbox="197 1065 642 1351"><b><u>Required.</u></b> [In every case,] <u>The disclosure must include a bench conference at which the government must disclose any agreement by the defendant to cooperate with the government or must state that there is no such agreement.</u></p>	<p data-bbox="722 626 1155 659"><b>(2) <u>Disclosing a Plea Agreement.</u></b></p> <p data-bbox="693 701 1155 912"><b><u>(A) In Open Court.</u></b> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.</p> <p data-bbox="693 954 1142 1279"><b><u>(B) Bench Conference Required.</u></b> [In every case,] <u>The disclosure must include a bench conference. Any discussion of or reference to the defendant’s cooperation or lack of cooperation with the government must take place at this conference and not in open court.</u></p>	<p data-bbox="1209 662 1650 912">CACM guidance mandates bench conferences for prosecutor to state whether or not the defendant cooperated, but does not regulate the discussion of cooperation in open court during plea proceeding by anyone.</p> <p data-bbox="1209 954 1659 1205">CACM guidance literally would allow the parties to discuss or refer to the defendant’s cooperation or lack of cooperation in open court, so long as they disclosed the agreement or made the required statement at the bench.</p>

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

Full CACM procedures including courtroom restrictions	CACM plus/complete	Notes
<p><b>Rule 11(c)</b></p> <p><u>(C) Filing the Agreement.</u> The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or reference to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p>* * *</p>	<p><b>Rule 11(c)</b></p> <p><u>(C) Filing the Agreement.</u> The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or reference to the defendant’s cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until otherwise ordered by the court.</p> <p><b><u>(D) Filing Submissions Concerning the Agreement.</u></b> If a written submission concerning the plea agreement is filed, the submission must include a public part and a sealed supplement. The supplement must contain any discussion of or references to the defendant’s cooperation or lack of cooperation with the government. The supplement must remain under seal indefinitely until otherwise ordered by the court.</p> <p>* * *</p>	<p>Subcommittee discussion confirmed that parties do file memoranda in connection with plea proceedings that may discuss cooperation or lack of cooperation. Such memoranda are not addressed by CACM guidance.</p> <p>This shows what a rule might look like if the same “sealed supplement” approach were followed for plea memoranda as well as the agreement itself.</p>

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

<b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>	<b>CACM plus/complete</b>	<b>Notes</b>
<b>Rule 11</b>	<b>Rule 11</b>	
<b>(g) Recording the Proceedings.</b>	<b>(g) Recording the Proceedings.</b>	
<p><b><u>(1) In General.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b><u>(2) Inquiries and Advice.</u></b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b><u>(3) Bench Conference.</u></b> If the bench conference required by Rule 11(c)(2) is transcribed, <b>the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</b></p>	<p><b><u>(1) In General.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b><u>(2) Inquiries and Advice.</u></b> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><b><u>(3) Bench Conference.</u></b> If filed, <b>any recording</b> or transcript of a bench conference required by Rule 11(c)(2) <b>must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</b></p>	<p>The rule contemplates a recording. CACM’s guidance referenced transcripts only. If it is possible that a recording could be filed in addition to or instead of a transcript, the words “recording or” may need to be included.</p>

## Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Full CACM procedures including courtroom restrictions	CACM plus/complete	Notes
<p><b>Rule 32</b></p> <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b>  <b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any un-resolved objections, the grounds for those objections, and the probation officer’s comments on them.  <b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The sealed supplement must contain:              (A) any discussion of or reference to the defendant’s cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or              (B) a statement that there has been no cooperation.            * * *</p>	<p><b>Rule 32</b></p> <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b>  <b><u>(1) Report.</u></b> At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any un-resolved objections, the grounds for those objections, and the probation officer’s comments on them.  <b><u>(2) Memoranda.</u></b> If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The sealed supplement must contain:              (A) any discussion of or reference to the defendant’s cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or              (B) a statement that there has been no cooperation.  <b><u>(3) Filing Presentence Report.</u></b> If filed, the presentence report and appended documents must be filed under seal. The presentence report must remain under seal indefinitely until the court orders otherwise.              OR, as alternative  <b><u>(3) No Filing of Presentence Report.</u></b> The presentence report [and appended documents] must be submitted directly to the sentencing judge, counsel of record for the government, and counsel of record for the [individual] defendant in the underlying prosecution, and must not be filed with the court.</p>	<p>CACM’s Guidance does not mandate filing or sealing of the presentence report</p> <p>Two options creating new subdivision (g)(3) are shown to codify the current practice in every jurisdiction of allowing no public access to PSRs. The first requires sealing, and the second that the PSR not be filed.</p> <p>If the Subcommittee prefers the no filing approach to PSRs, it might be accomplished by CACM guidance rather than a Rules change.</p>

<b>Full CACM procedures including courtroom</b>	<b>CACM plus/complete</b>	<b>Notes</b>
---	---------------------------	--------------

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

<b>restrictions</b>		
<p><b>Rule 32</b></p> <p><b>(i) Sentencing</b></p> <p>...</p> <p><b>(4) Opportunity to Speak</b></p> <p>...</p> <p><i>(C) Proceedings in Camera or at the Bench.</i></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> <u>[In every case,] Sentencing must include a conference at the bench for discussion of the defendant’s cooperation or lack of cooperation with the government. The transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until otherwise ordered by the court.</u></p>	<p><b>Rule 32</b></p> <p><b>(i) Sentencing</b></p> <p>...</p> <p><b>(4) Opportunity to Speak</b></p> <p>...</p> <p><i>(C) Proceedings in Camera or at the Bench.</i></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> <u>In every case, sentencing must include a conference [in camera or] at the bench. Any discussion of or reference to the defendant’s cooperation or lack of cooperation with the government must take place at this conference and not in open court. The [recording or] transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.</u></p>	<p>CACM’s Guidance requires that every sentencing include a bench conference at which the parties may discuss cooperation or lack of cooperation, but does not regulate any mention of cooperation or lack of cooperation in open court during sentencing by anyone. Although the intent to bar any public mention of this subject is implicit in CACM’s Guidance, the Guidance text taken literally would allow the parties to discuss or refer to the defendant’s cooperation or lack of cooperation in open court, so long as they also discuss it at the bench. Because one or more participants in a sentencing hearing may want references to cooperation (or lack of it) to be on the record, it may be necessary to be more explicit. Subsection (ii) illustrates one option for more clarity.</p>

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

Full CACM procedures including courtroom restrictions	CACM plus/Complete	Notes
Rule 32	Rule 32	
	<p><b><u>(1) Written References to Cooperation.</u></b>  <b><u>(1) By a Party or Victim.</u></b> If a party or victim files a written submission regarding sentencing [with the court/ in the record], it must include a public portion and a sealed supplement. The sealed supplement must contain any discussion of or references to the defendant’s cooperation or lack of cooperation with the government [including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1]. “Submission” includes sentencing memoranda, objections under Rule 32(f), and evidence submitted under Rule 32(i)(2). The supplement must remain under seal indefinitely until the court orders otherwise.</p> <p><b><u>(2) By the Judge.</u></b> If a written notice under Rule 32(h) or summary under Rule 32(i)(B) is filed [with the court/ in the record] it must include a public portion and a sealed supplement. The sealed supplement must contain any discussion of or references to the defendant’s cooperation or lack of cooperation with the government. The supplement must remain under seal indefinitely until the court orders otherwise.</p>	<p>CACM’s Guidance provides for sealed supplements to sentencing memos. But a number of other items sometimes filed in connection with sentencing may mention cooperation or lack of it. These include:</p> <ul style="list-style-type: none"> <li>• objections to the PSR</li> <li>• evidence submitted by victims and parties for sentencing</li> <li>• notice by the court under Rule 32(h), and</li> <li>• summaries under Rule 32(i)(B).</li> </ul> <p>CACM’s Guidance does not address any of these items. Column 2 shows what a rule might look like if the same “sealed supplement” approach were followed for all of these items.</p> <p>Also, Column 2 places these changes in a new subsection for Rule 32, rather than an amendment subdividing existing Rule 32(g) or (i).</p>

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

Full CACM procedures including courtroom restrictions	CACM plus/Complete	Notes
<p><b>Rule 35. Correcting or Reducing a Sentence.</b></p>	<p><b>Rule 35. Correcting or Reducing a Sentence.</b></p>	
<p><b>(b) Reducing a Sentence for Substantial Assistance.</b>                      * * * * *</p> <p><b>(3) <i>Sealing.</i></b> A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <b>(4) <i>Evaluating Substantial Assistance.</i></b> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <b>(5) <i>Below Statutory Minimum.</i></b> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p><b>(b) Reducing a Sentence for Substantial Assistance.</b>                      * * * * *</p> <p><b>(3) <i>Sealing.</i></b> A motion, <b>an order, and related documents under</b> Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <b>(4) <i>Evaluating Substantial Assistance.</i></b> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <b>(5) <i>Below Statutory Minimum.</i></b> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p>CACM’s Guidance does not require that Rule 35 <i>orders</i> or <i>memoranda</i> be filed under seal, nor does it address the obvious import of a sealed entry after sentencing followed by an order reducing sentence.</p> <p>The CACMplus /Complete version in Column 2 provides for sealing of orders and related documents.</p>

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

Rule 47	Rule 47	Rule 47
Full CACM procedures including courtroom restrictions	CACM plus/complete	Notes
<p><b>(b) Form and Content of a Motion.</b> A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.</p> <p><u>(no change)</u></p>	<p><b>(b) Form and Content of a Motion.</b></p> <p><u>(1) In Writing.</u> A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means.</p> <p><u>(2) Contents and Support.</u> A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.</p> <p><u>(3) Motions for Sentence Reduction.</u> Any motion for a sentence reduction under [Rule 35,<sup>1</sup> 18 U.S.C. §3553(e), [or U.S.S.G. §5K1.1],<sup>1</sup> together with supporting documents, must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p>	<p>CACM’s Guidance makes no provision for sealing § 3553(e) and §5K motions.</p> <p>The CACM plus/complete version in Column 2 amends rule 47 to require the government to file such motions under seal. Rule 35 is added in brackets here as an option for replacing or supplementing the amendment to that Rule requiring the motion to be filed under seal.</p>

<sup>1</sup> There is no statutory requirement for a “motion” expressing the government’s support for a substantial assistance departure under § 5K1.1. Thus the Sentencing Commission may have the authority to provide that (1) no “motion” is required, and (2) the government must request consideration of a substantial assistance departure by other means, such as a letter to the court, that would not be filed. Action by the Commission would not, however, affect requests for substantial assistance for departures under 18 U.S.C. §3553(e), which requires a government “motion.”



# APPENDIX C

**THIS PAGE INTENTIONALLY BLANK**

## APPENDIX C

### Rule 49.2. Limitations on Remote Access to Electronic Files.

1           (a) *In General.* Unless the court orders [or these rules provide]  
2           otherwise, access to an electronic file is authorized only as provided in (b),  
3           (c), and (d).

4           (b) *By the Parties and Their Attorneys.* A party and the party's  
5           attorney may have remote electronic access to any part of the case file that is  
6           not under seal or other restriction that bars access by that party.

7           (c) *By Others.* Any other person may have the following electronic  
8           access to a document that is not under seal or other restriction barring the  
9           person's access:

10                   (1) [electronic] access to any part of the case file at the  
11                   courthouse, after providing the clerk with identification [required by  
12                   local court rule] [consistent with any standards established by the  
13                   Judicial Conference of the United States], and

14                   (2) remote [electronic] access only to:

15                           (i) the docket maintained by the court;

16                           (ii) the indictment or information; and

17                           (iii) an opinion, order, judgment, or other

18                           disposition of the court.

19           (d) *By an Attorney in Another Case.* An attorney in another  
20           criminal case in the same district [circuit] may, without a court order, have  
21           remote electronic access to a document sealed under [Rules 11, 32, or 35] if  
22           the attorney:

23                   (1) is a registered user of the court’s electronic filing system;  
24                   (2) has filed a notice of appearance the other case and seeks  
25                   to use the document in that case; and  
26                   (3) files [under seal] in the case from which the document is  
27                   sought a signed certificate that:  
28                               (i) states that the attorney has a case-related need to  
29                               review the requested document; and  
30                               (ii) gives the name and docket number of the case in  
31                               which the attorney will use it.

# TAB 3C

**THIS PAGE INTENTIONALLY BLANK**

## ADVISORY COMMITTEE ON CRIMINAL RULES

### MINUTES

October 24, 2017, Chicago, Illinois

#### I. ATTENDANCE

The Criminal Rules Advisory Committee (“Committee”) met in Chicago, Illinois, on October 24, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair  
Judge James C. Dever III  
Donna Lee Elm, Esq.  
Judge Gary Feinerman  
Mark Filip, Esq.  
James N. Hatten, Esq.  
Judge Denise Page Hood  
Judge Lewis A. Kaplan  
Professor Orin S. Kerr  
Judge Raymond M. Kethledge  
Justice Joan L. Larsen  
Judge Bruce McGivern  
John S. Siffert, Esq.  
Jonathan Wroblewski, Esq.  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King, Reporter  
Judge David G. Campbell, Standing Committee Chair  
Judge Amy J. St. Eve, Standing Committee Liaison  
Professor Daniel Coquillette, Standing Committee Reporter (by telephone)  
Professor Catherine T. Struve, Associate Reporter, Standing Committee (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Chief Counsel, Rules Committee Staff  
Laural L. Hooper, Esq., Federal Judicial Center  
Julie Wilson, Esq., Rules Committee Staff  
Patrick Tighe, Esq., Law Clerk, Standing Committee  
Shelly Cox, Rules Committee Staff

## **II. CHAIR'S REMARKS AND OPENING BUSINESS**

### **A. Chair's Remarks**

Judge Molloy thanked the staff for the arrangements for the meeting, then welcomed Judge David Campbell, the Chair of the Standing Committee, and two new members of the committee: Federal Defender Donna Lee Elm and Magistrate Judge Bruce McGivern.

Judge Molloy also recognized two guests who were asked to introduce themselves: Catherine M. Recker, representing the American College of Trial Lawyers, and Professor Daniel S. McConkie, who had submitted a written statement on the proposed amendment creating Rule 16.1.

### **B. Approval of Draft Minutes**

Discussion identified several typographical errors in the minutes of the Committee's Spring meeting. The Committee voted to approve the draft minutes with the proviso that the reporters would correct any errors noted by members or identified by the reporters.

### **C. Status of Rules Amendments and Pending Legislation**

Ms. Womeldorf reported on status of the proposed amendments to Rules 12.4, 49, and 45. The Judicial Conference met in September and approved those Rules, which have been transmitted to the Supreme Court. If transmitted by the Court to Congress by May 1, 2018, the Rules would become effective in December 1, 2018, absent Congressional action.

Ms. Wilson discussed the chart at Tab 1D, which included pending legislation that would directly amend the Federal Rules. She said there had been no further action on the proposals to repeal the amendments to Rule 41 and also mentioned the "Back the Blue Act," which would amend Rule 11 of the 2254 Rules. This legislation is being monitored.

Ms. Wilson also discussed legislation that would not directly amend the rules but would require some clarification after passage. The Safe at Home Act, which involves programs by states providing a designated address for use instead of the person's actual physical address, would require courts to accept the designated addresses for litigation, mail, and service. The "Article I Amicus and Intervention Act" would potentially limit or deny the House of Representative's ability to appear as an amicus or intervene in pending cases. Although there is no intent to circumvent the Rules Enabling Act, the bill raises drafting issues that could potentially work to enlarge the appeal time. The Administrative Office is communicating with staffers on the Hill, and will continue to monitor all of this legislation.

Discussion focused on the bills to repeal the amendments to Rule 41. The chart in the agenda book lists bill numbers and sponsors. In response to questions about the Department's experience in using the new provisions, Mr. Wroblewski noted that Rule 41(b)(6)(B) had been employed in a case involving a large botnet, and that the use of the new authority under the



amended rule is becoming fairly routine. To his knowledge, the new provisions have not yet been challenged in court.

### **III. COOPERATORS SUBCOMMITTEE REPORT**

#### **A. Background**

Judge Molloy reminded the Committee of its charge from the Standing Committee: (1) to draft the Rules necessary to implement the changes recommended by CACM, and (2) to advise the Standing Committee whether those Rules should be adopted. Judge Campbell agreed and commented on the schedule going forward. The Committee's final recommendations are not needed until the Standing Committee's June meeting. It would, however, be very useful to provide the Standing Committee with a sense of the Committee's thinking at the January meeting, and allow the Standing Committee to provide feedback. After thanking the reporters and the members of the Cooperators Subcommittee for their work, Judge Molloy turned the discussion over to the Cooperators Subcommittee Chair Judge Lewis Kaplan, who is also chairing the Cooperator Task Force (TF).

Judge Kaplan stated that the Subcommittee had completed its work on drafting a slate of draft amendments that would be necessary to implement the CACM Guidance. The Subcommittee has also been working on a proposal to limit remote access; this proposal is not yet in final form, but the Subcommittee is seeking input from the Committee at this meeting. He noted the limited remote access approach is not a CACM proposal.

Judge Kaplan noted that the TF is not as far along as the Subcommittee, which has a much narrower focus. The TF has a Bureau of Prisons (BOP)/Marshal's Service working group (chaired by Judge St. Eve). This working group has made terrific progress, and it expects to make final recommendations to the TF for changes at the BOP. He noted that the proposed changes to BOP procedures and practices, by themselves, would be a major step forward, because the most serious manifestations of the problem occur in BOP facilities. The TF also has a CM/ECF working group (chaired by Judge Philip Martinez), which is working to identify options for changing the CM/ECF system to make an individual's cooperation less readily apparent than it is now in many districts on CM/ECF. The CM/ECF working group has tentatively identified for more careful consideration one option that overlaps in part with an approach the Subcommittee has been considering for some time.

Turning to the work of the Subcommittee, Judge Kaplan praised the reporters for their outstanding work, as well as the members of the Subcommittee, all of whom worked very hard on this problem. He reported that the Subcommittee began by comparing drafts of three different rules-based approaches to the cooperator problem. The first approach responded to the Standing Committee's charge to draft rules that would implement the CACM Guidance. The second option was to route most of the documents concerning cooperation to the presentence report (PSR), taking advantage of the traditional privacy accorded PSR to respond to First Amendment

issues and other concerns that might be raised by the CACM approach. After receiving input from the TF, the Subcommittee decided not to move forward with that option. It would have significantly changed the character of the PSR, put the Probation Officers in an uncomfortable role, and required the insertion of materials created long after the preparation of the PSR. That option is off the table. The remaining option (discussed later) is limiting remote access.

## **B. Discussion of Rules implementing the CACM Guidance**

Judge Kaplan then turned the Committee's attention to the amendments implementing the CACM Guidance. He noted the Subcommittee unanimously agreed that its draft amendments to Rules 11(c)(2) and (3), 11(g), 32(g), 32(i), and 35(b) would fully implement the CACM Guidance. Additionally, the Subcommittee developed other options, which are shown in Appendix A, Tab 2A. The first column shows the draft amendments implementing the CACM Guidance, and the other columns show variations on what CACM proposed. The Subcommittee also identified other documents and events not covered by CACM's Guidance that could reveal information concerning cooperation, and it drafted additional amendments that would plug these holes in the approach CACM is advocating. Those amendments are in Tab 2B.

After a great deal of deliberation, the Subcommittee concluded, without dissent, that it was not prepared to recommend the adoption of any of these rules changes. The reasons for that recommendation, Judge Kaplan explained, are well stated in the reporters' memoranda in the agenda book, especially the memorandum at Tab 2B. He mentioned a few highlights.

Judge Kaplan explained that the Subcommittee was quite negative on the CACM proposal that would have changed plea and sentencing procedures in the courtroom, requiring bench conferences in every case. The TF generally had the same view on this point. He noted a series of objections. First, these bench conferences would not prevent observers in the courtroom—whom no one is proposing to exclude—from determining who is and is not cooperating. The parties' body language would be different and the bench conferences would be longer when there was a discussion of actual cooperation, as compared to a brief statement there was no cooperation in this case. A second concern was that the defendant's right to be present at sentencing would create security issues for these bench conferences. Some members also took the view that especially at sentencing, channeling all discussion of cooperation to a bench conference would impair the defense, breaking up and interrupting the presentation counsel would otherwise make. There was also a concern that these conferences would be unnecessarily time consuming and burdensome. And what about the public's right of access and the First Amendment? For all of these reasons, the Subcommittee rejected this approach without exception.

Judge Kaplan then turned to the third approach considered by the Subcommittee: limiting remote access. The Subcommittee's draft of a proposed Rule 49.2, p. 157 of the Agenda Book, is a work in progress. The concept is to limit remote access but allow anyone who visits the courthouse and shows identification to see any unsealed portion of the file in a criminal case.

This approach is being followed now in at least two districts. The Subcommittee's working draft allows the parties and their attorneys to have remote electronic access to any part of the file that is not sealed or restricted as to that party. There is bracketed language about codefendants. The Subcommittee has wrestled with the proper approach to access by other attorneys. This draft (which the Subcommittee has not adopted), allows any attorney with ECF registration to have remote access to any part of the file that is not sealed or restricted, and it gives the public remote access to the indictment, docket, and judicial orders, paralleling Civil Rule 5.2(c)(2).

Judge Kaplan noted that the Subcommittee had not resolved which attorneys should get full remote access. Should it be only the attorney for the party, all attorneys who appear in the case, all attorneys who are counsel of record in some criminal cases, all attorneys who have CM/ECF registration, or all attorneys period? This is a very difficult problem. It raises the issue how far we can trust attorneys not to give cooperation information to their clients.

At its last meeting, the Subcommittee ultimately decided to put Rule 49.2 on the back burner because the TF's CM/ECF working group is developing an option with common elements. The lead option under consideration by the CM/ECF working group is something called the plea and sentencing folder (PSF) approach, which resembles the procedure used in the District of Arizona. Judge Kaplan described the current form of that proposal. There would be a PSF on the docket in every criminal case. The existence of the folder would show up on PACER, but its contents would not be listed or available on PACER. Admitted attorneys, including attorneys not involved in the case in question, could see the contents of the folder. Further, an individual judge or a district by local rule could require that particular documents or categories of documents in the folder be sealed or otherwise restricted so that an attorney without access to that restricted or sealed document could not discern its existence or open it. It is technically feasible to create a PSF, because the District of Arizona is now doing something similar, but we do not yet know whether the rest of the mechanics are within the current capabilities of the CM/ECF system.

Judge Kaplan noted that the variation permitted in CM/ECF working group's current proposal—allowing each district or each judge to make its own decision about which documents to seal, and which attorneys would get access—meant there would be no uniform national procedure. In contrast, Rule 49.2, if adopted, would create a uniform national approach.

Judge Kaplan said the TF working group had not yet focused on access by the press. Although procedures define the press for purposes of access to the Supreme Court and other proceedings, in the contemporary world any rules governing press access would have to consider how to treat not only traditional press outlets, but also individual bloggers.

Judge Kaplan concluded by stating several questions on which he hoped there would be discussion. First, does the Committee agree that the draft amendments would implement the CACM recommendation? Second, does the Committee endorse the Subcommittee's

recommendation not to support any of the amendments that would implement the CACM guidance? Finally, what are the Committee's thoughts about limiting remote public access?

At Judge Molloy's request, Professors Beale and King walked the Committee through the alternative approaches. The amendments implementing the CACM Guidance appear first on pages 153-55, and then again in the first column of the comparison chart beginning on page 199. These rules are the final version of the Subcommittee's best effort to implement exactly what CACM recommended. The second column, beginning on page 199, omits the courtroom rules requiring bench conferences in every case at the plea and sentencing phase. The third column substitutes sealing of the whole document instead of dividing them into two different documents. The fourth column follows the practice in some districts, including the Southern District of New York, of tendering these documents to the court but not filing them. Judge Kaplan explained that in the Southern District those documents are retained by the U.S. Attorney's office as exhibits. The reporters noted that all of these rules say sealing is indefinite, implementing CACM's policy of overriding local rules that say sealed documents must be unsealed after a certain period of time.

Rule 11(c). Professor Beale noted that although the CACM Guidance did not explicitly state that all plea agreements should be filed, the Subcommittee assumed that such a national policy was implicit in the Guidance, and it is reflected in the proposed amendment to Rule 11 in columns 1, 2, and 3. Column 4 shows the no filing approach, and does not include this proposed provision.

Rule 11(g). Judge Campbell noted that column 3 should reference the whole plea proceeding because there is no bench conference. The reporters agreed with this correction.

Members discussed the question whether the provision on permanent sealing would conflict with Circuit rules. For example, when a case goes to the Ninth Circuit, the record is unsealed unless there is a showing of good cause that it should remain sealed. Members noted variations in other circuits. Judge Campbell commented that if the Committee were to go forward with rules requiring permanent sealing, the Appellate Rules Committee should consider whether any changes would be needed to avoid a conflict.

A member who stated that he was generally against sealing observed that draft rules would at least require the courts of appeals to do a case-by-case analysis on the question whether something should remain sealed. The reporters responded that CACM's approach would reverse the current the current presumption: the parties would have to make the showing to unseal.

Rule 32. Rule 32(i) in column one implements the CACM requirement of a bench conference in every sentencing proceeding, and 32(g)(2) requires all sentencing memoranda to have a public part and a sealed supplement. The third column seals entire memorandum, and in the fourth column the sentencing memorandum is submitted directly to the judge and is not filed.

Rule 35. The amendment in column one seals all Rule 35 motions. For the no filing option, Rule 49, which governs motions, would be amended. On page 206, language is added to Rule 49 requiring any motion for sentencing reduction under Rule 35, 18 U.S.C. § 3553(e), or U.S.S.G.5K1.1 to be submitted directly to the judge and not be filed.

Taken together, these amendments reflect CACM Guidance precisely.

Any additional changes that go beyond CACM's Guidance to implement CACM's general approach and goals are covered in the "CACM plus" rules, Appendix B, pp. 209-16. Judge Molloy noted that the CACM plus rules add provisions that would implement CACM's goal of making sure there were no gaps revealing cooperation. Judge Kaplan stressed that the CACM plus rules are important. They demonstrate the efforts of the Committee and the Subcommittee to give the fullest consideration to CACM's goal of protecting cooperators and the means that might accomplish it. We all share the same goal here, which is to do whatever we reasonably can to protect cooperators.

Rule 11(c)(2)(B) CACM plus, p. 209. In addition to saying that there must be a bench conference, this states explicitly that any reference to cooperation must take place at the conference and not in open court. CACM Guidance is not explicit, and to be clear that extra language might be helpful.

Rule 11(c)(2)(D) CACM plus, p. 210. Subcommittee members had observed that written memoranda regarding plea agreements are filed in some cases, and they may refer to cooperation. To parallel the requirement that sentencing memoranda have a sealed supplement, this amendment does the same with memoranda regarding the plea agreement, plugging this gap. For example, submissions may be made when there is some disagreement about a term in the agreement, or a concern the plea agreement might be rejected. This amendment also addresses victim submissions, which are not covered by the CACM Guidance; they would also have to include a sealed supplement containing any information regarding cooperation.

Rule 11(g) CACM plus, p. 211. Since the practice in some districts might be to file a recording of the plea proceedings rather than a transcript, this adds a provision seal those recordings.

Rule 32(g) CACM plus, p. 212. Nothing in Rule 32 now requires the PSR to be filed, and according to the outstanding study prepared by the Rules office, many (perhaps most) districts do not file PSRs. Because it was clear that the CACM Guidance assumed the PSR would be filed under seal, we added a provision giving two alternatives: filing the PSR under seal, or not filing it. Either of which would protect the information about cooperation, but to fulfill the CACM approach it would be beneficial to have one amendment or the other.

Rule 32(i) CACM plus, p. 213. The amendment supplements the requirement of a bench conference at which cooperation may be discussed, adding an explicit bar on references to cooperation in open court, similar to the bar added under Rule 11.

Rule 32(l) CACM plus, p. 214. This provision would limit what the parties and victim could do with written information mentioning cooperation, applying CACM's approach of requiring both a public part and a sealed supplement, so that all cases would look alike. Additionally, if the judge gives notice under Rule 32(h) about an intended departure, those notices if filed must include a public part and a sealed supplement.

Rule 35(b)(3) CACM plus, p. 215. The proposed amendment extends the requirement of permanent sealing to orders and any related documents, in addition to the motions themselves that are covered by the CACM guidance.

Rule 47, CACM plus, p. 216. Like Rule 35 motions, the amendment requires motions for sentence reductions made under 18 U.S.C. § 3353(e) and Sentencing Guideline 5K1.1 to be filed under seal.

The reporters explained that taken together, the CACM plus amendments try to fill what the Subcommittee identified as the gaps in CACM's recommendations. Gaps are also relevant when considering the potential efficacy of the CACM Guidance rules we are considering to safeguard cooperator information. If there are significant gaps in the CACM Guidance, the rules implementing the Guidance will probably be less effective. CACM's recommendation for sealing Rule 35 motions is a good example. It did not address similar motions for sentencing reductions under 18 U.S.C § 3553 and U.S.S.G. 5K1.1. The CACM plus rules seek to fill the remaining gaps, though it is not possible to prevent all disclosures of cooperation. For example, a cooperating defendant may have to testify in open court. You can never do everything, but this tries to buttress the protection. In doing so, it creates more secrecy, moving more information out of the public domain in order to achieve the objectives of the CACM recommendations.

Members discussed whether Rule 32(l)(1) would be in tension with the Victims' Rights Act. Does the victim have right to know about cooperation? Would the amendment affect victims' substantive rights? The Act does not address documents or filings. Professor King read the Act aloud, noting that it provides the right to be informed in a timely manner of any plea bargain. Members questioned whether the victim has a right to be informed of all of the terms of the plea bargain, which may include cooperation.

Judge Molloy then asked each member to give his or her view of the amendments drafted by the Subcommittee.

A judicial member expressed a variety of concerns about the CACM rules. The problem with the required bench conferences is that anyone in the courtroom can see that there is a long conversation going on for some defendants and not for others. None of the amendments addresses the situation where a person pleads guilty earlier than everyone else, and that defendant's absence at subsequent proceeding may be seen as an indication of cooperation. This member also raised concerns about transparency and the public's right to know what is happening. It is not clear whether any of the sealing procedures apply once a cooperating witness testifies. In the member's district, sentencing memoranda are not filed in many

cooperation cases. They are given to probation, the judge, and the other side; they are kept in the judge's file, but are not public records. The court may also seal the record at sentencing, but there is the potential for everything to come out at some point. No option seems to balance this perfectly. If the Committee makes no recommendation, there will be variation in how sealing and in court procedures will be handled. In addition, the dangers for people in prison arise not only from their other codefendants but also from people who think cooperators should be penalized or ostracized.

Another judicial member premised his remarks by saying everyone takes this problem very seriously. There seem to be some concrete things the BOP can do to address this problem. But the only solution that can come from the courts is secrecy, which is not something the courts can offer. Constitutionally, it is just not the way we do business, but it would really be the only contribution we could offer. Accordingly, the member favored recommending that the CACM amendments not be adopted. This is not a problem that we can fix by amending the Criminal Rules.

Mr. Wroblewski emphasized that the Department of Justice is very much concerned about the dangers to cooperators. The FJC report was a huge contribution to the discussion. The Department is not, however, certain that rules amendments are the best approach. It is very hopeful that the TF and especially the BOP and CM/ECF working groups can offer solutions that will make a dramatic contribution and significantly reduce the problem. The Department is not seeking increased secrecy, because secrecy is already present. The parties routinely do not file documents concerning cooperation. For example, another member noted that defense lawyers often redact sentencing memoranda, do not file them, or seal them. But the current efforts to use secrecy to protect cooperators are very haphazard, and can be circumvented by people interested in doing harm. The Department hopes that the CM/ECF architecture can be revised to bring the current redactions and secrecy into a form that will eliminate or greatly reduce the ability to circumvent the current rules and do harm to cooperators. The Department hopes the BOP and CM/ECF working groups can address these problems in a non-rules way and make a significant contribution. BOP has been involved with that working group for many months and has been as cooperative as it possibly can be. He expected the TF recommendations will be very helpful and will be largely adopted by the BOP over time. There are some issues with union rules and the BOP's ability to adopt recommendations, but once the TF comes out with its recommendations that process will begin and we are hopeful that we can actually implement most of those. For those reasons, the Department abstained from the votes on all of these rules at the subcommittee level. We hope that these problems will be addressed in other ways that will be successful.

After complimenting the reporters on their work, another member said that in order to fully implement CACM's recommendations and goals it would be necessary to adopt something like the CACM plus rules. These procedures would be draconian, creating second sets of books and secret proceedings. He strongly opposed that approach. He objected to calling the current approach haphazard. The Supreme Court requires a case-by-case approach to sealing records.

The current system relies on judges in individual cases to weigh the need for secrecy and sealing against the public's right to know. He endorsed that approach. We need judges to do what is right in an individual case, rather than a legislative type solution. The CACM rules attempt to change rights, substantive rights. The member added that it would be better to revise the union rules within BOP than to amend the Rules of Criminal Procedure. The concern about misuse of the PSRs should focus on access in the prisons and what the BOP and the marshals can do to protect cooperators. The member appreciated the candor of the FJC report, which stated that it is impossible to identify the empirical effect of any policy individually, or in combination with other policies, on the amount of reported harm to cooperators. The CACM proposals are not data-driven. They propose secrecy in the courts based on fear not data. At an earlier meeting, another member said that even one death of a cooperator is too many, but that is not a reason to sacrifice the core values of the system. We should not alter the requirement that individual judges must make the decision to seal in individual cases, and we should not seek to change the constitutionally based procedures required by the Supreme Court. This is a serious problem. There are things that can and should be done, and they are primarily the responsibility of the Executive branch. The member was pleased to hear from Mr. Wroblewski that the executive branch is undertaking that. The member expressed concern that TF does not have representation from the defense bar, and wondered why that was so. He hoped the TF would take proper action, and once those changes had been implemented we can see how successful they have been in accomplishing the goals.

Judge St. Eve, the Standing Committee liaison, expressed the view that the proposed rules closely adhere to the CACM recommendations, and complimented the reporters for their work. After spending a lot of time with the TF and talking to people at the BOP, she believed cooperators are being targeted to some extent because of their cooperation status, especially in the high security facilities. She did not, however, support the proposed CACM rules because they go too far. With regard to Rule 11, she noted that the Seventh Circuit disfavors any kind of sealing, and was unlikely to accept the bench conference procedure and limitations on what is available on the docket. She drew a distinction between changing procedures in the courtroom and making changes in the docket. She stated that the PSR approach was unworkable, and strongly opposed by Probation Officers, who did not want to be custodians of these significant documents. Keeping documents in the PSR rather than the court record could cause all sorts of issues later in certain cases.

Another judicial member echoed the praise of others for the work of the reporters, and Judge Kaplan for his leadership on the Subcommittee's work. The rules drafted by the Subcommittee do track what CACM called for, which would be a dramatic sea change in the Rules of Criminal Procedure. Agreeing with other speakers, the member said that the CACM rules raise tremendous transparency problems. The member was glad to hear that the CM/ECF working group had focused on some of the issues concerning remote access. For this member, the desirability of moving forward with the remote access approach was an open question, in large measure because of the uncertainty about its effectiveness and the absence of empirical



information. At most, it seems likely the changes would improve things at the margins. It is not possible to eliminate danger to cooperators, who can be identified in many other ways (such as the disclosures required by *Brady* and by *Giglio* when someone testifies). In addition, there is no way to control disinformation, such as the belief that anyone who has made bail must be cooperating. These proposed rules show us what the CACM Guidance would require, and it is not something that we should support as a Committee. The member was opposed to adopting any of these proposed CACM rules.

The next member to speak, a practitioner, echoed the thanks to all the people who worked on the very helpful materials. This is a real issue and the system has a moral duty to try to protect cooperators, broadly speaking, without abridging anyone's rights. Being a cooperator is a very vulnerable position. Just as prison officials owe duties to someone in a captive setting, this is sort of that squared. Without cooperators it would be very difficult to successfully prosecute many senior people who engage in sociopathic conduct. That's why prisoners are working so assiduously to try to stop cooperators. This is a very difficult problem because we are working at the margins, and the main risk factors seem very difficult to address through this sort of system. Although he agreed that one death is too many in this setting, the proposed approach doesn't seem to move the ball forward. He hoped other avenues would lead to some concrete proposals. Individual judges are not reluctant to deal with this issue, but giving hundreds of district judges only general instructions to "do your best" without some structure and some uniformity won't work. He hoped that some tools could be made available at least presumptively to produce a more coherent landscape, rather than leaving everything up to the discretion of each individual district judge. The member said the bottom line is that the CACM approach does not move the ball forward enough and has multiple problems. At a minimum, we should table it and see what the future holds in other areas to make things better.

The Committee's clerk of court liaison said he was focused on how the proposed rules would be implemented. He agreed that it would be a sea change in how the courts do business, going from the default of transparency to a default of concealment. The culture of the courts, the training for the clerks' offices, and the system we use for our records are not designed for that new default. They are designed for transparency. Denying rather than granting access involves work. There are many steps to sealing a document. Once a judge says seal a document, somebody has to identify the document, place it under seal, define an access user group, and maintain that user group. When you are dealing with sealing as an exception this is not a big problem. But if we require every one of these various things to be sealed, that will create an opportunity for many mistakes. It would also be a change of mindset. When electronic filing was implemented, there was a huge amount of training. The CACM rules would require at least parallel training. It is important to keep in mind that the universe of users on EMECF is much broader than just attorneys. The overwhelming majority of those doing the filing are paralegals and staff. The responsibility for sealing would not be borne, generally, by attorneys, but by all of the staff members with whom registered attorney users have shared their logins IDs and

passwords. The clerks have no way to identify those people because the login and password remain the same.

The clerk of court liaison also commented on the need to distinguish between access on PACER, and a court's CM/ECF system. The parties could think that references to remote electronic access refer to CM/ECF access rather than the broader access in PACER. If a defendant complains he does not have access, clerks do not want to have to explain to him the difference between CM/ECF and PACER access. Down the road as we move toward more universal electronic filing, this problem will increase because more people who are not attorneys will have accounts.

From the implementer's perspective, this is an architectural issue. The current CM/ECF system is not designed to do what everybody is trying to facilitate, and trying to adapt it through human intervention is a recipe for disaster. He dreaded the idea that somebody else would have control of his court's records. He had always believed he was the custodian of the court's records. The no filing idea of farming records out to probation or not filing things is frightening. He had always thought that if you go to the archives you get a case file. Everything is there, but that would not be the case with some of these suggestions (the PSR and no file options). From an implementer's perspective, it would take a tremendous human effort to implement these procedures.

A judicial member stated that the Subcommittee's draft rules properly and faithfully implement the CACM guidance. He urged that to the extent we can, we should amend the rules to make it more difficult for bad people to identify cooperators and harm them. The fact that any rules-based approach won't solve the problem entirely should not be a reason to take no action. If we can save 15 of the 30 cooperators who might be killed, those 15 will be very happy. If we are unable to solve the problem completely, we should at least work to solve it incrementally. There are First Amendment and transparency concerns that we need to take very seriously. It may be that the CACM Guidance would cut into the muscle and the bone of the First Amendment, and is not something that we want to do. There must be some measure that we can take, perhaps less drastic than what CACM has proposed, that will move the ship in the right direction. The First Amendment is not a suicide pact, and it is also not a homicide facilitation pact. The First Amendment should not get in the way of modest common-sense improvements to help protect the cooperators that are so essential to the operation of the criminal justice system. We should see what the TF and BOP come up with. They should be the first movers, and then we should take stock and evaluate whether we can add anything through rules amendments.

A judicial member commented that it might make a great deal of sense to see what the TF and BOP come up with before imposing rules amendments. The member's state courts are just bringing electronic filing on line, so they have no experience with these issues. They would benefit from the Committee's discussions. For the matters on the table now, the proposal to defer action and then make modest rather than dramatic changes makes a great deal of sense.

Another member endorsed the idea of careful and modest changes rather than dramatic ones given the difficulty of knowing what might work, the First Amendment issues, and the great difficulties and cost of implementing any proposal. The best approach is treading carefully and looking for modest solutions, rather than overarching ones.

The next judicial member began by thanking the reporters, stating that the memoranda are extraordinarily helpful and he was persuaded that the Committee should not recommend the CACM rules changes. The member presides over many change of plea proceedings. Doing a private bench conference in each would be difficult, and the plusses would not outweigh the minuses in that situation. By local rule the member's district does include a sealed supplement to every plea agreement. He noted that there was a question whether that would withstand a constitutional challenge, noting it has never been challenged in the district. In the district's experience, it has been successful and practical, but he could not say whether there is (or ever could be) any data-driven proof that it actually prevented anyone from being hurt or having their cooperation revealed. The member agreed with prior comments that there are serious problems in the prisons that should be addressed, but that is only part of the problem in the member's district, Puerto Rico. In the past 10 years, people were murdered on two occasions on the same corner near the courthouse. Both were defendants who were out on bail, had just met with a probation officer then walked out of the courthouse. The member did not know, but presumed they were cooperating, and the bad guys were there waiting for them. There are also threats to families of people who are presumed to be cooperators, and lots of bad stuff goes on in prison. So, at least in Puerto Rico, attacks occur on in the street as well. This certainly affects cooperators, but it also has a negative effect on the criminal justice system and other defendants as a whole. People who would cooperate and might get a lower sentence do not do so because they are afraid of what is going to happen to them and their families if they cooperate. In Puerto Rico, the problem extends beyond cooperation to the safety valve. Many people in the district decline to use safety valve, which quite often is not onerous. You sit down with an agent and you say what it is you may or may not know, and you may get two points off your sentence. Yet many defendants decline to do so because they see that as cooperating. Judges would like to use the safety valve to go below the mandatory minimums, but these individuals are afraid to use the safety valve and will not do so.

A practitioner member stated that the CACM proposal is seriously problematic for all the reasons that had been discussed. The member highlighted just a few problems. One is the required bench conference where the parties would inform the court whether there had been cooperation or not. The materials noted that it might be necessary to extend the bench conference when there has been no cooperation so that would not be obvious to observers. The member expressed concern that this would go beyond being secretive to the court being deceitful, which is very problematic. Second, it would be awkward to require defense counsel at sentencing to tell the judge that the defendant did *not* cooperate. A defense attorney would not normally tell the court what the defendant had not done that might be beneficial to the community, because it would cast the defendant in a negative light. Counsel should not be thrust

into that role. Many of the problems do arise in the prisons, and BOP can and should address them. The member's district includes a large prison complex, including one entire prison is devoted to cooperators. That does not prevent prisoners from killing each other there. The other problem BOP has to deal with is that prisoners in protective custody do not have access to the full range of programming, which is problematic for people serving long sentences. The reporters' memos were terrific, and the draft rules are faithful to what CACM wanted. The member was not in favor of the CACM proposal, but noted if it were adopted it should be CACM plus, which addresses some problems CACM didn't identify.

Judge Kaplan noted that his responsibility as TF chair is to attempt, if possible, to reach an appropriate and mutually acceptable ground between CACM and the Committee. For that reason, he had abstained in the Subcommittee and said he would do so again at this stage.

Judge Campbell said he found the members' comments, the work of the reporters, and the work of the subcommittee very valuable. He agreed that the draft rules are faithful to CACM's proposal, and they do a great job of illustrating what would have to happen in the Rules of Criminal Procedure if CACM's Guidance were implemented. CACM plus is particularly helpful in showing that if you really want to accomplish what CACM says, there has to be a very extensive change in the way in which the rules are currently structured.

Responding to the question how it would be appropriate for the Committee to proceed, Judge Campbell said it would be entirely appropriate for the Committee to say to Standing, "We've done what you asked, and we fleshed out different rules drafts that would accomplish CACM. Here they are. We don't recommend that any of them be adopted." It will be very helpful to have all of those drafts in hand to understand what it would really require to carry out CACM's recommendations. Judge Campbell said that he did not disagree with the comments identifying problems with the procedures recommended by CACM. When they were considered in his district, a committee of district judges, magistrate judges, defense attorneys and prosecutors concluded that it was not possible to make the courtroom part of CACM's recommendations work, for all of the reasons that have already been discussed. His district routinely seals cooperation related documents, which could raise a First Amendment issue. They put all cooperation-related documents in one place in the docket, and when looking at the docket you cannot distinguish between cooperators and noncooperators. But his district concluded that the full CACM package would not work.

Judge Campbell thought it was well worth considering Rule 49.2 and trying to help in some degree by limiting remote access. If the CM/ECF working group comes up with a means of configuring the dockets so that cooperators would not be identifiable, he suggested it might make sense to have the Rules Committee attempt to draft a rule amendment to implement that system. The Rules approach would have several advantages. First, this Committee would be terrific body from which to get input. He was not sure the CM/ECF working group has the same broad representation. Second, a rule amendment would have the great benefit of publication, public comment, and review by the Standing Committee, the Judicial Conference, the Supreme

Court, and finally Congress. So you get much broader input. He He was not sure if there would be a jurisdictional issue. CACM may take the view that that CM/ECF is their territory, and they ought to be the ones to make any tweaks to make the dockets uniform. This would have to be discussed with the CACM chair. But it was an open question in his mind about whether this Committee should consider and at least give input on any proposed solution to change the docket to eliminate clues to cooperation. In his district, they accomplish this with a master sealed event included on every docket sheet. Anything related to cooperation is filed there in the docket, and sealed as it would be in its own place. But someone looking at the docket sheets can't identify cooperators. All of the docket sheets look the same. CM/ECF is considering something similar and whether there is a more automated way to do it. Judge Campbell expressed some concern about leaving that decision entirely to the CM/ECF working group and losing the input of this Committee and as well as public comment.

Judges Kaplan and St. Eve discussed the interplay between the TF working groups and the proposed rules changes. Judge St. Eve said the CM/ECF working group was looking at possible changes in the CM/ECF system, and its ultimate recommendation would go to the TF. Because this is a TF working group (not a CACM committee), it could come back to this Committee. Judge Kaplan commented that it was fair to say that the Rules Subcommittee has simply put the Rule 49.2 draft on hold pending developments in the TF. It is wide open for the issue to come back here.

Judge St. Eve was asked to comment on activity at BOP. She said that it has not yet done anything. Everyone at BOP has been completely cooperative with working group members over a period of several months, and the TF working group has come up with a lengthy list of recommendations for BOP. This includes making all cooperation documents contraband at BOP facilities; at present only PSRs are contraband. At its meeting this summer, the TF discussed and approved about a dozen recommendations to BOP. BOP has not yet taken any action. It is waiting for the TF's final recommendation before starting to implement any of the recommendations. BOP supports our recommendations, but many of them require action by the BOP union. They think it is better to come to the union with a complete slate of recommendations, rather than taking them up on a piecemeal basis, and they are more likely to get union approval if they come with the blessing of the TF and the Judicial Conference. Then they could say these recommendations have been blessed, we are seeking to implement them, and now we need the union to sign on. Nothing has happened yet, but BOP is aware of and supports the recommendations. This will go back to the TF meeting again in January. Judge St. Eve was not sure whether the TF would take any final action at that point.

Judge Kaplan briefly reviewed the highlights of the TF recommendations concerning BOP:

1. Limit transmission to BOP inmates of certain case documents including plea agreements, sentencing memoranda, docket sheets, 5K motions and transcripts.

2. Preclude possession of court documents in BOP facilities outside of an area designated by the warden.
3. Encourage the BOP to punish inmates who are pressuring other inmates for papers.
4. Require that probation officers transmit case docs to BOP inmates consistent with the above guidance. [That really means sending to the warden who would make them available in the secure location]
5. Require that court reporters transmit transcripts to inmates in the same way
6. Consider use of various electronic means of limiting access from within the institutions
7. Impose limits on pretrial detainees' continued possession of case documents once they are designated
8. Collect data on harm to cooperators.

... there are recommendations with regard to designations ...

#### 11. Modify and enter contracts with private prisons consistent with BOP procedure

Judge Molloy expressed concern that there was no empirical basis for making the connection between cooperation and harm. The FJC survey is not the equivalent of empirical data. When he and Judge St. Eve visited with the BOP, they consistently pointed out that cooperation is of two kinds: cooperation before you are sent to prison and cooperation while you are in prison. The latter is unconnected to anything that would be filed in a court or show up on the docket sheet.

Judge Campbell responded to the comments about the lack of empirical data. He agreed that we do not have case specific data that on whether certain individuals were attacked or threatened because they were cooperators. The problem of lack of empirical data affects all of the rules committees. When changes are proposed, there is seldom empirical data to support them, and generally we cannot get it. Collecting truly reliable empirical data in the judicial system is a very difficult undertaking, and the Federal Judicial Center has limited resources for this purpose. In his view, the Rules Enabling Act was designed to operate on the collective wisdom of people like the committee members who are on the ground working with these kinds of issues, plus the public comment process—not on the basis of hard empirical data. He also noted that the anecdotal information from the FJC survey and the information from BOP, taken together, provide a pretty strong indication that there is a link between judicial procedures and threats to cooperators. We are not likely to have a stronger link. There are other good reasons to say the CACM proposal is problematic, but he resisted the idea of basing a decision not to move forward on the absence of empirical data.

Judge Molloy responded that on the day an assault occurs the BOP has a great deal of information about the institution and about the level or degree of the assault, but nothing that would tie the fact that the person is a cooperator with the assault. We also know that if an inmate is in a penitentiary or a high security facility there is a much greater likelihood of injury or death than if they are in a camp or moderate to low level prison. Perhaps part of the solution might be for BOP, as a matter of practice, to investigate whether persons who have been assaulted in prison had cooperator before, or after, they reached the prison.

A judicial member asked for clarification of the word “table.” Did the suggestion of tabling envision a distinction between a motion to oppose adoption of the CACM rules at this time and a motion to table?

The member who suggested tabling said he did see a distinction. If the motion opposing adoption meant the CACM rules are dead and buried, there is a distinction. And if opposed means not now, but maybe we’ll come back to it, he would prefer to table. The substance of what he would support is to put this aside and then come back to it after the group on prisons tells us what it is going to do.

A member commented that he would like to oppose the CACM recommendations and table the Rule 49.2 issue.

Judge Molloy stated that the issue is whether the Committee was going to adopt the recommendation of the Subcommittee to tell the Standing Committee here is the package of the rules implementing the CACM Guidance and we think none of them should be adopted.

Judge Kaplan suggested that we should first have a motion to adopt the Subcommittee’s recommendation, and then if someone moved to table that would be voted on. He noted his opposition to tabling, because we already know what the BOP is going to do.

A judicial member said that consistent with the spirit of the Committee’s discussions it should reject the CACM rules, making it clear that this Committee does not (as we understand them now) remain open to adopting them after the BOP or the TF does something later. To the contrary, we think these particular proposals are a bad idea, but we remain open to other means that we could explore after action by the task force or other bodies.

A judicial member moved to oppose adoption of the CACM rules, and to defer final action on any alternative approach that would limit remote electronic access in order to reduce the likelihood that judicial records would be misused to identify and harm cooperators. The motion was seconded.

Another judicial member agreed with the proposal to put aside 49.2, but suggested deferring action on the CACM proposals. He agreed that he could not imagine a situation in which the Committee would accept all aspects of CACM’s recommendations. But after BOP makes its final determination there may be certain aspects of the CACM proposal that we might think are good incremental measures. So he moved to put aside any up or down vote on the

CACM rules, which could be revisited in light of the BOP's final actions on the TF's recommendations.

Judge Kaplan said that if there was a second to the motion to table, it should be voted on.

A member asked if there was any appetite in the group to consider the CACM rules one by one, noting that he had more problems with some than others. When asked if he could identify some that were beneficial, he responded yes, though he was not certain that they would be constitutional.

There was a suggestion of a friendly amendment, that we reject the CACM rules but defer action on the remote access or any other potential rule amendment, for example rules implementing changes in CM/ECF, rather than limiting ourselves to the just the remote public access.

After the motion to table was seconded, members asked for clarification. Was it expressing agnosticism about the CACM rules?

A member supporting the motion responded that it was not agnosticism in the sense of no view about anything about any of the CACM proposals. It was, instead, a more modest step than saying we are not prepared to adopt any of this. If nothing comes to bear fruit in the future, there may be pieces of this that merit further consideration as a possible alternative, perhaps tweaked. The motion to table would not signal that the entire project should be thrown into the trash heap unless there is something completely different. He supported that approach, which is a more modest and flexible than complete rejection. He honestly did not know how many other alternatives people can come up with that are unrelated to CACM's proposals. There is only so much space in which to operate.

Judge Kaplan expressed his opposition to the motion to table. The Subcommittee has considered each and every part of the CACM recommendation, including each and every thing that we could imagine ought to have been included in it, but wasn't. The Subcommittee then concluded, without dissent, that it was not prepared to recommend adoption of the package or any of the variations. Action by the Rules Committee with respect to that proposal is a very important input for the TF, which has been waiting for this recommendation, one way or the other, for a very long time. This is not a criticism, but the process has taken time. To table it now lays the ground work for an argument that the TF should wait with respect to various alternatives, to see whether there are rules solutions. We have spent well over a year looking for rules solutions. The Subcommittee's view is that there is no rules solution to be found on the landscape that we are now familiar with. Of course, given time it is possible someone may have a brand new idea, or CACM could return and say given where we are now, let's do these one or two things. We are always open to consider that again. He advocated trying to play the hand of cards we've been dealt.



A judicial member observed that some members seemed to be worried about a preclusive effect. It is hard for a new member to understand how much of a preclusive effect our voting this package down would have on something in the future, What if the BOP comes up with something, implements it, and there are still many cooperators dying?

Judge Molloy responded that if there are suggestions for rules changes the Committee has an obligation to consider them. If this Committee adopted the Subcommittee recommendation to reject the entire package it has worked on for over a year, someone can come along later (either a member of CACM or some other individual or interest group) and suggest a similar change, perhaps to Rule 11. He thought there would be no preclusive effect other than the matters that our Subcommittee has considered.

Judge Campbell agreed. Other committees have decided not to act or rejected a proposal, and then revisited it a couple of years later. However, in his experience most committees do not come back too quickly after they have put a lot of effort into something. Perhaps in light of this vote we should not reopen the same issues at the next meeting, but there is no bar on a member of this Committee asking to reopen and revisit at the next meeting.

Professor Coquillette agreed that there is no preclusive effect. Anybody on the Committee can raise this again. Professor King observed that this Committee has considered the same rule multiple times. It can come back in the various ways that have already been discussed. That said, Professor Beale expressed the hope that the Committee would not repeat the discussion of the very same thing at the very next meeting.

Mr. Wroblewski noted that DOJ is not waiting for BOP to act; BOP is part of the DOJ. DOJ is waiting for the CM/ECF proposals, which it thinks have a chance of addressing many of the relevant concerns in a non-rules way. DOJ would abstain. It wants to see what CM/ECF and the BOP recommendations come out of the TF, and we believe those are significant steps for addressing a genuine problem.

Judge Kaplan observed that there was a broad consensus at the TF about the BOP recommendations, and he asked Mr. Wroblewski for his sense of how these recommendations are going to come out. Mr. Wroblewski responded that he was focused on a second element, changing of the architecture of the CM/ECF perhaps along the lines of what is going on in Arizona. DOJ thinks that the BOP and the CM/ECF approaches, in combination, could be the solution for now, for the foreseeable future. It would reserve the right to come back, if the CM/ECF does not make any changes, or if we think those are not sufficient.

The motion to table any final recommendation on the CACM rules failed on a voice vote.

The Committee then turned back to the motion to oppose the CACM rules as well as the variations drafted by the Subcommittee, and to defer final action on the alternative approach of limiting remote access. A member moved to sever the two portions of the motion, and the motion to sever was seconded and passed by a voice vote.

The motion to adopt the Subcommittee's recommendation to oppose the CACM rules proposals in all forms passed with two no votes. Judge Kaplan and Mr. Wroblewski abstained.

The motion to hold in abeyance any final recommendation regarding Rule 49.2 passed unanimously.

### **C. Discussion of draft Rule 49.2**

At Judge Molloy's request, Professor King explained the Rule 49.2 proposal. The most recent version is on p. 157 of the agenda book. This approach avoids the First Amendment problems that arise from limiting all access to plea and sentencing documents, allowing the same access that was available before the internet. Before online access, anyone who wanted to see a document had to go to the courthouse. The proposed rule was modeled on Civil Rule 5.2, which limits remote access in order to protect confidential information such as social security numbers. The proposal is premised on the idea that if it is acceptable to limit remote access in the Civil Rule, it should be equally acceptable under the First Amendment to limit remote access to protect cooperators in criminal cases. The first part of the rule designates who has access to an electronic file. Subsection (b) provides for access by the parties and their attorneys, and subsection (d) access by the public. The Subcommittee reviewed the options for defining and distinguishing the press from the public and decided not to draft special provisions for press access.

In general, parties and their attorneys can have remote electronic access to anything that is not under seal or otherwise restricted in a way that bars access by the person seeking access. We added a reference to other restrictions because we were informed by our clerk liaison and others that sealing is not the only way that electronic access is restricted under the CM/ECF system. For example, if something is filed *ex parte*, the party that files it has access, but the other parties do not. Whenever a party files a document, the party has the option of restricting access to certain individuals or groups. We wanted to make sure that the rule reflected not only sealing, but also any other restriction placed on access. Attorneys can have access to any of it as well, under subsection (c). That was a policy choice by the Subcommittee. Under (d) the public can have electronic access only to the indictment, the docket, and an order of the judge. If the public or a non-attorney seeks access to another part of the case file, that person must go to the courthouse and provide the clerk with identification in order to get that access. The Subcommittee has not completed its work on Rule 49.2.

Judge Molloy noted that although the Committee has tabled a decision on 49.2, it would be helpful to get comments to guide the Subcommittee.

A member expressed opposition to the proposal because of it affects the poor and those unable to travel to the courthouse and without surrogates who can travel for them. He compared their plight to his own ready access through Law360, which can be set to provide him with updates on anything filed in selected cases. Since subscribers to such services could have full access, the only people who would be hurt are poor people who lack this access.

Professor Beale noted that if the proposed rule were adopted, it would no longer permit remote access by services such as Law360. The Subcommittee's assumption is that the press and subscription services would not go to the courthouse every day to see what is filed in every case.

Professor King commented that when the Subcommittee discussed giving all attorneys access it recognized that most organizations, media or otherwise, will have legal counsel. So simply by using counsel's login, any organization (whether it is Whosarat, or Fox News, or CNN, or NPR) could use the attorney-access clause to set up any kind of trolling device they can manage. That is something to consider if we get to the point of crafting a policy on who has remote access. If it is limited to attorneys, it is not limiting very much if organizations all have attorneys.

Judge Campbell raised a question about Rule 49.2(d)(2)(i), which allows the general public to have remote access to "the docket maintained by the court." He understood that one of the main reasons for limiting remote access was that prisoners would have family members or gang members on the outside go on PACER and look at dockets to determine whether individuals were cooperators. Even if documents revealing cooperation were sealed, the sealing itself served as a red flag indicating cooperation. So how well would 49.2 protect cooperators if (d)(2)(i) allows remote access to the docket?

Professor King responded that the Subcommittee was concerned about a decision of the Eleventh Circuit holding that it was unconstitutional to have part of the docket that is not public. The subcommittee also assumed (at least some members did) that the TF working group on CM/ECF would be handling docket creation issues, so that whatever docket was produced after the TF was done would be the docket the public could access.

Judge Campbell reiterated that his concern was whether (b)(2) undercut the purpose served by limiting remote access and requiring members of the public who might be seeking information about cooperation to visit to the courthouse under (d)(1).

Professor Beale responded that the Subcommittee used Civil Rule 5.2 as a model, and it allows electronic access to the docket, although other materials are private. However, it is not perfectly analogous because of the red flag problem in the criminal context. Probably that should have been in brackets too because we were already waiting on the CM/ECF working group. Is there some solution that could come from that? If not, then this would mean that some things available online would have the red flag problem.

Professor King commented that in addition to basing (d)(2)(i) on Civil Rule 5.2, there was at least some discussion of what the public expects it should be able to see. The docket sheet is critical because it shows what going on in the case: how far along is it, whether there has there been a decision, etc. Access to the docket is not only an important part of Rule 5.2, it is also an important part of transparency.

Judge Campbell expressed concern that if the TF does not devise a system that cloaks cooperation material on the docket, then it would serve little purpose to adopt Rule 49.2 if it included (d)(2)(i). If we are not accomplishing the goal or protecting people by limiting the ability to scan the dockets on PACER, why limit remote access at all? If we are going to accomplish that, we ought to drop (d)(2), and say go to the courthouse. On the other hand, if the CM/ECF working group comes up with a uniform docket that does not give those clues, we may not need to limit remote access. People going on PACER would not be able to tell by scanning the docket who is cooperating. So, either changes to CM/ECF will solve the problem, or limiting remote access could do so, but only if we delete (d)(2).

In response to the question whether he thought it would be necessary to drop all of (d)(2), or just (d)(2)(i), Judge Campbell said it would be necessary to consult clerks and others. But certainly at least access to the docket.

The Committee's clerk of court liaison explained that there are subscription services that data mine CM/ECF and report out almost instantly when documents are filed. He predicted these services would strongly oppose Rule 49.2 because it would totally undermine their business model. They no longer come to the courthouse because they have the electronic access. He agreed that under (d)(2), the filings are enumerated so you would know if anything is missing, and you are seeing everything that goes on. Moreover, he thought it may cause confusion to talk about PACER in (b) and about the court's electronic filing system in (c). He could imagine someone coming in under (b) and demanding a login in and password to get electronic access. Since only PACER access is contemplated under (b), that would be confusing. It might be necessary to add something in the Note or otherwise to refer to (b) as PACER access in contrast to (c), which provides for registered users of the court's electronic filing system.

A member observed that under the Rules Enabling Act, 28 U.S.C. § 2072, a rule cannot abridge substantive rights, which could include economic rights of business organized to assimilate court filings for the public and the bar. Another member responded that he doubted that there is a substantive right to any business model a service adopts out of self interest.

A member drew attention again to lines 7, 8, and 9, saying they were at the heart of the issue: who should get largely unrestricted access to court filings in criminal cases? That issue is before both this Committee and the CM/ECF working group. How narrowly or broadly should access be defined? Because if you make it very wide, that greatly reduces the benefit of limiting remote access. But if you make it too narrow, you have other serious problems.

Another member agreed that for purposes of the Rules Enabling Act that there is no right to any particular business model. He asked if he was correct in understanding that some districts are now restricting online access and making people come to court and present identification. Professor King said two districts have this procedure in place now. The member then observed that limiting remote access seems a practical step, noting it was hard to believe that the Constitution that allowed this system in the 1990s prohibits it now. The issue is finding the

balance between letting people have access without making it too readily available. It is essential to keep in mind that there are attacks on people who are cooperating. We need to find a balance.

Another member observed that this seems like the kind of problem where individual districts are trying different approaches, and the Committee should draw on their experience, determining what works and what does not work before considering a one-size-fits-all answer under the Rules. It seems to be a classic empirical question as to what actually stops people, and what is too much of a burden to stop this harmful conduct.

The reporters explained that three districts now restrict remote access. The Eastern District of North Carolina has a policy about sealing and restricting remote access to plea and sentencing documents. If you come to the courthouse, you can have access to those. Additionally, criminal defense lawyers can certify they need remote access for representation in a criminal case. Two districts in Texas also limit remote access, but the reporters thought this was not limited exclusively to plea and sentencing agreements. One option would be to designate a category of documents that have restricted access and lift that particular restriction for in-person activity. In contrast, Rule 49.2 does not break up categories, but says this is what you get online and everything else you have to come for in person.

Judge Campbell related the approach in the District of Arizona. Every criminal docket has as the third or fourth docket entry a master sealed event. All criminal dockets look the same in this respect. Cooperation addenda to plea agreements, 5K1.1 motions, sentencing memoranda that discuss cooperation, and anything related to cooperation goes into the master sealed event. The dockets in every case look the same because they all have a master sealed event. That practice was adopted to eliminate the red flags from the docket itself. The master sealed event is sealed under CM/ECF like any sealed document. The Arizona district courts have not focused on the First Amendment issue yet. If that is a First Amendment problem, the docket could still be structured the same way but with judges making individual decisions on whether it should be sealed and, if so, what would go in there. If CM/ECF were to come up with something like that, there would be no need to limit remote access, because there would be no clues on the docket and no public access to sealed documents.

Professor Coquillette commented that the FJC could assist in analyzing the experience in the courts that have restricted remote access. He likened this to the pilot projects on initial disclosure and accelerated dockets.

Professor Beale provided some additional information on the districts that limit remote access and require you to come into the courthouse. In addition to the Eastern District of North Carolina (already discussed), as noted on p. 248 of the agenda book the Western District of Texas, El Paso Division, implemented this system recently. The reporters spoke to representatives of that court by telephone, and they said it is working well but they have very few people who want to come in and see anything. And the Northern District of Texas responded to a TF survey saying it limited remote access. So those three districts we identified as using

practical obscurity. There are several relevant questions. One question is whether you have to show identification if you come to the courthouse to view case files. Another is whether it would be possible to track what individuals viewed at the courthouse. Judge St. Eve said it would be so useful to learn what parts of the file people wanted to see. If you do have to show ID to see a file and later it is possible to track what files you viewed, it might be possible for the government to connect the dots if someone whose file you had viewed was subsequently attacked. This also depends on what else is available remotely to anybody online, as Judge Campbell had noted. So, all of those are in play in trying to design something under Rule 49.2.

The Committee's clerk liaison expressed a concern about the language of Rule 49(b)(2) which states parties and their attorneys "may have remote electronic access." Professor King said she understood his concern to be that this language (which is now present in Civil Rule 5.2), might carry with it the connotation that not only must the court not block electronic access, but that the court must take affirmative steps to provide electronic access. Although this argument seems not to have arisen under Civil Rule 5.2, it might be possible to revise the language to make this clearer. Clarifying language might, however, generate opposition at the Standing Committee, because it would diverge from Civil Rule 5.2 and might even suggest a negative inference about Rule 5.2. However, if this is a potential problem, the Civil Rule could be amended as well. In his experience, those who are most interested in having remote access will focus on this and view it as a right to remote access.

Professor Beale reminded the Committee that it had recently had a discussion about what "may" meant in the context of Rule 5 of the 2254 and 2255 Rules, and the style consultants were very clear about what "may" means throughout the rules. So that would be one of the things to watch out for, it is not just Rule 5.2 of the Civil Rules, but throughout the rules "may" has a certain meaning. We should be cognizant of not creating contrary implications. That is definitely something to keep our eye on.

A member raised one more technical point about the relationship between (b) and (c); (b) says a party's attorney can access any part of the case file, and (c) says any attorney who is registered can access any part of the case file. It would seem unnecessary to have the reference to the party's attorney in (b), because by definition they are going to be in the larger group in (c). If you had this content, (b) could be the parties, and (c) could be all attorneys. The reporters agreed that the overlap could be eliminated if all registered attorneys are given full access.

#### **IV. Disclosure of the PSR to the Defendant; Rule 32(e)(2) (17-CR-C)**

Judge Molloy noted the issue whether the Probation Officer must give the PSR directly to a defendant had been raised in his district, and he asked the reporters to provide background. The reporters provided information on the development of Rule 32(e)(2) in the Agenda book, beginning p. 257. A process of gradual evolution began in 1983. Initially, the PSR was an internal court document that defendants and their counsel were not allowed to see. In 1983, the rule was amended to allow the defendant and counsel to read the document, but they could not

have their own copy. The next step was to provide them with a right to receive copies that they had to return. Eventually the Rule provided a right to receive the PSR with no further restrictions.

The Committee deliberately granted individual defendants (as well as counsel) the right to receive the PSR. In 1983, when Rule 32 was amended to permit the defense to read the report, the Committee emphasized that the PSR should go to both the defendant and his counsel, in order increase the likelihood that erroneous information would be noted and corrected. Because defendants often know more about the information that goes into the PSR than counsel, they need to be able to review the PSR themselves to identify any errors.

The Committee also recognized the possibility that a defendant's possession of his PSR may sometimes be dangerous, and this issue is mentioned in the Committee Notes. In 1989 when Rule 32 was revised to give the defense the right to receive copies of the PSR and to eliminate the requirement that these copies be returned, this danger was mentioned in the Committee Note. The Note stated that when retention of the report in a local detention facility might pose a danger, the district court could direct that the defendant not personally retain a copy in that facility. Despite the Committee's recognition of the potential for problems if PSRs made it into the detention facility, the Rule itself required that the PSR be provided to the defendant. Thus, the Rule balanced the danger against the need for defendants to review the draft PSR to get ready to consult with counsel. Another Committee Note recognized that access to PSRs within these institutions would fall beyond the Committee's rulemaking powers.

Judge St. Eve's discussions with BOP had highlighted the tension between the need for defendants awaiting sentencing to review sentencing documents such as the PSR to insure the accuracy of that process, and the danger that sentencing documents may be misused and cooperators threatened. There may be technological fixes that were not available when the rule was drafted and revised. BOP is exploring options such as having kiosks where defendants would be able to look at their own information but not print it, show it to others, or post it.

Since 1989, when the defense got access to the PSR, it has been the Committee's view that it is important for both the defendant and his counsel to have a right to that document. The question now is whether now the situation has changed enough because of threats that the Rule should be amended. For example, the Rule could provide that the PSR should go to counsel and be discussed with the defendant. Should a subcommittee be tasked with an in-depth review of this issue?

A member asked if the reporters had any further insight into why the rule was amended to eliminate the requirement that the defense return the copies of the PSR. The reporters did not. They had reviewed the relevant Committee Notes, but deferred further review of the minutes and other records until after the Committee determined whether it wished to take this matter up.

Discussion turned to the question of the practice under the rule. One judge commented that in his district the practice is to send it only to the attorney. Then under Rule 32(i)(1)(A) the

court has to confirm at sentencing that the defendant and counsel conferred, and the court makes sure that the defendant saw the PSR. The reporters noted they had made some initial enquiries, and could learn more if the issue were referred to a subcommittee for in-depth review. Do defense lawyers always share documents that are served on them with their clients? If this is viewed as part of counsel's duty in representing clients, that might provide the foundation for a rule that the PSR should be provided to counsel, who would then share it with the defendant.

A practitioner member noted that there are pro se defendants in the system, and the member had thought that was why the rule referred to sending the PSR to the defendant. Then if you are housed in CCA, a federal BOP facility, you are not allowed to have your PSR, and you will have to have that kiosk or the law library or somewhere you could check out and look at those documents. The member also noted that there is new ABA standard for the defense that is much more particularized and calls for talking to your client about what is in the PSR.

Two practitioner members said they were unaware of any case in which the PSR had been sent directly to their clients. When a lawyer represents a client, he serves as the client's agent and can receive service on his behalf. All of the practitioner members agreed that this is how the system now works. It does not require direct service on represented defendants.

Professor Beale noted that there might still be a need to revise the rule, so that it conforms to the practice. Judge Molloy agreed, noting that there are now "jailhouse lawyers" demanding that the Probation Service provide PSRs directly to individual defendants, and this practice may spread. Professor Beale agreed that when you serve a represented party you generally serve the lawyer. However, she did not think that is what was envisioned by Rule 32(e)(2), which directed that copies go both the lawyer and the client. A judicial member commented that when he was a practicing defense attorney he would always receive two copies of the report. Until this discussion, he had never known why he got two copies of the report.

Judge Molloy concluded the discussion, saying that he would refer this matter to the Cooperators Subcommittee because it might fit hand and glove with the issues they are dealing with.

## **V. Complex Criminal Litigation Manual**

After our mini conference on how to deal with complex criminal matters, there was a suggestion that it would be useful to have a manual for complex criminal cases, similar to the Manual for Complex Civil Litigation prepared by the Federal Judicial Center (FJC). This issue was referred to Judge Kethledge's Rule 16.1 Subcommittee.

Judge Kethledge stated that the FJC said they think they would happy to assist, but they asked that we make suggestions for topics that might be included in such a manual. The Subcommittee had a telephone conference to consider topics, and the list it came up with is reflected on p. 271 of the materials. We also learned then that the FJC now generally contracts this sort of work out to private lawyers and academics, rather than preparing it in house. The



FJC is also moving toward putting materials online rather than providing hard copies. Judge Kethledge noted that after consideration and discussion with the reporters he did not think there was much more for the Committee to do on this proposal. Given its small size and composition, the Subcommittee would not be well suited to guiding this project.

Professor Beale expressed enthusiasm for some of the changes being made by the FJC, such as putting materials directly online so that they will be readily accessible and can be updated frequently. The materials are also being reorganized and presented in a more user-friendly fashion. If the Committee feels this would be a useful project, the FJC would be willing to take the next steps, such as getting input on the most important topics from a broader group. She then invited Ms. Hooper to add her thoughts.

Ms. Hooper explained that the FJC will develop a special topics webpage focusing exclusively on complex criminal litigation. At the outset, it will be posting some of the publications it has done on national terrorism cases, our resource guide for managing death penalty litigation, and the manual on recurring problems in criminal trials. In addition, the FJC will review material that has been distributed at the magistrate and district judge workshops over the past few years, and may post those as well. The FJC will also be looking for guidance on new topics that could be developed and posted on the website.

Ms. Hooper said that it was not yet clear whether all of these materials would be available to the public as well as judges. At some of these workshops, judges participate with the understanding that the material will only be available to other judges; broader access to those materials is something that the FJC will have to work out.

Judge Campbell suggested that Judge Molloy's innovative procedures in the WR Grace prosecution should be considered for the website. This was a complex criminal case, and Judge Molloy used some innovative techniques, such as requiring the government to make certain pretrial disclosures at certain times, a ruling affirmed by the Ninth Circuit. Judge Campbell stated this technique has been invaluable in the Ninth Circuit to move criminal trials along and prevent surprise.

Another member stated that adequate funding for complex cases involving indigent defendants was an important topic. If there are a large number of codefendants, there will usually be CJA lawyers as well as federal defenders. In preparing the ESI protocol, they put CJA funding in as the first issue. These are really big and expensive, so the courts have to find ways to fund them adequately.

## VI. OTHER RULES SUGGESTIONS

### A. Sentencing by Videoconference (17-CR-A)

Judge Donald E. Walter wrote the Committee suggesting an amendment to allow the option of sentencing by videoconference, where the judge would be at a remote location but defendant and all counsel would be in the courtroom.

Professor Beale introduced the proposal, noting that Rule 43 now specifies when a defendant must be present; Judge Walter's proposal is that unless the defendant objects and shows good cause, the court would have the option of sentencing by videoconference. The proposal raises the question whether it a good idea to allow sentencing by videoconference and, if so, under what circumstances. The reporters' memorandum recounted the Committee's prior consideration of videoconferencing. Under Rule 43(b)(2), if an offense is punishable by a fine and a sentence of no more than one year, defendants have the option of having the arraignment, plea, trial and sentence done in absentia. In 2011, when the Committee was considering technology changes, it agreed also to allow sentencing by videoconferencing in these misdemeanor cases. The Committee concluded it would be desirable to allow a defendant who might otherwise choose to be sentenced in absentia to have the option of being sentenced by videoconferencing. But there was no support for further extending video sentencing. She noted that the memorandum describes some of the reasons why courts have concluded that videoconferencing is not the equivalent of in-person presence and may raise significant constitutional issues. The question for the Committee is whether to refer the proposal to a Subcommittee for more in-depth study.

In response to Judge Molloy's request for comments, multiple judicial members explained why they opposed an extension of sentencing by videoconference. There is a significant difference between proceedings conducted by videoconferencing and those done in person. One member noted that a judge who is in the same courtroom with the defendant can better determine whether the defendant understands the proceedings, and whether the defendant has been forced or threatened. Another noted that both the parties and the judge should be in the courtroom because there are such grave consequences for the individual defendant. A judicial member agreed, because "sentencing is the most human thing" that judges do. It is valuable to be in the same room as the defendant, because that allows the judge to understand the defendant in a way that would not be possible in a videoconference.

Members noted that the rules currently provide some flexibility, allowing judges and lawyers to work things out in unusual cases. Rule 43(c)(1)(B) now states that a defendant may be "voluntarily absent" at sentencing. There may be times when a defendant prefers not to come to court for sentencing. For example, a practitioner member described a case in which a defendant cooperated with the government and was out on bail when he was sentenced to time served by a video link to his home in Japan. Unlike the current rule, which anticipates that a defendant could

be “voluntarily absent,” Judge Walter’s provision would allow the judge to elect to conduct the sentencing by videoconference unless the defendant objects and can show good cause.

Judge Campbell observed that current Rule 43(c) contemplates waiver only by behavior, rather than other forms of waiver. He wondered if the rule needed to be more explicit. Professor Beale responded that there had been no indication of a need for revision or clarification of Rule 43(c). Professor King noted that one may forfeit a right to be present by not raising it, adding that a written waiver requirement might make it more difficult to waive the right to be present. She also noted that although most of the Federal Rules do not include specific waiver provisions, you can waive the rights provided by the rules or stipulate that they won’t apply, with the court’s permission.

At the conclusion of the discussion, Judge Molloy stated that he would write to Judge Walter informing him that the Committee had considered his suggestion, reviewed the history of Rule 43, and concluded that no change in the rule is warranted.

**B. Pretrial Disclosure of Expert Witness Testimony (17-CR-B)**

Judge Molloy asked Mr. Wroblewski to comment on Judge Jed Rakoff’s proposal for more pretrial disclosure of the testimony of expert witnesses. Over the last year, Wroblewski had worked closely with Judge Rakoff and the National Commission on Forensic Science, a federal advisory commission with authority only to advise the attorney general. The Commission recommended that the attorney general change the Department’s discovery practices, and its recommendations were adopted by then Deputy Attorney General Sally Yates. The new DOJ procedures are very similar to the civil rule. Both have different disclosure requirements, one a summary and the other more detailed, depending on the type of expert the party is hiring. If the party hires an expert for a particular case, a more detailed summary is required. Given the new DOJ policy, Wroblewski thought that amending the Criminal Rules to parallel the civil discovery rules would not make much difference in most cases. Wroblewski disagreed with the suggestion that without a rule prosecutors would not follow that guidance. Federal prosecutors get discovery training every year. This year there is discovery training on expert witness testimony for all 6,000 criminal prosecutors.

Mr. Wroblewski informed the Committee that within a few days the Evidence Rules Committee would be holding a discovery conference and considering issues relevant to expert forensic evidence in criminal cases. Since the rules of admissibility might be amended, and the Department has adopted the recommended procedure and is training its prosecutors on the practice, he suggested that the Committee should defer action on Judge Rakoff’s proposal.

A motion to table Judge Rakoff’s suggestion was made, seconded, and approved by a voice vote.

## VII. Discussion of Rule 16.1, Pretrial Discovery Conference

Judge Molloy introduced Professor Daniel McConkie, who had requested an opportunity to testify after the hearing had been cancelled. McConkie's written comments were not received in time for inclusion in the agenda book, but had been distributed to members. Judge Kethledge, chair of the Rule 16.1 Subcommittee, and Judge Molloy welcomed Professor McConkie and invited him to make a few comments.

Professor McConkie said he regretted not providing his comments before the Committee completed its work on the draft published for public comment, but he expressed the hope that they would still be useful. In summary, an amendment is warranted and the Committee's draft goes in the right direction, taking criminal discovery closer to civil discovery. Requiring the parties to confer about discovery would help them to regulate themselves. This requirement would help prosecutors, who generally want to comply with their discovery obligations but may find it hard to do so when they are not sufficiently familiar with the defense case. In his experience as an Assistant United States Attorney, Professor McConkie found it easier to comply with his discovery obligations if he spoke directly to defense counsel, and just had a conversation. It was not generally necessary to have a very long conversation.

Although Professor McConkie favored the adoption of the proposed rule, he also suggested a few "tweaks" for the Committee's consideration.

The first change Professor McConkie suggested was requiring that the conference be conducted in "good faith." He recognized that the Committee had discussed whether to include this language and decided not to do so. But he was concerned the Rule as written seems to be completely "voluntary," and it provides no remedy if one of the parties just goes through the motions of conferring. A good faith requirement would be helpful.

Professor McConkie also suggested going beyond the Committee's proposed "bare-bones rule," moving closer to the Civil Rule by requiring the parties to have a more structured discussion about what, when, and how discovery needs to be turned over. Finally, the parties should be required to submit a proposed order for the court. It is good practice to have a discovery order. It helps prosecutors fulfill their duties, and it helps the district court to enforce discovery obligations that are already in the rules and required by the Constitution.

In response to a question how his proposal would affect existing local rules and standing orders, some of which have a great deal of detail, Professor McConkie stated that it would change the practice if the local rules required less than the proposed national rule, but would not preclude local rules that now require more. He noted that the Committee has previously recognized that Rule 16 is not the only authority a judge has to regulate discovery, and accordingly his proposal would not defeat any local initiatives to regulate discovery in creative ways.

A practitioner member noted that as published the Committee Notes to Rule 16.1 reference the ESI protocol, which includes a report back to the court. Since the protocol already covers the report, it may not be necessary for the rule to require it. Also, the member noted, a report may be necessary only in the large discovery cases that need management.

Professor Beale observed that the Committee Note says that parties should be looking at best practices, giving the ESI protocol as an example. This builds in flexibility. The best practices could be a more or less detailed list or a report back to the judge. The proposed rule does not otherwise tie the hands of individual districts or judges. The Committee had concluded there was no need for a good faith requirement, but Professor McConkie had suggested this would be a more serious signal to the parties. Professor Beale asked whether members had experience with counsel not fulfilling their obligations in good faith, and if this is indeed an issue.

A practitioner member noted he had initially favored adding the phrase “good faith,” largely because it is in the Civil Rules, but he had been persuaded it was not necessary. The conversation reminded him, however, of the importance of requiring counsel to talk in real time to each other, which adds some gravitas to the meet and confer. He regretted the Standing Committee’s decision to delete the requirement for an in-person meeting from the Rules Committee’s proposed draft, and to allow conferences by telephone or Skype. Not explicitly requiring “good faith” is acceptable, but would be more satisfactory if the two parties always talked to each other in person. Deleting the requirement of a face-to-face meeting makes the conference a less meaningful event.

Professor King noted the requirements of “good faith” and meeting in person are related in another way. The Committee omitted “good faith” despite the fact that it created an inconsistency with Civil Rule 26. Later the Standing Committee deleted the requirement that the conference be in person, allowing it to be by telephone, in part to be consistent with the Civil Rule. Following that logic, she noted, would support adding “good faith” to the Criminal Rule.

Responding to a question about the effect of including “good faith,” Professor McConkie said had not done empirical work to see if the inclusion of the phrase had an effect on civil proceedings. A practitioner member doubted that it was necessary to include the words “good faith” in the Criminal Rule, noting that experience of practitioners during the discovery stage is now better in criminal than in civil cases, despite the inclusion of the words “good faith” in the Civil Rules. Moreover, in both civil and criminal cases he agreed the experience is better when counsel are speaking to one another.

Professor Beale noted that this discussion would be very helpful to the Rule 16.1 Subcommittee when it reviewed any other comments received during the notice and comment period.

## VIII. NEXT MEETING

Judge Molloy concluded the meeting with a reminder that the Standing Committee was meeting in January and the Rules Committee would be meeting in Washington, D.C. on April 24, 2018. He also thanked the reporters and the rules staff.

DRAFT

# TAB 4

**THIS PAGE INTENTIONALLY BLANK**



# TAB 4A

**THIS PAGE INTENTIONALLY BLANK**

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

DAVID G. CAMPBELL  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

MEMORANDUM

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

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

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** December 6, 2017

---

1 *Introduction*

2 The Civil Rules Advisory Committee met at the Administrative Office of the United  
3 States Courts on November 7, 2017. Draft Minutes of this meeting are attached.

4 No items are submitted for action by this Report.

5 Part I of this Report summarizes progress in developing a proposal to improve the  
6 procedure for taking depositions of an organization under Rule 30(b)(6). No recommendation is  
7 advanced now, but the goal is to prepare a proposed amendment that can be submitted this spring  
8 with a recommendation to approve for publication.

9 Beyond the Rule 30(b)(6) proposal, the Civil Rules agenda lies at a mid-point. More  
10 potentially worthy projects have appeared than can be managed within the limits of Committee  
11 capacities. As reported last June, four possible subjects have been deferred, to be taken up for  
12 further work or abandonment when decisions have been made as to the three major undertakings  
13 described in this report.

14           The four deferred projects include the rules on demanding jury trial, both generally and in  
15 the specific context of actions removed from state court; lawyer participation in voir dire  
16 examination of prospective jurors; the mode of serving subpoenas under Civil Rule 45; and both  
17 narrowly focused and broad questions as to offers of judgment under Rule 68. Jury-trial demand  
18 rules have not been considered for many years, if indeed they have been examined at any time  
19 since 1938. The other topics have been considered—repeatedly in the case of Rule 68—without  
20 developing any clear sense of direction. The question whether Rule 38 should be amended to  
21 delete any requirement of a demand when any party is entitled to a jury trial may be the most  
22 novel and important of the four. Still, it has seemed wise to defer action for a while. The topic  
23 was suggested by two members of the Standing Committee, which is a reason to pay close  
24 attention. But it may be that the major reason to reconsider the judgment of 1938 is the dramatic  
25 decline in the incidence of jury trials. The Advisory Committee was not particularly enthusiastic  
26 when the subject was discussed at the April 2017 meeting. All competing demands on  
27 Committee resources must be considered before scheduling a close examination of this topic.

28           The three major potential undertakings are described in Part II. One would respond to the  
29 request of the Administrative Conference of the United States, firmly supported by the Social  
30 Security Administration, that specific rules be adopted to regulate district-court review under  
31 42 U.S.C. § 405(g) of administrative decisions that deny individual claims for disability benefits.  
32 Another would undertake to develop specific rules to supplement the general Civil Rules in  
33 consolidated Multidistrict Litigation proceedings. The third would require mandatory initial  
34 disclosure of third-party litigation financing agreements. The Social Security review proposal  
35 will require close work, but it is finite in scope. If MDL rules are to be developed, the first steps  
36 will force the Committee to develop a deep understanding of the many different kinds of cases  
37 that may be consolidated and to learn about the procedures currently crafted by MDL judges to  
38 successfully manage proceedings. But at least MDL proceedings are well developed, and the  
39 basic framework is generally understood. Third-party litigation financing is different. It seems to  
40 be expanding rapidly. The submissions to the Committee and other sources hint that third-party  
41 financing agreements come in many forms, giving rise to various concerns. The initial  
42 submissions supporting disclosure are countered by submissions that deny all of the fact  
43 assertions offered by the proponents and question the proponents' real motives. Finally, Part II D  
44 provides a brief summary of the need to allocate Committee resources among these three  
45 potential subjects.

46           Part III offers brief notes on publication of newspaper notices in condemnation actions  
47 governed by Rule 71.1, a topic that remains open on the agenda, and a possible rule defining the  
48 role of a trial judge in encouraging settlement, a topic that has been removed from the agenda.  
49 Part IV concludes with reports on progress with the mandatory initial discovery and expedited  
50 procedure pilot projects, and an initial discovery protocol for individual Fair Labor Standards  
51 Act cases developed under the auspices of the Institute for the Advancement of the American  
52 Legal System.

53

### I. RULE 30(b)(6)

54 The Civil Rules Advisory Committee formed its Rule 30(b)(6) Subcommittee in April  
55 2016 in response to several submissions suggesting various changes to the rule. After  
56 considerable discussion, that Subcommittee identified 16 different issues that might warrant  
57 study as possible rule amendments, and initial sketches of amendments that might address those  
58 issues in various ways were discussed. Those sketches were included in the Standing  
59 Committee’s agenda book for its January 2017 meeting.

60 Through early 2017, the Subcommittee pursued its discussions of these ideas and  
61 gradually narrowed its focus through a kind of triage that shortened the list of potential issues to  
62 six. At that point, it concluded that input from the bar about these possible amendment ideas  
63 would be helpful. Under date of May 1, 2017, it therefore invited written commentary about  
64 those issues. A copy of the invitation for comment was included in the Standing Committee  
65 agenda materials for its June 2017 meeting. Briefly, the issues on which written input was  
66 invited were:

- 67 (1) Inclusion of reference to Rule 30(b)(6) depositions in Rules 26(f) and 16
- 68 (2) Adding rule provisions concerning whether statements by a 30(b)(6) witness  
69 constitute judicial admissions
- 70 (3) Providing for supplementation of 30(b)(6) testimony
- 71 (4) Forbidding contention questions during 30(b)(6) depositions
- 72 (5) Adding a rule provision authorizing objections by the named organization to a  
73 30(b)(6) notice
- 74 (6) Addressing the application of limits in the rules on the number of depositions and  
75 the length of depositions to 30(b)(6) depositions

76 In addition, representatives of the Subcommittee attended two events focused on the rule.  
77 On May 5, 2017, during the meeting of the membership of the Lawyers for Civil Justice in  
78 Washington, D.C., its representatives received comments in an “open mike” session about the  
79 rule. On July 21, 2017, during the annual convention of the American Association for Justice in  
80 Boston, there was a three-hour roundtable discussion with approximately 30 AAJ members with  
81 experience using the rule.

82 The May 1 invitation for comment asked that comments be submitted by August, and  
83 more than 100 comments were submitted. Many were very thoughtful and thorough.  
84 Summaries of the comments are included in this agenda book. The volume and tenor of these

85 comments shows that many in the bar care deeply about Rule 30(b)(6), and that many feel some  
86 practice under the rule has caused significant problems.

87 The comments also show that there are significant disagreements in the bar about what  
88 are the most serious problems. One set of concerns focuses on perceived over-reaching in use of  
89 the rule, sometimes leading to overbroad or overly numerous topics for interrogation, or strategic  
90 use of the judicial admission possibility. A competing set of concerns focuses on organizations'  
91 preparation of their witnesses; some say organizations too often evade their responsibilities and  
92 that enforcement of the duty to prepare is too lax.

93 At the same time, the input revealed another significant aspect of actual practice under  
94 the rule. Very often, after notice of deposition is given, the parties engage in constructive  
95 exchanges that produce improvements from the perspective of both the noticing party and the  
96 organization and facilitate an orderly inquiry. For one thing, the list of matters for examination  
97 could be modified or focused based on such exchanges. For another, candid exchanges may  
98 ensure that the witnesses designated are suitable in light of the topics to be discussed.

99 After receiving all this helpful input, the Subcommittee resumed its review of amendment  
100 ideas in a series of conference calls. In light of the rather strong objections from many who  
101 commented about various of the amendment ideas mentioned in the invitation for comment, it  
102 seemed that proceeding along many of those lines could readily produce controversy rather than  
103 improve practice.

104 At the same time, it seemed that prompting, or even requiring, communication about  
105 recurrent problem areas would hold the potential to improve practice. Initially, that idea focused  
106 on a change to Rule 16(c) calling for the court to consider including provision for 30(b)(6)  
107 depositions in a case management order or directing the parties to discuss the matter during their  
108 Rule 26(f) discovery planning conference. But there were significant concerns that in most cases  
109 the 26(f) conference would occur too soon for the parties to engage in meaningful discussion of  
110 problem areas bearing on 30(b)(6) depositions.

111 Another concern was that it seemed odd to highlight this particular form of discovery at  
112 the Rule 26(f) conference or scheduling order stage. True, the 2006 "E-Discovery" amendments  
113 did require parties to consider some specifics, such as form of production, at that point. But  
114 singling out one form of deposition from the entire panoply of other discovery tools did not seem  
115 warranted.

116 A third concern was that the full effect of the 2015 discovery amendments is difficult to  
117 gauge as yet. Certainly meaningful communication and a cooperative problem-solving approach  
118 could go far toward avoiding problems with 30(b)(6) depositions. And the concept of  
119 proportionality could be an antidote to over-reaching or overbroad lists of matters for  
120 interrogation. The unfolding experience under the 2015 amendments seemed to cut against  
121 proposing aggressive changes in Rule 30(b)(6) practice now.

122 With these concerns in mind, the Subcommittee returned to Rule 30(b)(6) itself,  
123 considering whether some requirement should be added to that rule mandating that the parties  
124 communicate about 30(b)(6) depositions when a party proposes to take such a deposition. That  
125 would be the time when the communication would be most important and effective. Putting such  
126 a provision right into Rule 30(b)(6) would be more direct than putting something into Rule 16 or  
127 Rule 26(f), and it would be right where the parties would look when considering 30(b)(6)  
128 depositions.

129 Accordingly, the Subcommittee brought the following revised rule sketch to the full  
130 Advisory Committee during its November 2017 meeting:

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

132 \* \* \* \* \*

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

134 \* \* \* \* \*

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

148 \* \* \* \* \*

149 As is clear from the brackets in the above sketch, the Subcommittee is in the ongoing  
150 process of evaluating how best to design a rule provision.

151 Discussion during the Advisory Committee's meeting is reflected in the minutes of that  
152 meeting, included in this agenda book. Several topics came up. One was that the rule sketch did  
153 not make it clear that there should be a bilateral obligation to confer (an obligation resting on the  
154 named organization also), although that seems important. Another was that the named  
155 organization should be expected to discuss the identity of the person to be offered as its designee

156 as well as the matters for examination. Yet another was that keeping “attempt to confer” in the  
157 rule might introduce difficulties even though a similar provision exists in Rule 37 with regard to  
158 conferences to avoid the making of a motion to compel. In addition, it was suggested that if the  
159 rule explicitly requires the named organization to confer about these matters, it would make  
160 sense to locate that requirement after the sentence in the current rule about the obligation of the  
161 organization to designate a witness to testify on its behalf.

162 There was also discussion of the question whether some sort of change to Rule 26(f)  
163 would be a helpful idea. That question remained unresolved pending further work by the  
164 Subcommittee. But it was agreed that the Rule 16 approach no longer looked promising, and  
165 that it would not be pursued further.

166 Since the Advisory Committee meeting, the Subcommittee has resumed work and held  
167 another conference call about developing a rule proposal that seems most promising. Initial  
168 inclinations regarding the bracketed phrases in the draft presented to the Advisory Committee  
169 were (1) to retain “or promptly after,” (2) to use “must” rather than “should,” and (3) not to  
170 include “or attempt to confer.” Additional issues under discussion include providing by rule that  
171 the named organization must confer in good faith, and adding the identity of the person or  
172 persons to testify to the list in the rule of topics for discussion.

173 The question whether to propose a change to Rule 26(f) remains under discussion, and  
174 several possible versions of such a change have been proposed. Whether such an addition would  
175 be useful remains uncertain. One possibility is that the Subcommittee might recommend  
176 publication of a possible Rule 26(f) amendment with the caveat that the Committee is publishing  
177 this possibility to obtain public comment about it, perhaps saying that unless the commentary  
178 provides strong reasons for including this change the Committee's initial attitude is that it would  
179 not be useful.

180 The Subcommittee has already scheduled a further conference call for January 2018 and  
181 presently contemplates being in a position at the time of the Advisory Committee's Spring  
182 meeting to recommend to the Advisory Committee a preliminary draft of an amendment to  
183 Rule 30(b)(6) for presentation to the Standing Committee and possible publication in  
184 August 2018.



185 **II. THREE MAJOR OPPORTUNITIES**

186 **A. Social Security Disability Review**

187 The Administrative Conference of the United States, working from a massive report  
188 prepared by Professors Jonah Gelbach and David Marcus, has recommended that explicit rules  
189 be developed to establish a uniform national procedure for district-court actions under 42 U.S.C.  
190 § 405(g) to review final administrative decisions that deny an individual request for disability  
191 benefits. Discussion in the Standing Committee last June led to a preliminary determination that  
192 any new rules probably should be in the Civil Rules rather than in a sixth stand-alone set of rules.  
193 Further study was assigned to the Civil Rules Committee, which has decided that its initial work  
194 should remain focused on Social Security review cases, not on all cases involving review on an  
195 administrative record.

196 Work began with a conference call for members of an informal subcommittee. They  
197 agreed that a good first step would be to hear from government representatives about the need for  
198 new national rules, and from representatives of claimants. The meeting was held at the  
199 Administrative Office on Monday, November 6, the day before the Civil Rules Committee  
200 meeting. Participants included the Executive Director-Acting Chief of the Administrative  
201 Conference; the General Counsel of the Social Security Administration; the Counsel to the  
202 Associate Attorney General; the Deputy Director of Government Affairs of the National  
203 Organization of Social Security Claimants' Representatives; and a representative of the  
204 American Association for Justice. The meeting began with formal statements, much as in an  
205 official hearing, and developed through open give-and-take discussion that substantially focused  
206 and seemed to narrow the issues.

207 The value of uniform national rules was strongly supported by the Administrative  
208 Conference and the Social Security Administration. The Department of Justice also offered some  
209 support. The claimants' representatives were somewhat more cautious, warning that while good  
210 national rules would be a positive thing, bad national rules would not.

211 The participants all agreed that the purpose of seeking uniform national rules is to  
212 alleviate the inefficiencies imposed by the great differences among the 94 districts in the  
213 procedures used for § 405(g) review cases. There is little reason to anticipate that uniform  
214 national procedures will have any direct effect on other issues that confront the system, including  
215 different substantive law adopted in different circuits; an average rate of remands to the agency  
216 of 45% that includes remands requested by government counsel in 15% of all review cases; wide  
217 differences in remand rates among different districts, with surprisingly close conformity in  
218 remand rates for judges within any single district; and lengthy delays in processing individual  
219 claims in a heavily burdened administrative system.

220 The inefficiencies imposed by district-level differences in review procedures are in large  
221 part a function of the administrative structure. The Social Security Administration is organized

222 by regions. Most of the delay is in the administrative process it operates. It does not have the  
223 capacity to represent itself directly in subsequent review proceedings; official representation is  
224 provided by United States Attorneys. Most of the substantive work on review, however, is done  
225 by attorneys in the Office of General Counsel. These attorneys commonly practice in more than  
226 one district, and may appear in several. They have to bear heavy case loads that severely limit  
227 the amount of time that can be devoted to any single case. Learning and relearning the procedure  
228 of each district eats up some of the time available for the case. Similar burdens may fall on  
229 claimants' representatives. Some claimants' lawyers maintain regional or national practices, in  
230 part because high volume is an important element in supporting a specialized practice.

231 The Social Security Administration presented a set of draft rules to illustrate the matters  
232 that might be brought into uniform national rules. These drafts covered many matters, including  
233 detailed rules for the content and length of briefs, motions for attorney fees, and the like.

234 Discussion tended toward the conclusion that the most important goal is to establish a  
235 firm understanding that § 405(g) review cases, although civil actions, resemble appeals. The  
236 action, on this view, should be initiated by a complaint that is closely akin to a notice of appeal  
237 under the Appellate Rules. The response should be either the administrative record or a motion to  
238 dismiss (as for untimeliness or lack of a final administrative decision). The actual issues in  
239 contention should be framed by the claimant's initial brief, the Administration's responsive brief,  
240 and a reply brief for the claimant. Beyond this point, formal service on the government under  
241 Civil Rule 4(i) generates inefficiencies for everyone concerned. The wish is for a rule that calls  
242 for an electronic notice of filing sent directly by the district court's CM/ECF system to the Social  
243 Security Administration. Some districts are beginning to experiment with local rules that move  
244 toward this mode of service even now.

245 The question whether it is consistent with § 405(g) to provide for a limited complaint and  
246 for an answer that does no more than file the administrative record was discussed. The initial  
247 conclusion is that there is no real risk of inconsistency, and no corresponding fear that such rules  
248 would supersede the statute. Section 405(g) provides for review by a "civil action." Rule 8 now  
249 defines a complaint in a civil action. It is equally within the Enabling Act to provide for a  
250 different kind of complaint; endless possibilities for revising Rule 8 have been discussed in  
251 recent years. Rule 8 also defines what is an answer. Section 405(g) provides that the  
252 administrative record should be filed as "part of" the answer. It is not inconsistent with this to  
253 limit the answer to filing the administrative record, to be followed by a somewhat different  
254 process of defining and presenting the issues for review.

255 The proposal that the issues be developed by the briefs found strong support. Some room  
256 may remain to explore the possibility that briefing can be made more efficient by some means of  
257 pleadings-like initial statements. A claimant might find some advantage in knowing, before  
258 writing the first brief, that some issues will not be contested. It is not uncommon, for instance,  
259 for an administrative decision to be inconsistent with governing law in the circuit where review  
260 is had, either as a matter of oversight or as a matter of deliberate nonacquiescence in the pursuit

261 of the uniform national substantive policies the Social Security Administration thinks right. A  
262 claimant need not brief such a point at length if the Administration recognizes the inconsistency  
263 —indeed a clear focus on the issue may lead the Administration to request a voluntary remand.  
264 But if that possibility is put aside, it will remain for the rules to address the nature and  
265 sequencing of the briefs.

266 Initial discussion suggested that it may not be important to freeze into national rules such  
267 matters as the statement of facts in the claimant’s brief, responses in the Administration brief,  
268 page limits, times for filing, and the like. These matters still should be explored further.

269 Fitting the new rules into the body of the Civil Rules also remains an open topic. The  
270 discussion was inconclusive, but it seemed to be recognized that there may be legitimate  
271 occasions for discovery incident to a proceeding that ordinarily cannot look outside the  
272 administrative record, apart from remanding under § 405(g) to develop the record further.  
273 Greater uncertainty was expressed as to the suggestion that new rules should explicitly prohibit  
274 class actions brought under § 405(g). Examples of class actions were cited, but it was unclear  
275 whether they relied on § 405(g) jurisdiction or some other ground of jurisdiction. The potential  
276 role for a class action would be to challenge rules or practices common to the individual review  
277 and a class of other claimants.

278 Transsubstantivity presents another set of questions. District courts encounter review on  
279 an administrative record in other settings, not only in Social Security disability cases. A  
280 transsubstantive rule for all proceedings for review on an administrative record is an open  
281 possibility. And substance-specific rules present familiar dangers of misunderstanding a specific  
282 context, seeming to favor one set of interests over another, and a need to maintain current  
283 knowledge of substantive developments (including statutory amendments) that may call for rule  
284 amendments. But there are persuasive reasons to focus on Social Security review.

285 One reason is that the needs of Social Security review proceedings are likely to be  
286 distinctive from other review proceedings, which are quite likely to be distinctive from one  
287 another as well. Cases come to the district courts from administrative proceedings in Social  
288 Security cases that labor under severe constraints. Administrative law judges, the central actors  
289 in the adjudication process once state agencies have concluded initial disposition of applications,  
290 are charged with deciding 500 to 700 cases a year. Appeal proceedings do not enjoy much time  
291 for consideration and decision. And, as compared to the rest of the entire universe of  
292 administrative review in the district courts, there are great numbers of Social Security review  
293 proceedings. Annual new case loads run from 17,000 to 18,000. That is enough to provide 20 or  
294 so cases for every district judge and senior district judge. Rules for this single subject can be  
295 developed with greater confidence than general rules could be, and would respond to distinctive  
296 needs.

297 If this task is taken up, it will be important to coordinate with the Appellate Rules  
298 Committee. The appellate nature of the district court’s review obligations has a close analogy to

299 direct review of administrative agencies under other statutes and the Appellate Rules.  
300 Coordination will be pursued when work has advanced to a point that makes it useful.

301 A formal Subcommittee has been appointed to carry forward the work on Social Security  
302 review cases. Much work will remain to be done if the decision is to pursue the recommendation  
303 of new rules. It is not likely that anything will be ready for recommendation this spring. A  
304 progress report is the most that can be anticipated then.

### 305 **B. Rules for MDL Proceedings**

306 Three proposals have suggested that new rules are required for actions transferred for  
307 “coordinated or consolidated pretrial proceedings” under 28 U.S.C. § 1407. Two of them suggest  
308 specific amendments of present Civil Rules. One is quite different, suggesting that five judges  
309 should be assigned for further proceedings after pretrial discovery has brought a proceeding  
310 involving more than 900 cases to the brink of bellwether trials.

311 MDL proceedings account for a large share of all individual actions in the federal courts.  
312 There is common agreement on that. The opportunities for efficiency in pretrial proceedings,  
313 particularly discovery, are apparent. Beyond that, it has become common to reach final  
314 disposition of hundreds or even thousands of cases without remanding for trial in the courts  
315 where they were filed. It also has become common to suggest that a consolidated proceeding has  
316 failed if it concludes by remanding the constituent cases for trial.

317 Sound procedures are important when the stakes are so high. A common theme of the  
318 requests for new rules is that many MDL proceedings are managed outside the Civil Rules. In  
319 the eyes of some observers, “there are no rules.” But those who support the present system argue  
320 that flexibility is required by the differing circumstances of MDL proceedings that come in  
321 different sizes and that cross many areas of substantive law, state and federal. Flexibility in  
322 administering the rules in the spirit of Rule 1 is important; the question is whether the lessons of  
323 successfully flexible administration can be captured and expressed in amended rules. A related  
324 question is whether flexibility leads not only to creativity, but to unbridled creativity that at times  
325 impedes sound outcomes.

326 These questions have caught the attention of Congress. H.R. 985, which was passed in  
327 the House in March 2017, includes several provisions that would amend § 1407 along lines  
328 similar to several of the suggestions made in the proposals for new Civil Rules.

329 Many parts of the current proposals seem to focus on mass tort proceedings that involve  
330 large numbers of individual plaintiffs whose personal claims involve significant injuries and  
331 damages. Many of the specific proposals for rule amendments draw from the belief that a  
332 troubling number of the individual plaintiffs in these MDL proceedings have no claim whatever,  
333 indeed often no connection to the events that give rise to the litigation. Tales are told of  
334 proceedings in which twenty, thirty, even forty percent of the consolidated plaintiffs are “zeroed

335 out” when the time comes to make individual awards. The plea is for rules that will weed out  
336 these bogus plaintiffs early in the proceeding, a task that is not accomplished by motions to  
337 dismiss or for summary judgment.

338 The most modest suggestions for rules that would support early disposition of frivolous  
339 claims address pleading. These rules would recognize the separateness of “master complaints”  
340 from “individual complaints.” Each individual plaintiff would be required to file a complaint that  
341 meets standards of particularized pleading parallel to the Rule 9(b) tests for claims of fraud or  
342 mistake. And each individual plaintiff would be required to pay a filing fee, without opportunity  
343 for dispensation by the court. These suggestions correspond, at least in a way, to the laments that  
344 Rule 12(b)(6) motions to dismiss for failure to state a claim are not sufficient to the needs of  
345 MDL proceedings.

346 More ambitious suggestions appear to respond to the concern that motions for summary  
347 judgment also are inadequate. One of these suggestions would require a plaintiff to respond to a  
348 new Rule 12(b)(8) motion to dismiss by providing “meaningful evidence of a valid claim.” The  
349 court would be required to rule on the motion within a defined period, perhaps 90 days; the  
350 plaintiff would be dismissed with prejudice if meaningful evidence were not provided within 30  
351 days of an initial finding that there is none. A related suggestion would require initial disclosure  
352 by each plaintiff of “significant evidentiary support for his or her alleged injury and for a  
353 connection between that injury and the defendant’s conduct or product.” Implementation of these  
354 procedures would be difficult in large MDL proceedings, and likely impossible in those that  
355 involve thousands of plaintiffs and joinder of new claimants on a daily basis.

356 Another suggestion addressed to weeding out false plaintiffs is that initial disclosure  
357 should reveal “any third-party claim aggregator, lead generator, or related business \* \* \* who  
358 assisted in any way in identifying any potential plaintiffs \* \* \*.” The theory is that those who get  
359 paid for identifying potential plaintiffs do not pay sufficient attention to the bona fides of the  
360 potential claims.

361 These proposals aimed at early dismissal of claims that lack any colorable foundation rest  
362 on the belief that early dismissal is important. This belief is tested by observations that, in the  
363 types of cases where this is a problem, the parties know that a substantial fraction of the claims  
364 are unfounded. They manage the litigation and negotiations for settlement with this in mind. If a  
365 resolution is reached, it likely will be on terms that include claims processes that dismiss the  
366 unfounded claims. The proponents counter that the complexity of the proceedings grows as the  
367 number of plaintiffs increases; that numbers raise the stakes and pressures; that settlement  
368 requires a realistic understanding of what the overall proceeding is worth; and that publicly  
369 traded companies face serious consequences when loss of a single bellwether trial requires  
370 reporting the loss and the pendency of 15,000 similar pending claims.

371 Another suggestion simply incorporates the proposal for disclosure of third-party  
372 litigation financing discussed in Part II C.

373 A different set of suggestions address bellwether trials. These suggestions seem to reflect  
374 a perception that the court may press parties to agree to a bellwether trial in the consolidated  
375 proceedings even when the case was not, or could not have been, filed in that court as an initial  
376 matter. This concern is triggered in part by what are called “Lexecon waivers” that require a  
377 party to waive remand to the court where its action was filed and also to waive objections to  
378 “jurisdiction.” These suggestions have not yet been fleshed out in sufficient detail to support  
379 initial understanding and appraisal.

380 A final set of suggestions would expand the opportunities for interlocutory appeals from  
381 pretrial rulings. These suggestions do no more than identify categories of rulings that are likely  
382 candidates for appeal. The details of implementation have not been refined, particularly in  
383 choosing between appeal as a matter of right or some measure of discretion in the MDL court,  
384 the court of appeals, or both. The specific categories of orders identified in the proposals include  
385 *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in  
386 bellwether trials, and “any ruling that the FRCP do not apply to the proceedings.” (The  
387 comparable provision in H.R. 985 directs that the circuit court for the MDL court “shall permit  
388 an appeal from any order” “provided that an immediate appeal of the order may materially  
389 advance the ultimate termination of one or more civil actions in the proceeding.” This blend of  
390 mandate and discretion presents obvious challenges.) Much remains to be learned about these  
391 suggestions, and the reasons for finding inadequate the many existing opportunities for review  
392 under elaborated concepts of finality—most obviously the “collateral order” doctrine; partial  
393 final judgment under Rule 54(b); interlocutory appeal by permission under § 1292(b); and  
394 extraordinary writ. The values of appellate guidance are plain, for the MDL judge as well as the  
395 parties. The delay that can arise from even a single appeal, on the other hand, can be a serious  
396 obstacle to effective progress in the proceedings.

397 Discussion of these issues supports the conclusion that it is important to learn more,  
398 likely much more, about the underlying phenomena and viewpoints. Most of the suggestions and  
399 discussion have been provided by those who represent defendants. They are seriously concerned  
400 about many aspects of MDL proceedings. But little has been heard from those who represent  
401 plaintiffs; it is common to observe that they seem content with the present state of affairs. Nor  
402 has the wisdom and experience of the Judicial Panel on Multidistrict Litigation or of MDL  
403 judges been brought to bear. The Panel makes many resources available to MDL judges,  
404 providing opportunities for uniformity that may accomplish as much uniformity as is desirable.

405 A Subcommittee has been appointed to launch the search for more information about  
406 MDL procedures. The task will not be easy. At least six months, and more likely a year, will be  
407 required to determine whether there is an opportunity to improve MDL practice by amending  
408 current rules or adopting new rules. Coordination with the Judicial Panel on Multidistrict  
409 Litigation will be an important part of this undertaking. Many other resources must be tapped. If  
410 it appears that something useful might be done, developing and refining specific rules proposals  
411 will likely require more than the three-year cycle that suffices for less ambitious rulemaking.

412 **C. Disclosing Third-Party Litigation Financing Agreements**

413 The U.S. Chamber Institute for Legal Reform and 29 other organizations have  
414 resubmitted a proposal to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure  
415 of

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

420 This proposal was considered in 2014, and again in 2016. Each time it was carried  
421 forward for further consideration. The sense then was that third-party litigation financing is both  
422 growing and evolving, and that it takes many forms with various sorts of agreements. The  
423 information provided by different sources often presents direct contradictions about whether  
424 there are general practices, what the practices may be, and what variations may occur or emerge.  
425 Work toward possible rules must begin, if at all, by undertaking a careful quest for information  
426 that may be hard to come by. Neither financing firms nor lawyers nor litigants may be eager to  
427 reveal the full terms of their agreements. None of them may even be able, much less willing, to  
428 describe the full impact of their agreements on the conduct of lenders, lawyers, and parties in  
429 third-party funded litigation. The topic may be no more ripe for further work now than it was in  
430 2014 or 2016.

431 One aspect of the proposal is clear. The proponents steadfastly maintain that it is not  
432 designed to regulate third-party lending in any way. All it would require is disclosure of the  
433 financing agreements. The benefits to be gained by disclosure are less clear. One specific  
434 argument is that a court that knows the financing terms can structure settlement proceedings in  
435 ways that protect against undue influence by the lender. A more general argument is that some  
436 financing agreements may be illegal under some residuum of state laws prohibiting champerty,  
437 maintenance, and barratry—disclosure will enable the adversary to win protection through  
438 vaguely anticipated court remedies. These arguments seem to depend on disclosure of the  
439 agreement. Other arguments might be satisfied by disclosure that reveals only the fact of third-  
440 party financing, and the identity of the financier.

441 These general arguments are met by counter-arguments that the professed motives  
442 camouflage different motives. One purpose may be to gain access to agreements that can be used  
443 in seeking direct regulation of third-party financing practices. Another may be to gain strategic  
444 advantage in particular litigation.

445 Questions about regulation, whether through musty common-law concepts that are likely  
446 to be substantially superseded by other forms of regulation or through new forms of direct  
447 regulation, point to the broad questions about the value of third-party financing. Proponents of  
448 the practice advance a simple argument. Litigation in many fields is becoming ever more costly.

449 The risks that inevitably attend adversary litigation further deter claimants who have strong  
450 claims. On this view, third-party financing is necessary to support litigation that is important  
451 both to provide remedies for private wrongs and to promote the public interest.

452 Those who champion disclosure argue from perceived consequences of third-party  
453 financing. As summarized in the 2017 proposal, “third-party funding transfers control from a  
454 party’s attorney to the funder, augments costs and delay, interferes with proportional discovery,  
455 impedes prompt and reasonable settlements, entails violations of confidentiality and work-  
456 product protection, creates incentives for unethical conduct by counsel, deprives judges of  
457 information needed for recusal, and is a particular threat to adequate representation of a plaintiff  
458 class.” No specific examples are provided.

459 Third-party funders meet these arguments by direct denial. None of them, they say, are  
460 true. The arguments and responses present conflicting versions of fact that cannot be resolved  
461 with the information now at hand.

462 The mandatory initial disclosure of liability insurance coverage under  
463 Rule 26(a)(1)(A)(iv) is invoked to support disclosure of third-party financing agreements. This  
464 disclosure requirement grew out of 1970 amendments that resolved disagreements among the  
465 lower courts in favor of allowing discovery. As polished by the Style Project, disclosure is now  
466 required of “any insurance agreement under which an insurance business may be liable to satisfy  
467 all or part of a possible judgment in the action \* \* \*.” The 1970 Committee Note recognizes that  
468 insurance coverage ordinarily is not admissible in evidence, and that knowing about coverage  
469 will not enable an adversary to find admissible evidence. Discovery was allowed to enable all  
470 parties to make the same realistic choices about conducting litigation and to alter the balance of  
471 bargaining for settlement. The outcome might be to advance settlement, or instead to impede  
472 settlement. The analogy to third-party financing agreements is in part clear. Disclosure of the  
473 agreement is not likely to lead to evidence admissible on the merits. But it can affect the parties’  
474 strategies. The question posed by the analogy is whether the social and strategic roles of third-  
475 party financing are so similar to the social and strategic roles of liability insurance as to resolve  
476 the debate.

477 The analogy to liability insurance may be useful in another way. Disclosure is carefully  
478 limited to an agreement with “an insurance business.” Other forms of indemnification  
479 agreements are not covered. Nor is discovery generally allowed into a defendant’s financial  
480 position, even though both indemnification agreements and overall resources may have impacts  
481 similar to, or even exceeding, the impact of liability insurance. The question for third-party  
482 financing disclosure is how to define the kinds of agreements that must be disclosed. A plaintiff,  
483 for example, may borrow the costs of litigating from friends and family on terms that, expressly  
484 or implicitly, call for repayment only if the litigation is successful. Health insurers routinely have  
485 rights of subrogation that depend on the outcome of individual tort actions. Joint defense  
486 agreements might allocate initial contributions according to rough guesses of relative exposure,  
487 with final allocations that depend on the outcome of the action. Some forms of indemnification



488 agreements might involve provisions that could be caught up in a disclosure rule without any  
489 clear advance judgment whether disclosure should be required.

490 A first step in attempting to craft a rule, then, would be to learn enough about various  
491 arrangements that may involve rights to repayment contingent upon the outcome of litigation.  
492 One preliminary possibility, needing refinement, would be to carry out the analogy to insurance  
493 disclosure to invoke disclosure only of agreements with an enterprise carrying on the business of  
494 investing in litigation.

495 Detailed arguments about the consequences of third-party funding move beyond these  
496 preliminary issues to focus on actual impact in practice. As already noted, fierce debates rage  
497 around the likely consequences. No more than brief descriptions are needed to provide a working  
498 picture of the debates.

499 The proponents of disclosure argue that third-party financing arrangements transfer a  
500 significant measure of control away from the financed party's lawyer to the financier. The effects  
501 are said to create conflicts of interest and to diminish the lawyer's exercise of independent  
502 judgment in representing the client. A more specific version of the control argument is that  
503 financiers exert undue influence on settlement, at times to press for inadequate early settlements  
504 that ensure repayment of the financier's share and at other times to impede reasonable settlements  
505 in the hope that a greater profit can be gained under the terms of the agreement by holding out  
506 for a more favorable settlement or for trial. Special concerns are expressed about the impact of  
507 third-party funding on the adequacy of representation provided by counsel for a plaintiff class.  
508 Counter arguments are readily found. Financiers argue that far from control, their expert advice is  
509 willingly sought by their clients to improve the conduct of the litigation and to assess the value  
510 of settlement offers.

511 Different concerns are expressed about the disclosure of confidential information and  
512 litigation strategy in the course of arranging third-party financing. One consequence might be to  
513 enhance the shift of control to the financier. Another might be that a court might conclude that  
514 confidentiality, privilege, and work-product protection are somehow waived by treating the  
515 third-party financier as outside the scope of protected disclosures. (The proposals do not extend to  
516 exploration of agreements with potential third-party financiers that do not culminate in a  
517 financing agreement. The effect of disclosures in that setting does not seem to be impacted by  
518 the proposed disclosure rule.)

519 Another concern is that disclosure is needed to provide information to enable the  
520 assigned judge to recuse when there is a direct or indirect connection to the financier. Those who  
521 resist disclosure respond that judges should not, and do not, invest in enterprises that finance  
522 litigation, and that disclosure is not justified by the low risk of unknown connections of friends  
523 or family members with a specific litigation financier. A somewhat similar concern is that  
524 disclosure is needed to enable counsel for the opposing party to know whether it has a  
525 relationship with a financier that generates a conflict for counsel.

526 Third-party financing also is attacked on the theory that it supports frivolous litigation.  
527 Not surprisingly, financiers counter that they have no interest in investing in anything other than  
528 litigation with strong prospects of success.

529 A distinctive argument against disclosure is that it will distort decisions about the  
530 proportionality of discovery requests. The Rule 26(b)(1) factors of proportionality include “the  
531 parties’ resources.” The fear is that knowledge of third-party financing will lead a court to  
532 approve discovery requests that otherwise would be rejected as disproportional, increasing costs  
533 and delay.

534 These various arguments lead to further concerns. Fears about confidentiality, conflicts of  
535 interest, vigorous advocacy, party control of settlement, and even fee-splitting resonate to rules  
536 of professional responsibility that are traditionally and peculiarly a matter of state regulation.  
537 Some states have already undertaken specific regulation of third-party financing. Others may  
538 follow, recognizing the apparent desuetude of earlier concepts of champerty, maintenance, and  
539 barratry. It is to be expected that many states will be jealous of their regulatory interests.

540 These preliminary debates demonstrate a complicated and politically charged interplay  
541 between rules of procedure, rules of professional responsibility, and substantive regulation of  
542 third-party financing. The stakes are high and important. Much more must be learned before  
543 determining whether a useful role can be found for new procedures, and particularly for  
544 determining whether disclosure without more can play a useful role. One caution has been that it  
545 may be counterproductive to require disclosure of information that raises potentially troubling  
546 questions that cannot be addressed within the framework of existing law.

547 The Committee concluded that these questions can be delegated, at least initially, to the  
548 Subcommittee appointed to develop information about the MDL proposals. One of the MDL  
549 proposals explicitly incorporates the proposal for disclosure of third-party financing agreements.  
550 There is reason to believe that MDL litigation is one of the prominent occasions for third-party  
551 funding. This Subcommittee’s work will prepare the way for a determination whether third-party  
552 financing disclosure should be pursued.

#### 553 **D. Summary**

554 The three subjects described in this Part II are each important. Each requires deep  
555 familiarity with complex problems. Attempting to develop specific proposals in each area along  
556 simultaneous tracks may well prove more than the process can readily bear, in the Civil Rules  
557 Committee, Standing Committee, and public comment stages. Making choices, however, must  
558 await development of further information and thought.

559 It well may be that the Social Security review task is the least complicated. It presents a  
560 finite subject. Substantial preparatory work has been done by and for the Administrative

561 Conference and by the Social Security Administration. Helpful guidance may yet emerge from  
562 closer study of actual practice in different districts.

563 The MDL questions are complex. The prospects that uniform national rules can be  
564 developed to enhance management of MDL cases without unduly confining the need for  
565 flexibility in such procedures are uncertain. The task of learning enough to assess the balance  
566 between potential benefits and harms is formidable. The questions are worth further work now,  
567 but it remains uncertain whether initial inquiries will provide a foundation that justifies the hard  
568 work of developing specific proposals. But at least there is a solid foundation of long and  
569 widespread experience with MDL litigation to build on.

570 Third-party litigation financing is like the MDL questions in its complexity. But it is  
571 quite different in terms of present experience and understanding. Courts have no more than  
572 episodic encounters with the terms of actual financing arrangements, nor even a reliable sense of  
573 just how common these arrangements are or will become. The questions presented, whether in  
574 terms of a specific disclosure proposal or more generally, are new and growing. Additional  
575 information and perspectives will be welcome.

### 576 III. OTHER RULE PROPOSALS

#### 577 A. Publication of Notice in Condemnation Actions

578 This “mailbox” proposal would amend Rule 71.1(d)(3)(B)(i) to discard the preference for  
579 publishing notice of a condemnation action in a newspaper published in the county where the  
580 property is located. The suggestion will be carried forward for further work.

581 The complaint in a condemnation action is filed with the court. Defendants are served  
582 with a notice that provides the essential details of the action, not with the complaint. Service is to  
583 be made under Rule 4 in the same way as service of a summons and complaint, if the defendant  
584 has a known address and resides within the United States or a territory subject to the  
585 administrative or judicial jurisdiction of the United States. If the defendant has a known address  
586 outside these limits for Rule 4 service, service is made by publishing the notice and, if the  
587 defendant has a known address, mailing notice to the defendant. Publication is to be

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

591 The proposal, drawing from examples in the Uniform Probate Code and in New Mexico  
592 rules, is to allow publication in a newspaper with general circulation where the property is  
593 located even when the newspaper is not published in the county. The suggestion is that a  
594 newspaper of general circulation may provide a better chance that the defendant will actually  
595 notice the notice. In addition, the amendment would reduce the tension that arises when the

596 incorporation of state modes of service in Rule 4(e)(1) and (h)(1) allows service by publication  
597 in a newspaper of general circulation.

598         The central question is pragmatic. It may well be that a newspaper published in the  
599 county has severely limited distribution, while other newspapers of general circulation published  
600 elsewhere have broader distribution. That observation might in turn invite speculation about  
601 requiring publication in the newspaper with the broadest general circulation in the county, a  
602 likely thankless and at times perilous prospect. More to the point, the empirical question remains:  
603 are those people who are concerned about published legal notices more likely to look to a local  
604 newspaper than to others published elsewhere but more broadly circulated? It may prove difficult  
605 to find a confident answer to that question. The uncertainty provides a reason to stick with the  
606 rule as it is. It may be significant that the question has not emerged until this one suggestion was  
607 made. On the other hand, the Department of Justice has not objected to the proposal. The  
608 Department surely has broader collective experience with condemnation proceedings than any  
609 other federal-court litigant.

610         This narrow question can be addressed without asking the kinds of questions that have  
611 repeatedly been put aside in addressing the migration to electronic communication. It is easy to  
612 debate what counts as a newspaper, how to locate the place of publication, and whether  
613 widespread access to the Internet establishes general circulation of any newspaper that is  
614 published in electronic form, at least so long as the newspaper also has a print edition.

615         As noted, the question will be retained on the docket. But it faces an uncertain future  
616 unless reliable information can be found on the habits of those who actually look for published  
617 legal notices.

## 618                                   **B. The Role of Judges in Settlement**

619         This question is raised by a proposal to amend Rule 16 advanced in a thoroughly  
620 researched and argued article: Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate*  
621 *Roles in Settlement*, 78 Ohio St.L.J. 73 (2017). The core of the proposal is that a judge assigned  
622 to manage and adjudicate a case should not also serve as a “settlement neutral.” The proposed  
623 rule is somewhat more complicated, however, because it would allow the assigned judge also to  
624 act as a settlement neutral if all parties give consent through a procedure that guarantees  
625 confidentiality for any party that does not consent, and further would allow the judge to urge the  
626 parties to consider settlement and available ADR options.

627         The proper role of the judge in settlement is a familiar problem. Both the ABA Model  
628 Code of Judicial Conduct and the Code of Conduct for United States Judges, having considered  
629 the question, provide only that the judge should not coerce a party to surrender the right to  
630 judicial decision. Federal Judicial Center programs for new judges and on case management  
631 regularly address these questions. Judges who participate in these programs take a variety of  
632 approaches. Many abstain from any involvement with settlement, and avoid even any

633 encouragement to settle or seek assistance from others in settling. Others, however, recognizing  
634 the valuable contributions a judge may make—contributions that Professor Deason recognizes—  
635 take more active roles. The temptation to assist in settlement grows when the parties ask the  
636 judge to help on the eve of trial or after trial has begun. By that point the judge knows the case  
637 and the parties’ positions in great detail.

638 Much of the discussion was neatly captured in the observation that “Judges have different  
639 temperaments and skill sets.” Although there are strong arguments on all sides, the arguments  
640 have been explored repeatedly and thoroughly. The Committee decided to remove this matter  
641 from the agenda. A Civil Rule may not be the best way to address this essentially ethical  
642 question.

#### 643 **IV.**

##### 644 **A. Pilot Projects**

645 The two pilot projects developed to provide empirical exploration of opportunities to  
646 advance civil practice, whether through rule amendments or through emulation, are well known.  
647 Participation by willing courts is being actively pursued. At present, two courts have enlisted in  
648 the Mandatory Initial Discovery project. No courts have yet enlisted in the Expedited Procedures  
649 project.

650 The Mandatory Initial Discovery project displaces the limited initial disclosures required  
651 by Rule 26(a)(1) by requiring early responses to the discovery requests framed by the project. A  
652 party must provide the requested information, just as with party-initiated discovery, even though  
653 the information is unfavorable to the party’s position and would not be used by the party in the  
654 litigation. The project became effective in the District of Arizona by general order on May 1,  
655 2017. Most judges in the Northern District of Illinois adopted it, taking effect on June 1.

656 Initial experience in Arizona reflects the fact that many of the pilot project terms have  
657 been taken from the broad initial disclosure rules that Arizona has had in state courts for many  
658 years and that were recently expanded. Still, early experience showed some problems that were  
659 addressed by modifying the general order in September. “Almost all Rule 26(f) reports report  
660 compliance.” The court has worked to make sure that the CM/ECF system will track initial  
661 discovery events, supporting Federal Judicial Center research that will test the experience.

662 The project also is progressing smoothly in Illinois, in part because the court is able to  
663 draw freely on the experience and adjustments made in Arizona. There have been few problems.  
664 One potential source of difficulty could be that the time limits for responding to the initial  
665 discovery requests are impracticable in cases that involve massive amounts of information.  
666 Judges are aware of this problem, and accommodate the need for more time when it arises.  
667 Guidance is available for lawyers who, unlike Arizona lawyers, are not accustomed to initial  
668 discovery of this scope, and for judges who, like the lawyers, are new to this mode of discovery.

669 An important test of mandatory initial discovery likely will come at summary judgment  
670 and at trial. There is a risk that if judges allow use of evidence that was not disclosed, lawyers  
671 will shirk the obligations imposed by the project. Data on this development will be valuable.

672 The experience in Arizona and Illinois may ease the way in recruiting additional districts  
673 to provide a broader foundation for empirical research. They have ironed out initial problems,  
674 and can provide enthusiastic endorsements. Experience, however, shows that significant  
675 obstacles remain. Initial consideration in other courts has shown interest and receptivity. But  
676 when the matter is considered by a full district bench, “issues arise.” Difficulties are found in  
677 work loads, vacancies and local culture.

678 The Expedited Procedures pilot is different in an important way. It is based on case-  
679 management practices that have been widely adopted in many courts and that have proved  
680 successful. It sets initial deadlines for specific steps in a litigation, such as the close of all  
681 discovery, but proponents of the project are willing to enlist districts that insist on more  
682 flexibility in the deadlines and that cannot ensure participation by all judges in the district.  
683 Vigorous efforts are being made to enlist at least a few districts. But here, too, work loads,  
684 vacancies, and local culture have presented obstacles.

## 685 **B. FLSA Discovery Protocol**

686 The Institute for the Advancement of the American Legal System has adopted Initial  
687 Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions. The  
688 protocols deserve active endorsement, adoption, and encouragement.

689 These protocols follow the model of the earlier and successful Initial Discovery Protocols  
690 for Employment Cases Alleging Adverse Action. The employment case protocols have been  
691 adopted by many federal judges, and have proved successful. The FLSA protocols were  
692 developed under IAALS auspices by teams led by the same plaintiff and defense lawyers as  
693 developed the employment case protocols, Joseph Garrison and Chris Kitchel. The team efforts  
694 were guided by the same judges, Lee Rosenthal and John Koeltl. The result matches the high  
695 standard achieved by the employment case protocols.

696 Discussion recognized that committees acting within the Rules Enabling Act framework  
697 are not authorized to offer formal endorsement of any work that does not proceed through the  
698 full Enabling Act process to emerge as formal court rules. But, following the path taken with the  
699 employment case protocols, it is possible for judges involved in the Enabling Act committees to  
700 consider adopting the FLSA protocols for their own dockets, to encourage other judges on their  
701 courts to follow that lead, and to take other steps to promote the protocols for wider adoption.  
702 The protocols deserve those kinds of support.

# TAB 4B

**THIS PAGE INTENTIONALLY BLANK**



## SUMMARY OF 2017 30(b)(6) COMMENTS

On May 1, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules invited comments on possible changes to that rule. This summary of those comments identifies comments by the name of the commenter and the designation assigned to the comment when it was posted in the Archived Rules Suggestions listing maintained by the Rules Committee Support Office. This summary is limited to comments submitted after May 1. Important submissions were received before that date, including no. 16-CV-K, submitted by the Lawyers for Civil Justice on Dec. 21, 2016, no. 17-CV-I, submitted by the National Employment Lawyers Association on March 20, 2017, and no. 17-CV-J, submitted by the American College of Trial Lawyers on March 28, 2017 (and incorporated by reference in its submission in July (17-CV-DDD)).

For simplicity's sake, the identification in this summary will be limited to the letters assigned to the comment. All those designations were preceded by 17-CV-, and it seemed unnecessary to repeat that each time.

The comments are presented in a topical manner, addressing the following topics:

- Overall
- Inclusion in Rules 26(f) and 16
- Judicial admissions
- Supplementation
- Forbidding contention questions
- Adding a provision for objections
- Addressing the application of limits in the rules on number of depositions and length of depositions
- Other matters

## Overall

Nancy Reynolds (L): I have defended numerous 30(b)(6) depositions. These depositions should carry the status of any other deposition except for the designation in advance of the areas for inquiry and the duty of the deponent to prepare to answer questions about the designated area.

Timothy Patenode (M): Rule 30(b)(6) and its local state equivalent has been a pet peeve of mine for years. I saw a news report on the committee's work and thought I would comment. The origin of the rule was to provide an antidote to "bandying," but the actual practice has moved far beyond that. No advocate awaits bandying to take a 30(b)(6) deposition. I have received notices at the outset of oral discovery that list, as topics, almost every element and salient factual point in the case. "The rule is effectively used to force the corporation to marshall its evidence on those topics." I laud the proposals to make clear that testimony does not constitute a judicial admission and to foreclose contention questions and allow supplementation.

Craig Drummond (R): I oppose the proposed changes. They appear to be designed to protect corporate defendants, all to the detriment of the individual litigant. An individual is bound by what he says in a deposition. Through the great legal creation of the 30(b)(6) deposition, so is a corporation.

Jonathan Harling (S): These amendments are ill-advised and will ultimately hinder the judicial system. Trials are searches for the truth and these rules will allow litigants to obfuscate the truth.

Christian Gabroy (T): "30(b)(6) should be allowed to be binding testimony, to narrow the issues, and help streamline the process as allowed by FRCP 1. Please do not make it more difficult for Plaintiffs to gain such important testimony."

Lawyers for Civil Justice (U): The rule has improved the process for both sides, but must be revised to make sure that it continues to work for both sides. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They do not only respond to discovery requests, they also seek discovery, including 30(b)(6) notices. Unfortunately, practice under the rule has not kept up with its promise to be advantageous to both sides. Because there is no consideration of these depositions in the Rule 26(f) process, the rule has become a catch-all for the kinds of disproportional demands, sudden deadlines, and "gotcha" games that have largely been removed from the other discovery rules. Too often the responding party is confronted with a Hobson's choice of attempting to comply with overbroad topics or filing a motion for a protective order, which could result in an even worse outcome including sanctions.

Jeff Scarborough (V): I strongly oppose such changes as they only make it even more difficult for Plaintiffs to obtain justice.

David Stradley (X): The proposed changes slant the discovery process in favor of corporate defendants. They should be rejected. The rule provides a powerful tool for an individual who is litigating against a corporation, especially where the litigation focuses on the corporation's conduct. The corporation frequently possesses most or all of the salient information needed to prove the claim. The rule was written to prevent abusive discovery avoidance by corporate parties. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Our firm uses Rule 30(b)(6) and our state's analogue as efficient tools to gather information from organizations on behalf of injured people. We oppose most or all of the proposed changes, and urge that the Committee keep in mind that without this rule an organizational party has an unfair advantage in litigation by virtue of the fact that it consists of multiple individuals. If a corporation is to be afforded the privileges of personhood, it should also be subject to the same responsibilities and rules that apply to individuals. When the corporation's lawyers depose an individual plaintiff, they can ask any question they want. But when the tables are turned, the individual plaintiff would be forced to sift through a maze of individuals within the entity to try to connect the dots to learn what the entity "knows," what the entity "believes" happened in the case, what the entity will "say" at trial through the agents and employees it selects to testify. This rule is the only tool that empowers a plaintiff to treat a legal entity just as it is treated in every other aspect of the law: as a person. But many of the changes under consideration would undermine the purposes of the rule, which include preventing bandying. They would severely prejudice individual and corporate plaintiffs alike, adding to the cost of litigation and making discovery a game of "blindman's buff." The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), and Ken Graham (NN).

Christopher Beckstrom (BB): The proposed changes would be devastating to plaintiffs who already face disadvantages when facing down corporations and businesses who are negligent and cause injury. This rule provides an important mechanism during discovery to obtain testimony from a business entity that facilitates the entire litigation process and helps hold wrongdoers accountable. Please do not take the teeth out of this important rule.

James Ream (CC): The rule as it currently exists is only effective when the plaintiff attorney is completely devoted to getting the information, has prepared for hours, and has waded through decoy witnesses in order to find someone at the company who is willing to take responsibility as a spokesperson for the company. I have never found it easy to have a corporate representative appear and give testimony for the company. Anything that makes it more difficult simply denies justice to more people trying to get justice.

Bryant Crooks (DD): The rule is an invaluable part of the rules of civil procedure. The requesting party has the burden to draft the notice outlining the areas of testimony, and the responding party has the burden to designate persons to answer about those topics. The responding party's burden is what gives the rule its force and effect, which greatly reduces the number of depositions that otherwise would have to be taken. It also eliminates the "I don't know" response that would be otherwise run rampant were there no duty for the company to prepare its designated representatives to answer. I urge the Committee not to make any changes in this salutary rule. Any issues that arise are properly handled by the district judge. The courts have handled those disputes well since the rule went into effect.

Ryan Skiver (EE): I oppose most, if not all, of the suggested changes. Corporations and other entities are treated as "people," and they should have to respond to discovery just as other people do. I have found 30(b)(6) to be an efficient tool to gather information from corporations on behalf of injured people. It overcomes what would otherwise be an unfair advantage for the corporation, and enables the plaintiff to treat a corporation just it is treated in every other aspect of the law - as a person. Making these changes would severely prejudice individual and corporate plaintiffs alike, increase the cost of litigation, and make discovery drastically less effective, producing a "game of blindman's buff."

Bernard Solnik (HH): Any change to the rule that would weaken the ability of parties to obtain information from a corporate defendant and to rely on that information would be unfair to the parties and a disservice to our system of justice. Our system prevents corporations from ducking the truth about their actions and ducking their duties not to endanger or harm the rest of us. Corporations want the right to be a "person" and thus should have the responsibilities to answer questions the same way persons must.

Frederick Goldsmith (II): My firm represents both plaintiffs and defendants. I am concerned that each of the proposed changes to the rule can only be seen as an effort to improperly insulate corporate defendants and other large organizations from the consequences of their conduct, to weaken

the rights of litigants to discover information, and to tilt the playing field in favor of large corporations. As presently written, the rule is a wonderful tool to force a corporation to facilitate discovery of pertinent facts and documents, and of the identity of pertinent witnesses. Each of these proposed changes would weaken the rule.

Patrick Yancey (JJ): I concur with the comments of Frederick Goldsmith (II). The combination of Rules 30(b)(5) and (6) allows a party to get documents produced on certain subject matters/topic areas and to have the corporation designate a person who is best qualified to discuss both those documents and the topic areas. The corporation knows who that person is, and that person will know the subject and meaning of the documents. That person will speak the truth under oath for the corporation as to what is meant by those documents. Why should a corporate party be allowed to Monday morning quarterback its responses to its answers.

Ken Graham (NN): This is a back door effort to assist corporations avoid providing information vital to opposing parties attempting to prove their case or prepare to meet the corporation's defenses. The rule already requires that we give the corporation advance notice of the topics for the deposition, and it can choose the person to testify. In our experience, the only problem results from corporations intentionally naming witnesses who have no knowledge and have not been prepared. These amendments would encourage that sort of behavior by allowing the corporation to "hide the ball" until it has used discovery to force the other side to completely reveal its deposition strategy. The current rule provides the most efficient way for a party to obtain information through discovery from a corporation.

Ford & Cook (OO and PP -- duplicate submissions): The rule is an efficient way to gather information from corporations on behalf of injured people. The original purpose of the rule still applies today -- to prevent the corporation from having an unfair advantage because it involves multiple individuals. If a corporation is afforded the privileges of personhood, it should also be bound by the rules that apply to persons. When the lawyers for a corporation depose an individual plaintiff, they can ask any question they want. Without this rule, plaintiff would be forced to sift through a maze of individuals within the entity to try to connect the dots and learn the totality of what the entity knows, believes, and what it will say at trial through the witnesses it calls to testify. Many of the suggested changes would undermine the real purpose of the rule. We will be stuck again with a game of "blindman's buff."

Department of Justice (RR): The Department has considerable experience with the rule, both as a plaintiff and as a defendant.

Based on its unique perspective, the Department believes that the rule serves a useful and important purpose, but that it could benefit from improvements with regard to judicial admissions and contention questions. But we do not think that requiring discussion of 30(b)(6) depositions during the 26(f) meeting is a good idea.

Jeremy Bordelon (TT): I handle cases for plaintiffs seeking disability benefits, either through ERISA or individual insurance policies. In these cases, 30(b)(6) depositions are often taken to gather information about the insurance companies' practices. This information is crucial for the courts' understanding of the issues raised in these cases. But each of the proposed changes to the rule would improperly insulate corporate defendants from the consequences of their conduct and weaken the rights of litigants to discovery and further tilt the playing field to favor large corporate interests and harm those who would try to justly discover information and documents from corporations.

Michael Romano (UU): I have represented both plaintiffs and defendants in complex and non-complex litigation. I have also served as president of the West Virginia Association for Justice and as a member of the West Virginia Senate. "Discovery is the essence of civil litigation and the only path to a just outcome. Civil litigation also is one of the tenets of democracy keeping in check forces that would subvert our institutions." These proposed changes would improperly insulate parties from the consequences of bad faith discovery conduct, weaken the rights of litigants to discover relevant information and tilt the playing field in favor of corporate litigants that will play "hide the ball." The current rule is the best discovery tool for obtaining full and complete discovery responses. David Sims (XXX), Damon Ellis (QQQQ), and Laura Davis (GGGG) submitted essentially identical comments [including typo].

Michael Merrick (VV): I represent individual employees in litigation about employment issues. I think that a number of the proposed changes would introduce costly and time-consuming motion practice about matters that the parties have been resolving without court intervention for years. Some would also encourage gamesmanship. Each is solicitous to the interest of organizational litigants at the expense of both individual litigants and judicial economy. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padgett (CCC), Mary Kelly (CCCC), and Bernard Layne (IIII) submitted very similar or identical comments.

Corey Walker (XX): Corporations want and receive the same constitutional rights as people do. A corporation acts as a single being and the rules, as is proper, address the deposition of a corporation. There is no need to substantively change the rule.

J.P. Kemp (ZZ): I strongly object to any changes to the rule, particularly of the sort identified in the invitation for comment. I can provide real life examples of my concerns if the committee would like to hear them. I primarily handle employment discrimination cases, representing plaintiffs. This rule is a vital tool to getting meaningful discovery in these types of cases. The defendant controls nearly all the information and we have found that interrogatories and requests for production are almost a waste of time. You receive almost nothing but objections and non-answers to written discovery in our cases. Initial disclosure are also treated as either a joke or a method to dump huge quantities of largely useless documents in which there may be one or two proverbial needles in a haystack. "But the 30(b)(6) deposition, now there is a useful tool to obtain discovery!!! Doing anything to make it less effective or more cumbersome to use would be a travesty."

Frank Silvestri, American College of Trial Lawyers (DDD and J): Our Federal Civil Procedure Committee does not believe that any amendments to Rule 30(b)(6) are warranted at this time. Several suggested amendments seek to codify answers to issues that reasonable counsel, mindful of their duty to cooperate, ought to be able to resolve. Particularly in light of the framework provided by the 2015 amendments to the discovery rules, we see no reason to modify Rule 30(b)(6) at this time.

Nitin Sud (EEE): I am a solo employment attorney, primarily representing individuals in wrongful termination litigation. The proposed changes to this rule would drastically impede the ability of attorneys representing individuals against corporations.

John Paul Truskett (FFF): We represent hundreds of clients and, over the years, thousands of people. Do not change 30(b)(6). If you do it will substantially impact our clients horribly.

Heather Leonard (GGG): I handle employment litigation for employees and employers. In almost every case I have handled, there has been a 30(b)(6) deposition. It is not unusual for the rule to be the only vehicle to obtain testimony about a company's defenses and/or the reasons for the actions at issue in the case. I fear that the suggested changes would hinder and burden litigation. Overall, they would encourage gamesmanship from the larger firms that have the time and resources to apply litigation strategies to delay, bog down, and spread thin counsel representing individuals.

Kevin Koelbel (HHH): Rather than provide for efficient discovery, the proposed changes provide an arsenal to corporate defendants to obfuscate and delay. They will create more problems than exist under the current practice.

Jonathan Feigenbaum (JJJ): In its current form, the rule works. The proposed changes will force courts to become micromanagers of discovery, and will elevate procedure over substance even more than the current situations. These changes are one-sided and favor defendants. [Several specific comments seem not to be directed to topics included in the invitation to comment.]

Robert Landry III (KKK): I am a plaintiff side employment lawyer. Organizational depositions are one of the key avenues to access information in my cases, which involve asymmetrical information because the defendant employer has much more information.

Wright Lindsey Jennings (MMM): We encourage the Subcommittee to continue its efforts to explore possible changes to the rule.

Richard Seymour (NNN): These are defense bar proposals to tilt the discovery rules further in their favor. Some of the proposals may have some merit, but some would largely gut the rule. Based on extensive experience as a mediator and arbitrator, I understand the concerns of organizational defendants about the burdens and risks of these depositions. Based on almost 49 years of practice, I can say that the rule as currently written is invaluable as a means of keeping discovery costs down, and assuring that discovery is proportional to the needs of the case. My experience is that defense counsel ordinarily contact me well in advance of the deposition to discuss the topics, and in the process to apprise me of how the defendant makes and stores its records. Our discussions can lead to rephrasing the topics to reduce the burden on the defendants and increase their utility to me. Indeed, these discussions often help to shape the entire remaining conduct of the case. What makes this process work is that the rule is well-balanced now, and presents no advantage to be gained by bad behavior.

Josh Eden (QQQ): The proposed changes to the rule will only aid corporations attempting to hide the ball. Corporations cannot be permitted to weasel out of being bound by the testimony of their employees. "DO NOT CHANGE IT!!!"

Dennis Murphy (RRR): Please do not change the rule. It helps reduce discovery costs considerably. Often there is no need for any additional discovery. Without the rule, individual litigants would have to take several other depositions to complete the process.

Jeffrey Pitman (SSS): "The current rule is fair for plaintiff and defendant. It strikes a fair balance. The proposed change would create imbalance and is unfair. It is a solution in search of a problem. It is not broke and doesn't



need to be 'fixed.' Just let it be."

Michael Quiat (TTT): "I am writing to express my dismay about the proposed changes to Rule 30(b)(6). It seems obvious that these changes would serve the interests of deep pocket corporate/institutional parties, to the great prejudice of the individual." The changes will provide new opportunities for corporate obfuscation.

Jeffrey Jones (UUU): I believe any change to 30(b)(6) that would weaken the ability of parties to obtain information from a corporate defendant would be unfair to the parties and a disservice to justice. Corporations want the right to be a "person" but also to avoid responsibility for their actions. Any change to the rule would allow them to slip, dodge and otherwise attempt to evade their responsibilities.

Robert Keehn (VVV): I have a lot of experience representing both plaintiffs and defendants. Though I have a relatively balanced experience, I see each of the proposed changes as an effort to improperly insulate corporate defendants from the consequences of their conduct.

Patrick Mause (WWW): Based on my experience defending (at a defense firm) and taking 30(b)(6) depositions as a plaintiff lawyer now, I believe the current rule works well. I worry that the proposed changes will undermine the rule's purpose and make it incredibly more difficult, if not impossible, for parties to obtain the facts they need. The changes would essentially make the rule toothless.

David Romano (YYY): I am opposed to any change to the rule that would limit its effectiveness. It is perhaps the only way to require an organization to provide sworn testimony about a subject about which another party has no idea who may have the needed information. I recognize that, too often, the notice is imprecise and too broad while the responding party plays hide and seek. But throwing out the baby with the wash is not the answer.

Dave Maxfield (ZZZ): I oppose the proposed changes because they will put corporate depositions on an unequal footing with individual fact depositions. These depositions can avoid significant expense for the parties and burden for the court in identifying persons with knowledge. Because the corporation has been granted the status of a "person," fairness dictates that this person be required to answer questions under oath.

Laurel Halbany (AAAA): The proposals to declare the testimony nonbinding or forbid contention questions would have the sole purpose of gutting the use of this rule.

George Wright Weeth (BBBB): The proposed changes are a

solution in search of a problem. The rule is functioning well. These suggestions by business interests would gut the rule and make it even more difficult to obtain a verdict against corporate defendants.

Product Liability Advisory Council (DDDD): Rule 30(b)(6) is unique in that it is directed only to organizations. As a result, its treatment of defendants and plaintiffs in product liability litigation is not equal. A corporate defendant must prepare to respond to all questions a plaintiff's attorney may ask, and if the designated representative is unable to answer, the corporation and its counsel are subject to sanctions. Plaintiffs do not face that risk because they will only be asked to respond to information within their personal knowledge. "This disparate treatment fails to provide equal protection under the law." In our experience, notices are often too general to provide necessary guidance, or so narrow and detailed that it is virtually impossible to comply with the notice.

Bowman and Brooke (EEEE): Our firm primarily defends product liability cases. In general, we support the Lawyers for Civil Justice submissions supporting adding 30(b)(6) to the 26(f) list of topics, and allowing supplementation of testimony. We also think that there should be a 30-day notice requirement.

Defense Research Institute (GGGG): 30(b)(6) has become a battleground rule that imposes disproportionate costs and burdens without providing commensurate benefits to the parties. Making changes is in keeping with the 2015 amendments to the discovery rules encouraging cooperation, proportionality, and case management. DRI supports the positions taken by Lawyers for Civil Justice. We urge that work continue on all the topics identified in the Subcommittee's invitation for comment, and also on a presumptive limit on the number of topics as well as a rule prohibiting a 30(b)(6) deposition on topics that have been the subject of a deposition for which a transcript is available.

National Employment Lawyers Ass'n Georgia (HHHH): Our members represent employees with claims against employers. The employers generally have custody of all or most of the potential evidence, so we often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence available for discovery. We fear that several of the amendment ideas identified in the invitation for comment would introduce costly and time-consuming motion practice to resolve issues that the parties now resolve without the need for court involvement. Overall, these proposals are too solicitous to the interests of organizational litigants. Adopting such changes would be a troubling departure for the Advisory Committee, which has worked to issue carefully-calibrated rule changes that do not favor one set of litigants over another. Columbia Legal Services (NNNN) submitted very similar comments.

Matt Davis (JJJJ): Individual plaintiffs already have a huge hill to climb in order to utilize their constitutional rights under the 7th Amendment to redress wrongdoing by corporate defendants. These changes are an attempt to allow corporations to hide key information that would otherwise come to light through discovery.

Ford Motor Co. (KKKK): Ford has found that 30(b)(6) depositions employed in a focused, reasonable and proportional manner are an efficient and effective discovery tool. But too often these depositions are not sought to uncover facts but used to pursue large numbers of vague or irrelevant topics. Sometimes litigants use them to take advantage of the spontaneous nature of depositions to surprise the deponent and capture unprepared, awkward, or confused statements on the record. Indeed, some of the comments submitted to the Subcommittee tout the use of surprise tactics in these depositions. "A corporate representative cannot possibly speak for the company on the basis of the information known or reasonably available if the noticing party's true intent is to question the witness about topics not identified in the notice." To provide the Subcommittee with details, Ford collected a sample of 52 representative notices it has received. These notices averaged 31 topics each, within one listing 129 topics. In 57% of the sample notices, more than 20 topics were listed, and 24% had more than 40. In 8% of the cases in the sample, plaintiffs served multiple 30(b)(6) notices. Often the topics are broad and broadly worded, and examples are provided in the submission.

Timothy Bailey (LLLL): 30(b)(6) depositions are often essential. Many of these amendment ideas would render the rule almost useless.

Jennifer Danish (PPPP): Each of these changes can only be seen as an effort to improperly insulate corporate defendants from the consequences of their conduct and weaken the rights of individuals to discover information.

State Bar of California Litigation Section Federal Courts Committee (TTTT): The problems prompting review of 30(b)(6) are real, and arise frequently. We do not believe they are unique to plaintiffs or defendants. We recommend that the Subcommittee move forward on durational and numerical limitations for these depositions, a procedure for objections, and the expectations of the witness and permitting supplementation.

National Employment Lawyers Ass'n -- Illinois (UUUU): One purpose of 30(b)(6) is to put individuals and corporations on a similar footing. We would add the following just before the last sentence of the current rule:

In all other respects, depositions under this sub-section

should be treated exactly the same as depositions of individuals taken under this Rule.

Many of the amendment ideas, however, are inconsistent with this principle. Treating corporations differently would be unwise, and "a probable violation of due process and equal protection."

Gray, Ritter & Graham, P.C. (VVVV): The rule functions as intended now, and there are very few disputes that cannot be resolved without court intervention. As plaintiff lawyers, we often agree to amend the notice if provided good reasons. Further, the deposition can often be done in stages, where one witness has been produced, and the parties may revisit how many are really needed. The rule already has sufficient protections for the responding entity.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: I make substantial use of 30(b)(6) in virtually every case I litigate. I believe the rule is working well as it is, and that no changes are needed.

Seyfarth Shaw (YYYY): We have experienced, firsthand, the significant burdens imposed by current practice under 30(b)(6). We support serious consideration of changes to the rule that would move this form of discovery closer to the cooperation and proportionality objectives of the 2015 amendments. Besides the ideas identified by the Subcommittee, we submit that there should be presumptive limits on the number of topics, and that there should be a minimum notice requirement and that the rules should include an objection process.

Potter Bolanos (ZZZZ): We find that 30(b)(6) is an essential tool in our employment litigation practice. In our experience, it is working well.

Leto Copeley (BBBBB): The rule provides a powerful tool for an individual who is litigating against a corporation. It was written to stop abusive discovery behavior by corporations. It has functioned to provide quicker discovery and cut down on discovery disputes. These changes would improperly strengthen the position of corporate litigants.

Clay Guise (HHHHH): The fact that many depositions occur without court involvement does not mean that the rules are "good enough." The lack of clarity and guidance in the rules favors the noticing party, which can serve a notice nearly any time before discovery closes and demand a designee regarding an unlimited number of topics. The problems worsen when there is not enough time to present a motion to the court. The corporation has no clear recourse under the rules when confronted with such a notice and faces a disproportionate burden.

Lord + Heinlein (IIIII): In our personal injury practice representing plaintiffs, our no. 1 challenge is to get information from corporations. Often, we are faced with a game of "hide the ball." 30(b)(6), as written and enforced, creates an efficient solution to this problem. This effectiveness serves judicial efficiency as well. We are very concerned that some of the proposals will reduce the organization's duty to prepare and could effectively gut the rule's effectiveness. In particular, we note that it is often desirable to have more than one 30(b)(6) deposition on different issues. The rule should not impede this efficient procedure.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): The rule was originally adopted to deal with the problem of "bandying." But it has evolved into a one-sided weapon that can be abused by the interrogating party to the prejudice of the corporation. Reforms are in order. It is time to level the playing field for corporate and individual parties alike. The three changes that should go forward are adding this topic to the 26(f) conference, establishing a clear procedure for objections, and clarifying that statements made during these depositions are not judicial admissions.

Sherry Rozell (KKKKK): 30(b)(6) depositions present very different challenges for smaller local corporations and huge multi-national corporations. But several key amendments would help to create a smoother and more collaborative experience for all sorts of litigants. Some of these matters are on the Subcommittee's list, and others are not.

Spencer Pahlke (LLLLL): We represent injured plaintiffs and regularly use 30(b)(6). It plays an essential role in our efforts to gather information from organizational litigants. The proposed changes would slow litigation, increase motion practice, and open the door to unnecessary gamesmanship.

Maglio Christopher & Toale (MMMMM): Our practice is nationwide, focusing on complex litigation. We regularly use 30(b)(6) and its state equivalents, both taking and defending depositions. We believe the proposed changes are misguided and will result in significantly increased litigation and costs. The changes do not address the real problem, which is the unprepared witness. We urge the Committee to forgo changing the rule. But if it does proceed with changing the rule it should focus on the problem of witness preparation.

Henry Kelston (NNNNN): I am a partner at Milberg L.L.P., where we represent victims of corporate and other large-scale wrongdoing. We find that 30(b)(6) depositions are often the most effective route to the heart of discovery, enabling us to draft more targeted document requests, interrogatories, and identify essential witnesses for additional depositions. A review of the

Subcommittee's reports to the full Committee, and of the submissions in response to the call for comments, shows that there is not a compelling need to amend the rule at this time. Instead, the clear consensus seems to be that, though disputes of various sorts about 30(b)(6) depositions are common, the vast majority are resolved without the need to involve the court. There is no evidence that disputes about these depositions have become more frequent or virulent in recent years, even though discovery in general has grown in complexity. Moreover, there is a serious risk that some of the amendments under discussion could actually work at cross-purposes with making discovery more efficient and less expensive.

Michael Slack (PPPPP): The experience at our firm has been that Rule 30(b)(6) is the most effective discovery tool available to promote efficient discovery and deter discovery abuse. It is effective because it enforces accountability by its own terms. As a result, we rarely have to seek court intervention with depositions under the rule. The same cannot be said about the rules related to disclosures, requests for production and interrogatories. We have taken and defended 30(b)(6) depositions, and know both sides of the rule very well. We implore the committee not to relax the duty to prepare or dilute the binding-effect features of the rule. We frequently receive supplemental disclosures and document production from a corporate defendant immediately after a 30(b)(6) deposition request has been made. As a consequence, we frequently request subject areas which allow us to explore the effort made by the organization to search for and produce responsive documents or to identify previously undisclosed persons who may possess knowledge. The rule has proven to be beneficial in making discovery more focused and efficient. In particular, it has been effective in allowing us efficiently to learn about (1) organizational hierarchy and areas of responsibility; (2) post-occurrence investigations by the organization; (3) the existence of safer alternative designs; and (4) the lack of support for defenses raised in the answer. We are convinced the rule should be left alone.

Baron & Budd (QQQQQ): Disputes concerning 30(b)(6) depositions are rare, and we believe that the rule does not need a major overhaul. In fact, the rule is one of the most useful tools in civil litigation. Unlike written discovery, which can be of limited use due to objections and qualified responses, 30(b)(6) uniquely provides an opportunity to obtain oral testimony from an organization. At the outset of litigation, in particular, organizations frequently object to providing documents or other information that would make it easy to ascertain the identities of individual witnesses from whom relevant information can be obtained. The rule puts the obligation on the entity to identify individuals who can address the relevant topics. As a result, Rule 30(b)(6) depositions provide an early and efficient opportunity to obtain discovery on core issues.

American Association for Justice (SSSSS): AAJ stresses the importance of 30(b)(6) as an invaluable tool for plaintiffs litigating against corporate defendants. Without the rule, injured plaintiffs would face the all-too-frequent practices of many corporate defendants and their counsel, including bandying, delaying, and sometimes denying the right to seek legitimate discovery. The rule has worked well over time, streamlining discovery and ensuring that organizational parties provide an educated, prepared witness. Changing the rule in many of the ways under consideration would raise risks of returning to the days of bad practices that the rule banished. It certainly seems that the tenor of the ideas under study favors the interests of corporate defendants and is one-sided. It is important to recognize that, as currently written, the rule is the most efficient means for the discovery of relevant facts within a corporation's control. The proposed changes appear to favor corporations and to invite a return to the practices that the rule sought to end. Often corporate defendants have most or all of the relevant information. This rule enables plaintiffs to identify key sources of information as well as information about corporate policies and practices. When this Committee last looked at the rule more than ten years ago, it concluded in 2006 that although there were complaints about unprepared witnesses and overbroad topic descriptions, a rule change would not be an effective tool in solving these problems. The issues raised this time are "eerily reminiscent" of the ones examined a decade ago. The fact that this rule has remained unchanged over several reviews is evidence of its effectiveness. AAJ would suggest that it not be changed, or that if it is changed the amendments be incremental rather than aggressive.

Public Justice (TTTTT): In our view, most of the change ideas are not balanced, and they would create unequal obligations under the rules by favoring large corporations over individual litigants. They would also create inefficiencies and prompt satellite litigation. Except for the last item on the Subcommittee's list -- duration and number of depositions -- we think that these proposals should not move forward.

Mark Cohen (UUUUU): Organizations' statements in depositions should not be treated differently from those made by individual parties. All deponents have the ability to change the testimony through an errata sheet. This is adequate to protect the organization, as it is adequate for the individual litigant.

## Inclusion in Rules 26(f) and 16

Nancy Reynolds (L): Most corporate-representative deposition notices are overbroad and onerous. I have successfully moved for protective orders to limit the scope. Some notices are intended as fishing expeditions to locate new theories for amended complaints. Others are intended to elicit lack of knowledge or information responses when plaintiff counsel knows the information is not typically known are retained in an industry. Opposing counsel refuses to accept this response and spends the next 15 pages of transcript attempting to elicit a lack of knowledge response to read to a jury. Then opposing counsel seeks sanctions for the witness not being prepared and requests that the area of inquiry be deemed admitted. This is a common occurrence.

Timothy Patenode (M): This is one of the committee's most effective suggestions. I think the 30(b)(6) deposition should be permitted only if so ordered by the court or agreed to by the parties during the 26(f) conference. This may seem extreme, but before a party can impose on another the duty of marshalling evidence and educating witnesses there should be a demonstration that the burden is warranted in the circumstances of the case. The circumstances that might justify going forward go beyond demonstrated bandying, such as asymmetrical discovery. An individual suing a corporation might properly use the rule to cost-effectively discover the case. But counsel could most profitably address these issues as part of the discovery conference.

Steve Caley (N): I have written two articles about the rule for the National Law Journal (in 2000 and 2011). I am opposed to adding the topic to the Rule 26(f) conference. That may be too early in the process for attorneys to have adequately and intelligently considered their 30(b)(6) needs. Moreover, requiring the parties to discuss this topic will prompt lawyers to make "knee jerk" demands, for fear of waiving the right to do a 30(b)(6) deposition if not raised at the conference. That could often be wasteful, because a 30(b)(6) deposition is not needed, and needed information can be obtained in other ways.

Lawyers for Civil Justice (U): Rule 30(b)(6) deserves to be treated as an important part of the discovery plan. Adding it to the list of 26(f) topics would be consistent with the thrust of the 2015 amendments to the discovery rules. Putting it on the list for all cases is warranted. Language along the following lines could be added to Rule 16(b)(3)(B), 16(c)(2) and Rule 26(f):

Include any agreements the parties reach for conducting Rule 30(b)(6) depositions, including as to the number and identification of anticipated topics, the anticipated number



of witnesses for those topics, anticipated objections to the topics, and the timing for objections to such topics, the scope of the deposition(s), the date, duration, and location for the deposition, and supplementation.

Jeff Scarborough (V): Having to incorporate a discussion/plan for 30(b)(6) depositions in the Rule 26 conference and discovery plan at the beginning of the case is senseless as Plaintiff has not yet had a chance to engage in discovery.

Barry Green (W): In most cases, a number of 30(b)(6) topics will be known at the outset of the case. However, in every case, additional topics for 30(b)(6) depositions are disclosed through discovery responses. Accordingly, either the proposed change should not be enacted because it could cut off important discovery, or it should be enacted with the express ability to include additional 30(b)(6) topics without the time and expense of requesting permission from the court.

David Stradley (X): Promoting cooperation during discovery is a laudable goal, but adding a requirement that the discovery plan address 30(b)(6) testimony substantially disadvantages parties who litigate against corporations. Corporations know who has information, where documents are stored, and the ease or difficulty attendant to accessing the important information. The other side lacks much or all of this information. The discovery conference occurs before even initial disclosure has occurred, so imposing a requirement that it address 30(b)(6) would require litigants to commit to a plan regarding specific depositions before receiving even the limited information provided in initial disclosures. In any event, in my experience counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable. But this discussion usually occurs after initial written discovery, including document production, has been completed. At that point, both sides can intelligently discuss the parameters of a 30(b)(6) deposition. Amanda Wingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Adding a reference to 30(b)(6) to Rule 26(f) would be the only specific reference in 26(f) to any discovery mechanism. [Note: Rule 26(f)(2) says the parties must "make or arrange for the disclosures required by Rule 26(a)(1)."] Requiring a party, in the earliest stage of a case, to commit to which depositions are needed would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at the time when the need for that testimony becomes apparent. At that point in the case, the plaintiff would be able to provide only a very broad and general

description of the types of topics 30(b)(6) depositions would explore. Inevitably, any dispute about a specific deposition would still have to be resolved later when the parties are aware of the specific matters noticed. If any amendment is proposed, it should be a simple addition to Rule 26(f)(3)(B), as follows:

\* \* \* the subjects on which discovery may be needed, when discovery should be completed, whether the parties anticipate the need for any deposition noticed pursuant to Rule 30(b)(6), and whether discovery should be conducted in phases or be limited to or focused on particular issues \* \*

As far as amending Rule 16 is concerned, note that the rule already requires a scheduling order to limit the time to complete discovery. Placing further restrictions on 30(b)(6) depositions, particularly if a supplementation provision is added to the rule, would completely defeat the purpose of the rule. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), and Ken Graham (NN).

Frederick Goldsmith (II): Although at first blush this may seem a good proposal, on further reflection it seems more an effort to give the corporate defendant a head's up of its opponent's litigation plans than to genuinely avoid later discovery disputes.

Patrick Yancey (JJ): This is not needed. At the initial stages of litigation, plaintiff will probably not know whether or not a 30(b)(6) deposition will be needed. To require a disclosure of a possible future use of a discovery method is not warranted. That would only provide the possibility for the corporation to object and lead to needless additional litigation in the court.

Ford & Cook (OO and PP -- duplicate submissions): This would be the only reference in 26(f) to a specific discovery mechanism. The rule does not require parties to provide in a discovery plan setting forth what specific topics the parties will inquire about through interrogatories, requests for production, or other types of depositions. Requiring a party to commit to which depositions are needed at the earliest stage of a case would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at a time when the need for that testimony becomes apparent. Inevitably, any dispute about a specific deposition would still have to be resolved later in the case when the parties are aware of the specific matters being noticed. If the plaintiff is subject to this limitation, the corporation should also be required to limit

its topics of inquiry so as to level the playing field. Litigation often takes unexpected turns, and requiring one side to limit its topics very early in the litigation will simply cause laundry lists to be developed which create busy work for lawyers. Regarding an amendment to Rule 16, if the rule allows supplementation of 30(b)(6) testimony after the Rule 16 deadline for this kind of deposition is unfair.

Department of Justice (RR): We do not believe that requiring discussion of 30(b)(6) depositions during the 26(f) meeting or in the report to the court under Rule 16 is advisable. We believe that such an amendment is not only impractical, but that it also may even lead to unintended, unhelpful consequences. For one thing, it risks raising 30(b)(6) issues too early in the pretrial process. The discovery plan must be submitted at least 21 days before a scheduling conference. Under Rule 16(b)(2), the court ordinarily must issue the scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. Adding this to the list of topics for the 26(f) conference would mean that the parties must discuss such things as the topics for a 30(b)(6) deposition at the earliest stages of the litigation, before the parties even know whether such a deposition will be necessary and before the parties have engaged in meaningful document discovery. That sort of requirement may result in unnecessary or inefficient 30(b)(6) depositions, which is contrary to the rationale for considering amending the rule. Even though this approach should provide the court with broad flexibility in managing discovery, it likely would come too early to be effective. As currently drafted, Rules 26(f) and 16 are sufficiently flexible to enable discussion of 30(b)(6) discovery when that would be useful.

Jeremy Bordelon (TT): Realistically, the element of surprise can be important in discovery. Adding this topic to the 26(f) meeting seems fair on its face, but it would in practice give corporate defendants unnecessary advance notice of plaintiff's litigation plans.

Michael Romano (UU): On the surface, this change appears harmless, perhaps even helpful. However, the effectiveness of 30(b)(6) is somewhat grounded in not being sure if it is part of an opponent's litigation plans. While not telegraphing one's discovery strategy may not seem important to those who do not regularly try cases, it does shape the eventual completeness of an opponent's discovery responses.

Michael Merrick (VV): This suggestion seems to assume (a) that disputes are arising regarding 30(b)(6) depositions that cannot be resolved without court intervention, and (b) that such disputes arise early enough in a case to be addressed effectively at the 26(f) conference. We submit that neither assumption is correct. To the contrary, including 30(b)(6) depositions as a

topic for discussion at the 26(f) conference would undermine much of what makes the rule useful and threaten to create disputes that otherwise would not exist. We represent individuals with claims against large entities, which generally have custody of all or most of the potential evidence at the outset of a case. So we tend to be at a considerable disadvantage at that point in identifying key documents and witnesses. We therefore often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence that may be available for discovery. Acquiring this information early in a case creates additional efficiencies and enables us to tailor further discovery narrowly. Inclusion of 30(b)(6) depositions in the initial case planning discussions would threaten these efficiencies and risk grinding the discovery process to a halt by creating the opportunity for defendant to create disputes about a host of items, such as when and where the deposition will take place, the topics that will be covered, the timeframes at issue and whether follow-up depositions can be obtained. Under existing practice, these types of issues have been resolved by the parties themselves without any need for court involvement. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Mary Kelly (CCCC), and Terrell Marshall (EEEE) submitted very similar or identical comments.

J.P. Kemp (ZZ): It appears that this suggestion is aimed at making it more difficult to get 30(b)(6) depositions. The implication is that if no 30(b)(6) depositions are discussed at the earliest part of the case, a party could be precluding from using this rule. This simply makes no sense. Very often until some preliminary discovery or investigation is done, it cannot be determined if the 30(b)(6) deposition will be needed (although it almost always is) or what its scope may be. Recall that, in many of the discrimination cases that I do, there is a 90-day window to bring suit after the EEOC has finished with the case. Sometimes clients don't make it to see me until there are just a few days or weeks until the time limit runs out. Frontloading discussion of 30(b)(6) does not seem to help anything.

Frank Silvestri, American College of Trial Lawyers (DDD and J): Counsel who anticipate problems in handling 30(b)(6) depositions are able to bring these issues up at the 26(f) conference and present them to the court if they are not resolved at the conference. No rule change is needed.

Nitin Sud (EEE): Adding this topic to the 26(f) discussion is unlikely to help. It is usually difficult to determine the potential scope of a 30(b)(6) deposition until after initial disclosures and initial written discovery. Regardless, however, I often reference the possibility of a 30(b)(6) deposition in the case management plan anyway.

Kevin Koelbel (HHH): Rule 30(b)(6) depositions have always been scheduled with reasonable notice in cooperation with opposing counsel. The need for and scope of potential 30(b)(6) depositions is always addressed at Rule 26 conferences.

Richard Seymour (NNN): This change would not produce positive results, at least insofar as it calls for including specifics on these depositions in the court's scheduling order. That could lead to the burden on the parties (and the court) of getting the order changed. Adding the topic to the 26(f) list would foreseeably create problems. There is no problem to be solved, and the default orientation should not be "more case management" to every discovery question.

Jonathan Gould (OOO): This is a solution in search of a problem. The 26(f) conference is generally too early to make any final decisions on 30(b)(6) depositions. All it could produce in most cases is a pro forma designation to preserve the opportunity for later use.

Tae Sture (PPP): This change would add to the time needed to prepare for the 26(f) conference, but it is difficult to see any advantage to adding it. The parties ordinarily discuss 30(b)(6) depositions separately at varying stages of liability discovery. Focusing only on employment litigation, it is clear that the timing and content of the 30(b)(6) depends hugely on the subject matter of the case. Usually, it is necessary first to do written discovery and then begin to fashion the topics for the 30(b)(6) deposition. So even though adding this provision would not necessarily prejudice either party, it would not produce benefits.

Michael Quiat (TTT): This idea is a recipe for strategic sandbagging by corporate defendants. Clearly such a mechanism will allow these defendants to learn more about plaintiff's strategy in discovery and permit these parties to orchestrate their responses accordingly.

Robert Keehn (VVV): This seems mainly to be an effort to give the corporate defendant a heads-up of its opponent's litigation plans rather than a genuine proposal to avoid later discovery disputes.

Patrick Mause (WWW): This would be almost entirely unworkable and unfair. You often do not know what topics will need to be included until well into the case, after you have gotten corporate documents. To get those documents typically requires a motion to compel because corporate defendants will rarely divulge any document without a court order. Moreover, it would require a party to essentially divulge his or her litigation strategy before any meaningful discovery has been allowed. Down the road, a corporate defendant will likely try to

bind the plaintiff to extraordinarily preliminary topics included in the Rule 16 case management plan. This would only give the corporation a heads-up on the plaintiff's litigation strategy.

David Sims (XXX): This conference occurs too early in the case, and it is impossible to imagine what 30(b)(6) depositions will be needed that early in the case. So the most the rule would achieve is to get parties to make a pro forma indication that would have little or no practical value.

George Wright Weeth (BBBB): The conference is too early; one must first send interrogatories and requests for production before deciding what 30(b)(6) topics to pursue.

Huie, Fernambucq & Stewart, LLP (FFFF): Particularly since the 2015 amendments, it is important that attention be focused on Rule 30(b)(6) at the outset to discourage wasteful pretrial activities. Too often, 30(b)(6) notices seek information already obtained through other discovery. For example, even though the defendant has already produced the actual test reports, a plaintiff may often notice a 30(b)(6) deposition to inquiring into the testing of the product. It should not be necessary for the defendant to spend the time and money to respond with regard to materials already in the requesting party's possession. Too often, there is no choice but filing a motion for a protective order, thereby burdening the court's docket and possibly disrupting the Rule 16 scheduling order. True, issues may arise later that were not foreseen, but a more robust conference between the parties early in the case and a more active role for the judge will help both sides set more reasonable expectations for discovery.

Matt Davis (JJJJ): This would not streamline discovery but instead lead to additional costly and time-consuming discovery disputes later in the process. 30(b)(6) depositions are usually taken only after initial disclosures and routine written discovery is conducted. Plaintiffs would have to speculate about the topics for these depositions, and will identify every possible topic to avoid the risk of losing the opportunity to take add a topic later. This change would also provide corporate defendants an unfair advantage by forcing plaintiff counsel to reveal trial strategy at the earliest stages of litigation.

Ford Motor Co. (KKKK): Adding 30(b)(6) to this early discussion will better establish appropriate expectations and frame the deposition needs of the case, as well as allowing the parties to vet their respective positions as to proposed areas of inquiry. The parties should discuss and identify the topics about which there will be inquiry. Advance notice about topics is essential to selecting the person to testify. This early discussion will also make the "reasonable particularity" provision in the current rule more workable, including a method

for supplementation. It would be important also to discuss the timing and staging of these depositions. "Rule 30(b)(6) depositions undertaken to learn certain core facts, obtain descriptions of key events, or identify individuals who participated in significant activities presumably should be conducted early within the discovery period. Rule 30(b)(6) depositions conducted later in the litigation lifecycle should focus on central disputes and issues not addressed by other discovery, rather than fundamental fact-finding." Also, the court should establish a limit on the number of topics to be explored in 30(b)(5) depositions. In Ford's experience, it is necessary to add this topic to Rule 26(f) because, when Ford has tried to raise it, too often courts respond by deferring the issue until notices are served and disputes arise.

Timothy Bailey (LLLL): I have never been a fan of the delay in moving a case forward occasioned by the 26(f) conference. These events are rarely more than mere formalities, but they delay productive discovery. Injecting 30(b)(6) into the agenda simply lengthens the process. It is not possible to discuss these issues meaningfully at that point. Sometimes formal written discovery provides responses that are sufficient to give me the company's position. "On the other hand, if I get responses which amount to nothing more than legal posturing, I know I am going to need to simply ask a company representative the same or similar questions by deposition. Again, that is not something I will want to discuss in a Rule 26 conference."

Brandon Baxter (MMMM): In my practice, 30(b)(6) depositions are taken near the end of fact discovery, when you know what is needed from an entity. That information usually comes from other discovery. The most that can be done early in the case is to state that a 30(b)(6) deposition will be likely.

Christina Stephenson (OOOO): I like the idea of inclusion of specific reference to these depositions in the 26(f) agenda. Early attention can help act as a catalyst for consideration of the various issues raised by such depositions.

Jennifer Danish (PPPP): This seems to be an effort to give a corporate defendant a head's up of its opponent's litigation plans rather than genuinely to avoid later disputes. I have found that some discovery and extensive preparation is necessary before I can prepare a detailed and appropriate 30(b)(6) notice. Early discussions are unlikely to be fruitful.

Frederick Gittes and Jeffrey Vardaro (SSSS): We often use the 26(f) process to bring preliminary problems to the attention of the court and establish the ground rules for the case right off the bat. But that process should be reserved for the most common and problematical issues. Otherwise the report will become burdensome and might also be used against parties in

problematic ways. Although 30(b)(6) depositions are sometimes early in the case, as a way to identify other witnesses and focus discovery, on other occasions this deposition is used to probe things that emerged through discovery. We have seen 26(f) reports used against a party who has failed to anticipate future developments in discovery, and expanding the topic list will broaden the risk of this sort of "estoppel." Moreover, it would only rarely be true that issues about these depositions would be ripe for resolution early in the case.

Hagens Berman Sobol Shapiro (XXXX): Our firm represents consumers, whistleblowers, and others in consumer fraud, antitrust, investment fraud, securities, employment, environmental and other personal injury cases. We both defend and take 30(b)(6) depositions regularly. We support the proposal to include a specific reference to 30(b)(6) among the topics for discussion during the 26(f) conference. Due to the size of the cases we litigate, we often discuss the scope of 30(b)(6) depositions with opposing counsel at an early stage. We propose that the rule be amended to require the parties to confer on the number and sequencing of these depositions. Such discussions could include whether those depositions will count as one deposition or multiple. In our experience, when the parties sharpen their pencils on these issues early in the case, they save time and resources down the line.

Potter Bolanos (ZZZZ): In our jurisdiction, the parties follow the practice of conferring about discovery issues, and there is only rarely occasion to raise 30(b)(6) issues before a judge. But we do not believe that adding the topic to the 26(f) list would make sense. The specific topics for such depositions vary from case to case, and typically can't be determined until some discovery is done. Until then, it would not be possible for the parties to have a meaningful discussion, and it would be a waste of the court's time to worry about these issues at that point.

Robert Rosati (AAAAA): I think it borders on fantasy to think that there will be early judicial attention to 30(b)(6) depositions. I have participated in hundreds of 26(f) conferences and normally address the list of witnesses I expect to want to depose, including 30(b)(6) depositions. I cannot recall any judge ever asking about my list of witnesses or being remotely interested in the list. My awareness of the 30(b)(6) needs of one case is likely to be very different from another case. Too often thinking about this topic up front would be a waste of time. I never take a 30(b)(6) deposition without first ending a draft of the notice with the areas of inquiry to opposing counsel. Rational and competent lawyers work out any issues that emerge.

Leto Copeley (BBBBB): Promoting cooperation during



discovery is laudable, but adding a requirement that 30(b)(6) depositions be discussed substantially disadvantages parties litigating against corporations. The discovery conference is just too early for the party to know everything that should be included. In any event, counsel normally engage in substantial communication prior to 30(b)(6) depositions under the current regime. The corporation nearly always objects to some topics, and we often attempt to modify topics to make them mutually agreeable. But this discussion occurs only after initial written discovery, including document production, has been completed.

Terrence Zic (CCCCC): The parties should be required to discuss the timing and service of 30(b)(6) notice during the 26(f) conference, and a deadline should be set in any scheduling order.

Clay Guise (HHHHH): The early discussion of discovery is one of the best ways to avoid later disputes. Although a number of commenters to the Subcommittee assert the 30(b)(6) depositions are not appropriate for discussion in the 26(f) conference, I disagree. It is true that a party may be reluctant to identify specific topics, agree to limitations on topics, or commit to the timing for taking 30(b)(6) depositions, but that is not always the case. In fact, the repeated statements about the importance of this discovery device shows that it should be included in the early planning.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): 30(b)(6) depositions are a central aspect of discovery in many cases, but they are rarely discussed until late in the discovery process. Moreover, the discussions that eventually occur usually occur after the plaintiff has propounded a 30(b)(6) notice that calls for a deposition on numerous and poorly defined topics. At that point, the corporation faces a risk of sanctions unless it moves for a protective order or reaches agreement with plaintiff about how to proceed. The resulting rancorous motion practice could largely be obviated by fleshing out the timing, number, scope or location of these depositions at the outset. Adding these depositions as a topic of the conference and scheduling order would be consistent with the 2015 amendments, which are designed to prompt judges to engage in early and active case management. We endorse the language submitted by LCJ on July 5 as an addition to Rule 16 and 26(f) (quoted above).

Sherry Rozell (KKKKK): Making this change is especially important for complex cases involving large corporations. It is often difficult to identify persons and documents necessary for compliance with the now commonplace notices containing copious and in-depth topics and document demands served at or near the end of the discovery period. By outlining the parameters at the outset, the parties can conduct discovery with an eye toward potential 30(b)(6) issues that may be resolved in a way that

benefits all parties and without the need for motion practice. The rules should require that the parties set forth the timing, scope, and limitations for 30(b)(6) depositions at the beginning of the litigation, when meaningful collaboration can provide the most benefit.

Spencer Pahlke (LLLLL): It is impossible for plaintiffs to have a clear plan for 30(b)(6) depositions at the time of the 26(f) conference. Any discussion of these issues would have to be very preliminary and nonbinding. Anything more specific would place an unfair burden on the plaintiff.

Henry Kelston (NNNNN): The proposed addition of 30(b)(6) to the topics for discussion at the 26(f) conference might have some salutary effect, assuming that the intent is purely to flag the potential use of 30(b)(6) without the obligation to provide details of topics and duration, for that may be premature at that time. As other submissions have pointed out, in most cases the 26(f) conference occurs too early in the case for a detailed discussion of 30(b)(6) to occur. However, there may be situations in which the prospect of a 30(b)(6) deposition will provide added incentive for a corporate party to produce information on an expedited and less formal basis. We have found, for example, that some companies prefer to provide information about their data systems and document repositories voluntarily rather than prepare their IT personnel for a 30(b)(6) deposition. The inclusion of 30(b)(6) among the subjects for discussion early in the litigation may assist some litigants in reaching similar agreements.

American Association for Justice (SSSSS): Although AAJ does not believe that any amendment to the rule is warranted, discussing the potential need for a 30(b)(6) deposition early in the litigation without discussing the specifics of the depositions is a proposed amendment that AAJ could potentially support subject to wording and clarity in the corresponding Committee Note. Any such change should be designed to avoid slowing down necessary early discovery, and to warn against trying to get into specifics as to topics and scope of inquiry that cannot usefully be addressed so early in the case.

## Judicial Admissions

Nancy Reynolds (L): Would testimony of a lay person be a binding admission? No. People can change their testimony if there are valid reasons to do so. Cross-examination and impeachment with deposition testimony are the standard mechanisms to address changed testimony. If it turns out that the person designated is not as knowledgeable as expected, the corporation should be allowed to designate another person for later deposition on that topic.

Joseph Sanderson (P): This point is frequently litigated, and in the head of trial often leads to erroneous rulings and unnecessary appeals. Codifying that testimony in a 30(b)(6) deposition is a statement of a party opponent but not "binding" unless so ordered under Rule 37 as a sanction for nondisclosure would be desirable.

Craig Drummond (R): Corporations should be bound by 30(b)(6) testimony just as individuals are bound by their testimony. Otherwise, the individual litigant cannot "hold" the corporation to what it has said. To have it otherwise could mean that corporations can continue to answer things vaguely with no real repercussions for gamesmanship.

Christian Gabroy (T): "Absolutely the testimony should be a judicial admission as this is binding testimony."

Jeff Scarborough (V): Absolutely the testimony should be judicial admission as this is an opportunity for plaintiff to establish binding testimony.

Barry Green (W): I oppose this change. The courts have been ruling more and more frequently with regard to a party's deposition answers that "a deposition is not a take-home examination" where answers can be changed. The proposed rule would allow corporations the ability to change their answers when individual parties cannot. I believe the rule should be amended to make it clear that corporations are not allowed to contradict the testimony of the person they provide at the deposition who is supposed to be their most knowledgeable person on that subject. That individual's answers should be judicial admissions.

McGinn, Carpenter, Montoya & Love (AA): In theory, an amendment that simply provides that 30(b)(6) testimony is not a judicial admission -- i.e., one that cannot be changed at trial -- would be acceptable. However, there is a danger that the rule would be interpreted to permit the type of sandbagging that Rule 30(b)(6) is intended to eliminate. The term "binding" means that the witness is speaking not as an individual but as the organization, and that the testimony should have the same consequences when used against the organization as testimony

would have against an individual. For example, the deposing party should be permitted to use the testimony in a summary judgment motion and the organization should not be permitted to respond with an affidavit contradicting that testimony, unless there is some change in circumstances that justifies the change in position. The binding effect of 30(b)(6) deposition testimony serves to motivate the organization to fully prepare its witnesses and deters sandbagging. The burden-shifting approach of *Rainey v. American Forest & Paper Ass'n*, 26 F.Supp. 2d 94 (D.D.C. 1998), is the right approach. To change the testimony, the organization must show that the new information was not known or reasonably available at the time of the deposition. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make clear that the testimony of a corporate representative is binding on the entity and define what that means. It should mean that if the corporation wants to amend its testimony it must show that the new evidence was not available at the time of the testimony, and provide the supplemental information a reasonable time in advance of trial. If the information could or should have been located earlier, the corporation should be denied leave to amend its answers and bound by the testimony given during the deposition. Any evidence contradicting the testimony should be excluded. This middle ground would protect the corporation against unfair treatment, but also punish a lax entity for failure to prepare its witnesses. In effect, it tracks the way an individual deponent is treated -- if such a witness does not supplement or amend deposition testimony prior to trial, then I can impeach with the prior deposition testimony. If the corporate witness spontaneously testifies differently at trial, the examining party should simply impeach with the corporation's prior testimony. This would offer a solution to the most common disputes I have encountered with 30(b)(6) practice.

Matthew Millea (GG): The rule was adopted to provide an efficient method of obtaining binding testimony from a large organization. The testimony must come from a witness who has been properly prepared to address the matters identified in the notice. The corporation must not be allowed to change the testimony of its designee, except in circumstances when it can demonstrate that there is new information that it could not have had at the time of the testimony. Otherwise, corporations will simply fail to provide the information. The right approach is to follow *Rainey v. American Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998).

Frederick Goldsmith (II): Lawyers representing corporations have long known the significance of a Rule 30(b)(6) deposition and the consequences which attend witness testimony at such a deposition. That is the stimulus for them to prepare the witness well. Any effort to water down the rule so that the deponent's testimony carries less force can only be seen as an effort to tilt the playing field in corporations' favor. Jeremy Borden (TT) submitted identical comments.

Patrick Yancey (JJ): Simply stated, this concern is about the truth being told. When the person chosen as the person of authority on a particular subject for a corporation says the color white is white, then the color is white. There is no need to be concerned about the truth, even if it is detrimental to the corporation.

Department of Justice (RR): There is currently a split of authority on this question. The majority view is that the organization is not bound. See *U.S. v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996). Under this view, testimony given by a 30(b)(6) witness is like the testimony of any other witness, admissible but subject to contradiction by other evidence. See *A.I. Credit v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001). But there is a minority view that, by commissioning the designee as the voice of the organization, the organization cannot argue new or different facts that could have been included in the 30(b)(6) deposition. See *Rainey v. American Forest & Paper Ass'n*, 26 F.Supp.2d 94 (D.D.C. 1998). The Department believes that the majority view is the right solution, and it supports further consideration of a rule amendment that codifies the majority view.

Michael Romano (UU): This testimony should be binding, just as the testimony of an individual is binding. Of course, testimony can always be changed, but only upon a demonstration of a good faith basis for the prior erroneous response and a good faith explanation of the modification. The well-known consequences of changing prior testimony must remain, not only so that the need to fully prepare the witness remains, but also to conclusively narrow issues for trial, which can only be accomplished by binding answers from the corporation.

Michael Merrick (VV): We think that the question whether a corporation should be allowed to offer evidence inconsistent with its testimony should be decided by courts on a case-by-case basis. Although most courts recognize that 30(b)(6) testimony is no more "binding" than testimony of other witnesses, a different result is appropriate in some circumstances. Some courts have rejected affidavits presented at the summary-judgment stage that vary the deposition testimony, invoking the "sham affidavit" doctrine. Attempting to create a bright-line rule that applies in all situations has the potential to create confusion, and this

matter is best left to the courts to decide on a case-by-case basis. Alternatively, because this idea focuses on the interaction of the Civil Rules and the Evidence Rules, perhaps it would be appropriate to refer it to the Advisory Committee on Evidence Rules for its review and analysis before proceeding further. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): If anything, the rule should be amended to make clear that the answers to questions at a 30(b)(6) deposition are indeed judicial admissions equivalent to those made in pleadings. My clients as individuals are certainly considered to have made judicial admissions in their depositions. The "sham affidavit" doctrine shows what happens when they try to stray from deposition testimony. Changing the rule to eliminate the binding effect of the testimony would gut the whole purpose of this rule. The corporation could easily avoid providing useful discovery, and would be almost encouraged to do so. "This is a horrendous idea that should be immediately scrapped." You could add an escape valve that would allow the corporation to move the court to be relieved of its admissions as under Rule 36, but the presumption should be that these are binding admissions unless such relief is granted.

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor an amendment addressing the judicial admissions issue. Although the Rainey case is cited as being a "minority position," there are no cases expressly holding that a 30(b)(6) witness's statements are judicial admissions. The current rule provides judicial discretion to decide whether or not to bind a deposed business to its testimony. To treat such testimony as a judicial admission in all instances is a bright-line rule that is too strict for these depositions. There are already remedies in place to punish bad actors and deter misleading or incomplete statements from 30(b)(6) witnesses. If testimony is later altered, it can be attacked through cross examination or impeachment, or simply utilized to demonstrate a lack of trustworthiness throughout the party's case in chief. If the altered testimony is flagrant, the court may impose sanctions under Rule 37(d). Moreover, it seems to us that the question how to treat 30(b)(6) testimony is not sufficiently unsettled to justify an amendment to the current rule. No court has declared 30(b)(6) testimony a judicial admission, so there is no widespread confusion that requires action from the Advisory Committee. We note that the NELA letter to Judge Bates on March 20, 2017, similarly urges a case-by-case approach to the handling of these matters. This flexibility allows better analysis by the courts.

Nitin Sud (EEE): There shouldn't be a bright-line rule, and it should be decided on a case-by-case basis. It is necessary to

bind a party to its answers, as otherwise the purpose of the deposition is defeated. But this does not need to be a "gotcha." The effect must be decided by the judge on a case-by-case basis.

Heather Leonard (GGG): In my practice, I have not encountered any problems on this topic. I fear a rule change would lead to gamesmanship. The rule in its current state allows courts to address this issue, when necessary, on a case-by-case basis.

Kevin Koelbel (HHH): Rule 30(b)(6) testimony should carry the same weight as any other deposition testimony. Similarly, post-deposition clarifications should abide the existing rule.

Jonathan Feigenbaum (JJJ): This change will lead to confusion over the weight that such testimony should be received in a particular instance. Time will be wasted fighting over so-called mixed issues of law and fact.

Wright Lindsey Jennings (MMM): A clear majority of courts have held that the organization is not bound by the designee's testimony. We believe this is the better rule, and that a change to the text of the rule that codifies that view should be considered.

Richard Seymour (NNN): It would be very useful to the parties and the courts to clarify the weight to be given to answers in a 30(b)(6) deposition. Case law is interesting, but it does not address the point of what the rule should say in order to make this discovery device as effective as it can be. And the FJC study found that much of the litigation over these depositions involves the effect of the testimony. I think the rule can be effective only if the answers have a strong binding effect, to a much greater extent than other evidence, so the entity has a strong interest in ensuring the accuracy of the information. Litigants rely on the answers given in these depositions to shape subsequent discovery requests. If the only effect is to immunize the answers against a hearsay objection that would give a license to corporations to provide misleading answers and hide the truth. But it would be proper for the corporation to seek consent of the plaintiff or leave of court to change the answer on an adequate showing that there was a diligent good-faith investigation, that they could not have obtained the added or accurate information earlier, and that they disclosed the added information at the earliest possible opportunity. Then there should be added discovery at the expense of the corporation. I have agreed to this solution in cases in which defense counsel contacted me and explained the problem.

Jonathan Gould (OOO): Some binding effect of the witness's testimony is necessary. Otherwise the rule would be worthless. Evidentiary admissions are usually what the courts have decided

are appropriate.

Tae Sture (PPP): I have never encountered this issue. And so far as I know, it's never been raised by members of the Indiana bar. Litigants merely treat 30(b)(6) statements as evidentiary statements, not judicial admissions. The litigants treat the sworn statements as binding upon the deponent, and not necessarily the corporation.

Michael Quiat (TTT): If the responses are not binding, that will dilute the impact of deposition testimony which is otherwise highly probative. Again, this advantages the corporations and disadvantages the individual.

Robert Keehn (VVV): Any attempt to water down the binding effect of deposition answers can only be seen as an effort by defense interests to tilt the playing field.

Patrick Mause (WWW): The 30(b)(6) depositions are essential to getting admissible evidence regarding the corporation's knowledge. If the corporate defendant elects to send an unprepared or deliberately evasive witness to the deposition, it should do so at its own peril. The proposed change would encourage gamesmanship.

David Sims (XXX): There must be some binding effect to the witness's testimony. Otherwise the rule will be worthless.

George Wright Weeth (BBBB): A primary reason for taking a deposition is to obtain judicial admissions. The corporate party should operate the same rules that apply to everyone else.

Timothy Bailey (LLLL): "This is absolutely shocking to me. Corporations and other organizations use these legal identities to escape personal responsibility." The jury is entitled to hear the corporation's actual position on matters of fact from an actual person. When the defendant is an individual, the person testifies. It should not be different for a corporation. If the corporation produces the right person, why shouldn't the jury be allowed to rely on what that person says? If this change is allowed, corporations will simply use their lawyers and paid experts to state their positions.

Brandon Baxter (MMMM): Most of the problems relating to "binding" testimony arise out of lack of proper preparation of the witness. That issue is often addressed in reported decisions, but is not addressed in this proposal. We should not encourage lack of preparation by explicitly sending the message that the answers are not "binding."

Christina Stephenson (OOOO): Statements during 30(b)(6) depositions should be considered judicial admissions, not merely



admissible hearsay. The organization should be forbidden to offer contrary evidence.

Hagans Berman Sobol Shapiro (XXXX): We are wary of an amendment that would reduce the effect of admissions made in testimony. Under the rule, an organization should be bound to a position it takes during a deposition. Although such statements may not always be tantamount to a "judicial admission," organizations may not disavow their testimony. If they are dissatisfied with the testimony, the solution for the company is to explain and explore these points through cross-examination, or the timely introduction of evidence that may contradict or expand the testimony. Allowing this change would encourage bandying.

Robert Rosati (AAAAA): This is a non-issue. Every appellate court that has addressed the issue has rejected the conclusion that the organization is forbidden to offer evidence inconsistent with the answers in the 30(b)(6) deposition. Making a rule change about this subject would only engender confusion given the state of the law.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): A driving force behind that widespread use of 30(b)(6) depositions is the ability to force the entity to make binding admissions. Some corporate defendants have been barred from defeating a motion for summary judgment using evidence that conflicts with a prior 30(b)(6) deposition. Although other courts have properly recognized that corporations may offer divergent evidence, the high-stakes and costly nature of these disputes warrants taking a fresh look at this rule, and clarifying that the majority of courts are right about the "binding" effect -- it is admissible evidence but not a judicial admission.

Spencer Pahlke (LLLLL): Because plaintiffs rely on what they learn during discovery to build their case and prepare for trial, it is essential that 30(b)(6) testimony not be used as a tool for sandbagging. Both the judicial admissions and supplementation ideas could lead to exactly that. If an amendment is made regarding judicial admissions, it must also clarify that the testimony is "binding" and define clearly that this means the witness is speaking as the organization rather than as an individual. The testimony should bear on the organization in the same way as it would an individual party. If the organization wants to change its answer, it should bear the burden to provide that the information involved was not available at the time of the deposition.

American Association for Justice (SSSSS): Without a binding effect, answers in a 30(b)(6) deposition would be essentially meaningless. But that does not mean they are routinely found to be judicial admissions. To the contrary, no district courts or

courts of appeals expressly hold that the 30(b)(6) witness's statements are judicial admissions. AAJ has examined the 114 cases since 1991 that expressly address whether a statement in such a deposition is a judicial admission. The overwhelming majority of these cases recognize that, although it is binding, the testimony of a 30(b)(6) witness is not a judicial admission. In the handful of cases in which courts precluded corporate parties from offering evidence that contradicted the testimony of their 30(b)(6) witnesses, the courts' motivation was punitive, triggered by extreme and unusual evasive behavior. The existing case law shows that there is a common sense case-by-case approach to these issues that should not be disturbed by a change in the rule.

Public Justice (TTTTT): This amendment would be unnecessary and harmful. Presently, the issues it would address have been left to the courts to be decided on a case-by-case basis. That is as it should be. Most courts regard 30(b)(6) testimony as binding only in the sense that all deposition testimony is "binding." In some cases, courts have rejected declarations contradicting prior 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. But those decisions were based on the court's conclusion that the organization had attempted improperly to thwart the objectives of the rule. "Courts are perfectly capable of determining when a statement given during a Rule 30(b)(6) deposition should be treated as a binding admission." Attempting to create a bright-line rule to apply in all situations would invite the very gamesmanship the rule seeks to avoid.

John H. Hickey (VVVVV): The testimony of an individual litigant is of course binding, or at least binding as a practical matter in the eyes of the fact finder. Courts have taken different positions on whether an admission in a corporate representative deposition is "binding" on the corporate party. The S.D. Fla., where I usually practice, has taken a "hybrid" approach. When the representative is unable to answer the question and the corporation fails to provide an adequate substitute, the corporation will be bound by the "I don't know" response. This precludes the corporation from offering contrary evidence at trial and prevents trial by ambush.

Massachusetts Academy of Trial Attorneys (AAAAA): The proposal to clarify whether testimony constitutes a judicial admission is unnecessary and invites confusion and additional wasted time. The current state of the law works well. Allowing parties the ability to disavow Rule 30(b)(6) testimony rather than "correct the record" through traditional cross-examination or introducing subsequent evidence undermines the value and dignity of the deposition as a discovery tool.

## Supplementation

Nancy Reynolds (L): Supplementation should be permitted for corporate depositions just as it is for individual depositions. In both situations, if the supplementation is significant, a second deposition can be requested at the expense of the witness. Particularly if the deposition occurs early in the discovery process, it is likely that some information will not be known at the time of the deposition. "[I]t is a common tactic for plaintiffs to depose corporate representatives before the information is known to obtain lack of knowledge responses and display to a jury that the corporation did not care or doesn't know what it is doing or the like. I have moved to quash early corporate representative depositions because of the unfairness of such an approach."

Timothy Patenode (M): The reality is that if deadlines are tight, the corporation has few avenues to supplement or rebut the witness's testimony. This may be an appropriate result when bandying has occurred, but it seems prejudicial at an early stage of discovery.

Christian Gabroy (T): "There should be no supplementation rule as this will just add confusion and murky up testimony and allow a rewrite by counsel of the testimony."

Lawyers for Civil Justice (U): Supplementation should be allowed under the rule. 30(b)(6) depositions are taken at different times in different cases, and it is inevitable that new information will sometimes emerge. Allowing supplementation in such situations would further the truth-finding function. In a way, these depositions are like the deposition of retained expert, which is subject to the supplementation rule. "Any supplementation should be in written form accompanied by an affidavit explaining the reason for the additional information or explanation or, if the parties agree, through another means such as a supplemental deposition. The amendment should provide that any second deposition is limited to the subject matter of the supplement."

Jeff Scarborough (V): There should be no supplementation rule. Such a rule would just add confusion and murky up testimony and allow a rewrite by counsel of the testimony.

Barry Green (W): The proposed change would provide corporations with the ability to change testimony, when the parties do not have that ability. It would also render the deposition useless because all information given would be subject to change.

David Stradley (X): Adding this provision will "gut the preparation requirement." If corporations are not bound by their

testimony in the deposition, they will skimp on preparing their witnesses, if they prepare them at all. They will know that counsel can supplement the answers after hearing the specific questions. The committee may as well eliminate the 30(b)(6) deposition altogether. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Allowing the organization to supplement would potentially defeat the purpose of the rule by giving the organization the ability to wait until the end of discovery to disclose the full extent of its positions and knowledge while offering an inadequately prepared witness at the deposition. If supplementation is allowed at all, it should be allowed only when the same type of burden shifting process that should apply on the judicial admissions point is employed. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Frederick Goldsmith (II): This proposal smells like an opportunity for corporations who did not like how the deposition turned out to get a do-over. This wrecks of another attempt by defense interests to change the rule to strengthen their hand. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): When the person most familiar with Safety Rule Y of a corporation comes into the deposition and tells us and the world that the purpose and meaning of Rule Y is Z, then we and the court should be able to rely on what is supposed to be truthful testimony. The corporation should not have any need to "amend" the authoritative person's answers.

Michael Romano (UU): This would create an opportunity for corporations to change prior testimony without a good faith explanation. That would blunt the effectiveness of the 30(b)(6) deposition. Many depositions adjourn with requests for additional information, but permitting supplementation by rule may create the unintended result of "sandbagging" at the deposition, knowing that relevant information can be provided up until the close of discovery. As things stand under the current rule, courts expect an explanation supporting the change, and usually permit the opposing party to test the altered testimony by further deposition.

Michael Merrick (VV): This change would encourage intentionally failing to prepare witnesses or introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) witnesses to say "I don't know. I will need to review our records" instead of answering.

That would make the deposition a largely empty exercise. Moreover, this change would only benefit organizational defendants, and would create serious inequities without any recognizable benefit. Rule 26(e) does not require supplementation of deposition testimony. Efforts to supplement by a plaintiff would be subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): This change would gut the rule. The witness would be coached to testify to a lack of knowledge about all the pertinent facts so that later the attorney could answer all the questions in writing in ways that are evasive and seek to hide the truth.

Nitin Sud (EEE): Allowing the deponent to supplement will result in a complete waste of time and promote gaming of the process.

Heather Leonard (GGG): The proposed change would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony.

Jonathan Feigenbaum (JJJ): Allowing supplementation will create "do-overs" and a one-sided chance to entities to avoid binding statements when the testimony does not come out as hoped for. Individuals don't have this opportunity.

Robert Landry III (KKK): Allowing supplementation would encourage wasteful forms of gamesmanship, such as failing to prepare witnesses or introducing sham testimony. This change would only benefit organizational defendants. If a plaintiff sought to change her prior testimony, the new "testimony" would be subject to a motion to strike or impeachment at trial. A corporation already has the advantage of selecting the witness, and it can choose the most knowledgeable. So it would doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony.

Richard Seymour (NNN): The solution to the judicial admissions issue outlined above should apply here also. Good-faith mistakes or omissions should be subject to correction based on a showing of full deposition preparation and the impossibility of obtaining the supplemental information earlier.

Jonathan Gould (OOO): Supplementation should be allowed only as to new facts not reasonably within the party's possession

at the time of the deposition. Otherwise, it would lead to "I'll get back to you" answers.

Tae Sture (PPP): I oppose this change because it would open the door even further to gamesmanship. I have too often been confronted by defense counsel "supplementing" defendant's document production just a few days before the deposition even though the documents have clearly been in defendant's possession for a long time. The result was a postponed deposition. This would happen a lot more often.

Michael Quiat (TTT): This is a bad idea. I have personally confronted insurance company attempts to "correct" transcripts which were otherwise detrimental to their litigation interests. Providing a formal mechanism for doing this would be a disaster.

Robert Keehn (VVV): This is a terrible idea. It provides a "do-over" opportunity for corporations who do not like how things turned out at a Rule 30(b)(6) deposition.

Patrick Mause (WWW): This is a terrible idea. It would invite corporations to completely rewrite testimony after the attorneys get ahold of the transcript would invite gamesmanship. Companies would deliberately present unprepared witnesses, and then "supplement" their testimony with attorney argument. If this is adopted, the committee might just as well eliminate 30(b)(6) in its entirety.

David Sims (XXX): This would invite failure to prepare the witness and sham testimony. Contradictory testimony by a plaintiff would be subject to a motion to strike under the "sham affidavit" doctrine, or impeachment at trial. A corporate defendant already has the advantage of choosing the witness, and allowing lawyers to "supplement" the witness's testimony later would be unfair. Allowing in additional evidence should be limited to new facts not reasonably within the party's possession at the time of the deposition.

George Wright Weeth (BBBB): This would simply open the door to more evasive answers during the deposition, after which the lawyer can answer the questions.

National Employment Lawyers Ass'n Georgia (HHHH): We oppose this idea, for it would encourage gamesmanship. Courts routinely strike sham affidavits, but allowing supplementation would permit the 30(b)(6) witness to say "I don't know. I will need to review our records." That would transform the deposition into an empty exercise. Because the change would benefit only organizational litigants, this would create serious inequities without any recognizable benefit. If a plaintiff changes her deposition testimony, there can be a motion to strike or impeachment at trial. It is therefore difficult to understand why

organizational litigants would be allowed to that without cost.

Timothy Bailey (LLLL): "This proposed changes is more than shocking. It is an invitation to obstruction and deceit." The efforts to prepare the witness will be downgraded. Counsel will, in effect, be able to testify. Testimony will never be final.

Christina Stephenson (OOOO): This should not be allowed because it would take away any incentive to prepare the witness adequately. In my experience, even the most sophisticated attorneys do not know what is required in terms of preparing a witness for these depositions.

Glen Shults (RRRR): This is unnecessary and would be inequitable. Because the notice identifies the topic for examination, the witness has the opportunity to prepare to address those subjects. Allowing supplementation could undermine the basic purpose of the deposition. The deposition would become a risk-free exercise for corporate counsel, because problematical testimony can be "cleaned up" later. Other witnesses do not have this right even though they do not get advance notice of the topics for examination.

Frederick Gittes and Jeffrey Vardaro (SSSS): This proposal (and the one for formal objections) would move farther away from the normal deposition model. Ideally, the 30(b)(6) deposition should be a way to simplify the discovery process. But the proposals would make this deposition more different from an ordinary deposition. Our individual plaintiffs know that if they "mess up" during their depositions they may confront "sham affidavit" arguments, the striking of their corrections, or at least impeachment. The idea of allowing automatic supplementation of a 30(b)(6) transcript that has been reviewed and signed would mean that the corporate designee is less bound. That makes no sense. Adoption this rule change (and the objection one) would also multiply the number of motions before the court.

State Bar of California Litigation Section Federal Courts Committee (TTTT): Adding a provision similar to Rule 26(e)(2) for 30(b)(6) depositions, perhaps specifying that the supplementation must be done in writing and providing a ground for re-opening the deposition to explore the additional information, may be helpful.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: This change would substantially undermine the usefulness of the rule because there would be little incentive to prepare. It would also be grossly one-sided.

Hagens Berman Sobol Shapiro (XXXX): This would be an

invitation to mischief. But the rule should not forbid correction when (1) at the time of the deposition, the organization did not know, or could not have known, the information sought to be added, (2) fact discovery has not yet closed, and (3) the witness may be re-called.

Potter Bolanos (ZZZZ): 30(b)(6) witnesses are not like retained experts. They are the hand-picked mouthpieces for parties. This change would invite corporations not to prepare their witnesses, and make the playing field uneven since the individual witness cannot supplement.

Robert Rosati (AAAAA): A retained expert is different from a 30(b)(6) witness. The expert must prepare a report, and if the witness is going to provide other opinions the report must be supplemented. A 30(b)(6) witness can, like any other witness, change form or substance of answers given pursuant to Rule 30(e). If that happens, the court can order the deposition reopened. The big problem in 30(b)(6) depositions is that the company does not adequately prepare the witness. The courts know how to address this problem by imposing sanctions. There is no need to amend the rule, and an amendment might be interpreted by some as virtually an invitation to perjury.

Maglio Christopher & Toale (MMMMM): Allowing supplementation would exacerbate one of the biggest problems with such depositions: the "I don't know" or evasive witness. Depending on the drafting this change could completely eliminate the utility of 30(b)(6) depositions to narrow issues for trial. The already difficult task of obtaining remedies from the trial court for this sort of behavior would likely be undermined or effectively eliminated. Instead, "I don't know," combined with "We'll get back to you" would be the new norm.

American Association for Justice (SSSSS): Adding a supplementation provision would be devastating to plaintiffs and would defeat the purpose of the rule. It would effectively extinguish the duty of corporate defendants to prepare a witness properly to testify. The "I'll get back to you" response could readily become the new norm. The utility of these depositions depends on the binding effect of the answers given. Without that, there is very little reason to take the deposition at all. Deponents already have a right under Rule 30(e)(1)(B) to make changes in form or substance to the recording or transcript of the deposition and provide the reasons for making the changes within 30 days of the taking of the deposition. The rules already permit timely changes to be made without leaving the deposition open indefinitely, which would render it useless. No other rule allows a deposition witness to rewrite her testimony without consequence. Although it has been suggested that supplementation here is like supplementation of the deposition of a retained expert witness, the situations are not analogous. The



expert is required to make a written report, and the supplementation requirement is closely tied to that report requirement. There is no similar report requirement with regard to a 30(b)(6) witness.

Public Justice (TTTTT): We strongly oppose this idea. It would undermine the core goals of the rule and unfairly advantage organizational litigants over individuals. An individual who tried to change deposition testimony via supplementation would be subject to impeachment or a motion to strike. But corporations would have carte blanche to do so. In practice now, all party deponents face potentially serious legal consequences for failure to prepare for their depositions. And individual plaintiffs often have much less experience preparing for and testifying in depositions than corporations, particularly hand-picked 30(b)(6) witnesses. Making this change would also add to the courts' workload by generating more motion practice.

John H. Hickey (VVVVV): The only case law applicable to the idea of supplementation is the law of errata sheets, which are meant only to correct a scrivener's error in the record. If the changes add or significantly change testimony, the deposing party can with leave of court retake the deposition. This rule should suffice. Any additional provision would unfairly expand the ability of the corporate party to avoid committing to a position. That would serve only to increase the time and costs of litigation.

Massachusetts Academy of Trial Attorneys (AAAAA): Making this change would undermine the function and effectiveness of the deposition. It would invite organizations to be less precise during a deposition, safe in the knowledge that they have a blanket opportunity to revisit the issue in written form at a later date. An organization's ability to supplement deposition testimony should be tied to narrow circumstances.

## Forbidding contention questions

Timothy Patenode (M): A rule change may not be adequate. A contention question is in the eye of the beholder. No advocate will want to instruct a witness not to answer on this ground, or to suspend a deposition to get a ruling.

Steve Caley (N): Given that the witness is testifying on behalf of the corporation, I think that contention questions are appropriate, provided that the 30(b)(6) notice explicitly gives notice that the witness will be asked contention questions and identifies, at least generally, the subjects of those questions.

Craig Drummond (R): Contention questions should be allowed. If a party wants to make an objection, that is fine, but the witness must answer. This attempt to "forbid" such questions appears to be just one more attempt to allow the corporate party to game the 30(b)(6) deposition. "Shouldn't a party be able to get an actual answer about an issue from a corporate defendant prior to trial? We all know that written discovery through interrogatories and Requests for Admissions are mainly a joke that are riddled full of objections and vague answers. Often, the only time to nail a corporate party down [is] to use gamesmanship at a 30(b)(6)."

Christian Gabroy (T): "There should be no forbidding of contention questions because facts need to be addressed so as to formulate what defendant considers defenses, etc."

Lawyers for Civil Justice (U): These depositions are designed to "discover facts." The rule should forbid contention questions. At present, it permits what are in effect oral contention interrogatories that require witnesses to such things as "state all support and theories" for myriad contentions in a complex case. Not only is this an almost impossible challenge, it also threatens the attorney-client privilege as it probes into attorney/client communications. Therefore, the rule should forbid contention questions to non-lawyer witnesses, or inquiries into materials reviewed in preparation for the deposition.

Jeff Scarborough (V): Contention questions should not be forbidden because all facts need to be addressed, including facts in support of defendant's defenses.

Barry Green (W): This is another effort to prevent the designated witness's testimony from binding the corporation. The rules already contain a procedure for dealing with this issue. The attorney for the deponent can object to the question, but the question must be answered. The corporation can then move the court to allow amendment of the answer because the question is a contention question.

David Stradley (X): The rule helps balance the lack of information that defendants are required to provide in their pleadings. Under Rule 8, there is no consensus that a defendant is required to plead facts in support of its affirmative defenses. Accordingly, a plaintiff can face a raft of affirmative defenses, yet be utterly in the dark as the factual basis for these defenses. Rule 30 allows a plaintiff to question the defendant as to the factual basis of its affirmative defenses. The proposed change would prevent plaintiff from learning the factual basis of a corporation's affirmative defenses. Such questions are vital to efficient discovery and trial preparation. Counsel can easily toss an affirmative defense into an answer, especially where he does not have plea facts in support of that defense. Preparing a witness to support such a defense is quite another kettle of fish. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): This rule change would confer special rights on corporations that already have the advantage of knowing in advance what topics will be explored during a deposition. There is no prohibition in Rule 30 against asking an individual about her contentions or opinions, and ordinary witnesses are routinely asked these types of questions in depositions. The concern that a "spontaneous answer in a deposition seems quite different" from an interrogatory answer that the answering party has 30 days to prepare has no merit. A typical 30(b)(6) deposition involves the same 30-day period because of requests for documents. Prohibiting contention questions would only serve to allow a corporate defendant to polish its testimony through its attorneys and to save its contentions for trial, where the opposing party would have no prior testimony with which to impeach. Individual deponents are not afforded this luxury, and organizational deponents should not be afforded it either. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): Contention questions are very important and should be maintained. A corporation can request an individual person to answer what she contends and factual basis or support they have for contending it. There is no reason this should suddenly become unfair when asked of a corporate party. Indeed, the sophisticated corporation is likely better equipped to respond to such a question.

Frederick Goldsmith (II): Organizational defendants often hide behind boilerplate affirmative defenses. The ability to ask contention-related questions is an important tool in flushing out whether the entity actually has any facts or documents to support

its defenses. Litigants are entitled to know before trial what the other side's case is. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): Why should a plaintiff not be permitted to ask the corporation a contention question such as "If employee John Doe who is required to comply with safety Rule Y either did not or did not do A, B and C to comply with Safety Rule Y, isn't it true that he violated Safety Rule Y?" The corporation does not need 30 days to sit down and craft some obscuring response to this question. Permitting it to do so will only lengthen the time it takes to get to the truth.

Department of Justice (RR): The Department has had the experience of being subject to 30(b)(6) depositions that seek the United States' views about legal theories or legal opinions, particularly in cases where the United States is a plaintiff in litigation. This practice raises substantial privilege concerns. A rule amendment that distinguishes between factual contentions, on the one hand, and legal opinions or legal theories, on the other, would be worth further consideration.

Michael Romano (UU): Making this change would create a risk of "trial by ambush." Corporations often hide evidence behind affirmative defenses, and contention questions are often the only way to flush out the grounds for these defenses.

Michael Merrick (VV): This change would unfairly impose a discovery restriction on individual litigants, but not on organizational parties. It is true that there is much more time to respond to contention interrogatories, but corporate defendants often ask plaintiffs numerous contention questions during their depositions. For example: "What support do you have for your claim that you suffered discrimination?" Allowing this sort of question to be asked of plaintiffs but not defendants would unfairly tilt the scales in favor of one side. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), Walt Auvil (LLL), Tae Sture (PPP), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): "Oh my god!! This is over the top bad." An example is provided by the Farragher/Ellerth defense. Suppose the defendant invokes this defense in its answer. The 30(b)(6) notice lists as a topic: "The factual bases for Defendant's 27th affirmative defense in which it claims to have investigated and taken prompt remedial action." This is a "contention question," beyond a doubt. Why shouldn't the plaintiff employee's counsel be allowed to ask questions about this? The defendant has raised an affirmative defense that is diametrically opposed to Plaintiff's theory of the case. Should the defendant be able to hide behind its pleading and provide no

facts in sworn testimony about what investigation it contends to have done and what prompt remedial action it claims to have taken?

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor making a change to the rule on this issue. There are very few reported decisions on this issue. Those that limit contention inquiries or topics do not establish a blanket exclusion. In fact, many of the cases deal with efforts to depose counsel, or to invade the work product protection to the extent that only counsel could answer the questions in the notice. We agree that the deposition should be limited to factual matters, we do not think the rule needs to have a blanket exemption that might stymie efforts to obtain the factual underpinning of the complaint, answer or counterclaim. If the topics are properly framed to obtain facts, that should be acceptable.

Nitin Sud (EEE): "You have to be kidding me. Such questions are permissible for individuals being deposed, and are often the basis of the high percentage of pro-employer decisions. Companies often assert a plethora of affirmative defenses. They should be able to back them up at a deposition."

Heather Leonard (GGG): This change would create a double standard for parties. It is common for contention questions to be posed to individual parties. To immunize corporate defendants against such questions would unfairly impose a discovery restriction on individuals.

Robert Landry III (KKK): This change would unfairly impose a discovery restriction on individual litigants. Corporate defendants often ask plaintiffs numerous contention questions.

Wright Lindsey Jennings (MMM): The practice of using 30(b)(6) depositions to seek the views of a corporation regarding legal theories or legal opinions should be forbidden. The purpose of these depositions is discovery of factual matters known to the entity. Allowing questions about legal theories threatens to invade the attorney-client privilege. Putting corporate designees, who are usually not lawyers, on the spot with such questions should be prohibited.

Richard Seymour (NNN): Contention questions can be subdivided usefully into legal and factual contention questions. Mixed questions of law and fact can be regarded as legal questions. An amendment should disallow legal contention questions and allow factual contention questions. Interrogatories can be used for legal contention questions. It seems to me an abuse of the 30(b)(6) deposition to ask such questions. Perhaps that would mean only a lawyer could be designated as a witness. In addition, allowing such questions

would often lead to a game of "gotcha." How can jurors evaluate answers to these sorts of questions? If this sort of questioning were allowed, would that lead to cross-examining counsel on their briefs? But factual contentions are an entirely different matter. If 48 years of practicing law has taught me anything, it is the critical nature of finding out how the other side sees the facts, and what the other side's factual contentions really are.

Jonathan Gould (OOO): Fact contention questions are totally appropriate in a 30(b)(6) deposition. Legal contentions should probably be excluded.

Michael Quiat (TTT): I frankly think this is silly. "Anyone who has done any serious litigation over time recognizes that frequently pleadings, prepared by lawyers, have dubious evidentiary support. To suggest that those areas are beyond the pale of contention questions serves no practical function and can severely prejudice a party legitimately seeking areas of probative evidence."

Robert Keehn (VVV): The opportunity to ask contention-related questions is an extremely important tool in flushing out whether the entity actually has any facts or documents to support its defenses, as opposed to simply hiding behind a multitude of boilerplate affirmative defenses.

Patrick Mause (WWW): If a corporate defendant is going to file an answer with 25 affirmative defenses and then serve evasive interrogatory responses, the only opportunity to obtain a corporate admission is at a 30(b)(6) deposition. The spontaneity of the witness's response is a feature of the rule, not a flaw. I disagree, as well, with the idea that contention-type questions are rarely used in depositions of other witnesses.

David Sims (XXX): Defendants typically ask contention questions during depositions, and to deny plaintiffs that opportunity unfairly tilts the scales.

George Wright Weeth (BBBB): Fact contention questions are totally appropriate in a 30(b)(6) deposition and should not be restricted.

National Employment Lawyers Ass'n Georgia (HHHH): This would unfairly provide for different treatment of organizational litigants and individual plaintiffs. Corporate defendants often ask plaintiffs numerous contention questions during depositions. Columbia Legal Services (NNNN) submitted very similar comments.

Ford Motor Co. (KKKK): Ford has observed that the most common contention questions address its affirmative defenses or its assessment of the claim asserted. 30(b)(6) topics seeking to explore legal theories or evaluate the application of facts to

specific claims and defenses are particularly unsuitable for these depositions. Addressing legal theories requires involvement of counsel, and often legal theories evolve during the course of a case, and can be finalized only after the close of discovery. Trying to channel all the pertinent information through a single witness, particularly early in the case, presents a situation ripe for confusion. Contention questions during 30(b)(6) depositions usually amount to little more than gamesmanship seeking to generate awkward moments on videotape. Interrogatory answers are a better way to get at such matters.

Timothy Bailey (LLLL): Isn't litigation all about contentions? With individual litigants, contention questions are fair game. Why can't corporations state their contentions also? Counsel for a corporation should have the same duty to prepare the witness as counsel for an individual.

Brandon Baxter (MMMM): The ability to obtain spontaneous answers in cross-examination is one of the keys to obtaining unvarnished truth. The topics have already been provided to the entity. Questions about motives or opinions are commonplace in depositions, and they should not be limited.

Christina Stephenson (OOOO): Contention questions should not be forbidden, but the company might be allowed to answer in writing so long as the answer is provided within the time allowed for interrogatory answers and without the requesting attorney having to submit a separate request for the information.

Jennifer Danish (PPPP): Corporations often hide behind boilerplate affirmative defenses. Contention questions are an important tool to flush out whether the company really has any facts or documents to support its defenses. We are entitled to know before trial what the other side's case is.

Glen Shults (RRRR): This would leave the playing field between corporations and individual litigants even more tilted than it already is. Defense counsel can ask plaintiffs contention questions, even though those are often very challenging for plaintiffs with limited educations. I see no reason why a hand-picked witness, fully prepared by counsel, can't be asked similar questions. Contention interrogatories are a poor substitute.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: I have found 30(b)(6) depositions addressing the bases for a defendant's claim to have acted in "good faith" or to identify what defendant contends was a legitimate non-discriminatory reason for an employment decision to be the most effective means of discovery on those issues. No defendant has seriously objected to such inquiries.

Potter Bolanos (ZZZZ): The Subcommittee is wrong that contention questions are rarely used in individual depositions. They are frequently used. It would be wrong to deny plaintiffs a similar opportunity to explore the contentions of their corporate opponents.

Robert Rosati (AAAAA): Contention questions are clearly improper in a deposition of any kind. Numerous federal cases recognize that contention questions are improper legal questions, not factual questions. In my experience, competent counsel do not ask contention questions in 30(b)(6) or other deposition. Competent counsel representing the witness do not allow their clients to answer such questions.

Leto Copeley (BBBBB): It makes no sense to eliminate questions designed to help a party learn the factual bases of a corporation's affirmative defenses.

Sherry Rozell (KKKKK): The rule should be amended to prohibit questioning that requires the deponent to express opinions or contentions that relate to legal issues, such as the corporation's beliefs or positions as to the contentions in the suit. Applying law to the facts in this way often forces the deponent, generally not a lawyer, to analyze complex legal and factual positions and commit the organization to a legal position in the case. Questioning regarding a party's theories in the case is better left to contention interrogatories. This is particularly true in instances in which the witness's answers are considered binding on the corporation.

Spencer Pahlke (LLLLL): There is inherently a gray area in determining what is and is not a contention question. Often questions straddle the line between basic facts and facts supporting a contention. Adopting a rule that bars questions one attorney construes as contention questions will dramatically increase the number of instructions not to answer at deposition, thereby provoking more motion practice. So if a rule change is adopted, it should also say that this is not a ground for instructing a witness not to answer.

Maglio Christopher & Toale (MMMMM): This idea runs completely counter to any efforts to increase the speed and efficiency of litigation. Together with requests for admissions, "contention" questions are the best tools to narrow issues for trial and thus eliminate the need for discovery on those topics. "Contention" questions are utilized in almost every party deposition. Giving organizations a special immunity to answering such questions makes no sense. Moreover, what constitutes a contention question is often a complicated analysis with a large body of case law developed over years to delineate which avenues of questioning are permissible and which are not. A rule change would certainly serve to complicate the situation.



American Association for Justice (SSSSS): The appropriateness of a contention question can only be determined on a case-by-case basis. Barring all "contention" questions would be too broad. Consider, for example, inquiries about the factual basis for affirmative defenses a corporation has included in its answer. Clearing up which affirmative defenses actually call for further attention is a key service 30(b)(6) depositions can provide. As with other proposals, this one would multiply the burden of motions on the court, which would have to make the context-controlled decision whether the question should be allowed.

Public Justice (TTTTT): We also strongly oppose this idea. Although it is true that there is much more time to respond to contention interrogatories, corporate defendants often ask individual plaintiffs contention questions during their depositions. Allowing these questions to be asked of plaintiffs but not corporate defendants has no principled justification. Moreover, allowing these questions streamlines the litigation and is good for both sides. By helping to define and refine the issues in controversy, these questions help the parties cut to the chase. Finally, trying to define forbidden "contention" questions would prove very difficult.

John H. Hickey (VVVVV): This proposal would limit the ability of litigants to get to the real contested issues in the case. The apex doctrine properly limits the ability of litigants to depose the top officers of a corporation. But directing that lower level witnesses chosen by the corporation cannot be asked its position could in a sense might cut against the apex doctrine by making it necessary to question those top officers to determine the corporation's position. Moreover, the rule would create an asymmetry because corporations could ask individual litigants contention questions but would be immune to them.

## Adding a provision for objections

Timothy Patenode (M): This would be a useful change. Indeed, I've always thought the right to object was implicit in the rules.

Steve Caley (N): I strongly favor this change. 30(b)(6) depositions are frequently objectionable as burdensome, harassing, or irrelevant. Permitting a party to serve written objections, rather than have to make a motion for a protective order, will force the noticing party to take a realistic look at the topics and will provide a mechanism for parties to resolve such disputes informally.

Joseph Sanderson (P): I support this change. The practice of allowing pre-deposition objections to 30(b)(6) topics is common in modern practice because it is more efficient and avoids the expense of wasted motions for protective orders. Indeed, the rule should require pre-deposition objections, in particular objections to the scope of the topics. The rule should provide that such objections are waived unless raised before the deposition begins.

Christian Gabroy (T): "There should be no objection rule provision, which will just waste court time and excuse valid points."

Lawyers for Civil Justice (U): The rule should establish a clear procedure for objecting to the notice. These depositions by their nature generate controversy. Preparing a witness to provide all the organization's information can impose an enormous burden on the organization. That burden can be justified if the information is actually important to the case, but that is not always so. When the topics are not defined with "reasonable particularity" the process of preparation can become almost impossible. Presently, different district courts have endorsed different procedures for handling these problems. Some say that the only vehicle is a motion for a protective order, requiring that the matter be raised before the deposition begins. Other courts find motions for protective orders generally improper, and some even say they are not available at all for overbreadth or relevance objections. Rule 30(b)(6) should be amended to include a provision like the one in Rule 45(d)(2) for subpoenas, with an early deadline for objections and clear consequences for failure to do so. This should come with a 30-day notice requirement for these depositions.

Jeff Scarborough (V): There should be no objection provisions. They would waste the court's time and act only as a roadblock to a successful deposition.

Barry Green (W): This addition would be ripe for abuse. If

it is adopted, it should require that objections be specific, and impose a mandatory sanction for frivolous objections.

David Stradley (X): Making this change would be "the greatest step backward in civil discovery in my career." Scheduling 30(b)(6) depositions is frequently an exercise in futility already. In the past, I have provided a draft notice along with a request for dates. Almost universally, my request goes unanswered. I follow up, but am again greeted with silence, weeks of silence. So I now begin by serving the actual notice, with a letter offering to work with opposing counsel as to the date, time, and place of the deposition, but also say that we will go forward at the time noticed unless an agreement can be reached. Even following this procedure, it can take weeks to get a deposition scheduled. Making the suggested change would slow things even more. That would allow corporations to stall without moving for a protective order, while individual litigants must move for a protective order. This way, every 30(b)(6) deposition would be preceded by a motion to compel. [Note: In regard to adding 30(b)(6) to the 26(f) list of topics, this comment also includes the following: "[I]n my experience at least, counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable." Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Making this change would slow down litigation by permitting an organizational party to obstruct the discovery process in a way that individual parties cannot. A plaintiff does not have the benefit of being notified in advance what topics will be explored in a deposition and cannot object to questioning in advance. Allowing the corporation to receive special treatment by using the noticed topics as a basis for objections would give those organizations an unfair advantage. The most efficient way for parties to address questioning that exceeds the boundaries of relevance is through objections to deposition designations at the time of trial, just like with other witnesses. Pre-deposition objections would inevitably result in delays and motion practice over the permissible scope of a 30(b)(6) deposition. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN) and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make it clear that unless the responding party obtains a protective order it must attend and testify. Merely moving for a protective order should not be enough. It might be a good idea also to place a specific

time limit on making such a protective-order motion a specified time before the deposition. Failure to abide this rule should be an automatic ground for sanctions, just like failure to attend a deposition by an individual litigant.

Frederick Goldsmith (II): Allowing objections to take the place of a protective order motion will invite the kind of mischief that lawyers have long faced from obstructive and baseless objections to interrogatories and Rule 34 requests.

Patrick Yancey (JJ): This is not needed. There is already a procedure for the corporation to protect itself -- a motion for a protective order.

Michael Romano (UU): Making this change will only invite mischief by corporations. It is easy to envision a plethora of objections, only to find the Rule 30(b)(6) representative unprepared to respond to any area of inquiry to which an objection has been lodged. Those objections would have to be resolved prior to the deposition. The time-tested requirement of objecting to a question to preserve the record remains the best method to protect all parties. If a request is too burdensome, the right measure is a motion for a protective order, and it must be filed and heard before the deposition.

Michael Merrick (VV): The 30(b)(6) deposition is often the first deposition taken in a case. Encouraging formal objections would create more motion practice at the start of the discovery process, with resulting delays. Specifying that the responding party must indicate what it will provide (as under Rule 34) would do little to resolve this issue. To the contrary, that would require that a party sit for multiple depositions -- one on the topics it has agreed to address, and a second after the court rules on the objections at the inevitable motion to compel. These types of inefficiencies can be avoided by leaving the rule as it is now written. More generally, this proposal runs counter to the recent amendment to Rule 1 and to the overall direction of the Committee's approach to discovery in recent years. It would surely increase the workload of overworked federal judges. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), Walt Auvil (LLL), and Mary Kelly (CCCC) submitted identical or very similar comments.

J.P. Kemp (ZZ): This change would simply jam up the process and put the onus on the person seeking the discovery to have to prove it is necessary. It puts the inmates in charge of the asylum. If the party to be deposed truly believes that a topic is objectionable, it should move for a protective order on an emergency basis. Even better, have the courts deal with these issues on conference calls.

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor a provision on objections. The only procedure the courts recognize now for objections is a motion for a protective order. We believe that the protective-order paradigm operates sufficiently well and that no amendment is warranted. To introduce the suggested right to object would likely lead to heightened pre-deposition wrangling.

Nitin Sud (EEE): This would delay the discovery process and probably require additional depositions or other discovery. Usually the parties discuss the topics in advance and any concerns are addressed at that time.

Heather Leonard (GGG): This would create a situation in which companies would feel obligated to object to almost every topic out of an abundance of caution to avoid waiver of an objection. That, in turn, would generate more motion practice. All of this runs counter to the spirit of Rule 1.

Jonathan Feigenbaum (JJJ): A formal objection process will lead to more and more delays. It will also require judges to expend their time to resolve disputes over more and more procedural matters rather than on the substance of the dispute.

Wright Lindsey Jennings (MMM): The lack of a procedure for objecting to the list of topics in a 30(b)(6) deposition notice creates uncertainty, and a very real possibility of sanctions against the entity. The Subcommittee should consider a procedure for objection to specific topics, to the number of topics, to the reasonable particularity of the topics. After objections are made, the parties should be required to meet and confer as they must for other discovery disputes, and the party seeking the deposition should have the burden of justifying the requests. In keeping with this proposal, there should also be a minimum time for noticing such a deposition. This procedure might lead to more motion practice before the deposition, but it would reduce the post-deposition motion practice.

Richard Seymour (NNN): This proposal should not be pursued. The unstated assertion is that it's too difficult to get a protective order motion heard, but in every court in the country there is a method for getting a needed ruling on an emergency basis. The only ones favoring this idea are the law professors, for abstract reasons that neither practicing lawyers nor judges endorse. Moreover, allowing objections would encourage game-playing.

Jonathan Gould (OOO): This is another solution in search of a problem. The procedures in place for protective orders are sufficient now.

Tae Sture (PPP): I oppose this idea. Corporate defendants

have far more resources available to litigate. Defense counsel, as they zealously represent their clients, will routinely object, much as they do in answering interrogatories. It is far easier to raise a spurious objection than to mount a response.

Michael Quiat (TTT): This is not a sound idea. This would be used by well-financed litigants to "smoke out areas of questioning before the witness is under oath and forced to respond." It will also unnecessarily limit the scope of questions.

Robert Keehn (VVV): Making this change will invite the kind of obstructive conduct individual litigants have long faced. "The last thing our profession needs is another avenue for defense lawyers to assert ridiculous objections to discovery."

Patrick Mause (WWW): Corporate parties already object enough to impede the collection and presentation of evidence. In my experience, when 30(b)(6) topics are served defendants often object on numerous grounds anyway as part of the pre-motion "meet and confer," and the parties often end up having to take the issue to the court anyway. The last thing we need is to give corporate defendants more tools to obstruct discovery.

David Sims (XXX): Defense counsel will routinely object to a 30(b)(6) deposition, much like what they do in response to other discovery. Allowing a pre-deposition objection will only add to the time and expense in the process. If this change is made, the courts are going to face even more discovery disputes.

George Wright Weeth (BBBB): This would unnecessarily delay discovery and add another opportunity for motion practice by the defense. It is unlikely the court will deal with objections before the deposition, leading to adjournment of the deposition.

Product Liability Advisory Council (DDDD): Unlike Rules 33, 34, or 45, Rule 30(b)(6) is silent on objections. Recipients should be permitted to formally object to the written notices. Objections should be made with specificity. The requesting party should be required to meet and confer with the respondent on the objections before presenting the issue to the judge or before an answer covered by specific objections must be given. This process would help ensure control over the number of topics that may be served in such a notice the number of hours the witness must testify. The company should not be required to obtain a protective order.

Bowman and Brooke (EEEE): Providing corporations with the opportunity to object will would be an important protection.

Huie, Fernambucq & Stewart, LLP (FFFF): Because Rule 30 is the only discovery method without an objection procedure, we

often see it used as a sword. For example, depositions are often scheduled at a time known to be unworkable. Particularly under 30(b)(6), the noticing party often takes the position that the company must present a fully prepared witness unless the court issues a protective order. Thus, the current setup actually promotes adversarial posturing. Rule 45 provides a good template for 30(b)(6). This will prompt plaintiffs to take greater care to tailor their requests narrowly. It will also incentivize more robust meet-and-confer sessions before the notice goes out. It will also reduce motion practice before the court.

National Employment Lawyers Ass'n Georgia (HHHH):

Encouraging more objections would create more motion practice for the court. Requiring the objecting party to produce a witness to address the topics not objected to would require the party to sit for multiple depositions. These inefficiencies can be avoided by leaving the rule as it stands. There is no showing that the few protective-order motions that have been filed have been resolved in an incorrect manner. Adding this provision would cut against the overall direction of the Advisory Committee in recent years, seeking to reduce expense and judicial workload. Columbia Legal Services (NNNN) submitted very similar comments.

Ford Motor Co. (KKKK): The lack of direction about objections creates a procedural ambiguity that deepens disagreement between parties and has even led some courts to refuse to address objections until after the deposition has been concluded. Other discovery devices that direct a corporate party to scour its resources, such as Rule 34 and 45, establish official procedures for objecting. Adopting a similar procedure for 30(b)(6) would end the current confusion on the subject. Moreover, the failure of the noticing party to describe the topics with reasonable particularity puts the responding party in the impossible position of having to prepare a witness to testify with only an opaque notion of the questions that will be asked. For example, Ford's sample of notices includes such topics as "Ford's safety philosophy for its customers" and "Discuss crashworthiness." Ford finds that propounding parties often do not want to focus the issues. Some topics are so vast in scope that they offend against proportionality principles. Consider, for example: "Ford's historical knowledge of safety belt buckle performance in rollovers." Moreover, Ford often receives 30(b)(6) notices that seek "discovery on discovery," such as: "Ford Motor Company's document retention policies." Ford has found that the lack of a recognized objection process makes the meet-and-confer process less productive, because the propounding party seems to feel less concerned about possible court intervention. Some courts will not even consider a protective-order motion before the deposition, but proceeding with the deposition and objecting can burden the court with phone calls seeking court resolution. That sort of on-the-spot ruling creates risks of sanctions if the objection is overruled, or that

the witness must return for further testimony about subjects not foreseen in preparation.

Timothy Bailey (LLLL): The motion for a protective order covers the same ground. This change would merely shift the burden required to go to court. That is a bad idea.

Christina Stephenson (OOOO): There should be a provision for pre-deposition objections, requiring that they be specific. The deposition should go forward on all other issues. The party taking the deposition should have the option of moving to compel answers to questions not answered based on objections.

State Bar of California Litigation Section Federal Courts Committee (TTTT): We support consideration of an addition to the rule of an explicit provision for written objections that may be served in advance of the deposition. Many 30(b)(6) notices are broad and can require extensive research and preparation. A simple and efficient mechanism to raise these concerns, short of a motion for a protective order, would be helpful. One thing that might be included would be a requirement like the one now in Rule 34(b) that the objecting party specify what it will provide despite the objection. However, concerns about objections halting or delaying depositions are real, as well as disputes over requirements to move to compel or for a protective order before or after the deposition begins.

Gray, Ritter & Graham, P.C. (VVVV): Rule 34(b)'s objection provision is not a good comparison. That applies to all parties. An objection provision in 30(b)(6) would protect only organizational litigants. To even the discovery scale, it would be necessary to devise a method for the plaintiff to peremptorily limit questioning at his or her deposition. Adding a provision like the one proposed would delay and increase the costs of litigation. We do not believe it's too difficult for the defense to seek a protective order if informal resolution is not possible. That has certainly not been our experience.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: This is not needed and would be harmful. It is common for a producing party to raise objections in advance of the deposition, but those objections do not block the deposition from going forward. Nearly always, by the time the deposition is completed, there are no disputes remaining for a court to address. In those cases where there continue to be disputes, the testimony provided in the deposition gives context that provides a sounder basis for resolving the disputes.

Hagens Berman Sobol Shapiro (XXXX): We strongly oppose any amendment that would excuse a party's attendance at a deposition when the party lodges an objection to the notice.



Seyfarth Shaw (YYYY): In its current form, the rule does not say how objections should be handled, and district courts have created or endorsed different avenues for a party to protect itself. Some courts say that only a protective-order motion will suffice, and that unless such an order is granted the party noticed may be subject to sanctions for failure to comply fully. Other courts refuse to entertain 30(b)(6) issues before the deposition occurs, usually allowing the responding party to object in advance and refuse to provide the material objected to, leaving issues to the motion-to-compel stage. Moreover, courts often disagree about whether "undue burden or expense" is the same as "overly broad/unduly burdensome," creating an asymmetry between potential objections and grounds for a protective order.

Seyfarth Shaw (YYYY): The rule should adopt an objection and motion to compel procedure like that in Rule 45. Rule 45 requires that objections be submitted in 14 days, which affords time to resolve them before the deposition if that must be 30 days from notice. This would also allow the deposition to go forward on the unobjectionable topics. Moreover, it is likely that the objection process would often led to a resolution by the parties without involvement from the court.

Potter Bolanos (ZZZZ): This change would make absolutely no sense. Corporations already make objections before the deposition and we meet and confer in an effort to clarify the scope and resolve the issues. Even when the objections are not resolved this way, they are often mooted by the actual deposition. Under the change proposal described in the invitation for comment, responding parties would have an incentive to object to delay the deposition. But requiring them to provide their objections in advance -- without requiring a court ruling on those objections -- so that the parties can confer in preparation for the deposition, might make 30(b)(6) depositions more efficient.

Robert Rosati (AAAAA): In reality this is a common practice. The rule does not have to be amended to authorize it.

Terrence Zic (CCCCC): The burden should not be on the party responding to the notice to quickly file a motion for a protective order. The noticing party can take weeks, or months, to draft a notice with scores of potentially overly broad and unduly burdensome matters for examination. A 30-day notice period would provide some opportunity to meet and confer. A right to object should be added; having to make a motion is too much to ask on short notice.

Clay Guise (HHHHH): There should be clear procedures in the rule for resolving disputes. In some courts a protective-order motion is necessary. Others take the opposite view.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): There is presently no formal procedure for the responding corporation to object to the scope of the topic list or otherwise. But the topic lists are often hotly contested. Courts have diverged on what is meant by "reasonable particularity." There are also disputes about what counts as corporation knowledge, particularly when the corporation has no person on staff who is familiar with events that occurred long ago. Even the courts that are most stringent about the corporation's duty to prepare recognize that there can be instances when it simply does not possess knowledge about some subjects. Corporate deposition notices increasingly precipitate these sorts of disputes. These burdensome and costly disputes could be avoided by a formal objection procedure. Like LCJ, we believe that Rule 45 is a useful model for such a procedure. It places the burden on the party that served the subpoena to move to compel and relieves the nonparty of any obligation to comply absent a court order. Applying this approach to 30(b)(6) depositions of parties would facilitate resolution of certain disputes that now lead to protective-order motions. At a minimum, adding such a procedure would solve the problem created by uncertainty about how to proceed under the current rule. In this way, "corporations would no longer have to face the Hobson's choice of complying with an improper or overreaching deposition notice or mounting a pre-deposition challenge and risking draconian sanctions."

Sherry Rozell (KKKKK): Standardizing the practice for objections would promote consistency within the rules, and provide the parties with a procedure for addressing these matters. The rule should enable the parties to proceed with the agreeable topics while seeking to resolve those in dispute. Rule 45 could serve as a model.

Spencer Pahlke (LLLLL): The relevance of a particular line of questioning often becomes evident only through the context provided by the deposition setting. Allowing a party to object to a line of questioning before the deposition begins will only create yet another hurdle to getting depositions on calendar and completed. It will also make the actual deposition much more cumbersome, with parties spending time arguing about what the parameters of their pre-deposition objections were.

Henry Kelston (NNNNN): A new procedure permitting formal written objections to 30(b)(6) notices would result in objections being served in response to virtually every deposition notice, as they are in response to every set of document requests and interrogatories. Written objections would then lead to motion practice -- and protracted delay -- far more often than responding parties now move for a protective order. And adding this would be unnecessary. Nobody seriously claims that the absence of a rule provision prevents a company's counsel from

contesting the proposed date or list of topics in a 30(b)(6) notice. The amendment would only lead to less cooperation, more delay, and more expense.

American Association for Justice (SSSSS): Such a change would mark a dramatic departure from current practice and would stall discovery. It would create more pre-trial motions practice and create more disputes requiring judicial involvement. Judges, in turn, will not only have more motions to decide, they would have to decide those motions without proper context. There will surely be many baseless objections, often boilerplate in nature. Often an early 30(b)(6) deposition will enable plaintiff to identify which files contain relevant information. Allowing objections to stall such early depositions of the organization would stall other discovery. In class actions, 30(b)(6) depositions are often the only discovery needed for plaintiffs to support class certification motions, some thing that Rule 23 says should be resolved early in the case. So allowing objections could hamstring a court trying to comply with Rule 23. The amendment idea seems to be based on a flawed notion about current practice. True, Rule 45 has an objection provision with regard to document production. But that is designed to protect nonparty witnesses against burdens. The situation of a corporate defendant is materially different. No other litigant has a similar right to block a deposition, and corporations should not get this special right.

Public Justice (TTTTT): We strongly oppose this amendment idea. It is one of the most potentially disruptive changes currently on the table. It would make discovery far more cumbersome, and slow things dramatically right from the outset. A 30(b)(6) depositions is often the first deposition taken in the case, so a formal objection process would cause delay from the beginning of discovery. Nearly every 30(b)(6) deposition would be preceded by objections and a motion to compel. This would de facto place the burden of persuasion on the party seeking discovery. Discovery would come to a standstill. If the 30(b)(6) notice is truly objectionable, the responding party can file a motion for a protective order. There has been no showing that the courts are overburdened by such motions at present. Only the most compelling circumstances would support creating new mechanisms to allow lawyers to fight about discovery. This mechanism would create motion practice without solving an actual problem.

John H. Hickey (VVVVV): This proposal would serve only to engender more motion practice and delay. If the noticed party truly is unable to educate any witness on an issue, the representative or counsel can say so on the record at the deposition. There can, of course, be issues about whether the corporate party has properly prepared the witness. But there is a well-developed body of law on that obligation. This proposal

is a remedy in search of a problem.

Massachusetts Academy of Trial Attorneys (AAAAAA): Making this change would not be helpful to the process. Plaintiffs already have an information disadvantage during discovery. This proposed change would amplify the imbalance by laying the burden of obtaining a court order compelling attendance on the noticing party. It would do nothing to streamline the process and likely result in more protracted litigation.

Addressing application of limits  
on number and duration of depositions

Nancy Reynolds (L): In my experience, when a corporation is deposed, the deposition is considered one deposition. If the corporation wants to designate 20 people in response to the notice, it may do so, but it remains the deposition of one corporation. I have designated up to 12 employees to respond because I wanted the most knowledgeable people answering questions. The duration for each witness's deposition was 7 hours because it was the corporation that opted for numerous deponents.

Timothy Patenode (M): There is a common strategy of taking an early 30(b)(6) deposition, and then noticing up depositions for the same individuals that testified in the 30(b)(6) deposition, giving the interrogator two bites at the apple.

Steve Caley (N): I think this is a good idea, as it will provide certainty with respect to these issues and, in turn, reduce motion practice. I agree with the Committee Notes that a 30(b)(6) deposition should count as only one deposition, no matter how many people are designated. I strongly disagree with the view that the examining party should be entitled to seven hours of questioning for each person designated. 30(b)(6) notices may include dozens of topics on disparate subjects, requiring a corporation to designate many individuals. To give the interrogator the right to question each of them for seven hours would effectively nullify the rules' limitation on number of depositions. To retain the seven-hour rule for the entire deposition will force the questioner to focus on what is truly material.

Joseph Sanderson (P): 30(b)(6) depositions are generally much more efficient ways of getting discovery than noticing multiple individual depositions. There is a risk that parties will try to game the system by trying to cram as many topics as possible into a single day. The rules should explicitly state that (1) a 30(b)(6) deposition may last seven hours for each person designated, with time freely granted for additional time when needed, and (2) for purposes of the ten-deposition limit a 30(b)(6) deposition is one deposition regardless of the number of people designated.

Christian Gabroy (T): "There should be no limitation on duration. There can be multiple individuals designated, and costs increase."

Lawyers for Civil Justice (U): The rule should define presumptive limits on in order to improve communication, cooperation, and case management. The present situation is anomalous because presumptive limits apply to several other

important discovery tools.

(1) Number of topics: Too often, Rule 30(b)(6) notices are overloaded with dozens of topics. (A footnote cites cases involving 80 to 220 topics.) Responding to such sprawling lists requires the responding party to investigate all factual aspects of each topic. There should be a limit of ten topics.

(2) Scope of topics: The rule should also require that topics be reasonable in scope and proportional to the needs of the case. But some courts interpret the rule's directive that the topics be defined with "reasonable particularity" as requiring only that the notice "describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents." These sorts of lists frequently lead to rancorous disputes.

(3) Numerical limit on deposition hours: Based on the Committee Note to the 2000 addition of a seven-hour limit to depositions, many courts allow multiple 30(b)(6) depositions on the ground that the seven-hour clock "resets" each time a different corporate designee takes the witness chair. This approach has the perverse effect of penalizing organizations that designate multiple witnesses, thereby incentivizing the use of a single witness. In many cases, however, both sides would benefit from designation of additional witnesses.

Barry Green (W): This proposed change has some merit, but should not be limited to 30(b)(6) depositions. Whatever limitations are imposed should be applicable to all depositions to prevent discovery abuse.

David Stradley (X): The Committee Notes to the current rules contain the right answer. The deposing part should get one day of deposition time for each person designated, and the 30(b)(6) deposition counts as a single deposition toward the ten-deposition limit. If each day were counted as a separate deposition, corporations could use up their opponents' deposition days by designating multiple individuals unnecessarily. Similarly, if the 30(b)(6) deposition were limited to a single day, without regard to the number of designees, the corporation could eat up all the time by designating multiple witnesses, requiring deposing counsel to explore the background of each of them. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): If an amendment is made on this subject, it should codify what now appears in the Committee Notes. One day should be allowed for each person designated, but the 30(b)(6) deposition counts for only one of the ten permitted each side. Otherwise, the corporation might simply designate 10 witnesses in response to a 30(b)(6) notice

and argue that the deposing party is prohibited from taking any more depositions. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make clear that a 30(b)(6) deposition counts as only one for purposes of the ten-deposition limit.

Frederick Goldsmith (II): This change will only invite mischief. The corporation can designate a gaggle of witnesses and they argue that the other side has already used up all ten of its depositions. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): There is no need to amend the rules to limit either the duration or the number of depositions needed under 30(b)(6). If the corporation chooses to designate many witnesses, than the other side needs to be able to take their depositions.

Michael Romano (UU): In my twenty years of practice, I have never encountered an issue about these matters. As with any deposition, the rule against redundancy protects litigants from unnecessary or excessive depositions.

Michael Merrick (VV): We have found that a full day is usually permitted for each 30(b)(6) witness, and it is rare for disputes to arise on this topic. If they do, they can be worked out without court intervention. It is important to note that the corporation is in control of how many individuals to put forward. If on limited the time that could be spent with given individuals, that could prevent some topics from being thoroughly explored, leading to additional fact depositions. This set of issues is not currently a source of disputes that the parties cannot resolve, and should not be the focus of rule changes. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA) Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): This is typically not a big problem. In my district the rule is that the 30(b)(6) counts as one deposition no matter how many people are designated, and that each person may be questioned for seven hours. To change this would permit and encourage game playing.

Frank Silvestri, American College of Trial Lawyers (DDD and J): Attempting to definitively answer these questions by amending the rule would essentially put the cart before the

horse. Practicing attorneys generally understand that the "one bite at the apple" rule applies to 30(b)(6) depositions. One well-drafted notice therefore counts as one single, separate, seven-hour deposition, no matter how many witnesses the corporation involves. The current framework is sufficient to encourage a logical resolution of the problem.

Nitin Sud (EEE): This has never been an issue. There is no problem that needs to be fixed.

Kevin Koelbel (HHH): The number of 30(b)(6) depositions should be left to the discretion of the trial judge, who can set appropriate limits at the Rule 26 conference.

Richard Seymour (NNN): We must not allow organizations to play "keep away" by exhausting the plaintiff's supply of ten depositions through its practices in designated 30(b)(6) witnesses. To reduce the seven hours for each witness's deposition would reinforce the tendency of some lawyers to "play out the clock" with lengthy speaking objections. The recommendations of the Committee Note should be inserted into the rule. "I cannot count the number of times I have had to point out this Note to plaintiffs' or defense counsel, resulting in a change of position." The Notes are just not that prominent, and by now the 2000 Note (where the provision is found) is buried behind the Notes for several further sets of amendments.

Jonathan Gould (OOO): The rule should make clear that 30(b)(6) witnesses should be counted as only one of the ten depositions. Otherwise a party could circumvent the rules by designating several witnesses to deprive the other side of enough depositions to prepare.

Tae Sture (PPP): Giving the corporate defendant the ability to use up plaintiff's depositions by designating lots of witnesses is wrong. Plaintiffs are constrained by costs; they will not "run up the clock" with excessive deposition practice.

Robert Keehn (VVV): This change would only invite mischief by the organization, which would argue that its opponent's permissible number of depositions has been exhausted by the gaggle of people it has designated.

Patrick Mause (WWW): A Rule 30(b)(6) deposition should count as one deposition to avoid game-playing by the corporation. Saying that these issues should be worked out between counsel is a pleasant thought but highly unrealistic. Counsel for large corporations do not always play nice.

David Sims (XXX): I am opposed to any separate limitation on 30(b)(6) depositions. The current rule is adequate. If the corporation can eat up plaintiff's depositions by designating



lots of people, it will.

George Wright Weeth (BBBB): Each plaintiff is a person who counts as a separate depositions. Corporate defendants should also be counted as one person. Allowing the company to curtail the other side's use of deposition by designating lots of witnesses is not fair.

Product Liability Advisory Council (DDDD): A potential limitation to guard against overbroad notices would be a limit on deposition hours. Although Rule 30 says a deposition must not be longer than seven hours, often courts have allowed multiple 30(b)(6) depositions, each lasting seven hours.

National Employment Lawyers Ass'n Georgia (HHHH): Our experience is that most jurisdictions allow a full day of deposition for each designee. Disputes that cannot be worked out between the parties on this subject are rare. Limiting the time that can be spent with a witness could impair the ability to get to all needed topics. Columbia Legal Services )NNNN submitted very similar comments.

Brandon Baxter (MMMM): This is not currently an issue. The Committee Notes have it right.

Christina Stephenson (OOOO): There is no principled reason there should be limits on the number of 30(b)(6) depositions. These depositions are governed by topics, not by amount of time or number, because multiple people may be designated. This has not caused disputes I have observed.

State Bar of California Litigation Section Federal Courts Committee (TTTT): Although not all of our members agree on whether a 30(b)(6) deposition should be considered one deposition for the ten-deposition limit, or whether a full seven hours should be allowed for each designated individual, we do agree that further guidance in the rules would eliminate potential disagreements and accompanying cost and delay. Parties often dispute whether the limitation on number of depositions of a witness should preclude a second deposition of an organization on different topics. An early 30(b)(6) deposition is a useful way to find out what sources of information exist and learn about technologies and record-keeping practices of an adverse party. Later depositions are likely prompted by testimony and other discovery occurring later. Both early and later depositions may be appropriate in a given case. Accordingly, clarity about whether more than one 30(b)(6) deposition may be taken, and the timing of such depositions, would be desirable.

National Employment Lawyers Ass'n -- Illinois (UUUU): We believe the Committee Note statements about the handling of these matters should be elevated to the rule.

Gray, Ritter & Graham, P.C. (VVVV): We fully agree that this should be worked out by counsel. Our experience has not suggested any significant problem in doing that.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: The Committee Notes establish satisfactory guidance. Operating in a plaintiff-side contingency practice, I have zero interest in taking unnecessary depositions. When a defendant designates a large number of witnesses, I find that those with a few topics may be deposed for an hour or two. When witnesses are designated to cover more, or more significant topics, a full day is necessary. I have not found these issues difficult to resolve with opposing counsel.

Potter Bolanos (ZZZZ): The rule should be amended to make explicit that the 30(b)(6) deposition is one deposition.

Robert Rosati (AAAAA): In my experience, counsel understand that a 30(b)(6) deposition counts as one, and the absence of a rule provision is not important.

Leto Copeley (BBBBB): This proposed change would be an open invitation to abuses by corporations. Right now, the deposing party gets one day of deposition for each person designated, and the 30(b)(6) deposition is a single deposition. To change this rule would invite gamesmanship.

Spencer Pahlke (LLLLL): If the Subcommittee addresses these issues by amendment, it should codify what is now in the Committee Notes. Any deviation from these guidelines will lead to gamesmanship.

American Association for Justice (SSSSS): Parties frequently agree on these matters and, if they do not, a judge familiar with the specifics of the particular litigation can best determine what is appropriate.

Public Justice (TTTTT): We agree that some clarification in this regard would be useful. We think the ten-deposition limit should be amended to exclude 30(b)(6) and expert depositions from the count. So the rule should be rewritten to say that the limit is ten depositions, exclusive of 30(b)(6) depositions and expert depositions. In addition, the current prohibition of a second deposition of a deponent should be rewritten to exclude 30(b)(6) deponents. Multiple 30(b)(6) depositions of the same party are often needed and desirable. "[A] plaintiff has a dilemma in deciding whether to take an initial corporate deposition to help narrow the scope of discovery and of the issues -- a type of deposition that serves the purpose of both fact-finding and efficiency. A plaintiff does not know at the beginning of a case whether a court will allow one or more later substantive 30(b)(6) depositions."

John H. Hickey (VVVVV): The rules should be amended to say that the limit on number of depositions does not apply to 30(b)(6) deponents. Certainly the corporation's decision to designate multiple witnesses should not eat up the plaintiff's right to take ten depositions. And the time limits should not apply to 30(b)(6) depositions either. These are depositions to eliminate issues, and can be crucial to a case. There should be no time limit on that.

## Other matters

Nancy Reynolds (L): Exceeding the scope of the topics listed in the notice is often an issue. We make it very clear on the record that the area of questioning is outside the scope, and that the deponent is not speaking on behalf of the corporation. Motions in limine address any attempts to use the responses about undesignated topics at trial.

Joseph Sanderson (P): The submission offers several additional ideas:

(1) The rule should provide for expedited pre-deposition ruling on motions to compel. There should be a notice period of 28 days for these depositions, and objections should be due 14 days prior to the scheduled date for the deposition. Any motion to compel or for a protective order could then be due 7 days before the deposition.

(2) The rule should provide special protections for nonparties subpoenaed to provide information. The Advisory Committee Notes should be amended to state that "information known are reasonably available to the organization" includes information which it could reasonably obtain from persons or entities under its control.

(3) Because the limit on number of interrogatories prompts parties to ask about matters that could more efficiently be responded to in writing than in an oral deposition, the rule should be amended to state that a 30(b)(6) notice may include questions for which written answers are sought.

(4) Regarding nonparty depositions using subpoena, the rules should explicitly permit 30(b)(6) depositions of nonparties via subpoena, and clarify that a single subpoena can list separate dates for production of documents and the deposition itself.

(5) The rule should be amended to clarify that it applies to unincorporated businesses. Even a one-person corporation is covered, but unincorporated sole proprietorships (still common in some states) may not. The rule should be amended to state that an "entity" includes unincorporated businesses.

Lawyers for Civil Justice (U): LCJ had two additional proposals:

(1) The rule should allow for a written response when the organization has no knowledge on a particular topic. This sort of problem is common when the litigation is about something that occurred in the distant past. Presently, an

organization faces the threat of sanctions if it fails to produce a prepared witness despite the fact that the witness adds nothing to the information contained in the documents. This is pointless. The rule should be amended along the following lines:

An organization receiving a Rule 30(b)(6) deposition notice may respond to the notice, or individual topics contained therein, by providing a written response in lieu of presenting a witness if the responding entity certifies that the written response provides the responsive information reasonably available to the organization and no further information would be provided at a deposition. The written response may include a production of documents, tangible materials or electronically stored information.

Such a rule should clarify that the organization is not required to obtain knowledge it does not have at the time of the deposition notice by seeking out and interviewing former employees.

(2) The rule should prohibit redundant depositions. Duplicative depositions are wasteful. One way this waste can occur is that when a relevant employee has testified as fact witness, he or she is then called upon to testify a second time pursuant to a 30(b)(6) notice. Such notices often identify topics on which fact witnesses have already testified. In complex product liability litigation, this problem can be even more significant. The current situation means that the same witness can be deposed repeatedly in different cases. One defendant's regulatory witness was deposed seven different times, always concerning the same issues and documents. The rule should be amended to exclude matters for examination that have been covered in prior depositions, and should include a new process for objections in order to avoid such duplication.

Barry Green (W): Another topic that could be addressed is the problem with deposing 30(b)(6) witnesses who are also fact witnesses. In many states like New Mexico, it often turns out that an LLC is comprised of one or two members who are also fact witnesses. In keeping with the idea of limiting depositions and their duration, trying to determine whether the witness is being questioned as a fact witness or as a corporate witness is difficult. The actual solution seems to be separate depositions, but the rule should clearly state that all questions must be answered subject to objection unless a privilege is invoked.

National Federation of Independent Business (Z): NFIB is a nonprofit association with more than 300,000 members across the country. Unlike large corporations, its members do not employ

staffs of lawyers and accountants. More than half its members have five or fewer employees. When they are served with subpoenas these businesses need time to find and consult a lawyer. There should be a reasonable period of time for nonparties to find and consult counsel before responding to the subpoena. A nonparty business should have the ability to raise objections to the subpoena before the deposition, with the burden on the party seeking the deposition to seek a court order rather than imposing on the nonparty small business the burden of moving for a protective order. We propose that something like the following be added to the rule:

A nonparty organization shall have a reasonable time to engage and consult an attorney prior to responding to the subpoena. A nonparty organization shall notify the party issuing the subpoena if the organization objects to the subpoena's description of the matters for examination on the ground of privilege, lack of reasonable particularity, or exceeding the scope of discovery and may decline to present deponents to testify on the matters to which the objection applies unless otherwise directed by the court at the instance of the party issuing the subpoena.

Jonathan Feigenbaum (JJJ): Proposals to require a minimum notice procedure or impose a numerical limit on topics for the deposition would be counterproductive. Requiring parties to provide the exhibits in advance will prompt parties to list an excessive number of exhibits. There is no need to state that the examination must be limited to the topics listed.

Wright Lindsey Jennings (MMM): Though the Subcommittee's invitation to comment does not mention it, we believe that the "reasonable particularity" standard in the rule should be re-examined. In our experience, parties often designate topics that are so broad as to defy any reasonable effort to prepare a witness on them. More focused topics make the process of preparing the witness simpler, and increase the likelihood that the party taking the deposition will get answers to the questions it asks.

Product Liability Advisory Council (DDDD): There should be a limit on the number of topics permitting in order to allow the corporation to focus on the real issues in dispute rather than being burdened with researching topics that are not relevant.

Bowman and Brooke (EEEE): Rule 30(b)(6) notices should be expressly subject to the scope of discovery defined by Rule 26(b)(1), including the principles of proportionality. There should be a presumptive limit on the number of topics that can be included, and an express acknowledgement that depositions may not be necessary where other evidence exists, either through written discovery or due to prior depositions on the same topic or of the

same witness.

Huie, Fernambucg & Stewart, LLP (FFFF): Too often plaintiff attorneys insist that we disclose the materials relied upon by the witness to prepare or chosen by an attorney to prepare the witness. This kind of question is almost universal. The lack of any protection in Rule 30(b)(6) comparable to Rule 26(b)(3) is a glaring hole that must be filled. Proper preparation requires the company's lawyer to select documents from the larger production already made in the case in order to focus the preparation and concentrate on the areas pertinent to the list of topics for the deposition. Without this protection, attorneys and witnesses have to review every document produced in the case, which is wasteful and contrary to Rule 1.

Ford Motor Co. (KKKK): There should be a safe harbor of companies that have information only in documentary form with regard to certain topics. For example, Ford received a notice in 2015 asking for manufacturers of replacement parts during the period 1955-79. Companies often do not have employees with actual knowledge about such matters, so the only information they have is in documents. The person designated cannot do more than repeat what is in the documents, and if there are discrepancies between the documents the witness cannot reconcile them. The language proposed by LCJ in its July 7 comments would address this problem. Another problem that should be solved is repetitive discovery regarding a topic already covered in a 30(b)(6) deposition. Once an issue has been so addressed in discovery, that should be presumptively sufficient. Ford finds that it is subjected to repeat 30(b)(6) inquiries in copycat litigation, and believes that these duplicative discovery efforts merely increase the cost it bears and give the questioning attorney an opportunity to grandstand. Instead, a party should be allowed to satisfy a 30(b)(6) notice by providing the transcript of the deposition already taken in a different case. If the propounding party insists on going forward after receipt of the transcript, there should be a presumption that it will bear the costs for the company of the deposition.

State Bar of California Litigation Section Federal Courts Committee (TTTT): A rule inviting the noticing party to provide the witness with the exhibits to be used in advance of the deposition is a technique that could focus the responding party in a way that is better than the current provision that requires merely a description of the matters upon which the organization may be examined. Putting it in the rule tells the parties they get the advantage of greater particularity by taking this step. Another provision that could be useful would a rule provision addressing the problem of questions on matters no specified in the notice.

Seyfarth Shaw (YYYY): The rule should require 30 days

notice, which would provide time to prepare for the deposition and eliminate motion practice about whether sufficient notice has been given. The rule should also include a presumptive limit on the number of topics that can be included. Under the current rule, the noticing party has no incentive to leave off lesser topics. But the investigatory burden of each topic may be heavy, and the absence of a numerical limit undermines proportionality in the use of this device. In keeping with the goals of the 2015 amendments, the rule should also state that the topics must be reasonable in scope and proportional to the needs of the case.

Robert Rosati (AAAAA): I know that the Subcommittee has a "B" list and offer the following reactions to it:

1. I always attach exhibits to the deposition notice and integrate the exhibits with the areas of inquiry. If you want the deposition to be effective, you have to tell the witness what the areas of inquiry are. If you don't provide the exhibits, it is much more likely that the witness will not be properly prepared.
2. A minimum notice requirement is unnecessary, assuming competent counsel who coordinate the timing with each other.
3. Forbidding questioning beyond the topic list is meaningless. The standard 30(b)(6) notice will include: "I will ask the witness or witnesses about their personal knowledge of the facts of the case outside the areas of inquiry addressed in the balance of this deposition notice."
4. Substituting interrogatories for live testimony may work, and perhaps a deposition on written questions. But a Rule 31 deposition works only in very narrow circumstances.
5. Advance notice of the identity of the witnesses would be helpful.
6. The rule does not presently prohibit a second deposition of the organization.
7. Limiting 30(b)(6) to parties would be a bad idea. I use 30(b)(6) with nonparties because the alternative would often involve deposing a lot of nonparty employees.
8. I can't imagine how identifying the documents reviewed by the witness in preparation would benefit anyone.
9. Expanding initial disclosure would not obviate any problems with 30(b)(6).
10. Attempting to forbid "duplication" would be a bad idea. This would tempt a party to offer false testimony in a



30(b)(6) deposition and then try to prevent depositions of its employees.

11. Limiting the number of areas of inquiry would not be a good idea. The requirement of reasonable particularity is sufficient. Placing a numerical cap on the topic areas prompts parties to be more vague or general.

Terrence Zic (CCCCC): There should be a presumptive limit on the number of matters for examination, and the rule should require detailed specificity and proportionality with regard to the matters. As counsel for a major defendant in asbestos litigation, I often confront 30 to 50 matters for examination. Sometimes the time frame is enormous. One recent notice (attached as an exhibit) listed 54 matters, the last of which asked us to produce a witness to testify with regard to any factual basis for which the defendant was contesting the authenticity of 900 documents identified by plaintiff. Other changes should be made:

1. The rule should also include a 30-day notice period. Notices are often sent out late in the discovery process.
2. Further depositions should not be allowed on matters already covered in a 30(b)(6) deposition.
3. The rule should state that the witness is not required to respond with regard to matters not listed in the notice. An instruction not to answer risks sanctions under Rule 30(d).
4. The Federal Rules of Evidence should be amended to permit admissibility of affirmative testimony provided by the witness. Otherwise, counsel may object to admissibility on the ground that the witness lacked personal knowledge.

Thomas Sims (DDDDD): The only change to the rule that should be considered is to confirm that one may take more than one 30(b)(6) deposition. For example, in one case we took one such deposition regarding organizational structure and a second one regarding electronically stored information.

McDonald Toole Wiggins, P.A. (FFFFF): Our firm has defended countless 30(b)(6) depositions on behalf of numerous multi-national and national corporations. We favor the following changes:

1. The rule should limit the number of topics and the duration of the deposition. All too often the notice is voluminous and vague, as well as duplicating prior discovery. The deposition should, in its entirety, be limited to one day of seven hours.

2. Parties should not be foreclosed from seeking additional 30(b)(6) depositions, with leave of court, if they encounter new issues.

3. The scope of the notice should be expressly limited to information within the company's possession, custody or control. It should be forbidden to use the notice to obtain information from non-party subsidiaries, parent companies or foreign entities outside the subpoena power of the court.

4. Work product protection should be explicitly recognized with regard to the documents used to prepare the witness. The courts have not resolved this issue consistently, and for corporations with litigation pending nationwide that is a significant problem.

5. There should be a reasonable minimum notice period -- 30 or 45 days. The court's scheduling order should address this question.

Clay Guise (HHHHH): The rule should include a presumptive limit on the number of topics and on the length of the deposition.

Sherry Rozell (KKKKK): We believe there are additional measures that would improve the functioning of 30(b)(6) depositions:

1. There should be a minimum notice period, which would be better than the current rule's requirement of a "reasonable" period. We suggest 30 days.

2. The rule should require that the parties schedule these depositions at a mutually agreeable time and date. This would boost cooperation.

3. The rule should define a specific number of sufficiently detailed topics that may be included in the notice. We routinely presented with notices that contain 20 to 30 far-reaching topics about all aspects of the case. Often several of these should be sought through written discovery. By placing a limit of 10 topics, the Subcommittee could improve practice. (Five topics should suffice in many cases.)

4. When discovery of the relevant information has already occurred, such as by interrogatory, the rule should prevent duplicative discovery.

5. The rule should expressly prohibit questioning about materials reviewed in preparation for the deposition. This is necessary to protect the integrity of the litigation

process.

Maglio Christopher & Toale (MMMMM): We believe the rule should be left alone. But if the Committee elects to proceed with an amendment, the focus should be on the "I don't know" response. The time, expense, and uncertainty of obtaining a remedy from the judiciary for this behavior often means that this tactic succeeds. Courts often feel that the most they can do is order a second deposition. That sort of order is inadequate, increases costs, and wastes time. The second deposition is likely to be fruitless also. We believe that the remedy is to direct that what the corporation does not know at deposition it cannot know at trial, somewhat like the judicial admission issue raised by the Subcommittee. That result should be written into the rule for the "I don't know" answer.

Henry Kelston (NNNNN): If and when the Committee does consider amending 30(b)(6), I urge that a provision be added stating that more than one deposition of the entity may be noticed where circumstances warrant. It is unrealistic to expect that an early 30(b)(6) deposition to include every topic on which an examination of the company may be needed. Unless more than one may be had, counsel can be forced into a difficult choice -- forgo an early deposition that may simplify and clarify the remaining discovery, or draft a very broad notice to preserve topics for possible later depositions.

Baron & Budd (QQQQQ): There is one issue that occasionally arises which could be addressed in an amendment. There is a split in authority about whether more than one 30(b)(6) deposition is permitted without leave of court. If the rule is to be changed, we suggest that it should be made clear that Rule 30(a)(2)(A)(ii) does not apply to 30(b)(6) depositions, and that multiple depositions of the same party organization can be taken. Among other things, such a change would mean that parties opposing organizational litigants can safely be precise and focused in their topic definitions, knowing that they don't have to cover everything in one omnibus deposition.

American Association for Justice (SSSSS): AAJ suggests that the rule should be fortified with language emphasizing the obligation of the defenant to provide a witness who is properly prepared. The rule could incentivize such preparation by identifying specific sanctions that are triggered by a failure to prepare. In addition, the rules could be clarified to state that the "one deposition only" provision of Rule 30(a) does not apply to organizational depositions. A plaintiff who wants to take an early deposition of the corporation to get the lay of the land for purposes of discovery should not be prevented from taking a later organizational deposition about important specific topics in the case. One solution would be to amend Rule 30(a)(2)(A)(ii) to state that it does not apply to 30(b)(6) deponents.

**THIS PAGE INTENTIONALLY BLANK**

# TAB 4C

**THIS PAGE INTENTIONALLY BLANK**

## Minutes

### Civil Rules Advisory Committee

November 7, 2017

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

35           Judge Bates welcomed the Committee and observers to the  
36 meeting. He noted that two members have joined the Committee.  
37 Ariana Tadler has attended many past meetings and participated  
38 actively as an observer; she is well known. Professor Spencer,

Minutes  
Civil Rules Committee  
November 7, 2017  
page -2-

39 of the University of Virginia, has substantial rules experience  
40 and has written widely on rules subjects.

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

50 *April 2017 Minutes*

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

54 *Legislative Report*

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



71 *Rule 30(b)(6)*

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

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

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

93 Third, most of the issues get worked out. But the problem  
94 is that there is no established process for working them out  
95 before expending a great deal of time and cost. These reports  
96 are consistent with the common observation that judges seldom  
97 encounter these problems – the problems are there, but are  
98 resolved, often at high cost, without taking them to a judge.

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

108 provisions governing the number of depositions and the duration  
109 of a single deposition.

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

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

128 (6) *Notice of Subpoena Directed to an Organization.*  
129 In its notice or subpoena, a party may name as  
130 the deponent a public or private corporation, a  
131 partnership, an association, a governmental  
132 agency, or other entity and must describe with  
133 reasonable particularity the matters for  
134 examination. Before [or promptly after] giving  
135 the notice or serving a subpoena, the party must  
136 [should] in good faith confer [or attempt to  
137 confer] with the deponent about the number and  
138 description of the matters for examination. The  
139 named organization must then designate one or  
140 more officers, directors, or managing agents, or  
141 designate other persons who consent to testify on  
142 its behalf, and it may set out the matter on  
143 which each person designated will testify. \* \* \*

144 In addition, the Subcommittee also considered adding a  
145 direction in Rule 26(f)(2) that in conferring the parties should  
146 "consider the process and timing of [contemplated] depositions

Minutes  
Civil Rules Committee  
November 7, 2017  
page -5-

147 under Rule 30(b)(6)." It recommends the Rule 30(b)(6) proposal  
148 for further development. The Rule 26(f)(2) proposal bears  
149 further discussion, but may be put aside as unnecessary.

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

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

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

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

182 A subcommittee member stated that the Rule 26(f) proposal  
183 is not a bad idea, but it is not necessary. The present general  
184 language of Rule 26(f) calling for a discovery plan covers

Minutes  
Civil Rules Committee  
November 7, 2017  
page -6-

185 Rule 30(b)(6) along with other discovery questions; it is indeed  
186 odd to single out one particular subdivision of one discovery  
187 rule for specific attention. He does support the 30(b)(6)  
188 proposal.

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

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

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

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

217 Judge Bates raised a different question: We continually  
218 hear that judges do not often encounter Rule 30(b)(6) disputes.  
219 Is there a prospect that requiring lawyers to confer will lead  
220 to more litigation about the disputes, so judges will see more  
221 of them? Judge Ericksen and Professor Marcus responded that  
222 while there might be a flurry of activity during the early days

Minutes  
Civil Rules Committee  
November 7, 2017  
page -7-

223 of an amended rule, the long-term goal is to reduce the  
224 occasions to go to the judge. Still, "judge involvement can be  
225 good." Something like the proposed process happens now, without  
226 generating much work for judges.

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

231 Attention turned to the question whether the rule should be  
232 satisfied by an attempt to confer. A judge observed that a  
233 suggestion in a rule will help only if it encourages lawyers to  
234 talk early. "I've been impressed by the ability of lawyers to  
235 avoid conferring." A rule provision that requires conferring  
236 may lead to protracted avoidance. A Subcommittee member agreed  
237 that "lawyers are really good at avoiding conferring." Does  
238 that mean that a lawyer will be able to stymie a deposition by  
239 avoiding a conference? And what of a nonparty deponent – it may  
240 be especially difficult to get it to confer before a subpoena is  
241 served.

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

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

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

Minutes  
Civil Rules Committee  
November 7, 2017  
page -8-

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

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

268 Another question was raised: should the conference include  
269 discussion of who the witnesses will be? The draft Committee  
270 Note suggests this may be useful; should it be added to rule  
271 text? A Subcommittee member said that the Subcommittee had  
272 considered this, as well as other subjects addressed in the Note  
273 – how many witnesses there will be for the deponent, and how  
274 much time for examination. A Committee member agreed that it is  
275 useful to discuss who the witnesses will be. That can lead to  
276 discussions whether this is an appropriate witness – indeed the  
277 party noticing the deposition may already have documents or  
278 other information suggesting that a different witness would be  
279 more appropriate. Or it may be that discussion will show that a  
280 proposed witness should be deposed as an individual, not as a  
281 witness for an organization named as deponent.

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

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

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

306 *Social Security Disability Claims Review*

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

312 The Standing Committee has decided that this subject should  
313 be considered by the Civil Rules Committee. The work has  
314 started. An informal Subcommittee was formed. Initial work led  
315 to a meeting on November 6 with representatives of several  
316 interested groups. The meeting resembled a hearing. Matthew  
317 Wiener, Executive Director and acting Chair of the  
318 Administrative Conference, made the initial presentation.  
319 Asheesh Agarwal, General Counsel of the Social Security  
320 Administration, followed. Kathryn Kimball, counsel to the  
321 Associate Attorney General, represented the Department of  
322 Justice. And Stacy Braverman Cloyd, Deputy Director of  
323 Government Affairs, the National Organization of Security  
324 Claimants' Representatives, presented the perspective of  
325 claimant representatives. Susan Steinman, from the American  
326 Association for Justice, also participated. Professor David  
327 Marcus, co-author with Professor Jonah Gelbach of a massive  
328 study that underlies the ACUS proposal, participated and  
329 commented by video transmission.

330 Social Security disability review annually brings some  
331 17,000 to 18,000 cases to the district courts. The national  
332 average experience is that 45% of these cases are remanded to  
333 the Social Security Administration, including about 15% of the  
334 total that are remanded at the request of the Social Security  
335 Administration.

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

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

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

372 The people who appeared on November 6 did not present a  
373 uniform view. The Administrative Conference believes that a  
374 uniform national rule is desirable. The Social Security  
375 Administration strongly urges this view. But discussion seemed



Minutes  
Civil Rules Committee  
November 7, 2017  
page -11-

376 to narrow the proposal from the highly detailed SSA rule draft  
377 advanced to illustrate the issues that might be considered.  
378 There was not much support for broad provisions governing the  
379 details of briefing, motions for attorney fees, and like  
380 matters. Most of the concern focused on the process for  
381 initiating the action by a filing essentially equivalent to a  
382 notice of appeal; service of process – the suggestion is to  
383 bypass formal service under Rule 4(i) in favor of electronic  
384 filing of the complaint to be followed by direct transmission by  
385 the court to the Social Security Administration; and limiting  
386 the answer to the administrative record. There has been some  
387 concern about how far rules can embroider on the § 405(g)  
388 provision for review by a “civil action” and for filing the  
389 transcript of the record as “part of” an answer.

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

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

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

404 Professor Marcus added that the Conference and other  
405 participants agreed that adopting uniform procedures for  
406 district-court review is not likely to address differences in  
407 remand rates, differences among the circuits in substantive  
408 social-security law, or the underlying administrative phenomena  
409 that lead to these differences. There was an emphasis on  
410 different practices of different judges. Local rules and  
411 individual practices must be consistent with any national rule  
412 that may be developed, but reliance must be placed on implicit  
413 inconsistency, not on explicit rule language forbidding specific

Minutes  
Civil Rules Committee  
November 7, 2017  
page -12-

414 departures that simply carry forward one or many of the present  
415 disparate approaches.

416 Further initial discussion elaborated on the question of  
417 serving notice of the review action. The Social Security  
418 Administration seems to be comfortable with the idea of  
419 dispensing with the Rule 4(i) procedure for serving a United  
420 States agency. Direct electronic transmission of the complaint  
421 by the court is more efficient for them. This idea seems  
422 attractive, but it will be necessary to make sure that it can be  
423 readily accomplished by the clerks' offices within the design of  
424 the CM/ECF system. Some claimants proceed pro se in § 405(g)  
425 review cases, and are likely to file on paper even under the  
426 proposed amendments of Rule 5. The clerk's office then would  
427 have to develop a system to ensure that electronic transmission  
428 to the Administration occurs after the paper is entered into the  
429 CM/ECF system.

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

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

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

Minutes  
Civil Rules Committee  
November 7, 2017  
page -13-

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

458 Professor Coquillette provided a reminder that there are  
459 dangers in framing rules that focus on specific subject-matters.  
460 Transsubstantivity is pursued for very good reasons. The  
461 lessons learned from rather recent attempts to enact "patent  
462 troll" legislation provide a good example. It would be a  
463 mistake to generate Civil Rules that take on the intricacy and  
464 tendentiousness of the Internal Revenue Code. But § 405(g)  
465 review proceedings can be addressed in a way that focuses on the  
466 appellate nature of the action, distinguishing it from the  
467 ordinary run of district-court work. Even then, a rule  
468 addressed to a specific statutory provision runs the risk that  
469 the statute will be amended in ways that require rule  
470 amendments. And above all, the Committee should not undertake  
471 to use the supersession power.

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

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

484 Another judge observed that the importance of disability  
485 review cases is marked by the fact that they are one of the five  
486 categories of matters included in the semi-annual "six month"  
487 reports. The event that triggers the six-month period occurs  
488 after the initial filing, so a case is likely to have been  
489 pending for nine or ten months before it must be included on the  
490 list, but the obligation to report underscores the importance of

Minutes  
Civil Rules Committee  
November 7, 2017  
page -14-

491 prompt consideration and disposition. There is at least a sense  
492 that the problems of delay arise in the agency, not in the  
493 courts.

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

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

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

511 Another judge renewed the question: Do the proposals for  
512 uniform rules deviate from the principle that counsels against  
513 substance-specific rules?

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

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

522 A judge responded that one reason to have local rules  
523 arises from the lack of a national rule. The Northern District  
524 of Illinois has a new rule for serving the summons and complaint  
525 in these cases. "It's all about consent; the Social Security  
526 Administration consents all the time." But "local rules are  
527 antithetical to national uniformity." If national rules save

528 time for the Social Security Administration, that will yield  
529 benefits for claimants and for the courts. Another judge  
530 emphasized that local rules must be consistent with the national  
531 rules, but it can be difficult to police. At the same time,  
532 still another judge noted that the Federal Judicial Center can  
533 educate judges in new rules. And a fourth judge observed that  
534 local culture makes a difference, but "some kind of uniformity  
535 helps."

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

542 *Third-Party Litigation Financing*

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

548 The impetus for this topic comes from a proposal first  
549 advanced and discussed in 2014, and discussed again in 2016.  
550 Each time the Committee thought the question important, but  
551 determined that it should be carried forward without immediate  
552 action. The Committee had a sense that the use of third-party  
553 financing is growing, perhaps at a rapid rate, and that it  
554 remains difficult to learn as much as must be learned about the  
555 relationships between third-party financiers and litigants. It  
556 is difficult to develop comprehensive information about the  
557 actual terms of financing agreements. The questions have been  
558 renewed in a submission by the U.S. Chamber Institute for Legal  
559 Reform and 29 other organizations.

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

562 any agreement under which any person, other than an  
563 attorney permitted to charge a contingent fee  
564 representing a party, has a right to receive

Minutes  
Civil Rules Committee  
November 7, 2017  
page -16-

565 compensation that is contingent on, and sourced from,  
566 any proceeds of the civil action, by settlement,  
567 judgment or otherwise.

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

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

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

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

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

595 The first question is the familiar drafting question. How  
596 would a rule define the arrangements that must be disclosed?  
597 Inevitably, a first draft proposal suggests possible  
598 difficulties. The language would reach full or partial  
599 assignment of a plaintiff's claim, a circumstance different from  
600 the general focus of the proposal. It also might reach  
601 subrogation interests, such as the rights of medical-care

Minutes  
Civil Rules Committee  
November 7, 2017  
page -17-

602 insurers to recover amounts paid as benefits to the plaintiff.  
603 It rather clearly reaches loans from family or friends. So too,  
604 it reaches both agreements made directly with a party and  
605 agreements that involve an attorney or law firm.

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

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

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

Minutes  
Civil Rules Committee  
November 7, 2017  
page -18-

640 The concern with influence on settlement is a variation on  
641 the control theme. The fear is that litigation finance firms  
642 will influence settlements in various directions. At times the  
643 pressure may be to accept an early settlement offer that is  
644 unreasonably inadequate from the litigant's perspective, but  
645 that ensures a safe and satisfactory return for the lender. An  
646 alternative concern is that at other times a lender will exert  
647 pressure to reject an early and reasonable settlement offer in  
648 hopes that, under the terms of the agreement, it will win more  
649 from a higher settlement or at trial. Funders respond that it  
650 is in their interest to encourage plaintiffs to accept  
651 reasonable settlement offers. They avoid terms that encourage a  
652 plaintiff to take an unreasonable position.

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

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

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

674 Disclosure also is challenged on the ground that it may  
675 interfere with application of the rules governing  
676 proportionality in discovery. Rule 26(b)(1) looks to the  
677 parties' resources as one factor in calculating proportionality.  
678 The concern is that a judge who knows of third-party financing



679 may look to the financing as a resource that justifies more  
680 extensive and costly discovery, and even may be inclined to  
681 disregard the terms of the financing agreement by assuming there  
682 is a source of unlimited financing.

683 Finally, it is urged that third-party financing will  
684 encourage frivolous litigation. The financiers respond that they  
685 have no interest in funding frivolous litigation – their success  
686 depends on financing strong claims.

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

690 There is a more positive dimension to third-party funding.  
691 Litigation is expensive. It can be risky. Parties with viable  
692 claims often are deterred from litigation by the cost and risk.  
693 Important rights go without redress. Third-party financing  
694 serves both immediate private interests and more general public  
695 interests by enabling enforcement of the law. It should be  
696 welcomed and embraced, no matter that defendants would prefer  
697 that plaintiffs' rights not be enforced.

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

714 Professor Marcus suggested that it is important to  
715 recognize that proponents of disclosure may have "collateral  
716 motives." He noted that third-party financing takes many forms,

717 and that the forms probably will evolve. Financing may come to  
718 be available to defendants: how should a rule reach that? More  
719 specific points of focus should be considered. Rule 7.1 could  
720 be broadened to add third-party financiers to the mandatory  
721 disclosure statement. Rule 23(g)(1)(A)(iv) already requires the  
722 court to consider the resources that counsel will commit to  
723 representing a proposed class; it could be broadened to require  
724 disclosure of third-party funding. Third-party financing also  
725 might bear on determining fees for a class attorney under  
726 Rule 23(h).

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

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

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

737 Professor Coquillette offered several thoughts.

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

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

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

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

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

779 His first observation was that disclosure of insurance is  
780 unlike the general scope of discovery in Rule 26(b)(1). There  
781 are reasons to question whether disclosure of third-party  
782 funding should be treated as a phenomenon so much like insurance  
783 as to require disclosure. "We need to know exactly what we're  
784 dealing with" Third-party funding creates risks, including  
785 ethical risks. The duty of loyalty may be affected. The lawyer  
786 still must let the client make the decision whether to settle,  
787 but third-party financing may generate pressures that make  
788 settlement advice more complex. Disclosure, of itself, will not  
789 bear on these problems. Many steps must be taken from the  
790 disclosure to make any difference.

791 "Warring camps" are involved. The proponents of disclosure  
792 have strategic interests. They would like to outlaw third-party

793 financing because it enables litigation that would not otherwise  
794 occur. There is no question that funding enables lawsuits.  
795 Many of them are meritorious, though perhaps not all. In  
796 present practice, defendants seek discovery about financing.  
797 Objections are made. The law will evolve, and may come to allow  
798 routine discovery. There are settings in which funding can  
799 become relevant, as in the class-action context noted earlier.  
800 There may be guidance in decisional law now, but "I'm not aware  
801 of it."

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

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

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

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

Minutes  
Civil Rules Committee  
November 7, 2017  
page -23-

831 explicit or implicit understandings that repayment will depend  
832 on success.

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

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

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

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

866 Professor Coquillette observed that "we need to learn  
867 more." If work goes forward, it will be important to learn what  
868 states are doing about third-party financing. The states are

869 better equipped than the federal courts are to deal with ethical  
870 issues such as conflicts of interest and control.

871 A judge suggested that it may not be useful to require  
872 disclosure of information when the courts are not equipped to do  
873 anything with the information. An example is suggested by  
874 litigation in which a defendant, after a number of unfavorable  
875 rulings, retained as additional counsel a law firm that included  
876 the judge's spouse. Rather than countenance this attempt at  
877 judge shopping, the chief judge ordered that the new firm could  
878 not play any role in the litigation. Something comparable might  
879 happen with third-party financing, without the opportunity for  
880 an analogous cancellation of the financing agreement. It does  
881 not seem likely that judges will invest in enterprises that  
882 engage in third-party financing, but there may be a risk,  
883 especially with networks of related interests. Judge Bates  
884 noted that similar concerns had emerged with filing amicus  
885 briefs on appeal.

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

891 *Rules for MDL Proceedings*

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

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

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

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

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

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

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

Minutes  
Civil Rules Committee  
November 7, 2017  
page -26-

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

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

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

971 A quite different proposal was submitted by John Rabiej,  
972 Director of the Center for Judicial Studies at the Duke  
973 University School of Law. This proposal aims only at the  
974 largest MDL aggregations, those consisting of 900 or more cases.  
975 At any given time, there tend to be about 20 of these  
976 proceedings. Combined, they average around 120,000 individual  
977 cases. There are real advantages in consolidated pretrial  
978 discovery proceedings. But when the time has come for  
979 bellwether trials, the proposal would split the aggregate  
980 proceeding into five groups, each to be managed by a separate  
981 judge. Separate steering committees would be appointed. The



Minutes  
Civil Rules Committee  
November 7, 2017  
page -27-

982 anticipated advantage is that dividing the work would increase  
983 the opportunities for individualized attention to individual  
984 cases, although the large numbers involved might dilute this  
985 advantage.

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

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

996 Professor Marcus reported that Professor Andrew Bradt has  
997 worked through the history of § 1407. The history shows a  
998 tension in what the architects thought it would come to mean for  
999 mass torts. The reality today presents "hard calls. The stakes  
1000 are enormous, the pressures great. Judges have provided a real  
1001 service."

1002 Judge Bates predicted that a rulemaking project would bring  
1003 out "two clear camps. We will not find agreement."

1004 The appeals proposals were the last topic approached in  
1005 introducing these topics. The suggestions in the submissions to  
1006 this Committee are no more than partially developed. It is  
1007 clear that the proponents want opportunities to appeal from  
1008 pretrial rulings on *Daubert* issues, preemption motions,  
1009 decisions to proceed with bellwether trials, judgments in  
1010 bellwether trials, and "any ruling that the FRCP do not apply to  
1011 the proceedings." It is not clear whether all such rulings  
1012 could be appealed as a matter of right, or whether the idea is  
1013 to invoke some measure of trial-court discretion in the manner  
1014 of Civil Rule 54(b) partial final judgments. Nor is it clear  
1015 what criteria might be provided to guide any discretion that  
1016 might be recognized. One of the amendments of § 1407 embodied  
1017 in H.R. 985 would direct that the circuit of the MDL court  
1018 "shall permit an appeal from any order" "provided that an  
1019 immediate appeal of the order may materially advance the

Minutes  
Civil Rules Committee  
November 7, 2017  
page -28-

1020 ultimate termination of one or more civil actions in the  
1021 proceedings." The proviso clearly qualifies the "shall permit"  
1022 direction, but the overall sense of direction is uncertain. The  
1023 Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that  
1024 define what are final judgments for purposes of § 1291 and to  
1025 create new categories of interlocutory appeals. If the  
1026 Committee comes to consider rules that expand appeal  
1027 jurisdiction, it likely will be wise to coordinate with the  
1028 Appellate Rules Committee.

1029 The first suggestion when discussion was opened was that  
1030 these questions are worth looking into. The Committee may, in  
1031 the end, decide to do nothing. "Some of the ideas won't fly."  
1032 But it is worth looking into.

1033 Judge Bates noted that almost all of the input has been  
1034 from the defense side. The Committee has yet to hear the  
1035 perspectives of plaintiffs, the Judicial Panel on Multidistrict  
1036 Litigation, and MDL judges.

1037 A Committee member noted that his experience with MDL  
1038 proceedings has mostly been in antitrust cases, "on both sides  
1039 of the docket," and may not be representative. "The challenges  
1040 for judges are enormous." Help can be found in the Manual for  
1041 Complex Litigation; in appointing special masters; in seeking  
1042 other consultants; and in adaptability. Still, judges' efforts  
1043 to solve the problems may at times seem unfair. It is difficult  
1044 to be sure about what new rules can contribute. If further  
1045 information is to be sought before deciding whether to proceed,  
1046 where should the Committee seek it?

1047 Judge Bates suggested that it may be difficult to arrange a  
1048 useful conference of multiple constituencies in the course of a  
1049 few months or even a year. The Committee can reach out by  
1050 soliciting written input. It can engage in discussions with the  
1051 Judicial Panel. It can reach out to judges with extensive MDL  
1052 experience. Judge Fogel noted that the FJC and the Judicial  
1053 Panel have scheduled an event in March. "The timing is very  
1054 good." That could provide an excellent opportunity to learn  
1055 more.

1056 Another judge suggested that judges that have managed MDL  
1057 proceedings with large numbers of cases might have useful ideas

Minutes  
Civil Rules Committee  
November 7, 2017  
page -29-

1058 about what sort of rules would help. "We have nowhere near the  
1059 information we would need to have" to work toward rules  
1060 proposals. At least a year will be required to gather more  
1061 information.

1062 A Committee member echoed this thought. "We're far from  
1063 being ready to think about this." She is not opposed to looking  
1064 into these questions, "but we must hear from all sides."

1065 Another judge noted that she has an MDL proceeding with  
1066 more than 4,000 members. She has 17 *Daubert* hearings scheduled.  
1067 "It's a lot of pressure" to get things right. We should think  
1068 about working with the Appellate Rules Committee. Another judge  
1069 described an MDL proceeding with 3,200 claimants and 20 *Daubert*  
1070 hearings.

1071 A Committee member asked whether the Judicial Panel has  
1072 accumulated information about MDL practices.

1073 Judge Campbell described resources available to MDL judges.  
1074 The Judicial Panel has a web site with a lot of helpful  
1075 information and forms. The Judicial Panel staff attorneys are  
1076 very helpful about model orders. The Manual for Complex  
1077 litigation is useful. There are annual conferences for MDL  
1078 judges. And lawyers "bring a lot to the table." Experienced  
1079 MDL lawyers reach agreement much more often than they disagree.  
1080 But the question of appeal opportunities is important and should  
1081 be explored. It would be very hard to manage an MDL if there are  
1082 multiple opportunities to appeal. As an example, in one massive  
1083 securities case a § 1292(b) appeal was accepted from an order  
1084 entered in August, 2015. The appeal remains pending. The case  
1085 has been essentially dead while the appeal is undecided.  
1086 "Managing with appeals is a tough balance."

1087 Judge Campbell continued by taking up the question of means  
1088 for early procedures to weed out frivolous cases. In his 3,200-  
1089 claimant MDL there are four new claims filed every day. It is  
1090 impossible in this setting to have evidential showings for each  
1091 claimant. It would be all the more impossible in cases with  
1092 15,000 claimants and 20 new claimants every day. The lawyers  
1093 seem to know there are frivolous cases, and bargain toward  
1094 settlement with this in mind. They often establish a claims  
1095 process that weeds out frivolous claims. What is the need to

Minutes  
Civil Rules Committee  
November 7, 2017  
page -30-

1096 weed them out at an earlier stage? The flow of new cases has no  
1097 effect on discovery, on the day-to-day life of the case. It  
1098 will be useful to learn why early screening is important.

1099 Another judge seconded these observations. "I don't think  
1100 it makes a difference to sort out the frivolous cases at the  
1101 beginning. We know they're there. Weeding them out takes  
1102 effort. Weeding them out before discovery is especially  
1103 doubtful."

1104 An observer from a litigation funder asked what is the  
1105 overlap between MDL procedures and third-party financing?  
1106 Judge Bates noted that one of the MDL submissions expressly  
1107 incorporates the disclosure proposal advanced for third-party  
1108 financing.

1109 John Rabiej described his proposal. The Center for  
1110 Judicial Studies has been holding conferences since 2011. Data  
1111 bases show that a large share of all the federal-court case load  
1112 is held by 20 judges. "This holds over time. There is a  
1113 business model that will endure for the foreseeable future."  
1114 They are planning a conference for April, asking lawyers to  
1115 address problems in practice. The Center has prepared a set of  
1116 best practices guidelines that are being updated. It is a  
1117 mistake to underestimate the burden that frivolous claims  
1118 imposes on defendants. The problem is the frivolous cases, not  
1119 the "gray-area" cases. Reliable sources suggest that in big  
1120 MDLS of some types 20% or more of the claims are "zeroed out."

1121 There is some momentum in practice for providing some  
1122 minimum information about each claimant at the outset. In drug  
1123 and medical products cases, for example, the information would  
1124 show a prescription for the medicine, and a doctor's diagnosis.

1125 MDL proceedings are a big part of the caseload. "The Civil  
1126 Rules are not involved." Judges like the status quo because  
1127 they like the discretion they have. "Plaintiffs are basically  
1128 happy, although they recognize there is room for rules on some  
1129 topics such as the number of lawyers on a steering committee.  
1130 The Civil Rules Committee should be involved in this."

Minutes  
Civil Rules Committee  
November 7, 2017  
page -31-

1131 Judge Bates agreed that the Committee needs to learn more  
1132 about the basis for the positions taken than the simple facts of  
1133 what plaintiffs say, what defendants say, what MDL judges say.

1134 Responding to a question, John Rabiej said that he has not  
1135 found anyone who wants to talk about third-party financing in  
1136 the MDL setting. It would be difficult for the Center to devise  
1137 best practices for third-party financing. "It does come up in  
1138 MDL proceedings - funders even direct attorneys where to file  
1139 their actions."

1140 Susan Steinman noted that most American Association for  
1141 Justice members work on contingent-fee arrangements. "They have  
1142 no incentive to take cases that are not meritorious." Third-  
1143 party financing is not an issue to be addressed in the Civil  
1144 Rules. "It is a business option some members choose." There  
1145 may be some areas of disagreement among plaintiffs, but they  
1146 tend to have negative views of disclosure.

1147 Alexander Dahl said that weeding out frivolous claims is an  
1148 important part of the system. "Rules 12 and 56 are designed for  
1149 this." In MDL proceedings, the weeding-out function is still  
1150 more important. "It is numbers that make them complex." The  
1151 numbers are inaccurate in ways that we do not know. "Numbers  
1152 raise the stakes and pressures." "Some courts see MDL  
1153 proceedings as a mechanism for settlement, not truth-seeking.  
1154 Settlements require a realistic understanding of what the case  
1155 is worth." And there is an important regulatory aspect. A  
1156 publicly traded company has to disclose litigation risks. If it  
1157 loses a bellwether trial, it has to disclose the 15,000 other  
1158 cases, even though many of them are bogus, inflating the risk  
1159 exposure.

1160 Alexander Dahl also provided a reminder that the proposal  
1161 to disclose litigation-financing agreements calls only for  
1162 disclosure. There is no need to resolve all the mysteries that  
1163 have been identified in discussing third-party financing.

1164 A judge asked whether a "robust fact sheet" would satisfy  
1165 the need for early screening? She requires them. A defendant  
1166 can look at them. Alexander Dahl replied that there are a lot  
1167 of cases where that does not happen. When it does happen, it  
1168 can work well. What is important is uniformity of practice.

Minutes  
Civil Rules Committee  
November 7, 2017  
page -32-

1169 A Committee member observed that not all MDL proceedings  
1170 involve drugs or medical devices.

1171 Another Committee member asked what is the "simple  
1172 disclosure" of litigation-funding that is proposed? Alexander  
1173 Dahl replied that the proposal seeks the funding agreement,  
1174 although "the existence of funding is the most important thing."

1175 Judge Campbell noted that he understands the argument for  
1176 early screening. In his big MDL there is a master complaint.  
1177 Each plaintiff files a fact sheet. The defendant carefully  
1178 tracks the fact sheets and identifies suspect cases. "But I  
1179 never see them." The defendants identify the suspect cases in  
1180 bargaining. "How is it feasible for the judge to screen them?"  
1181 Alexander Dahl responded that the use of fact sheets varies.  
1182 Compliance varies. "Often defendants have to gather the  
1183 information on their own." Defendants eventually bring motions  
1184 to dismiss where that is important. Again, "uniformity in  
1185 practice is important, including uniform standards for  
1186 dismissal." Further, we need to know what ineffectual judges  
1187 are doing. The rulemaking process would be beneficial to all  
1188 sides. Rules can allow sufficient flexibility while still  
1189 providing guideposts for cases where guidance is needed.

1190 John Rabiej described an opinion focusing on a proceeding  
1191 with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used  
1192 in many of these cases. That is why lawyers are devising  
1193 procedures to get some kind of fact information. That is all  
1194 they need.

1195 A Committee member asked why is it necessary to consider  
1196 particularized pleading, or motions to dismiss for want of  
1197 meaningful evidence? Why is it not sufficient to apply the  
1198 pleading standards established by the Twombly and Iqbal  
1199 decisions?

1200 Judge Bates summarized the discussion by stating that the  
1201 Committee needs to gather more information. Valuable  
1202 information has been provided, but it is mostly from one  
1203 perspective. The Committee has learned a lot from the comments  
1204 provided this day. But the Committee needs more, particularly  
1205 from the Judicial Panel. The Committee should embark on a six-  
1206 to twelve-month project to gather information that will support

1207 a decision whether to embark on generating new rules. A  
1208 Subcommittee will be appointed to develop this information. For  
1209 the time being, third-party financing will be part of this, at  
1210 least for the MDL framework.

1211 *Rule 16: Role of Judges in Settlement*

1212 A proposal to amend Rule 16 to address participation by  
1213 judges in settlement discussions is made in Ellen E. Deason,  
1214 *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78  
1215 Ohio St.L.J. 73 (2017). The proposal calls for a structural  
1216 separation of two functions – the role of "settlement neutral"  
1217 and the role of the judge in "management and adjudication." The  
1218 judge assigned to manage the case and adjudicate would not be  
1219 allowed to participate in the settlement process without the  
1220 consent of all parties obtained by a confidential and anonymous  
1221 process. The managing-adjudicating judge could, however,  
1222 encourage the parties to discuss settlement and point them  
1223 toward ADR opportunities. A different judge of the same court  
1224 could serve as settlement neutral, providing the advantages of  
1225 judicial experience and balance.

1226 The proposal reflects three central concerns. The judge's  
1227 participation may exert undue influence, at times perceived by  
1228 the parties as coercion to settle. Effective participation by a  
1229 settlement neutral usually requires information the parties  
1230 would not provide to a case-managing and adjudicating judge. If  
1231 the judge gains the information, it will be difficult to ignore  
1232 it when acting as judge. In part for that reason, the parties  
1233 may not reveal information that they would provide to a  
1234 different settlement neutral, impairing the opportunities for a  
1235 fair settlement.

1236 The proposal recognizes contrary arguments. The judge  
1237 assigned to the case may know more about it, and understand it  
1238 better, than a different judge. The parties may feel that  
1239 participation by the assigned judge gives them "a day in court"  
1240 in ways not likely with a different judge or other settlement  
1241 neutral. And the assigned judge may be better able to speak  
1242 reason to unreasonably intransigent parties.

1243 These questions are familiar. Professor Deason notes that  
1244 after exploring these problems both the ABA Model Code of

Minutes  
Civil Rules Committee  
November 7, 2017  
page -34-

1245 Judicial Conduct and the Code of Conduct for United States  
1246 Judges adopted principles that simply forbid coercing a party to  
1247 surrender the right to judicial decision.

1248 These questions are regularly explained in the Federal  
1249 Judicial Center's educational programs for judges, including the  
1250 programs for new judges. Discussion at those programs shows  
1251 that many judges prefer to avoid any involvement with settlement  
1252 discussions. Some, however, believe that they can play an  
1253 important role in facilitating desirable settlements. It may  
1254 well be that judges who have this interest and aptitude play  
1255 important roles.

1256 Judge Bates followed this introduction by noting that this  
1257 suggestion has not come from the bar. "Judges do have a variety  
1258 of perspectives. I would guess that most judges work hard to  
1259 avoid involvement in settlements." Judges often refuse active  
1260 participation, but do encourage the parties to explore  
1261 settlement.

1262 Judge Fogel noted that some judges do become involved in  
1263 settlements, usually with the parties' consent. Some, on the  
1264 other hand, refuse to become involved even if the parties ask  
1265 for help from the judge. Judges divide on the question whether  
1266 it is even appropriate to urge the parties to consider  
1267 settlement. "Judges have different temperaments and skill  
1268 sets." The Code of Conduct gives pretty good guidance on the  
1269 need to avoid coercion. "We should educate judges to be alert  
1270 to uses of 'soft power.'" It is difficult to see how a court  
1271 rule could improve on the present diversity of approaches.

1272 Another judge fully agreed. "The key is coercion, and  
1273 judges need to be aware of subtle pressure." Most often the  
1274 judge assigned to the case assigns settlement matters to a  
1275 magistrate judge. But as a case comes close to trial, and at  
1276 the start of trial, the judge knows a lot about the case, and  
1277 can really help the parties reach settlement. The proposed rule  
1278 "would have my colleagues up in arms."

1279 A Committee member described one case in which, before a  
1280 jury trial, the judge told one party that something bad would  
1281 happen if the case were not settled. Other than that, he had  
1282 never encountered a judge who pressed one party to settle. "But



1283 as it gets closer to trial – often a jury trial – there may be  
1284 pressure on both sides.”

1285 A judge suggested that it is easy to abide by the command  
1286 of Criminal Rule 11(c)(2) that the judge not participate in  
1287 discussions of plea agreements. “But for civil cases, where  
1288 lawyers want the judge to talk to them, it is hard to draft a  
1289 rule that would not make me nervous.”

1290 Another judge observed that there are different pressures  
1291 in bankruptcy and other bench trials.

1292 The discussion concluded by deciding to remove this  
1293 proposal from the agenda.

1294 *Publication Under Rule 71.1(d)(3)(B)(i)*

1295 This proposal is easily illustrated, but then should be fit  
1296 into the full context of Rule 71.1(d). Rule 71.1(d)(3)(B)(i)  
1297 directs that when notice is published in a condemnation action,  
1298 the notice be published:

1299 in a newspaper published in the county where the  
1300 property is located or, if there is no such newspaper,  
1301 in a newspaper with general circulation where the  
1302 property is located.

1303 The proposal would eliminate the preference for a newspaper  
1304 published in the county where the property is located, calling  
1305 only for publication “in a newspaper with general circulation  
1306 [in the county] where the property is located.”

1307 Under Rule 71.1 the complaint in a proceeding to condemn  
1308 real or personal property is filed with the court. A “notice”  
1309 is served on the owners. The notice provides basic information  
1310 about the property and condemnation, and information about the  
1311 procedure to answer or appear. Service of the notice must be  
1312 made in accordance with Rule 4. But the notice is to be served  
1313 by publication if a defendant cannot be served because the  
1314 defendant’s address remains unknown after diligent inquiry  
1315 within the state where the complaint is filed, or because the  
1316 defendant resides outside the places where personal service can  
1317 be made. Notice must be mailed to a defendant who has a known  
1318 address but who cannot be served in the United States.

Minutes  
Civil Rules Committee  
November 7, 2017  
page -36-

1319           The suggestion to delete the preference for publication in  
1320 a newspaper published in the county where the property is  
1321 located picks up from other rules for publishing notice that  
1322 require only that the newspaper be one of general circulation in  
1323 the county. Several provisions of the Uniform Probate Code are  
1324 cited, along with New Mexico court rules. The New Mexico rules  
1325 add a further twist. Federal Rule 4(e)(1) and (h)(1),  
1326 incorporated in Rule 71.1(d)(3)(B)(i), allow service by  
1327 "following state law." The New Mexico rule allowing service by  
1328 publication in a newspaper of general circulation in the county,  
1329 when incorporated in Rule 4, creates a conflict with the  
1330 Rule 71.1(d)(3)(B)(i) priority for a newspaper published in the  
1331 county.

1332           This suggestion raises empirical questions that cannot  
1333 easily be answered. It is easy to point to counties that are  
1334 the place of publication of intensely local newspapers that have  
1335 limited circulation. And it is easy to point to out-of-county  
1336 newspapers that have much broader circulation within the county.  
1337 In many counties there may be more than one out-of-county  
1338 newspaper of "general" circulation - one question might be  
1339 whether a rule should attempt to require publication in the  
1340 newspaper of broadest circulation. But a different empirical  
1341 question follows. Where will people interested in local legal  
1342 notices look? Does it make sense to recognize publication in a  
1343 newspaper of nationwide circulation, or is it highly unlikely  
1344 that a resident of Sanillac County, Michigan, would look to USA  
1345 Today for local legal notices? A participant looked at the  
1346 current issue of a local Sanillac County newspaper and found  
1347 eight legal notices. Perhaps readers indeed will look first at  
1348 a locally published newspaper.

1349           A second question is part theoretical, part empirical. In  
1350 adapting the rules to the displacement of paper by electronic  
1351 communication, the Committee has avoided many issues similar to  
1352 the questions raised by this modest proposal. What counts as a  
1353 "newspaper"? Should some form, or many forms, of electronic  
1354 media be recognized? And where is a newspaper "published,"  
1355 particularly those that appear daily in electronic form but only  
1356 one or two days a week in paper form? What should be done with  
1357 a newspaper that is published daily on paper, and also - perhaps  
1358 continually updated - on an electronic platform? Should a rule

Minutes  
Civil Rules Committee  
November 7, 2017  
page -37-

1359 direct publication in both forms, direct one form or the other,  
1360 or leave the choice to the government?

1361 It would be possible to recommend the proposed amendment  
1362 without addressing these broader questions. But they must at  
1363 least be considered in the process of framing a recommendation.

1364 The Department of Justice does not object to the proposal.

1365 A Committee member asked whether the proposed change raises  
1366 due process problems. The Supreme Court has recognized that as  
1367 compared to other means of notice, publication is a mere feint.  
1368 But publication is recognized in circumstances that make better  
1369 notice impracticable. So it is for a defendant in a  
1370 condemnation action who has no known address.  
1371 Rule 71.1(d)(3)(B)(i) begins the compromise by demanding that an  
1372 address be sought only by diligent inquiry within the state  
1373 where the complaint is filed. Publication is required only for  
1374 "at least 3 successive weeks." The test is nicely expressed by  
1375 asking what would satisfy a prudent person of business, counting  
1376 the pennies but anxious to accomplish notice. In this setting,  
1377 this simply returns the inquiry to the empirical questions: are  
1378 there knowable advantages so general as to illuminate the choice  
1379 between locally published newspapers and others that have  
1380 general local circulation?

1381 A judge expressed reluctance to change the rule. "You know  
1382 to look to the local newspaper for legal notices," even when a  
1383 newspaper published in a nearby county has broader circulation  
1384 in the county.

1385 These exchanges prompted a broader question: Should the  
1386 Committee look at broader questions of publication by notice "in  
1387 the world we live in"? The Committee agreed that the time has  
1388 not come to address these questions.

1389 Judge Bates summarized the discussion by suggesting that he  
1390 and the Reporters will consider this proposal further. The  
1391 present rule language is clear. The question is the wisdom of  
1392 its choices. And it may be difficult to answer the empirical  
1393 questions that underlie the choice, perhaps prompting a decision  
1394 to do nothing.

1395 *IAALS FLSA Initial Discovery Protocol*

Minutes  
Civil Rules Committee  
November 7, 2017  
page -38-

1396 The Institute for the Advancement of the American Legal  
1397 System has submitted for consideration "and hopeful endorsement"  
1398 the INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED  
1399 AS COLLECTIVE ACTIONS.

1400 The Protocols were developed by the people and process that  
1401 developed the successful Initial Discovery Protocols for  
1402 Employment Cases Alleging Adverse Action. IAALS was the overall  
1403 sponsor. The drafting group included equal numbers of lawyers  
1404 who typically represent plaintiffs and lawyers who typically  
1405 represent defendants. Joseph Garrison headed the plaintiff  
1406 team, while Chris Kitchel headed the defendant team. Judge John  
1407 Koeltl and Judge Lee Rosenthal again participated actively.

1408 The FLSA protocols appear to be headed for successful  
1409 adoption by individual judges, just as the individual employment  
1410 protocols have proved successful. The question for the  
1411 Committee is whether to find some means of supporting and  
1412 encouraging adoption.

1413 The Committee can act officially only in its role in the  
1414 Rules Enabling Act process by recommending rules to the Standing  
1415 Committee. Formal endorsement of worthy projects does not fit  
1416 within this framework, just as the Committee cannot revise  
1417 earlier Committee Notes without proposing an amendment of rule  
1418 text.

1419 Judge Bates echoed this introduction, noting that  
1420 rulemaking is not called for and asking how can the Committee  
1421 approve or encourage this project?

1422 Judge Campbell noted that with the individual employee  
1423 protocols, the judges on the Committee "took them home," using  
1424 them and encouraging other judges to use them. "I would  
1425 encourage our judges to do this again."

1426 Professor Coquillette agreed that there are many problems  
1427 with acting officially. "Judge Campbell's suggestion is  
1428 practical and gets results."

1429 Joseph Garrison reported that plaintiffs' attorneys in  
1430 Connecticut have changed their preference for state courts since  
1431 the federal court adopted the individual employee protocols.  
1432 They now prefer federal court because they get a lot of early

1433 discovery, often leading to early settlements. Participation by  
1434 judges is important. It would be good to have this Committee's  
1435 members, and members of the Standing Committee, pursue the new  
1436 protocols enthusiastically. These protocols will be more  
1437 important in individual FLSA cases than in individual employment  
1438 cases because FLSA cases tend to involve small claims and  
1439 benefit from prompt closure. Protracted litigation generates  
1440 problems with attorney fees.

1441 Brittany Kauffman, for IAALS, expressed the hope that the  
1442 Federal Judicial Center will publish the FLSA protocols.  
1443 Working with IAALS to get the word out will be helpful.

1444 A Committee member noted that the 30-day timeline in the  
1445 FLSA protocols will prove difficult for the Department of  
1446 Justice.

1447 Judge Bates thanked the participants in the FLSA protocols  
1448 for putting them together. The advice provided by  
1449 Judge Campbell and Professor Coquillette is wise.

1450 *Pilot Projects*

1451 Judge Bates reported on progress with the two Pilot  
1452 Projects.

1453 The Mandatory Initial Discovery project has been launched  
1454 in two courts. It became effective in the District of Arizona  
1455 on May 1, 2017. Many judges in the Northern District of  
1456 Illinois adopted it, effective on June 1, 2017. The pilot  
1457 discovery provisions require answers that reveal unfavorable  
1458 information that a party would not use in the case. And they  
1459 require detailed information be provided without waiting to be  
1460 asked. The provisions are thoroughly developed.

1461 Judge Campbell reported that Judge Grimm oversaw the effort  
1462 of developing the Mandatory Initial Discovery project. It is  
1463 great work. It was adopted in the District of Arizona by  
1464 general order. The time to provide the initial responses, 30  
1465 days, is not deferred by motions except for those that go to  
1466 jurisdiction. The court did a lot of work to make sure the  
1467 CM/ECF system would record the events, supporting research by  
1468 Emery Lee that will assess the effects of the pilot. Dr. Lee  
1469 also will ask lawyers in closed cases to respond to a brief

Minutes  
Civil Rules Committee  
November 7, 2017  
page -40-

1470 survey about their experiences, about how mandatory initial  
1471 discovery affected their cases. The Arizona bar is used to  
1472 sweeping initial disclosure, so implementing initial discovery  
1473 has gone smoothly. Almost all Rule 26(f) reports reflect  
1474 compliance. The District's judges met in September and modified  
1475 the general order to address some problems. The only downside  
1476 has been that the District has had to suspend its adoption of  
1477 the individual employment discovery protocols because they are  
1478 inconsistent with the pilot project.

1479 Judge Dow reported that the judges in the Northern District  
1480 of Illinois have followed in the wake of the District of  
1481 Arizona. Between 16 and 18 active judges, one senior judge, and  
1482 all magistrate judges are participating in the pilot;  
1483 collectively they account for about 80% of the cases in the  
1484 District. The project is progressing smoothly. Lawyers have  
1485 rarely had questions. And there have been few problems. When  
1486 it is not feasible to complete the mandatory initial discovery  
1487 in the prescribed time, additional time is allowed. "We aren't  
1488 asking for production of 30 terabytes in 30 days." Some general  
1489 counsel have been uncomfortable with a new practice - signing  
1490 their filings. As compared to Arizona, the project will begin  
1491 differently in Illinois because the lawyers are not accustomed  
1492 to this kind of initial disclosure or discovery. For the  
1493 judges, Judge Dow and Judge St. Eve provide guidance. "If the  
1494 culture changes so lawyers do early case evaluations after they  
1495 get the discovery responses, we will have made a difference."  
1496 In response to a question, he said that lawyers do cooperate.

1497 Judge Campbell noted that Arizona judges report that most  
1498 issues with their sweeping initial disclosure rule arise on  
1499 summary judgment or at trial, when objections are made to  
1500 evidence that was not disclosed. "If you allow the evidence  
1501 rather than exclude it, word gets out fast." In Arizona as in  
1502 Illinois, more time to make the initial discovery is allowed in  
1503 cases that involve massive information. In turn that prompts  
1504 more active case management.

1505 A Committee member expressed a hope that the experience in  
1506 Arizona and Illinois can be used to leverage the project for  
1507 adoption in other districts. Judge Dow noted that Arizona and  
1508 Illinois have already "ironed out a lot of bugs." It will be a  
1509 lot easier for other districts to sign on.

Minutes  
Civil Rules Committee  
November 7, 2017  
page -41-

1510 Judges Bates and Campbell responded that although the  
1511 initial experience may help, "we have tried." Personal  
1512 approaches have been made to about 40 districts. "It is not  
1513 always a tough sell initially, but when it gets to discussion by  
1514 a full court, issues arise." Work load, vacancies, and local  
1515 culture are obstacles.

1516 Judge Bates turned to the Expedited Procedure Pilot. This  
1517 project is designed simply to expand adoption of practices that  
1518 many judges follow now. But no district has yet adopted the  
1519 project. Again, problems arise from the culture of the bar or  
1520 court, work load, and like obstacles. A concerted effort is  
1521 being made to enlist some districts. Judge Sutton – former  
1522 Chair of the Standing Committee – has engaged in the quest, and  
1523 Judge Zouhary – a member of the Standing Committee – has joined  
1524 the effort. They are prepared to consider more flexibility in  
1525 the deadlines set by the project, and to accept participation by  
1526 a district that cannot enlist all of its judges. In addition,  
1527 the Federal Judicial Center study will be expanded to look at  
1528 experience in districts that already are using practices like  
1529 the pilot. And a group of leading lawyers are being enlisted to  
1530 join a letter encouraging judges to participate.

1531 *Subcommittees*

1532 Judge Bates stated that the Social Security Review  
1533 Subcommittee would be formally established, with Judge Lioi as  
1534 chair.

1535 Another Subcommittee will be established to consider the  
1536 proposals for MDL rules, and with the MDL rules will also  
1537 consider the proposal for disclosure of third-party litigation  
1538 financing agreements that is adopted in one of the MDL  
1539 proposals. This Subcommittee's work will extend for at least a  
1540 year, and perhaps more. If the task of framing actual rules  
1541 proposals is taken up, the work will extend for years beyond  
1542 that.

1543 *Next Meeting*

1544 The next meeting will be held on April 10, 2018. The place  
1545 has not yet been fixed, but Philadelphia is a likely choice.

Minutes  
Civil Rules Committee  
November 7, 2017  
page -42-

Respectfully submitted,

Edward H. Cooper  
Reporter

DRAFT



# TAB 5

**THIS PAGE INTENTIONALLY BLANK**

# TAB 5A

**THIS PAGE INTENTIONALLY BLANK**

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

DAVID G. CAMPBELL  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

**MEMORANDUM**

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

**FROM:** Hon. Debra A. Livingston, Chair  
Advisory Committee on Evidence Rules

**RE:** Report of the Advisory Committee on Evidence Rules

**DATE:** November 15, 2017

---

**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on October 26, 2017 at Boston College Law School. On the day after the meeting, the Committee held a Conference of experts on forensic expert testimony, Rule 702, and *Daubert*.

The Committee at the meeting discussed ongoing projects involving matters such as possible amendments to Rules 404(b), 801(d)(1)(A) and 807. It also considered proposals submitted to the Committee suggesting changes to Rules 106 and 609(a)(1).

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

**II. Action Items**

No action items.

### **III. Information Items**

#### **A. Conference on Forensic Expert Testimony, Rule 702, and *Daubert***

The Conference on the day after the Committee meeting consisted of two separate panels. The first panel included scientists, judges, academics and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Committee with extremely helpful insight, background, and suggestions for change. The Conference proceedings—as well as accompanying articles by a number of the participants—will be published in the *Fordham Law Review*.

The Committee will review and discuss the points raised at the Conference at its next meeting. One of the most important topics to be discussed is what role the Committee could have with regard to forensic evidence, short of proposing a rule change.

#### **B. Proposed Amendment to Rule 807, Issued for Public Comment**

At its last meeting, the Standing Committee authorized a proposed amendment to Rule 807—the residual exception to the hearsay rule—to be released for a period of public comment. The amendment would eliminate the “equivalence” standard in the existing rule in favor of a more direct focus on circumstantial guarantees of trustworthiness for proffered statements, taking into account the presence or absence of corroboration. In addition, the proposed amendment would eliminate the “materiality” and “interests of justice” requirements as duplicative, while retaining the “more probative” requirement in the existing rule. Finally, the proposed amendment would update and clarify the notice provision in Rule 807. Only a few comments have been received so far, but all have been supportive of the proposed amendment. The Committee will consider all the public comment at its April 2018 meeting in Washington DC.

#### **C. Possible Amendment to Rule 801(d)(1)(A)**

The Committee has been giving careful and lengthy consideration to the possibility of amending Rule 801(d)(1)(A), which currently provides for substantive admissibility for a very limited set of prior inconsistent statements of a testifying witness (those made under oath at a formal proceeding). The goal of an amendment would be to expand the rule to allow for more substantive admissibility of prior inconsistent statements. The Committee has, however, decided against implementing the “California rule,” under which all prior inconsistent statements are substantively admissible. The Committee’s concern is that there will be cases in which there is a dispute about whether the statement was ever made. In that situation, it is difficult to cross-

examine the witness, because the witness denies even making the statement; and the dispute over whether the statement was made could be costly and distracting.

The Committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was audiovisually recorded. If the statement is recorded by both audio and visual means there can be no dispute about whether the witness actually made it. Moreover, the jury can see the statement itself and better assess its credibility. This limited proposal was reviewed at a Conference held by the Committee at Pepperdine Law School in 2016, where it received a favorable reception. Some Committee members and others, however, remain skeptical about even the proposal; they are concerned about the risk of abuse and about the incentive that it might create to prepare audiovisually recorded statements for purposes of litigation.

The Committee is seeking further input on the proposal before determining whether it should be issued for public comment. At the Committee's request, the Federal Judicial Center has prepared and issued surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. Some organizations, such as the American Association for Justice, the Innocence Project, and the National Association of Criminal Defense Lawyers, have already responded to the Committee's invitation to submit comments on the rule. At its next meeting, the Committee will consider all this input and decide whether or not to proceed with an amendment to Rule 801(d)(1)(A).

#### **D. Possible Amendments to Rule 404(b)**

The Committee has been discussing potential amendments to Rule 404(b) since the Pepperdine Conference in 2016. The Committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. In particular, the Committee has explored three strands of recent precedent. First, the Seventh and Third Circuits (and at least one panel of the Fourth) have demanded that prosecutors and trial judges articulate with precision the chain of inferences leading from an uncharged crime, wrong, or other act to the purported proper purpose for admitting it. These Circuits have forbidden the admission of any act through Rule 404(b) that depends for its probative value on the defendant's propensity. Second, these Circuits also have insisted upon "active contest" by a criminal defendant of the element to which the uncharged act is relevant, rejecting a simple plea of not guilty as demonstrating such an "active contest." Finally, several Circuits have eliminated or restricted the "inextricably intertwined" doctrine that allows uncharged acts purportedly connected with the charged offense in some way to be admitted without a Rule 404(b) analysis.

The Committee has resolved not to propose an amendment that would add an "active contest" requirement to Rule 404(b), concluding that such a requirement would be too rigid and should be left to the court's assessment of probative value and prejudicial effect. The Committee continues to discuss the possibility of adding language requiring that the probative value proceed through a non-propensity inference, and also language providing that Rule 404(b) should apply

whenever a bad act is offered as “indirect” evidence of a crime. Other possible changes being explored by the Committee are: 1) a change to the notice requirement that would require the proponent to clearly articulate the proper purpose for which the evidence is offered; 2) a change to the notice requirement that would require the proponent to provide a more detailed notice than that currently required by the Rule; and 3) a change to the balancing test as applied to bad act evidence offered against a criminal defendant—specifically that the probative value must outweigh the prejudicial effect.

#### **E. Possible Amendment to Rule 106**

At the suggestion of Hon. Paul Grimm, the Committee is considering whether Rule 106—the rule of completeness—should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement to put the initial submission into context. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements. The courts are not uniform in the treatment of these issues. Some courts have held that when a party introduces a portion of a statement that is misleading, it can still object, on hearsay grounds, to completing evidence that would place the statement in proper context. One possibility being explored by the Committee is to provide explicitly that the completing evidence in such a circumstance would be admissible for the non-hearsay purpose of providing context. That amendment, as well as a provision to cover oral statements, will be considered by the Committee at its Spring meeting.

#### **F. Possible Amendment to Rule 609(a)(1)**

At the suggestion of Hon. Timothy Rice, the Committee is considering whether Rule 609(a)(1) should be abrogated. Rule 609(a)(1) provides for admissibility (subject to a balancing test) of a witness’s convictions that did not involve dishonesty or false statement. Judge Rice relied on principles of “restorative justice” as a basis for abrogating Rule 609(a)(1), i.e., that a person who has been convicted and released into society should not be saddled with the opprobrium of a prior conviction. More broadly, Judge Rice argues that non-falsity convictions as a class are of very limited probative value and are highly prejudicial.

At its Spring meeting the Committee considered Judge Rice’s proposal, with knowledge that Rule 609(a)(1) and its applicable balancing tests are the result of a compromise following extensive Congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. One possibility being considered, short of abrogation, is to amend Rule 609(a) (1) to require a more rigorous application of the balancing test applied to criminal defendant-witnesses—if it is found that the existing test is failing to fulfill Congress’s original intent of providing special protection to criminal defendants who testify. The Committee will continue its consideration of both proposals at its next meeting. The Reporter will conduct additional research on how Rule 609(a)(1) is being administered in the federal courts, and will



also try to find empirical data on the extent to which admitting convictions on Rule 609(a)(1) affect the criminal defendant's decision whether to testify.

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

At its April 2017 meeting, the Committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b)—barring testimony of jurors on deliberations—violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. The Committee declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Committee has asked the Reporter to monitor Rule 606(b) cases for any development or expansion that would alter the Committee's previous decision. Federal courts have thus far rejected efforts to expand the *Pena-Rodriguez* exception to Rule 606(b) beyond the clear statements of racial animus at issue in that case. The Committee will continue to monitor the case law applying *Pena-Rodriguez*.

#### **H. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules**

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration—as it did previously with the 2013 amendment to Rule 803(10).

#### **IV. Minutes of the Fall 2017 Meeting**

The draft of the minutes of the Committee's Fall 2017 meeting is attached to this report. These minutes have not yet been approved by the Committee.

**THIS PAGE INTENTIONALLY BLANK**

# TAB 5B

**THIS PAGE INTENTIONALLY BLANK**

## **Advisory Committee on Evidence Rules**

Minutes of the Meeting of October 26, 2017  
Boston College Law School  
Newton Centre, Massachusetts

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 26, 2017 at the Boston College Law School in Newton Centre, Massachusetts.

*The following members of the Committee were present:*

Hon. Debra Ann Livingston, Chair  
Hon. James P. Bassett  
Hon. J. Thomas Marten  
Hon. Shelly D. Dick  
Hon. Thomas D. Schroeder  
Daniel P. Collins, Esq.  
Traci L. Lovitt, Esq.  
A.J. Kramer, Esq., Federal Public Defender  
Robert K. Hur, Esq., Principal Associate Deputy Attorney General, Department of Justice

*Also present were:*

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure  
Hon. Jesse M. Furman, Liaison from Committee on Rules of Practice and Procedure (by phone)  
Hon. Sara Lioi, Liaison from the Civil Rules Committee  
Hon. James C. Dever III, Liaison from the Criminal Rules Committee  
Hon. William K. Sessions III, Former Chair of the Committee  
Hon. Paul W. Grimm  
Elizabeth J. Shapiro, Esq., Department of Justice  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Daniel R. Coquillette, Reporter to the Standing Committee  
Professor Catherine T. Struve, Assistant Reporter to the Standing Committee (by phone)  
Professor Liesa L. Richter, Academic Consultant to the Committee  
Dr. Timothy Lau, Esq., Federal Judicial Center  
Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice and Procedure  
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure  
Patrick Tighe, Esq., Rules Committee Law Clerk

### **I. Opening Business**

#### ***Announcements***

Judge Livingston opened her first meeting as Chair by noting the very special nature of the Advisory Committee on Evidence Rules, that draws experts hailing from diverse legal fields and parts of the country. She was happy to note that her excellent predecessor, Judge Sessions,

was in attendance for the Committee meeting, as well as for the symposium on forensic evidence, *Daubert* and Rule 702 planned for the following day.

Judge Livingston introduced two new members of the Evidence Advisory Committee. She welcomed Judge Shelly Dick, United States District Court Judge for the Middle District of Louisiana, and Judge Thomas Schroeder, United States District Court Judge for the Middle District of North Carolina, to the Committee. Judge Livingston described many notable contributions made by both during their distinguished careers and welcomed their participation on the Committee. Judge Livingston also welcomed two new liaison members to the Advisory Committee—Judge Jesse Furman, a member of the Standing Committee, and Judge Sara Lioi, a member of the Civil Rules Committee. Judge Livingston noted that both bring amazing experience to the Committee and will be a great resource to the Committee in its work. Finally, Judge Livingston welcomed Rob Hur, Principal Associate Deputy Attorney General, an *ex officio* member of the Advisory Committee.

Following introductions, Judge Livingston paid tribute to Judge Sessions' distinguished service as Chair of the Evidence Advisory Committee, noting that he helped shape the important work of the Advisory Committee with grace, intellect, and good sense. Judge Livingston noted Judge Sessions' many contributions to the Committee's work, including its close review of the hearsay rules leading to proposed amendments to the Ancient Documents and Residual exceptions, its work on electronic evidence and updates to the authentication provisions, and finally its equally important decisions *not* to propose amendments to other rules. Judge Livingston also emphasized the key role Judge Sessions played in bringing the consideration of *Daubert* and forensic evidence to the Committee and in developing the Rule 702 symposium.

Judge Sessions thanked Judge Livingston for her remarks and noted that the Evidence Advisory Committee is an excellent example of how government ought to function, with experts from various fields and with divergent viewpoints listening to one another with mutual respect.

### ***Approval of Minutes***

The minutes of the April 21, 2017 Advisory Committee meeting at the Thurgood Marshall Building in Washington DC were approved.

### ***Standing Committee Meeting***

Judge Sessions gave a brief report on the June meeting of the Standing Committee. The proposed amendment to the residual exception to the hearsay rule, Rule 807, was presented to the Standing Committee. The proposal received the unanimous support of the Standing Committee and was approved for public comment. The Standing Committee was also updated as to the remaining topics on the agenda of the Advisory Committee.

## **II. Proposal to Amend Rule 807**

The Reporter noted that the Committee approved a proposal to amend Rule 807, the residual exception to the hearsay rule, at its April, 2017 meeting. Most importantly, the amendment would eliminate the “equivalence” standard in the existing rule in favor of a more direct focus on circumstantial guarantees of trustworthiness for proffered statements, taking into account the presence or absence of corroboration. In addition, the proposed amendment would eliminate the “materiality” and “interests of justice” requirements (as duplicative), while retaining the “more probative” requirement in the existing rule. Finally, the proposed amendment would update and clarify the notice provision in Rule 807. The proposed amendment to Rule 807 has been published for public comment, with the comment period officially closing on February 15, 2018. The Reporter noted that few comments had been received to date but that additional public comments are likely to come in the Spring. The Reporter observed that the few public comments received to date were positive and supportive of the proposed amendment. The Committee will consider all of the public comments at its April 2018 meeting in Washington DC.

## **III. Potential Amendment to Rule 801(d)(1)(A)**

The Reporter explained that the Committee had been exploring the possibility of expanding the substantive admissibility of prior inconsistent statements made by testifying witnesses for the past several meetings, beginning with a symposium hosted by the Committee at the John Marshall Law School in the Fall of 2015. The working draft of a potential amendment would permit prior inconsistent statements of testifying witnesses that are recorded audio-visually and available for presentation at trial to be admitted for their truth. The Reporter explained that the Committee decided at its previous meeting to conduct additional pre-public comment research concerning the implications of such an expansion of Rule 801(d)(1)(A), prior to proceeding with a proposal to issue the Rule for public comment. The Reporter noted that this research would continue until the April 2018 Advisory Committee meeting, at which time the Committee will determine whether to propose an amendment to the Rule or to discontinue its examination of Rule 801(d)(1)(A) for the time being.

Request for input on Rule 801(d)(1)(A) to date has included pre-public comment publication of the working draft of the amendment on the [uscourts.gov](http://uscourts.gov) website, which generated comments only from groups already invited to provide input. In addition, the American Association of Justice, the NACDL, and the Innocence Project have responded to the Committee’s invitation to comment with letters opining on the working draft. The Reporter stated that consideration of those letters would be saved for the April 2018 meeting when all research would be complete, although he noted that the AAJ review of the potential Amendment was largely positive (with a helpful suggestion to consider clarification of the definition of “audio visual recording”) and that concerns raised by both the NACDL and the Innocence Project might be answered by the Committee’s research and a proper understanding of the limited scope of the working draft of the amendment. The Reporter further informed the Committee that the ABA Section on Criminal Justice is planning to submit a report on the working draft for the Spring meeting.

The Reporter informed the Committee that Dr. Lau of the Federal Judicial Center had prepared surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. Dr. Lau received input from the Chair and Reporter of the Advisory Committee in preparing the surveys. Dr. Lau informed the Committee that the surveys had already been circulated and that responses are due by November 17, 2017. Dr. Lau will report on the survey results at the April 2018 Advisory Committee meeting. Judge Campbell asked about questions in the surveys calling for respondents' perceptions of videos of interviews that they have encountered in the courtroom. Dr. Lau explained that those survey items were designed purely for informational purposes to get a sense of the experience of judges and lawyers with audio visual interviews. Judge Campbell emphasized that audio-visual statements admitted through an amended Rule 801(d)(1)(A) could include cell phone, dash cam, "GoPro" or other footage that does not occur in an interview setting and that the Advisory Committee should not base a decision about amending Rule 801(d)(1)(A) on the viewing experiences of survey respondents, but might consider the survey data purely for informational purposes. Another Committee member inquired whether additional surveys could be circulated to state court judges and practitioners in the many states that have expanded their counterparts to Rule 801(d)(1)(A) beyond the limited federal approach, to determine the experience of those states with broader substantive admissibility of prior inconsistent statements. The Reporter explained that the Committee had hosted two symposia (one at John Marshall Law School and another at Pepperdine School of Law) to study the effects of expanded substantive admissibility of prior inconsistent statements, where practitioners in Wisconsin and California described their very positive experience with broad substantive admissibility under their respective state provisions. In addition, the Reporter noted extensive independent research into state variations of Rule 801(d)(1)(A) that permit broader substantive admissibility. Thus, the Committee has already made significant enquiry into the state experience with broader substantive admissibility of prior inconsistent statements.

Although full consideration of an amendment to permit substantive admissibility of audio-visually recorded prior inconsistent statements available for presentation at trial will take place at the April 2018 Advisory Committee meeting, several Committee members made preliminary comments about the potential amendment. One Committee member noted that the primary impact of an amendment would not be at trial (because juries fail to comprehend the limiting instructions currently provided to prevent substantive consideration of prior inconsistent statements falling outside Rule 801(d)(1)(A)). Rather, the primary effect, as illustrated by the remarks of a California prosecutor at the Pepperdine symposium, would be in getting past a Rule 29 motion and getting to the jury with a recorded witness statement. The existence of substantively admissible recorded witness statements would also enable prosecutors to obtain plea bargains in cases where they otherwise might not. Another Committee member responded that there are mixed views about the potential change in the criminal defense community. On the one hand, allowing recorded statements allows defendants (who cannot put witnesses into the grand jury) to obtain substantive evidence from witnesses who may end up testifying favorably for the government at trial. On the other hand, defense counsel have concerns about recordings made of child victims, particularly on Native American reservations, that may be offered into evidence when the audio visual equipment may be turned on late to capture less than the full interview. Judge Livingston noted that the invited comment from the Innocence Project



illuminated potential ramifications of an amendment at the plea bargaining stage, noting that a defendant could be persuaded to plead guilty based upon an early recorded witness statement notwithstanding the possibility that the witness's testimony could change at trial. Judge Livingston further noted the benefits of putting witnesses into the grand jury, where law enforcement and prosecutors are required to interface, and where there are greater assurances of the reliability of pre-trial statements. Judge Campbell noted the heavy caseload arising on reservations in Arizona and the difficult position encountered by criminal defendants trying to refute testimony by polished and articulate FBI agents regarding the content of oral interviews between the agent and defendant. Judge Campbell suggested that any rule that would encourage more recording of interviews would be beneficial to defendants in countering such testimony. Mr. Hur noted that FBI regulations now contain a presumption that favors recording of all custodial interrogations. The Public Defender stated that the criminal defense bar strongly supports recording of statements by defendants, but has concerns about the recording of statements by prosecution witnesses.

The Reporter concluded the discussion of the potential amendment to Rule 801(d)(1)(A) by noting that concerns raised about the amendment by the Innocence Project and others could be fully vetted at the spring meeting when the Committee will make a final determination about whether to propose an amendment to Rule 801(d)(1)(A), but that additional studies advocated by some could take a decade to perform and interpret and would be ill-suited to the rule-making process.

#### **IV. Rule 606(b) and *Pena-Rodriguez* Developments**

At its April 2017 meeting, the Advisory Committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Reporter noted that the Committee had considered three possibilities for amending Rule 606(b) at its last meeting, including: 1) an amendment that would capture the precise exception to Rule 606(b), requiring admission of juror statements indicating clear racial or ethnic bias, as articulated in the *Pena-Rodriguez* opinion; 2) an amendment that would expand the *Pena-Rodriguez* exception to the Rule 606(b) prohibition on juror testimony to encompass all juror conduct implicating a party's constitutional rights; and 3) a generic "constitutional" exception to Rule 606(b) that would capture the *Pena-Rodriguez* holding for now, but that would adapt to any future expansion of that rule by the Supreme Court (akin to the constitutional exception found in Rule 412(b)(1)(C)). The Reporter explained that the Committee had declined to pursue any amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding.

At its April 2017 meeting, the Committee asked the Reporter to monitor Rule 606(b) cases for any development or expansion that would alter the Committee's previous decision. The Reporter provided the Committee with recent Rule 606(b) cases and informed the Committee that federal courts had thus far rejected efforts to expand the *Pena-Rodriguez* exception to Rule 606(b) beyond the clear statements of racial animus at issue in that case.

Several Committee members expressed concern that there is no language in Rule 606(b) warning litigants and judges that the Rule is unconstitutional if applied to exclude post-verdict testimony relating clear juror statements of racial bias under *Pena-Rodriguez*. Committee members noted that the point of the Evidence Rules is to allow judges and lawyers to rely on the Rules for a correct and complete set of principles upon which they may depend and that judges and lawyers should not have to consult treatises to learn that Rule 606(b)'s clear mandate cannot be constitutionally applied in certain circumstances. One Committee member suggested reconsideration of an amendment that would codify only the narrow holding of *Pena-Rodriguez* in rule text. The Reporter explained the difficulty in drafting language that would capture the *Pena-Rodriguez* holding without risking expansion to include other juror conduct that violates constitutional rights, such as jury consideration of a criminal defendant's failure to testify. Further, the Reporter explained the difficulty in characterizing even the *Pena-Rodriguez* holding in rule text with any precision—noting a recent Sixth Circuit case in which jurors made clearly racist statements about other jurors and their unwillingness to convict the accused. In that case, the majority distinguished *Pena-Rodriguez*, emphasizing that the juror in *Pena-Rodriguez* made racist statements specifically about the accused. Over a lengthy dissent, the majority applied Rule 606(b) to prohibit juror testimony about the racist remarks. Another Committee member suggested that the habeas standard requiring a violation of “clearly established law” might be employed to draft an amendment that would avoid expansion should the Committee consider possible amendments in the future.

The Reporter concluded the discussion of Rule 606(b) by promising to continue monitoring the Rule 606(b) case law for the Committee and to keep the Committee apprised of developments.

## **V. Rule 404(b)**

The Reporter explained that the Committee had been discussing potential amendments to Rule 404(b) since the symposium the Committee hosted at Pepperdine in the Fall of 2016. The Committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. In particular, the Committee has explored three strands of recent precedent. First, the Seventh and Third Circuits (and at least one panel of the Fourth) have demanded that prosecutors and trial judges articulate with precision the chain of inferences leading from an uncharged crime, wrong, or other act to the purported proper purpose for admitting it. These Circuits have forbidden the admission of any act through Rule 404(b) that depends for its probative value on the defendant's propensity to behave in a certain way. In addition, these Circuits also have insisted upon “active contest” by a criminal defendant of the element to which the uncharged act is relevant, rejecting a simple plea of not guilty as demonstrating such an “active contest.” Finally, several Circuits have eliminated or restricted the “inextricably intertwined” doctrine that allows uncharged acts purportedly connected with the charged offense in some way to be admitted without a Rule 404(b) analysis—these circuits appear to opt for a direct/indirect distinction, finding that Rule 404(b) is applicable whenever the bad act is offered as indirect evidence of the charged crime.

At the Spring meeting, Committee members inquired as to the level of care being taken in performing a Rule 404(b) analysis in criminal cases in other circuits. In particular, the DOJ representative suggested that courts were taking great care in policing the requirements of Rule 404(b) in criminal cases, particularly at the district court level. The Reporter explained that the agenda materials contained an examination of recent cases decided since the Spring meeting, including all circuit court opinions and a representative sample of district court opinions to give the Committee a picture of the handling of Rule 404(b) at both the trial and appellate levels in all circuits.

The Reporter explained that the cases clearly revealed a split in authority at both the appellate and trial levels with respect to Rule 404(b) evidence. At the appellate level, opinions in the First, Second, Fourth, Fifth, Eighth, and Ninth Circuits recently admitted other acts evidence against criminal defendants to show intent and knowledge without any explanation of non-propensity inferences supporting admissibility. Several circuits continue to treat Rule 404(b) as a “rule of inclusion,” with recent Eighth Circuit cases emphasizing that point and making admission of Rule 404(b) evidence almost automatic. Decisions in the Fifth, Eighth, and Eleventh Circuits broadly applied the inextricably intertwined doctrine to admit other acts evidence outside Rule 404(b). Conversely, recent opinions in the Third, Fourth, and Tenth Circuits approached Rule 404(b) evidence with caution and thorough analysis. District court opinions were similarly split, with some district court opinions taking great care in analyzing the admissibility of Rule 404(b) evidence and others taking none at all.

The Reporter also noted that the Committee had been provided with a memorandum prepared by Professor Richter, detailing state law variations on Rule 404(b). Professor Richter described the findings in that memo, explaining that several states have added protections to their Rule 404(b) counterparts, including procedural protections like enhanced notice and articulation requirements, as well as substantive protections like enhanced balancing tests that provide greater protection to criminal defendants. These additional protections appear to be operating well without unduly constraining the government’s ability to admit bad act evidence for a proper purpose.

The Reporter noted the Committee’s proper and essential role in resolving circuit splits with respect to Evidence Rules and emphasized the split between the various circuits, as well as within the Fourth Circuit. The Reporter explained that various amendments could be considered to resolve the split, but noted that no votes were to be taken at this meeting and that additional research and discussion were anticipated prior to any decision.

The Reporter noted that the Committee had decided at its last meeting to drop consideration of an “active contest” requirement as a potential amendment. The Committee was therefore continuing consideration of three possible amendments to the substantive provisions of Rule 404(b): (1) an amendment that would require precise articulation of the chain of inferences supporting admissibility of an uncharged act and a prohibition on acts that depend on propensity inferences; (2) an amendment to require all uncharged acts not “directly” proving the charged offense to proceed through a Rule 404(b) analysis; and/or (3) an amendment modifying the regular Rule 403 balancing test for criminal defendants to require that the probative value of an

uncharged act outweigh unfair prejudice to the defendant. In addition the Committee was continuing to consider possible changes to the notice provision.

The Public Defender stated that he had conducted an informal survey of federal defenders on Rule 404(b), and that they were unanimously and vehemently opposed to the current application of Rule 404(b) in most of the circuits. In particular, he noted the difficulty judges and defendants have in asking prosecutors to identify a proper Rule 404(b) purpose with any clarity. He lamented the circular nature of the reasoning attending Rule 404(b) arguments and rulings, i.e., that an act is admissible to prove intent because it shows intent and knowledge. The Public Defender emphasized the extreme prejudicial effect that bad act evidence has on the defendant and explained that the government often spends more time at trial presenting evidence of “other acts” than it does to present evidence of the charged offense. In sum, he concluded that Rule 404(b) is misused on a regular basis and that an amendment is necessary. He offered to prepare a memo collecting examples from federal defenders.

Thereafter, Mr. Hur, the DOJ representative, explained that the Department of Justice has very strong views on the subject of Rule 404(b). As a threshold matter, Mr. Hur noted that the DOJ does not agree that there is a problem with Rule 404(b) that needs to be fixed. The DOJ has taken the position in a Supreme Court filing that there is no circuit split with respect to Rule 404(b). He emphasized that anecdotal complaints about the Rule’s application were not evidence of a problem and that he personally had as many anecdotes of being put through his paces by trial judges protecting against admission of Rule 404(b) evidence. While there may be cases where the analysis is not rigorous, DOJ can identify as many where trial courts are handling Rule 404(b) with care. Using the analysis of Rule 404(b) set forth by the Supreme Court in *Huddleston*, courts are doing what they do best—sorting the admissible from the inadmissible. The Reporter responded that the conflict between the circuits is clearly apparent in the decisions where some characterize Rule 404(b) as a “rule of inclusion” and maintain that intent is automatically at issue whenever a defendant pleads not guilty, and others treat the rule as one of exclusion and prohibit reliance on propensity inferences in any case. Mr. Hur replied that factual distinctions are crucial in Rule 404(b) cases and that the cases represent factual differences rather than a circuit split.

Elizabeth Shapiro of the DOJ stated that Rule 404(b) issues were percolating in the courts and that courts should be allowed to continue working on Rule 404(b) issues. The Reporter expressed concern that Rule 404(b) issues had been percolating for a very long time and that uniformity in the courts could be a very long time coming, if it comes at all.

One Committee member articulated the concern that the Rule as currently drafted allows the prosecution to rely on a laundry list of purported proper purposes to make unsupported arguments for admission. With the amount of discretion vested in trial judges, appellate courts are reluctant to tinker in Rule 404(b) decision-making, leaving unsupported assertions of admissibility unchecked. An amendment that forces lawyers to articulate the proper purposes for admitting Rule 404(b) evidence will lead to better outcomes and create a better record for the appellate court. The Committee member stated that Rule 404(b) has been abused more than any

other rule in criminal cases and the possibility of percolation in the Circuit courts does not absolve the Committee of responsibility for fixing it.

The Chair noted that evidence of extrinsic acts may be crucial to fact-finding and may be the only way to establish state of mind in some cases. The Chair then read the famous quote from Justice Jackson regarding American character evidence rules—codified now in Rules 404(a) and 405—highlighting the risk of pulling even one misshapen stone from the “grotesque structure” and emphasizing that all decisions regarding such evidence are moderated by discretionary authority of the trial court.<sup>1</sup> The Chair noted that in her personal experience, it is not easy to have Rule 404(b) evidence admitted, and that she does not favor an amendment that focuses reviewing courts on the verbal formulations employed by district courts in explaining their decisions, as opposed to the soundness of their decisions. She noted at the appellate level there may be significant and searching discussion about a Rule 404(b) issue followed by a rather cursory ruling on the evidence. The Reporter responded that while an articulation requirement and a propensity ban might intrude on judicial discretion, a modification of the balancing test applicable to criminal defendants would not constitute the same type of intrusion on discretion—indeed it would preserve and promote judicial discretion.

Another Committee member noted concerns about the role of Rule 404(b) in plea bargaining. Where very few cases go to trial, defense expectations about the broad admissibility of other acts evidence may result in a decision to plead guilty. Rule 404(b) thus presents a larger issue than whether the jury hears other acts evidence in the few cases that go to trial.

Mr. Hur stated that prosecutors are required to give Rule 404(b) notice even in cases where defendants plead guilty. He argued that the influence of Rule 404(b) at the plea bargaining stage is a virtue rather than a flaw because defendants plead guilty fully aware of the evidence they would face at trial. Further, Mr. Hur noted that trial judges rarely rule on Rule 404(b) motions in advance of trial, preferring to monitor the evidence as it comes in, thus eliminating any concern that Rule 404(b) *in limine* rulings are causing defendants to plead guilty.

In response, the Federal Public Defender remarked that his experience was very different from that described by Mr. Hur. He explained that the government never gives detailed notice of Rule 404(b) evidence and that defense lawyers have to fight to obtain necessary information. He also noted that Rule 404(b) motions are almost always ruled upon prior to trial because the lawyers need to know what is coming in to prepare opening statements. Furthermore, he expressed the view that the real reason the government wants other acts evidence is for the prejudicial propensity purpose, and that the limiting instruction provided with Rule 404(b) evidence is incomprehensible to the jury. He opined that forty-plus years of percolation in the courts is too long to wait for improvement and stated that he favors the modification to the Rule 403 balancing test to make it more protective. Finally, he stated that knowing what is

---

<sup>1</sup> See *Michelson v. United States*, 335 U.S. 469, 486 (1948) (discussing the rules on allowing the defendant to admit character evidence).

coming is not sufficient for a defendant when what is coming is often automatic admission of the defendant's bad acts.

The Chair argued that Rule 404(b) reversals are not infrequent and suggested that Rule 404(b) may be the most common ground for reversal in a criminal case. Other Committee members suggested that improper jury instructions could be more common bases for reversal and that Rule 404(b) reversals may be more numerous than other evidentiary reversals simply because the rule is utilized so often. Another Committee member emphasized that trial judges sometimes confront many motions prior to trial and may give Rule 404(b) careful consideration and then write a very brief order; district court opinions may not reflect the true consideration trial judges are giving this evidence. Another Committee member suggested that an amendment to improve the notice in criminal cases could be quite helpful, stating that the government fails to give sufficiently detailed notice and that better notice would assist trial judges in giving thoughtful consideration to Rule 404(b) evidence at an earlier stage. The Reporter observed that an enhanced notice requirement, if violated, would not necessarily result in exclusion of the Rule 404(b) evidence.

A Committee member asked the DOJ representative for the Department's view on an amendment that would alter the balancing test to require the probative value of the Rule 404(b) evidence to outweigh the unfair prejudice to the defendant. Ms. Shapiro expressed the view that the Rule 404(b) balancing test should be less protective than the Rule 609(a)(1)(B) test because not all Rule 404(b) acts are convictions (though many are). She complained that less bad act evidence would be admitted if the balancing test were altered. Mr. Hur suggested that a modification of the balancing test was inconsistent with the will of Congress and the Supreme Court in *Huddleston*. The Reporter responded that the Rule 403 test was applied to Rule 404(b) evidence by the Supreme Court in *Huddleston* because it was the test that was applicable to all evidence under the Rules. Changing the balance under an amendment would thus not overrule *Huddleston*—any more than changing the ancient documents exception to the hearsay rule “overrules” judicial interpretations of the previous rule.

Judge Campbell asked two questions: (1) whether the modified balancing test would reverse the characterization of Rule 404(b) as a “rule of inclusion” as some circuits do, and (2) where the “rule of inclusion” characterization originated. The Reporter responded that the modified balancing test would eliminate the “rule of inclusion” characterization because it would require probative value to outweigh prejudice and would thus, slightly favor exclusion. He further explained the history of the “rule of inclusion” language as described in the Third Circuit *Caldwell* decision: because the enumerated list of proper purposes in Rule 404(b)(2) is not exhaustive or exclusive, it “includes” other potential proper purposes not specifically enumerated. Thus, the Rule was characterized as a rule of “inclusion.” That characterization did not originally mean that the Rule favored admissibility of other acts evidence as many circuits now hold. Judge Campbell asked whether the modified balancing test would eliminate the concern about other acts evidence relying on propensity inferences. The Reporter explained that the balancing approach would not specifically outlaw propensity per se, but would counsel greater caution in admitting Rule 404(b) evidence that presents a risk of unfair propensity prejudice. So the effect on using propensity inferences would be indirect.

Judge Campbell then asked whether there was any way for the Committee to gather data about the frequency of exclusion of Rule 404(b) evidence, noting that appellate opinions provide a somewhat skewed sample of cases in which the evidence was admitted. Apart from a survey or a detailed multi-year study of district court docket entries, the Reporter explained that the reported opinions are the only basis for evaluating the operation of Rule 404(b). The Public Defender noted that exclusions of Rule 404(b) evidence would not necessarily demonstrate that courts are keeping the evidence out because the government often asks to admit five or six prior acts in a single case and trial courts often respond by allowing only a few. Mr. Hur expressed the view that this demonstrates the proper operation of Rule 404(b) because trial judges are carefully sorting and allowing some prior acts, but excluding others. Others on the Committee suggested that partial admission suggested more of a “split the baby” approach than careful parsing of prior convictions.

At the conclusion of the discussion, the Committee resolved to continue consideration of: (1) a potential propensity ban/articulation requirement; (2) a modified balancing test that would require probative value of Rule 404(b) acts to outweigh unfair prejudice to a criminal defendant; and (3) language that would tie the coverage of Rule 404(b) to all bad act evidence that is offered as “indirect” evidence of the crime charged; and (4) enhanced notice requirements. Committee members commended the Reporter for the thorough and excellent preparation of materials and resolved to continue the study of potential amendments to Rule 404(b) at the Spring 2018 meeting.

## **VI. Rule 106 Rule of Completeness**

The Honorable Paul W. Grimm, United States District Court Judge for the District of Maryland, presented a proposal to amend Rule 106 (governing completeness of writings or recordings) based upon the results of extensive research he conducted in drafting an opinion in *United States v. Bailey*, Crim No. PWG-16-0246 (D. Md. May 24, 2017). Judge Grimm explained that the rule of completeness constitutes an exception to the general principle that prevents a party from interrupting the trial presentation of an opponent and that requires parties to await their case to put in counter proof. Prior to the Evidence Rules, the common law allowed interruption by an opponent to prevent misleading the fact-finder with partial and distorted information. Specifically the common law doctrine allowed for completion of acts and oral conversations, as well as writings and recordings. It allowed such completion only when a proponent presented a selected portion of an act, conversation, or writing that would cause unfairness by misleading the jury as to the true nature of that act, conversation, or writing. It allowed completion with the remainder of the conversation, act, or writing regardless of whether it was independently admissible under the hearsay rule. Finally, the common law required acceleration of the presentation of the completing information, requiring the proponent of the act, conversation, or writing to admit the remaining portion necessary to avoid misleading the jury.

Judge Grimm noted that Federal Rule of Evidence 106 codified the common law only partially, allowing completion only of writings and recorded statements and omitting oral statements for unspecified “practical reasons.” In addition, Rule 106 is silent on whether a writing or recorded statement may be used to complete a misleading portion of that statement

when the completing portion is not independently admissible for its truth under the hearsay rules. Judge Grimm explained that the limited scope of Rule 106 causes particular concern in criminal cases. He gave an example of a case where the FBI conducted an oral interview of a criminal defendant and made a later record of that oral interview, documenting both inculpatory and exculpatory statements by the defendant. The government filed a motion *in limine* revealing its intention of calling the FBI agent who conducted the interview to testify to the defendant's inculpatory statements and asking the court to prevent the defense from seeking admission of the exculpatory portions of the same interview to place those inculpatory statements in context. Specifically, the government argued that it could present the defendant's inculpatory statements pursuant to the hearsay exception for party opponent statements, but that the defendant could not use that exception to admit his own exculpatory statements. On its face, Rule 106 does not help resolve this situation because it does not cover oral statements and is silent about completing with information that is not independently admissible under the hearsay rules.

Judge Grimm noted the concerns about unfairness if a selective and misleading portion of a statement is admitted and a criminal defendant is either forced to wait until the defense case to correct it—or, more importantly, may be unable to correct it at all due to the hearsay rule, coupled with a decision not to testify. Judge Grimm explained that the federal courts are struggling with this issue and that the circuits handle it in conflicting ways. Some circuits exclude completing statements that are not independently admissible and that would constitute hearsay—even if they are necessary, in fairness, to complete an opponent's presentation. Other circuits allow statements necessary to complete on the theory that completing statements need not be admitted for their truth and may show context without being used substantively. Some courts allow completion of oral statements using the court's broad powers to control the mode and order of proof under Rule 611(a) and others use Rule 403 and the risk of distortion to foreclose use of incomplete statements altogether. Others find that common law standards continue to exist to supplement Rule 106. Judge Grimm therefore recommended that the Committee consider amending Rule 106 to cover oral statements and to allow completing statements necessary in fairness to prevent misleading the jury, regardless of whether those statements would be independently admissible under the hearsay rule.

The Reporter directed the Committee to a draft of a potential amendment to Rule 106 conforming to Judge Grimm's proposal, emphasizing that the draft rule was for purposes of discussion only and that no vote would be taken at this meeting concerning the proposal. The Reporter explained that the draft rule would add oral statements to Rule 106 and would allow statements necessary in fairness to complete to be admitted for their truth notwithstanding the absence of an applicable hearsay exception.

A discussion of the draft amendment to Rule 106 followed. One Committee member inquired whether hearsay exceptions other than Rule 801(d)(2)(A) covering party opponents' statements could create an issue where part of a single statement would fit the hearsay exception, but another part of the same statement would not. The Reporter noted that it was indeed possible for statements admitted through other hearsay exceptions to create a similar issue. For example, a portion of a 911 call could constitute an excited utterance, but a later portion of the same 911 call after excitement had waned might not satisfy the exception. The Committee member



expressed concern about creating a new categorical hearsay exception for all completing statements under the auspices of Rule 106. Another Committee member noted the ubiquitous nature of long e-mail chains that a party could argue would have to be admitted in their entirety for their truth under an amended Rule 106. Judge Grimm responded that trial judges have to draw meaningful lines about how much of an e-mail chain would be necessary in fairness to complete the material originally offered and that the amendment would not make the entire chain admissible—it would not change the law on whether a completing portion is necessary. The Reporter noted that Rule 106 is anchored by the requirements that: 1) the portion of a statement originally presented must be misleading, and 2) the completing portion would clear up that misleading impression. Thus, the amendment would not authorize admission of all statements in their entirety. Nothing in the draft amendment would change the court’s analysis of email strings.

The Chair queried whether it would be necessary to create a hearsay exception for completing portions of statements and suggested that allowing nonhearsay use of completing statements to provide context would be sufficient. Judge Grimm acknowledged that allowing use of the completing information for its truth would not be necessary to correct the misleading impression left by the original selective portion of the statement. The Reporter provided two reasons why allowing use of the completing information for its truth would be justified. First, if the original proponent has put in a portion of a statement for its truth in a manner that misleads and distorts the truth, there is a solid argument that the proponent does not deserve protection from the accurate portrayal of the information through a hearsay exception for the completing portion of a statement. Second, allowing the completing portion of the statement only for its nonhearsay contextual value would require a confusing limiting instruction that jurors are unlikely to follow. The Committee has endeavored to minimize such confusing and ineffective limiting instructions through amendments like the one to Rule 801(d)(1)(B). Affording full use of completing statements would be consistent with those efforts.

Committee members discussed the difficulty for trial judges attempting to apply the Rule to lengthy video recordings typical in FBI and DEA investigations. Committee members noted that there could be two hour recordings that a judge would have to view in order to apply Rule 106. Of course, the existing rule of completeness already covers recordings, and so these challenges are imposed under the existing Rule.

Ms. Shapiro opined that courts are handling completion of video recorded statements well under the existing Rule 106 and cautioned that an amendment specifically authorizing a hearsay exception for completing statements could be subject to abuse, with defendants constantly objecting to interrupt and hinder the prosecution’s presentation thinking that a new hearsay exception should justify admission of video and other statements for their truth only in their entirety. She further expressed concern that the expansion of the Rule to cover oral statements could cause abuse, even though courts currently apply the completeness rule to oral statements under Rule 611(a). While Rule amendments have in the past been found necessary to rectify conflicts in the courts, Ms. Shapiro argued that this was unnecessary in the Rule 106 context, because only a few circuits are preventing completion of misleading statements by invoking the hearsay rule. Judge Grimm respectfully disagreed that the federal courts are

handling the issue well given his extensive research on the subject, and opined that it was simply unfair to allow a party to introduce a misleading portion of a statement and then lodge a hearsay objection to prevent a necessary clarification. The Reporter opined that there was no such thing as a “small” circuit split; whenever there are different results among the circuits on an Evidence Rule, it undermines the basic reason for having Rules of Evidence—uniformity.

Committee members then discussed how disputes about the content of oral statements would be handled if the Rule were expanded to cover oral statements. Judge Grimm noted that courts would continue to enjoy discretion to require an opponent to wait until its case in chief to present evidence of completing oral statements in circumstances where there is a significant dispute about the content of the oral statements, so as to minimize the interruption of the proponent’s case. The Reporter noted that trial judges enjoy considerable discretion under Rule 403 to handle disputes about whether oral statements have actually been made.

Judge Campbell suggested that proponents of incomplete statements will not risk misleading the jury due to the possibility of having the distortion revealed to the jury later in the case. The Reporter responded, however, that completing statements made by a criminal defendant would never be revealed to the jury except through Rule 106 if the court holds that they are inadmissible hearsay and the defendant does not testify.

At the conclusion of the discussion, the Committee members determined that the issue of Rule 106 deserved further consideration and resolved to continue discussion of a potential amendment to Rule 106 at the next meeting. The Reporter was asked to prepare a draft amendment that would allow for completion, but only for a nonhearsay contextual purpose and not for the truth of the completing statements.

## **VII. Rule 609(a)(1) Impeachment**

The Reporter informed the Committee that the Hon. Timothy R. Rice, United States Magistrate Judge for the Eastern District of Pennsylvania and former member of the Criminal Rules Committee, had proposed that the Evidence Advisory Committee consider an amendment abrogating Rule 609(a)(1) of the Federal Rules of Evidence. Judge Rice’s article proposing abrogation based upon principles of “restorative justice” was distributed to the Committee in preparation for the meeting. The Reporter summarized Rule 609(a)(1), which permits testifying witnesses to be impeached at trial by evidence of felony convictions that are less than ten years old at the time of trial, even though they are not for crimes involving dishonest acts or false statements. For a testifying criminal defendant, the Rule provides a more protective balancing test than that found in Rule 403—requiring the probative value of the conviction for impeaching the witness’s character for truthfulness to outweigh the prejudicial effect. The Rule 403 balancing test applies to all other witnesses. Under Judge Rice’s proposal, impeachment with convictions that do not involve dishonesty or false statement would be eliminated entirely. The proposal would retain automatic impeachment of all witnesses with convictions involving dishonest acts or false statements, regardless of severity, under Rule 609(a)(2).

The Reporter called the Committee’s attention to the legislative history behind Rule 609(a)(1) set out in detail in the agenda materials, emphasizing that the admissibility of such felony convictions to impeach and the applicable balancing tests were the result of a compromise following extensive Congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The Reporter outlined the potential amendment options for the Committee:

- Abrogate Rule 609(a)(1), eliminating non-dishonesty felony conviction impeachment for all witnesses.
- Abrogate Rule 609(a)(1)(B), eliminating non-dishonesty felony conviction impeachment for testifying criminal defendants only.
- Maintain Rule 609(a)(1), but modify the balancing test to provide enhanced protection to testifying criminal defendants in particular.

The Reporter noted that it would be necessary to amend Rule 608(b) if Rule 609(a)(1) were abrogated in whole or in part, in order to prevent admission of the bad acts underlying inadmissible felony convictions from being used to impeach on cross-examination under the auspices of Rule 608 (instead of Rule 609).

Judge Campbell queried whether there is any data concerning the impact Rule 609(a)(1) has had on criminal defendants’ decisions not to testify. The Reporter responded that studies provided no definitive answer to that question, but noted that data from the Innocence Project revealed that a high percentage of defendants who were proven innocent through DNA evidence had not testified in their own defense. He observed that it is impossible to determine with any precision whether Rule 609(a)(1) was involved in all of those decisions, but explained that there is some sense that Rule 609(a)(1) plays a role in defendants’ decisions to stay off the stand. The Public Defender stated that it is anecdotally well-accepted that defense lawyers don’t put defendants with felony convictions on the stand. He stated that there could be other reasons for keeping a defendant from testifying (such as a *Miranda*-barred statement that remains a permissible basis for impeachment), but that the most important reason to keep a defendant from testifying remains the existence of felony convictions. Another Committee member expressed an interest in paring down Rule 609, noting that it provides a distraction that lacks substance at trial.

The Chair acknowledged the effect that Rule 609(a)(1) plays in keeping criminal defendants from testifying, but expressed concern regarding any amendment that would disrupt one of the hardest-fought compromises of the original rule-making process—a compromise that has persisted for the past forty-plus years. She further noted that the “restorative justice” philosophy underscoring Judge Rice’s proposal (one aimed at bringing convicted persons back into society) did not seem to be an appropriate basis for amending an evidence rule, emphasizing that evidence rules are designed to secure truth and that Congressional support for Rule 609(a)(1) impeachment arose from the philosophy that prior felony convictions reflect poorly on truthfulness as a testifying witness. The existing protective balancing test gives judges discretion

to control the admissibility of felonies against testifying criminal defendants. The Chair also expressed concern about the Committee's workload and the appropriate sequencing of projects, noting the exhaustive consideration of Rule 702 expected to begin after the symposium on forensic evidence the following day.

The Reporter responded that workload and sequencing posed no obstacle to a potential Rule 609(a)(1) amendment, emphasizing that the Committee could decide to propose a modification quickly that could be transmitted to the Standing Committee before a multi-year project on forensic evidence began. The Reporter noted several problems with the application of the existing Rule, such as: 1) the questionable connection it draws between truthful testimony and non-dishonesty felony convictions; 2) its failure to account for the fact that the testifying criminal defendant is automatically impeached by his strong incentive to be acquitted; and 3) its application by courts to admit felony convictions very similar to the charged offense.

The Reporter also emphasized that the Committee could retain Rule 609(a)(1), but propose a more rigorous application of the balancing test applied to criminal defendant-witnesses, if it concluded that the existing test was failing to fulfill Congress's original protective intent. That more limited amendment could be consistent with, rather than upending, the hard-fought congressional compromise, as that compromise was clearly intended to provide more protection for criminal defendant-witnesses. The Reporter highlighted a 2008 law review article by Professor Jeffrey Bellin in the U.C. Davis Law Review, which posits that the courts have thwarted the original congressional intent to protect criminal defendants with multi-factor tests favoring admissibility, and proposes a more targeted and cautious approach to the admissibility of felony convictions. The Reporter noted that an amendment consistent with Professor Bellin's proposal could be crafted in place of abrogation.

With respect to potential abrogation, several Committee members expressed reluctance to substitute the Committee's value judgment about the connection between non-dishonesty felonies and truthful testimony for the value judgment expressed in the congressional compromise currently embodied in the Rule.

One Committee member queried whether particular standards apply to a decision to abrogate a rule. Professor Coquillette responded that many rules are abrogated and that no specific standards govern. He agreed, however, that different degrees of caution are appropriate when Congress has been involved actively in rule-making, stating that a Committee should take a hands-off approach to rules like Rules 413-415 where Congress actually did the drafting, and should exercise some caution for rules like 609(a) where Congress was heavily involved in drafting. The Reporter acknowledged the importance of caution, but noted that: Congress in reality enacted all the Rules; circumstances and judicial interpretation of the Rules can change over time; and Congressional involvement does not mean that the Committee cannot explore amendments. He also pointed up that the Committee had only recently proposed abrogation of the ancient documents exception to the hearsay rule.

Judge Sessions commented that the Committee's role is to make the Evidence Rules fair, efficient, responsible and forward-looking and that, while any amendment must meet an

appropriate threshold for change, the Committee should feel free to proceed with needed changes.

As the discussion continued, Committee members noted that Rule 609(a)(1) may work in a criminal defendant's favor, permitting impeachment of testifying government witnesses with non-dishonesty felonies. One Committee member observed that impeachment of government witnesses with felony convictions in federal gun and drug cases is commonplace. Another Committee member responded that non-dishonesty felonies have a very different prejudicial effect for testifying criminal defendants, who risk use of their convictions to prove the charges they are denying. Cooperating government witnesses often admit wrongdoing at trial but the only consequence is that their credibility is diminished.

The discussion then returned to a potential amendment that would retain impeachment with non-dishonesty felony convictions, but would enhance the balancing approach courts are currently taking to such convictions when offered against a criminal defendant-witness. Judge Campbell asked what evidence suggested that the existing balancing test was not being applied appropriately. The Reporter noted the cases in the Reporter's memo that showed: 1) the failure of courts to consider the criminal defendant's obvious impeaching bias in performing the balancing test; 2) the cases in which non-dishonesty felonies very similar to the charged offense are admitted; and 3) the use of a balancing test that has factors that cancel each other out (e.g., considering the importance of obtaining the defendant's testimony as a factor against impeachment, and considering the importance of the defendant's credibility as a factor in favor). The Reporter also emphasized that the Supreme Court's opinion in the *Luce* case makes it impossible to review the cases in which the defendant stays off the stand to avoid anticipated impeachment with prior convictions. Committee members noted that it is also impossible to see how often such felonies are excluded under the existing balancing test and suggested that it would be important to gather more data before deciding that the current balancing test is broken. Other Committee members expressed a reluctance to micromanage trial judges with further refinements to the balancing test, stating that defense lawyers could use the existing balancing test to argue for better results. Another Committee member noted that an important goal of law review articles like Professor Bellin's is to influence the courts (and not just rule-makers) to apply the Rules appropriately. The Reporter acknowledged this, but queried whether it was realistic to hope for such an effect given that Professor Bellin's article sounded an alarm about Rule 609 in 2008 and no change in the case law could be detected.

The Committee concluded that Rule 609(a)(1) impeachment presents an important issue and resolved to continue its discussion of the Rule at its spring meeting. The Committee directed the Reporter to perform additional research regarding how Rule 609(a)(1) is being administered in the federal courts. Some Committee members noted that there should be a presumption against abrogation in the ensuing consideration of the Rule, given that Congress had carefully balanced competing interests in the existing Rule.

## **VIII. Closing Matters**

Committee members agreed to postpone discussion of a proposed rule on “Illustrative Aids and the Treatment of ‘Demonstrative Evidence’” until the Spring meeting.

In closing the Chair thanked the Boston College Law School for hosting the meeting, thanked the Committee members and all participants for their valuable commentary at the meeting, and noted the Symposium on “Forensic Expert Testimony, Rule 702, and *Daubert*” scheduled for the following day. The meeting was then adjourned.

## **IX. Next Meeting**

The Spring meeting of the Evidence Rules Committee will be held in Washington D.C. on Thursday, April 26 and Friday, April 27, 2018.

Respectfully submitted,

Liesa L. Richter  
Daniel J. Capra

# TAB 6

**THIS PAGE INTENTIONALLY BLANK**



# TAB 6A

**THIS PAGE INTENTIONALLY BLANK**

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

DAVID G. CAMPBELL  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

**MEMORANDUM**

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

**FROM:** Hon. Sandra Segal Ikuta, Chair  
Advisory Committee on Bankruptcy Rules

**RE:** Report of the Advisory Committee on Bankruptcy Rules

**DATE:** December 6, 2017

---

**I. Introduction**

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on September 26, 2017. The draft minutes of that meeting are attached.

At the meeting the Advisory Committee approved for publication amendments to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because both amendments relate to other amendments that were published in August 2017 and remain subject to comment, the Advisory Committee does not seek action on them at this meeting. Instead we will present them at the June 2018 meeting.

Part II of this report presents four information items. The first concerns the Advisory Committee's decision to withdraw the proposed amendment to Rule 8023, which was published for comment in August 2016. The second item discusses the Advisory Committee's approval of national instructions to several Official Forms that authorize courts to make alterations to those forms. The third item discusses the Advisory Committee's plans for considering a suggestion that Rule 2013 be amended to eliminate a recordkeeping requirement regarding court awards of

compensation. The final item concerns the Advisory Committee's exploration of the advisability of restyling the Bankruptcy Rules.

## II. Information Items

### A. Withdrawal of the proposed amendment to Rule 8023 (Voluntary Dismissal).

In August 2016 the Standing Committee published an amendment to Rule 8023. As published, the rule and committee note provided as follows:

#### **Rule 8023. Voluntary Dismissal**

Subject to Rule 9019. The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

#### **Committee Note**

The rule is amended to provide a reminder that, when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court.

No comments were submitted on the amendment during the notice-and-comment period.

At the spring 2017 meeting, when the Appeals Subcommittee recommended that the Advisory Committee give its final approval to the amendment, the representative of the Department of Justice on the Committee raised some concerns. Specifically, he noted that making the clerk's authority "subject to Rule 9019" might mean that every attempt to seek a voluntary dismissal of an appeal based on a signed agreement of the parties would require the clerk to determine whether Rule 9019 applied or to seek a judicial determination of its applicability. (Rule 9019 allows a court to approve a settlement on motion of the trustee.) As a result, the Department feared that clerks would end up making determinations more appropriate for the judiciary, or voluntary dismissals would be delayed awaiting the court's ruling. After committee discussion in which varying views were expressed, the matter was referred back to the subcommittee for further consideration. At the fall 2017 meeting, the Advisory Committee accepted the subcommittee's recommendation that the amendment be withdrawn and that no further action be taken on it.

The amendment to Rule 8023 was proposed in response to a comment from the National Conference of Bankruptcy Judges ("NCBJ") that the current rule fails to take account of the fact

that one of the parties to an appeal being voluntarily dismissed might be the bankruptcy trustee, who, according to the NCBJ, “is obliged under Fed. R. Bankr. P. 9019 to obtain court approval of any compromise.” The NCBJ raised the concern that, by its silence, Rule 8023 could be read as overriding Rule 9019. The Advisory Committee approved for publication an amendment that cross-referenced Rule 9019—to signify that Rule 8023 does not supersede it—without attempting to resolve the division in the case law concerning a bankruptcy court’s jurisdiction to approve a settlement of a matter on appeal.

Since 1983, Rule 8023 and its predecessor, Rule 8001(c), have required the clerk to dismiss an appeal based on the parties’ agreement, and Rule 9019 has provided for court approval of settlements. The NCBJ, in suggesting a possible amendment to Rule 9023, admitted that the issue it raised regarding the possible applicability of Rule 9019, did “not appear to be disrupting bankruptcy administration.” Furthermore, research revealed no reported decision that raises any issue about the relationship between the voluntary dismissal of a bankruptcy appeal pursuant to the parties’ agreement and Rule 9019. Because the proposed amendment was not intended to change the current rule, but only to call attention to the possibility that Rule 9019 might also apply, the Advisory Committee concluded that there is insufficient reason to amend Rule 9023 if doing so might cause problems of the sort suggested by the Department of Justice. It therefore voted unanimously to withdraw the amendment.

**B. Approval of national form instructions authorizing alterations.**

Amendments to Rule 9009 that went into effect on December 1, 2017, restrict authority to make alterations to Official Bankruptcy Forms. The amended rule provides as a general matter that “[t]he Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration.” This amendment was made in order to ensure that forms such as the Chapter 13 Plan Form (Official Form 113) and the Mortgage Proof of Claim Attachment (Official Form 410A), which are intended to provide information in a particular order and format, are not altered.

Rule 9009, as amended, does provide certain exceptions to the general rule. First, minor alterations that do not affect wording or the order of presenting information are permitted, and the rule provides specific examples of that type of change. Second, alterations to a particular form may be authorized by “these rules, . . . a particular Official Form, or . . . the national instructions for a particular Official Form.” These exceptions were included in the rule in response to comments from clerks, judges, and lawyers that Official Forms are sometimes tailored to implement local rules and practices and to reduce the burden of providing multiple notices.

As the effective date of amended Rule 9009 approached, several court officials contacted the Administrative Office of the Courts (“AO”) to inquire about whether they would be able to add information to or otherwise alter certain Official Forms. In response, Scott Myers drafted,

and the Advisory Committee approved, instructions for the following forms that specify the types of alterations that may be made and by whom:

- Official Form 103A (Application for Individuals to Pay the Filing Fee in Installments),
- Official Form 103B (Application to Have the Chapter 7 Filing Fee Waived),
- Official Forms 309(A-I) (Case Noticing Forms),
- Official Form 312 (Order and Notice for Hearing on Disclosure Statement),
- Official Form 313 (Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan),
- Official Form 318 (Discharge of Debtor – Chapter 7), and
- Official Form 420A (Notice of Motion or Objection).

Mr. Myers also drafted a Table of Authorities Permitting Alterations to Official Bankruptcy Forms. After providing information about Rule 9009 and the circumstances in which it permits alterations of Official Forms, the document includes a table that describes alterations that are permitted by national instructions, a table that describes alterations that are permitted by a Bankruptcy Rule, and two tables that list the Official Bankruptcy Forms and the Director's Forms. This information has been posted on the AO website along with all of the forms.

**C. Consideration of a suggestion that Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals) be amended.**

The Advisory Committee received a suggestion from a bankruptcy clerk, Kevin P. Dempsey, that questions whether there is a need any longer for Rule 2013. The suggestion (BK-17-A) proposes that the Advisory Committee consider substantially modifying the rule to eliminate its requirements that (1) the clerk maintain a public record of awarded fees and (2) make an annual summary available to the public and the United States trustee.

Rule 2013(a) requires the clerk to maintain a public record of all fees awarded by the court to trustees, attorneys and other professionals employed by trustees, and examiners.<sup>1</sup> The record must identify each case in which fees were awarded and indicate for each case who received the fees and in what amount. Subdivision (b) requires the clerk annually to prepare a summary of the record by individual or firm name, indicating the total fees each was awarded

---

<sup>1</sup> Rule 2013(a) says that the requirements do not apply to debtors in possession, and the Committee Note says that the rule is inapplicable to standing trustees in chapter 13 cases.

during the year. The summary must be made available without charge to the public, and a copy of it must be transmitted to the U.S. trustee.

Mr. Dempsey says, based on his experience and discussions with other clerks, that compliance with Rule 2013 “is spotty.” He states that during his 17 years in the U.S. trustee’s office, such a report was never submitted to the office, nor was it ever requested. And during his 10 years as clerk, he says, no one has ever requested to see the Rule 2013 record.

Mr. Dempsey suggests that CM/ECF has replaced the need for the type of record that the rule calls for. Information about fee awards is available electronically, and reports can be generated on demand. He says that his office would provide such a report without charge to anyone who asked. To ensure that all courts would follow a similar practice, he proposes that, rather than being abrogated, Rule 2013 be amended to require the clerk to make information about fees awarded to professionals available upon request, perhaps with a limit on the time period covered by the report. He suggests that the information might be expanded to include fees awarded all professionals, including those employed by chapter 11 debtors in possession.

The original Committee Note to Rule 2013 states that its purpose “is to prevent what Congress has defined as ‘cronyism.’” The Committee Note goes on to explain as follows:

Appointment or employment, whether in a chapter 7 or 11 case, should not center among a small select group of individuals unless the circumstances are such that it would be warranted. . . . This rule is in keeping with the findings of the Congressional subcommittees as set forth in the House Report of the Committee on the Judiciary, No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 89-99 (1977). These findings included the observations that there were frequent appointments of the same person, contacts developed between the bankruptcy bar and the courts, and an unusually close relationship between the bar and the judges developed over the years. A major purpose of the new statute [the Bankruptcy Code] is to dilute these practices and instill greater public confidence in the system. Rule 2013 implements that laudatory purpose.

FED. R. BANKR. P. 2013 advisory committee’s note (1983); *see also In re Smith*, 524 B.R. 689, 699 (Bankr. S.D. Tex. 2015) (noting Rule 2013’s purpose of preventing cronyism). A leading bankruptcy treatise adds that the reports under the rule “are intended for use by the United States trustee in ensuring against disproportionate employment or compensation of some professionals.” 9 ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY* ¶ 2013.03 (16th ed. 2017).

Members of the subcommittee to which the suggestion was referred noted Rule 2013’s goal of providing transparency regarding compensation in the bankruptcy courts and expressed reluctance to amend or abrogate the rule without having a record to support such a decision.

Before deciding whether the suggestion should be pursued, the subcommittee intends to gather more information about current compliance with Rule 2013. Mr. Dempsey asserts that it is spotty, but a more systematic survey of districts might reveal otherwise. The subcommittee has therefore asked Dr. Molly Johnson of the Federal Judicial Center to survey bankruptcy clerks regarding their compliance and experience with Rule 2013. She will also seek information from a group of bankruptcy scholars to determine the extent to which information reported under Rule 2013 is useful for research purposes. The subcommittee will look further to information provided by the Executive Office for U.S. Trustees regarding their need for and use of the summary report mandated by Rule 2013(b).

The Advisory Committee agreed with this approach, and the subcommittee anticipates obtaining this information and being in a position to make a recommendation to the Advisory Committee at the spring 2018 meeting.

**D. Exploration of whether the Bankruptcy Rules should be restyled.**

The Bankruptcy Rules are the only set of federal rules that have not been comprehensively restyled, although in the process of revising Part VIII of the rules (Appeals) and certain individual rules, the new style conventions have been incorporated. In the past, when the issue of restyling has been raised, the Standing Committee has agreed with the Advisory Committee that such a project should not be undertaken because of the close association of the Bankruptcy Rules with statutory text. For example, the Bankruptcy Rules continue to use the now disfavored word “shall” in order to be consistent with the Bankruptcy Code’s use of that term.

In response to suggestions from the style consultants that the time for a Bankruptcy Rules restyling has come, the Advisory Committee agreed at the fall meeting to explore the advisability of embarking on such a project. A subcommittee has been established to investigate whether a restyling is needed and whether it would be appropriate.

Among other steps, the subcommittee plans to look more closely at the Bankruptcy Rules to determine the extent to which the bankruptcy rules are dependent on statutory language that cannot be restyled and whether the bankruptcy rules differ from the other federal rules in any other way that would make restyling unnecessary or undesirable.

The subcommittee anticipates that it will make at least a preliminary report to the Advisory Committee at the spring 2018 meeting.



# TAB 6B

**THIS PAGE INTENTIONALLY BLANK**

ADVISORY COMMITTEE ON BANKRUPTCY RULES  
Meeting of September 26, 2017  
Washington, DC

**Discussion Agenda**

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair  
Circuit Judge Thomas L. Ambro  
Circuit Judge Amul R. Thapar  
Bankruptcy Judge Stuart M. Bernstein  
Bankruptcy Judge Dennis Dow  
Bankruptcy Judge A. Benjamin Goldgar  
Bankruptcy Judge Melvin S. Hoffman  
Jeffrey Hartley, Esquire  
David Hubbert, Esquire  
Richardo I. Kilpatrick, Esquire  
Thomas Moers Mayer, Esquire  
Jill Michaux, Esquire  
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter  
Professor Laura Bartell, associate reporter  
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure  
(the Standing Committee)  
District Judge Susan Graber  
Bankruptcy Judge Mary Gorman  
Professor Daniel R. Coquillette, reporter to the Standing Committee  
Professor Cathie Struve, associate reporter to the Standing Committee (by telephone)  
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer  
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee  
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado  
Molly Johnson, Senior Research Associate, Federal Judicial Center  
Bridget Healy, Esq., Administrative Office  
Scott Myers, Esq., Administrative Office  
Patrick Tighe, Administrative Office  
Debra Miller, Chapter 13 Trustee  
Dermott Gorman, U.S. Trustee Program

1. Greetings and Introductions

Judge Sandra Ikuta welcomed everyone to the meeting, and introduced Professor Laura Bartell, the Committee's new associate reporter. She is a professor at Wayne State University

Law School in Detroit, Michigan. In addition, Judge Ikuta introduced Judge Mary Gorman, the new liaison from the Committee on Bankruptcy Administration, and Professor Cathie Struve, the new associate reporter to the Standing Committee. Professor Struve previously served as the reporter to the Advisory Committee on Rules of Appellate Procedure.

Judge Ikuta advised the group that this is the final meeting for Judge Jean Hamilton and Richardo Kilpatrick. She thanked them for their service to the Committee, noting their assistance with the new chapter 13 plan form and related rules. Debra Miller, the Standing Chapter 13 Trustee for the District of Northern Indiana, and Judge Marcia Krieger of the District of Colorado, will join the Committee as of October 1, 2017.

2. Approval of minutes of the spring meeting held April 6, 2017

With two minor amendments, the minutes were approved upon motion and vote.

3. Oral reports on meetings of other committees:

(A) June 13, 2017 meeting of the Committee on Rules of Practice and Procedure

Professor Elizabeth Gibson provided the report. The Standing Committee gave final approval to the amended rules and forms, and one new rule. It also approved conforming amendments to amended rules that were not published, but were amended to conform to amendments to the civil and appellate rules. The rules were approved by the Judicial Conference in September, and will have an effective date of December 2018, if approved by the Supreme Court and Congress. Professor Gibson advised that Appellate Rule 26.1 was approved for publication by the Standing Committee, and if the amendment goes forward, it may require a conforming amendment to Rule 8012.

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

Judge Benjamin Goldgar provided the report, noting that there were several issues discussed that may require monitoring by this Committee. First is a piece of legislation being considered by Congress that may impact the federal rules, specifically Civil Rule 11, entitled the Lawsuit Abuse Reduction Act. Second, a subcommittee of the Civil Rules Committee is considering potential changes to Civil Rule 30(b)(6). Third, the Civil Rules Committee is considering possible changes to Civil Rule 45, and any changes may impact Bankruptcy Rule 2004. Finally, a possible change to Civil Rule 68 is under consideration. Judge David Campbell explained the proposed legislation in greater detail, advising that the rules committees have communicated with Congress regarding the potential rules involvement and its concerns regarding a possible change to the rules.

(C) May 2, 2017 Meeting of the Advisory Committee on Appellate Rules

Professor Gibson provided the report because Judge Pamela Pepper was unable to attend the meeting. The Appellate Rules Committee will not meet until November, and there are no issues on the meeting agenda that would impact bankruptcy, but the Committee will continue to monitor any comments on the published amendment to Rule 26.1 regarding corporate disclosure.

(D) June 8-9, 2017 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report. She advised that the Bankruptcy Committee agreed that no action should be taken regarding the creation of a specific form for creditor address changes. The Bankruptcy Committee remains concerned about unclaimed funds remaining with courts, and will continue to investigate the issue to attempt to develop solutions. Also, the Bankruptcy Committee determined that no action should be taken regarding a suggestion to permit bankruptcy judges to consider venue *sua sponte*, and that the Judicial Conference agreed with this decision.

Judge Gorman stated that the Federal Judicial Center (FJC) developed a manual for chapter 9 cases for courts and practitioners. She advised that judges and practitioners have voiced concerns about gaps in the law regarding Chapter 9. In addition, the FJC created a manual for guidance in the use of telephonic and video conferences. The manual contains tips and practical advice for judges.

### **Subcommittee Reports and Other Action Items**

4. Report by the Subcommittee on Consumer Issues

- (A) Further consideration of a proposed amendment to Rule 2002(h) (Suggestion 12-BK-M from Chief Judge Scott Dales, BK WD-MI). See Memo of September 1, 2017, by Professor Gibson, included in the agenda materials located at the following link: [Advisory Committee on Rules of Bankruptcy Procedure - September 2017](#).

Judge Goldgar explained that following discussion at the spring 2017 meeting, the subcommittee was asked to consider the inclusion of chapter 12 in proposed amended Rule 2002(h). Following discussion, the subcommittee determined to add chapter 12 to the proposed amendment, and the Committee Note was updated as well.

The subcommittee considered a suggestion regarding the creditor matrix namely, that it be truncated after the claims bar date has passed, to comport with the proposed amendment to Rule 2002(h), but the subcommittee concluded that the issue could not be resolved by rulemaking. Ken Gardner added that he will look into a technological solution to the creditor matrix issue.

A motion was made to approve the proposed amendment to Rule 2002(h) for publication, and the motion was approved. Professor Gibson stated that because there are several proposed amendments to Rule 2002 pending, this amendment will not be presented to the Standing Committee for approval until its June 2018 meeting.

5. Report by the Subcommittee on Forms

- (A) Consider National Instructions for Official Forms 103A, 103B, 309A-I, 312, 313, 314, 315, 318, and 420A. See Memo of September 1, 2017, by Professor Gibson.

Judge Dennis Dow explained that several forms may need to be modified, but that the amended language of Rule 9009 that will be effective in December generally prohibits modification of Official Forms. Professor Gibson added that amended Rule 9009 permits a form to be modified if the national instructions permit such modification, therefore, the national instructions should be modified given that courts and practitioners have raised concerns about the need to modify specific forms. She advised that the amendments to the national instructions are approved by the Committee alone; no approval is needed from the Standing Committee.

Scott Myers provided a list of the specific forms that need to be included in the list of modifiable forms, and the language that will be added to the national instructions. He detailed the reasons for the need for modification for each form or group of forms. A proposed table was included in the agenda materials. It lists the forms that may be modified, and separates Official Forms from Director's Forms. Director's Forms are not Official Forms, and may be modified despite amended Rule 9009.

Mr. Myers noted that it is possible that additional forms will need to be added to the national instructions to permit modifications. Generally, the practice will be to present any needed changes at Committee meetings.

A motion to approve the changes to the national instructions and the table was approved.

6. Report by the Subcommittee on Business Issues

- (A) Recommendation concerning suggestion 17-BK-A from Kevin Dempsey, Clerk (IL-S) to revise and modernize the recordkeeping requirements of Rule 2013. See Memo of September 1, 2017, by Professor Gibson.

Professor Gibson stated that the suggestion is to amend Rule 2013. In the suggestion, Kevin Dempsey opines that the rule is rarely used or enforced. The subcommittee asked Molly Johnson of the FJC to research the use of the rule and whether it is being enforced, and she will report about her findings at the Committee's spring 2018 meeting.

- (B) Recommendation concerning suggestion 17-BK-B from the ABA Business Law Section to incorporate “proportionality” language in Bankruptcy Rule 2004. See Memo of September 5, 2017, by Professor Gibson.

Professor Gibson stated that the subcommittee discussed the suggestion. It agreed that discovery should not be excessive and that the production and preservation of electronically stored information can be expensive and time consuming. The subcommittee discussed potential language for Rule 2004, and thought it needed to be more specific than the language included in the suggestion. It determined that it would be helpful to include proportionality factors rather than merely a cross-reference to Civil Rule 26. The proposed amended language included in the agenda materials introduces the term “electronically stored information,” and language regarding proportionality. The proposed Committee Note explains that the amendments conform to the Civil Rule amendments, and the reasoning behind the clause in the second paragraph of the proposed rule that permits the court to consider the purpose for which the request is being made under Rule 2004. Professor Gibson detailed the proposed language, referring to the proposed amended rule included in the agenda materials, stating that the subcommittee recommended adoption of the proposed amended rule.

Several members voiced concerns about substantive changes to the purpose of Rule 2004, noting that the purpose of the rule is a “fishing expedition,” which is different than Civil Rule 26. This makes it difficult to fit proportionality within the rule, and it may be inconsistent. Rule 2004 serves a purpose within a bankruptcy case, and if the rule is amended as suggested, it may lead to increased litigation regarding Rule 2004 motions. Others responded that disputes do arise regarding the scope of Rule 2004, and courts need a frame of reference for resolving these disputes; the proposed amendments reflect the reality of what occurs in bankruptcy courts. A suggestion was made to change the amended language to include a reference to electronically stored information only, and to remove the language regarding proportionality.

Professor Bartell summarized that it appeared that the first amended paragraph was not objectionable to the Committee, i.e., the inclusion of the term “electronically stored information” to modernize the rule. She suggested that there may be different language that could be added to the second paragraph to achieve the goal of preventing improper use of the rule in bankruptcy cases. The Committee agreed to ask the subcommittee to reconsider the proposed amendment.

#### 7. Report by the Subcommittee on Privacy, Public Access, and Appeals.

- (A) Recommendation regarding proposed amendments to Rule 8023, published for comment in 2016, withheld from final approval at spring 2017 meeting to consider concerns raised by Department of Justice. See Memo of September 5, 2017, by Professor Gibson.

Judge Thomas Ambro advised that the proposed rule amendment was reconsidered by the subcommittee following a concern raised by the Department of Justice (DOJ) at the spring meeting. Professor Gibson explained that the DOJ was concerned that the proposed amendments

would require a judicial decision for every voluntary dismissal or would unnecessarily burden clerks. The subcommittee discussed several options including revising the amendments or abandoning the amendment. The DOJ provided substitute language (the suggested language was included in the memo referenced above), and while the subcommittee preferred the substitute language, it recommended abandoning the proposed amendment. It did not appear that the current rule is causing difficulties, and any proposed amendment may lead to potential problems. The subcommittee also discussed the issue of costs in the rule, and determined not to pursue any amendments to this language. The Committee approved a motion to withdraw the proposed amendment. The action will be reported to the Standing Committee.

- (B) Consider possible conforming amendments to Rule 8012 in light of proposed amendment to FRAP 26.1 (Corporate Disclosure Statement). See Memo of September 5, 2017, by Professor Gibson.

Professor Gibson stated that the Appellate Rules Committee published several amendments to Appellate Rule 26.1. These changes may require amendments to Rule 8012, and Professor Gibson detailed some of the potential changes, noting that the version of the rule approved by the Appellate Rules Committee had a narrow focus regarding disclosures in bankruptcy. The subcommittee agreed that Rule 8012 should conform to the proposed amendments to Appellate Rule 26.1. She has communicated with the Appellate Rules Committee regarding a potential gap in Rule 8012(c) if the rule is conformed to amended Appellate Rule 26.1.

Professor Gibson and will monitor the final version of the proposed amended Appellate Rule, particularly after the Appellate Rules Committee considers any comments at its spring 2018 meeting. Judge Campbell made a suggestion to change the title of subsection (d) to better reflect the purpose of Rule 8012, noting that it differs in application from Appellate Rule 26.1. The group discussed limiting the wording to “Disclosures as to Debtor” or similar language.

The group discussed several minor language revisions to the proposed amendments to Rule 8012, including the language regarding corporate ownership for clarity, the percentage ownership requirement, and changing the word “intervenor” to the singular, “intervenor.” A motion to approve the revised language for publication was approved.

Judge Ikuta advised that the revised amendments should be communicated to the Appellate Rules Committee. Professor Gibson stated that the proposed amendment will not be presented to the Standing Committee until June 2018 to provide an opportunity to coordinate with the Appellate Rules Committee regarding the proposed amendments.

### **Information Items**

8. Item Awaiting Transmission to the Standing Rules Committee



- (A) Recommendation in consideration of suggestion 12-BK-B to amend Rule 2002(f)(7) to require notice of a chapter 13 plan confirmation order.

Professor Gibson explained that at the spring 2017 meeting, the Committee recommended publishing the proposed amendment to Rule 2002(f)(7) after the pending change to Rule 3002 goes into effect on December 1, 2017. The intended publication date would be August 2018. She noted that there may be a new amendment to Rule 2002(k), pending the outcome of the discussion regarding the suggestion at the spring 2018 meeting.

9. Items Retained for Further Consideration.

*The matters listed below are part of the noticing project and will be considered at a later date in light of final approval of electronic noticing rules already under consideration*

- (A) Suggestion 15-BK-H, proposing an amendment to Bankruptcy Rule 9036 that would mandate electronic noticing in certain circumstances.
- (B) Suggestion 14-BK-E, proposing an amendment to Bankruptcy Rule 3001 to require a corporate creditor to specify address and authorized recipient information and the promulgation of a new rule to create a database for preferred creditor addresses under section 347. In addition, the Suggestion discusses the value to requiring electronic noticing and service on large creditors in bankruptcy cases for all purposes (other than process under Bankruptcy Rule 7004).
- (C) Comment 12-BK-040, submitted as a comment in response to proposed revisions to Rule 9027. It suggested that the reference to “mail” in Rule 9027(e)(3) be changed to “transmit.” Because the comment did not implicate the part of Rule 9027 being amended, the comment was retained as suggestion for further consideration at a later time.
- (D) Comments 12-BK-005, 12-BK-008, 12-BK-026, 12-BK-040, submitted separately. The comments were made response to pending amendments to Rule 8003(c)(1), and have been retained as suggestions for further consideration. They recommend that the obligation to serve a notice of appeal rest with the appellant or be permitted by electronic means.
- (E) Suggestion/Comment BK-2014-0001-0062, proposing amendments regarding service of entities under Bankruptcy Rule 7004(b) and, in turn, Bankruptcy Rules 4003(d) and 9014(b).
- (F) Informal Suggestion from David Lander, former committee member, proposing rule in context of electronic noticing that would require particular notice to, or service on, a party when a motion or pleading is adverse to that party, as opposed to that party just receiving the general e-notice of a filing in the case.

8. Coordination Items. See Memo of September 6, 2017, by Mr. Myers.

Mr. Myers advised that there are no new issues to consider for coordination items.

9. Future meetings:

The spring 2018 meeting will be in San Diego, CA, on April 3, 2018.

The fall 2018 meeting will be in Washington, DC, on September 17, 2018.

10. New business

Judge Ikuta proposed that the Committee consider restyling the Bankruptcy Rules, noting that it will be a big undertaking for the Committee. Professor Gibson advised that she consulted with the reporters of the other rules committees regarding the process, and cited an article published by Dan Capra, reporter to the Evidence Rules Committee, regarding the process. Generally, the first step would be to provide the rules to the style consultants for their suggestions and proposed changes. Following this, the Committee would review the suggested changes to evaluate whether they would result in any substantive changes. The Committee could object to a suggested change if merely style-based, although the style consultants have the final say on mere style (not substantive) language changes.

The goals of restyling are to make the rules clearer, better presented, and to eliminate unnecessary and ambiguous words. Good examples are the elimination of the word “shall” and the use of the active versus passive voice in the restyling of the Evidence Rules. Professor Gibson spoke with Professor Ed Cooper, reporter to the Civil Rules Committee, regarding his experience with the restyling process. The Civil Rules Committee created multiple subcommittees to review the proposed style changes, and then met as a full committee over multiple days to complete a full review and approve or reject the style suggestions.

Professor Gibson stated that it will be a multi-year process that will require a lot of time and effort, and the challenge is the line between style and substance. In the past the bankruptcy rules have been exempt from restyling because of their close relationship to the language in the Bankruptcy Code. Professor Coquillette advised that when restyling was initially started with the rules committees, Chief Justice Rehnquist voiced concern regarding restyling the Bankruptcy Rules because of their relationship with the Code. Also, substantive problems with rules restyling inevitably arise, although some are not apparent until the amendments are effective and the rules are in general use.

Judge Ikuta suggested an incremental approach. First, a restyling subcommittee should be created. That subcommittee will seek input from the other rules committees on restyling, determine whether the Committee has Standing Committee support, and whether restyling would be welcomed by the bankruptcy community. The subcommittee will then make a

recommendation whether to go forward with the project. The Committee discussed the idea of restyling, and agreed that an incremental approach makes sense.

In addition, Professor Gibson advised that a suggestion regarding mediation was filed. It will be assigned to the Business Subcommittee.

Also, there is an inconsistency between the Rule 9010 and two power of attorney forms that are currently Director's Forms. The rules may require that they be converted into Official Forms. This issue will be assigned to the Forms Subcommittee.

Finally, a suggestion from the reporter to amend Rule 2002(k) regarding chapter 13 noticing of objections to plans should be assigned to the Consumer Subcommittee.

### **Consent Agenda**

The Chair and Reporter proposed the following item for study and consideration prior to the Committee's meeting. There being no objection to placing the item on the consent agenda, the recommendation was approved.

1. Subcommittee on Forms Issues.
  - (A) Recommendation of no action regarding suggestion 17-BK-C from Judge Pamela S. Hollis for a revision to Official Form 423 to require most individual chapter 11 debtors to take the personal financial management course described by 11 USC § 111(d) as a condition of obtaining a discharge. See Memo of September 1, 2017, by Professor Gibson, included in the agenda materials.

**THIS PAGE INTENTIONALLY BLANK**

# TAB 7

**THIS PAGE INTENTIONALLY BLANK**

# TAB 7A

**THIS PAGE INTENTIONALLY BLANK**



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

DAVID G. CAMPBELL  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

**MEMORANDUM**

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

**FROM:** Hon. Michael A. Chagares, Chair  
Advisory Committee on Appellate Rules

**RE:** Report of Advisory Committee on the Appellate Rules

**DATE:** December 6, 2017

---

**I. Introduction**

The Advisory Committee on the Appellate Rules met on November 8, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered five items. In part II of this memorandum, the Advisory Committee presents one of these items—a proposal to amend Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) to address references to "proof of service"—for discussion by the Standing Committee. In part III of this memorandum, the Advisory Committee presents the other four items for the Standing Committee's information. The Advisory Committee also encloses with this memorandum the draft minutes from its meeting and an updated table of agenda items.

**II. Discussion Item: Proposal to Amend Rules 5(a)(1), 21(a)(1) & (c), 26(c), 32(f), and 39(d)(1) to Address References to "Proof of Service"**

The recently proposed amendments to Appellate Rule 25(d)—which are now before the Supreme Court—will eliminate the requirement of proof of service when a party files a paper

using the court's electronic filing system.<sup>1</sup> The elimination of this requirement is potentially problematic for Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) because they all refer to "proof of service." The Advisory Committee accordingly proposed changes to each of these rules. At the meeting, Judge Campbell observed that the proposals might be properly seen as technical corrections made in light of the recently proposed amendments to Rule 25. He therefore suggested that it might not be necessary to publish them for additional comments. The Advisory Committee recommends this approach to the Standing Committee.

#### A. Rule 5(a)(1)

Rule 5(a)(1) requires a party requesting permission to appeal to file a petition "with proof of service on all other parties." This requirement of proof of service is problematic for two reasons. First, Rule 5(a)(1) contains no exception for petitions filed electronically. Second, addressing proof of service in Rule 5(a)(1) is unnecessary because Rule 25(d) separately specifies when proof of service is required. A solution to both of these problems is to delete the reference

---

<sup>1</sup> The pending proposed amendment to Rule 25(d) is as follows:

**Rule 25**

\* \* \* \* \*

**(d) Proof of Service.**

(1) A paper presented for filing other than through the court's electronic-filing system must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person

who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile

numbers, or the addresses of the places of delivery, as

appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(~~B~~)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

\* \* \* \* \*

The Advisory Committee proposed this amendment to Rule 25(d) to match a comparable amendment to Civil Rule 5(d)(1)(B), which if approved will say: "No certificate of service is required when a paper is served by filing it with the court's electronic-filing system."



8 \* \* \* \* \*

9 (c) **Other Extraordinary Writs.** An application for an extraordinary writ  
10 other than one provided for in Rule 21(a) must be made by filing a petition with  
11 the circuit clerk ~~with proof of service on~~ and serving it on the respondents.  
12 Proceedings on the application must conform, so far as is practicable, to the  
13 procedures prescribed in Rule 21(a) and (b).

14 Committee Note

15 The words "with proof of service" in subdivision (a)(1) and (c) are deleted  
16 because Rule 25(d) specifies when proof of service is required for filed papers.  
17 Under Rule 25(d), proof of service is not required when a party files papers using  
18 the court's electronic filing system.

**C. Rule 26(c)**

Rule 26(c) affords a person who has been served with a paper three additional days to act beyond the otherwise applicable time limit, unless the paper "was delivered on the date of service stated in the proof of service." The rule further provides that a paper served electronically is to be treated as being delivered on the date of service stated in the proof of service. The references to proof of service are problematic because, under the proposed revision to Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system. As described in the attached minutes, the Advisory Committee considered several approaches for amending Rule 26(c) to address this issue. The Advisory Committee decided that the best approach was to rewrite the rule to say expressly that three days are added unless the paper is served electronically or unless the paper is delivered on the date stated in the proof of service. The Advisory Committee proposes the following amendment:

1 **Rule 26. Computing and Extending Time**

2 \* \* \* \* \*

3 (c) **Additional Time after Certain Kinds of Service.** When a party may  
4 or must act within a specified time after being served with a paper, and the paper  
5 is not served electronically on the party or delivered to the party on the date stated  
6 in the proof of service, 3 days are added after the period would otherwise expire  
7 under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the~~

8 ~~proof of service. For purposes of this Rule 26(c), a paper that is served~~  
9 ~~electronically is treated as delivered on the date of service stated in the proof of~~  
10 ~~service.~~

The Advisory Committee did not approve a Committee Note for the amendment proposed above. An appropriate note, however, might explain the purpose and function of the proposed amendment as follows: "The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision so that it can apply even when there is no proof of service."

#### **D. Rule 32(f)**

Rule 32 addresses the forms of briefs, appendices, and other papers. The Advisory Committee first determined that the phrase "the proof of service" in Rule 32(f) should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. The Advisory Committee proposes the following amendments:

### **Rule 32. Form of Briefs, Appendices, and Other Papers**

\* \* \* \* \*

**(f) Items Excluded from Length.** In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ **a** cover page;
- a corporate disclosure statement;<sup>2</sup>
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ **a** signature block;

---

<sup>2</sup> The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

13  
14

- ~~the~~ **a** proof of service; and
- any item specifically excluded by these rules or by local rule.

The Advisory Committee did not approve a Committee Note for the amendment proposed above. An appropriate Committee Note might explain: "The amendment to subdivision (f) does not change the substance of the current rule. It changes the references to 'the cover page,' 'the signature block,' and 'the proof of service' to 'a cover page,' 'a signature block,' and 'a proof of service' because a paper will not always include these three items."

**E. Rule 39(d)**

Rule 39 addresses costs. Subdivision (d) requires a party who wants costs to be taxed to file a bill of costs "with proof of service." Addressing proof of service in this subdivision is unnecessary because Rule 25(d) specifies when a proof of service is required and does not require a proof of service when a party uses the court's electronic filing system. A solution to this problem would be to delete the words "with proof of service." The Advisory Committee proposes the following amendment:

1  
2  
3  
4  
5  
6  
7  
8

**Rule 39. Costs**

**(d) Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, ~~with proof of service,~~ an itemized and verified bill of costs.

Committee Note

In subdivisions (d)(1) the words "with proof of service" are deleted because Rule 25(d) specifies when proof of service is required for filed papers.

**III. Information Items: Other Matters Discussed at the November 8, 2017 Meeting**

The Advisory Committee discussed four additional items at its November 8, 2017 meeting. The Advisory Committee describes these items here for the information of the Standing Committee but does not propose any amendments at this time. The enclosed minutes summarize other matters considered at the Advisory Committee's meeting.

**A. Item No. 09-AP-B: Revisiting Proposals to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs Without Leave of the Court or Consent of the Parties**

Rule 29(a) allows the federal and state governments to file amicus briefs without leave of the court or consent of the parties. In 2009, the Committee received proposals to amend Rule 29(a) to extend this privilege to federally recognized Indian tribes and to cities. The Committee discussed this matter at several meetings and solicited input from the Courts of Appeals. At its April 2012 meeting, however, the Advisory Committee decided to postpone action on the item. Judge Jeffrey Sutton, who was then the chair of the Advisory Committee, wrote a letter to the chief judges of each of the Courts of Appeals explaining that the Committee would revisit the item in five years. As five years have now passed, the Advisory Committee resumed its consideration of the item at its November 2017 meeting. Following a discussion recounted in the attached draft minutes, the Committee decided to remove the item from its Agenda. The sense of the Committee was that the proposed amendments likely would have little practical effect.

**B. Item No. 16-AP-D: Rule 3(c)(1)(B) and the Merger Rule**

The Advisory Committee received a proposal to revise Appellate Rule 3(c)(1)(B) to eliminate a potential trap for the unwary. Rule 3(c)(1)(B) requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.” In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. The proposal suggests that such a forfeiture is not justified by the policies underlying Rule 3(c)(1)(B). The Advisory Committee has formed a subcommittee to study this issue.

**C. Suggestion Regarding Possible Amendments to Rules 10, 11, and 12 to Address Electronic Records**

The Advisory Committee received a suggestion from within the Department of Justice that Appellate Rules 10, 11, and 12 may require amendment in light of increased electronic filing. These Rules concern the content, forwarding, and filing of the record on appeals from a district court in non-bankruptcy cases. At its November meeting, the Advisory Committee considered proposing amendments to these Rules so that they would not require the District Court to “send” the record to the Court of Appeals. In the future, the District Court might simply make the record available on its computer system without actually “sending” it. But the sense of the Advisory Committee was that no changes were necessary at this time and that the Committee should wait for further developments before proposing changes to these rules.

**D. Discussion of a Circuit Split on Whether Attorney’s Fees Are “Costs On Appeal” Under Rule 7**

Appellate Rule 7 provides: "In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule." A circuit split has arisen on the question of whether attorney’s fees may be included in the amount of a bond. The Advisory Committee has formed a subcommittee to investigate this issue. The subcommittee intends to consult with the Civil Rules Advisory Committee because proposed changes may affect practice in the District Courts.

Enclosures:

1. Draft Minutes from the November 8, 2017 Meeting of the Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee



# TAB 7B

**THIS PAGE INTENTIONALLY BLANK**

## Advisory Committee on Appellate Rules Table of Agenda Items —December 2017

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
16-AP-D	Amend Rule 3(c)(1)(B) to address the Merger Rule	Neal Katyal, Esq. Sean Marotta, Esq.	Discussed and retained on agenda 11/17
17-AP-F	Amend Rule 29(a)(2) to address blanket letters of consent	Prof. Stephen E. Sachs	Awaiting initial discussion

# TAB 7C

**THIS PAGE INTENTIONALLY BLANK**



**DRAFT** Minutes of the Fall 2017 Meeting of the  
Advisory Committee on the Appellate Rules

November 8, 2017  
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, November 8, 2017, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Esq., Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli, Esq. Solicitor General Noel Francisco was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, former Rules Law Clerk, RCSO; Judge Frank Mays Hull, Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on the Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Patrick Tighe, Rules Law Clerk, RCSO; Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure, participated by telephone.

## **I. Introduction**

Judge Chagares opened the meeting and greeted everyone. Judge Chagares welcomed Judge Jay Bybee, Chris Landau, Esq., and Danielle Spinell, Esq., as new members of the Committee, and Judge Frank Hull, as a new liaison member from the Standing Committee. He noted that Clerk of Court Marcy Waldron will be completing her service for the Advisory Committee, and thanked her for her contributions.

Judge Chagares noted that the President had appointed or nominated several members of the Committee to judicial offices. Former Advisory Committee Chair Neil Gorsuch was elevated to the Supreme Court, former Committee member Kevin Newsom was appointed to the U.S. Court of Appeals for the Eighth Circuit, former Committee member Amy Coney Barrett is a nominee for a judgeship on the U.S. Court of Appeals for the Seventh Circuit, former Committee member Alison Eid is a nominee for a judgeship on the U.S. Court of Appeals for the Tenth Circuit, former Committee member Gregory Katsas is a nominee for a judgeship on the U.S. Court of Appeals for the D.C. Circuit, and Committee reporter Gregory Maggs is a nominee for a judgeship on the U.S. Court of Appeals for the Armed Forces.

## **II. Approval of the Minutes**

An error in the spelling of Acting Solicitor General Jeffrey B. Wall's name in the draft minutes of the May 2017 meeting of the Advisory Committee was noted and corrected. A motion to approve the draft minutes was then made, seconded, and approved.

## **III. Report on June 2017 Meeting of the Standing Committee**

The reporter presented a report of the action taken by the Standing Committee at its June 2017 meeting. As described in the Advisory Committee Agenda Book at 31, the Advisory Committee recommended that the Standing Committee (1) send proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7 to the Judicial Conference of the United States and (2) publish proposed amendments to Appellate Rules 3, 13, 26.1, 28, and 32 for public comment. The Standing Committee approved these recommendations at its June 2017 meeting with the minor changes noted in the Agenda Book.

## **IV. Discussion Items**

### **A. Item 09-AP-B: Proposal to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs without Leave of Court or Consent of Parties**

Judge Chagares presented discussion Item 09-AP-B, which concerns a proposal to allow Indian tribes and cities to file amicus briefs under Rule 29 without leave of the court or the consent of the parties. *See* Agenda Book at 131. Judge Chagares noted that the Committee had last considered the issue in 2012. At that time, the Committee took no action and recommended revisiting the issue in 2017. Judge Chagares suggested that the question for the Committee now was whether the matter should be pursued or removed from the Committee's agenda.

Mr. Letter recounted some of the history of the matter. He said that some judges were concerned that Indian tribes should be accorded the same dignity as other sovereigns under Rule

29. He informed the Committee that the Solicitor General saw no need for amending Rule 29 but would not oppose the amendment if the judges supported it.

An attorney member said that she wondered why Indian tribes were not treated the same as states and the United States. If the policy is to allow sovereigns to file, then it would be consistent to add Indian Tribes. Cities, however, would not need to be included because they are subdivisions of states.

Mr. Coquillette recounted that Judge Sutton had spent a lot of time checking with judges and Indian tribes about the matter and had concluded that this was more of an academic issue than a practical one. Mr. Coquillette recalled that research could not locate any instance in which an Indian tribe was denied leave to file an amicus brief. But Mr. Coquillette said that allowing cities to file amicus briefs without leave of the court or party consent might cause problems.

A judge member observed that Indian tribes, unlike most states and the United States, typically hire law firms to represent them. Accordingly, there may be more recusal issues arising out of amicus briefs filed by Indian tribes than amicus briefs filed by states or the United States.

Mr. Letter noted that foreign nations are sovereign and are not permitted to file amicus briefs without leave of the court or consent of the parties. He also noted that the United States generally does not oppose amicus briefs.

An attorney member asked for clarification on the rules on when counsel for an amicus would require recusal. Judge Chagares and Judge Hall said that their Courts of Appeals generally treat amicus briefs the same as other briefs. The attorney member also asked what percentage of motions to file an amicus brief are denied. The clerk representative said that they were seldom denied unless they caused a recusal or were not in conformity with the rules. The attorney member also asked how the word "state" in Rule 29 is defined. Mr. Letter said that Rule 1(b) defines the term "state" to include territories, Puerto Rico, and D.C.

Judge Campbell discussed the recently proposed amendments to Rule 29. The amendments would allow a court to strike or deny leave to file an amicus brief if the brief would cause a recusal. But these amendments do not apply to amicus briefs filed by states or the United States. They therefore would also not apply to Indian tribes if the rule were amended to treat Indian tribes like the states and the United States.

A judge member moved that the Committee not act on the proposal given the general tenor of the comments. The motion was seconded and then passed. Judge Chagares said that the matter could be brought up again in the future if the Committee desired.

**B. Potential Amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) Regarding Proof of Service**

The reporter introduced a new matter concerning potential amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) regarding proof of service. *See* Agenda Book at 131. He explained that proposed changes to Rule 25(d) will eliminate the requirement of a proof of service when a paper is presented for filing other than through the court's electronic filing system. Accordingly, slight changes to other rules that address proof of service might be necessary.

The Committee first discussed the proposed amendments to Rule 25(d). The clerk representative was concerned that the proposed amendment might not address situations in which some parties were served electronically and some parties were served non-electronically. The Committee noted the potential issue. But the sense of the Committee was to take no action at this time because the proposed amendment to Rule 25(d) matches the proposed amendment to Civil Rule 5(d)(1)(B), and both proposals are currently before the Supreme Court. The Committee may wish to revisit the issue if actual problems arise in the future.

The Committee considered and approved the proposed changes to Rule 5(a)(1). *See* Agenda Book at 180-81.

The Committee considered the proposed changes to Rule 21, *see* Agenda Book at 181-82, and approved the changes as slightly modified by the style consultants. The approved version of the proposal reads as follows:

**Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs**

**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.**

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court.

\* \* \* \* \*

**(c) Other Extraordinary Writs.** An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents.

12 Proceedings on the application must conform, so far as is practicable, to the  
13 procedures prescribed in Rule 21(a) and (b).

14 Committee Note

15 The words "with proof of service" in subdivision (a)(1) and (c) are deleted  
16 because Rule 25(d) specifies when proof of service is required for filed papers.  
17 Under Rule 25(d), proof of service is not required when a party files papers using  
18 the court's electronic filing system.

The Committee next addressed the proposed changes to Rule 26(c). *See* Agenda Book at 183-84. The reporter noted that the style consultants had recommended two versions of more extensive revisions for Rule 26(c), which had previously been circulated by email to the Committee members.<sup>1</sup> Discussion of the issue revealed dissatisfaction with both the original proposal and the style consultants' proposed revisions because they were too complicated. An attorney member said that lawyers look at this rule whenever they file a brief, and the rule must be easier to understand.

---

<sup>1</sup> The style consultants' first proposed revision of Rule 26(c) would read as follows:

When a party may or must act within a specific period after being served, 3 days are added after the period would otherwise expire under Rule 26(a). But three days are not added if the paper:

- (1) is delivered on the date of service stated in the service;
- (2) is served electronically without using the court's electronic-filing system—in which event it is treated as delivered on the date of service stated in the service; or
- (3) is served electronically by using the court's electronic-filing system—in which event it is treated as delivered on the date of filing.

The style consultants' alternative revision of Rule 26(c) would read as follows:

This Rule 26(c) applies only when a paper is not served electronically. When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service.



- 7 • a table of citations;
- 8 • a statement regarding oral argument;
- 9 • an addendum containing statutes, rules, or regulations;
- 10 • certificates of counsel;
- 11 • the **a** signature block;
- 12 • the **a** proof of service; and
- 13 • any item specifically excluded by these rules or by local rule.

The Committee discussed and approved the proposed change to Rule 39. *See* Agenda Book at 185.

After the Committee considered and proposed all of the changes above, Judge Campbell observed that they might be properly seen as technical correction to the Rules to conform to the amendments to Rule 25(d). As a result, he did not see the need to publish them for additional comments. The sense of the Committee was to recommend this approach to the Standing Committee.

### **C. Item No. 16-AP-D: Appellate Rule 3(c)(1)(B) and the Merger Rule**

Judge Chagares next presented a new proposal, prepared by former Committee member Neal Katyal, regarding Rule 3(c)(1)(B) and the Merger Rule. *See* Agenda Book at 189.

Mr. Byron expressed caution in taking action to address the interpretation of Rule 3(c)(1)(B). He was concerned that the case law in the Eighth Circuit, upon closer examination, might not be so clearly divergent from the decisions of other Courts of Appeals. He explained that there is often some uncertainty as to whether a particular order is a final order. He also said that there were other cases where it would be appropriate to inquire into the party's intent. Judge Chagares agreed, and said that revising the rule would be a really complex matter.

An attorney member said that the issue is often very fact-specific. He explained: "If you say I am appealing order A and order B, then it is clear that you are not appealing order C." An academic member said that it should be clearer what is a final order. Mr. Letter said that lawyers often take a belt-and-suspenders approach, and say that they are appealing the final judgment and specific orders.

Following the discussion, Judge Chagares asked for the views of the Committee. An academic member proposed further study. Mr. Letter suggested that the main point should be to

make the rules clearer. The Chair formed a subcommittee to consider the matter further. The members of the subcommittee are Mr. Letter, Mr. Byron, and Mr. Landau.

#### **D. New Discussion Item Regarding Possible Amendments to Rules 10, 11, and 12**

Mr. Byron led the discussion of a new suggestion for amending Rules 10, 11, and 12 to address electronic records. *See* Agenda Book at 197. He explained that these Rules were mostly directed to clerks of court. Accordingly, the initial question is whether electronic records currently present a problem for the clerks.

The clerk representative informed the Committee that she had spoken to clerks of court from other Courts of Appeals. The other clerks did not have any objection to changing the word “send” to “make available” in Rules 10, 11, and 12 as proposed. But she further noted that various Courts of Appeals follow different approaches on whether the District Courts or the Courts of Appeals do relevant tasks with respect to records. She suggested that, in the future, records might be kept in a central repository and might not be transmitted from District Courts to Courts of Appeals. Accordingly, by the time the proposed amendment works its way through the system, it might be obsolete. She also noted that there are still many paper records, especially in state habeas corpus cases.

Judge Chagares asked whether there was a risk of upsetting what is now a stable system. A liaison member was concerned that if the District Court did not send the record, but merely made it available, the record might be incomplete. Judge Chagares said that it was not clear that a problem needs to be fixed and that any amendment might soon be obsolete.

The sense of the committee was to take the matter off the agenda.

#### **E. New Discussion Item Regarding a Circuit Split on Whether Attorney’s Fees Are “Costs on Appeal” Under Rule 7**

Judge Chagares presented a matter concerning a circuit split on whether attorney’s fees are “costs on appeal” under Rule 7. *See* Agenda Book at 223. He thanked Ms. Gailey, the former Rules clerk, for her research into the matter. He noted that the Committee previously had considered the issue, and thanked Ms. Struve for finding memoranda on the subject that the Committee previously considered. Summarizing the research, he explained that the U.S. Court of Appeals for the Third Circuit appears to be an outlier, but has taken a position only in a non-precedential opinion.

Ms. Struve said that the question was a perennial issue. An attorney member asked why the question was addressed in the Appellate Rules instead of the Civil Rules. He suggested that



Civil Rule 62 should address the question. A judge member agreed with this point. The clerk representative said that few cases involve bonds.

An academic member said that it was unclear to him how the issue comes up. The Rule refers to costs, not fees, and usually the law distinguishes between costs and fees. He said that maybe the solution would be to remove the word "costs" and specify more clearly what should and what should not be covered.

Judge Campbell said that the rule formerly provided for an automatic \$250 bond. He said that there now may be strategic use of the rule to require a large bond to prevent the other party from appealing. He also said that many of the cases citing the rules deal with class action objectors. He suggested asking Mr. Edward Cooper, the reporter for the Civil Rules Advisory Committee, for his opinion.

The sense of the Committee was to keep this matter on the Agenda and ask the Civil Rules Committee for its opinion.

## **V. New Matters**

Judge Chagares led a discussion of possible new matters that the Committee might want to take up. He said that he recently had spoken to the American Academy of Appellate Lawyers (AAAL) and that they were concerned with three matters. First, the AAAL wants to clarify when a cross-appeal is necessary. The AAAL believes that cross-appeals often are filed just to avoid the risk that one might be needed. Second, the AAAL was concerned about judges considering facts that are not in the record. The AAAL thought that the court should provide some sort of notice to the parties before doing this. A judge member pointed out that there was the possibility of seeking rehearing. Third, the AAAL was concerned about courts' sua sponte consideration of legal issues. The AAAL thinks parties should receive notice and opportunity to be heard. Judge Chagares said that the AAAL had not yet submitted any proposals to the Committee.

Judge Chagares next suggested that the Committee might review the rules regarding the appendix. In his experience, much of what is in the appendix is unnecessary. He suggested that it might be best to require the appendix to be filed seven days after the last brief. An attorney member said that the rule as written is often not followed. He believed that it is better to have a deferred appendix that only contains what is cited in the brief (including some context). But Mr. Letter said that a potential problem with a deferred appendix is that the parties then have to file a revised brief that cites the appendix. The clerk representative agreed that this is a problem, especially when trying to docket briefs. She said that in the future, briefs will contain hyperlinks to the actual record, and appendices therefore might be unnecessary.

An attorney member said that every Court of Appeals now has its own rules on appendices. Mr. Byron predicted that most Courts of Appeals would be unlikely to want to change their local rules. The attorney member responded that it might still be better to have an improved default rule. The Chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Letter, Mr. Byron, Ms. Spinelli, and Judge Bybee.

Judge Chagares asked whether members of the Committee had ideas for improving the efficiency of appellate litigation. An attorney member raised the issue of how much discretion clerks have under Rule 42(b) in not allowing parties to dismiss a case after they have settled. A liaison member said that a request to dismiss is often “subject to settlement agreements being executed.” Ms. Struve said that there are very few cases that deny leave to dismiss. Mr. Letter said that sometimes judges say something like “the government should not be settling on these terms.” An academic member said that there are some situations in which settlements must be reviewed and others when they should not be reviewed. Mr. Byron asked whether it is necessary to have both parties sign the request for dismissal. A judge member asked whether the matter should be addressed in the Civil Rules. The chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Landau, Judge Kavanaugh, and Mr. Letter.

## **VI. Information About the Activities of the Other Committees**

Judge Campbell reported that the Civil Rules Advisory Committee is looking at multi-district litigation, interlocutory appeals, third-party funding of litigation, and pilot programs aimed at improving discovery and making litigation quicker.

Judge Campbell reported that the Evidence Rules Advisory Committee is looking at issues under Rules 404(b), 702, and 609. He noted that one recommendation is to refine the analysis with respect to specific kinds of evidence like fingerprints, bite marks, etc.

Judge Campbell reported that the Criminal Rules Advisory Committee is looking for better ways to protect cooperators in criminal cases. He said that there were hundreds of instances in which cooperators were threatened or killed based on information included in court records.

Judge Campbell also observed that the House has passed bills that could affect appeals. HR 985 could make every class certification appealable as of right and would limit the kinds of classes that could be certified. The other legislation would address current rules requiring complete diversity, which are often manipulated. Another bill would alter Rule 11 standards.

## **VII. Adjournment**

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and meeting. He also thanked Ms. Waldron for all of her contributions to the Committee. He announced that the next meeting will be held on April 6, 2018 in Philadelphia.

The Committee adjourned at 12:15 pm.

DRAFT

**THIS PAGE INTENTIONALLY BLANK**

# TAB 8

**THIS PAGE INTENTIONALLY BLANK**

# TAB 8A

**THIS PAGE INTENTIONALLY BLANK**



## MEMORANDUM

TO: The Rules Committees

FROM: Scott Myers -- Rules Committee Support Office

RE: Rules Coordination Report

DATE: December 11, 2017

At its June 2016 meeting, the Standing Committee asked the Rules Committee Support Office (RCSO) to identify and coordinate proposed changes to rules that have implications for more than one set of rules. The proposed changes listed below implicate more than one rule set.

### **Rules published for comment in 2017**

#### *Appellate Rule 26.1 (Disclosure Statement)*

The Appellate Rules Committee published proposed amendments to Appellate Rule 26.1 (Disclosure Statement) to add a new subdivision (b) that follows pending 2018 amendments to Criminal Rule 12.4(a)(2).(Disclosure Statement). The proposed appellate version of the disclosure rules also a new subdivision that would require disclosures of certain actors when an appeal originates from a bankruptcy proceeding. The Bankruptcy Rules Committee reviewed the proposed FRAP 26.1 at its fall 2017 meeting and anticipates publishing conforming amendments to its appellate disclosure rule, Bankruptcy Rule 8012 in 2018 – after considering the version of FRAP 26.1 that is recommend for final approval.

### **Rules changes under consideration**

#### *Civil Rule 30(b)(6)*

The Civil Rules Committee is developing a proposal to improve the procedure for taking depositions of an organization under Rule 30(b)(6), with a goal to consider a proposed amendment for publication at its spring 2018 meeting. Rule 30 is wholly incorporated into Bankruptcy Rule 7030, and therefore applies in bankruptcy adversary proceeding and contested matters. The Bankruptcy Rules Committee has been kept apprised of developments in the Rule 30(b)(6) proposal, and a subcommittee will be asked to determine whether any bankruptcy specific issues should be accounted for in considering an amendment for publication.

**THIS PAGE INTENTIONALLY BLANK**

# TAB 8B

**THIS PAGE INTENTIONALLY BLANK**

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

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
<b>Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017</b>	<b>H.R. 985</b> <i>Sponsor:</i> Goodlatte (R-VA)  <i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)	CV 23	<p><b>Bill Text (as amended and passed by the House, 3/9/17):</b>  <a href="https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf">https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</a></p> <p><b>Summary (authored by CRS):</b>                      (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> <li>• in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives;</li> <li>• no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and</li> <li>• in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members.</li> </ul> <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p>	<ul style="list-style-type: none"> <li>• 3/13/17: Received in the Senate and referred to Judiciary Committee</li> <li>• 3/9/17: Passed House (220–201)</li> <li>• 3/7/17: Letter submitted by AO Director (sent to House Leadership)</li> <li>• 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached)</li> <li>• 2/15/17: Mark-up Session held (reported out of Committee 19–12)</li> <li>• 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees)</li> <li>• 2/9/17: Introduced in the House</li> </ul>

Updated December 12, 2017

Page 1

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

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

Updated December 12, 2017

Page 2

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

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
<b>Lawsuit Abuse Reduction Act of 2017</b>	<b>H.R. 720</b> <i>Sponsor:</i> Smith (R-TX)  <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p><b>Bill Text (as passed by the House without amendment, 3/10/17):</b>  <a href="https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf">https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</a></p> <p><b>Summary (authored by CRS):</b>                      (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p><b>Report:</b> <a href="https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf">https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</a></p>	<ul style="list-style-type: none"> <li>• 3/13/17: Received in the Senate and referred to Judiciary Committee</li> <li>• 3/10/17: Passed House (230–188)</li> <li>• 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees)</li> <li>• 1/30/17: Introduced in the House</li> </ul>
	<b>S. 237</b> <i>Sponsor:</i> Grassley (R-IA)  <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p><b>Bill Text:</b> <a href="https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf">https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</a></p> <p><b>Summary (authored by CRS):</b>                      This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p>	<ul style="list-style-type: none"> <li>• 11/8/17: Senate Judiciary Committee Hearing held – “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators”</li> <li>• 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees)</li> <li>• 1/30/17: Introduced in the Senate; referred to Judiciary Committee</li> </ul>

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

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p><b>Report:</b> None.</p>	
<b>Stopping Mass Hacking Act</b>	<p><b>S. 406</b> <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	CR 41	<p><b>Bill Text:</b> <a href="https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf">https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</a></p> <p><b>Summary:</b> (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016."</p> <p><b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 2/16/17: Introduced in the Senate; referred to Judiciary Committee</li> </ul>
	<p><b>H.R. 1110</b></p> <p><i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> <b>Amash (R-MI)</b> <b>Conyers (D-MI)</b> <b>DeFazio (D-OR)</b> <b>DelBene (D-WA)</b> <b>Lofgren (D-CA)</b> <b>Sensenbrenner (R-WI)</b></p>	CR 41	<p><b>Bill Text:</b> <a href="https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf">https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</a></p> <p>(Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant."</p> <p><b>Summary (authored by CRS):</b> This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p><b>Report:</b> None.</p>	<ul style="list-style-type: none"> <li>• 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations</li> <li>• 2/16/17: Introduced in the House; referred to Judiciary Committee</li> </ul>

Updated December 12, 2017

Page 4



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

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

Updated December 12, 2017

Page 5

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

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

# TAB 8C

**THIS PAGE INTENTIONALLY BLANK**

## **JUDICIARY STRATEGIC PLANNING (ACTION)**

The Committee is asked to advise the Executive Committee on which strategies and goals from the *Strategic Plan for the Federal Judiciary* should receive priority attention for the next two years. The Committee is also asked to provide the Executive Committee with feedback on whether the strategic planning process is the appropriate mechanism for considering Judicial Conference committee efforts to study and address racial fairness, implicit bias, diversity, and related topics.

### **PRIORITY SETTING (ACTION)**

On the recommendation of the Executive Committee, the Judicial Conference of the United States approved an updated *Strategic Plan for the Federal Judiciary* in September 2015. The plan is available here: <http://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>

The strategic planning approach approved by the Judicial Conference assigns the responsibility for setting priorities for the implementation of the *Strategic Plan* to the Executive Committee, with suggestions from Judicial Conference committees and others (JCUS-SEP 10, pp. 5-6). Judicial Conference committees are encouraged to pay particular attention to these priority strategies and goals in committee planning and policy development activities, in setting the agendas of future meetings, and in the identification of committee-requested studies and analyses. Committees are also asked to consider priority strategies and goals when making resource allocation decisions and when assessing cost-containment proposals.

The Executive Committee has considered strategic planning priorities three times since the *Strategic Plan* was approved by the Conference in 2010 – in 2011, 2013, and 2016. In 2016, the last time it addressed this issue, the Executive Committee reaffirmed the same four strategies and one goal that had been identified in 2011 and again in 2013, and identified one additional goal (Goal 4.1d) to receive priority attention, as set forth below.

**Strategy 1.1** Pursue improvements in the delivery of justice on a nationwide basis.

- Strategy 1.3** Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
- Strategy 2.1** Allocate and manage resources more efficiently and effectively.
- Strategy 4.1** Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.
- Goal 4.1d** Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.
- Goal 7.2b** Communicate and collaborate with organizations outside the judicial branch to improve the public’s understanding of the role and functions of the federal judiciary.

**Action Requested:** The Committee is asked to provide suggestions to the Executive Committee regarding the strategies and goals from the *Strategic Plan* that should be considered priorities for the next two years.

## **RACIAL FAIRNESS, IMPLICIT BIAS, DIVERSITY, AND RELATED TOPICS**

At its February and August 2017 meetings, the Executive Committee discussed judiciary programs and initiatives that are intended to address or raise awareness about implicit bias, racial fairness, and related topics.

At its February 2017 meeting, the Executive Committee endorsed a suggestion from Administrative Office (AO) Director James C. Duff, in coordination with Judge Jeremy D. Fogel, Director of the Federal Judicial Center (FJC), to gather information about efforts and initiatives that are already underway in these areas. In response, the AO and the FJC compiled a report documenting a broad range of current and recent efforts across the judiciary. The report is considered a working document, as programs and initiatives continue to be added. It has been made available to members of the Judicial Conference, committee chairs, as well as advisory councils and peer groups that provide advice to the AO Director. Copies of the report are available upon request.

In addition to efforts addressing racial fairness and implicit bias, the report also documents programs and initiatives addressing other types of bias, as well as diversity and fair employment practices initiatives. The information-gathering effort included AO and FJC staff, circuit executives, and other circuit and appellate unit executives. The report focuses on programs that were delivered or initiatives that were active during fiscal years 2014 through 2017.

The draft report includes the diversity initiatives of several Judicial Conference committees, including the Bankruptcy, Defender Services, Judicial Resources, and Magistrate Judges Committees. The report also describes the Criminal Law Committee's reviews of statistical analyses of demographic disparities in sentencing by the U.S. Sentencing Commission.

The report documents a broad range of activities and programs across the judiciary. In particular, many conferences and programs have included discussions about implicit bias and race, including sessions at circuit judicial conferences, FJC programs, and AO-sponsored training programs and conferences. Programs have included discussions on implicit bias in jury selection; subliminal influences on decision-making; the neuroscience of judicial decision making – impartiality and legal analysis; social cognition and implicit assumptions; addressing the impact of implicit bias, cognition, and the courtroom; and “debiasing” techniques. The AO's Defender Services Office (DSO) has designed and delivered numerous programs for panel attorneys and staff, including: Implicit Bias Basics – What Every Defense Practitioner Needs to Know; Confronting Implicit Bias; and Managing (Bias) and Supervising (Diverse) Staff: Blind Spots, Bias, and the Brain; Perspectives on Racial and Ethnic Bias; among many others.

Finally, the report includes information about selected programs in court units across the judiciary, including training on implicit bias, diversity and inclusion, employee dispute resolution, and heritage celebrations.

### **Requested Action by Judicial Conference Committees**

The September 11, 2017 long-range planning meeting of Executive Committee members and Conference committee chairs included a discussion about the report and, more broadly, about judiciary programs and efforts to address these topics.

Participants in the meeting discussed next steps that should be considered, with AO Director Duff noting planned efforts to raise the profile of and promote current efforts. Among the efforts discussed was the development of a judiciary website that

would serve as a repository for programs and initiatives of the AO, the FJC, circuit judicial councils, Judicial Conference committees, and court units.

For efforts that lie within the jurisdictions of the Judicial Conference and its committees, participants in the long-range planning meeting also discussed the use of the strategic planning approach for the Conference and its committees. The planning process includes a mechanism for committees to identify and report on strategic initiatives that are linked to the *Strategic Plan*.<sup>1</sup> Efforts addressing racial fairness, implicit bias, and related topics could be linked to the core values of the *Strategic Plan* (including the core value of equal justice), and to several of the plan's issues, strategies, and goals. Language from the *Strategic Plan* that may be relevant to these topics is included as an attachment.

The strategic planning approach could be an effective mechanism to assess the effectiveness of current efforts, identify any gaps in current initiatives, and facilitate the consideration of new initiatives in a manner that is mindful of committee and jurisdictions and responsibilities.

Under this approach, committees would consider new and ongoing actions relating to racial fairness, implicit bias, diversity, and related topics as part of the regular process of reporting on strategic initiatives to the judiciary planning coordinator for the Executive Committee. Reports on committee efforts other than strategic initiatives would be compiled by the AO on a periodic basis.

**Action Requested:** The Committee is asked to advise the Executive Committee of its views about whether the strategic planning approach for the Judicial Conference and its committees is likely to be an effective mechanism for considering Conference committee actions to study and address racial fairness, implicit bias, diversity, and related topics.

Committees will be asked to report on the status of strategic initiatives during their summer 2018 meetings. At those meetings, committees may review current efforts relating to these areas, and consider whether any additional projects or activities might be reported to the Executive Committee in the future as strategic initiatives supporting the implementation of the *Strategic Plan*.

---

<sup>1</sup>A strategic initiative is a project, study, or other effort that has the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan*. Strategic initiatives are distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.



# Strategic Plan for the Federal Judiciary

---

## *Language on Equal Justice, Fairness, and Diversity*

### Introduction

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice. (p. 1)

### Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs. (p. 2)

### Core Values

**Equal Justice:** fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect

**Excellence:** adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and staff; commitment to innovative management and administration; availability of sufficient financial and other resources (p. 2)

### Issue 3. The Judiciary Workforce for the Future

How can the judiciary continue to attract, develop, and retain a highly competent and diverse complement of judges and staff, while meeting future workforce requirements and accommodating changes in career expectations? (p. 11)

### Strategy 3.2. Recruit, develop, and retain highly competent staff while defining the judiciary's future workforce requirements.

Goal 3.2d: Strengthen the judiciary's commitment to workforce diversity through expansion of diversity program recruitment, education, and training. (pp. 12-13)

**Strategy 5.1. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.**

**Background and Commentary.** The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood. (p. 16)

**Strategy 5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.**

**Background and Commentary.** As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, witnesses, and observers — are treated with dignity and respect and understand the process. (p. 17)